Neutral Citation [2015] IEHC 467

THE HIGH COURT

[2015 No. 2537P]

BETWEEN:

GLAXO GROUP LIMITED
AND
GLAXOSMITHKLINE (IRELAND) LIMITED T/A ALLEN & HANBURYS

PLAINTIFFS

AND
ROWEX LIMITED

DEFENDANT

JUDGMENT of Mr Justice Max Barrett delivered on 16th July, 2015.

PART I

BACKGROUND

1. This is the third judgment that the court has given in the within matter in as many months. This time its judgment is concerned with whether or not to award to Rowex the costs of Glaxo's failed application for an interlocutory injunction.

2. It is always tempting to decide a costs application on-the-spot. However, as this Court indicated at hearing, its sense is that parties hazard and spend a lot of money coming to the Commercial Court and are entitled to a considered, reasoned decision even as to costs, in fact perhaps especially as to costs. This observation seems to apply with even greater truth when it comes to the somewhat tortured issue of whether or not to order costs following an application for interlocutory relief.

PART II

ORDER 99

3. As with any application for costs, the starting point is O.99, r.1. This provides that *"The costs of and incidental to every proceeding in the Superior Courts shall be in the discretion of those courts respectively."* So the court broaches the issue of costs armed with a discretion as to whether and on what basis to make an order as to costs. In the within application, the court is particularly concerned with O.99, r.1(4A). This provides that *"The High Court…upon determining any interlocutory application shall make an award of costs save where it is not possible justly to adjudicate upon liability for costs on the basis of the interlocutory application."* Notably, and the court considers it noteworthy, r.1(4A) addresses interlocutory applications *en masse*, not just applications for interlocutory injunctions. Therein lies the basis for some qualification and distinction, as will become apparent in the consideration of case-law that follows.

PART III

CASES CITED

i. Haughey v. Synnott [2012] IEHC 403

4. Rowex relied largely in its application on the decision of Laffoy J. in *Haughey*. That was a case that arose out of a dispute between two solicitors who had formerly been in practice with one another, and in which the plaintiff had been successful in an application for interlocutory relief.

5. In her judgment, Laffoy J. noted, at para.4, the following observation in Delany H. and D. McGrath, *Civil Procedure in the Superior Courts* (3rd edition, 2012):

> *"It is clear from the use of the word 'shall' in rule 1(4A) that the effect of the rule is that a court is required to adjudicate upon and make a costs order in respect of an interlocutory application rather than to reserve the costs of the application. However, the court retains a wide discretion in deciding what costs order to make in respect of the application and the options available include making an order awarding all or part of the costs to one party, making no order as to costs or making the costs of the application costs in the cause. It is only permissible to reserve costs, thereby deferring an adjudication upon the entitlement to costs, where it is not possible, at that juncture, justly to adjudicate upon the costs of the application."*

6. Laffoy J. proceeds, at para.4 of her judgment to refer to the judgment of Clarke J. in *Veolia Water UK plc v. Fingal County Council* [2007] 2 I.R. 81, and, in particular, Clarke J.'s suggestion that the courts should be prepared to deal with the costs of contested interlocutory applications as a discrete 'event'. Laffoy J. also refers favourably to the summary, at para.23-46 of the above-mentioned textbook, of the important factors which should inform the court's decision-making when dealing with an application for costs of an interlocutory application:

> *"Important factors in determining how to deal with the costs of an interlocutory application will include whether an application was required to be brought in any event, the success, or degree of success of a party on the application, whether the party bringing the application gave the opposing party an adequate opportunity to deal with the subject matter of the motion prior to its issue and whether the opposing party acted reasonably in refusing to deal with the particular matter on a consensual basis."*

7. Laffoy J. also makes her own observations about the prospect of a court being in a position to make an award of costs in relation to an application for interlocutory injunctive relief, stating, at para.5 of her judgment:

> *"The prospect of a court being in a position to make an award of costs in relation to an application for interlocutory injunctive relief after the determination of the application is less likely than in the case of other forms of interlocutory applications, for example, interlocutory applications dealing with procedural matters**.[1]** That is because, in the case of an application for interlocutory injunctive relief, it is frequently 'not possible justly to adjudicate upon liability for costs' at that juncture, so that the case comes within the saver in rule 1(4A). The features of an application for interlocutory injunctive relief which give rise to this distinction were analysed in Civil Procedure in the Superior Courts (at para. 23–49) by reference to the decision of Clarke J. in Allied Irish Banks Plc v. Diamond(High Court, 7th November, 2011) where it is stated:*
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> > *'[Clarke J.] went on to draw a distinction between cases where the decision on an interlocutory injunction*

application turns on issues relating to the merits of the proceedings such that a different picture may emerge at the trial and cases where the application turns on matters such as adequacy of damages or balance of convenience which will not be addressed again at the trial. In the former category of cases, a risk of injustice may arise in determining costs at the stage of the interlocutory injunction application whereas the same risk may not arise where the application does not turn on the merits of the proceedings.'"

