

Neutral Citation No: [2021] NIQB 19	Ref: SIM11420
<i>Judgment: approved by the Court for handing down (subject to editorial corrections)*</i>	ICOS No: 20/79096
	Delivered: 19/02/2021

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

 QUEEN'S BENCH DIVISION
 (COMMERCIAL HUB)

BETWEEN:

HOLCHEM LABORATORIES LIMITED

Plaintiff:

-and-

JAMES HENRY

Defendant:

 Michael Potter, of counsel (instructed by Napier & Sons) for the plaintiff

Sean Doherty, of counsel (instructed by Donaghy Carey) for the defendant

SIMPSON J

Ruling on outstanding issues

[1] I gave judgment in this case on 3rd February 2021. At the end of the judgment I indicated that I would allow the parties 14 days to make written submissions in relation to the order for costs to be made following the dismissal of both the claim and the counterclaim, and for the parties to consider the effect of the judgment on the undertakings provided by the defendant at the time of the plaintiff's claim for an injunction.

[2] I have received those submissions.

[3] Where material section 59(1) of the Judicature (Northern Ireland) Act 1978 provides:

“Subject to the provisions of this Act and to rules of court and to the express provisions of any other statutory provision, the costs of and incidental to all proceedings in the High Court ... shall be in the discretion of the court and the court shall have power to determine by whom and to what extent the costs are to be paid.”

[4] The plaintiff has indicated that it is content with the order for costs which I proposed in paragraph 93 of the judgment, subject to the submission that costs relating to the counterclaim should be assessed on the High Court scale.

[5] The defendant submits that the costs in relation to the counterclaim should be on the County Court scale.

[6] Section 59(2) of the 1978 Act provides:

“Save as otherwise provided by any statutory provision passed after this Act or by rules of court, if damages or other relief awarded could have been obtained in proceedings commenced in the county court, the plaintiff shall not, except for special cause shown and mentioned in the judgment making the award, recover more costs than would have been recoverable had the same relief been awarded by the county court.”

[7] The amount counterclaimed by the defendant was £7,573.21, which is well below the limit of the County Court jurisdiction. However, in the circumstances of this case I consider that if the defendant had issued a separate claim in the County Court it is highly likely that that claim would have been removed into the High Court, pursuant to the provisions of Order 78 of the Rules of the Court of Judicature (Northern Ireland) 1980, so that it could be dealt with at the same time as the plaintiff's claim against the defendant, and by the same judge. Indeed if I had been told at the commencement of the hearing that there had been an outstanding counterclaim in the County Court I would have ordered its removal for precisely that purpose.

[8] I am fortified in that view by the judgment of Nicholson J (as he then was) in *McGuinness v Dunn* [1986] NI 80. At 86F he said:

“In my view where an action which has been appropriately commenced in the High Court ... and all issues arising in a County Court action on the same facts can be dealt with in the High Court action, it is, generally speaking more appropriate that ... the County Court action be removed to the High Court and consolidated with the High Court action.”

[9] Accordingly, the counterclaim properly fell to be heard and determined in the High Court and, as recorded below in paragraph 12, the hearing of evidence relating to the counterclaim occupied a not insubstantial portion of the hearing time.

[10] Having considered the submissions of counsel, I order that the plaintiff pays the defendant's costs of defending the plaintiff's claim and that the defendant pays the plaintiff's costs of defending the counterclaim, both sets of costs to be based on the High Court scale.

[11] I order that the costs should be taxed in default of agreement between the parties.

[12] I noted in the judgment that the case lasted 3 days. In coming to my conclusions in relation to costs I have read through my notes of the hearing and have considered the approximate time spent during the hearing on the various issues which I identified in paragraph 13 of the judgment. Doing the best I can, and in the hope that it might be of assistance to the Taxing Master in her assessment if the issue of costs goes to taxation, I consider that approximately 75% of the hearing related to the plaintiff's claim against the defendant; with approximately 25% of the hearing relating to issues raised in the counterclaim.

[13] On foot of an order of Horner J dated 9th December 2020 the costs of the injunction proceedings were reserved to the trial judge. In all the circumstances of this case, and in the light of my findings following the substantive hearing, I consider that it is appropriate for me to make no order as to the costs of the injunction proceedings, leaving each party to bear their own costs of those proceedings.

[14] The other outstanding issue on which the parties were invited to make submissions related to the undertakings given by the defendant at the time when the plaintiff sought an injunction. The plaintiff submits that it can continue to rely on the covenant against solicitation; the defendant submits that he should be released from all undertakings.

[15] Having made no findings as to the lawfulness of the restriction on solicitation, it would not be appropriate for me to release the defendant from his undertakings in relation to that aspect of the case. The defendant gave two undertakings in the following terms:

"1. I will not make any contact (or cause any contact to be made) with any company or individual who is a current customer of Holchem Laboratories Limited (and who was a customer of the company in the final 12 months of my employment) in order to solicit business either on my own behalf or on behalf of any third party.

2. I will not make any contact (or cause any contact to be made) with any company or individual who I am aware was, in the final 12 months of my employment, in discussion with Holchem Laboratories Limited about becoming a customer of the company, in order to solicit business either on my own behalf or on behalf of any third party."

[16] Accordingly, the defendant should regard himself as bound by those undertakings until midnight on 24th August 2021 (i.e. one year from the date of his leaving the employment of the plaintiff), at which date and time he is released from the undertakings.

[17] As of the date of this ruling, I release the defendant from all of the other undertakings given by him.