

THE HIGH COURT

COMMERCIAL

Record No. 2023/280 MCA

[2024] IEHC 106

**IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 61(3)
OF THE COMMUNICATIONS REGULATION ACT 2002 (AS AMENDED)**

BETWEEN

COMMISSIONS FOR COMMUNICATIONS REGULATIONS

APPLICANT

AND

EIRCOM LIMITED

(No. 2)

RESPONDENT

JUDGEMENT of Mr Justice Twomey delivered on the 22nd of February, 2024.

Introduction

1. This case raised a number of points, one of which appears to be a novel, *albeit* minor, one. It was the issue of the effect, of an award of costs by a court in favour of one party, on an

agreement between the parties, prior to the judgment, that they would share the costs of a stenographer 50:50.

2. Does the interaction between that agreement and the costs order mean that the losing litigant has to pay *just 50%* of the stenographer's costs to the winning litigant, as previously agreed, or does she have to pay *the full amount*, in line with the court's award of costs against her? In other words, does the order of the court, that the losing litigant *pay all the legal costs* of the winning litigant, take precedence over the agreement of the parties to share the costs of the stenographer 50:50?

3. This and other issues arose in the hearing on 16 February, 2024. This hearing was held in order to finalise the Step Plan and final orders arising from the judgment which was delivered by this Court on 2 February, 2024 (*Commission for Communications Regulation v Eircom Limited* [2024] IEHC 49 (“**Principal Judgment**”)).

4. The Step Plan contains the procedures to be adopted to finalise the terms of keyword searches and the steps to be taken by ComReg to remove privileged and irrelevant material from data which it seized from Eircom, pursuant to ComReg's regulatory functions under the 2002 Act. (Defined terms which are used in the Principal Judgment have the same meaning when used in this judgment)

5. It is important to note that in finalising the Step Plan, the starting point is the Principal Judgment, since the purpose of the post-judgment hearing is not to depart from the effect of that judgment, but rather to *implement the terms* of that judgment, by finalising any court orders arising from same.

Eircom does not get ‘second bite of the cherry’ to influence contents of Step Plan

6. In this regard, it is also important to bear in mind that, in the context of finalising the terms of the Step Plan, Eircom had its chance to provide this Court with its views on the terms of the Step Plan. That was the purpose of the hearing which was held over two days on 19th

and 20th December 2023, which led to the Principal Judgment. However, Eircom chose not to engage, prior to, or at, that hearing, on the types of keywords to be used in, or the other contents of, the Step Plan, which had been proposed by ComReg. Instead, Eircom adopted the position that the search of the Seized Data should be carried out by it, rather than by ComReg. This approach adopted by Eircom was put in stark terms in the letter of 29 June, 2023 from its solicitors, Arthur Cox which stated that *‘[a]bsent clarification of the scope of the Investigation, any engagement on keywords is premature’*.

7. However, as is clear from the Principal Judgment, this Court found that Eircom’s decision not to engage in the finalisation of the Step Plan (either before or at the hearing in December 2023) was not unjustified. This is because this Court found that, as there was no challenge by Eircom to the scope of the investigation, there was no basis for it not engaging with ComReg to finalise the Step Plan. This Court also found against Eircom on its principal claim, namely that it, as the regulated entity, should be the party to carry out the search of the Seized Data (to eliminate privileged and irrelevant material). This Court found instead that the regulator (ComReg) should carry out the search of the Seized Data.

8. It is crucial to note that, having wrongly refused to engage with the terms of the Step Plan (when this Court was asked to approve it in December 2023), Eircom does not get a second bite at the cherry, when the orders are being finalised by this Court, i.e. to argue why it might be better to have the Step Plan drafted in a different manner or how Eircom’s interests might be better protected in the Step Plan.

9. Thus, as Eircom chose to pass up that opportunity at the hearing in December 2023, Eircom’s role at the hearing in February 2024 is limited to seeking to ensure that whatever Step Plan, is finally approved by this Court, complies with the terms of the Principal Judgment. Of course, ComReg’s role at the February 2024 hearing is similarly limited. Yet, unlike Eircom it took the opportunity in December 2023 to provide its views on the terms of the Step Plan.

