

THE HIGH COURT

[2022] IEHC 250
[2014 No. 3292 P]

BETWEEN

ACTION ALARMS LIMITED TRADING AS ACTION SECURITY SYSTEMS

PLAINTIFF

AND

EMMET O'RAFFERTY AND TOP SECURITY LIMITED

DEFENDANTS

(No. 3)

JUDGMENT of Humphreys J. delivered on Friday the 6th day of May, 2022

1. In *Action Alarms v. O'Rafferty (No. 1)* [2021] IEHC 779, [2021] 12 JIC 2108 (Unreported, High Court, 21st December, 2021), I dealt with the mode of trial of the proceedings.
2. In *Action Alarms v. O'Rafferty (No. 2)* [2022] IEHC 33, [2022] 2 JIC 0403 (Unreported, High Court, 4th February, 2022), I made an award in favour of the plaintiff against the second defendant.
3. An issue has arisen in relation to costs. I dealt with that on 6th April, 2022 in an *ex tempore* ruling, and, as the matter is being appealed, I now take the opportunity to provide a written statement of the reasons I gave on that occasion.
4. The parties helpfully agreed almost all of the terms of a draft order as follows:

"(i) That there be judgment as against the Second Defendant in the amount of €148,324.89 made up as follows:

- (a) damages for breach of contract of €95,528;
- (b) VAT at 23% in the amount of €21,971.44; and
- (c) Courts Act 1981 interest of €30,825.45.

(ii) That the [Defendants] do pay to the Plaintiff the Costs of the proceedings to include all reserved costs, the costs of discovery, witnesses expenses, stenography fees and the costs of written submissions arising in respect of the 2022 hearing before Mr Justice Humphreys including preparation and attendances thereat, subject to the following:-

- (a) The Plaintiff and the Defendants shall each bear their respective costs of the court attendance/hearing before Mr Justice O'Connor on the 22nd day of November 2017, as appropriately adjudicated in default of agreement;
- (b) That the Costs of the court attendances before Ms Justice Pilkington on the 19th November, 20th November, 21st November, 22nd November 2019, 26th November, 29th November and 5th December 2019, together with a separate and additional brief fee for Senior and Junior Counsel, witnesses expenses, stenography fees and the costs of written submissions are to be ascertained for each party and made the subject of an application to the Attorney General for re-imbursement and/or contribution;

(c) Liberty to re-enter and/ or apply in relation to the said Costs of the court attendances before Ms Justice Pilkington following the decision of the Attorney General for final Orders.

(iii) All such costs and expenses to be adjudicated in default of agreement.

(iv) There shall be a STAY placed on the award and the Costs Order for a period of 28 days from the date of this Order and, in the event of an Appeal, the stay shall extend to the first directions hearing before the Court of Appeal. If the Plaintiff consents to the stay continuing prior to the first directions hearing, such stay to be extended to the determination of the appeal without the requirement for the Defendants to issue a motion.

(v) Liberty to apply.”

5. The outstanding issue that required my involvement was the single word in square brackets above – the issue being whether costs should be against both defendants or only as against the second defendant.
6. The primary reason that it is appropriate only to award costs against the second defendant is that the only relief granted was against the second defendant. The plaintiff complained that the first defendant caused costs to be incurred by denying the existence of a contract between the plaintiff and the second defendant, but it seems to me that the admission or otherwise of such a contract is primarily up to the second defendant itself.
7. There was never any basis for suggesting that there was a contract between the plaintiff and the first defendant, and the only relief that could have been relevant in relation to the first defendant was the claim for equitable relief. However, as noted in the No. 2 judgment, I did not need to decide that because I found in favour of the plaintiff on the contractual issue.
8. Thus, the appropriate order here is no order as to costs against the first defendant on the basis that the contractual claim was the only part of the claim that I had to decide. It is implicit in that that if, hypothetically, my findings in relation of the contract were to be reversed by the Court of Appeal and the equitable claim were to come back into the frame for discussion, the question of whether the plaintiff could obtain relief against the first defendant or if successful seek costs against him could be reconsidered at that point.
9. The final but nonetheless practical consideration was whether taking the first defendant out of the costs picture would create an unnecessary and protracted argument for the purposes of adjudication of costs, and set the case on a trajectory of trench warfare whereby any individual item of costs claimed would be sought to be reduced on the basis of there being no order as to costs in relation to one of the two defendants.
10. Had that been a realistic scenario I would have probably pressed the defendants to clarify exactly what costs incurred on behalf of the first defendant should be disallowed, and would have been minded to decide that myself at this point, rather than create the conditions for a prolonged conflict by leaving the whole thing to adjudication. Fortunately, however, I did not have to conduct that exercise because the defendants agreed that they would be taking

the position in this case that there were no costs incurred specifically on behalf of the first defendant above and beyond those incurred on behalf of the second defendant.

Order

11. Accordingly, the order made on 6th April, 2022 was:

- (i). that the draft order prepared by the parties be perfected with the modification that costs would be awarded only against the second defendant;
- (ii). that there would be no order as to costs against the first defendant on the basis that the contractual issue was the only issue that had to be decided; and
- (iii). that it be noted that the defendants accept that there were no costs incurred on behalf of the first defendant above and beyond those incurred on behalf of the second defendant.