[1] In this regard, it appears that Laffoy J. is referring to matters such as particulars for discovery and so on.

ii. O'Dea v. Dublin City Council [2011] IEHC 100
8. The decision in *O'Dea* is considered by Laffoy J. in *Tekenable* (considered hereafter). However, the court considers it beneficial to consider *O'Dea* separately and in sequence. The decision that fell to be made in that case was what, if any, order for costs should be made in circumstances where an application for an injunction was part-heard, adjourned and then abandoned because of some form of settlement between the parties. Thus it was in effect a case in which there was no 'event', in the sense that there was no determination by the court; consequently Laffoy J. decided that the court had no function in relation to liability for costs. The key part of Laffoy J.'s judgment, so far as the present application is concerned appears at paras. 6.5 *et seq*:

"A large variety of interlocutory applications come within the ambit of rule 1(4A). Most, by their nature are susceptible to a determination as to where liability for costs should lie, without giving rise to concern that an injustice or an unfairness may be perpetrated. In my view, an application for an interlocutory injunction is not in that category, as is illustrated by the course which was usually adopted in relation to the costs of an interlocutory injunction prior to the coming into operation of rule 1(4A)- that the costs were reserved for the trial Judge to determine at the conclusion of the substantive hearing. The rationale underlying that approach was explained by Keane J., as he then was, in Dubcap Ltd. v. Microchip Ltd. (Unreported, Supreme Court, 9th December, 1997), as follows:

'It is right to say, of course, that while there is no rule of court or even a practice to that effect, the normal procedure on the hearing of an interlocutory application is to reserve the costs to the trial judge. The reason for that is obvious: there may and frequently will be matters which can only be resolved by the Court of Trial on oral evidence at a plenary hearing of the action and indeed matters may come to light by way of discovery or by way of new evidence not available to the parties at the time of the hearing of an interlocutory application which will bring about a result which seemed unlikely or improbable at the time of the hearing of the interlocutory application, so for that reason it is quite normal on the hearing of the interlocutory applications to reserve the costs.'

6.6 The factors outlined in that passage, which informed the 'normal procedure' prior to the coming into operation of rule 1(4A), are the very factors which a Court is likely to have regard to in considering whether, having decided to grant or refuse an application for an interlocutory injunction, it is possible to justly adjudicate at that stage on whom liability for the costs of the application should lie…."

iii. Tekenable Ltd. v. Morrissey and Others [2012] IEHC 391
9. This was another case in which Laffoy J. considered whether to order costs, this time in the employment law context, following a settled application for interlocutory relief. Having referred to her decision in *O'Dea* and the introduction of r.1(4A) in 2008, Laffoy J. continued, at para.18 of her judgment:

"18…That amendment appears to remove the discretion of the Court to postpone making a determination in relation to costs of interlocutory applications except in cases where it is not possible to justly adjudicate upon liability for costs, in which case, presumably, the costs should be reserved to the trial Judge on the basis that the determination of the substantive action will produce an 'event'. There is a wide range of interlocutory applications the costs of which are now governed by rule 1(4A), in many of which there is not the remotest possibility of injustice if costs are awarded in a particular manner. An obvious example is the award of costs to a plaintiff on a motion for judgment in default of defence. Other situations give rise to genuine concerns that to determine where the burden of costs shall lie in relation to an interlocutory application at the interlocutory stage may perpetrate an injustice. One such situation is at the conclusion of an application for an interlocutory injunction.

19. In the case of interlocutory injunction applications the diversity of outcomes following which the Court may be asked to determine where the burden of costs should lie is a factor which is inevitably going to bear on the Court's determination. Another factor, in my view, is the inherent nature of an application for an interlocutory injunction, in relation to which it is necessary to go back to basics, that is to say, to the judgment of the Supreme Court in Campus Oil….As O'Higgins C.J. stated in his judgment (at p.105), relief in the form of an interlocutory injunction is given because a period must necessarily elapse before the action can come to trial and for the purpose of keeping matters in statu quo until the hearing".

