THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 252

Irvine J.
Hogan J.
Whelan J.

RECORD NO. 2016/271

BETWEEN/
JOSE MONTERIRO DA SILVA, NUNO PERDRO GONCALVES LOPES, DAVID SARAIVA MATIAS, ANTONIO BARBOSA MOREIRA, JOSE FRANCISCO OLIVEIRA DA SILVA, JORGE DA SILVA LUIS, JOSE TEXEIRA GONCALVES, ANTONIO JORGE OLIVEIRA BESSA, FRANCISCO DA COSTA FERRIERA, JOSE LUIS FREITAS LIMA

PLAINTIFFS/

RESPONDENTS

- AND -

ROSAS CONSTRUTORES S.A., CONSTRUCOES GABRIEL A.S. COUTO S.A. & EMPRESA DECONSTRUCOES AMANDIO CARVALHO S.A. trading under the style and title of RAC CONTRACTORS and/or RAC EIRE PARTNERSHIP

DEFENDANTS/

APPELLANTS

RECORD NO. 2016/273

BETWEEN
CARLOS MANUEL MIRANDA, ALFREDO MARTINS RODRIGUES FERNANDES, VICTOR MANUEL MARQUES DE OLIVEIRA, MARIA PIEDOSA RIBEIRO CARDOSA GASTALHO, FRANCISCO PEREIRA MARTINS, JOSE MARIA COEHLO BARBOSA, CARLOS JOSE LONGA

PLAINTIFFS/

RESPONDENTS

- AND -

ROSAS CONSTRUCTORES S.A., CONSTRUCOES GABRIEL A.S. COUTO S.A & EMPRESA DECONSTRUCOES AMANDIO CARVALHO S.A. all trading under the style and title of RAC CONTRACTORS and/or RAC EIRE PARTNERSHIP

DEFENDANTS/

APPELLANTS

RECORD NO. 2016/272

BETWEEN

ARMANDO AGOSTINHO ALVES DA SILVA, ALVARO ABILIO QUEIROS COEHLO, HELDER FIGUEIREDO, MARIO AUGUSTO RAMALHO GASTALHO, SAMUEL FILIPE DA SILVA OLIVERIA, JOSE ANTONIO FONSECA RIBEIRO, ALBERTO BESSA LEITE, LUIS RODRIGUES DIAS MOURATO, JOSE DUARTE MAGALHAES, JOSE MARIA MARTINS VELOSO

PLAINTIFFS/

RESPONDENTS

- AND -

ROSAS CONSTRUTORES S.A., CONSTRUCOES GABRIEL A.S. COUTO S.A. & EMPRESA DECONSTRUCOES AMANDIO CARVALHO S.A. all trading under the style and title of RAC CONTRACTORS and/or RAC EIRE PARTNERSHIP

DEFENDANTS/

APPELLANTS

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 4th day of October 2017

1. Judicial and legislative concerns regarding deductions made by employers of the salaries and wages of their employees in respect of goods and services provided by that employer have been a feature of the legal system since the 18th century and perhaps even earlier. Thus, for example, the Truck Acts of 1831 and 1887 sought to outlaw the practice of employers paying employees by means of tokens which were only exchangeable at a company store, often at inflated prices. Indeed, it was judicial and legislative distaste for this system of truck which historically prompted moves towards the concept of legal tender.

2. The issues presented in this appeal all have a distinctly Victorian feel to them and, indeed, the factual sub-stratum of the case – allegations of illegal deductions made by the employers of foreign and generally poorly educated construction workers – would have seemed familiar to late 19th century judges in different jurisdictions.

3. These are three linked sets of proceedings in which the plaintiffs seeking damages from the defendant employers for a variety of alleged breaches of their contracts of employment by reason of what was contended were wrongful deductions from their salaries and wages. The 27 plaintiffs are Portuguese and, with one exception, they are all construction workers who worked on the construction of the N7 motorway between Nenagh and Limerick between 2007 to 2009. The fourth plaintiff in the second set of proceedings, Sra. Maria Piedosa Ribeiro Cardosa Gastalho, is married to another plaintiff and was employed by the defendants as a cleaner.

4. In a comprehensive judgment delivered on 18th March 2016 in the High Court Keane J. found for the plaintiffs, holding (*inter alia*) that the deductions made by the defendant employers from the plaintiff's wages in respect of the provision of accommodation and laundry services were unlawful and in breach of contract. (The judge, however, rejected similar claims in respect of the food provided at a canteen service and this latter issue is not the subject of any appeal.)

5. Keane J. awarded each of the plaintiffs' sums ranging from €26,928 in the case of the ninth plaintiff, Sr. Magalhaes to €53,346 in the case of the second plaintiff, Sr. Coelhoe: see *da Silva v. Rosas Construtores S.A.* [2016] IEHC 152. The total sums awarded came to €364,290.

