

APPROVED

[2021] IEHC 22

THE HIGH COURT

2016 No. 6897 P

BETWEEN

RECORDED ARTISTS ACTORS PERFORMERS LIMITED

PLAINTIFF

AND

PHONOGRAPHIC PERFORMANCE (IRELAND) LIMITED
MINISTER FOR JOBS ENTERPRISE AND INNOVATION
IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 4 February 2021

INTRODUCTION

1. This judgment addresses the orders to be made in consequence of a preliminary ruling delivered by the Court of Justice in respect of a reference under Article 267 of the TFEU. The reference concerned the interpretation of a European Directive in respect of copyright and intellectual property rights (Directive 2006/115/EC).
2. The High Court had made the reference to the Court of Justice for the reasons set out in detail in a judgment delivered in January 2019 (*Recorded Artists Actors Performers Ltd v. Phonographic Performance (Ireland) Ltd* [2019] IEHC 2).
3. The Court of Justice delivered its judgment in September 2020 (Case C-265/19, *Recorded Artists Actors Performers Ltd*). The High Court proceedings were then relisted before me on 29 January 2021 to address two issues as follows. First, the appropriate form of order to be made having regard to the judgment of the Court of Justice. Secondly,

the allocation of the costs associated with the trial of the preliminary issues and the proceedings before the Court of Justice.

4. For the balance of this judgment, I will use the shorthand “*RAAP*” to refer to the plaintiff, Recorded Artists Actors Performers Ltd., and the shorthand “*PPI*” to refer to the first named defendant, Phonographic Performance (Ireland) Ltd.

PROCEDURAL HISTORY

5. To assist the reader with a better understanding of the issues which fall for determination in this judgment, it is necessary to refer briefly to the procedural history. These proceedings concern a long running commercial dispute between the entities representing respectively the producers of, and performers on, sound recordings. The relationship between the parties is governed primarily by contract. However, the contract itself had defined certain terms by reference to the Copyright and Related Rights Act 2000. To this extent, therefore, the interpretation of the domestic legislation and the related EU Directive is, potentially at least, relevant to the resolution of the underlying dispute between the parties.
6. It is apprehended that the full trial of these proceedings will take a significant period of time and will involve extensive documentation and a large number of witnesses. In an attempt to reduce the cost of the proceedings and the hearing time necessary for same, PPI applied to have a number of issues tried as preliminary issues. (To avoid confusion, the reader should bear in mind the distinction between (i) the trial of the preliminary issues before the High Court, and (ii) the preliminary ruling of the Court of Justice on the reference made to it by the High Court).
7. The application for the trial of preliminary issues was resisted, unsuccessfully, by RAAP. The High Court (Cregan J.) delivered a written judgment on the application on

21 February 2018. Cregan J. directed the trial of three preliminary issues (by order dated 30 April 2018).

8. Given the nature of the dispute which has now arisen between the parties, it is necessary to set out the operative terms of the High Court order in full, as follows.

THE COURT DOTH ORDER that the following matters be dealt with by way of preliminary hearing:-

Whether the Plaintiff is entitled to the Reliefs set forth at paragraphs (1), (2) and (3) of the Statement of Claim herein which provide as follows:

“As against Phonographic Performance (Ireland) Limited and, insofar as it is necessary, as against the Minister for Jobs, Enterprise and Innovation Ireland and the Attorney General:

1. A declaration that Directive 2006/115/EC of the European Parliament and of the Council 12 December 2006 on rental right and lending right and on certain right related to copyright in the field of intellectual property requires the right to remuneration accorded to owners of sound recordings in respect of the broadcasting and of any communication to the public in the State of the said sound recordings to be equally accorded to all performers whose performances are incorporated on the said sound recordings;
2. A declaration that the proper construction of the Copyright and Related Rights Act 2000, in the light of Directive 2006/115/EC of the European Parliament and of the Council 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, taking account of the EU law treaty-based obligation of consistent interpretation, is that the right to remuneration accorded thereunder to owners of sound recordings in respect of the broadcasting and of any communication to the public in the State of the said sound recordings is also accorded to any and all performers whose performances are incorporated on the said sound recordings;

