THE HIGH COURT

[2021] IEHC 158

RECORD NUMBER: 2020 204 CA

BETWEEN

IN THE MATTER OF THE LANDLORD AND TENANT (GROUND RENT) ACTS 1976 – 2007

PRIME GP2 LIMITED

APPELLANT/DEFENDANT

AND

TECHNOLOGICAL UNIVERSITY DUBLIN

RESPONDENT/PLAINTIFF

JUDGMENT (COSTS) of Ms. Justice Niamh Hyland delivered on 5 March 2021

Introduction

1. The plaintiff ("TUD") submits that it was largely successful in the appeal before this Court (*Prime GP2 Limited v. Technological University Dublin* [2021] IEHC 88) and that it ought to be entitled to the costs of the appeal, as the defendant ("Prime") was unsuccessful in all but one of the grounds argued at the appeal. Regarding conduct, TUD maintains that it sought, at all times, to ensure the matter would be dealt with expeditiously and fairly, whereas Prime's conduct was designed to cause delay and difficulty in the proceedings.

2. Prime argues that it was entirely successful in the appeal and is therefore entitled to its costs before the High Court. It further argues that the Court should also substitute the Order for costs made in favour of TUD in the Circuit Court with an Order directing that TUD pay the costs of the Circuit Court, and that this Court should vary the award of the County Registrar so as to direct TUD to pay Prime's costs before the County Registrar. Prime argues that TUD failed in relation to the "live issues" in the appeal, i.e. the question of whether the 1978 lease was a separate leasehold interest and whether there was a "building" on the lands the subject of the 1978 lease. Prime also argues that the Court should take into account the conduct of the parties before and after the proceedings, pointing to the conduct of TUD when it attempted to deny Prime its right of appeal by attempting to enforce the County Registrar's award prior to the hearing of the appeal.

Legal Test

3. Sections 168 and 169 of the Legal Services Regulation Act 2015 (the "2015 Act") are concerned with legal costs. Section 168 gives the power to the court to make costs orders. Under s. 168(2)(d), the order may include an order that a party shall pay:

> *(d) where a party is partially successful in the proceedings, costs relating to the successful element or elements of the proceedings;*

4. Section 169 provides that a party who is entirely successful in civil proceedings is entitled to an award of costs against a party not successful unless the court orders otherwise having regard to the nature and circumstances and the conduct of the parties.

5. The definition of a success on the event is identified in the decision in *Chubb European Group SE v. Health Insurance Authority* [2020] IECA 183, as per Clarke J. in *Veolia Water UK plc v. Fingal County Council (no. 2)* [2007] 2 I.R. 81, as being the securing of a *"substantive or procedural entitlement which could not be obtained without the hearing*

concerned" (para. 2.8 of Veolia). Such a party should normally obtain their costs even if not successful on every point. But under the approach in *Veolia*, now reflected in s. 169, even where an event is identified, if the party has not been successful on an identifiable issue which has materially increased the costs of the case, then the party may not get their full costs. At paragraph 31 in *Chubb*, Murray J. observes that when allocating time between issues, one takes account not merely of court time but also the costs of the legal submissions and affidavits. The exercise falls to be conducted adopting a relatively broad-brush approach and it is not possible to achieve a mathematically perfect allocation of time, effort and costs.

Application of principles to this case

6. In this case I find Prime was only partially successful and that therefore I should exercise my jurisdiction under s.168(2)(d) and grant it costs relating to the successful elements of the proceedings. It sought to prevent TUD from acquiring the fee simple in both plot A and plot C, arguing that the two plots ought to be treated separately. I agreed with that submission and treated them separately. However, Prime objected to the acquisition of both plot A and plot C, when treated separately. I upheld its objection in respect of plot C and dismissed its objection in respect of plot A. It cannot therefore be considered to be fully successful.

7. In respect of plot C, Prime persuaded me that plot C should be treated separately to plot A as it was not held under the same lease. It successfully identified that there were no buildings on plot C and therefore the statutory conditions were not satisfied. It has succeeded in preventing the acquisition of plot C. However, Prime was unsuccessful in an alternative argument it made, to the effect that if the 1952 lease was to be interpreted as governing both plots, then there must have been a surrender and regrant of the lands and, in those circumstances, there would still be no entitlement to acquire the lands the subject of the 1978 lease (although that latter position was resiled from in the High Court). For the reasons I explain in the judgment, I found it necessary to rule on the surrender and regrant argument and determined that the lease of 1978 did not effect a surrender of the 1952 lease and a regrant of the lands.

8. In respect of plot A, Prime failed in its attempt to introduce a new ground to prevent the acquisition of that plot, i.e. that plot A contained unbuilt upon land that was not subsidiary/ancillary.

9. Prime was also unsuccessful in relation to its claim that it had not been correctly served, which claim, if successful, would have prevented the acquisition of both plot A and plot C.

10. In view of Prime's partial success, it is only entitled to 70% of its costs before the High Court. I have arrived at this percentage for the following reasons.

