



THE COURT OF APPEAL

Neutral Citation Number [2020] IECA 301

Court of Appeal Record Nos. 2019/288

2019/289

2019/290

2019/291

2019/292

2019/293

2019/294

**Costello J.
Haughton J.
Binchy J.**

BETWEEN/

2012 No. 9535 P

BETWEEN

**JOSE MONTERIRO DA SILVA, NUNO PEDRO GONCALVES LOPES, DAVID SARAIVA
MATIAS, ANTONIO BARBOSA MOREIRA, JOSE FRANCISCO OLIVIERA DA SILVA, JORGE
DA SILVA LUIS, JOSE TEIXEIRA GONCALVES, ANTONIO JORGE OLIVEIRA BESSA,
FRANCISCO DA COSTA FERRIERA, JOSE LUIS FREITAS LIMA**

PLAINTIFFS

-AND-

**ROSAS CONSTRUTORES S.A. T/A RAC CONTRACTORS AND/OR RAC EIRE
PARTNERSHIP
CONSTRUCOES GABRIEL A.S. COUTO S.A. T/A RAC CONTRACTORS AND/OR RAC EIRE
PARTNERSHIP
AND EMPRESA DECONSTRUCOES AMANDIO CARVALHO S.A. T/A RAC CONTRACTORS
AND/OR RAC EIRE PARTNERSHIP**

DEFENDANTS

2013 No. 12219 P

BETWEEN

**CARLOS MANUEL OLIVEIRA MATOS, CARLOS ALBERTO OLIVEIRA MATOS, RUI MIGUEL
DOS REIS SERPA CORTE REAL, MANUEL JOAQUIM ALVES MACHADO FERREIRA,
HELDER FILIPE BARBOSA GONCALVES, JORGE ALEXANDRE UMBELINO, AGOSTINHO
DE SILVA SAMPAIO, JOSE ALFREDO QUINTANS MAGALHAES, VICTOR MANUEL
CARDOSA ALMEIDA**

PLAINTIFFS

-AND-

**ROSAS CONSTRUTORES S.A. T/A RAC CONTRACTORS AND/OR RAC EIRE
PARTNERSHIP
CONSTRUÇOES GABRIEL A.S. COUTO S.A. T/A RAC CONTRACTORS AND/OR RAC EIRE
PARTNERSHIP
AND EMPRESA DECONSTRUÇOES AMANDIO CARVALHO S.A. T/A RAC CONTRACTORS
AND/OR RAC EIRE PARTNERSHIP**

DEFENDANTS

2012 No. 9537 P

BETWEEN

**CARLOS MANUEL MIRANDA, ALFREDO MARTINS RODRIGUES FERNANDES, VICTOR
MANUEL MARQUES DE OLIVEIRA, MARIA PIEDOSA RIBEIRO CARDOSA GASTALHO,
FRANCISCO PEREIRA MARTINS, JOSE MARIA COELHO BARBOSA AND CARLOS JOSE
LONGA**

PLAINTIFFS

-AND-

**ROSAS CONSTRUTORES S.A. T/A RAC CONTRACTORS AND/OR RAC EIRE
PARTNERSHIP
CONSTRUÇOES GABRIEL A.S. COUTO S.A. T/A RAC CONTRACTORS AND/OR RAC EIRE
PARTNERSHIP
AND EMPRESA DECONSTRUÇOES AMANDIO CARVALHO S.A. T/A RAC CONTRACTORS
AND/OR RAC EIRE PARTNERSHIP**

DEFENDANTS

2014 No. 9212 P

BETWEEN

**ANTONIO GERMANO ALVES GUEDES MONTEIRO, ANTONIO GUEDES MONTEIRO, ARTUR
JOAO ALONSO MOREIRA**

PLAINTIFFS

-AND-

**ROSAS CONSTRUTORES S.A. T/A RAC CONTRACTORS AND/OR RAC EIRE
PARTNERSHIP
CONSTRUÇOES GABRIEL A.S. COUTO S.A. T/A RAC CONTRACTORS AND/OR RAC EIRE
PARTNERSHIP
AND EMPRESA DECONSTRUÇOES AMANDIO CARVALHO S.A. T/A RAC CONTRACTORS
AND/OR RAC EIRE PARTNERSHIP**

DEFENDANTS

2012 No. 9538 P

BETWEEN

**ARMANDO AGOSTINHO ALVES DA SILVA, ALVARO ABILIO QUEIROS COELHO, HELDER
FIGUEIREDO, MARIO AUGUSTO RAMALHO GASTALHO, SAMUEL FILIPE DA SILVA**

