THE HIGH COURT

COMMERCIAL

[2023] IEHC 23

Record No. 2021/4762P

BETWEEN

JAMES STREET HOTEL LIMITED

PLAINTIFF

AND

MULLINS INVESTMENT LIMITED, PETER MULLINS, DELBOURNE LIMITED (IN LIQUIDATION), EOGHAN KEARNEY, LIAM FOLEY, PATRICK COX, SIMON FOX AND CMPDM LIMITED

And by Order

CARROWMORE PROPERTY LIMITED, GALLAGHER SHATTER, A FIRM AND CLARK HILL, A FIRM

DEFENDANTS

JUDGMENT OF Mr. Justice Twomey delivered on the 20th day of January, 2023

INTRODUCTION

1. This judgment considers, *inter alia*, an application by the defendants for the legal costs of junior and senior counsel in relation to their successful application for security for costs. However, Order 52, rule 17(12) of the Rules of the Superior Courts provides that *'one counsel only shall be allowed'* for such applications (presumably with the intention of reducing legal costs for straightforward court hearings, such as security for costs).

2. In particular, this judgment considers the position under Order 52, rule 17(12) where a plaintiff, against whom the costs order is being sought, resists the order (as it claims the defendants are only entitled to 80% of the legal costs), but who implicitly agrees that whatever costs are awarded, they can be awarded on the basis of junior counsel and senior counsel.

3. As noted, hereunder, it seems to this Court that if the person paying the bill (in this case the plaintiff) does not object to that bill being increased (because eight counsel, rather than four counsel are to be paid), then this is not a matter of concern for the court, as it is the plaintiff's money at issue, not the taxpayers or any other third party. Accordingly, this is one of the exceptional cases where an order should be made for legal costs to include senior counsel, notwithstanding the terms of Order 52, rule 17(12).

ANALYSIS

4. This judgment relates to the costs of the motions which were won by the defendants and which require the plaintiff to provide the defendants with security for costs. That decision is set out in *James Street Hotel Ltd. v. Mullins Investment Ltd. & oths.* [2022] IEHC 549 (the "Principal Judgment"). For that hearing, the eleven defendants were divided into four groups of defendants, who were represented by four junior counsel and four senior counsel.

5. Despite losing, the plaintiff claims that it should be liable for only 80% of the defendants' legal costs, on the grounds that the defendants were not *'entirely successful'* within the meaning of s. 169 (1) of the Legal Services Regulation Act, 2015.

6. On any reading of the Principal Judgment, it is clear that the defendants were '*really the winner(s)'* (to use the expression used by Bingham M.R. in *Roache v. News Group Newspapers Ltd* [1998] EMLR 161 at p. 166) and that the plaintiff was *'really the loser'*. This is because the plaintiff refused to provide security for costs, forcing the defendant to issue the

motions and after hearing the motions, this Court has ordered that the plaintiff provide such security.

7. In addition, a key issue in determining the allocation of legal costs is whether the relief was granted (see *Higgins v. Irish Aviation Authority* [2020] IECA 277 at para. 13) and in this regard the defendants were granted the relief they sought in their motions.

8. However, the plaintiff argues that it was successful in relation to what it claims was one of the issues at the hearing, i.e. whether the security for costs should be phased. On this basis, the plaintiff claims that it should only be liable for 80% of the costs of the motions.

9. However, this is not in fact a correct characterisation, by the plaintiff, of this Court's judgment. This is because it is clear from para. 113 of the Principal Judgment that what the plaintiff sought at the hearing was a phasing of the security until the end of the discovery phase.

10. It is also clear from para. 116 of the Principal Judgment that this Court rejected the plaintiff's application for a phasing of the security until the end of the discovery phase. In particular, this Court held that it did:

> "not see any basis for departing from the default rule that the plaintiff is required to provide full security for the defendants' costs (by providing for phased security up to the end of the discovery phase)."

Accordingly, it seems to this Court that the plaintiff lost, not only in relation to whether it should provide security for costs, but also in relation to whether the costs should be phased until the end of the discovery phase.

11. Thereafter, at para. 117 *et seq* of the Principal Judgment, this Court did take upon itself to raise a separate issue. In the interests of the efficient use of court time, this Court raised the issue of mediation. In particular and in order to facilitate/encourage such mediation, this Court raised the possibility of there being a phasing of the security for costs up to the mediation, if there was to be mediation between the parties. No order was made by the Court nor was any

direction made by the Court regarding the phasing of security in relation to any such mediation. This Court simply stated that it would be in a position to consider submissions, if any, which the parties may wish to make on how a phasing of security might work up to the end of the mediation stage (if the Court was to make such an order).

12. In all the circumstances, this Court cannot see how this Court's decision to seek to encourage the parties to mediate their dispute, including by the Court seeking submissions regarding possible phasing of security up to the end of the mediation, could be regarded as an issue which was 'won' by the plaintiff, such as to justify a reduction in the legal costs it would have to pay for losing the motion.

13. For this reason, there is no basis for concluding that the defendants were not entirely successful in the motions and that they are not entitled to recover the costs of the motions.

'*One counsel only shall be allowed*' for applications for security for costs

14. A separate issue arises regarding whether those costs should be limited to one counsel. Order 52, rule 17(12) of the Rules of the Superior Courts states:

> "In the case of any of the following applications, **one counsel only shall be allowed** unless the Court shall otherwise order:
>
> […]
>
> (12) Applications in reference to security for costs." (Emphasis added)

15. Since the motions at issue were applications for security for costs, it is clear that only one counsel was allowed to make the application. It seems to follow therefore that this Court can only award costs for one counsel, '*unless the Court shall otherwise order'*.