In the alternative to the foregoing declaratory relief sought, as against the Minister for Jobs, Enterprise and Innovation, Ireland and the Attorney General:

3. A declaration, in so far as the Copyright and Related Rights Act 2000 cannot be construed so as to accord to all performers whose performances are incorporated on sound recordings, a right to remuneration in respect of the broadcasting and communication to the public in the State of their said recorded performances in circumstances where the owners of the rights in the sound recordings carrying such performances are accorded such a right to

remuneration, that the said Act does not properly transpose Directive 2006/115/EC of the European Parliament and of the Council 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, and in particular Article 8(2) thereof, into Irish law.”

9. As appears, the first issue to be determined centres on the correct interpretation of the EU Directive. The second and third issues are interrelated, and centre on the ancillary question of whether the domestic legislation is consistent with the EU Directive (on its correct interpretation). The latter two issues are presented as alternatives: either the domestic legislation is open to an interpretation which is consistent with the EU Directive or it is not, in which case the EU Directive has not been properly transposed.
10. It should also be explained that the preliminary issues were presented at a level of generality, divorced from the underlying facts of the contractual dispute between the parties. This is important because it delimits the findings which this court can properly make in the context of the trial of the preliminary issues.
11. The trial of the preliminary issues was heard by me over four days towards the end of November 2018, and I delivered a written judgment on 11 January 2019.
12. As appears from my judgment of January 2019, the principal issue which arose for determination on the trial of the preliminary issues concerned the correct interpretation of the EU Directive. In particular, an issue arose as to the extent to which that interpretation was to be informed by reference to international treaties and conventions governing copyright and intellectual property rights. The respective positions of the parties on these issues were as follows. RAAP took the view that the EU Directive fell to be interpreted by reference to the international instruments, notwithstanding that certain of the terms in the latter were not expressly included in the EU Directive. PPI and the State respondents took the opposite view.

13. As appears from the judgment of the Court of Justice of September 2020, the interpretation advocated for by RAAP prevailed. The Court of Justice held that the EU Directive must be interpreted, as far as possible, in a manner consistent with the WIPO Performances and Phonograms Treaty 1996 (“*WPPT*”). This has the consequence that the right to equitable remuneration under the EU Directive must be granted both to performers and phonogram producers who are nationals of Member States of the European Union and to those who are nationals of other contracting parties to the WPPT.
14. By contrast, under the Copyright and Related Rights Act 2000, a performer is not entitled to share in the equitable remuneration unless they are (i) an Irish citizen or domiciled or resident in Ireland, or (ii) domiciled or resident in an EEA country. To this extent, the Irish State has failed to properly transpose the EU Directive.

FORM OF ORDER

15. Given the unequivocal terms of the judgment of the Court of Justice, one might have been forgiven for thinking that there could be no disagreement as to the appropriate form of order which follows. The parties have, unfortunately, been unable to reach agreement in this regard. At the core of this disagreement is a dispute as to the implications for the underlying proceedings of my earlier finding that the domestic legislation cannot be given an interpretation which is consistent with what we now know to be the correct interpretation of the Directive. To elaborate: for the reasons explained in my judgment of January 2019, I had found that the Copyright and Related Rights Act 2000 cannot be interpreted in a manner which would allow for the inclusion of non-EEA nationals.
16. The position now adopted by PPI is that, irrespective of the correct interpretation of the EU Directive, RAAP cannot succeed in its proceedings against it. More specifically, it is said that the failure in the transposition of the EU Directive cannot be relied upon in

proceedings, such as the present, which involve a dispute between two private law entities. The jurisdiction of a national court, such as the High Court, is confined to either (i) interpreting national legislation in a manner which is sympathetic to or consistent with EU legislation, or (ii) disappling that legislation. The latter remedy is only open in cases taken against the State.