The versions of the Step Plan

10. After the hearing in December 2023, this Court delivered the Principal Judgment, in which it approved the Step Plan, which had been presented to the Court, subject to the changes thereto which are referenced at para 71 *et seq* of the judgment. That Step Plan which was presented to the Court in December 2023 (“**Version 1**”) is set out in the Principal Judgment.

11. For the purposes of the February 2024 hearing, ComReg provided this Court with a re-draft of the Step Plan (“**Version 2**”), which it believes has been amended to comply with the terms of the Principal Judgment. At the February 2024 hearing, Eircom provided this Court with suggested amendments to Version 2.

12. As already noted, in considering Version 2 and Eircom’s suggested amendments to it, the key issue for this Court is whether Version 2 complies with the Principal Judgment. This Court concludes that the following Step Plan (“**Final Version**”), which contains a small number of changes to Version 2, most accurately complies with the terms of the Principal Judgment. After setting out the Final Version, reference is made to the small number of decisions which had to be made by this Court, to change or not change Version 2, to get to the Final Version.

Step	Description	Date
1.	<p>PURPOSE: To enable ComReg to upload the Seized Data onto a review platform</p> <p>ComReg will unseal evidence bags and upload Seized Data to an electronic platform (RelativityOne). Representatives from Eircom can attend ComReg’s offices to observe this step.</p>	

	<p>As per ComReg’s letter of 2 June 2023, ComReg will use RelativityOne, a cloud based platform hosted by VMGroup, the technical service provider engaged by ComReg for this Investigation. RelativityOne is ISO 27001 certified, HIPAA compliant, achieved SOC 2 Type II attestation, and is IRAP assessed to PROTECTED level. All files are encrypted at rest with 256-bit AES encryption. Data is encrypted in transit, internally and externally, via Transport Layer Security (TLS) certificates. RelativityOne is set up to audit activity on the platform and it allows for restrictions to be placed on how users can interact with files. It can facilitate different levels of permissions for documents or batches of documents.</p>	
<p>2.</p>	<p>PURPOSE: To remove clearly irrelevant documents from the Seized Data prior to further processing</p> <p>ComReg will remove documents from the Seized Data that can be identified as clearly irrelevant to Eircom’s business or purely administrative in nature. To do this ComReg will search for documents with domain names which relate to media, travel and accommodation, healthcare providers, out of office responses, retail adverts and similar topics. Eircom can make submissions in writing to ComReg on domain names or other terms to be applied to assist with this step. This should be done by Eircom 3 days in advance of the date set for this</p>	

	<p>step. ComReg will consider such submissions but will not be bound by them.</p> <p>Representatives from Eircom can attend ComReg’s offices to observe this step.</p>	
<p>3.</p>	<p>PURPOSE: To identify documents that are potentially privileged and to store them separate to the documents to be reviewed</p> <p>Eircom has provided a list of domains, names and email addresses at page 58-59 of Exhibit KH1 to the affidavit of Kjeld Hartog sworn 20 October 2023. This list is intended to assist identifying potentially privileged documents. Eircom will provide an updated list of such terms (including the list of proposed individual names, law firms and pseudonyms referred to below).</p> <p>In addition to searching for the domains, names and email addresses of Eircom’s legal advisors in the to/from/cc meta data fields, those terms (as set out at page 58- 59 of Exhibit KH1 to the affidavit of Kjeld Hartog sworn 20 October 2023 and as will be updated by Eircom) will be run as keywords on the contents of all documents to capture instances for example where a lawyer sent, received or was copied on an email further down in an email chain but where the lawyer is not a party to the most recent email in the chain (from which the email meta-data is drawn).</p>	

To facilitate the identification of any summarised legal advises within other documents, the names of individual lawyers, law firms and pseudonyms for both (to be provided by Eircom) will also be run as keywords on the contents of all documents. For example, such terms might include ‘AC’, ‘Coxes’, ‘Cox’, as keywords. The intention is that this additional element would capture a wider range of potentially privileged documents.

ComReg will apply a further set of keywords (to be proposed by Eircom) specifically designed to identify instances where legal advice might be discussed or summarised but where legal advisors are not identified directly (whether by the names of individual lawyers, law firms or pseudonyms) but advice is described or shared.

