THE COURT OF APPEAL

UNAPPROVED
Appeal Number: 2021/73

Whelan J.
Faherty J.
Binchy J.

Neutral Citation Number [2022] IECA 291

BETWEEN/

GREENWICH PROJECT HOLDINGS LIMITED

APPELLANT

- AND –

CON CRONIN

RESPONDENT

JUDGMENT of Ms. Justice Máire Whelan delivered on the 19th day of December 2022

Introduction

1. Judgment on the substantive appeal was delivered by this court on the 6th July, 2022. This judgment is directed toward the proper allocation of costs arising therefrom.

Context

2. Three distinct aspects required consideration in relation as to liability for costs:

(i) High Court costs arising in respect of the respondent's motion seeking to dismiss the appellant's claim for want of prosecution arising from procedural failures and alleged non-compliance with the terms of an order made by Jordan J. in the High Court on the 8th July, 2019. The said motion was brought based on the *Tracey v McDowell* [2016] IESC 44 jurisprudence. The said application was

successful in the High Court [2021] IEHC 33 where an order dismissing the proceedings was granted. The said order was reversed by this court in the within appeal [2022] IECA 154. The High Court had made an order granting the respondent his costs of that motion. The respondent seeks to retain the said order as to costs of the application notwithstanding that same was reversed on appeal.

(ii) The appellant had brought a motion before the High Court in February 2021 seeking that the trial judge revisit its judgment [2021] IEHC 33 which had been delivered on the 20th January, 2021. The High Court delivered a further judgment [2021] IEHC 145 refusing to revisit its earlier judgment. The appellants appealed unsuccessfully to this court against same. Para. 128 of the judgment of this court [2022] IECA 154 delivered on the 6th July, 2022, provides:

> "*…the respondent is entitled to his costs in the High Court and in this court in relation to the appellant's application to reopen the proceedings which culminated in the judgment of Hyland J. dated 3rd March, 2021. Payment of the said costs to be stayed pending the conclusion of the within proceedings."*

Neither side appear to contest the said proposed order in regard to the appeal against the refusal of the motion to review the High Court judgment of 20th January, 2021. Accordingly, this aspect of costs is not in issue now.

(iii) With regard to the substantive appeal, judgment was delivered on 6th July, 2022 [2022] IECA 154 wherein the appellant succeeded in reversing the orders of the High Court which had dismissed the proceedings based on the *Tracey* jurisprudence as stated above.

3. This court identified a preliminary view as to costs of the substantive appeal - (iii) above - at para. 129 of the judgment as follows:

> "*… the appellant is not entitled to its costs in respect of the aspects of the appeal wherein it has succeeded. I am satisfied that the appropriate order, both in the High Court and this Court, is that there be no order as to costs (save as provided at para. 128 above in relation to the Revisit Judgment) in circumstances where the appellant pursued a whole variety of grounds which were clearly not maintainable and has succeeded on a limited basis principally in regard to the issue of proportionality."*

Additional reasons identified for refusing to make an order for costs in favour of the successful appellant and identifying reasons for the purposes of s. 169(1) of the Legal Services Regulation Act, 2015 as to why no order as to costs should be made in its favour were stated to include:-

> *"… the conduct of the appellant has not been satisfactory in the context of the pursuance of the proceedings from the date of their institution to date. The delays are exceptional and for the most part unwarranted and were both inordinate and inexcusable. Having instituted the proceedings and effected the sterilisation of the property by the registration of a lis pendens which was kept in place for over four years, the appellant exhibited no enthusiasm in pursuing its damages claim. I am satisfied it was not reasonable for the appellant to raise, pursue and contest a whole variety of issues in this appeal, including the nature and extent of the failures to comply with the relevant Court order and contending that its omissions were not serious or significant in that regard. Greenwich denied the significance of its own failures and conveyed a cavalier approach to the Rules of the Superior Court. Arguing that its failure to comply with the Directions Order was not persistent notwithstanding that same continued for many months beyond the deadline specified on the face of the order*

- and asserting that its explanations were legitimate for the failures when clearly, they were not, was sub-optimal and wasteful." (para. 129).

