Neutral Citation: [2014] IEHC 283

THE HIGH COURT

[2014 No. 87 MCA]

IN THE MATTER OF SECTION 71 OF THE CONSUMER PROTECTION ACT 2007 AND IN THE MATTER OF REGULATION 5 OF THE EUROPEAN COMMUNITIES (MISLEADING AND COMPARATIVE MARKETING COMMUNICATIONS) REGULATIONS 2007 AND IN THE MATTER OF ORDER 84B OF THE RULES OF THE SUPERIOR COURTS 1986, AS AMENDED

BETWEEN

VODAFONE IRELAND LIMITED

APPLICANT

AND

TELEFONICA IRELAND LIMITED

RESPONDENT

CONSUMER PROTECTION

NOTICE PARTY

JUDGMENT of Mr. Justice Barton delivered on the 20th day of May, 2014

1. The applicant has brought these proceedings against the respondent by way of originating notice of motion pursuant to O. 84B of the Rules of the Superior Courts 1986, as amended, for certain reliefs pursuant to the provisions of s. 71 of the Consumer Protection Act 2007 ("the Act of 2007"), and Regulation 5 of the European Communities (Misleading and Comparative Market Communications) Regulations 2007 ("the 2007 Regulations").

2. The notice of motion was grounded on the affidavits of Keith Daly, Manager of the applicant's prepaid customer base in Ireland and Ann Mulcahy, Head of Brand and Marketing Communications in Ireland. Their affidavits were sworn on 21st February, 2014. The respondent's statement of grounds of opposition was delivered in reply to the notice of motion and is dated 21st March, 2014. It was grounded on the affidavit of Cliodhna O'Sullivan, the respondent's general counsel and company secretary in Ireland and sworn on the same date.

3. The essence of the applicant's claim against the respondent is for various orders prohibiting the respondent from engaging in misleading advertising in respect of its Pay-As-You-Go mobile phone products. Both the applicant and the respondent provide telecommunication services in the State, including mobile phone services. The respondent's brand in Ireland is O2 and these proceedings concern advertisements of that company.

4. In or around early May 2013, the respondent's company, O2 launched a new Pay-As-You-Go product called "*Freedom*" which was advertised in a number of ways set out in the affidavit of the applicant's Ann Mulcahy. No complaint is made about this advertising campaign because whilst there was a large €10 sign alongside the offer of "*unlimited calls*" to "*all mobiles or landlines*", it was also made clear that a customer had to pay €20 by way of a top up in order to obtain the product on offer.

5. A further phase of this campaign was launched in July 2013. Advertising in this campaign was much more focused on the "*Freedom*" brand than on price. For the reasons set out on affidavit, the applicant did not consider that the advertisements placed as part of either the May or July campaigns were sufficiently misleading so as to warrant legal action.

6. A further campaign, however, was launched in November 2013. The respondent was now advertising "*unlimited internet*" for €10 on its Pay-As-You-Go service and these advertisements were placed in a variety of marketing streams including billboards, buses, bus shelters, shopping centres and the like as well as in O2 retails stores. Included amongst these were a number of special advertisements at bus shelters which emphasised the €10 price point. In some cases, the unlimited internet offer for €10 was made without any language appearing on the advertisement informing customers that in order to obtain unlimited internet, a top up of at least €20 was in fact required. In other cases, there was writing but it was in extremely small print. The applicant contends that the average consumer could hardly have seen that there was any small print, let alone be able to read what the small print actually said. The applicant considered these advertisements to be misleading and to be in breach of both the Act of 2007 and the 2007 Regulations. Certain correspondence passed between the applicant and respondent in relation to this matter. The response of the respondent, in essence, was that there was nothing unfair or misleading and that they had done nothing more than the applicant itself and that their campaign was compliant with "*industry practice*", a suggestion completely disputed by the applicant. The situation, however, was, it seems, defused as the campaign was due to finish in December 2013 and on that basis, the applicant ultimately decided not to bring an application before the High Court. It was also assumed by the applicant that following the exchange of correspondence and certain commitments made by the respondent that the respondent would not seek to run a similar advertising campaign in the future, however, in February 2014, the respondent did engage in another advertising campaign substantially similar to that which was run in November except that instead of advertising "*unlimited internet*" for €10, the respondent was advertising "*unlimited calls*" for €10. Again, the complaint was that these advertisements were misleading because whilst there was notification that in order to avail of the offer, a top up of least €20 was required, this was in such small print that the average consumer would hardly see it let alone read it. This amounted to the same objection which the applicant had taken to some of the advertisements in November.