11. In the High Court, the arguments as to whether the 1978 land was held under the 1952 lease and, if not, whether there were buildings on the 1978 lands, and when those buildings were constructed for the purposes of s.10(1) of the Landlord and Tenant (Ground Rents) (No. 2) Act 1978 took up a significant amount of time both in the

affidavits and submissions, and at hearing. The surrender and regrant issue took up a reasonable amount of time both in the written and oral parts of the case. The attempt to introduce a new ground took up a significant amount of the hearing, but there was practically no reference to it in the written material provided to the court. The argument about service took up little time at the hearing, but a reasonably significant volume of the affidavits and submissions. Overall, given the allocation of time between the matters where Prime succeeded and those where it did not, it seems to me Prime should get 70% of its costs in the High Court.

12. Following the approach in *Veolia* and *Chubb*, I must then award costs to TUD in respect of the areas where it successfully resisted the arguments of Prime. I observe that Veolia was decided well before the 2015 Act was commenced and thus the passage set out below does not address the Court's jurisdiction under s.168. Nonetheless, where s.168 is invoked, it seems to me that the approach identified below is equally applicable.

13. In *Chubb* Murray J. held that:

> *"11. The second situation arising from Veolia is where an 'event' is identified, but where the party who has prevailed on that event has not been successful on an identifiable issue or issues which have materially increased the costs of the case. In that circumstance the successful party may obtain his costs but may suffer two deductions –one in respect of his own costs in presenting that issue, and the other requiring him to set off against such costs as are ordered in his favour, the costs of his opponent in meeting it (see Veolia at para. 2.10 and O'Mahony v. O'Connor[2005] IEHC 248, [2005] 3 IR 167). …*
>
> *12. What is important for present purposes is that in this second scenario the logic of the analysis in Veolia may prompt a situation in which a party who succeeds 'on the event' nonetheless ends up with costs being ordered against it. At first glance, this appears counter-intuitive. However, once it is understood that this will only occur where the relief has been granted on the basis of a ground that has occupied very little of the time at hearing, and where the issues on which the bulk of the parties' attention has been focussed have been resolved in favour of the party unsuccessfully resisting that claim for relief, it makes sense."*

14. TUD was successful in its attempt to acquire of plot A, over the objections of Prime both in relation to the service point and the attempt to introduce a new ground of appeal. Given the relative time apportioned to those issues, identified above, I find that TUD is entitled to 30% of its costs in the High Court to reflect its success in those areas, with a set off to be applied as identified in *Veolia*.

15. In the Circuit Court and before the County Registrar, there was no attempt by Prime to rely on a ground in respect of the lack of subsidiary/ancillary land to ground an objection to the acquisition of plot A. In respect of all other matters, the position largely mirrored that in the High Court, although it is more difficult for me to estimate how much time the various issues took up at hearing, not having been present. To reflect the above factors, I

will adjust the percentages somewhat and give Prime 80% of its costs and TUD 20% of its costs in both the Circuit Court and before the County Registrar, with a set off to be applied as identified in Veolia.

16. In its submissions, Prime submitted its position as a property owner with constitutionally protected rights should be weighed in the balance and points out it was entitled to litigate the question of whether TUD enjoyed a right to appropriate its property. It suggests that should it not recover all its costs, it will have been penalised for seeking to vindicate its property rights. There is no merit in this argument. Prime was entitled to dispute the entitlement of TUD to acquire plot A and plot C; it failed in respect of the first and succeeded in respect of the second. The costs decision I have made reflects that, in accordance with s.168 and case law. The application of the law on costs does not constitute a penalisation for seeking to vindicate its rights.

17. Prime has also asked that I reflect in the costs Order the conduct of TUD when, on Prime's submission, it attempted to deny Prime its right of appeal by attempting to enforce the County Registrar's award prior to the hearing of the appeal. I have no knowledge of this issue: the first time it was ever raised was in the written submissions on costs filed by Prime. It was not raised by Prime in the hearing before me. Nor was the motion of 19 January 2021, that Prime alleges ought not to have been brought, put before me. The legal submissions refer to the County Registrar "very properly" refusing to entertain the application until this appeal was determined. No explanation is given as to whether there was any application for costs by Prime before the County Registrar and if so, the approach of the County Registrar.

18. In summary, given Prime's decision not to raise this issue at the hearing, and my consequent lack of knowledge about this issue, as well as the fact that it seems more properly a matter for the County Registrar, I decline to treat this matter as a relevant factor.

19. Finally, a misconceived application for discovery was made by Prime on the morning of the trial which took up half of the first day. Prime was unsuccessful in that application and TUD is entitled to the costs of the discovery application.

Form of Order

20. I note from the submissions that it is agreed between the parties that the purchase price to be paid for Prime's interest in the lands the subject of the 1952 lease is €8,150 and I accordingly make the following Order:

- An Order awarding the fee simple and any intermediate interests in the premises held under the lease identified at paragraph (i) of the Second Schedule i.e. the 1952 lease, together with intermediate interests (if any) to TUD;

- An Order fixing the purchase price to be paid by TUD herein for the purchase of the said fee simple and any intermediate leasehold interests at €8,150;

- Costs on the basis of the within judgment.