6. Keane J. further exercised his discretion pursuant to s. 22 of the Courts Act 1981 ("the 1981 Act") and awarded the plaintiffs' Courts Act interest on these sums from the date of the commencement of the proceedings on 24th September 2012 to the date of judgment, namely, 18th March 2016. At the time the prevailing interest rate under the Courts Act was 8%, having been so fixed by the Courts Act 1981 (Interest on Judgment Debts) Order (S.I. 12 of 1989) ("the 1989 Order"). As it happens, that interest rate has subsequently been reduced to 2% by virtue of the Courts Act 1981 (Interest on Judgment Debts) Order 2016 (S.I. No. 624 of 2016), the new interest rate having come into effect on 1st January 2017.

7. As we shall presently see, one of the arguments advanced by the defendants is that the High Court could not properly have exercised its discretion in this fashion, since the effect of the 8% interest rate went beyond the proper compensation of the plaintiffs for being at a loss of these monies, but that the order effectively enabled the plaintiffs to make a profit in view of prevailing interest rates. I propose to return to this issue at a latter point of the judgment, but it is first necessary to take up the narrative of the background to the case.

The background to the proceedings

8. The defendants are three Portuguese companies that traded in Ireland as a partnership ("RAC Éire"), having its registered office at Mill House, Henry Street, Limerick. RAC Éire traded in the State as a contractor or sub-contractor to a consortium known as Bóthar Hibernian, itself comprised of three companies: Mota-Engil (Portugal); Michael McNamara and Company; and Coffey Construction Limited. In November 2007 Bóthar Hibernian were awarded the public works contract to design and build the N7 Nenagh to Limerick Dual Carriageway by Limerick County Council.

9. Each of the plaintiffs was employed under written contract by the defendants for some part of the period between 2007 and 2009 in connection with the project. With the exception of the contract entered into by Sra. Cordosa Gastalho, the contracts signed by the other plaintiffs are, to all intents and purposes, more or less identical:

> "6. Rate of Remuneration
>
> The rate of remuneration to which you are entitled is in accordance with the Construction Industry Registered Employment Agreement…. This remuneration is subject to the deduction specified in clause 7 below.
>
> 7. Board, Lodgings and Laundry services
>
> As part of the terms and conditions of your employment, [RAC Éire] agrees to provide you with accommodation, meals and laundry service for the duration of your employment under this contract. In consideration of the provision of these services, [RAC Éire] will make a deduction from your hourly rate of pay as set out in clause 6 of this agreement in the amount of:
>
> Board: 15€/day
>
> Lodging: 17.50€/day
>
> Laundry service: 3.75€/kg
>
> You hereby authorise [RAC Éire] to make the said deduction on a monthly basis for the duration of the agreement."

10. It was accepted in the High Court that it was a term of the contracts of employment between the defendants and each of the plaintiffs that the employees would be paid in accordance with the relevant Construction Industry Registered Employment Agreement ("CIREA"). As Keane J. noted in his judgment, the defendants "were contractually bound to abide by the payment terms of the CIREA, regardless of whether it was otherwise enforceable as a matter of statute law."

11. As it happens, the relevant legislation providing for registered employment agreements was subsequently found to be unconstitutional by the Supreme Court in *McGowan v. Labour Court* [2013] IESC 21, [2013] 3 I.R. 718 in May 2013. But nothing, I think, turns on this, because it has not been suggested that the relevant contracts did not cease to be contractually binding, this finding of unconstitutionality notwithstanding. It is true that an argument based on the potentially retrospective implications of *McGowan* for the validity of these contractual agreements was somewhat lightly made in the course of written submissions, but, counsel for the defendants, Mr. McDonagh S.C., correctly did not press it in oral argument

12. In the High Court there were two main limbs to the plaintiffs' claim of breach of contract. The first was that the defendants failed to pay them in accordance with clause 6 of the contract for all of the hours that they worked. The second was that the defendants breached an implied term of the contract that the accommodation, meals and laundry service that the defendants were to provide under clause 7 of the contract would be of a reasonable standard, and that the specified deductions made from the plaintiffs' pay in

recognition of the provision of those services were to be fair and reasonable. The plaintiffs alleged that the accommodation and meals provided were not of a reasonable standard and that the amounts deducted for the provision of those services were excessive and unlawful.

Underpayment for hours worked
13. So far as the contention of underpayment in respect of hours worked was concerned, following an exhaustive and meticulous review of the evidence, Keane J. found as follows:

> "On the basis of the evidence just described, I have no hesitation in concluding that, on the balance of probabilities, the construction operatives on the project, and the plaintiffs in particular, consistently worked significantly longer hours than those recorded in the diary of labour (and reflected in their payslips) and that the plaintiffs were, in consequence, substantially underpaid."

