

APPROVED

[2021] IEHC 714



THE HIGH COURT

2018 No. 8976 P

BETWEEN

DRM CONTRACT ADMINISTRATION LIMITED

PLAINTIFF

AND

PROTON TECHNOLOGIES AG

DEFENDANT

JUDGMENT of Mr. Justice Garrett Simons delivered on 2 December 2021

INTRODUCTION

1. This judgment addresses the appropriate costs order to be made in respect of two procedural motions. The first motion was brought on behalf of the defendant, and sought to have a default judgment set aside on the basis that the proceedings had not been properly served. The second motion had been brought on behalf of the plaintiff, on a precautionary basis, and sought to have the plenary summons renewed. It should be explained that the plaintiff brought its motion in an attempt to protect its position in respect of the limitation period in the event that the service of the proceedings were to be set aside as irregular.
2. Both motions came on for hearing before me on 20 July 2021. A reserved judgment was delivered on 25 August 2021 (“*the principal judgment*”). The principal judgment bears

NO REDACTION REQUIRED

the neutral citation [2021] IEHC 554. The overall outcome of the motions was that the default judgment was set aside, but the plaintiff was given leave to renew the plenary summons.

PRINCIPAL JUDGMENT: PROPOSED COSTS ORDER

3. I had set out my provisional view in relation to costs at paragraphs 111 to 115 of the principal judgment as follows:

“Insofar as costs are concerned, it is a condition of the order setting aside the default judgment and the *Norwich Pharmacal* order that the plaintiff should recover as against the defendant the adjudicated costs of the applications on 21 January 2019 and 2 July 2020, respectively. These costs were incurred as a result of the defendant’s failure to engage with the proceedings earlier. The costs associated with the drafting of the plenary summons and the statement of claim are not recoverable as part of this costs order. This is because such costs would have had to be incurred even if the defendant had engaged with the proceedings from the outset. Such costs fall to be allocated by the trial judge.

Insofar as the costs of the two motions heard on 20 July 2021 are concerned, my *provisional view* as to the appropriate costs order is set out below. The provisional view is predicated on the assumption that the motions are subject to Part 11 of the Legal Services Regulation Act 2015. Any costs order will be subject to a stay in the event of an appeal, and subject to the proviso that, in default of agreement between the parties, costs are to be adjudicated upon under Part 10 of the Legal Services Regulation Act 2015.

The plaintiff would appear to be entitled to the costs of the motion to renew the summons under Order 8 of the Rules of the Superior Courts. This is because the plaintiff has been “entirely successful” in this application notwithstanding the defendant’s opposition to same. Further, it is at least arguable that the application to renew would not have been necessary at all “but for” the failure of the defendant to engage with the proceedings.

The plaintiff would also appear to be entitled to the costs of the motion to set aside the default judgment. Whereas the plaintiff did not ultimately succeed in its opposition to the motion, it would have been necessary for the defendant to bring the motion before the court even had the plaintiff consented to same. Further, one of the considerations to be taken into account on a costs application is litigation conduct. For the reasons explained earlier, the initial

approach of the defendant to these proceedings is to be deprecated. Subject to any submission which the defendant may make, it would seem reasonable to mark the court's disapproval by awarding the costs of the motion against the defendant."

4. The parties were given liberty to file written submissions by 10 October 2021 in the event that they contended for a different form of costs order. Both parties duly filed short written legal submissions, and these were supplemented by oral submission at a hearing on 27 October 2021.
5. Following that hearing, the parties were directed, pursuant to Order 99, rule 7(3) of the Rules of the Superior Courts, to produce to the court, and to exchange with one another, estimates of the costs respectively incurred by them in relation to the two motions. The costs estimates were duly received by the registrar on 9 November 2021.

DEFENDANT'S OBJECTION TO PROPOSED ORDER

6. Counsel on behalf of the defendant submits that having regard to the supposed failings of both sides, the appropriate order is that each side should bear its own costs. It is submitted that the plaintiff acted unreasonably in opposing the application to set aside the default judgment. It is said that that application could and should have been dealt with on consent. Instead, the plaintiff's opposition had the consequence that unnecessary costs had been incurred. The hearing took up a full day and both sides had been put to the expense of preparing detailed legal submissions and affidavits.
7. Counsel relied, by analogy, on the approach taken in *Care Prime Holdings FC Ltd v. Howth Estate Company (No. 2)* [2020] IEHC 329 and *Stafford v. Rice (Costs)* [2021] IEHC 344. In each of those cases, the costs were discounted to reflect the fact that had the responding party simply consented to the relevant motion, same could have been dealt with as a short motion on a Monday listing, with an attendant saving in costs.