In respect of costs of the substantive appeal in this court, neither the appellant nor the respondent advanced any argument opposing the proposed order to make no order as to costs as outlined above. Accordingly, no issue arises for determination in respect of same.

4. Therefore, only the issue of costs at (i) above remains to be determined. The respondent asserts entitlement to costs of bringing the said motion, notwithstanding that the order granted by the High Court dismissing the proceedings was subsequently reversed by this court. In issuing its motion before the High Court, the respondent invoked the *Tracey* jurisdiction and thereby sought a dismissal of the appellant's proceedings by reason of the procedural failures of the appellant to comply with orders made by Mr. Justice Jordan in the High Court on the 8th July, 2019.

Context

5. The respondent's motion to dismiss involved the invocation of the jurisprudence derived from the decision of the Supreme Court in *Tracey v McDowell* [2016] IESC 44. Such an application involves the invocation of the inherent jurisdiction of the court to strike out proceedings for reasons or bases that typically fall outside Order 19, rule 28 of the RSC. The precise limits and scope of the *Tracey* jurisdiction have not been defined. Clarke J. (as he then was) at para 5.8 cautioned that *"…the response of a judge to a significant or persistent procedural failure in the course of case management must be proportionate in all the circumstances of the case…"*

6. A successful invocation of the *Tracey* principles will result in a dismissal of the proceedings. Such an outcome carries potentially existential consequences for any litigant and hence in that context an approach to the issue of costs where such an application has been found not to have been validly brought or otherwise has not succeeded requires to be

treated differently to outcomes that may arise in the context of costs applications in interlocutory type applications.

Arguments advanced by the respondent

7. In his submissions the respondent contends that this court ought to award him the High Court costs of bringing the motion for non-compliance with the Directions Order aforesaid *"…by reason of the clear and unambiguous findings of non-compliance with a court order and cumulative delay in the conduct of the proceedings."*

8. The respondent invokes the decision in *Moorview Developments Limited v First Active Plc.* [2011] IEHC 117 where at para. 4.12 Clarke J. (as he then was) emphasised that the deterrent quality that an order for costs may have in certain instances:

> *"…Courts have consistently expressed the view that procedural failures (even relatively serious ones) should not be met by orders which would affect the likely outcome of the proceedings per se, but rather should be dealt with by means of costs orders if at all possible. The deterrent of making a party have to pay any costs incurred by its own procedural failures is important. Likewise, it is important that procedural failures should not get in the way of coming to a just result for the case as a whole unless those procedural failures have made it difficult to give a fair trial. However, if parties are effectively absolved from the practical consequences of any costs orders, then it is difficult to see how a practice which confined the court to dealing with procedural failure through costs orders could be justified."*

9. The respondent advances the extensive procedural delays on the part of the appellant and the cumulative impact of same over the years as an alternative basis for awarding the respondent his costs in bringing the within High Court motion albeit that the orders made were set aside in their entirety in this appeal. Reliance was placed on the Supreme Court decision in *Lismore Builders Limited (in Receivership) v Bank of Ireland Finance Limited*

& Ors. [2013] IESC 6 in that regard. It was emphasised by the respondent, relying on the jurisprudence, including *M.D. v. N.D.* [2016] 2 I.R. 438, that the appellant had not succeeded on several of its grounds of appeal.

10. Citing *Delany & McGrath on Civil Procedure* (4th ed., Round Hall, 2018), para. 10-228 the respondent asserts *"Once default is established, the Court ordinarily refrains from granting the draconian relief of dismissal or strike out of a defence but customarily awards costs to the moving party."*

Consideration of the arguments

11. The dictum of Clarke J. in *Moorview* sought to be relied upon was made in a very specific context and that is underlined by the first sentence of the relevant paragraph, though same is not relied on by the respondent:

> "*4.12 One of the policy reasons why it is said that it is important that a jurisdiction of the type which I have identified exists, is to prevent parties having a 'free ride' as to how they conduct litigation, designed for their benefit, without there being any real risk of a meaningful costs order being made against them."*

Clarke J. further observed:

> "*4.13 I would not like to exaggerate the extent to which it is possible to be critical of the Cunningham Group for the way in which these proceedings were conducted. However, I have little doubt but that the overall costs of the proceedings from the perspective of First Active were significantly increased by reason of serious procedural failures on the part of the Cunningham Group. Those failures are well rehearsed in the many judgments already delivered in these proceedings.*
>
> *4.14 If anything, therefore, an assessment of the reasonableness with which the proceedings were maintained and progressed weighs against rather than for Mr.*

Cunningham who must be taken to have been the person who directed the proceedings."