**OLIVERIA, JOSE ANTONIO FONSECA RIBEIRO, ALBERTO BESSA LEITE, LUIS
RODRIGUES DIAS MOURATO, JOSE DUARTE MAGALHAES, JOSE MARIA MARTINS
VELOSO**

PLAINTIFFS

-AND-

**ROSAS CONSTRUTORES S.A. T/A RAC CONTRACTORS AND/OR RAC EIRE
PARTNERSHIP
CONSTRUÇOES GABRIEL A.S. COUTO S.A. T/A RAC CONTRACTORS AND/OR RAC EIRE
PARTNERSHIP
AND EMPRESA DECONSTRUÇOES AMANDIO CARVALHO S.A. T/A RAC CONTRACTORS
AND/OR RAC EIRE PARTNERSHIP**

DEFENDANTS

2014 No. 3319 P

BETWEEN

**RAMIRO ABRANTES DO CARMOS, MANUEL SEBASTIAO BRAS DE OLIVEIRA, JOSE
FERNANDO MAGALHAES DA SILVA**

PLAINTIFFS

- AND-

**ROSAS CONSTRUTORES S.A. T/A RAC CONTRACTORS AND/OR RAC EIRE
PARTNERSHIP
CONSTRUÇOES GABRIEL A.S. COUTO S.A. T/A RAC CONTRACTORS AND/OR RAC EIRE
PARTNERSHIP
AND EMPRESA DECONSTRUÇOES AMANDIO CARVALHO S.A. T/A RAC CONTRACTORS
AND/OR RAC EIRE PARTNERSHIP**

DEFENDANTS

2014 No. 2244 P

BETWEEN

**JOSE MANUEL RIBEIRO DE ALMEIDA, CARLOS MANUEL MONTEIRO, ALBERTO DA CRUZ
COEHLIO, MANUEL ALBERTO PEREIRA DUARTE, JOAO PAULO RODRIGUES LEMOS,
SERGIO ANTONIO CARVALHO, JOAO FILIPE OLIVEIRA GONCALVES, VITOR MANUEL
FORMOSO PEREIRA**

PLAINTIFFS

-AND-

**ROSAS CONSTRUTORES S.A. T/A RAC CONTRACTORS AND/OR RAC EIRE
PARTNERSHIP
CONSTRUÇOES GABRIEL A.S. COUTO S.A. T/A RAC CONTRACTORS AND/OR RAC EIRE
PARTNERSHIP
AND EMPRESA DECONSTRUÇOES AMANDIO CARVALHO S.A. T/A RAC CONTRACTORS
AND/OR RAC EIRE PARTNERSHIP**

JUDGMENT of Ms. Justice Costello delivered on the 9th day of November 2020

1. This is an appeal against the judgment of the High Court (Stewart J.) of 1 May 2019 refusing the plaintiffs' application for an order pursuant to O. 42B of the Rules of the Superior Courts, for a certificate under Art. 6(1) of EU Regulation 805/2004 (a European Enforcement Order) certifying the court's final order dated 24 January 2019 and making no order as to costs on the application. The defendants have appealed the order in relation to costs and the plaintiffs cross-appealed the refusal to issue a European Enforcement Order. There is a second cross-appeal in the proceedings bearing record number 2013/12219P concerning Carlos Manuel Oliveira Matos, the first plaintiff named in the summons. In the interests of clarity and consistency, I shall refer to the parties as the plaintiffs and defendants respectively rather than appellants and respondents.

Background

2. This appeal and cross-appeals are the latest hearing in a long, tortuous saga which commenced in 2007 and 2008. The details of the history of the litigation between the parties is set out in a judgment I delivered on 29 July 2019, [2019] IECA 237. The plaintiffs in the proceedings are Portuguese nationals who came to Ireland as construction workers in or about 2007 and 2008 to carry out construction works on the N7 Nenagh to Limerick Dual Carriageway. There were more than 150 workers on the project. The defendants were their employers. They are three Portuguese companies who formed a partnership, "RAC Eire Partnership", for the purposes of the N7 project. The plaintiffs claimed against their employer for:

- (1) the underpayment of wages; and
- (2) unlawful deductions from their wages.

They also sought compensation for the substandard conditions in which they were required to work.