8. It is further submitted that the making of a costs order in respect of the two motions is not necessary to protect the plaintiff's position. Rather, it is said, the plaintiff's position is adequately protected (i) by allowing it to renew its summons (and thus retain the benefit of the date of the institution of the proceedings on 15 October 2018 for the purpose of the Statute of Limitations), and (ii) by awarding the plaintiff the costs of two earlier applications which had been pursued on the understanding that the proceedings were not being defended.
9. As to the defendant's own conduct, it is said that a costs order against it is not necessary to mark the court's disapproval of the tactical decision taken by the defendant. It is said that an incorrect understanding on the part of a foreign defendant as to the workings of the Irish legal system cannot be described as disrespectful. Rather, the incorrect understanding or assumption could be characterised, at most, as misguided, naïve or unwise.

DECISION

10. The default position under section 169 of the Legal Services Regulation Act 2015 is that a party who has been "*entirely successful*" in civil proceedings will normally be entitled to recover their legal costs from the unsuccessful party. Importantly, however, the court retains a discretion to make a different form of costs order, having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties. Section 169 then sets out a non-exhaustive list of the factors to which the court may have regard in the exercise of its discretion. These include, *inter alia*, (a) conduct before and during the proceedings, (b) whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings, and (c) the manner in which the parties conducted all or any part of their cases.

11. Section 169 is concerned principally with the overall outcome of civil proceedings, rather than with the outcome of an interlocutory application. A court is, however, obliged under the Rules of the Superior Courts to rule upon the costs of an interlocutory application at the time, i.e. rather than to reserve those costs to the trial judge, save where it is not possible justly to adjudicate upon liability for costs on the basis of the interlocutory application. (See Order 99, rule 2). In approaching the allocation of the costs of an interlocutory application, the court will normally apply the principles identified under section 169 *mutatis mutandis*.
12. Turning to the facts of the present case, the starting point for costs purposes is that each side succeeded in their respective motions, i.e. the defendant succeeded in having the default judgment set aside, and the plaintiff succeeded in securing leave to renew its plenary summons. There might be a temptation, therefore, to treat the overall outcome as a one-all draw, and direct that each party should bear its own costs.
13. In adjudicating justly on costs, however, sight cannot be lost of the fact that the difficulties in this case all arose as a result of the tactical decision made by the defendant in late November 2018 not to participate further in the proceedings. This decision represented a *volte face* on the part of the defendant. The initial approach of the defendant to the proceedings had been to engage in detailed correspondence with the solicitors for the then intended plaintiff. Thereafter, once proceedings were issued, an attempt was made to enter a notice of appearance in the Central Office of the High Court. A copy of the notice of appearance dated 8 November 2018 had been sent to the plaintiff's solicitor.
14. It was only when it was explained to the defendant's in-house legal counsel that the defendant, as a corporate entity, would require formal legal representation and could not act on its own behalf, that a tactical decision was made not to engage further with the proceedings. For reasons which have never been properly explained, this decision was

not communicated to the solicitor acting for the plaintiff. Instead, the defendant simply ceased to correspond. As counsel for the defendant euphemistically put it, the defendant went dark.

15. Crucially, it was never suggested to the plaintiff's solicitors that—notwithstanding that the defendant had been prepared to enter an unconditional appearance in the Central Office of the High Court—the defendant would now be maintaining the position that the service of the proceedings had been irregular. It was reasonable for the plaintiff and its legal advisors to assume that no point was being taken in respect of service. It was also reasonable to pursue an application for judgment in default of appearance.
16. It was only some years later that the defendant finally engaged properly with the proceedings. Irish lawyers were retained for the first time. It was necessary to make a formal application to court to seek to have the default judgment set aside. This would have been so even had the plaintiff indicated in advance that it would not be opposing the application: the matter would still have to be ruled upon by the court.
17. The court is entitled, in the exercise of its discretion, to have regard to the litigation conduct of the defendant. For costs purposes, the issue is not simply whether a party succeeded or not: an assessment of the litigation conduct of both sides may be required.
18. The approach initially taken by the defendant to these proceedings is to be deprecated. It is correctly characterised as the defendant having shown disrespect to the Irish Courts. The Irish Courts undoubtedly had substantive jurisdiction to entertain these proceedings, given that the harmful event is said to have occurred in this jurisdiction. Indeed, the defendant has not, at any stage, sought to contest the substantive jurisdiction of the Irish Courts. (There is a separate point made to the effect that the proceedings are without merit, but this does not involve a challenge to the forum of the proceedings).

