

THE HIGH COURT**2008 10559 P****BETWEEN****ACC BANK PLC****PLAINTIFF****AND****BRIAN JOHNSTON, PRACTISING UNDER THE STYLE AND TITLE OF BRIAN JOHNSTON & CO, SOLICITORS****DEFENDANT****AND****JOSEPH TRAYNOR & SEAMUS MALLON****THIRD PARTIES****JUDGMENT of Mr. Justice Clarke delivered the 21st December, 2011****1. Introduction**

1.1 This final judgment in these long running proceedings concerns the costs which arise between the defendant ("Mr. Johnston") and the second named third party ("Mr. Mallon"). These proceedings generally have already been the subject of a significant number of judgments, namely: *ACC Bank plc. v. Brian Johnston & Co.* [2010] 4 I.R. 605 (the "main" or "principal judgment"); *ACC Bank PLC v Johnston* [2011] IEHC 108 (the "third party judgment"); *ACC Bank PLC v Johnston* [2011] IEHC 376 (the "damages judgment"); and *ACC Bank PLC v Johnston* (Unreported, High Court, Clarke J., 9th December, 2011) (the "apportionment judgment").

1.2 The costs arising out of the claim made by ACC against Mr. Johnston have already been dealt with and are also the subject of a written decision, namely: *ACC Bank PLC v Johnston* (Unreported, High Court, Clarke J., 24th October, 2011) (the "first costs judgment"). What remains are the costs arising out of the third party issue between Mr. Johnston and Mr. Mallon together with the assertion by Mr. Johnston that he should be indemnified by Mr. Mallon against the costs which he had to bear in defending the proceedings brought by ACC. Finally, it should be noted that ACC had a residual involvement in this costs issue for it is argued by Mr. Mallon that ACC should bear some responsibility for his costs of the quantum issue. The starting point has to be an analysis of the various hearings which took place, their length and their result.

2. The Hearings

2.1 The case as and between ACC and Mr. Johnston lasted for 11 days. Only ACC and Mr. Johnston participated in that hearing. For the reasons set out in the principal judgment I determined that Mr. Johnston was guilty of negligence and that ACC was entitled to damages. However, for the reasons also set out in that judgment I deferred the question of the assessment of those damages until a subsequent occasion. By virtue of the responsibility of ACC for my inability to assess damages at that stage, I expressed the view that ACC might have to bear some responsibility for any additional costs incurred by the separation out of the quantum issues and the consequential need for a second separate quantum hearing.

2.2 The next hearing which occurred was concerned with the third party issue as and between Mr. Johnston and Mr. Mallon. That hearing lasted for five days and resulted in a finding, again at the level of principle, that Mr. Mallon was a concurrent wrongdoer with Mr. Johnston such that Mr. Johnston was entitled to an appropriate contribution or indemnity in respect of any damages which might be awarded against Mr. Johnston in favour of ACC. For reasons set out in the third party judgment I deferred assessing the amount of any such contribution until after damages had been determined and, indeed, the precise basis on which such damages were to be awarded had been assessed.

2.3 The third hearing concerned the question of quantum and lasted three days. ACC, Mr. Johnston and Mr. Mallon all participated. For the reasons set out in the damages judgment, I determined that the damages to be awarded against Mr. Johnston and in favour of ACC were to be assessed in the sum of €2m.

2.4 Finally, and for the reasons set out in the apportionment judgment, I assessed the appropriate contribution as and between Mr. Mallon and Mr. Johnston to be 70% to Mr. Mallon and 30% to Mr. Johnston and, accordingly, required Mr. Mallon to indemnify Mr. Johnston in respect of €1.4m of the damages awarded in favour of ACC. The hearing that led to that judgment lasted one day.