3. Three of the cases were heard by Keane J. in the High Court in 2016. He made a number of findings of fact which were not appealed by the defendants:-
 - (1) the defendants engaged in the systematic and deliberate under-recording of hours of work, leading to the underpayment of wages in breach of contract of employment of each of the plaintiffs (the underpayment of wages was in the order of 40% or thereabouts);
 - (2) each plaintiff was entitled to recover, as damages for breach of contract, the full amount of the underpayment of his or her wages, as calculated by the plaintiffs' expert accountant;
 - (3) deductions made by the defendants from the wages for benefit in kind were wrongly made in breach of the relevant contracts of employment and the plaintiffs were entitled to the repayment of those sums in full; and

- (4) the accommodation provided by the defendants, for which the plaintiffs were required to pay €520 approximately per month which was deducted directly from their wages, was of a deplorable – even a dangerous – standard.
4. On 15 April 2016, Keane J. awarded damages to the plaintiffs in these three cases.
 5. The defendants appealed the decision of Keane J. in part and on 4 October 2017 the Court of Appeal allowed the appeal on one ground in relation to the charge for accommodation on the basis there had not been a total failure of consideration. In light of the very significant deficiencies in the accommodation provided to the plaintiffs, the court directed that the matter be remitted to the High Court for a retrial to assess quantum of damages in respect of this head of claim. The decision of the High Court otherwise stood.
 6. Following the judgment of the Court of Appeal of 4 October 2017, the claims of all of the former employees – not just the plaintiffs in the three actions heard by Keane J. – were *de facto* assessments only, although the defendants never withdrew their defences denying liability. The three cases which were referred back to the High Court for assessment of the quantum of damages in respect of the claim arising out of the deficiencies in the accommodation provided to the plaintiffs were linked with the four cases which had yet to be heard in full.
 7. The solicitors on record for the defendants applied to come off record on the grounds they could not obtain instructions from the defendants. The defendants applied to adjourn the case on a number of occasions, but their applications were refused. The trial commenced on 11 January 2018 in the absence of any representation for the defendants. The plaintiffs issued a motion to strike out the defences of the defendants, but it did not proceed in their absence and in the end this motion was never heard.
 8. On the afternoon of the third day of the trial, 16 January 2018, Lavelle Solicitors came on record for the defendants. The defendants were represented by solicitor and counsel for five days. They then applied and were granted leave to come off record on the grounds that they too could not obtain instructions. The trial concluded as it had started with the defendants unrepresented over the last two days.
 9. During the period when the defendants were represented their participation in the trial was minimal. I shall consider precisely what role was played and the significance of this engagement below.
 10. The judgment of the High Court was delivered on 18 December 2018 and the trial judge awarded the plaintiffs various sums of damages as set out in the appendix to her judgment. After she had delivered her judgment, the plaintiffs applied to Stewart J. for a European Enforcement Order (“EEO”). The application was opposed by the defendants. Stewart J. refused the application. The appeal and cross-appeal are in respect of these decisions.

Regulation (EC) No. 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims

11. Regulation (EC) 805/2004 ("the Regulation") created a European Enforcement Order for uncontested claims throughout the European Union. It establishes a new, simplified form of enforcement of orders in respect of uncontested claims. Those claims which may not be enforced by means of an EEO remain enforceable through existing mechanisms.

Recitals 5, 7, 10 and 12 of the Regulation provide:-

"(5) *The concept of 'uncontested claims' should cover all situations in which a creditor, **given the verified absence of any dispute by the debtor as to the nature or extent of a pecuniary claim**, has obtained either a court decision against that debtor or an enforceable document that requires the debtor's express consent, be it a court settlement or an authentic instrument.*

...

(7) *This Regulation should apply to judgments, court settlements and authentic instruments on uncontested claims and to decisions delivered following challenges to judgments, court settlements and authentic instruments certified as European Enforcement Orders.*

...

(10) *Where a court in a Member State has given judgment on an uncontested claim **in the absence of participation of the debtor in the proceedings**, the abolition of any checks in the Member State of enforcement is inextricably linked to and dependent upon the existence of a sufficient guarantee of observance of the rights of the defence.*

...

(12) *Minimum standards should be established for the proceedings leading to the judgment in order to ensure that the debtor is informed about the court action against him, the requirements for his active participation in the proceedings to contest the claim and the consequences of his non-participation in sufficient time and in such a way as to enable him to arrange for his defence." (emphasis added)*

12. Article 3(1) of the Regulation defines the claims to which the Regulation applies:-

"... A claim shall be regarded as uncontested if:

- (a) *the debtor has expressly agreed to it by admission or by means of a settlement which has been approved by a court or concluded before a court in the course of proceedings; or*
- (b) *the debtor has never objected to it, in compliance with the relevant procedural requirements under the law of the Member State of origin, in the course of the court proceedings; or*

- (c) **the debtor has not appeared or been represented at a court hearing regarding that claim after having initially objected to the claim** in the course of the court proceedings, **provided that such conduct amounts to a tacit admission of the claim or of the facts alleged** by the creditor under the law of the Member State of origin; or
- (d) *the debtor has expressly agreed to it in an authentic instrument.*” (emphasis added)

The term “claim” is defined in Article 4(2) as:-

“claim’: a claim for payment of a specific sum of money that has fallen due or for which the due date is indicated in the judgment, court settlement or other authentic instrument.”

