

**THE HIGH COURT**

**[No. 2017/8782 P]**

**BETWEEN**

**RYANAIR DAC**

**PLAINTIFF**

**AND**

**SC VOLA.RO SRL**

**AND BY ORDER OF THE COURT YPSILON.NET AG**

**DEFENDANTS**

**JUDGMENT of Mr. Mark Sanfey delivered on the 24th day of July, 2020**

1. On 22nd June, 2020, I delivered judgment on two applications in the present proceedings, by the plaintiff and the first named defendant respectively. The citation for that judgment is [2020] IEHC 308, and it should be read in conjunction with the present judgment, the purpose of which is to make appropriate orders arising out of the judgment, including in relation to the costs of the matter, and also to address the question of the future conduct of the proceedings in accordance with the powers of the court to give directions in this regard as set out in the Rules of the Superior Courts.

**Reliefs sought and findings.**

2. In relation to the plaintiff's application, the plaintiff applied to strike out the first named defendant's counterclaim pursuant to O.19, r.27 or r.28 of the Rules of the Superior Courts for "failing to disclose a reasonable or sustainable cause of action and/or being bound to fail and/or being frivolous and vexatious and/or constituting an abuse of process".
3. There were two reliefs sought by the plaintiff in the alternative. The plaintiff sought an order pursuant to the inherent jurisdiction of the court staying prosecution of the counterclaim pending determination of the plaintiff's claim. Alternatively, the plaintiff sought a modular trial in which the plaintiff's claim would be prosecuted and determined first, with the first named defendant's claim being tried and determined thereafter as a second module. The first named defendant applied for orders in its favour equivalent to the two alternatives sought by the plaintiff.
4. In summary, I held as follows in relation to the two motions:
  - The plaintiff's application under O.19, r.27 or r.28 was refused;
  - the first named defendant's counterclaim was however insufficiently pleaded, and I raised five queries on the detail of the counterclaim which in my view required further particulars in order to "save" the counterclaim;
  - I did not accede to the application for a stay on the prosecution of the counterclaim pending determination of the plaintiff's claim;
  - I held that there should be a modular trial of the issues of liability in the plaintiff's claim against both defendants, and if the plaintiff were successful, there would then be argument as to whether orders should be made immediately, or whether a ruling

on the orders should be deferred until the hearing and determination of the counterclaim;

- I refused the first named defendant's application for a stay on the plaintiff's claim pending determination of the first named defendant's counterclaim, and the first named defendant's application for a modular trial in which the first named defendant's counterclaim was heard and determined first.

### **Discussion**

5. There is no dispute between the parties as to the principles governing the determination of costs in the present case. The fundamental principles are that the award of costs is discretionary, and that generally costs will "follow the event". Section 169(1) of the Legal Services Regulation Act 2015 ('LSRA') sets out a non-exhaustive list of circumstances in which the court may depart from this rule "having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties...". Under O.99, r.2(3), the court is required, "upon determining any interlocutory application", to make an award of costs "save where it is not possible justly to adjudicate upon liability for costs on the basis of the interlocutory application". The court is required by O.99, r.3(1) to "have regard to the matters set out in s.169(1) of the [LSRA] where applicable". The principles set out in *Veolia Water UK plc v. Fingal County Council (No. 2)* [2007] 2 IR 81 by Clarke J. (as he then was) provide guidance as to the exercise of the court's discretion.
6. In relation to the plaintiff's application, it is noteworthy that there was no alternative plea for an order compelling the first named defendant to furnish further particulars in the event that the relief under O.19, r.27 or r.28 was not granted. The plaintiff maintained that it had already given a "last chance" to the first named defendant to furnish adequate particulars, and that the particulars furnished were wholly inadequate. The plaintiff thereafter committed itself to arguing that the pleadings did not disclose a reasonable or sustainable cause of action or that the counterclaim was bound to fail or frivolous and vexatious and/or an abuse of process. It did so notwithstanding a clear body of jurisprudence which emphasises the court's reluctance to grant such an order except in the clearest of cases.
7. The plaintiff mounted a determined and aggressive application in this regard. It was argued that there was a "heightened obligation" to plead with particularity in competition cases, and that the first named defendant had wholly failed in this obligation. There can be no doubt that this was the main thrust of the affidavit evidence, the very extensive written submissions, and the oral submissions at the hearing itself.
8. In the event, I was not persuaded that such an extreme step was warranted. In this sense, the "event" could be said to have been the refusal of the plaintiff's application. As against that, I was satisfied that the counterclaim was indeed deficient, and required to be "saved" by ordering further particulars to be furnished by the first named defendant.
9. The issue as to the running order of the cases was treated in the affidavits and submissions as very much a subsidiary part of the applications. Neither party succeeded

in persuading me that the other's claim should be stayed pending the determination of its own claim. The plaintiff did however succeed in its application to have its claim heard and determined as a first module. The first named defendant was unsuccessful in its equivalent application.