With regard to any documents covered by litigation privilege, Eircom will provide to ComReg: the name of the proceedings, the record number,; the case name and number of any regulatory investigation, inquiry or enforcement action,; names of any other counsel instructed, the name of the plaintiff/defendant (or counterparties to the dispute where litigation has not commenced) and any shorthand or pseudonym used by Eircom for the dispute or investigation,

inquiry or enforcement action, other parties or legal advisers involved. These terms will be added as keywords.

ComReg will apply those terms and will remove all responsive documents and store them separately as **“Potentially Privileged Data”**.

Eircom can make submissions in writing to ComReg on additional terms to be applied to assist with this step as outlined above. This should be done by Eircom 3 days in advance of the date set for this step. ComReg will consider such submissions but will not be bound by any keywords/search terms that Eircom proposes pursuant to this step.

Representatives from Eircom can attend ComReg’s offices to observe this step.

In the event of a dispute concerning search terms aimed at identifying potentially privileged documents ComReg will, seek directions from the High Court (such application being on prior notice to eircom). In the event that ComReg indicates that it will not or fails to seek directions, Eircom may seek directions from the High Court (such application being on prior notice to ComReg).

<p>4.</p>	<p>PURPOSE: To apply key words aimed at identifying the documents likely to be relevant to the Investigation to produce a dataset for review by ComReg.</p> <p>ComReg then will apply keywords to the balance of the dataset. ComReg will apply the keywords it provided to Eircom by letter dated 18 July 2023. Eircom can make submissions in writing to ComReg on keywords or combinations of key words to be applied to assist with this step and this should be done by Eircom 3 days in advance of the date set for this step.</p> <p>In addition, Eircom will provide keywords designed to identify irrelevant documents from within the results presenting from the application of relevant keywords. These keyword search terms will be designed to remove false positive or “irrelevant” results from the dataset.</p> <p>ComReg will consider such submissions but will not be bound by them.</p> <p>Representatives from Eircom can attend ComReg’s offices to observe this step.</p>	
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	<p>The results of this step, which ComReg will share with Eircom, may suggest that the application of fewer or additional key words or different combinations of key words may produce a more meaningful dataset (with a higher incidence of relevant documents) for review. ComReg will engage with Eircom in relation to further steps ComReg proposes in relation to key words and ComReg will consider further submissions of Eircom in this regard but will not be bound them.</p> <p>The outcome of this step will be the production of a data set for review by ComReg (“the Dataset for Review”).</p> <p>In the event of a dispute concerning key words aimed at identifying relevant documents and thereby excluding irrelevant documents ComReg will seek directions from the High Court (such application being on prior Notice to eircom). In the event that ComReg indicates that it will not or fails to seek directions, Eircom may seek directions from the High Court (such application being on prior notice to ComReg). Pending the first listing of an application for directions under this step, and subject to the parties agreeing otherwise, ComReg may apply the agreed key words and commence its review of such responsive documents but</p>	
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	<p>ComReg will not review documents solely responsive to disputed key words.</p> <p>In the event that ComReg encounters potentially privileged during its review, ComReg will tag them as such and will remove them from the Dataset for Review and will add them to the Potentially Privileged Data and will notify Eircom of such additions as soon as practicable.</p>	
<p>5.</p>	<p>PURPOSE: To narrow down the Potentially Privileged Data by the application of the same key word exercise in Step 4 to produce the “Refined Potentially Privileged Data”</p> <p>The final set of key words applied in Step 4 will also be applied by ComReg to the Potentially Privileged Data. The resulting set will be the “Refined Potentially Privileged Data” and it will be a dataset on which Eircom will make submissions regarding privilege as set out in step 6.</p> <p>Representatives from Eircom can attend ComReg’s offices to observe this step.</p>	
<p>6.</p>	<p>PURPOSE: For Eircom to identify the documents in respect of which it asserts privilege and to justify its claims to privilege.</p>	