17. Put otherwise, PPI now adopt the paradoxical position that notwithstanding that their arguments as to the interpretation of the EU Directive *failed* before the Court of Justice, they should nevertheless be regarded as having succeeded in the trial of the preliminary issues directed by the High Court. The earlier finding that the domestic legislation cannot be interpreted in a manner consistent with the EU Directive is, it is now said, fatal to RAAP's claim.
18. With respect, it is not open to PPI to adopt this position now, given its approach to the proceedings to date. It was PPI who applied for, and ultimately obtained, an order directing the trial of the preliminary issues. PPI itself identified the issues it wished to have tried (albeit that it did so by reference to the language used in the statement of claim served by RAAP). This court was, therefore, specifically asked to determine an issue in respect of the correct interpretation of the EU Directive. There is no doubt but that PPI failed in its arguments in this regard.
19. The second and third preliminary issues were ancillary to the first issue. The latter two issues were presented as alternatives: either the domestic legislation is open to an interpretation which is consistent with the EU Directive or it is not, in which case the EU Directive has not been properly transposed. The resolution of these latter two issues hinged on the finding on the first issue. If the correct interpretation of the EU Directive was that contended for by RAAP, then it followed almost inevitably that there had been a failure of transposition. The definition of qualifying persons under the domestic

legislation is incapable of bearing a meaning consistent with RAAP's interpretation of the EU Directive.

20. This court had not been asked to determine—and did not determine—what the consequences of a finding of non-transposition would be for the underlying dispute between the parties. It had never been suggested, for example, that a finding of non-transposition would be fatal to RAAP's claim against PPI. This question simply never arose in the context of the trial of the preliminary issues.
21. Rather, the approach adopted by PPI had been to apply to have the three identified issues determined by way of the trial of preliminary issues in advance of any adjudication on the underlying merits of the contractual dispute. This had been done on the basis that the correct interpretation of the domestic and EU legislation was relevant to the underlying dispute given the fact that certain of the contractual terms were defined by reference to the legislation. As appears from the judgment of Cregan J., part of PPI's justification for seeking the trial of preliminary issues had been that the issues were questions of law and statutory interpretation. It was never suggested that the judge hearing the trial of the preliminary issues would embark upon a consideration of the underlying dispute.
22. Having presented the issues in this way, PPI cannot now turn around and argue, in effect, that the finding in January 2019 that a consistent or sympathetic interpretation of the Directive was not open is conclusive in its favour. Indeed, it is telling in this regard that notwithstanding that the parties were afforded an opportunity to make submissions in relation to the form of the reference to the Court of Justice in the period between the date of delivery of my judgment (January 2019) and the formal transmission of the reference to the Court of Justice (March 2019), it was never suggested that the reference was now unnecessary in that the finding as to the absence of a consistent or sympathetic interpretation was sufficient to ensure victory for PPI.

23. At the hearing on 29 January 2021, counsel on behalf of PPI sought to explain his client's new position by saying that, notwithstanding the finding in January 2019, the question of a conforming interpretation might nevertheless arise on appeal, and, therefore, it was necessary for PPI to address the interpretative issue also. With respect, this argument proves too much. It simply highlights that the correct interpretation of the EU Directive has always been regarded by PPI as a relevant issue in the proceedings. Indeed, it could hardly be otherwise in circumstances where PPI expressly requested the court to decide the issue.
24. The artificiality of PPI's position is highlighted by the fact that, during the course of his submissions, counsel conceded on instructions that he was no longer looking for an award of costs against RAAP in respect of the hearing before the Court of Justice.
25. It seems to me that having chosen to pursue the case by way of the trial of preliminary issues, and having framed those issues in the manner that it did, PPI must accept the consequences. The appropriate order therefore is that RAAP is entitled to the reliefs set forth at paragraphs (1) and (3) of the statement of claim.
26. I have carefully considered whether the order should be framed so as to replicate precisely the language used by the Court of Justice. On balance, I do not think that it is necessary to do so. First, it seems to me that having framed the preliminary issues in a particular way, this court should answer those issues in the same manner. Secondly, and in any event, it is not necessary for there to be a formal order of this court to give effect to the judgment of the Court of Justice. The terms of the judgment of the Court of Justice could not be clearer and would not be improved upon by recitation in this judgment.