Article 6(1) allows for an EEO to be made in relation to a “*judgment on an uncontested claim delivered in a Member State*” and Article 7 allows for an EEO to be made in relation to costs orders only where the debtor in question has not objected to such costs orders. Article 8 allows for a partial EEO if only parts of the judgment meet the requirements of the Regulation.

13. The critical concept is that of an “uncontested claim”. In *Pebros Servizi Srl. v. Aston Martin Lagonda Limited* Case C-511/14, the CJEU stated:-

- “37. *In that regard, it must be stated that Regulation No. 805/2004 does not define the concept of ‘uncontested claim’ by means of a reference to the laws of the Member States. On the contrary, it is apparent from a reading of Article 3 of that regulation in the light of recital 5 of the latter, that that concept is an autonomous concept of EU law. The reference to the laws of the Member States in Article 3(1)(b) and (c) of that regulation does not relate to the constituent elements of that concept, but concern the specific elements of its application.*
38. *Recital 5 of that regulation states that the concept of ‘uncontested claims’ should cover all situations in which a creditor, given the verified absence of any dispute by the debtor as to the nature or extent of a pecuniary claim, has obtained, inter alia, a court decision against that debtor.*
39. *As is apparent from the order for reference, Aston Martin, in its capacity as duly informed debtor who is given an opportunity to participate in the court proceedings, failed to take action throughout those proceedings by not participating in them at any moment. For that reason, a judgment was delivered in default with respect to it. It follows that that company’s situation is covered by Article 3(1)(b) of Regulation No. 805/2004, in accordance with which a claim is to be regarded as uncontested if ‘the debtor has never objected to it, in compliance with the relevant procedural requirements under the law of the Member State of origin, in the course of the court proceedings’.*”

14. It is thus clear that an uncontested claim is an autonomous concept of EU law. A debtor's silence may potentially be used against him as a form of admission. In the case of *Pebros*, the defendant failed to participate at all in the proceedings and was adjudged therefore, under Article 3(1)(b), not to have contested the claim.
15. The situation under Article 3(1)(c) is somewhat different. It applies where a defendant has initially contested the claim but then he is deemed, by his behaviour, tacitly to have admitted the claim. Advocate General Bot opined at paras. 25-26 of his opinion in *Pebros* that:-

"25. *It is important to point out, in that respect, that the definition given to 'uncontested claim' by Article 3(1) of Regulation No. 805/2004 covers not only cases where the debtor has 'expressly' agreed to it either in an authentic instrument or 'by admission or means of a settlement ... before a court' but also situations where he is deemed to have 'tacitly' admitted it, either by having never objected to it in the course of the court proceedings, or by not appearing or being represented at a court hearing regarding the claim after having initially objected to it.*

26. *Given that this has the drawback of the debtor's silence potentially being used against him as a form of admission, Regulation No. 805/2004 requires compliance with minimum procedural standards in order to preserve the rights of the defence..."*
16. The Advocate General was of the view that a defendant could tacitly admit the claim either by (1) never objecting to it in the course of the proceedings (Article 3(1)(b)), or (2) by not appearing at a court hearing or by not being represented at a court hearing regarding the claim after having initially objected to it (Article 3(1)(c)).
17. The issue for determination in the cross-appeal is whether, on the facts of this case, the claim of the plaintiffs against the defendants can be regarded as uncontested within the meaning of the Regulation.

Did the defendants contest the claims?

18. The defendants entered appearances and delivered full defences in each of the proceedings. Prior to the hearing in January 2018, the defendants had instructed three firms of solicitors, each of whom came off record in turn, citing, *inter alia*, a failure to provide instructions as a basis for so doing. When the trial commenced on 11 January 2018 the defendants were unrepresented. They were unrepresented on the second day, 12 January 2018. On the afternoon of the third day, Messrs. Lavelle Solicitors applied to come on record on behalf of the defendants and they instructed counsel who appeared between 16 and 26 January 2018 (five days of the trial). Prior to the conclusion of the trial, Lavelle Solicitors also applied to come off record on the basis, *inter alia*, that they could not obtain instructions and the trial concluded on 30 January 2018 with no appearance in court on behalf of the defendants.