7. The applicant sought an undertaking from the respondent that it would cause the February 2014 campaign to "*come down*" and that it would not engage in similar misleading advertising campaign in the future. The respondent declined to comply with this request and accordingly, these proceedings were instituted.

8. The matter now before the court relates not to the substance of the application or the relief sought but the way in which the issues which have arisen between the parties should now properly be disposed of.

9. It appears that the respondent had assumed, having regard to the nature of the issue between the parties and the relief being sought, that the applicant would deliver a points of claim to which the respondent would then deliver a points of defence, following which there would discovery between the parties and that thereafter the matter would proceed to plenary hearing.

10. No agreement could be reached between the applicant and the respondent in relation to the appropriate and proper procedure to be adopted after the filing of the various affidavits on behalf of both parties. Accordingly, the respondent applied to the Deputy Master for directions. On the hearing of the application, the matter was transferred to the Judge's List.

11. When the case came on for hearing before me there was broad agreement between the parties that the essential issue between them was the manner in which the application should proceed from here and the form in which evidence should be given at the hearing of the substantial application.

12. The applicant contended, having regard to the nature of the reliefs being sought and the substance of the case as well as the nature of the issue between the parties that the matter should proceed by way of affidavit with liberty to both parties to seek discovery and in that regard submitted proposed directions for consideration by the court.

13. The respondent, on the other hand, contended that the nature of the reliefs sought, the substance of the proceedings and the issues between the parties, required that the application be determined by way of plenary hearing and that that should be proceeded by the delivery of points of claim, points of defence and discovery.

14. Counsel for the applicant, Mr. Dunleavy, submitted that this was an appropriate application within the meaning of O. 84B and that that being so it was clear from the provisions of that Order that the general intention was that applications brought pursuant thereto would be dealt expeditiously and in a way which would minimise costs. It was accepted that discovery might well be necessary but he did not see how this would be voluminous, moreover, both parties were engaged in exactly the same business, were conversant with one another's advertising campaigns and fully understood the nature of the business and the market. There was nothing, he submitted, which warranted the delivery of pleadings and the determination of the issue between the parties by way of plenary hearing rather than on affidavit.

15. As to the correctness of the procedure he relied on the decision of this Court in *Tesco Ireland Limited v. Dunnes Stores* [2009] IEHC 569. In that case, the plaintiff sought to restrain by injunction a certain type of advertising by the defendant on the grounds that the advertising was misleading for customers and was in breach of the Consumer Protection Act 2007 and the European Communities (Misleading and Comparative Market Communications) Regulations 2007, being the same statute and regulations, the subject matter of these proceedings.

16. Having issued plenary proceedings, the court gave the plaintiff leave to issue and serve a notice of motion in which, amongst other things, the plaintiff sought a series of interlocutory reliefs as well as orders under both the Act of 2007 and the 2007 Regulations restraining the defendant from engaging in comparative advertising. The evidence before the court on the hearing of the application was by way of affidavit. When the matter came on hearing, counsel on behalf of the plaintiff contended that in addition to interlocutory reliefs, the plaintiff was also seeking a final order. Understandably, counsel for the defence complained that the defendant had been wrong footed in being faced with a claim for a final order when his understanding and that of his client was that the plaintiff was in court to make a case for an interlocutory order and that thereafter, the matter would go to plenary hearing.

17. The court found that the defendant was justified in its complaint and in that regard, Laffoy J. examined the statutory framework established by the Act of 2007 and the 2007 Regulations. Having done so and in considering the decision of the Supreme Court in *Dunnes Stores Limited v. Mandate*, she came to the conclusion, following that decision that the jurisdiction of the court under s. 71 of the 2007 Act and under Regulation 5(1) of the Regulations was to make a final order and that the court did not have jurisdiction to grant an interim or interlocutory order. In this regard, she observed:-

> *"It is true, as counsel for the plaintiff submitted, that there are two regimes which the plaintiff may invoke and has invoked in seeking a remedy for its complaints: the procedure under the Act of 2007 and the procedure under the 2007 Regulations which transpose the Directive. However, even though, under the Directive, the State is obliged to make provision for an accelerated procedure for obtaining a remedy, the State is given the option of providing such a procedure for a remedy with either interim effect or with definitive effect. It seems to me that in reflecting in the 2007 Regulations the features of the 1988 Regulations which led the Supreme Court to conclude that the jurisdiction of the Court under the 1988 Regulations was to make a final order rather than an interlocutory order, the State, as it was entitled to do, has opted for a procedure with definitive effect. Therefore, in my view, it is not open to the Court, in reliance on the Directive, to grant interim or interlocutory relief on an application under Regulation 5."*