14. The judge further concluded that the defendants engaged in the systematic and deliberate under recording of the plaintiffs' hours of work, leading to the underpayment of their wages in breach of their contracts of employment.

15. No appeal has been taken in respect of this aspect of the decision and the trial judge's stark findings as to the conduct of the defendants in terms of the deliberate underpayment of the plaintiff really speak for themselves. The focus, however, of the present appeal concerns the legality of the deductions made by the defendants in respect of the plaintiffs' accommodation and laundry services. It is to these issues to which I now turn.

Deductions for accommodation, board, laundry and benefit in kind
16. In his judgment Keane J. found that the plaintiffs had been provided with accommodation, in one or more prefabricated buildings located at a compound adjacent to a slip road off the motorway then under construction close to Nenagh, Co. Tipperary. Approximately 150 workers lived there during the relevant period between 2007 and 2009. There was a canteen at the compound and three meals a day were provided there. There was a laundry service on site.

The deductions for accommodation
17. As Keane J. noted in his judgment, a very significant portion of the evidence and argument at trial was directed towards the issue of whether the accommodation that the defendants provided for the plaintiffs at the site compound was of a reasonable standard or fit for purpose and whether the defendants' deduction from the plaintiffs' wages of €17.50 per day for that purpose was fair and reasonable. These deductions for accommodation corresponded to approximately €520 per month.

18. Although the plaintiffs gave evidence as to what they considered to be the unsatisfactory nature of the accommodation with which they had been provided, it is fair to say that it was the evidence of Mr. Ronald Green, an independent expert consulting engineer retained on their behalf, and that of Ms. de Oliveira, the environmental technician employed by the defendants at the material time, on which Keane J. principally relied.

19. It must be acknowledged, of course, that the camp site no longer existed at the time of the trial in 2014/2015. Nevertheless, as Keane J. found, in November 2014, shortly prior to giving his evidence, Mr. Green visited the former site of the temporary accommodation that had been provided for the plaintiffs. The temporary structures that had been on the site between 2007 and 2009 were, of course, no longer there. Mr. Green had, however, also inspected certain photographs and video footage, later proved in evidence, of the camp site as it was when the plaintiffs were accommodated there.

20. Based upon his consideration of that material, Mr. Green made several criticisms of the accommodation provided, including, *inter alia*, that the living and sleeping accommodation were unacceptably cramped for the number of persons accommodated, that the sanitary arrangements were both sub-standard and inadequate for the number of persons using them, and that there was no provision of potable water. As Keane J. explained:

> "Mr. Green described the nature and layout of the accommodation as he had seen it depicted. It comprised a temporary pre-fabricated building erected on a raised bed of gravel fill. Adjacent to the structure at one end there was a diesel powered generator set for the provision of electricity and close to that a bore hole well was located with an electrical pump attached to it for the provision of water to the shower and sanitary facilities within the building. At the other end of the structure a couple of underground holding tanks had been constructed, in an excavation approximately two metres square, for the sewage and waste water from the compound's sanitary facilities.
>
> Mr. Green was deeply critical of the external structure of these facilities on three principal grounds. First, he pointed to a photograph depicting the diesel powered electrical generator sitting on a filled area of broken stone. Mr. Green identified a dark stained area around the generator as in all probability spilled or leaked diesel fuel, which he said must necessarily have posed a significant risk of ground water contamination. Three or four metres away, Mr. Green pointed to the brown metal casing of the bore hole well with an electrical pump attached and a blue water pipe emerging from it, noting that this was the source of the building's water supply for shower and toilet purposes. Mr. Green stated that the close proximity of those two installations created a high potential for the contamination of the relevant water supply, particularly in light of the significant percolation capacity of broken stone."

21. Ms. de Oliveira stated that the operation of the generator was one of her responsibilities and that she was concerned that it was leaking a lot of diesel, in her view giving rise to a significant risk of groundwater contamination.

22. Mr. Green's second ground of criticism of the external structure of the accommodation facility was the proximity of the sewage holding tanks to both the compound and the well supplying it with water. As Keane J. explained:

> "While acknowledging that the tanks concerned were sewage holding tanks rather than sewage treatment (or septic) tanks, Mr. Green expressed the view that the Environmental Protection Agency *Wastewater Treatment Manual on Treatment Systems for Small Communities, Business, Leisure Centres and Hotels* (1999) provided appropriate guidance in relation to the location of such structures. He pointed out that, according to the contents of Table 4 in that document, the recommended minimum distance between the relevant installation and an existing development serving the equivalent of a population of between 120 and 140 persons is 43 metres. The purpose of that distance is to create a buffer zone to limit or avoid odour or noise nuisance. Mr. Green stated that the guidelines just quoted dealt with septic tank installations in which waste undergoes treatment, thereby significantly reducing any risk of pollution, whereas the defendants had simply provided sewage holding tanks and had located them within 10 metres of the gable of the accommodation building and approximately 25 metres away from the location of the bore hole well. Ms. de Oliveira also took the view that the

waste holding tanks were too close to the well that provided the building with its water supply."