19. The uncontroverted evidence was that during the five days that the defendants were represented by Messrs. Lavelle Solicitors, no defence case was put to the plaintiffs or their witnesses on behalf of the defendants. Their evidence was not challenged. Such cross-examination of witnesses as occurred was "limited to points of clarification of the evidence they had given and did not amount to a challenge of the case that they made to the Court." The defendants called no evidence on their own behalf. Mr. Tom O'Regan, solicitor acting for the plaintiffs, averred in his affidavit of 26 April 2019 that the defendants accordingly failed to stand over the defence or raise any of the issues pleaded in their defence during the course of the proceedings. He averred that the defendants had repeatedly failed to provide their legal representatives with the necessary instructions to defend the proceedings, in particular in January 2018. He argued that their participation had been solely for the purposes of frustrating and delaying the judicial process in this jurisdiction. He, accordingly, believed that the proceedings were uncontested within the meaning of Art. 3(1)(c) of the Regulation.¹
20. Prior to the hearing of the application, for an EEO the defendants secured further representation and filed a notice of appeal. In response to the notice of appeal, the plaintiffs issued a motion seeking to dismiss the appeals on the basis they constituted an abuse of process and were not *bona fide* for the purpose of resolving issues between the parties. The court granted the relief sought in a judgment I delivered on 29 July 2019. The defendants participated in and resisted that motion. The parties are agreed that for the purposes of determining whether the claim before the High Court was uncontested the court should not have regard to events which occurred after the order was perfected.
21. The defendants emphasised that at no point did they consent to judgment or withdraw their defences or indicate that they were not contesting the orders sought by the plaintiff. This was underscored by the fact that the plaintiffs issued motions to strike out the defences in order that the proceedings could proceed as uncontested claims. The motions were never heard and the defences were never struck out. On 24 January 2019, the High Court made orders granting the reliefs sought together with orders directing payments on account of the costs of the proceedings pending taxation. Counsel for the defendants made submissions as to why both categories of orders should not be made. The orders were perfected on 8 March 2019.
22. On the facts, it is clear that the defendants played a role in the trial, but did it amount to contesting the claim? The plaintiffs argue that the court must engage in a qualitative assessment of that role and determine whether the role, in truth, amounted to contesting the claim. The plaintiffs maintain that the conduct of the defendants amounted to an abuse of the court process, that the participation of the defendants in the trial could not be interpreted as *bona fide* contesting the claim. The delivery of a defence was not sufficient to contest a claim as, frequently, pleas in defences are not maintained at trial; what is crucial in our system is the case advanced at trial. In these cases, no case was

¹ In his first affidavit he said the application was brought pursuant to Article 3(1)(b) however at the hearing of the appeal it was confirmed that the plaintiffs' application was brought solely pursuant to Article 3(1)(c).

advanced and, accordingly, no court could endorse what occurred as contesting a claim for the purposes of determining whether the claim was an uncontested claim within the meaning of Article 3(1)(c).

23. While I have every sympathy with the plight of the plaintiffs and I deprecate entirely the conduct of the defendants in the litigation, and the attitude displayed to date to the processes and orders of the courts, I cannot agree that the court ought – or even can – engage in the qualitative assessment of the participation of the defendants in the trial in order to determine whether the plaintiffs are entitled to an EEO under Article 3(1)(c).
24. I agree with the submissions of counsel for the defendants. The Regulation introduces a simplified mechanism to enforce uncontested claims throughout the Union. Central to the Regulation is the fact that the order will not be reviewed in the recipient Member State and, therefore, the safeguards afforded to defendants must be strictly construed to ensure, *inter alia*, that the claim is in fact an uncontested claim. Article 3(1)(c) applies where a defendant has originally taken steps, pursuant to the procedures of the Member State in question, to contest the claim but nonetheless that defendant may be deemed not to have continued that contest and thus, the claim may thereafter be considered to be uncontested for the purpose of the Regulation. Two conditions must be satisfied. The first was described by counsel as a threshold test; the defendant must not have appeared or been represented at a hearing of the case. If that is not true, then the paragraph cannot apply. If that is true, then a second test must be satisfied: can the non-appearance or non-representation amount to a “tacit admission” of the claim?
25. I accept that this is the correct approach to the construction of the article and it does not permit a qualitative assessment of the role played once the defendant appears or is represented at a hearing. This is so because the Regulation is intended to apply solely to clearly uncontested cases and a qualitative assessment such as the plaintiffs contend for cannot, in my judgment, be read into the Regulation. Recital 5 refers to the “*verified absence of any dispute by the debtor as to the nature or extent of a pecuniary claim*” (emphasis added). Participation in a trial, however slight it may be or for whatever unmeritorious motives, cannot verify the absence of a dispute. For this reason, I would refuse the cross-appeal.
26. The qualitative assessment arises when the court considers whether the fact of the non-appearance or the non-representation of the defendant at a hearing amounts to a tacit admission of either the claim or the facts of the claim. If I am wrong in my reading of the Regulation, and the attendance of counsel and solicitor during part of the trial is not to be construed as an appearance by the defendants for the purposes of the paragraph, nonetheless I am satisfied that the defendants’ conduct (if it be accepted that this is conduct other than a failure to appear or be represented at the trial) does not amount to a tacit admission of the nature or extent of the plaintiffs’ claims. Firstly, counsel for the defendants opposed the orders made by the court following the delivery of its reserved judgment. Secondly, the trial judge characterised the actions of the defendants as “stymying” the plaintiffs’ claims. As counsel submitted, whatever one may think of such