19. It is common case that the defendant was on actual notice of the proceedings at all material times. The defendant might, in principle, have been entitled to stand on its rights under the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters and not have engaged with the proceedings. The approach the defendant actually adopted was very different. The in-house legal counsel, by his conduct in signalling an intention to enter an unconditional appearance, led the plaintiff's lawyers to believe that no objection was being taken to service. The defendant did, belatedly, raise an objection to the service of the proceedings and this proved successful. That this objection has been upheld does not detract from the fact that the defendant behaved poorly in its initial approach to the proceedings. The proper approach for the defendant to have taken would have been to explain to the solicitor acting on behalf of the plaintiff that an appearance would not now be entered, and that service was being disputed. Had this been done, the technical defect in the service could readily have been corrected by the plaintiff invoking the procedure under the Hague Convention.
20. Far from doing this, the defendant instead sought to capitalise upon the confusion in respect of service, which the defendant itself had created, to open up a defence under the Statute of Limitations. Having lulled the plaintiff into believing that there was no objection to service, the defendant then opposed the plaintiff's application for leave to renew its summons on the basis that the plaintiff should somehow have known that service was disputed. Had this opposition been successful, the plaintiff would have been unable to rely upon the date of the institution of these proceedings for the purpose of the limitation period prescribed for defamation claims.
21. It is correct to say that had the plaintiff not opposed the set aside application or had confined its grounds of opposition more narrowly, then the matter could have been dealt

with in short course on a Monday listing, with an attendant saving in costs for both sides.

The fact that the application was opposed meant that it was necessary to fix the matter for a longer hearing. The hearing of the two motions ultimately took a full day.

22. As it happens, however, the level of costs sought by the plaintiff are relatively modest and it must be doubtful as to whether any significant saving would have been achieved. As noted earlier, the parties were directed to file cost estimates. The plaintiff's costs in respect of the two motions have been estimated at approximately €10,700 (excluding VAT). The figure put forward by the defendant is just shy of €60,000.
23. As explained under the next heading below, I *propose* to make a direction, pursuant to Order 99, rule 7, that a sum of €10,000 be paid in lieu of adjudicated costs. This proposed order should meet the defendant's concern that the level of costs might have been increased unreasonably as a result of the set aside motion being contested.

CONCLUSION AND FORM OF ORDER

24. It is not necessary for a court to be satisfied that there has been cynical disregard by a party before it can take litigation conduct into account in allocating costs. It is apparent from the defendant's own affidavit evidence that a commercial decision was taken not to engage further with the proceedings. This factor is coupled with an unexplained decision not to notify the plaintiff's solicitor of this *volte face*, and a subsequent attempt to rely on the confusion created to open up a defence under the Statute of Limitations. On any analysis, this type of litigation conduct is to be deprecated, and the making of a costs order in the modest sum indicated below is entirely proportionate.
25. The plaintiff is, therefore, entitled to its costs of the application for leave to renew its summons on the basis that it has been entirely successful in that application. The plaintiff will also be allowed its costs of the set aside application. The application would have

been unnecessary but for the litigation conduct of the defendant. For the avoidance of doubt, it should be emphasised that there is no criticism whatsoever made of the conduct of the legal team now representing the defendant in these proceedings. The difficulties in this case were all caused as a result of the defendant failing to retain legal representation at the initial stages of the proceedings.

26. The parties have previously exchanged estimates of the costs in respect of the two motions. Having the benefit of these estimates, I propose to make a direction, pursuant to Order 99, rule 7, that a sum in gross be paid in lieu of adjudicated costs. The sum proposed is €10,000 (plus such value added tax, if any, as may be allowed under Order 99, rule 2(4)). This sum approximates to that specified in the plaintiff's estimate of costs. I am satisfied, having regard to the principles laid down by the Court of Appeal in *Landers v. Dixon* [2015] IECA 155; [2015] 1 I.R. 707, that this is precisely the type of simple and straightforward case in respect of which most judges are well capable of making an appropriate assessment of costs.
27. The proposal that the court measure costs is made in response to the concern expressed on behalf of the defendant that the costs incurred have been materially increased as a result of the set aside motion having been contested (rather than dealt with as a short motion on a Monday listing). In the event, the costs actually being sought by the plaintiff are modest, certainly relative to the defendant's own estimated costs (€59,888.00).
28. If either party objects to the court measuring the costs in gross, then the order as drawn up will simply provide that the plaintiff is to recover the costs of the two motions, such costs to be adjudicated upon under Part 10 of the Legal Services Regulation Act 2015 in default of agreement. The parties are to notify any such objection within fourteen days of today's date.

29. In all events, the execution of the costs order will be subject to a stay pending the final determination of the within proceedings. This will allow for the possibility of any costs orders which might subsequently be made in favour of the defendant being set-off against this costs order.

Appearances

Sean Corrigan for the plaintiff instructed by Sharon Oakes Solicitor

Anthony Thuillier for the defendant instructed by William Fry Solicitors

Approved
GAMMA S.M.A.S