10. Laffoy J. then considered her judgment in *O'Dea* and, in particular, her reference therein to the judgment of Keane J. in *Dubcap*, making much the same comments regarding that judgment as she had made in *O'Dea*.

iv. ACC Bank plc v. Hanrahan and Sheeran [2014] IESC 40
11. This was a case in which there had been a failed application for summary judgment. The matter was referred to plenary hearing and the High Court judge directed that the defendant should get the costs of the plaintiff's unsuccessful application for summary judgment. The Supreme Court overturned that on the basis that the appropriate order was that costs should have been costs in the cause. In the context of the within judgment, it is Clarke J.'s comments at paras.3.2–3.5 that are of especial interest. Per Clarke J:

"3.2 The reason for the introductions of [r.1(4A)] seems to me to be clear. While, historically, there had been a tendency to reserve the costs of most motions to the trial judge. a view has been taken that this can lead to injustice for, at least in very many cases, a judge who has heard a motion is in a better position than the trial judge to consider the justice of where the costs of that motion should lie. This will especially be so in cases where the trial court will not have to revisit the merits or otherwise of the precise issue that was raised by motion…..[For example, a] judge hearing a discovery motion will…in almost all cases, be in a better position than the trial judge to decide where the costs of such a motion should lie. Like considerations apply to many other cases such as motions for further and better particulars.

3.3 It is, of course, the case that such motions are very much 'events' in themselves. There are issues as to the appropriate scope of discovery or particulars. They are decided once and for all on the motion. The merits of the results of these motions are not, in the vast majority of cases, in any way revisited at trial.

3.4 Slightly different considerations seem to me to apply in cases where, at least to a material extent, some of the issues which are before the Court at an interlocutory stage arise or are likely to arise again at the trial in at least some form. [Clarke J. refers to the decisions in Diamond and Tekenable and then continues]…It is true that both of those cases concerned the costs of an interlocutory injunction. One of the issues which, of course, arises on an application for an interlocutory injunction is as to whether the plaintiff has established a fair issue to be tried and, indeed, whether the defendant has established an arguable defence. In many cases the argument for both plaintiff and defence on these questions is dependant on facts which will not be determined at the interlocutory stage save for the purpose of analysing whether the facts for which there is evidence give rise to an arguable case or an arguable defence.

3.5 However the point made in Diamond is that those facts may well be the subject of detailed analysis at trial resulting in a definitive ruling as to where the true facts lie. In substance a plaintiff may well secure an interlocutory injunction by putting forward evidence of facts which, if true, would give him an arguable case and by succeeding on the balance of convenience test thereafter. However, if the facts on which the plaintiff's claim is predicated are rejected at trial, then the justice of the case may well lead to the conclusion that the interlocutory injunction was wrongly sought. It may be that, on the basis of the evidence before the Court at the interlocutory state, the injunction was properly granted. However, with the benefit of hindsight, and after the trial, it may transpire that the case for the granting of an interlocutory injunction was only sustained on the basis of an assertion that the facts were other than the true facts finally determined by the Court at trial. It follows that in such cases there may well be good grounds for not dealing with the costs at the interlocutory stage for the trial court may be in a better position to assess the justice of the costs of an interlocutory hearing when it has been able to decide where the true costs lie. It is not necessarily just that a plaintiff who secures an interlocutory injunction on the basis of putting up false facts should get the costs of that interlocutory injunction even if it was fairly clear that an injunction would be granted on the basis of the facts as asserted."

PART IV

SUMMARY OF PRINCIPLES CONCERNING O.99,r.1(4A).

12. It seems to the court that the following principles as to whether or not to make an order for costs in favour of the victor following an application for interlocutory injunctive relief can be derived from the cases considered above.

A. Reason for introduction of r.1(4A).

i. While, historically, there was a tendency to reserve the costs of most motions to the trial judge, a view has been taken that this can lead to injustice: a judge who has heard a motion is often better placed than the trial judge to consider the justice of where costs of that motion should lie. (*Hanrahan*).

B. Effect of r.1(4A).

ii. The effect of r.1(4A) is that a court is required to adjudicate upon and make a costs order in respect of an interlocutory application, rather than reserve the costs. (*Haughey*).

C. Discretion and options of court.

iii. The court retains a wide discretion in deciding what costs order to make. (*Haughey*).

iv. Options include making (a) an order awarding all or part of the costs to one party, (b) no order as to costs, or (c) the costs of the application costs in the cause. (*Haughey*).

v. Costs may only be reserved where it is not possible justly to adjudicate upon the costs of the interlocutory application. (*Haughey*).