23. Mr. Green also considered that sewage holding tanks were an inherently inadequate response to the requirement to provide appropriate living accommodation to upwards of 150 men for a period well in excess of twelve months. Mr. Green took the view that a sewage holding tank solution would only have been appropriate and, hence, acceptable over a much shorter period and, even then, would have required holding tanks of significantly greater capacity to deal with the number of persons accommodated. Mr. Green stated that, in his view, any accommodation that was to be used to house 150 persons for more than 12 months would require the installation of a proper waste treatment system.

24. Keane J. then stated that:

> "Ms. de Oliveira and a number of plaintiffs gave evidence that the sewage holding tanks frequently overflowed because they were not emptied often enough, particularly at weekends, and that foul water tended to pool close to the accommodation building as a result. The only cover on one of the tanks was a metal sheet. Several of the plaintiffs gave evidence of the prevalence of vermin outside and, on several occasions, inside the buildings on site. Ms. de Oliveira also gave evidence, in which she was supported by a number of plaintiffs, that the external refuse bins provided for the accommodation building were inadequate in size or number, or were not emptied sufficiently often, to deal with the amount of refuse typically generated by the occupants of the accommodation building, with the result that the bins frequently overflowed, further exacerbating the problem with vermin."

25. Keane J. then summarised the evidence as to the inadequacy of the accommodation itself:

> "….the plaintiffs who gave evidence made broadly consistent complaints that it was not only overcrowded but also inherently inadequate. The plaintiffs' evidence was that between 2 and 5 persons were accommodated in each bedroom. Based upon the photographs he had studied, Mr. Green both supported and amplified the plaintiffs' criticisms. He stated that the bedrooms were too small for the number of persons sleeping in each and contained inadequate storage facilities for clothing, footwear and other personal effects. This resulted in the storage of footwear and clothing in the corridors, giving rise to a fire hazard. In the washroom, the number of sink units and toilet and shower cubicles was inadequate for the number of persons accommodated and the water tanks and water heaters lacked the capacity to provide sufficient hot water for those persons when it was required in the mornings and evenings. Several of the plaintiffs gave evidence of returning from work to find that very often there was no hot water for a shower. The single recreation area or common room was inappropriately furnished with plastic garden furniture and there was not enough furniture to accommodate the number of workers it was required to facilitate. The amenity provided by a single television set in that room was inadequate for so large a complement of workers. The absence of a source of potable water in the accommodation was indefensible, as was the failure to provide any adequate changing area or storage area for wet or outdoor clothing."

26. Keane J. noted that Mr. Green had pointed to Article 102 of the Safety, Health and Welfare at Work (Construction) Regulations 2006 (S.I. No. 504 of 2006) ("the 2006 Regulations") deals with accommodation facilities as an aspect of construction site welfare facilities for workers. Article 102 of the 2006 Regulations provides that a contractor responsible for a construction site shall ensure that fixed living accommodation areas on the site: (a) have sufficient sanitary equipment, a rest room and a leisure room; (b) are equipped with beds, cupboards, tables and seats with backs, taking account of the number of persons at work, and: (c) are allocated taking account, where appropriate, of the presence of persons of both sexes. Mr. Green expressed the view that the accommodation provided to the plaintiffs by the defendants in this case was sub-standard in every respect, adding that the standard of accommodation required in prison facilities at the material time would have been superior.

27. Keane J. noted that, Mr. Quirino, the representative of the third defendant most directly involved in the management of the RAC Éire partnership, had said in evidence that he was not aware of any complaints about the accommodation at the site compound, although he acknowledged that any such complaints would have been directed to local management:

> "Under cross-examination, he stated that the defendants had contracted an Irish company to provide accommodation. Mr. Quirino stated that, when he began his professional career as a civil engineer 38 years ago, he lived in a compound with three other individuals in similar conditions. However, Mr. Quirino did not appear to be familiar with any of the specific criticisms of the accommodation provided in this case."