	<p>ComReg will provide Eircom with a schedule of the Refined Potentially Privileged Data. Within 4 weeks of receipt of same Eircom will identify documents from the schedule in respect of which it maintains a claim of privilege. In relation to each such document, Eircom shall set out the nature of the privilege claimed and the basis for same.</p> <p>ComReg will consider the claims made and will inform Eircom if it has any queries and if it accepts or rejects the claims.</p> <p>In the event of a dispute concerning privilege ComReg will seek directions from the High Court before reviewing the documents in respect of which privilege is disputed (such application being on prior Notice to eircom). In the event, that ComReg indicates that it will not or fails to seek directions, Eircom may seek directions from the High Court (such application being on prior notice to ComReg).</p>	
7.	<p>PURPOSE: To enable ComReg to apply key words to the original Seized Data during its investigation aimed at identifying additional relevant documents if this becomes necessary.</p>	

	<p>During the course of its review of the Dataset for Review, ComReg may consider that it should apply keywords to the Seized Data which were not applied at Step 4. This may arise as a result of information that ComReg learns during the review process. In the event ComReg considers this necessary ComReg will give advance notice to Eircom and Eircom will be requested to make submissions in respect of any such step.</p> <p>In the event of a dispute concerning this step ComReg will seek directions from the High Court (such application being on prior Notice to eircom). In the event, that ComReg indicates that it will not or fails to seek directions, Eircom may seek directions from the High Court (such application being on prior notice to ComReg). Pending the first listing of an application for directions under this step, and subject to the parties agreeing otherwise, ComReg may apply the agreed key words and commence its review of such responsive documents but ComReg will not review documents solely responsive to disputed key words.</p>	
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13. The first change to refer to relates to Step 3. The Final Version takes account of the fact that para 71 of the judgment is based on ComReg’s affidavit, which provided that ComReg ‘will’ run keyword searches (pursuant to the Step 3 search for privileged material) and not

'may' run them (as suggested by ComReg in Version 2). Accordingly, the term 'may' is removed and replaced with 'will' in the Final Version.

14. In this regard, it is clear that ComReg's concerns, that it might be *obliged* to use search terms provided by Eircom, even if ComReg believes this will remove non-privileged material, can be allayed in a different way (than by using 'may' in the Step Plan), i.e. ComReg is entitled to have any dispute about these search terms determined by the High Court, pursuant to the final paragraph of Step 3. This clearly can be done prior to the use of any search terms on the Seized Data and so in this way ComReg can be assured that it will not be obliged to run what it believes are inappropriate search terms (unless approved by a court).

15. While Eircom sought to have the term '*in the first instance*' inserted in the second line of the last paragraph of Step 3 after 'will', this Court does not believe this adds anything to this paragraph. More significantly, it also agrees with ComReg that this is not required by the changes which must be implemented to Version 1 under the terms of the Principal Judgment. Accordingly, that phrase is unnecessary in Step 3 and if Eircom had good arguments for it being inserted, these should have been raised at the December 2023 hearing. For the same reason this expression is unnecessary in Step 4, Step 6 and Step 7 (where Eircom also suggested it be inserted).

16. As regards Step 4, para 73 of the Principal Judgment provides that Eircom is '*entitled*' to supply ComReg with search terms to remove irrelevant material. This statement in the Principal Judgment is simply a reflection of the entitlement of Eircom under the terms of the first paragraph of Step 4 of Version 1, which was then before the Court. This entitlement is naturally therefore reflected in Version 2 and in the Final Version. However, there was no reference in Step 4 in Version 1 to what was going to happen *if* Eircom provided such keywords and *if* it led to irrelevant material being isolated. Version 1 of the Step Plan simply provided what was going to happen to any privileged material which came to light.

17. If Eircom believed that Version 1 of the Step Plan should have had a specific provision in Step 4 for it to be notified of irrelevant material (as it clearly now does, in light of its suggested amendments), the time to raise that issue was when Version 1 was before the Court for its approval. It is too late, at the hearing for finalising the court's orders (after Version 1 has been approved by this Court, subject to amendments), for these concerns to be raised.

18. For this reason, this Court will not make the amendments suggested by Eircom to Version 2 of the Step Plan. In particular, this Court does not believe that it is appropriate to engage with Eircom's argument that '*irrelevant material*' is treated the same as '*privileged material*' under the 2002 Act, as a basis for its suggested amendments. This may or may not be a valid legal argument, but the time to have made this legal argument was at the December 2023 hearing, not when orders are being finalised.