10. I am of the view that, as regards the plaintiff's motion, the application to strike out the defendant's counterclaim was very much the dominant issue. The refusal of this application was the "event" for the purpose of determining costs. There is some force in the submission by the first named defendant that the plaintiff "should have brought a motion for further and better particulars, yet chose to push for a high stakes strike out and failed". On a very rough estimate, I take the view that this issue would have accounted for 75% of the costs of the application as a whole.
11. On the other hand, I am not impressed by the manner in which the first named defendant has pleaded its counterclaim. The plaintiff has had to raise two sets of particulars in relation to the counterclaim in an attempt to elicit sufficient detail to enable it to understand the case being made against it. As is evident from my judgment, the counterclaim is still insufficiently pleaded, in particular in relation to the "downstream market" contended for by the first named defendant. While I am prepared to give the first named defendant an opportunity to mend its hand in the manner and for the reasons set out in the judgment, there can be no doubt that the way in which the counterclaim has been pleaded and augmented by successive replies to particulars has added to the cost of the proceedings, and has occasioned considerable delay.
12. In view of its conduct of the proceedings giving rise to the application, I am not disposed to make an award for costs on the plaintiff's application in favour of the first named defendant. If the plaintiff had brought an application for further and better particulars, it would have undoubtedly succeeded. In seeking the more ambitious relief, it failed to clear the "high bar" imposed by the case law. However, the application to obtain a modular trial was successful, notwithstanding the opposition of the first named defendant. As I am of the view that this aspect of the application represented 25% of the costs of the application as a whole, I will make an order for 25% of the costs of the plaintiff's application as against the first named defendant.
13. As regards the first named defendant's application, while this motion took up a relatively small amount of the time spent at hearing and was not the subject of intense or prolonged debate, the first named defendant was wholly unsuccessful in the application, and accordingly I will award the costs of that application to the plaintiff.
14. As regards the five matters set out at para. 108 of the court's judgment which I have held require to be addressed by the first named defendant, I think on balance that an "unless" order should not be made. Whether or not the replies ultimately furnished by the first named defendant are sufficient or satisfactory may well be a matter of dispute, and it seems to me in those circumstances that an "unless" order may not be appropriate. However, I would reiterate what I stated at para. 141 of the judgment to the effect that

those matters should be addressed in a substantial and meaningful fashion, failing which there may be serious consequences for the first named defendant.

### **Case management**

15. In the course of the judgment, I indicated my intention that the court would avail of the case management procedures afforded by the Rules of the Superior Courts to give directions as to preparation for trial and the conduct of the trial itself. I said that this would include the imposition of a strict timetable for any further interlocutory applications and the exchange of witness statements and written submissions. In this regard, see para. 143 of the judgment.
16. In the event, the plaintiff and the first named defendant have, in their respective submissions, each proposed a timetable for the various steps in the litigation in the future. There are minor differences between the proposals, and it should be said that the second named defendant has not had the opportunity to proffer its suggestions for the timetable.
17. I think that it would be as well to await the furnishing by the first named defendant of the further particulars in relation to the counterclaim before imposing further deadlines on the proceedings as a whole. At that point, the pleadings in both claim and counterclaim will hopefully be accepted by the parties as being complete. I suggest that the second named defendant should be made aware of the respective timetables proposed by the plaintiff and first named defendant, and invited to either concur with one or other of them, or to submit its own proposal. I will list the matter before me for a date in September 2020, to be notified to the parties, so that the court can be apprised of any issues arising out of the further particulars to be furnished by the first named defendant, and as to whether a timetable for the conduct of the litigation can be agreed, so that the court may be in a position to make appropriate orders.
18. In summary, I will make the following orders:
  - An order dismissing the plaintiff's application to strike out the first named defendant's claim;
  - an order that the first named defendant furnish, within six weeks from the making of this order, further particulars in relation to the five matters set out at para. 108 of the judgment of this Court of 22nd June, 2020 ([2020] IEHC 308);
  - an order dismissing the plaintiff's application for a stay on the prosecution of the counterclaim pending determination of the plaintiff's claim;
  - an order directing a modular trial whereby the issues of liability in the plaintiff's claim are heard and determined, with the first named defendant's counterclaim being tried and determined thereafter as a second module;
  - an order that the plaintiff be entitled to 25% of the costs of its motion issued on the 8th day of October, 2019;

- an order dismissing the application of the first named defendant for an order staying the prosecution of the plaintiff's claim pending the determination of the first named defendant's counterclaim;
- an order dismissing the first named defendant's application for a modular trial in which the first named defendant's claim is heard and determined first, with the plaintiff's claim being tried and determined thereafter as a second module;
- an order that the plaintiff is entitled to its costs of the motion issued by the first named defendant on the 23rd day of October, 2019.