conduct, it is inconsistent with a finding that it amounts to a tacit admission of the claim. The very distasteful logic is unimpeachable. The fact that the defendants did not equip their lawyers with instructions or witnesses to enable their legal representatives to fight the case in the way such litigation is normally conducted in our legal system does not amount to a tacit admission of the claim. For this reason also, I would reject the cross-appeal.

27. There is a third reason why I would reject the cross-appeal. I do not accept that the plaintiffs' claims in their proceedings come within the definition of a claim for the purposes of the Regulation. This point was not raised by the parties. It was raised by the court during oral argument and the parties were afforded the opportunity to address it.
28. The plaintiffs' claims were for damages for breaches of their contracts of employment. They were not paid for the hours they worked, there were wrongful deductions from their wages and wrongful deductions of alleged benefits in kind. They were also awarded general damages for breach of contract, for physical inconvenience and mental distress suffered by reason of the appalling living conditions they endured. In each case, the court was required to hear evidence and make an assessment of the appropriate level of damages due to each individual plaintiff. The damages awarded partly comprised a sum representing a calculation of the underpayment of wages in respect of hours and days which could not easily be established due to the fact the defendants failed to keep proper records and, in fact, falsified such records as they did keep. This required the court to assess the evidence presented and determine to what extent each plaintiff had made out his case. The assessment of general damages is quintessentially the role of the court and is not an exact science.
29. In my judgment, the resulting order in relation to the entitlements of each plaintiff does not amount to a claim as defined in Article 4(2) of the Regulation. It is not a claim for "*a specific sum of money that has fallen due*" and the plaintiffs did not contend that this was so. As the award of general damages required to be assessed by the court, it cannot be a claim within the meaning of Article 4(2). Counsel for the plaintiffs argued that there was a judgment within the meaning of the definition of judgment in the Regulation and this, therefore, brought the claim within the second limb of the definition of claim in Article 4(2). I do not accept this construction of the definition. I read Article 4(2) as applying to claims for a specific sum of money. The specific sum must either have fallen due or the judgment, court settlement or authentic instrument must indicate the date (i.e. when) the sum is due. It is not concerned with determining the *amount* that is owing. The second limb of the definition is an alternative means of identifying the date the sum is due, no more. It follows that the award in this case is not a claim as defined in the Regulation and, therefore, could not be an uncontested claim within the meaning of Article 3. The plaintiffs did not apply for a partial EEO pursuant to Article 8, so I will not consider whether part of the award might satisfy the definition of claim.
30. For these reasons, I would refuse the cross-appeal of the plaintiffs against the refusal of the High Court to certify the order as an EEO.

The defendants' appeal on the order for costs

31. The plaintiffs' application for an EEO was rejected by the trial judge and she made no order as to costs on the application. She made her decision before counsel for the defendants could address her on the issue. The relevant passage of the transcript reads as follows:-

"JUDGE: ... So, with great regret I must say, because I have an enormous amount of sympathy for the plaintiffs and for what they endured at the hands of the defendants when they were brought to this jurisdiction to work on that project some years ago, and the circumstances in which they were accommodated and housed and the condition in which they were employed came to light on foot of a NERA inspection, and it's unfortunate that even at this late juncture that the defendants seem to be determined to try to avoid their responsibilities and liabilities in that regard. But it seems to me that for the purpose of this application, that I can't be satisfied that the matter was an uncontested matter. So, in those circumstances, I must refuse the application. But that doesn't prohibit the plaintiffs obviously from seeking to enforce their order in the other mechanisms available to them. And in the circumstances, I don't propose to make any order for costs.

MR FITZPATRICK: Will the Court just note that I formally applied for my costs and that the Court rejected that?

JUDGE: I'm not making any orders for costs. I'll just rise to allow the court to clear and let the other matter to assemble."