2.5 So far as the costs already awarded are concerned, same are dealt with in the first costs judgment. For the reasons set out in that judgment I ultimately awarded ACC costs based on a seven day hearing against Mr. Johnston. However, it is important to note the way in which that seven day period was calculated. First, I came to the view that one day of the main liability hearing as and between ACC and Mr. Johnston had been wasted by virtue of difficulties encountered as a result of what I found to be a failure on the part of ACC to properly plead their case. Thus, in substance, ACC was awarded ten days costs with Mr. Johnston being awarded the costs of one day set off against ACC's costs so as to reduce the net amount to nine days. So far as the three days spent on the quantum hearing are concerned I determined, again for the reasons set out in the relevant judgment, that Mr. Johnston was entitled, in all the circumstances, to two of those three days in costs as against ACC and thus further reduced the costs which ACC was to recover to costs based on seven days. I made no order in respect of the final day. The net position in relation to the case as and between ACC and Mr. Johnston was, therefore, that, of the 14 days cumulatively at hearing, ACC was awarded the costs of ten days, Mr. Johnston was awarded the costs of three days to be set off against the ten days awarded to ACC and no order was made in respect of one day. It must, therefore, be noted that Mr. Johnston has already obtained the costs of three days of the hearing between him and ACC against ACC even though the way in which he is to gain the benefit of those costs is by way of set off and thus a reduction in the amount which he has to pay to ACC. That factor needs to be taken into account in dealing with the overall picture as and between Mr. Johnston and Mr. Mallon.

2.6 Against that background it is now necessary to turn to the issues which arise for judgment on this occasion. I turn first to the costs of the third party proceedings themselves.

3. The Costs of the Third Party Proceedings

3.1 As pointed out earlier, the third party proceedings took five days leading to the judgment in principle against Mr. Mallon and a further one day leading to the apportionment between Mr. Mallon and Mr. Johnston. Mr. Mallon fully defended the third party proceedings. While I have very considerable sympathy for the position in which Mr. Mallon finds himself being, as he is, responsible for the wrongdoing of his partner Mr. Traynor, nonetheless the costs of that five day hearing were incurred in disputing issues on which I ultimately found for Mr. Johnston. The sixth day was concerned with determining the apportionment between the parties.

3.2 Two principal points are made on behalf of Mr. Mallon in respect of those costs. First, it is pointed out that the costs of the first two days of the third party proceedings have already been awarded against Mr. Mallon. That award arose from the need by Mr. Mallon to amend the pleadings at the end of the second day. It is accepted that there should not, at this stage, be a double count and that what I am concerned with is, therefore, the costs of the remaining three days of the main third party hearing and the additional day spent in dealing with the contribution issue.

3.3 Second, Mr. Mallon draws attention to the fact that the finding on the contribution issue was to apportion only 70% of the liability on him. On that basis it is suggested that Mr. Johnston should be only able to recover 70% of the costs of the third party issue. I am afraid I do not agree. The third party issue was a stand alone case which turned on the question of whether, and if so to what extent, Mr. Mallon was obliged to make a contribution to the damages which Mr. Johnston would have to pay to ACC. The fact that Mr. Johnston did not succeed in obtaining a complete indemnity does not, in my view, mean that the event, so far as the third party proceeding was concerned, was other than decided in favour of Mr. Johnston. Mr. Johnston had to maintain the third party proceedings in order to obtain any contribution from Mr. Mallon. In that context, Mr. Johnston is in no different a position to a plaintiff who brings a claim against a defendant which is only partially successful. Unless it can be shown that the issues raised by the plaintiff but on which the plaintiff was unsuccessful have materially lengthened the case and thus increased the costs, the plaintiff will, nonetheless, be entitled to the full costs of the proceedings for the plaintiff had to bring those proceedings and incur those costs in order to obtain the relief to which the court ultimately found the plaintiff to be entitled.