28. In the light of this evidence Keane J. then stated:

> "Having carefully considered the evidence that I have just summarised, the conclusion I have reached is that the accommodation provided was, sadly, of a deplorable - perhaps even, a dangerous - standard. In the circumstances, I do not believe that any deduction from the plaintiffs' wages for its provision was justified. It follows that the plaintiffs are entitled to recover those deductions in full."

29. In any assessment of this matter it must be recalled that, of course, the claim that these deductions were not lawfully made is in itself a claim for breach of contract. Whatever reservations one might have about the obvious lack of equality of bargaining power as between the plaintiffs and the defendants in the negotiation of the contract, for present purposes it is, perhaps, sufficient to state that there is no suggestion that these contracts of employment are not valid.

30. Against the background it must be stressed that first and foremost the remedies available for breach of contract are designed to be compensatory and not punitive in nature. As the Supreme Court has recently re-affirmed in *Murray v. Budds* [2017] IESC 4, the general rule dating back at least to the seminal decision of the House of Lords in *Addis v. Gramophone Co. Ltd.* [1909] A.C. 488 is that damages for breach of contract were designed, in the words of Lord Atkinson in that case, to be "in the nature of compensation, not punishment."

31. It is clear from the findings of fact made by Keane J. – and which the defendants have not sought to disturb – is that the accommodation provided was sub-standard, deplorable and perhaps even dangerous. The employees must have endured a miserable and soulless experience in cramped and over-crowded conditions at the accommodation centre. There is, however, a difference between the total failure of consideration on the one hand and the supply of services on the other which are sub-standard. While I entirely share the concern which Keane J. had for the plight of the plaintiffs, I nonetheless find myself obliged to accept that this was not a case where there was a total failure of consideration. The plaintiffs were, after all, provided with accommodation and protected from the elements, even if the conditions were miserable and joyless.

32. It seems to me that the plaintiffs' real complaint is not that the defendants were not entitled to charge for the accommodation,

but that they were obliged to endure miserable conditions and that the accommodation fell short – perhaps even far short – of what the contract impliedly provided and contemplated. While it is true that the compensation principle in *Addis* normally excludes damages for inconvenience and distress short of financial loss – precisely because the breach of contract in question caused no financial loss and the principal object of the law of contract is to compensate for such loss - it has also long been recognised by way of exception to the rule in *Addis* that damages under this heading can be awarded for a breach of a contract involving the provision of personal services.

33. Thus, by way of example: damages can be recovered for upset and disappointment arising from an unsatisfactory holiday (*Jarvis v. Swan Tours Ltd.* [1973] Q.B. 223) or where a wedding party are wrongly denied access to food and drinks which a public house had agreed to supply for a post-wedding reception (*Dinnegan v. Ryan* [2002] IEHC 55) or where a worker is wrongfully denied the early retirement he had been promised and for which he had made personal arrangements (*Browne v. Iarnród Eireann* (No.2)[2014] IEHC 117). Damages for inconvenience can also be awarded for breach of contract in respect of the construction of a defective dwelling: see, *e.g., Johnson v. Longleat Properties Ltd.* [1976-77] I.L.R.M. 93, *Quinn v. Quality Homes Ltd.* [1976-77] I.L.R.M. 314, *Leahy v. Rawson* [2004] 3 I.R. 1 and *Mitchell v. Mulvey Developments Ltd.*[2014] IEHC 37.

34. It is true that the circumstances of the present case are quite different from the unsatisfactory Swiss Alpine holiday at issue in *Jarvis* or the failure to supply food and drink at a post-wedding reception, as occurred in *Dinnegan*. Viewed, however, from the perspective of the law of contract, there is one underlying theme unifying all of these cases, namely, that a plaintiff is entitled to recover damages for inconvenience, annoyance and distress caused by the unsatisfactory performance by a defendant of a contract for personal services leading to the loss of enjoyment on the part of the plaintiff, since this was the very objective of the contract in the first place.

35. So it is the case here. The plaintiffs did not, of course, expect or anticipate that they would enjoy the same level of personal comforts and convenience in the provision of employment accommodation as if – as in *Jarvis* – they had, for example, had booked a hotel in the Swiss Alps. But given that they were paying some €520 a month for these accommodation services by way of employment deductions, they had a right to expect certain minimum standards, including hot water, appropriate furniture and leisure facilities. These were basic comforts which the High Court has found the plaintiffs were denied and, in my view, based on the authorities such as *Jarvis* and *Dinnegan*, this is a case which clearly comes within the exception to the rule in *Addis*. These were contracts for personal services in the provision of accommodation and the plaintiffs are accordingly clearly entitled to sue for damages for inconvenience, upset and distress caused by the provision of this sub-standard accommodation in a manner which amounted to a breach of contract.