COSTS

27. It only remains, therefore, to address the issue of costs. The parties are agreed that the costs fall to be determined by reference to the recently commenced provisions of Part 11 of the Legal Services Regulation Act 2015 (“*the LSRA 2015*”).
28. Part 11 of the LSRA 2015 draws a distinction between a party who is “entirely successful” in proceedings, and a party who has only been “partially successful”. The default position is that a party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings *unless* the court, in the exercise of its discretion, orders otherwise. The reasons for such an order must be stated. A non-exhaustive list of the factors to be taken into account by a court in exercising its discretion are enumerated under section 169(1).
29. No such default position applies in respect of a party who has only been “partially successful”. As explained by Murray J. in *Higgins v. Irish Aviation Authority* [2020] IECA 277 (at paragraph 10), such a party may nevertheless be entitled to recover all of their costs in an appropriate case.

“[...] it is particularly important to bear in mind that whether a party is ‘*entirely successful*’ is primarily relevant to where the burden lies within process of deciding how costs should be allocated. If a party is ‘*entirely successful*’ all of the costs follow *unless* the Court exercises its discretion to direct otherwise having regard to the factors enumerated in s.169(1). If ‘*partially successful*’ the costs of that part on which the party has succeeded may be awarded in its favour, bearing in mind those same factors. Indeed, having regard to the general discretion in s.168(1)(a) and O.99 R.2(1) a party who is ‘*partially successful*’ may still succeed in obtaining all of his costs, in an appropriate case.”

30. Murray J. goes on in his judgment in *Higgins* to explain that in determining whether a party has been “entirely successful” for the purposes of section 169(1), the correct approach is to look beyond the overall result in the case and to consider whether the

proceedings involve separate and distinct issues. If so, it is appropriate to determine which side succeeded on those issues.

31. These costs principles have been stated in the context of the final outcome of litigation. By contrast, I am concerned with the outcome of an interlocutory hearing, i.e. the trial of the preliminary issues. Order 99, rule 2 of the Rules of the Superior Courts indicates that the High 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. It seems to me that I should apply, by analogy, the principles discussed above, albeit directed to the outcome of the interlocutory hearing.
32. For the reasons which follow, I am satisfied that RAAP has been “entirely successful” and is entitled to its costs: there are no discretionary factors against such an order.
33. As appears from my judgment of January 2019, and the subsequent judgment of the Court of Justice, the principal issue in dispute between the parties had been in respect of the correct interpretation of the EU Directive. This was the issue with which almost all of the time at the hearing before me had been taken up. RAAP has succeeded on this issue in that its interpretation, and not the rival interpretation of PPI and the State respondents, has been found to be correct.
34. PPI submits that the related finding, i.e. that the domestic legislation could not be interpreted in a manner which is consistent with what we now know to be the correct interpretation of the EU Directive, represents the true “event”, and, accordingly, it should be entitled to its costs.
35. For reasons similar to those set out under the previous heading, this submission is incorrect. It is evident from the terms of the preliminary issues themselves that the principal issue advanced was as to the interpretation of the EU Directive, and that the consequences of same were, at this stage of the proceedings at least, an ancillary matter.

Crucially, as appears from the language used in its statement of claim, RAAP was satisfied either with a finding of consistent interpretation or a declaration of non-transposition. To put the matter colloquially, the battle between the parties centred on the interpretation of the EU Directive. RAAP were entirely successful on this issue, and are accordingly entitled to their costs.

