

THE HIGH COURT

[2021] IEHC 721
[Record No. 2019/7672]

BETWEEN

CAROLINE CROTTY

PLAINTIFF

AND

SAS, AB AND SWEDAVIA AB

DEFENDANTS

JUDGMENT of Ms. Justice Butler delivered on the 18th day of November, 2021

1. This is a ruling on costs consequent on a judgment delivered by me on 10th June, 2021 [2021] IEHC 394. In that judgment I acceded to an application made by the second defendant to set aside the service upon it of a personal injury summons by the plaintiff and to strike out the proceedings against it for want of jurisdiction. The proceedings remain extant as against the first defendant. The second defendant now makes an application for costs against the plaintiff on the basis that it succeeded in full in its application. On the face of it that application is straightforward save for the fact that the plaintiff has provided detailed written submissions on costs requesting, firstly, that no order be made and, secondly, in the event that an order for the second defendant's costs is made, a further order staying payment so that the issue of recoupment of those costs from the first defendant can be dealt with when liability between the plaintiff and the first defendant is determined. The first defendant has not made any submissions.
2. I will take these matters in sequence. Although ostensibly the plaintiff argues that no order for costs should be made in favour of the second defendant, in reality the bulk of her argument is directed at the potential liability of the first defendant in respect of any costs which she may be ordered to pay to the second defendant. No specific reason is advanced as to why the court should exercise its discretion against making an award of costs to the second defendant and depart from the normal rule that costs should follow the event. Therefore, I think that the second defendant is entitled to an order for the costs of this application and of the proceedings against it which have now been struck out and I will make such an order.
3. The more complicated issue concerns the plaintiff's argument that she is – or may be – entitled to recoup those costs from the first defendant under s.78 of the Courts of Justice Act 1936. Section 78 which is entitled "*Liability of unsuccessful defendant for costs of successful defendant*" provides as follows: -

"Where, in a civil proceeding in any Court, there are two or more defendants and the plaintiff succeeds against one or more of the defendants and fails against the others or other of the defendants, it shall be lawful for the court, if having regard to all the circumstances it thinks proper so to do, to order that the defendant or defendants against whom the plaintiff has succeeded shall (in addition to the plaintiff's own costs) pay to the plaintiff by way of recoupment the costs which the plaintiff is liable to pay and pays to the defendant or defendants against whom he has failed."

4. The plaintiff served O'Byrne letters on both defendants on 8th October, 2019. The text of the letter sent to the first defendant included the following passage: -

"In the event that it becomes necessary for us to issue proceedings against you and/or Swedavia AB and if in those proceedings our client is successful against one defendant and unsuccessful against another, then this letter will be used to apply to the court for an order that (in addition to any compensation and/or costs recovered by our client) the unsuccessful defendant(s) pay by way of recoupment any costs which our client is ordered to pay to any successful defendant(s)."

5. An O'Byrne letter is typically sent to prospective defendants in circumstances where a plaintiff cannot identify at the outset of proceedings which (or how many) of a number of alleged wrongdoers are potentially liable for the damage caused to her. The effect of the letter is to shift the costs-risk created by the plaintiff having sued unnecessary defendants to the defendant(s) ultimately found liable to her. An O'Byrne letter is inextricably linked to the jurisdiction of a court under s.78 to direct that the additional costs incurred by virtue of the plaintiff having sued one or more other defendants unsuccessfully (including any costs ordered against the plaintiff in favour of that defendant) be recouped from the unsuccessful defendant. Of course, it does not follow from the fact that an application may be made under s.78, that the court will necessarily exercise the jurisdiction to order such recoupment. There may be other factors relating to the case or to the way in which the plaintiff has prosecuted it which would render such an order unfair to the unsuccessful defendant. Nonetheless, the sending of an O'Byrne letter prior to the institution of proceedings or at an early stage thereafter does afford an intending plaintiff a measure of comfort as regards her potential exposure to costs in the event that she succeeds in her proceedings but not as against all defendants.
6. When the second defendant in this case issued its motion, the plaintiff sent a further letter (by email) on 23rd March, 2021 to the solicitors on behalf of the first defendant advising that if the motion succeeded, the plaintiff would rely on her original O'Byrne letter to seek a stay on any order for costs to allow the plaintiff apply at the conclusion of the proceedings to recoup such costs from the first defendant. An order for the recoupment of costs can be made in respect of either costs which the plaintiff is liable to pay or costs which the plaintiff actually pays to the successful defendant. It is not necessary that the costs order be stayed for the plaintiff to make an application under s.78, although of course it will usually be in ease of the plaintiff if it is. I think the salient feature of the email of 23rd March was not so much the indication that the plaintiff intended to apply for a stay but the flagging of her underlying intention to make an application against the first defendant under s.78.
7. Finally, the plaintiff relies on the proviso to O.99, r.2(3) of the Rules of the Superior Courts. Under that rule in normal course the High Court should make an award of costs at the conclusion of any interlocutory application save in circumstances *"where it is not possible justly to adjudicate upon liability for costs on the basis of the interlocutory application"*. The plaintiff suggests that a full hearing will be required to establish the

relevant facts in relation to the first defendant including what the plaintiff characterises as "the conduct" of the first defendant on receipt of the O'Byrne letter. The plaintiff also seeks that the costs incurred by her in unsuccessfully defending the motion should be reserved to the trial so that the trial judge may make an order under s.78 should they think it proper to do so.