36. I would therefore allow the appeal insofar as Keane J. found that the defendants were not entitled to charge for deductions in respect of accommodation. But as I have also found that the plaintiffs are entitled to sue for damages for inconvenience, distress and upset by reason of the sub-standard accommodation, I would remit this matter to the High Court for re-hearing on the issues of quantum of damages only.

Deductions for laundry

37. Clause 7 of each contract of employment stipulated that the defendants were to provide each plaintiff with a laundry service for the duration of his or her employment, in consideration for which they were entitled to deduct €3.75 *per* kilogramme of laundry by weight. In his judgment Keane J. noted that it was common case that a laundry service was, indeed, provided. Moreover, while certain of the plaintiffs complained of mislaid articles of clothing (which, as Keane J. wryly noted in his judgment, this is a criticism "from which few, if any, laundry services are immune"), he also found that "there was no evidence to persuade me that the service was not of a reasonable standard."

38. The critical feature of this aspect of the case was that the defendants conceded both in pre-trial correspondence and at trial - although not in the defences they delivered - that they never weighed the plaintiffs' laundry. Yet, as Keane J. observed, it was:

> "…the unchallenged evidence of the plaintiffs, by reference to copies of their payslips produced to them for that purpose, that varying and significant deductions for laundry services were consistently made from their wages on a basis that was never explained to them."

39. In his judgment Keane J. recorded that the fourth plaintiff, Sra. Maria Piedosa Ribeiro Cardosa Gastalho, who was employed by the defendants as a cleaner, gave evidence that she used the laundry facilities on site to launder her own clothes and those of her husband, Sr. Mario Augusto Ramalho Gastalho, another of the plaintiffs. Neither used the laundry service offered by the defendants. Sra. Gastalho stated that the couple had what she considered a normal amount of laundry, amounting to one load between them each week or, approximately, four loads of washing between them every month. As Keane J. said:

> "Mr. McGuinness, the plaintiffs' accountant, gave unchallenged evidence that, during the period of his employment on the project, Mr. Gastalho had €1,103.63 deducted from his wages for laundry, and that, during her period of employment on the project, Mrs. Gastalho had €692.93 deducted from her wages for laundry."

40. The judge continued:

> "The defendants did not adduce any evidence whatsoever to explain the basis upon which they purported to make persistent, precise and significant deductions from the plaintiffs' wages for the provision of a laundry service, the value of which they were contractually required to calculate and apply solely by laundry weight, when no laundry was ever weighed. Nor did the defendants adduce any evidence to explain how persistent, precise and significant deductions came to be made from the wages of both Mr .and Mrs. Gastalho for the provision of laundry services to each, where no such services were ever availed of by either of those plaintiffs.
>
> Instead, the defendants invite the Court to embark on an abstract consideration of whether the deductions made from the plaintiffs' wages might be considered generally fair and reasonable for the provision of the type of laundry service that most, though not all, of the plaintiffs actually received. In that regard, although he was given no instructions concerning the basis upon which the defendants purported to make the relevant deductions, Mr. Hyland, the expert forensic accountant retained on their behalf, was requested to express an expert opinion concerning whether those deductions might be considered fair and reasonable."

41. Keane J. continued:

> "In acceding to that request, in my view Mr. Hyland strayed well outside the confines of his own, no doubt extensive,

> expertise as a forensic accountant. The exercise that Mr. Hyland conducted was to research on the internet the capacity of the average domestic washing machine, which he discovered is 7 kg. In the words of his report, he then applied that "rate" (*i.e.* the assumption that the average load of laundry washed for each plaintiff weighed the equivalent of the average load capacity of a domestic washing machine) to what he had calculated was the weight of laundry washed on behalf of each plaintiff (which weight, he assumed, could be correctly calculated by dividing the specific aggregate amount deducted for laundry from each plaintiff's wages by the contractually applicable charge of €3.75 per kg of laundry). Mr. Hyland concluded that, applying the assumptions just described to the payslips of a random sample of fourteen of the twenty seven plaintiffs, the average number of laundry loads per month for which each of the plaintiffs was charged would have varied between 1.4 and 4.09. Presumably, on the basis that it was broadly the plaintiffs' evidence that each would each have presented one load of washing *per* week (deposited in a communal laundry basket outside each shared room), Mr Hyland concluded that "none of the [plaintiffs] were charged for excessive laundry services" and that the relevant deductions made were "in line with the rates as set out in the individual contracts of employment for the [plaintiffs]."

42. Keane J. felt that he could not act on the basis of these internet researches which were based, in any event, on standard family – as distinct from individual – use. In any event Keane J. also concluded that he could not on the basis of this evidence because:

> "…. it requires the Court to ignore the unchallenged evidence of the plaintiffs that at least two of them had regular, precise and significant deductions made from their wages for laundry services that were never provided at all. In addition, it invites the Court to disregard the acknowledged fact that the plaintiffs were charged by weight for laundry that was not weighed, and to consider instead the extent to which those deductions, applied on an apparently random and entirely unexplained basis, may have been fair and reasonable, by engaging in speculation about the weight of the plaintiffs' laundry."