16. While the defendants are seeking costs for senior, as well as junior, counsel, this Court cannot simply ignore the very clear terms of Order 52, rule 17(12) which states that only one

counsel is *'allowed'*. There are a number of reasons why it would have to be an exceptional case for this Court to ignore this express provision.

17. First, it seems likely that this rule was implemented with a view to reducing legal costs. This is because an application for security for costs, as well as the other instances under Order 52, rule 17 where only one counsel is allowed, are relatively straightforward pre-trial applications. For example, the other applications include applications to compel a person to proceed, applications to extend time, applications to take any step in an action and applications for discovery. As they are relatively straightforward matters, and since they do not decide the substantive issue between the parties, the rationale for just one counsel being allowed would appear to be that these straightforward applications do not require the expense of two counsel.

18. Secondly, if this Court were to ignore the terms of Order 52, rule 17(12), it would be ignoring an apparent attempt by our lawmakers to reduce legal costs, at a time when these are a very significant issue in Ireland. See for example the *Review of the Administration of Civil Justice*, October 2020 at p. 267 chaired by Kelly P. (the "*Kelly Review*"), where it is stated *'Ireland ranks among the highest-cost jurisdictions internationally for civil litigation'*. If anything, it seems to this Court that in in light of these findings in the *Kelly Review*, there is a particular onus on the courts to implement rules, which appear to have as their aim the reduction of legal costs in Ireland.

19. Thirdly, the four sets of defendants now seeking the costs of four senior counsel (in addition to the cost of four junior counsel) would have known of the existence of the rule that only one counsel is allowed (and so they would have known that if they won, they would not obtain the legal costs for a senior counsel, if they decided to engage one). Nonetheless, the defendants, as they were perfectly entitled to do, decided to engage junior and senior counsel, despite Order 52, rule 17(12). There should be no surprise therefore for the defendants if the costs order does not cover two counsel.

20. However, what makes this an exceptional case is the fact that the person who is going to be out of pocket if the Court grants a certificate for senior counsel (the plaintiff) does not appear to want this Court to restrict the defendants to costs for just one counsel (as required by Order 52, rule 17(12)).

21. The plaintiff, who engaged senior counsel at the hearing of the motion and at the costs hearing, made the following submissions. Counsel for the plaintiff accepted that the plaintiff had, very late in the day, withdrawn its claim that one of defendants did not have a *prima facie* defence. Accordingly, he accepted that, if senior counsel had been instructed prior to that withdrawal, which was the case, then the plaintiff was not going to argue that that defendant should not have instructed senior counsel. Having accepted that it was appropriate for one of the defendants to have instructed senior counsel, he made it clear that he was not going to invite the court to make a distinction between the four groups of defendants in relation to the whether one or other of them should have instructed senior counsel.

22. Having made it clear he was not suggesting that any of the defendants should *not* have engaged two counsel, he went on to suggest that, rather than rely on the clear terms of Order 52, rule 17(12) so as to restrict the defendants' costs to one counsel, the Court should take account of Order 52, rule 17(12) in some other way. In this regard, he suggested the legal costs provide for two counsel, but with a 5% or 10% reduction to take account of that fact.

23. The only conclusion which this Court could draw from these submissions was that, despite the express terms of Order 52, rule 17(12), the plaintiff was agreeable to the costs order providing for two counsel. It is the plaintiff's money at stake (and not that of the taxpayer or a third party) and if it is agreeable to paying for eight, rather than four, counsel, then this Court can see no reason why it should not order such payment. This Court is doing so on the basis that, while only one counsel is '*allowed*' in a security for costs application, the court can

'*otherwise order*'. This is one of the exceptional cases, since it seems clear to this Court that the plaintiff, the only party prejudiced, is agreeable to such an order.

24. Finally, since the concession by the plaintiff to pay for four senior counsel appears to have been based on this Court reducing the overall costs by 5% *or* by 10%, this Court believes that it is appropriate for it now to consider which percentage reduction is appropriate. In deciding whether to pick a 5% or 10% reduction, this Court has regard to the Supreme Court case of *Permanent TSB plc v. Skoczylas* [2021] IESC 10 at para. 12, where it was stated that one of the functions of making costs orders is to '*encourage*' an '*efficient approach to litigation*' (see also *Word Perfect Translation Services LTD v. Minister for Public Expenditure and Reform* [2021] IEHC 219, where this approach was adopted). In this case, the plaintiff was not efficient in its use of court time. In particular, as is clear from para. 62 of the Principal Judgment, it was only during the course of the hearing that the plaintiff made it clear that it was not pursuing its claim that its inability to pay was caused by the defendants (which argument was set out in detail as part of its legal submissions submitted in advance to the Court).

25. This therefore led to a waste of court time, which could have been avoided by the plaintiff. For this reason, this Court has opted for a reduction of 5%, rather than 10%, in the legal costs, in order to comply with the direction in *Skoczylas* that costs orders are used to encourage parties to be as efficient as possible in relation to the use of court time.

26. For all the foregoing reasons, the defendants will be awarded 95% of their costs, with a certificate for junior and senior counsel, with those costs to be adjudicated in default of agreement.