32. The first issue raised on the appeal was a fair procedures point. The decision was made before counsel addressed her on the order for costs. During the hearing, counsel fairly conceded that he could have asked the court to hear his submissions before the judge made her decision, but that he did not. In the circumstances, this ground of appeal was not pressed. I would not allow the appeal on this ground as the defendants did not even ask the trial judge to hear their submissions on costs.
33. The main ground upon which the appeal was advanced was Order 99 of the Rules of the Superior Courts. It was accepted that the provisions of the Legal Services Regulation Act 2015 had not been commenced when the trial judge made her decision on the costs and so this court should deal with the law as it stood prior to the amendment effected by sections 168 and 169 of that Act.
34. Costs are at the discretion of the court. The normal rule is that costs follow the event and, while the court has a discretion, it must be exercised judicially and is not completely unfettered. Counsel urged that, in the exercise of her discretion, the trial judge was confined to considering the application before her and could not have regard to the wider considerations, including the conduct of the litigation. The plaintiffs' application could never have succeeded, as the order in question simply did not come within the provisions of Article 3 of the Regulation. It followed that the defendants were entitled to the costs of

the failed motion and she erred in the exercise of her discretion in failing to award them their costs.

35. The court had jurisdiction to hear the application, whatever the outcome. The defendants' opposition to the application engaged the merits of the application, not the jurisdiction of the court. The trial judge therefore had jurisdiction to deal with the costs of the application. I do not accept the defendants' submission that the trial judge found that there was no jurisdiction to make the orders sought; she found that the claim was not an uncontested claim within the meaning of Article 3(1)(c). So, insofar as their appeal is predicated on a want of jurisdiction, I would dismiss the appeal.
36. The issue is whether she erred in the exercise of her discretion to such an extent that this court ought to intervene. There are many judgments of this court and the Supreme Court which emphasise the deference which should be afforded to the trial judge in the exercise of her discretion, especially on the costs of the trial she conducted. She is best placed to assess the conduct of the parties and to reach her decision, taking account of all relevant factors.
37. The argument advanced was that she was confined in her consideration of the costs to the application before her and specifically that she not only ought not, but could not, have regard to the previous conduct of the defendants or the outcome of the proceedings. This was because O.99 provides that costs follow the event and the event was the dismissal of the application for an EEO.
38. The relevant part of Order 99, r.1 provides:-
- "(1) The costs of and incidental to every proceeding in the Superior Courts shall be in the discretion of those Courts respectively.*
- ...
- (4) Subject to sub-rule (4A), the costs of every issue of fact or law raised upon a claim or counterclaim shall, unless otherwise ordered, follow the event.*
- ...
- (4A) The High Court or the Supreme Court, upon determining any interlocutory application, shall 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."*
39. I do not accept that this argument of counsel for the defendants is supported by the authorities. In *Dunne v. Minister for the Environment & Ors.* [2005] IEHC 79, the High Court had regard to previous proceedings brought by the plaintiff when exercising its discretion in relation to the costs of the proceedings. On appeal, [2008] 2 I.R. 775, Murray C.J. did not rule out such consideration as impermissible. If it is permissible to have regard to earlier litigation from a "*contextual point of view on the issue of costs*", it seems to me that there is no reason in principle why a trial judge considering the costs of

a motion to enforce her order, may not have regard to the conduct and outcome of the trial over which she presided and which preceded her order. For this reason, I do not accept the premise of the submissions of the defendants and there was no error in principle in the approach of the trial judge.

40. The equitable basis for the rule that costs follow the event was emphasised in *Dunne* and in *Godsil v. Ireland* [2015] 4 I.R. 535. It seems to me that the trial judge was entitled to have regard to the wider equitable picture in this case when she ruled on the costs of the motion for an EEO. It is clear from the passage from the transcript cited that she had regard to the deplorable history, both of the conduct of the defendants as the employers of the plaintiffs and of their conduct of the litigation, when she decided to make no order as to costs. As a matter of principle, she was entitled to have regard to such matters. It is clear from her ruling why she departed from the rule that costs follow the event, as is apparent from the arguments advanced by the defendants on appeal. In the circumstances, I see no reason why this court should interfere with her exercise of her discretion and I would refuse this appeal.