43. Keane J. then concluded thus:

> "Having considered the relevant evidence, I am satisfied that the deductions that the defendants made from the plaintiffs' wages in respect of the provision of laundry services were not made in accordance with the terms of the contract of employment between the parties and were not fair and reasonable. It follows that the plaintiffs are entitled to recover those deductions in full."

44. In view of these unchallenged findings of fact, I cannot fault in any way either the analysis or the conclusions of the trial judge. By contrast to the position with regard to the accommodation, payment by weight was an integral part of the contract for laundry services. In this instance this simply meant that the weighing of the laundry was a pre-condition to any entitlement to charge, so that the failure to weigh the laundry amounted in these particular circumstances to a total failure of consideration on the part of the service provider. It is irrelevant in this context that laundry services were actually provided, because the entitlement to charge was itself completely dependent on weight.

45. Like Keane J., this Court does not know why the defendants failed entirely to honour a basic term of a contract of employment which they themselves had prepared and it is, perhaps, idle to speculate on why this might have occurred. But given that they have so failed, they cannot be heard to complain if they are not permitted to charge for laundry services based on some hypothetical average.

46. Nor do I consider that the defendants should be permitted to charge by reference to some *quantum meruit* basis. It is clear from the decision of the Supreme Court in Reynolds *v. Blanchfield* [2016] IESC 3 that not only must *quantum meruit* be pleaded, but there must be some objective evidential basis by which the value of the services could properly be measured: a speculative or intuitive assessment of the amount of laundry services provided to each plaintiff will not suffice for present purposes. The plain fact of the matter is that in the light of the undisputed facts and the additional findings of Keane J., one is obliged to say, adopting the language of Laffoy J. in *Reynolds* is that there was "no evidence before the High Court on which the value of the *quantum meruit* could be properly assessed."

47. I would therefore affirm the decision of Keane J. so far as the deductions for laundry services are concerned.

Courts Act interest

48. As I have already noted, Keane J. awarded Courts Act interest at 8% on the awards which he made to date from the date of the commencement of the proceedings to the date of judgment. The defendants submitted in this respect that the High Court order amounted to a punitive sanction in terms of the length of time and the amount of the interest rate, having regard to the prevailing bank interest rate in place during the period over which interest pursuant to the Courts Acts was awarded.

49. Section 22(1) of the 1981 Act provides as follows:

> "Where in any proceedings a court orders the payment by any person of a sum of money (which expression includes in this section damages), the judge concerned may, if he thinks fit, also order the payment by the person of interest at the rate per annum standing specified for the time being in section 26 of the Debtors (Ireland) Act, 1840, on the whole or any part of the sum in respect of the whole or any part of the period between the date when the cause of action accrued and the date of the judgement."

50. The legal principles governing s. 22(1) of the 1981 Act were recently described by Finlay Geoghegan J. delivering the judgment of this Court of Appeal in *Reaney v Interlink Ireland Ltd.* [2016] IECA 238 as follows:

> "There are a number of decisions which refer to the discretionary nature of the jurisdiction. Once the court orders the payment by any person of a sum of money (including damages) the judge concerned, "may, if he thinks fit", also order the payment by the person of interest "on the whole or on the part of the sum in respect of the whole or any part of the period between when the cause of action accrued and the date of the judgment".

51. In *Reaney* Finlay Geoghegan J. adopted the following approach to determining the appropriate period for which interest could be awarded:

> "I am in agreement that a primary purpose of an award of interest under s. 22 of the 1981 Act is fairly to compensate a recipient for being deprived of the awarded money that he should have received at an earlier date and which the court by making the order for payment has determined that he should have received. To put it another way: it is intended to

> compensate a person for being out of the money awarded from the time he ought to have received it to the date of judgment, provided, however, other facts make it just between the parties to make such an award….As appears from the foregoing, in addition to considering the purpose of an award of interest under s. 22 as being intended to compensate a person who has been wrongly out of his money it is also necessary in considering the period for which interest will be awarded to consider the facts pertaining to when the claim was made and how it was pursued. I do not accept the submissions made that the court should disregard the manner in which the proceedings were conducted. A plaintiff who delays in commencing or pursuing his proceedings may not be entitled to interest for the entire period from the cause of action or the commencement of the proceedings. It does not appear to me that would be a just exercise of the discretion."

