

APPROVED

[2021] IEHC 795



THE HIGH COURT

2019 No. 7990 P

BETWEEN

**GENERATOR SOURCE LIMITED LIABILITY PARTNERSHIP
(TRADING AS DIESEL SERVICE AND SUPPLY)**

PLAINTIFF

AND

**IGSTSP LIMITED
(TRADING AS 360 TURBINES)
TASIAST MAURITANIE LIMITED SOCIÉTÉ ANONYME
KINROSS GOLD CORPORATION**

DEFENDANTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 21 December 2021

INTRODUCTION

1. This judgment addresses the question of which party should bear the legal costs associated with a procedural error in respect of the service of proceedings out of the jurisdiction pursuant to Order 11 of the Rules of the Superior Courts. The proceedings, as served, had not been accompanied with the requisite court order properly identifying the basis on which the Irish Courts were asserting jurisdiction.

NO REDACTION REQUIRED

PROCEDURAL HISTORY

2. Two of the defendants to these proceedings are domiciled outside the jurisdiction: the second named defendant is a société anonyme incorporated in Mauritania, and the third named defendant is a company incorporated in Ontario, Canada. Neither of these countries is a party to the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (“*Lugano Convention*”). Accordingly, an order of the High Court was required before the (then intended) proceedings could be issued and served against these two defendants.
3. An *ex parte* application for leave to serve notice of a summons on the two intended defendants out of the jurisdiction was made on 7 October 2019. The application was made pursuant to Order 11, rule 1 of the Rules of the Superior Courts. This rule enumerates a number of circumstances in which service out of the jurisdiction may be allowed. These include, relevantly, at subparagraph (h) circumstances where any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction.
4. It is apparent from the transcript of the hearing on 7 October 2019 that counsel on behalf of the plaintiff relied on subparagraph (h) of Order 11, rule 1, and that this was the basis on which the High Court (Meenan J.) granted leave.
5. A party seeking leave to issue and serve outside the jurisdiction is required to prepare an *ex parte* docket identifying, *inter alia*, the subparagraph(s) of Order 11, rule 1 relied upon. This assists the registrar in drawing up the formal order of the court. Regrettably, this requirement was not complied with by the

plaintiff's legal representatives. Instead, the *ex parte* docket referred to Order 11, rule 1 *simpliciter*.

6. This omission may well have contributed to the subsequent error in the drawing up of the order of the court. At all events, for whatever reason, the formal order mistakenly refers to subparagraphs (e) and (f) of Order 11, rule 1. This error was not noticed at the time by the solicitors acting for the plaintiff. The defective order was served on the second and third named defendants, together with notice of the plenary summons.
7. The proceedings had been served on the two defendants in accordance with the Hague Convention. It seems that service was delayed in consequence of the restrictions introduced in response to the coronavirus pandemic. Service was ultimately effected in September 2020.
8. The court has not been provided with the full set of correspondence between the solicitors acting for the plaintiff, and the second and third named defendants, respectively. It appears, however, that the solicitors for the two defendants sought and obtained a copy of the papers in respect of the *ex parte* application for leave from the plaintiff's solicitors in October 2020.
9. A conditional appearance was entered on behalf of the second and third named defendants on 21 October 2020. The memorandum of conditional appearance indicates that it has been entered solely to contest jurisdiction and the validity of service out of the jurisdiction.
10. A motion was then issued on behalf of the two defendants on 5 January 2021. The principal relief sought in the motion was the discharge of the order granting liberty to issue and serve out of the jurisdiction. This application was advanced

on the grounds that the two subparagraphs of Order 11, rule 1 cited in the order granting leave did not provide a proper jurisdictional basis for the proceedings.

11. In response to this motion, the plaintiff issued its own motion on 12 April 2021 seeking to correct the order granting liberty to serve out of the jurisdiction. In particular, it was sought to substitute a reference to subparagraph (h) of Order 11, rule 1 in lieu of subparagraphs (e) and (f).
12. The rationale underpinning the application to amend is summarised as follows in the grounding affidavit (at paragraphs 7 and 8):

“The *ex parte* application for the said order giving leave to issue and serve the plenary summons outside the jurisdiction was moved before this Honourable Court (the Hon. Mr. Justice Meenan) on the 7th October, 2019. I confirm that I was present in court when the application was made and counsel on behalf of the Plaintiff moved the application on the basis that the provisions of the Rules of the Superior Court under which the Plaintiff was entitled to commence proceedings in this jurisdiction against the Second and Third Named Defendants was Order 11, Rule 1(h). Counsel on behalf of the Plaintiff did not refer to Order 11, Rule 1(e) or 1(f) for the purposes of the application and the learned High Court judge made no mention of either provision during the course of the hearing. The Plaintiff’s application for leave to issue and serve the plenary summons outside the jurisdiction upon the Second and Third Named Defendants was granted on the basis that same was permitted by Order 11, Rule 1(h) RSC.

Accordingly, I say and believe that the Order as perfected does not accurately record the correct basis of the decision of the Court to permit the issue and service out of the jurisdiction of the within proceedings on the Second and Third Defendants. It would appear that this is a clerical mistake in the Order or an error arising therein from an accidental slip.”

