

THE HIGH COURT**2008 1683 P****BETWEEN****O'BRIEN'S IRISH SANDWICH BARS LIMITED****PLAINTIFF****AND****ANN MARIE BYRNE****DEFENDANT****Judgment of Miss Justice Laffoy delivered on 15th January, 2009**

I have considered the oral submissions made by the parties in relation to costs on 19th December, 2008 and the written submissions of counsel for the defendant and the authorities referred to in the written submissions.

In my judgment on this matter delivered on 17th December, 2008 I dealt with the issues raised on the pleadings, the course of the proceedings and what remained to be decided in the light of concessions made by the parties at interlocutory stage and in the course of the proceedings in considerable detail. Those matters are of relevance in determining where, and the extent to which liability for costs should lie. I do not propose to traverse that ground again, except to make some observations in outlining the outcome of the proceedings by reference to the decisions made in relation to the outstanding issues which remained to be determined by the Court and which are listed on page 21 of my judgment.

The outcome was as follows:-

- (a) The defendant's defence that the Franchise Agreements were void and unenforceable failed.
- (b) The defendant's claim for a strike out on the grounds of abuse of process or non-disclosure failed.
- (c) What remained of the plaintiff's claim for injunctive relief arising out of Clause 23 of the Franchise Agreements failed. However, as I recorded on page 18 of the judgment, when the application for an interlocutory injunction was before the Court on 10th March, 2008, the defendant gave permanent undertakings in relation to some elements of the injunctive relief which arose out of Clause 23.
- (d) No relief was granted on foot of the plaintiff's claim for injunctive relief arising out of Clause 17 of the Franchise Agreements. However, I made it clear, at page 30 of the judgment, that I was satisfied that the plaintiff was entitled to injunctions in the terms sought. The reason a restraining order was not made was because it was not necessary, because the restraint period had expired by the time the judgment was delivered. While I also made it clear that the defendant's undertakings would have been acceptable in lieu of orders, significantly, as is recorded on page 17 of the judgment, it was not until the last day of the hearing that the Court was informed that the plaintiff had recently ceased trading in the Suffolk Street premises and did not intend to trade in competition to the plaintiff in the future. Until that point in time, compliance with the non-compete provisions of the Franchise Agreements was the principal issue in the proceedings. While, as is recorded on page 20 of the judgment, it had been intimated that the defendant was willing to give any undertakings which were required by the plaintiff "without prejudice to her defence", her defence and counter-claim were pursued to the end.
- (e) The plaintiff's claim for damages was successful, but the award of €35,516.87 was within the jurisdiction of the Circuit Court (€38,000.91). The plaintiff's claim for further and other relief, which was designed to address consequential loss, was refused. In terms of the conduct of the proceedings, the final position adopted by the plaintiff in seeking damages in the sum of €35,516.87 on the basis of a July 2008 cut-off in calculating loss of fees due under the Franchise Agreements avoided prolonging the duration of the hearing, with a consequential increase in the costs of the proceedings.
- (f) The defendant's counter-claim for damages, which was unlimited in amount, failed.

In summary, the overall outcome of the proceedings was that the defendant's attack on the Franchise Agreements and on the plaintiff's conduct of the proceedings failed and her counter-claim for unlimited damages failed. As regards the plaintiff's claim, while the award of damages was within the Circuit Court jurisdiction, the plaintiff withstood the attack on the validity of the Franchise Agreements and procured permanent undertakings in relation to its claim for passing off and would have been granted an injunction to restrain breach of the non-compete provisions of the Franchise Agreements had that been necessary.

It was submitted on behalf of the defendant that the Court should make no order as to costs, so that each party should bear its/her own costs.

That submission cannot be acceded to for the following reasons:-

(1) While under Order 99, rule 1 of the Rules of the Superior Courts 1986, subject to any statutory provision, costs are at the discretion of the Court, the primary rule is that costs "follow the event" (Order 99, rule 1(4)). In this case, the plaintiff succeeded in its claim on what I consider to be the principal issues, namely, protecting itself against passing off and an infringement of the non-compete clauses in the Franchise Agreements. It was also successful to a limited extent in relation to the consequential loss arising from the defendant's breaches of the Franchise Agreements, in that it procured the award of damages. The defendant, on the other hand, was wholly unsuccessful in her counter-claim. In the circumstances, applying the primary rule, the plaintiff is entitled to its costs. I see no other basis on which the Court's jurisdiction could be properly exercised.

(2) The defendant invoked s. 17 of the Court's Act 1981, as amended by s. 14 of the Court's Act 1991, which imposes a cap on the costs which may be recovered by a plaintiff who obtains an order for costs in a court which is not the lowest court having jurisdiction to make an order granting the relief the subject of the order. In this case, as I have already stated, the award of costs was within the jurisdiction of the Circuit Court. Sub-section (2) of s. 17 provides:-

"In any action commenced and determined in the High Court, being an action where the amount of damages recovered by the plaintiff exceeds [€31,743.45] but does not exceed [€38,091.00] the plaintiff shall not be entitled to recover more costs than he would have been entitled to recover if the proceedings had been commenced and determined in the Circuit Court, unless the judge hearing the action grants a special certificate, for reasons stated in the Order, that, in the opinion of such judge, it was reasonable in the interests of justice generally, owing to the exceptional nature of the proceedings or any question of law contained therein, that the proceedings should have been commenced and determined in the High Court."

The award in this case comes within that exception to s. 17(1). In my opinion, because the principal relief being sought by the plaintiff was declaratory and injunctive relief to enforce the complex provisions of the Franchise Agreements and the claim for damages was, in a real sense, ancillary, it was reasonable in the interests of justice generally, owing to the difficult issues of law which could have been anticipated and, in fact, did emerge, that the proceedings should have been commenced and determined in this Court, and I so certify. Apart from that, another factor which I consider to be relevant is that the quantum of damages to which a franchisor plaintiff enforcing a Franchise Agreement may ultimately be entitled, if successful, will in many cases depend on how quickly the impugned conduct is restrained by injunction or undertaking, which may be difficult to predict for a variety of reasons, including how quickly the matter can get a full hearing in Court. If the parties had not been accommodated by an early hearing in this matter, the damages may well have been outside the jurisdiction of the Circuit Court.

(3) It was submitted on behalf of the defendant that the plaintiff's claim was exaggerated. I do not accept that this submission is correct. The plaintiff claimed relief which the Court was not prepared to grant, but that does not mean that the claim was exaggerated. It was also submitted that the time spent on the proceedings, presumably, because of the conduct of the proceedings by the plaintiff, was exaggerated. I do not accept that submission either. While it is true that counsel for the defendant sought to expedite the matter by admitting certain evidence, for example, the report of Patrick Massey, competition law expert, referred to at page 24 of the judgment, it is not possible to conclude that the plaintiff's conduct of the proceedings resulted in an unnecessarily long hearing or an excessively expensive hearing. I find that the manner in which the plaintiff conducted the case was necessary to make its case or defend the counter-claim. Therefore, I see no basis on which the plaintiff's entitlement to costs should be curtailed because of its conduct of the proceedings.

The existence of the specific performance proceedings referred to in the judgment would appear to have given rise to a certain degree of confusion on the part of the parties. However, those proceedings, as I have explained in the judgment, were, and are, extraneous to these proceedings and can have no bearing on the decision as to the costs of these proceedings.

There will be an Order that the plaintiff is entitled to its costs on the High Court scale, for the reasons set out in (2) above, against the defendant.