THE HIGH COURT

[2013 No. 4090 S.]

BETWEEN

MICROSOFT IRELAND OPERATIONS LTD

PLAINTIFF

AND

MONEER OMAR THABIT TRADING EST

DEFENDANT

JUDGMENT of Mr. Justice Noonan delivered on the 6th day of February, 2019

1. The plaintiff in these proceedings is an Irish registered company. The defendant carries on its business in Saudi Arabia.

2. The parties entered into a written contract on the 26th July, 2010, known as the Retail Distribution Agreement ("RDA"), whereby the defendant became a distributor of the plaintiff's products. Those products were duly supplied by the plaintiff to the defendant, *inter alia*, in 2012. A number of invoices in respect of those products was raised by the plaintiff between 27th April, 2012 and the 21st November, 2012. The value of those invoices was US$829,720.64. None of this is in dispute.

3. Various demands for payment were made with which the defendant failed to comply and ultimately a summary summons was issued on the 5th December, 2013. A motion for summary judgment issued on the 26th June, 2014 which came on for hearing before this court (Haughton J.) on the 27th July, 2015. On that day, Haughton J. gave judgment for the plaintiff in the amount claimed but stayed the judgment pending the determination of a setoff and counterclaim raised by the defendant by way of defence.

4. The defendant's defence and counterclaim was delivered shortly thereafter on the 31st August, 2015. It admits the plaintiff's claim and pleads an equitable setoff of the counterclaim.

5. In essence, the gravamen of the counterclaim is that before the RDA was entered into, the plaintiff made certain representations to the defendant to induce it to enter into the RDA which included that the defendant would become the sole distributor of certain Microsoft products in Saudi Arabia and that the plaintiff would terminate its relationship with the existing distributor. The defendant further alleges that pending the defendant establishing itself in the marketplace as a distributor of the products, the plaintiff would set up a short term temporary distributorship to ensure that market share was not lost.

6. The defendant claims that it acted on foot of these alleged representations in entering into the contract and investing sums of money in the venture. It is pleaded that the defendant failed to honour its promises which were made either falsely or fraudulently and in consequence, the defendant has suffered substantial losses amounting to something of the order of US $6 million in respect of anticipated profits and other special damages.

7. A reply and defence to the counterclaim was delivered by the plaintiff on the 27th October, 2015. The issue of discovery then arose and was finally dealt with by the court on the 19th December, 2016 when the court directed both parties to make discovery. The defendant was given a period of eight weeks to comply with the order so that discovery was to have been made by the 13th February, 2017.

8. Various extensions of the deadline were agreed between the parties, but the defendant failed to comply with any of these. Consequently, on the 20th April, 2018 some sixteen months after the order for discovery was made the plaintiff issued a motion to strike out the defendant's defence and counterclaim or in the alternative, to lift the stay. The hearing of this motion was fixed for the 17th July, 2018 and five days before the motion was due to be heard, on the 12th July, 2018, the defendant finally produced its affidavit of discovery. This was nineteen months after the order for discovery was made and seventeen months after it was due to be complied with.

9. The plaintiff's motion was heard by me in Cork on the 17th July, 2018. A replying affidavit was sworn by Mr. Moneer Omar Thabit of the defendant, in which he accepts that the defendant did not attend appropriately to its discovery obligations and he apologised to the court in that regard. Part of the excuse advanced by Mr. Thabit was that the defendant was in dispute with its then solicitors. Mr. Thabit also averred that now that the defendant had made discovery, it was the defendant's wish to have the proceedings dealt with as soon as possible subject only to receiving senior counsel's advice on proofs.

10. The affidavit grounding the plaintiff's application is sworn by its solicitor, Tom Mullen, who was present in court on the 17th July, 2018. I gave judgment ex tempore on that date. Certain aspects of the judgment are recorded by Mr. Mullen and not disputed by the defendant. At that time, I reached the conclusion "with reluctance" that the balance of justice favoured leaving the stay on execution in place for the time being subject to convening a case conference on the 17th October, 2018. The rationale for so doing was to expedite the hearing of the counterclaim at the earliest moment.

11. In reaching that conclusion, I indicated that I would expect to see the defendant make "dramatic progress" with the counterclaim and directed that the matter should be "expedited with all possible speed". I also indicated that the court would have "little tolerance for further heel dragging". I awarded the costs of the motion to the plaintiff without a stay. At the case conference on the 17th October, 2018, I directed that the experts on both sides should exchange reports within a period of four weeks.