13. The two motions were adjourned from time to time. Relevantly from a costs perspective, neither motion was ever allocated a hearing date, and, accordingly, the costs would be minimal.

14. The solicitors acting on behalf of the two defendants next requested a transcript of the digital audio recording (“*DAR*”) of the hearing on the *ex parte* application for leave. On consent of the parties, an order permitting the transcript to be taken up was made on 12 May 2021. Following review of the transcript, the solicitors acting on behalf of the two defendants confirmed that their clients would not be objecting to the plaintiff’s application to amend, pursuant to the slip rule, the order granting leave. The defendants have reserved the right to contest jurisdiction under Order 11, rule 1(h).
15. This sensible approach on the part of the defendants should have meant that it was not necessary for either of the two motions to proceed to hearing at all. Unfortunately, however, the parties were unable to reach agreement as to the incidence of costs. This resulted in a short contested hearing on costs before this court last month.

SUBMISSIONS ON COSTS

16. The two defendants seek their costs on the basis that the proceedings were improperly served out of the jurisdiction, and that there had been considerable delay on the part of the plaintiff in identifying and correcting the error on the face of the order. Counsel on behalf of the defendants cites the judgment of the Court of Appeal in *O’Flynn v. Carbon Finance Ltd* [2015] IECA 93, and that of the Supreme Court in *McMullen v. Clancy* [2002] IESC 61; [2002] 3 I.R. 493 (at page 506).
17. In response, counsel on behalf of the plaintiff submits that no costs order should be made in respect of either motion. The point is made that notwithstanding (i) the error on the face of the order, and (ii) the omission from the *ex parte*

docket, the correct subparagraph of Order 11, rule 1 had been cited in the affidavit grounding the application for leave to issue and serve outside the jurisdiction. (This grounding affidavit had not been furnished with the initial papers served in September 2020, but had been provided to the defendants subsequently on request). It is submitted that once the defendants knew of this supposed “*discrepancy*” between the order and the content of the affidavit, the discrepancy should have been addressed in correspondence prior to the issuing of the defendants’ motion. The implication being that the defendants had acted precipitously in issuing their motion to set service aside.

18. Attention has been drawn to the fact that the plaintiff’s citation of Order 11, rule 1(h) in its grounding affidavit is actually referred to by the defendants in the affidavit grounding their own motion (at paragraph 29 thereof). It is suggested that this confirms that the defendants were aware of the discrepancy in the order.
19. With respect, my understanding of the point been made at paragraph 29 of the affidavit is different: the point being that even if the court had granted leave pursuant to Order 11, rule 1(h), the deponent is saying this would not have represented a proper jurisdictional basis either. I did not read paragraph 29 as acknowledging the existence of a “*discrepancy*” between the order and the grounding papers which required to be resolved. The deponent expressly states that he had been advised that Order 11, rule 1(h) was not the basis on which the order was ultimately made.
20. At all events, counsel for the plaintiff, very properly, acknowledges that having regard to the obligation to serve a copy of the order with the proceedings (Order 11, rule 10), the terms of the order should have been checked prior to service of the proceedings. Nevertheless, it is submitted that the defendants

themselves should have cross-referenced the terms of the order with the affidavit belatedly received. It is said that there being fault on both sides, the appropriate outcome is that each side bear its own costs.

DISCUSSION AND DECISION

21. The obligations upon a party who wishes to issue and serve intended proceedings outside of the jurisdiction (and outside the European Union) are well known. They have been stated as follows, in the form of an exhortation to practitioners, by the Court of Appeal in *O'Flynn v. Carbon Finance Ltd* [2015] IECA 93 (at paragraph 97):

“An Exhortation

Before addressing the arguments on this aspect of the appeal, the Court wishes to emphasise to practitioners generally the importance of ensuring that on an *ex parte* application under Order 11(1) RSC (a) the appropriate paragraph(s) of Order 11(1) RSC is/are stated correctly in the *ex parte* docket filed; (b) that the correct said paragraph(s) are referred to in the affidavit grounding the application; and (c) that the order as perfected and taken up contains a recital of the paragraph(s) of Order 11(1) under which the order has been made. The reason why these matters are important is that once served with the proceedings and a copy of the order, the defendant who is served outside the jurisdiction must know under what paragraph of Order 11(1) RSC the order has been made, because he/she is entitled under the Order 12(26)RSC to bring an application to the Court on notice to the plaintiff for an order discharging the *ex parte* order made which authorised service upon him/her outside the jurisdiction. In order to bring such an application, the defendant must know the basis on which the order was made, so that he can be properly advised in relation to any such possible application. Equally any Court hearing the application to discharge the order must know under what paragraph of Order 11(1) RSC the order was made.”

22. The difficulties in the present case commenced with the failure on the part of the plaintiff's legal representatives to comply with the requirement to state in the *ex*

parte docket the subparagraph of Order 11, rule 1 being relied upon. This difficulty was compounded by their subsequent failure to check the terms of the order as drawn up, with the consequence that the error in the order was not spotted.