12. It will be recalled that the said observations of Clarke J. in *Moorview Developments* arose in the particular context of the issues which at that point were being agitated before the High Court in the course of the long-running, multi-faceted litigation pertaining to the Cunningham Group. Clarke J. was considering two motions, one seeking to have an individual made personally liable to discharge costs awarded in favour of the plaintiff in certain linked proceedings and the second an application seeking to have an individual cross-examined in aid of execution in the context of orders previously made in linked proceedings against the individual concerned.

13. The decision in *Lismore* which the respondent invokes concerned an appeal against an order to dismiss claims brought by the plaintiffs by reason of inordinate and inexcusable delay pursuant to the court's inherent jurisdiction. A significant distinguishing feature in *Lismore* was the extent of the delay, which by the time judgment came to be delivered in the Supreme Court exceeded 22 years.

14. In the context in which the respondent seeks to deploy *Lismore*, sight must not be lost of the fact that same was a case decided on its very own particular facts. If anything, the decision of the Supreme Court in *Lismore* requires a fact-specific, bespoke approach to be taken in each case in evaluating firstly, whether an application that the suit be struck out be acceded to and secondly, in assessing whether in all the circumstances and having due regard to all the material aspects of the case but with particular reference to the conduct of the appellant, an order for costs ought to be made as an expression of the court's disapprobation for specific conduct and where it is considered proportionate, that the disapprobation of the court find expressions in an order for costs against the successful party.

15. As the judgment of this court made clear, the appellant did not succeed on all grounds of appeal it had advanced. In *M.D. v. N.D.* [2016] 2 I.R. 438, Clarke J. reiterated the principle that in the context of a claim for costs as asserted against a successful appellant where several grounds of appeal did not succeed, it must be clear that the costs of the proceedings were significantly and materially increased by the additional unsuccessful grounds:

> *"It is clear, therefore, that the proper application of the Veolia principles does not involve the Court in simply determining that an otherwise successful party was unsuccessful on one or more points raised. It is necessary, in order to depart from the principle that costs follow the event, that it be 'clear' that the raising of those additional unmeritorious points actually and materially increased the costs of the case. For example, it is by no means clear that the costs of a judicial review hearing which finishes within a day but which involved five points would be, to any material extent, greater than the costs of a similar judicial review proceeding which also finished within a day but which involved only three points. In such a case, the fact that one or more of the relevant points were lost by the otherwise successful party might well not, therefore, legitimately lead to the view that it was clear that the costs had been increased. The Court must not only be satisfied that the otherwise successful party has raised unmeritorious points but also that it is clear that the raising of those points has materially increased the costs of the litigation as a whole."*

16. That is a material qualification which it is appropriate to have regard to. The appellant was the successful party in this appeal. Some of the arguments and propositions were not sustained. The appellant succeeded on a number of discrete issues and grounds and crucially was successful overall in the appeal. The order of the High Court was found to have been erroneously made. The order was reversed. As a result, the appellant *"won the event"* and is entitled to pursue the litigation to a conclusion before the High Court.

The statutory regime – s. 169 of the Legal Services Regulation Act, 2015

17. The respondent was successful in its motion before the High Court to have the within proceedings dismissed for non-compliance with the substantive orders of the High Court made by Jordan J. aforesaid. That application was grounded on the *Tracey* jurisprudence. The respondents were granted an order for costs of the motion.

18. The appellants have been entirely successful in reversing that order on appeal. The matter now proceeds to a substantive hearing before the High Court. Notwithstanding that successful outcome, to mark its disapprobation this court was of the view that no order as to costs be made in respect of the appeal. Hence the ordinary principle that "*costs to follow event"* was not followed and I consider that to be a proportionate and fair determination in the context of the evidence regarding the relative delays, particularly in complying with the Order of Jordan J., the overall conduct of the appellant and all the material factors that have been set out in detail in the substantive judgment delivered on the 6th July, 2022.