12. This was extended by agreement of the parties to six weeks so that the reports were due to be exchanged by the 28th November, 2018. I adjourned the case conference to the 5th December, 2018 and gave liberty to the defendant to bring a motion for discovery returnable to that date. The day before the case conference was due to take place, the defendant's solicitors indicated to the plaintiff's solicitors that they were unable to comply with the direction of the court concerning exchange of expert reports. The defendant further failed to bring the motion for discovery as had been directed.

13. The defendant's solicitors further indicated in the letter of the 4th December, 2018 for the first time that they now proposed to seek to amend the defence and counterclaim. When the matter came before me on the 5th December, 2018, at the request of counsel for the defendant I extended the time for delivery of its expert report until the 11th January, 2019. I also permitted the defendant to bring its motion for further and better discovery despite its previous failure to do so. However, the price for so doing

was that I gave liberty also to the plaintiff to renew its application to lift the stay.

14. When the matter came before me again on the 30th January, 2019, it emerged that the defendant had finally, on the 17th January, 2019, provided its expert report. That report, from Messrs. Moore Stephens, an Irish accountancy firm, is dated the 11th January, 2019. This is almost three and a half years after its counterclaim seeking some $6 million in damages was delivered, a claim which itself was intimated initially as far back as July 2014. The Moore Stephens report does not disclose when it was first commissioned.

15. In addition to the foregoing matters, Mr. Mullen in his grounding affidavit avers that a significant prejudice accrues to the plaintiff as a result of being unable to obtain the benefit of the judgment it obtained from this court now some three and a half years ago. This prejudice is compounded on an ongoing basis by the fact that under Saudi law, the plaintiff is precluded from recovering interest upon the judgment sum.

16. The application to lift the stay is opposed in a replying affidavit delivered by the defendant's solicitor Ms. Aislinn Cullen. She points to the fact that the proposal to exchange reports was in fact made by the defendant as far back ago as the 15th October, 2018. She says that the delay in exchanging reports was due to the fact that the defendant is located in Saudi Arabia. The report is however, as I have said, from a Dublin based accountancy firm, and it is difficult to see, in the modern era of instantaneous electronic communication, how geographical location can have any bearing on the delay. Ms. Cullen also points to the fact that the defendant has consented to a modular trial on the issue of liability first and if its wish was to string out the matter, it would obviously not have done so. She further apologises for the failure to issue the motion for discovery as directed and refers to the fact that senior counsel originally instructed in the case left practice at the Bar giving rise to the necessity to instruct another senior counsel.

17. With regard to the motion to amend its defence and counterclaim, that has to some extent been overtaken by events in that the plaintiff has indicated it consent to the proposed amendments, without prejudice to its right to proceed with its application to lift the stay.

18. It seems to me that what all this amounts to is that since July 2018, not only has the defendant's counterclaim not advanced to any significant degree but if anything, it might be said that it has reversed. As counsel for the plaintiff submits, following the delivery of the amended defence and counterclaim, there will be a requirement for further pleading by way of an amended reply and defence to the counterclaim, and perhaps even further pleadings after that, together with unresolved issues in relation to discovery. All of these matters have yet to be attended to and when one looks at the timeline of the rate at which this case has advanced since its inception, now over five years ago, it seems to me that there is very little cause for optimism that the trial can take place anytime soon. I am satisfied that none of the delays that have to date taken place are the fault of the plaintiff. Although it is suggested that the plaintiff belatedly made further discovery, that is a commonplace occurrence and does not in my view form any basis for an attempt to shift the blame for the gross delays to date on the part of the defendant.

19. I believe I made it perfectly clear to the defendant almost seven months ago that there would be little tolerance for further delays and that there was an urgent need to progress the case rapidly. Indeed, despite the court's best efforts to ensure that that happened, those efforts have been substantially frustrated by the defendant.

20. Whilst seven months ago I came to the reluctant conclusion that the balance of justice just about favoured leaving the stay in place, I arrived at that conclusion on the basis that I had anticipated that the case would long since have obtained an early trial date. It seems to me that the reality of this case is that the defendant, as far back as 2014, having advanced a very large claim in damages, which has prevented the plaintiff obtaining the benefit of a judgment to which it is entitled, has done little or nothing to advance that claim with anything approaching expedition. The fact that it is only in the last few weeks that expert reports have been obtained, more discovery sought and further legal advice about amending pleadings given, speaks for itself.

21. For these reasons therefore, I am satisfied that it would be quite unjust to the plaintiff to continue the stay in place, even in the absence of its inability to recover interest on the judgment which to my mind copper-fastens the position. Furthermore, there is no suggestion by the defendant that if the stay is lifted and it ultimately succeeds with its counterclaim, that it will not recover fully from the defendant, a long established multinational conglomerate which it is not disputed is a mark for damages.

22. I therefore propose to lift the stay with immediate effect.