8. I have considerable difficulty with many aspects of the plaintiff's submissions. O'Byrne letters are a regular feature of litigation particularly in personal injury cases where the actions of a number of people may have potentially contributed to the damage ultimately suffered by a plaintiff. The need for an O'Byrne letter may also arise where, as here, it is not clear which of two defendants is responsible for the locus in which the accident occurred. However, if defendants are to be afforded a fair opportunity to deal with the implications of an O'Byrne letter in the event that they are jointly sued, they must be provided with sufficient information by a plaintiff to enable them to assess the claim and seek advice on their potential liability.
9. In this case both defendants raised notices for particulars seeking to identify where the accident occurred. The exact *locus* of the accident is crucial to the potential allocation of liability between the defendants because, as discussed in the main judgment, the first defendant is strictly liable under the Montreal Convention for any injury sustained by the plaintiff on board or in the course of disembarking the aircraft. Therefore, in order for the first defendant to have made an informed decision on receipt of the O'Byrne letter, it was necessary for it to know exactly where the accident is alleged to have occurred to assess the extent to which an accident at that location could be said to have happened whilst the plaintiff was disembarking the aircraft. It is unrealistic to expect the first defendant to make an informed decision as to whether it should admit liability to the plaintiff or even take over conduct of the second defendant's defence without knowing the basis upon which it is claimed that the accident the subject of the proceedings occurred in the course of the plaintiff disembarking the aircraft. The plaintiff had not replied to either notice for particulars at the time this motion was heard.
10. Secondly, the plaintiff has not identified to the court any authority in which an O'Byrne letter has been successfully relied upon where the plaintiff's claim against the successful defendant failed because the court did not have jurisdiction to hear it. I note that the test generally applied by courts in respect of s.78 is to ask whether it was reasonable to have joined the successful defendant to the proceedings at the outset. In this case the answer to that question will depend not on the extent to which, as a matter of Irish tort law, the plaintiff could reasonably frame a claim in occupier's liability against the second defendant or the extent to which the circumstances were such that on the basis of the information available to her at the outset it was reasonable for the plaintiff to anticipate that the second defendant might be liable. Rather it will depend on whether it was reasonable for the plaintiff to institute proceedings in Ireland against the second defendant, as the occupier of property in Sweden, in light of the existing legal framework.

11. In my view there is a material difference between the potential costs issues that may arise between defendants only one of whom is held liable but both of whom are properly sued in the jurisdiction of the court in which the case is to be heard and circumstances where one defendant is able to extract itself from the proceedings because it has not been properly sued in this jurisdiction. Clearly, the conduct of the first defendant has not caused or contributed to the plaintiff improperly suing the second defendant in this jurisdiction. The plaintiff was entitled to make the choice to sue the first defendant in this jurisdiction and the first defendant has not contested that decision. However, it did not follow from the plaintiff making that choice that she could also sue the second defendant in this jurisdiction. Nothing the first defendant did had any bearing on either the plaintiff's choice or the consequences which flowed from it.
12. Thirdly, the first defendant was not a party to the second defendant's motion against the plaintiff. On becoming aware of the motion, the first defendant then served a notice of indemnity and contribution against the second defendant, it would seem in ease of the plaintiff in an attempt to bring into play Article 8(2) of the Brussels Recast Regulation 1215/2012. For the reasons set out in the main judgment, I was not satisfied that this could be done in circumstances where proceedings had not been properly served out of the jurisdiction on the second defendant in the first place. Counsel appeared on behalf of the first defendant at the hearing of the motion to advise the court of the existence of this notice of indemnity and contribution and to express a strong preference that all of the issues arising out of the plaintiff's accident should be determined in one set of proceedings. Thus, broadly speaking, notwithstanding the plaintiff's characterisation of the first defendant as having joined issue with it (in the sense of denying liability), the first defendant supported rather than opposed the plaintiff's position on the motion. Consequently, it is difficult to see why the first defendant should now be liable for the costs incurred by the plaintiff in unsuccessfully defending the motion.
13. I am conscious that the observations which I have just made are made in circumstances where the first defendant has not made any submissions on costs, perhaps because it was not formally a party to the motion, although it must have been aware from the email of 23rd March 2021 that the plaintiff was likely to make an application of this nature. Thus, there are potentially serious issues to be determined in the event that the plaintiff succeeds against the first defendant and makes an application under s.78 of the 1936 Act. It is evident from the title to s.78 that the intent of the provision is to provide a mechanism through which the unsuccessful defendant can be made liable for the costs of a successful defendant, albeit that that liability is transferred by ordering the unsuccessful defendant to pay the plaintiff costs which she is liable to pay. This in turn assumes that an order will have been made against the plaintiff in respect of the successful defendant's costs. The mechanism cannot arise if the plaintiff does not succeed against at least one defendant.
14. In all of the circumstances I propose to make the following orders:

- (a) An order that the plaintiff pay the second defendant the costs of this motion. As the second defendant is no longer party to the proceedings I do not propose staying that order until the outcome of the residual proceedings between the plaintiff and the first defendant. My decision to refuse a stay is significantly influenced by the fact that, as I have held in the main judgment, the second defendant was never properly sued in this jurisdiction.
- (b) I will refuse the plaintiff's application for its costs as against the first defendant. The first defendant was not a party to the motion and did not participate at the hearing in a manner which was adverse to the plaintiff's interests.
- (c) I will direct that the issue of the recoupment of the costs which I have ordered the plaintiff pay to the second defendant from the first defendant be reserved to the trial of the action.
- (d) As the first defendant has not made an application for its costs, I will make no order in that regard.