D. Factors influencing exercise of discretion.

vi. Important factors in determining how to deal with the costs of an interlocutory application include (a) whether an application was required to be brought, (b) the success, or degree of success, of a party on the application, (c) whether the party bringing the application gave the opposing party an adequate opportunity to deal with the subject matter of the motion prior to its issue, and (d) whether the opposing party acted reasonably in refusing to deal with the particular matter on a consensual basis.(*Haughey*).

vii. In the case of interlocutory injunction applications, the diversity of outcomes following which the court may be asked to determine where the burden of costs should lie will inevitably bear on the court's determination. (*Tekenable, Hanrahan*).

viii. Another factor is the inherent nature of an interlocutory injunction which is to preserve the *status quo*. (*Tekenable, Campus Oil*).

E. Interlocutory injunction vs. other interlocutory applications.

ix. There is a wide range of interlocutory applications where there is not the remotest possibility of injustice if costs are awarded in a particular manner. An obvious example is the award of costs to a plaintiff on a motion for judgment in default of defence. (*Tekenable*).

x. The prospect of a court being in a position to make an award of costs in relation to an application for interlocutory injunctive relief is less likely than in the case of other forms of interlocutory applications. (*Haughey, O'Dea, Tekenable, Hanrahan*).

xi. A distinction falls to be drawn between (a) cases where the decision on an interlocutory injunction application turns on issues in respect of which a different picture may emerge at trial and (b) cases where the application turns on matters such as adequacy of damages or balance of convenience which will not be addressed again at the trial. In the former category of cases, a risk of injustice may arise in determining costs at the stage of the interlocutory injunction

application; in the latter the same risk may not arise. (*Haughey, Diamond, Hanrahan*).

xii. Factors making an application for an interlocutory injunction less susceptible to a determination as to liability for costs include (a) that there may be matters which can only be resolved by the court of trial on oral evidence at plenary hearing of the action, and (b) matters may come to light by way of discovery or new evidence not available to the parties at the time of the interlocutory application which will bring about a result which seemed unlikely or improbable at the time that application was heard. (*O'Dea, Dubcap*).

xiii. It is not necessarily just that a plaintiff who secures an interlocutory injunction should get the costs of that interlocutory injunction even if it was fairly clear that an injunction would be granted on the basis of the facts as asserted. (*Hanrahan*).

PART V

THE DECISION IN VEOLIA

13. Not directly concerned with O.99, r.1(4A) but of relevance nonetheless is the decision of Clarke J. in *Veolia Water UK plc v. Fingal County Council* [2007] 2 I.R. 81. That judgment was concerned with a costs application that followed a challenge to a public procurement contract. At paras.[5]–[18], and [27] of his judgment, Clarke J. set out the principles concerning the awarding of costs in complex litigation. These might perhaps be summarised as follows:

i. It is incumbent on the court before awarding costs, at least in complex cases, to give consideration to whether it is necessary to engage in a more detailed analysis of the precise circumstances giving rise to the costs incurred. (para.[6]).

ii. The court must attempt to do justice to parties by fashioning, where appropriate, orders of costs which do more than simply award costs to the winning side. (para.[6]).

iii. Costs always remain discretionary; special or unusual circumstances may make it appropriate to depart from the 'normal' course in respect of costs. (para.[8]).

iv. The overriding starting position is that costs should follow the event. (para.[9]).

v. The courts generally, and the commercial court particularly, should be prepared to deal with the costs of contested interlocutory applications on the basis of whether there were proper grounds for bringing/resisting the application. (para. [9]).

vi. In this last regard, it may be appropriate to distinguish between a routine application which had to be brought and which is not contested to the extent that the costs of the application are increased. In such a case it may be appropriate that costs be reserved to the trial judge or made costs in the cause. (para.[9]).

vii. When an interlocutory application is the subject of significant dispute, it is appropriate, in general terms, to consider the costs of such applications as stand-alone items to be assessed by reference to the event being the issue determined by the interlocutory application. (para.[10]).

viii. There may be cases where even to determine what the 'event' is, is a matter of some complexity. (*Veolia* was such a case).(para.[11]).

ix. The starting-point of any consideration of costs is to ask what the 'event' is and thereby identify the winning party. (para.[12]).

x. If the moving party required to bring the proceedings as a whole (where the costs of the whole are under consideration) or a particular interlocutory application (where those costs are involved) in order to secure an end that could not be obtained without that hearing, that party will be regarded as successful even if not successful on every point. (para.[12]).

xi. When the winning party has not succeeded on all issues, the court should (a) consider whether it is reasonable to assume that costs were increased by virtue of the successful party having raised additional issues without success and (b) if so, reflect that in its order for costs. (paras.[12], [13]).