36. Even if I am incorrect on this, and the trial of the preliminary issues should instead be analysed as involving two distinct “events”, i.e. the interpretation of the EU Directive, and the transposition issues, I am satisfied, in the exercise of my discretion, and having regard to the principles as set out by the Court of Appeal in *Higgins v. Irish Aviation Authority*, that the appropriate order is still that RAAP should recover the entire of the costs of the hearing on the preliminary issues and of the hearing before the Court of Justice. If and insofar as the question of whether the domestic legislation was capable of a consistent or sympathetic interpretation represented a separate event, it took up only a fraction of the time before the High Court, and none of the time before the Court of Justice. (The latter because of course the interpretation of domestic legislation is a matter for the national court alone). The costs associated with this issue are minimal, and it is unnecessary to adjust the costs order in this regard.
37. I have also been asked to address the costs of the initial application to have the trial of preliminary issues. The order of 30 April 2018 records that Cregan J. directed that these costs be reserved to the judge hearing the trial of the preliminary issues. I am not in a position to make an informed decision as to the appropriate allocation of costs in this regard. It seems to me that the true victor will not necessarily emerge until such time as the trial of the action has taken place, and it has been determined whether the contractual relationship is indeed influenced by the outcome of the issues in respect of the interpretation of the EU Directive. This is the consequence of PPI’s having chosen to

have the preliminary issues presented at a level of generality. Accordingly, I reserve those costs to the trial judge.

38. A dispute also arose as to the proper allocation of costs between the defendants *inter se*. It was suggested by the State respondents that liability to pay RAAP's costs should be divided equally between PPI and the State respondents. It seems to me that the correct order is that the costs be awarded against the defendants jointly and severally. There is no rational basis for distinguishing between them: both vigorously pursued the incorrect interpretation of the EU Directive, and thus are equally responsible for the running up of costs.

CONCLUSION AND FORM OF ORDER

39. The order on the preliminary issue will be as follows. The Plaintiff is entitled to the reliefs set forth at paragraphs (1) and (3) of the statement of claim as follows.

As against Phonographic Performance (Ireland) Limited and, insofar as it is necessary, as against the Minister for Jobs, Enterprise and Innovation Ireland and the Attorney General:

- (1). A declaration that Directive 2006/115/EC of the European Parliament and of the Council 12 December 2006 on rental right and lending right and on certain right related to copyright in the field of intellectual property requires the right to remuneration accorded to owners of sound recordings in respect of the broadcasting and of any communication to the public in the State of the said sound recordings to be equally accorded to all performers whose performances are incorporated on the said sound recordings;

as against the Minister for Jobs, Enterprise and Innovation, Ireland and the Attorney General:

- (3). A declaration, in so far as the Copyright and Related Rights Act 2000 cannot be construed so as to accord to all performers whose performances are incorporated on sound recordings, a right to remuneration in respect of the broadcasting and communication to the public in the State of their said recorded performances in circumstances where the owners of the rights in the sound recordings carrying such performances are accorded such a right to remuneration, that the said Act does not properly transpose Directive

2006/115/EC of the European Parliament and of the Council 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, and in particular Article 8(2) thereof, into Irish law.

40. As to legal costs, the Plaintiff is entitled to the costs of, and incidental to, the trial of the preliminary issues in November 2018 (to include the costs of written legal submissions, and of an overnight transcript); the costs of, and incidental to, the reference for a preliminary ruling to the Court of Justice; and the costs of the hearing before me on 29 January 2021 (to include the costs of two sets of written legal submissions). The costs order is made as against the defendants jointly and severally. The costs are to be adjudicated by the Office of the Legal Costs Adjudicator in default of agreement. The usual stay on the execution of costs will be imposed pending an appeal, if any, to the Court of Appeal or an application for leave to appeal to the Supreme Court.
41. The parties are asked to agree a date upon which the matter can be relisted before the judge in charge of the Commercial List with a view to the progression of these proceedings to full hearing.

Approved
Gareth S. Mans