3.4 Where a defendant wishes to deal with a situation where the defendant views the plaintiff's claim as excessive, then the defendant can do so by means of crafting an appropriate Calderbank letter (see *Calderbank v Calderbank* (1978) 3 All E.R. 333), making a lodgement, or using any other appropriate device designed to admit some but not all of the relevant quantum of liability. Mr. Mallon did none of these things. Mr. Mallon maintained the position at all stages that there should be no contribution ordered against him. If, for example, Mr. Mallon had written a Calderbank letter, in which he agreed to accept an apportionment of not less than 70%, then the position might well be different. Mr. Mallon is in no different a position to a defendant against whom a claim of €500,000 was made but where the court only awarded €350,000. In those circumstances a plaintiff is nonetheless entitled to full costs unless it can be shown that material additional costs were incurred in putting forward that part of the claim which was rejected.

3.5 In my view there is nothing on the facts of this case which would justify a conclusion that the costs of the third party issue were materially increased by virtue of the fact that Mr. Johnston claimed a complete indemnity rather than the 70% contribution ultimately ordered. All of the issues of law and fact that were explored would need to have been explored in any event. The case did not take longer nor did it cost more by virtue of the claim for a full indemnity. Mr. Johnston had to bring the case against Mr. Mallon in order to obtain the contribution which he did. Even had he claimed a 70% contribution, all of those costs would have been incurred.

3.6 It seems to me, therefore, that Mr. Johnston is entitled to recover the costs of the six days spent dealing with the third party issues (or more accurately the four days costs beyond the two days already awarded). In passing I should note that this case seems to me to be totally different from the sort of case where, for example, a plaintiff sues two defendants raising the same factual and legal issues against both and where the defendants serve notices of contribution and indemnity which, in turn, are determined on the same facts and law. In such a case, and assuming that the plaintiff succeeds against both, the plaintiff is likely to obtain an order for costs jointly and severally against both defendants. However, the justice of such a case will normally require that the defendants indemnify each other not only in relation to damages but also in relation to costs on the basis of the apportionment of liability determined by the court. The logic of such a situation is that all of the issues which needed to be decided were interlinked. However, where, as here, the issues which arise in third party proceedings raise separate questions both of law and fact, different considerations apply. In such a case the court needs to assess the third party proceedings, to a large extent, on a stand alone basis. It is next necessary to turn to the claim made by Mr. Johnston for an indemnity in respect of his costs of defending the proceedings against ACC.

4. Mr. Johnston's Claim for an Indemnity

4.1 Mr. Johnston seeks an indemnity in respect of the 14 days costs which he incurred in defending the proceedings brought by ACC. The basis for that contention is that, but for the wrongdoing of Mr. Traynor for which Mr. Mallon is vicariously liable, Mr. Johnston would not have been the subject of the proceedings in the first place. While that may be so, the argument is, in truth, a repetition of an argument that has been repeatedly made by Mr. Johnston and repeatedly rejected by the court in the course of these proceedings. As pointed out on numerous previous occasions it is equally true that if Mr. Johnston had not been negligent, Mr. Traynor would not have had the opportunity to breach his undertaking. It follows that it can equally be said that Mr. Mallon would not be here defending these third party proceedings were it not for Mr. Johnston's negligence.

4.2 However, there seems to me to be an even more fundamental problem with the argument put forward by Mr. Johnston. Why did Mr. Johnston incur the costs of defending an action brought by ACC for 14 days and why is Mr. Johnston liable to pay ACC for seven days of that hearing? The simple answer is that Mr. Johnston denied negligence. He put forward evidence rejected by the court and legal argument which ultimately did not find favour. Mr. Johnston is, of course, entitled to defend the proceedings. However, if he chooses to defend the proceedings on a basis which ultimately does not find favour with the court then he cannot seek to pass the burden of those costs which he incurred in putting forward an unmeritorious defence onto Mr. Mallon (through Mr. Traynor). Seen in that light the fact that he might, had Mr. Traynor not been guilty of a breach of undertaking, have gotten away with his negligence in the sense that there would have been no loss to ACC, is neither here nor there. Mr. Johnston was negligent. He denied it. It took 14 days to establish that he was negligent and that €2m damages was the appropriate remedy. None of that is Mr. Mallon's fault.