18. With regard to the issue of the appropriate procedure to be followed when applying for relief under s. 71 of the Act of 2007 or under Regulation 5 of the 2007 Regulations, Laffoy J. stated:-

> *"Order 84B of the Rules contains the procedure for seeking certain relief in the High Court where the relief is statutory in nature, for example, relief being sought by a relevant authority, which, broadly speaking, means a public body, seeking to prohibit or restrain any person from taking any step or doing any thing. While I am not satisfied that an application under s. 71 of the Act of 2007 or under Regulation 5 of the 2007 Regulations by an applicant other than the Agency comes strictly within the letter of the definition of 'relevant application' in Order 84B, it certainly comes within its spirit. Moreover, rule 1(2)(b) provides that in the case of an application which is statute based, other than a 'relevant application', the Court has a discretion to direct that Order 84B shall apply, where it determines that it is just and convenient to do so. It seems to me that to adopt the procedure under O. 84B, rather than the plenary procedure of the High Court, would be fairer and more convenient in the case of an application under s. 71 or under Regulation 5."*

19. The court went on to hold that the fact that the plaintiff had failed to bring the application under O. 84B was not necessarily fatal and in this regard noted the provisions of O. 124, r. 1 of the Rules of the Superior Courts. Having concluded that the jurisdiction of the court was to grant or to refuse a final order, Laffoy J. went on to determine whether or not a final order should be made and in that regard, on the facts in that case as disclosed on affidavit, she concluded as follows:-

> *"However, I am of the view that, given the level of conflict of fact disclosed on the affidavit evidence, it is not possible to reach a conclusion that the defendant has been in breach of the Act of 2007 or the 2007 Regulations, even taking account of the evidential provisions included in s. 71 of the Act of 2007 and Regulation 5 of the 2007 Regulations. The factual dispute in relation to the advertisements in respect of which the plaintiff complains, which I have outlined in some detail earlier, is compounded by the defendant's assertion of the plaintiff's involvement in similar advertising*

practices. Nineteen examples are given in the affidavits filed on behalf of the defendant. Although the assertions of the defendant are addressed in a subsequent affidavit by the plaintiff's deponent, in my view, it would be dangerous on the evidence before the Court, without more, to make a judgment on whether the defendant was in breach of the Act of 2007 or the 2007 Regulations in procuring the publication of the advertisements complained of.

Moreover, the totality of the evidence before the Court suggests a degree of subtlety in retail pricing, marketing and advertising which, it seems to me it is difficult, if not impossible, to grasp on an application on affidavit evidence without the possibility of cross-examining witnesses."

20. No issue arose in the hearing before me as to whether the application in this case was properly brought pursuant to the provisions of O. 84B of the Rules of the Superior Courts. I will, therefore, confine myself to adopting the views of Laffoy J. in *Tesco Ireland Limited v. Dunnes Stores* [2009] IEHC 569, concerning the appropriateness of bringing an application of this nature under O. 84B of the Rules of the Superior Courts. The real issue in controversy between the applicant and respondent on this application for directions is whether on the hearing of the substantive application this should be determined on affidavit or by way of plenary hearing.

21. The head of the respondent's brand and sponsorship communications in Ireland, Rita Kirwan, swore a further affidavit for the purposes of this application on 8th May, 2014, in which she refers to the affidavit supporting the statement of grounds of opposition sworn 21st March, 2014, by Cliodhna O'Sullivan in relation to the contentions of the respondent on the matters of fact in dispute between the parties. In that regard, it seems to me useful that the content of para. 6 of the affidavit of Cliodhna O'Sullivan should be set out here.

"Furthermore, I believe it is appropriate that the following points be drawn to the attention of the Honourable Court at this point in time:-

(a) the opinions as to alleged misleading advertising by the respondent expressed in the applicant's grounding affidavit are expressed by persons in their capacity as employees of the applicant (a major competitor of the respondent) and do not represent the expression of independent expertise or judgment upon the issues in question; this could only be established after both parties put in evidence such independent expertise (should the applicant continue to prosecute these proceedings). In particular, I would note that the fact that the Freedom product, which is the subject of the campaigns in question, has been successful since its launch almost one year ago in winning customers, cannot simply be equated, as the respondent appears to, with that product's advertising being misleading.

(b) The applicant has been corresponding with the respondent since December 2013, setting out its position as to why the advertising complained of is not misleading, noting the respondent's own similar practices and requesting the respondent to substantiate its claim. In particular, since the last correspondence between the applicant and the respondent exhibited by Ms. Mulcahy, the respondent has engaged in further correspondence with the applicant clarifying the current position. None of this correspondence has (like the correspondence leading up to the issue of these proceedings) been responded to in any substantive manner.

