UNAPPROVED
THE COURT OF APPEAL

Neutral citation Number: [2021] IECA 136
Appeal Number: 2019/427

Whelan J.
Faherty J.
Binchy J.

BETWEEN/

CASTLETOWN FOUNDATION LIMITED

PLAINTIFF/RESPONDENT

- AND -

GEORGE MAGAN

DEFENDANT/APPELLANT

Ruling on costs of Ms. Justice Faherty dated the 7th day of May 2021

1. This Court delivered its judgment ("the principal judgment") on 21 December 2020, dismissing the defendant's appeal from the judgment and Order of Hunt J. At para. 144, the Court stated:

> "The plaintiff, who succeeded in the High Court, has succeeded in this appeal. Accordingly, it follows that the plaintiff should be entitled to its costs. If, however, either party wishes to seek some different costs order to that proposed they should so indicate to the Court of Appeal Office within twenty one days of the receipt of the electronic delivery of this judgment, and a costs hearing will be scheduled, but any party seeking such a hearing will run the risk that if they are unsuccessful they

may incur further costs. If no indication is received within the twenty-one-day period, the order of the Court, including the proposed costs order, will be drawn and perfected."

2. On 11 January 2021, the defendant delivered brief written submissions seeking no order as to costs or, in the alternative, a stay of twelve months on any costs award to the plaintiff

3. The defendant advances the following submissions in aid of his argument that there should be no order as to costs in the appeal. Firstly, had he succeeded in his appeal, he would have sought costs from the plaintiff. He contends that the guiding principle for the Court should not be simply whether or not he was successful in the appeal. He asserts that the circumstances which led to his non-attendance in the High Court should be considered. He says that, essentially, he failed to communicate with sufficient speed and clarity his medical condition to the High Court prior to the hearing of the action. He further states that his lack of legal representation in the High Court was due to his inability to access sufficient funds to retain a legal team. He points to the fact that he was previously and regularly in correspondence with the plaintiff asserting that the plaintiff was responsible for his inability to access funding for legal representation.

4. He further contends that while this Court has concluded that he had no reasonable prospect of success in defending the proceedings there are two reasons why that view should not be the basis of a costs award against him. He asserts, firstly, that had he better communicated his medical circumstances, the High Court would not have proceeded to hear the case in his absence. Accordingly, had the proceedings been adjourned, he would not found himself in the position of having to satisfy this Court that there was a real purpose to a re-hearing being conducted in the High Court and that he had a real prospect of success. Secondly, he contends that had this Court remitted the matter to the High

Court, his cross-examination of the plaintiff's witnesses would have resulted in an entirely different outcome to that arrived at by the High Court. He asserts that the root cause of his failure in the proceedings was the absence of representation which he claims has been caused by the plaintiff.

5. The plaintiff delivered its submissions on costs on 26 January 2021. It submits that there is no basis for a departure from the usual rule that costs follow the event. It points to the fact that it successfully resisted the defendant's appeal on all grounds, that the Court found the appeal devoid of merit and that as a result of the appeal the plaintiff has been put to the significant cost of having to resist same.

6. It is submitted that there are no special circumstances that warrant no order for costs being made. Every point raised by the plaintiff in defence of the defendant's appeal was accepted by the Court and there was nothing in the plaintiff's conduct that gave rise to unnecessary court time in the manner in which it resisted the appeal. Counsel submits that the defendant seeks only to rely on factors relevant to his own personal position in order to justify the making of no order as to costs. It is submitted that neither of the factors relied on by the defendant (his previous medical circumstances or the fact that he was unrepresented at the High Court), even if accepted on their face, can justify a departure from the usual costs award. Neither of the factors explain or justify the defendant's decision to take an appeal that was entirely devoid of merit.

Discussion

7. Section 169(1) of the Legal Services Regulation Act 2015 ("the 2015 Act") provides as follows:

> "169**.** (1) 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 orders otherwise, having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties, including—

(a) conduct before and during the proceedings,

(b) whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings,

(c) the manner in which the parties conducted all or any part of their cases,

(d) whether a successful party exaggerated his or her claim,

(e) whether a party made a payment into court and the date of that payment,

(f) whether a party made an offer to settle the matter the subject of the proceedings, and if so, the date, terms and circumstances of that offer, and

(g) where the parties were invited by the court to settle the claim (whether by mediation or otherwise) and the court considers that one or more than one of the parties was or were unreasonable in refusing to engage in the settlement discussions or in mediation.

(2) Where the court orders that a party who is entirely successful in civil proceedings is not entitled to an award of costs against a party who is not successful in those proceedings, it shall give reasons for that order."

8. The new statutory regime, together with the relevant provisions of O. 99 of the Rules of the Superior Courts as they stand since 3 December 2019, now provide the backdrop against which decisions in respect of costs are to be made. The new regime was considered in *Chubb European Group SE v. The Health Insurance Authority* [2020] IECA 183. In the course of his judgment for the Court, Murray J. set out, at para.19, the principles to be applied by the Court in determining costs post December 2019. Section 169(1) provides that where the parties seeking costs has been "*entirely successful*" in the proceedings, such party "*is entitled to an award of costs unless the court orders*

otherwise". In determining whether to order otherwise, the Court should have regard to the *"nature and circumstances of the case"* and "*the conduct of the proceedings by the parties*".

9. Thus, the general principle is that where a party has been entirely successful, the default position is that they should get their costs. However, as provided for in the statute, notwithstanding that a party may have been *"entirely successful"* in proceedings, s.169(1) also provides that the Court may order otherwise than awarding costs to the entirely successful party.