4.3 To the extent that Mr. Johnston was partially successful in relation to the damages issue and also was put to additional expense because of the way in which ACC ran the damages issue, then Mr. Johnston had already been compensated for that fact by the significant reduction in the total amount of costs which he might otherwise have had to pay to ACC. At the end of the day Mr. Johnston has to pay ACC for only seven days of a 14 day hearing. It is in that way that Mr. Johnston has been recompensed for the

way in which the case as and between ACC and himself ran. To the extent that he remains liable for seven days costs to ACC and has had to bear his own costs of defending for the full 14 days, then same stems solely and only from his unmeritorious denial of liability and his continuing refusal to accept that any quantum of damages ought be awarded against him. For example if, prior to the quantum hearing, Mr. Johnston had admitted a liability for any sum in excess of €2m (on a Calderbank basis) then he would have been awarded the entire costs of the quantum hearing against ACC. That he did not do so cannot be blamed on Mr. Mallon. Indeed the reason why costs of one day of the quantum hearing were not awarded to Mr. Johnston was because he decided to attempt to relitigate a causation issue that had already been decided. That again is not Mr. Mallon's fault.

4.4 On that basis I am not satisfied that Mr. Johnston is entitled to an indemnity from Mr. Mallon in respect of any of the costs which he incurred himself in defending the proceedings against ACC or in respect of the costs which he now has to pay ACC. It is finally necessary to turn to the question of the costs incurred by Mr. Mallon in participating in the quantum hearing.

5. Mr. Mallon's Costs of the Quantum Hearing

5.1 Mr. Mallon claims that his costs of dealing with the quantum hearing should be paid by ACC on the basis that a significant reduction in the damages claimed by ACC was attributable to argument and evidence which he advanced. It is certainly correct to characterise the result of the quantum hearing as being one in which the argument raised by Mr. Mallon met with a measure of success resulting in a significant reduction in the amount of damages. However, the problem with Mr. Mallon's argument under this heading is that no concession was made in advance of the quantum hearing as to the amount of damages that ought properly be awarded.

5.2 In my view there might well be some merit in Mr. Mallon's claim for costs against ACC in respect of the quantum hearing if Mr. Mallon had written an appropriate form of Calderbank letter in advance of that hearing agreeing that the damages ought be assessed in a specified sum not less than €2m. In those circumstances it would have been on ACC's head if ACC chose to go ahead with the trial as to quantum and failed to beat the offer (although the matter might well have been complicated had Mr. Johnston not written a similar letter). Again it seems to me that Mr. Mallon is in no different a position than any ordinary defendant who achieves a much lower award as a result of arguments successfully put forward but where there was no lodgement or other mechanism adopted to specify a minimum amount of damages which ought properly be awarded. ACC does not seek that the costs of the quantum hearing be paid by Mr. Mallon. I have rejected Mr. Johnston's claim to be paid such costs against Mr. Mallon. It follows that no order is being sought against Mr. Mallon arising out of the quantum hearing. If he had wished to recover his costs from one or other party then it would have been necessary for him to specify a precise amount which he was prepared to admit ought to be allowed. In those circumstances the other parties would have had to take their chances on being able to beat that sum or run a risk on the costs wasted by failing so to do. By not adopting that strategy, it seems to me that Mr. Mallon has lost any entitlement to obtain the costs of the quantum hearing.

6. Conclusions

6.1 It follows that the only order which it seems to me to be appropriate to make arising out of the third party proceedings is an order that Mr. Johnston is entitled to recover from Mr. Mallon the costs of the four days out of the six days required to determine the liability of Mr. Mallon to contribute 70% to the damages awarded against Mr. Johnston (being those days not yet the subject of a costs order) in addition to the two days already awarded. There will, therefore, be an order that Mr. Johnston recover the costs of the third party issue based on a six day hearing in substitution for the order for the two days costs already made.

6.2 For the avoidance of doubt the order will also note the court's rejection of Mr. Johnston's claim for an indemnity in respect of his costs of defending ACC's claim in these proceedings as against Mr. Mallon and also the rejection of Mr. Mallon's claim for the costs of the quantum hearing against ACC.