(c) There are examples of the type of advertising the subject matter of complaint in these proceedings in the applicant's own advertising campaigns, a point that was raised repeatedly in correspondence prior to the issue of these proceedings, and a point that is not disclosed or addressed in the grounding affidavits. The respondent will adduce further evidence on this issue (should the applicant continuing to prosecute these proceedings)."

22. Not only is there a dispute, therefore, as to whether or not the respondent's advertising campaign is misleading but there is also a suggestion by the respondent that the very matters of which the applicant complains are actually contained in advertising campaigns run by the applicant itself. In her affidavit, sworn on behalf of the respondent, Rita Kirwan has averred that on the face of the affidavits and correspondence already exchanged in the course of the proceedings so far, it is manifest that the respondent does not accept that the average consumer, as referred to in the statutory provisions, could have been in any way misled by its advertising nor does it accept that there was any risk of such.

23. At para. 6 of her affidavit, she avers:-

"I would further note that it is well established that prepay customers are price conscious. They are especially well aware that there are distinct monthly minimum top ups, as this is something they encounter every month, regardless of which mobile provider they use. Prepay customers are also aware that mobile providers typically offer price plans comprising a mixture of voice, text and internet data. The advertisements specifically complained of by the applicant focused on the internet and calls components of the respondent's Freedom campaign (the campaign), but also made clear in the footnotes that the usual minimum top up requirement apply. As the respondent has previously repeatedly stated, this is standard practice across the industry, and indeed is a practice engaged in by the applicant, as illustrated by the advertisements attached to the respondent's letter dated 13th December, 2013, and a further example of same which I exhibit to this affidavit."

24. From this affidavit it is also apparent that the respondent would contend at the substantive hearing, that the Advertising Standards Authority of Ireland has actually agreed that top up information can be included in the footnotes to advertisements subject to certain terms and conditions in respect of which the respondent, apparently, has given certain undertakings.

25. It also alludes to the absence of any evidence on behalf of the applicant which would go to demonstrating that customers moved from the applicant to the respondent as a result of being misled by the respondent's advertising, the subject matter of the complaint, save that opinions in this regard have been expressed. A number of other factors have also been introduced into the mix including the proposed acquisition by Hutchinson 3G UK Holdings Limited of the shares of the respondent which, if it proceeded, would have the effect that the O2 brand would cease to exist in the Irish market.

26. The proposed acquisition would, of course, be subject to a decision of the European Commission having regard to the provisions of the EU Merger Control Regulation. Other arguments in relation to whether or not the substantive application is in fact truly urgent are addressed but these, it seems to me, are not really material to the outcome of an application for directions.

27. Counsel for the respondent, Mr. Newman, submitted that apart altogether from the conflict of fact, apparent from the affidavits, which would have to be resolved there were other issues which could not be properly resolved on affidavit evidence alone, questions which could only be fairly dealt with by plenary hearing. It was also desirable that a points of claim and points of defence be delivered for the purposes of ascertaining the precise nature of the claim that was being made, the matters being relied upon and the

relationship between those and the relief that was being sought. He accepted that in general the procedure for determining such application under O. 84B, was by way of affidavit, however, he relied in particular on the provisions of r. 8(1)(f) where the court is empowered in certain circumstances to direct determination of the substantial application by way of plenary hearing and in the respondent's submission it was urged that provision was applicable in this case.

28. In reply, counsel for the applicant submitted that this was a simple case and that the issue in question was a simple one which could be determined by the court on affidavit evidence without the necessity of a plenary hearing. In this regard, he relied upon the recent decision of the High Court in England, *Interflora Inc. v. Marks and Spencer Plc* [2013] EWHC 1291 (Ch.)(transcript) and which he submitted was persuasive authority for the proposition contended for by the applicant that the application in this case could properly be dealt with on affidavit.

29. That was a case in which the claimants, who owned the registered trademarks consisting of the word "*Interflora*" issued proceedings against the defendant for the infringement of those trademarks under Article 5(1)(a) of the First Council Directive (EEC) 89/104 and Article 9(1)(a) of Council Regulation (EC) 40/94.

30. In determining the matters at issue in that case, the court had to consider European trademark law and in that regard, it was held by court that it was well established that any questions in European trademark law were to be assessed from the perspective of the "*average consumer*" of the relevant goods or services and that the "*average consumer*" is deemed to be "*reasonably well informed, and reasonably observant and circumspect*".