Costs

19. Eircom, although it lost on the key issue at the December 2023 hearing, points out that the proceedings in this case arose, not because of a dispute between the parties, but because the 2002 Act *requires* a regulator (ComReg), which has seized material from a regulated entity (Eircom), to make an application to court seeking orders/directions regarding the treatment of privileged and irrelevant material.

20. This was also the case in *Director of Corporate Enforcement v Cumman Peile Na h-Eireann (FAI)* [2022] IEHC 649. There it was an application by the Corporate Enforcement Authority under s 795(4) of the Companies Act, 2014, seeking a determination as to whether certain documents seized by the Director of Corporate Enforcement attracted legal professional privilege.

21. As is clear from Reynolds J.'s judgment in *Delaney*, the fact that the regulator is *statutorily obliged* to make an application to a court for its approval/directions (rather it being an *inter partes* dispute) does not mean that the affected party who *chooses* to argue for a certain

outcome during that application, and loses, is not liable for costs, on the basis of the usual rule of costs following the event.

22. If it were otherwise, then any regulated entity or affected person could waste court time and taxpayers' money pursuing whatever points it wishes in court, without any fear of a costs sanction. In this Court's view, this cannot be correct. This is because the right of access to the courts is such a fundamental constitutional right that there is little or no barrier to litigation, regardless of the merits of the claims being litigated. This means that the costs sanction is one of the few tools available to the courts to ensure that taxpayer's funds are not wasted by the inefficient use of court time, by litigants pursuing points which should not have been pursued (i.e. as evidenced by the fact that they are rejected by a court). Even when a party decides to pursue points which it may feel are arguable, a costs sanction is invaluable since it encourages the use of as little court time as necessary, since if that party loses, it will be liable for however long it took to air those points in court.

23. It is for this reason that it is clear to this Court that the usual costs rules apply to a case such as this one (a mandatory application to court which is imposed by statute upon a regulator), just as it applies in an *inter partes* dispute. Accordingly, just as in the *Delaney* case, where Mr. Delany failed in his attempt to have documents designated as privileged (and had costs awarded against him), so too in this instance, Eircom failed in its attempt to have it designated as the party to conduct the search of the Seized Data. As this was the key issue in dispute between the parties at the hearing, and ComReg won, ComReg could be said to be '*entirely successful*' in the proceedings. For this reason, under s 169(1) of the *Legal Services Regulation Act, 2015*, the default position is that Eircom is liable for ComReg's costs.

24. Despite this, Eircom sought to resist a costs order on a number of grounds. Firstly, Eircom claimed that there should be no order as to costs as this was a '*novel*' issue, i.e. on the

basis that this was the first time s. 61 of the 2002 Act was subject to court interpretation, regarding its application to *'irrelevant material'*, as distinct from *'privileged material'*.

25. If the existence of a *'novel'* issue were an exception to the general rule that costs follow the event, there would be huge number of cases which would be subject to no costs orders. This is because every day of the week new legislation is enacted and subsequently is subject to interpretation *for the first time* in our courts. For this reason, it cannot be the case, in this Court's view, that every time a piece of legislation is interpreted for the first time that there would be no order as to costs because the case is *'novel'*.

26. Secondly, this Court also rejects Eircom's claim that there should be no order as to costs because this was a *'test'* case. As this Court understands it, a test case is where there are numerous other cases waiting to be heard, which could be determined/settled by the outcome of the test case. There is no evidence of this being a test case. Indeed, even if it was a test case, in that sense, there is no rule that says that test cases are not subject to the usual rules regarding costs following the event.

27. While counsel for Eircom described the case as a *'test'* case, it seemed that he meant that it was test case in the sense that it involved a novel interpretation of a statute *from which future litigants will benefit*. However, just because future litigants may benefit from a clarification of a statute, provided by this Court, is not a basis for there being no costs order. If it were, there would be very many cases with no costs orders and indeed very little incentive for litigants to efficiently use court time.