10. I am satisfied that none of the factors set out in s.169(1) as to when a court might order otherwise than awarding a successful party their costs assists the defendant in his request that there should be no order as to costs. Firstly, there is nothing in the nature and circumstances of the case that, to my mind, warrants a departure from the default position on costs. The proceedings are not in any way exceptional such as might lead the Court to consider making no order as to costs in the appeal. In the proceedings, the plaintiff sought particular reliefs against the defendant, which the High Court was satisfied to grant. The trial judge's findings were, effectively, upheld by this Court in the principal judgment when it found that there were no grounds established which would warrant the setting aside the judgment of the trial judge for alleged procedural unfairness. This Court also found that there were no grounds established that would warrant the High Court judgment being set aside on the basis that the defendant had a reasonable prospect of success in establishing that he had an entitlement to a new tenancy. Accordingly, the defendant's assertion, in his submissions, that had he appeared in the High Court he might have been successful is belied by this Court's finding that he had "not shown this Court that he has a good defence on the merits or that he has a defence which has a reasonable prospect of success, or to put

it another way, a real chance of success". It is in those circumstances that the plaintiff can be said to have been "entirely successful" in the appeal.

11. Save the claim that it was the actions of the plaintiff that deprived him of legal representation (which I address below), the defendant does not contend that the manner in which the plaintiff otherwise conducted the proceedings warrants not making an order for costs to the plaintiff. Nor were any such findings made by the Court in the principal judgment.

12. As to the defendant's contention that the plaintiff was responsible for his lack of legal representation at the hearing before the High Court or during the appeal, there is no merit in that claim. The defendant makes mere assertions in this regard: he has provided no evidence that the plaintiff interfered with his ability to retain legal representation. Indeed, in its submissions, the plaintiff points to the defendant's frequent change of legal representation in the course of the proceedings which, the plaintiff submits, was part of a broader strategy on the defendant's part of delay and obfuscation. While I make no finding on the frequency with which the defendant changed his legal representation, or the reason for same, as I have said, the fact that the defendant did not have legal representation either at the hearing of the action, or in the course of the appeal, cannot be laid at the plaintiff's door.

13. In his submissions, the defendant cites the dictum of Murray C.J. in *Dunne v. Minister for the Environment* [2007] IESC 60, [2008] 2 I.R. 775 as authority for the proposition that where a party has been entirely successful, an award of costs may not necessarily follow:

> "The rule of law that costs normally follow the event, that the successful party to proceedings should not have to pay the costs of those proceedings which should be borne by the unsuccessful party, has an obvious equitable basis. As a counterpoint

> to that general rule of law, the court has a discretionary jurisdiction to vary or depart from that rule of law if, in the special circumstances of a case, the interests of justice require that it should do so. There is no predetermined category of cases which fall outside the full ambit of that jurisdiction. If there were to be a specific category of cases to which the general rule of law on costs did not apply that would be a matter for legislation since it is not for the courts to establish a cohesive code according to which costs would always be imposed on certain successful defendants for the benefit of certain unsuccessful plaintiffs."

14. The court's overriding general discretion to depart from or vary the rule that costs follow the event, as expressed in *Dunne,* is in fact preserved by s.168(1)(a) of the 2015 Act and O.99, r.2(1) RSC. However, the general thrust of the 2015 Act is that it remains default position that the "entirely successful" party is entitled to their costs "unless the court orders otherwise". For the reasons already set out, I find no basis to order otherwise in this case. Overall, the defendant's submissions on costs do not engage in any meaningful way with the salient findings of this Court in the principal judgment, or indeed engage the Court's discretion not to make an award of costs. By and large, the defendant merely repeats arguments which this Court has already rejected in the principal judgment. He has not established any basis upon which the Court could find that the plaintiff is not entitled to its costs. The plaintiff is hereby awarded its costs in the appeal.

15. In the event that the Court granted the plaintiff its costs, the defendant requested a twelve month stay on any costs awarded against him on the basis that he is "confident by that time I will have vindicated myself in the courts". The plaintiff asserts that the defendant has not made clear what purpose a stay on any costs order awarded would serve and submits that given the findings of this Court on the merits of the defendant's position, there can be little likelihood of the outcome predicted by the defendant. It asks the Court to

bear in mind that the plaintiff is a trustee with responsibility to safeguard trust assets for the ultimate benefit of the beneficiaries of the trust. It is asserted that the within proceedings (which have been costly) have arisen out of a refusal by the defendant to accept the decision of the trustee to sell a trust asset, a decision that has been approved by the courts who have jurisdiction over the trust. In those circumstances, it is submitted that a stay on any potential execution of a costs award will only further prejudice the position of the trustee to do all it can to ensure that all appropriate steps are taken (such as can be taken) to lawfully preserve the value of the trust itself.

16. I find that there is merit the plaintiff's submissions in this regard. I am not persuaded that the defendant has established any basis for the twelve months stay he seeks. Accordingly, the request for a twelve month stay on the execution of the costs order is declined. The Court will, however, stay the execution of the costs Order for 28 days pending any application by the defendant to the Supreme Court for leave to appeal. If such application is made, there will be a stay of execution pending the determination of the leave application. In the event that leave to appeal is granted by the Supreme Court, it will be open to the defendant, on notice to the plaintiff, to seek a further stay on the execution of the costs order from the Supreme Court.

17. As this ruling is being delivered electronically, Whelan J. and Binchy J. have indicated their agreement therewith.