23. The issuance and service of proceedings outside the jurisdiction on a foreign domiciled defendant is a serious matter. It behoves the legal representatives acting on behalf of a plaintiff to ensure that the procedural requirements are met in full. It is a mandatory requirement under Order 11, rule 10 that a copy of the order granting leave be served with the proceedings. It is imperative that the order correctly identify the jurisdictional basis. As explained by the Court of Appeal, the precise purpose of this is to allow the foreign defendant to know the basis on which the Irish Courts are asserting jurisdiction, and thus allow it to make an informed decision on whether to challenge jurisdiction.
24. The obligation to confirm that the terms of the order are accurate resides with the plaintiff and its legal representatives. Fortunately, the lawyers' oversight in the present case is capable of rectification by the making of an amendment now to the order, and the subsequent service of the proceedings in proper form. The two defendants have taken a very sensible and reasonable approach in not seeking to capitalise on the mistake. The two defendants have confirmed that they do not oppose the application to amend the order.
25. One can readily sympathise with the making of a procedural error on the part of the plaintiff's legal representatives: none of us is infallible. It is more difficult, however, to understand the attempt to attribute any blame in this regard to the two defendants. It is not, with respect, correct to say that there is fault on both sides. It is entirely appropriate that a defendant who has entered a conditional

appearance for the purpose of contesting jurisdiction should move promptly thereafter to issue a motion seeking to have service of the proceedings set aside. Indeed, a defendant might well be criticised if they delayed. The defendants in the present case were fully entitled to issue the motion when they did in January 2021. The costs incurred by the defendants in this regard were a foreseeable consequence of the errors on the plaintiff's side.

26. Although the court has been provided with extensive papers in this matter (running to in excess of 300 pages), the plaintiff has not put before the court the full of the correspondence between the parties' solicitors during the period between (i) the service of the proceedings in September 2020, and (ii) the issuing of the motion in January 2021. There is no evidence before the court to indicate that the plaintiff's solicitors had alerted the two defendants to the error in the order prior to the latter issuing their motion. Indeed, it seems that the error in the order was only acknowledged, for the first time, in April 2021.
27. It is no answer to say that the correct subparagraph of Order 11, rule 1 had been identified in the *grounding affidavit* in support of the application for leave to issue and serve outside the jurisdiction. The requirement under the Rules of the Superior Courts is that it is the order granting leave that is to be served. There is no requirement to serve the grounding affidavit, and a copy of same was not, in fact, served on the two defendants at the time the proceedings were served. It is imperative, therefore, that the order granting leave to serve out of the jurisdiction be correct.
28. Moreover, it does not necessarily follow from the fact that the affidavit grounding an application for leave to serve out of the jurisdiction references one particular subparagraph of Order 11, rule 1 that this will be the basis on which

the High Court ultimately decides to grant leave. It is entirely possible that the precise jurisdictional basis might have been teased out at the hearing before the judge, and that leave might have been granted pursuant to a different or additional subparagraph. A foreign defendant should not have to speculate as to the basis upon which jurisdiction is being asserted, but is instead entitled to rely on the express wording of the order with which they have been served. To suggest that the obligation lay upon the defendants to identify and query the supposed “*discrepancy*” between the order and the affidavit is to undermine the purpose of Order 11, rule 10.

29. It was only when the defendants had sight of the transcript of the hearing on 7 October 2019 that the precise basis upon which leave had been granted was put beyond doubt. Thereafter, the two defendants indicated that they would not pursue their application to set aside service and would consent to the application to amend the order.
30. In all the circumstances, I am satisfied that the two defendants are entitled to recover the costs incurred by them as a result of the errors on the part of the plaintiff’s legal representatives. More specifically, the defendants are entitled to the costs of their motion to set aside service. They are also entitled to the costs of the motion to amend: this application would have been unnecessary but for the omissions and failures on the part of the plaintiff.

CONCLUSION AND FORM OF ORDER

31. On consent of the parties, the order of 7 April 2019 is to be amended, pursuant to Order 28, rule 10, so as to make reference to subparagraph (h) of Order 11, rule 1. The references to subparagraphs (e) and (f) are to be deleted.

32. The service of notice of the proceedings in September 2020 had been irregular. To ensure compliance with Order 11, the proceedings should now be properly served together with a copy of the amended order. The plaintiff's application to deem service good is refused. It is essential that the requirements of the Rules of the Superior Courts with respect to the issuance and service of proceedings outside of the jurisdiction be complied with in full. A defect cannot be overlooked as a mere technicality, but must instead be rectified by ensuring that the proceedings are now issued and served in the manner prescribed. The two defendants' solicitors have confirmed by correspondence dated 22 June 2021 that, to avoid the necessity of service through the Hague Convention channels, their firm would accept service of the proceedings under the amended order.
33. The second and third named defendants are entitled to recover the costs of both motions as against the plaintiff. The recoverable costs are to include the costs of the hearing before me on 8 November 2021. Costs to be adjudicated, i.e. measured, under Part 10 of the Legal Services Regulation Act 2015 in default of agreement between the parties.

Approved
Gemma S. Mans