

Costs awards Defining the event

July 2018



When a party is successful in litigation, the usual rule is that costs follow the event. In most cases, the event is easily defined and causes little difficulty in terms of the resulting costs Order. However, the recent case of *Fastwell Limited –v- OCL Capital plc* [2018] IEHC 39 shows that defining the event is not always as straightforward as it may seem.

Background

The Plaintiff and Defendant were parties to an Agreement for Lease (“AFL”) for a lease over two kiosks at Grand Canal Square. The proceedings originally sought a Declaration that the Agreement was valid and effective and had not been terminated, amongst other reliefs. A key feature of the AFL was that if the Plaintiff did not get the necessary planning permission within six months of the date of execution of the AFL, either party could terminate the AFL on one week’s notice.

Planning permission was obtained by the Plaintiff but the permission obtained was in respect of a significantly enlarged demise, to include space in the basement. The Defendant contended that planning permission had not been obtained within the required time period and ultimately served a Notice of Termination on the Plaintiff.

During the trial, it emerged that the Plaintiff had failed to make proper discovery and that it was seeking to rely on pre-contractual dealings that had not been pleaded in its Statement of Claim.

The Court ruled that the Statement of Claim did not plead with sufficient particularity the events subsequent to those described in the Statement of Claim and gave liberty to deliver an amended Statement of Claim.

The amended Statement of Claim

An amended Statement of Claim was delivered by the Plaintiff that incorporated extensive and significant revisions and amendments. The Court ultimately ruled that the Order granting liberty to amend the Statement of Claim did not permit these significant revisions and amendments. On the Plaintiff’s application, the Court gave liberty to the Plaintiff to deliver this significantly amended Statement of Claim.

The amended Statement of Claim sought, amongst other reliefs, an Order rectifying the AFL to provide that planning permission, included permission for a development in accordance with the plans submitted to Dublin Docklands Development Authority that included the basement area.

The resumed trial

The trial resumed before Mr Justice O’Connor in December 2017 and was heard over the course of four days. The Plaintiff’s witnesses gave evidence as to the pre-contractual dealings between the parties to support the argument that at all times the Defendant knew their plans for the basement and that the extent of the demise covered by the lease included the basement.

During the afternoon of the last day at trial, Judge O’Connor, in an effort to break the deadlock between the parties, asked if the Plaintiff would be willing to accept the smaller demise that the Defendant asserted was covered by the lease. The Plaintiff confirmed it would accept this smaller space.

Judgment

Mr Justice O'Connor delivered Judgment on 2 February 2018 and informed the parties that he proposed making Orders that included a Declaration that the agreement between the parties had not been terminated, an Order enabling the Plaintiff to commence work on the smaller demise, an Order dismissing the Plaintiff's claim for rectification and an Order dismissing the Plaintiff's claim for damages for breach of contract (the "proposed Orders").

Final Orders and costs

The matter of final Orders and costs came before Mr Justice O'Connor in May 2018. The Plaintiff informed the Court that it had no difficulty with an amendment to the proposed Orders suggested by the Defendant.

The Court then dealt with the matter of costs. The Plaintiff submitted it was entitled to its costs having won its case regarding the question of the validity of the lease. The Plaintiff suggested that 1.5 days of costs could be awarded to the Defendant in respect of the rejected claim for rectification.

The Defendant argued that the Plaintiff had not succeeded, as its entire case following the amended Statement of Claim was in respect of the enlarged demise. The Defendant further submitted that simply being pleased with the result, did not entitle the Plaintiff to contend that the 'event' had been determined in its favour. Accordingly, the Defendant applied for its costs.

The Court noted that costs followed the event; but the 'event' in this case was not the event as pleaded by the Plaintiff. The Court accepted the Defendant's submission that whilst the Plaintiff was pleased with the Orders, that was not the case it had pleaded or pursued until the very last moment of the trial.

The evidence adduced related to the claim for the enlarged demise. The Court was critical of the case pleaded by the Plaintiff, commenting that had it listened to its advisers and been realistic in its approach, it could have made a more succinct claim.

The Court found that the Plaintiff had failed in its claim, and costs followed the event. However, in recognition of the fact that not all of the issues were decided in favour of the Defendant, the Court excluded the costs of two days of hearing.

Comment

Litigants should take note that just because a party may be pleased with the result of a hard fought case, it does not necessarily mean that they will be successful in obtaining an Order for costs. The importance of the 'event' cannot be overstated. Should a litigant depart from the event as pleaded, there may be associated costs risks.

The recent case of O'Reilly & Anor v Neville & Ors [2018] IEHC 228 also shows a departure from the usual costs rule. In this case, the Plaintiffs rejected six open offers of settlement from the Defendants. When considering the matter of costs, a Court can have regard to the terms of a settlement offer (except tenders or lodgements), whether it be an open offer or when made on a without prejudice basis save as to costs.

Here, the Court found that the Plaintiffs' failure to accept the final offer, which it noted was comprehensive, resulted in all of the costs from that date. As a result, the Court awarded all of the costs of the trial (with the exception of one day that related to a matter not dealt with by the settlement offer) to the Defendants.

The above cases serve as a useful warning to litigants who seek to rely on the well-established rule that costs follow the event. Not only should the "event" be as pleaded, but also the lack of meaningful engagement with the other side on offers may result in the successful party being penalised on costs.

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EVE.DUB.1890 07/18