28. Thirdly, Eircom also claimed that this Court should exercise its discretion against awarding ComReg costs because of its behaviour e.g. the scale of the seizure of the documents by ComReg and that, at any earlier stage, ComReg incorrectly relied on its own protocol as a basis for it searching the Seized Data, before it decided to seek directions from the High Court (which it was, of course, required to do by s 61 of the 2002 Act).

29. It seems to this Court that none of the alleged poor behaviour of ComReg justifies a departure from the general rule, particularly when one considers that no challenge was made to the scale of the seizure/legality of the search (as pointed out at para 25 of the Principal Judgment).

30. In addition, like a lot of litigation, it is easy to say that, with hindsight, matters should have been dealt with differently by one party. However, hindsight applies to both parties. For example, Eircom itself refused to provide ComReg with keywords contained in slides which it had shown to ComReg at a meeting for the purposes of illustrating its views on the issues involved in analysing the Seized Data (referenced in ComReg's letter of 27 July, 2023).

31. However, more significantly, the only behaviour of the parties referenced in the Principal Judgment is not the behaviour of ComReg, but rather the behaviour of Eircom. This is because, at para 26, this Court refers to the failure of Eircom to engage in finalising the terms of keyword searches with ComReg, which contributed to several months being lost in the pursuit of an investigation, which investigation is *prima facie* in the public interest. Accordingly, it is difficult to see any basis therefore for this Court concluding that ComReg's behaviour was such as to justify a departure from the usual rule on costs.

CONCLUSION

32. For all the foregoing reasons therefore, this Court adopts Version 2 of the Step Plan, with certain minor modifications to get to the Final Version and it rejects the arguments of Eircom to amend the Step Plan, insofar as those arguments go beyond ensuring that the Final Version complies with the terms of the Principal Judgment.

33. As regards costs, this Court rejects Eircom's arguments for disapplying the default rule that costs follow the event.

34. In particular, if Eircom had engaged with ComReg, in advance of the application to court, on the keywords and the Step Plan, it is conceivable that the application to court could have been made on consent and/or with little or no involvement on the part of Eircom. Instead, Eircom chose to oppose the application by ComReg, on the grounds of the alleged right of a regulated entity to conduct a search of data seized from it by a regulator, which took two days of Court time (plus a further half day dealing with costs and final orders). Eircom lost the argument it made at the December 2023 hearing and so it should be liable for ComReg's legal costs. In this way, a costs sanction, such as this one, operates as an incentive for parties, such as Eircom, to be more efficient with the use of court time.

Effect of agreement sharing costs of stenographer if costs against one party

35. Finally, this Court was asked to address one additional issue regarding costs, namely the fact that prior to the hearing in December 2023, Eircom had agreed with ComReg, in return, presumably, for receiving a transcript, to pay half of the costs of the stenographer, which ComReg had arranged. There was no evidence that the parties contemplated what would happen regarding the costs sharing agreement, in the event of a court ordering costs in favour of one side or ordering that there be no order as to costs. It seems the parties simply agreed to share the costs of the stenographer and nothing else.

36. Submissions were made by ComReg which implied that Eircom was claiming that it should only have to pay 50% of the stenographer's costs, even if (as it has now transpired) Eircom was ordered by this Court to pay *all* ComReg's legal costs.

37. It seems to this Court that, when a party agrees with another to share the costs of a stenographer, then, in the absence of contrary agreement, it is an implied term of that costs sharing agreement that it *is subject to any subsequent costs order* by a court.

38. Thus, for example if there is no order as to costs at the end of a case, it seems to this Court that the parties' agreement regarding sharing stenographer costs would continue to apply.

Thus, if this Court had made no order as to costs, Eircom would pay *just* 50% of the costs paid by ComReg for the stenographer.

39. However, if one party is found liable for all the legal costs of the other party, it seems to this Court that the ordinary meaning of legal costs includes stenographer's costs (if a stenographer is employed at the hearing on behalf of both parties). It seems to this Court that it follows from this conclusion, that the effect of such a court order is to displace the costs sharing agreement regarding the stenographer, *unless* the parties themselves provided that the stenographer's costs were to be shared irrespective of any costs order. Thus, in this situation, since ComReg is entitled to all its legal costs by court order, it follows that, as there is no evidence of a contrary agreement, Eircom is obliged to reimburse ComReg 100% of its costs regarding the stenographer.