xii. When a matter involves oral evidence and the evidence of a witness was directed to an issue on which the party who was successful overall still failed, ordinarily the court should (a) disallow any costs attributable to such witness and (b) provide by way of set-off for the recovery by the unsuccessful party of the costs of any witness it was forced to call in respect of the same issue. (para.[13]).

xiii. A similar approach should apply to any discrete item of expense incurred solely in respect of an issue upon which the otherwise successful party failed. (para.[13]).

xiv. When a trial is prolonged by the otherwise successful party raising issues on which it failed, that party should (a) ordinarily be refused costs attributable to that prolongation, and (b) have, in effect, to pay costs to the unsuccessful party in relation to whatever portion of the hearing the court considers was attributable to the issue on which the overall victor was unsuccessful. (para.[14]).

xv. Such an approach may not be appropriate in straightforward litigation where some element of a plaintiff's case or a defence may not have succeeded. That an additional issue was raised should only affect costs where raising an issue can reasonably be said to have affected the overall costs of litigation to a material extent (para.[18]).

xvi. Where there are two equally valid ways of looking at which party might be said to have been successful, it is appropriate to base the award of costs on an assessment of how much the hearing is attributable to the issues upon which each party succeeded. (para.[27])

xvii. In this last context, issues which would have arisen in any event, e.g. the legal principles applicable and necessary background information, should be attributed proportionally across the range of issues to which they were applicable for the purposes of coming to a global view as to the length of time taken at hearing regarding issues on which either party might be said to have succeeded. (para.[27]).

14. The court does not consider that the application by Glaxo for an interlocutory application can properly be described as complex litigation. That said, had the court been minded to make an order for costs in favour of Rowex at this time, the court would have taken into account the fact that in the course of what was a three-day application for interlocutory relief a significant proportion, perhaps as much as half of the time at the hearings was occupied by Rowex's arguments that Glaxo had not made out a fair issue to be tried, a point on which Rowex was ultimately successful. However, by reference to the *Haughey, O'Dea, etc.,* line of cases considered above, the court, as will be seen later below, does not consider it appropriate to make an order for costs in favour of Rowex at this time.

PART VI

ARTICLE 104 HEARING

15. The second of the court's previous judgments in this matter was concerned with the issue raised by the court during the application for interlocutory proceedings as to whether a stay should be granted pursuant to Art.104 of the Community Trade Mark Regulation (*i.e.* Council Regulation (EC) No. 207/2009 of 26 February 2009 on the Community trade mark, as amended. (O.J. L78, 24.3.2009, p.1)). That being a matter that the court raised, and regarding which the parties were thereafter effectively required to make argument, the court does not consider it appropriate to make any order as to costs in respect of the Article 104 dimension of proceedings.

PART VII

CONCLUSIONS

16. As regards the costs arising in the interlocutory application, other than the costs relating to the Article 104 dimension of matters (in respect of which the court declines to make any order as to costs), the court considers that it is appropriate to reserve the costs at this time. The reasons for this conclusion are simply put:

- first, if Glaxo is ultimately successful at the full hearing, it will obtain a permanent injunction in precisely the form of the interlocutory injunction that this Court has declined to grant. Were the court now to order Glaxo to pay the costs of the interlocutory application, one would be in the absurd situation that despite the court having decided (if it decides) after full hearing that Glaxo should get a permanent injunction and that, in effect, Rowex ought never to have had its product on the market, Glaxo should nonetheless pay the costs of its failed interlocutory application. This is a court of law, not a theatre of the absurd; and the law demands that such a scenario not be allowed to come about.

- second, although the court decided, after the interlocutory application, that damages are a suitable remedy for Glaxo, that will, of course, be a central issue at the full trial of the action. If one has regard to the decisions in *Haughey, Diamond* and *Hanrahan,* that is precisely the type of circumstance in which for the court to make an order for costs in favour of one or other party at this time could yield a risk of injustice; this obviously militates most strongly against such an order now being made.

- third, in this last regard, the court is mindful of the observation of Keane J. in *Dubcap* that matters may come to light by way of discovery or new evidence not available to the parties at the time of the interlocutory application which will bring about a result that seemed unlikely or improbable at the time that application was heard, here that damages may eventually be decided by the court of trial not to be an adequate remedy for Glaxo.

- fourth, the court considers that each and all of the above reasons has the result that, to paraphrase O.99, r.1(4A) it is not possible for the court justly to adjudicate upon liability for costs on the basis of the interlocutory application, and thus that costs ought to be reserved.