31. Arnold J. in his judgment at para. 198 having cited a number of the decisions of the Court of Justice relating to the concepts of the "*average consumer*" and "*reasonably circumspect consumers*" stated:-

> *"It is clear from this that the Court was saying that a national court should determine whether a description, trade mark or promotional statement was liable to mislead by considering the matter from the perspective of 'an average consumer who is reasonably well-informed and reasonably observant and circumspect'. In general, it was not necessary to have expert evidence or consumer research for that purpose."*

32. He went on to say, however, that national courts were not precluded in cases of difficulty from seeking assistance from expert evidence or consumers. He was considering these matters in the context of determining whether any given description, trademark or promotional description or statement called into question was liable to mislead the purchaser.

33. It is clear from that case and the authorities referred to in the judgment of Arnold J. that both the Court of Justice and the courts in England consider the concept of "*average consumer*" and "*reasonably observant circumspect consumers*" as a "*legal construct*". The test was said by counsel for the defence in that case to be a "*normative*" one. Arnold J. at para. 209 of his judgment observed that:-

> *"By assessing matters from the perspective of a consumer who is reasonably well-informed and reasonably observant and circumspect, confusion on the part of those who are ill-informed or unobservant is discounted."*

34. The learned judge went on to state at para. 210 of his judgment that:-

> *"In a case concerning ordinary consumer goods and services, the court is able to put itself into the position of the average consumer without requiring expert evidence or a consumer survey. As Chadwick L.J. said in BACH and BACH FLOWER REMEDIES Trade Marks [2000] RPC 513 at 41, in a passage which Lewison L.J. emphasised in Interflora (CA I) at 41-43:*
>
> > *'The task for the court is to inform itself, by evidence, of the matters of which a reasonably well informed and reasonably observant and circumspect consumer of the products would know; and then, treating itself as competent to evaluate the effect which those matters would have on the mind of such a person with that knowledge, ask the [relevant] question'."*

35. Bearing in mind that this was a case involving the infringement of trademark involving complex issues of European trademark law as well as issues of fact and is not on all fours with the matters in issue here I do not consider this case to be persuasive authority for the proposition that oral evidence is unnecessary in this case for the purposes of determining the question as to the whether or not the advertising complained of here was misleading to the "*average consumer*" who was "*reasonably well informed and reasonably observant and circumspect".*

36. It is, however, arguable that the decision is persuasive authority for the proposition that in determining whether a description, trademark or promotional statement was liable to mislead the average consumer in a case concerning ordinary consumer goods and services it is not, in general, necessary for the court to have available to it, expert evidence or consumer research for that purpose.

37. It is also clear, however, from a reading of paras. 5 – 17 of the judgment of Arnold J. that the issues between the parties which the court was asked to resolve were founded on evidence given orally at plenary hearing.

Decision

38. No issue arises as to whether it is appropriate to bring an application for relief under s. 71 of the Consumer Protection Act 2007, and under Article 5 of the European Communities (Misleading and Comparative Marketing Communications) Regulations 2007, by way of originating notice of motion under O. 84B of the Rules of the Superior Courts. I have already observed in passing, however, that it would seem entirely appropriate to do so having regard to the decision of this Court in *Tesco Ireland Limited v. Dunnes Stores*.

39. In relation to the question now before the court, as to whether the substantive application should be determined on affidavit or by way of plenary hearing, it is, in my view, clear from the provisions of r. 7 of that Order that, in general, evidence in proceedings to which the Order relates are to be given on affidavit. The determination of such an application on oral evidence is therefore an exception to the general rule and can only arise on the direction of the court. As to whether or not, the court should make such direction in any given case, it seems to me that the court has to be satisfied that the subject matter of the application is one likely to involve a substantial dispute of fact or otherwise and that it is considered by the court that it is necessary or desirable to direct plenary hearing in the interests of justice. In that regard, and for that purpose, the court may make orders and give directions in relation to the exchange of pleadings or points of claim or defence or other procedural orders or directions between the parties as may be appropriate.

40. Having read and considered the evidence available to the court at this juncture on affidavit, including the correspondence and the impugned advertising exhibited and having considered the submissions of counsel, I have come to the conclusion that there is a substantial dispute as to material facts between the parties which it would not be appropriate for the court to try to resolve on the basis of affidavit evidence alone and without the benefit of cross examination. That being so, I will direct that the application, the subject matter of the originating notice of motion issued herein be determined by way of plenary hearing.

41. I will discuss with counsel the consequential directions and form of the final order required on this application.