52. It is clear, therefore, from *Reaney* that the object of the section is to compensate the plaintiff for being at a loss by reason of the breach or breaches of contract concerned. It is also true that the power to make such an order under s. 22 of the 1981 Act is discretionary. But as Reaney itself makes clear, the exercise of that discretion is often governed by factors such as the conduct of the parties and the conduct of the litigation. To take an obvious example: it could not be right that a plaintiff who was guilty of undue delay in the conduct of the litigation should be rewarded by the making of a s. 22 order back-dated to the date of the commencement of the litigation.

53. In the present case there is no suggestion that the plaintiffs were guilty of undue delay in the conduct of the litigation or that any award of compensation should not in principle be back-dated to the date on which the litigation commenced. The defendants' objection is, in reality, a rather different one, namely, that the rate of interest (8%) which any judgment debt might carry is excessive.

54. Prior to the recent change in the rate (and which does not apply to the present case), the applicable rate under the Courts Act was fixed in 1989 at 8%. That, however, was in an era of at least moderate inflation and one in which bank rates were far higher than today. Since the introduction of the Euro in 2002 interest rates have fallen steeply. This is especially true in the modern quasi-deflationary environment after the onset of the financial crisis in 2008-2009, where inflation has either been very low or even negative. This itself has impacted on international capital markets where bonds yield have either been very low and in some instances – such as in the case of high quality sovereign debt - such debt has even carried negative yields. This itself has translated into bank interest rates which have been either negligible or, even, in some cases, negative.

55. All of this is to say that the 8% rate specified in the 1989 Order is far in excess of prevailing interest rates. Any reputable saving scheme that, for example, offered an 8% rate would be flooded with applicants. To that extent, therefore, there is some force in the submissions of the defendants.

56. But all of this pre-supposes that the courts have a jurisdiction to vary the otherwise applicable interest rate specified in s. 22 of the 1981 Act. The defendants pointed to a number of High Court decisions which suggested that the courts enjoyed a discretion in this regard. Thus, for example, in *Gunning v Coillte Teo.* [2015] IEHC 44 – where the failure to performance-related bonuses to an employee was held to amount to a breach of contract leading to an award of damages - Kearns P. awarded an interest rate of 2% having had "regard to the true rate of interest payable over the last two years" and having exercised to be the discretion which he considered was permitted by s. 22 of the 1981 Act.

57. For my part, however, in view of the wording of s. 22 of the 1981 Act, I do not think that the courts enjoy any such discretion in relation to the prevailing interest rate which the judgment debt might carry. The discretion conferred by s. 22 rather relates to whether interest should be paid on the debt. If, however, the court elects to order that interest be paid, it must do so at the rate specified in the relevant ministerial order made under s. 22 of the 1981 Act ("… the judge concerned may, if he thinks fit, also order the payment by the person of interest *at the rate per annum standing specified for the time being* in s. 26 of the Debtors (Ireland) Act 1840…") (emphasis supplied). Insofar as Kearns P. suggested otherwise in *Gunning*, I think, with respect, that he was wrong and that the court enjoys no discretion in relation to the applicable rate.

58. I would therefore sum up on this point by saying that the judge's discretion to direct the payment of Courts Act interest in the manner in which he did cannot be faulted in the light of the nature of the judgment debt (arising as it does from wrongful deductions from employees wages) or the manner in which the litigation was conducted.

59. In truth, as I have already observed, the defendants' real objection was fundamentally to the rate of interest which any judgment debt might carry. Yet, having regard to the clear language of s. 22 of the 1981 Act, the courts have no discretion *in that regard*: if a court elects to direct Courts Act interest, the statutory language makes clear that it *must* do so at the rate specified in the relevant ministerial order. Nor can the courts be dissuaded from otherwise exercising their discretion to direct Courts Act interest in an appropriate case by reason of the prevailing commercial bank interest rate which are currently available. As the language of s. 22 of the 1981 Act makes clear, the Oireachtas has committed the determination of the interest rate to the Minister for Justice and the courts cannot seek indirectly go behind that rate by declining to exercise the discretion to direct Courts Act interest in appropriate case when they would otherwise but for that interest rate have done so.

Conclusions

60. In summary, therefore, I would allow the appeal only insofar as the High Court judge held that the defendants could not make deductions for accommodation services provided to the plaintiff. I would, however, temper that finding by directing a re-trial on the question of the damages to be awarded to the plaintiff for inconvenience, distress and general loss of enjoyment by reason of the provision of sub-standard accommodation to these employee plaintiffs in breach of their respective contracts of employment.

61. Save that the ultimate quantification of the final awards to each plaintiff must await the outcome of this re-trial, I would otherwise dismiss the defendants' appeal in relation to both the deductions for laundry services and the issue of the Courts Act interest.