The cross-appeal of Carlos Manuel Oliveira Martins

41. These linked cases involved the claims of 50 Portuguese workers. For the most part, the plaintiffs did not speak English and were not present in the jurisdiction. Taking instructions was consequently a difficult task for the solicitors acting for the plaintiffs. Many of them have similar names. At the trial before Stewart J., some of them gave evidence via video link from Angola through an interpreter. Each plaintiff was required to be named on a summons and to give evidence in person, as the rules of court do not provide for class actions. Not surprisingly, errors occurred, and the trial judge noted some discrepancies between the spelling of the names of individual plaintiffs in the titles to the proceedings and in the documents presented, in respect of certain plaintiffs, by Mr. McGuinness, the accountant who prepared the reports on each of the plaintiffs. This appeal concerns confusion around the identity of the first named plaintiff in proceedings 2013/12219P.
42. The first named plaintiff in proceedings bearing record number 2013/12219P is named Carlos Manuel Oliveira Matos. The trial judge considered his claim at pp. 35-36 of her judgment. She identified the confusion as to the identity of this plaintiff in the papers handed up to her and concluded that no evidence had been given in respect of this plaintiff.
43. Counsel for the plaintiffs informed the court that there never was a plaintiff of this name; no such plaintiff instructed his solicitors and no case was ever advanced on behalf of an individual of this name. The intended plaintiff was named incorrectly on the summons and thereafter the error was repeated in the title to the proceedings and not adverted to. The worker who instructed the plaintiffs' solicitors was Carlos Manuel Oliveira Martins. He was wrongly named on the summons as Carlos Manuel Oliveira Matos. The mistake was not adverted to and no application was made to amend the title to the summons. Mr. Carlos Manuel Oliveira Martins gave evidence on 16 January 2018, as appears from the transcript and the judgment. He gave evidence of his employment by the defendants and

his experiences. A booklet prepared by Mr. McGuinness set out his contract of employment and the P60 and P45 issued to him by the defendants. Mr. McGuinness calculated his claim for damages, including interest, in the report handed into the court.

44. The trial judge made no award in respect of Mr. Martins. She said that he was a plaintiff in proceedings which were not before her, bearing record number 2013/5290P. She held that Carlos Manuel Oliveira Matos had not given evidence and, accordingly, made no award in his favour in accordance with the case advanced by Mr. McGuinness for Mr. Martins.
45. The plaintiffs say that an error occurred, and the matter requires to be rectified. The defendants object, saying that there was no error and certainly no error by the trial judge and so there are no grounds for interfering with the decision of the High Court.
46. I accept that the trial judge did not err in dealing with the discrepancies in this case but that does not mean that the plaintiffs' solicitors cannot seek to rectify the situation. The justice of the case clearly requires that his representatives be afforded an opportunity to address the situation which they say has arisen. Evidence will be required to explain the situation and to enable a court to decide whether to amend the title to the proceedings. It will be necessary, therefore, to remit the case bearing record number 2013/12219P back to the trial judge to permit the solicitors for the plaintiffs to bring such application on notice to the defendants as they deem to be necessary to address the situation. They will need to address the fact that Mr. Martins appears to have been named as a plaintiff on a summons which was issued in 2013, but which appears not to have been progressed. The trial judge will be able to determine whether Mr. Martins is a plaintiff in different proceedings which were not before her in January 2018, as she indicated in her judgment of December 2018, and, if so, whether she ought to amend the title to these proceedings and join Mr. Martins as a plaintiff.
47. Accordingly, I would allow the cross-appeal in this case and remit the case to the High Court before Stewart J.
48. The preliminary view of the court in relation to costs is as follows. There shall be no order as to the costs of the appeal against the refusal by the High Court to award the defendants the costs of the application for an EEO as the argument took so little time before this court (see *Chubb European Group SE v. The Health Insurance Authority* [2020] IECA 183). The defendants are entitled to the costs of the cross-appeal in relation to the refusal to grant an EEO on the basis that costs follow the event, such costs to be adjudicated in default of agreement. They are to be set-off against existing orders for costs in favour of the plaintiffs, though there shall be liberty to apply in the event that no timely action is taken by the defendants pursuant to this order. There shall be no order as to the costs of the cross-appeal in relation to Carlos Manuel Oliveira Martins as he is not a party to the proceedings as they stand but it was a matter where the defendants ought not to have opposed the application to remit the matter back to the High Court to resolve the confusion which has arisen regarding his participation in proceedings bearing record number 2013/12219P.

49. If the parties wish to submit that alternative orders as to costs should be made they should notify the other party to that effect within seven days of the date of the delivery of this judgment. In such an event, the party contending that a different order as to costs should issue should have in total fourteen days from the date of the delivery of this judgment to make written submissions to that effect, not exceeding 1500 words, and the other party shall have fourteen days thereafter to respond in written submissions, not exceeding 1500 words.
50. Haughton and Binchy JJ. have indicated their agreement with this judgment which is to be delivered electronically.