19. Section 169(1) envisages that an "*entirely successful"* party is *prima facie* entitled to an order for costs. The appellant does not quibble with the view of the court that no order should be granted to it, notwithstanding that its appeal has been entirely successful and the orders of the High Court dismissing the proceedings are set aside. In reaching a conclusion not to award the appellants their costs as they might have reasonably anticipated, regard has been had to:

(a) Its conduct, particularly from the institution of the litigation, with particular reference to delay.

(b) The fact that there was a clear and sustained failure to comply with the directions given by Mr. Justice Jordan in the High Court on the 8th July, 2019.

(c) The court's dissatisfaction with the sundry reasons advanced by way of explanation for non-compliance, all of which have been explored in detail in the substantive judgment.

(d) The delays were particularly unsatisfactory in circumstances where the proceedings invoked the equitable jurisdiction of the court and were brought in the course of a receivership.

20. The respondent asserts in written submissions that:

"17. … this default and the prejudice to him can be somewhat mitigated by means of a costs order in his favour in respect of both applications before the High Court, and that it would be just that no order be made on this Appeal."

The actual prejudice alluded to is not elaborated upon in the said submissions and beyond the inconvenience that the delay in concluding the process of concluding the sale of the subject property undoubtedly entails, which was not demonstrated to be greater than marginal prejudice at most in the context of his position.

21. However, in my view, by analogy with the *Primor* principles, the *Treacy* jurisprudence and the jurisdiction which the Supreme Court has thereby identified, to borrow the language of Peart J. in *Bank of Ireland v Kelly* [2017] IECA 288, at para. 52, the said "*…jurisdiction does not exist so that a form of punishment can be inflicted upon a dilatory plaintiff as a mark of the Court's displeasure.*"

22. The balancing exercise called for was usefully analysed recently in *Cave Projects Ltd. v. Kelly & Ors*. [2022] IECA 245 where Collins J. observed:

"37. It is entirely appropriate that the culture of 'endless indulgence' of delay on the part of plaintiffs has passed, with there now being far greater emphasis on the need for the appropriate management and expeditious determination of civil litigation. Article 6 ECHR has played a significant role in this context. But there is also a

significant risk of over-correction. The dismissal of a claim is, and should be seen as, an option of last resort. If the Primor test is hollowed out, or applied in an overly mechanistic or tick-a-box manner, proceedings may be dismissed too readily, potentially depriving plaintiffs of the opportunity to pursue legitimate claims and allowing defendants to escape liability that is properly theirs. Defendants will be incentivised to bring unmeritorious applications, further burdening court resources and delaying, rather than expediting, the administration of civil justice. All of this suggests that courts must be astute to ensure that proceedings are not dismissed unless, on a careful assessment of all the relevant facts and circumstances, it is clear that permitting the claim to proceed would result in some real and tangible injustice to the defendant."

23. I am satisfied that the authorities sought to be relied upon by the respondent in support of his contention that the successful appellant ought to pay its High Court costs in respect of the motion brought for non-compliance with the said Directions Order are distinguishable in several material respects from the relevant facts in the instant case as referred to above. Issues of costs generally in these proceedings will remain to be determined by the trial judge where arguments as appropriate can be advanced by the respondent in light of the statutory regime. The evidence does not support a contention there were "*serious procedural failures*" established against the appellant of either the order or magnitude of those established in *Moorview Developments.* Likewise, taking account of all the circumstances disclosed and having regard to the totality of the material aspects of the case, the decision in *Lismore* sought to be relied upon is distinguishable. The respondent at no time conceded the appeal on any basis. It was open to the respondent to offer a less draconian compromise than the entire dismissal of the proceedings. Such options included suggesting a timetable to progress the proceedings that would be peremptory as against the appellant, and on the basis that the

respondent's costs would be paid by the appellant. Had an offer of this nature been made, it would have provided the appellant with the option of not having to pursue the appeal. As no such compromise was suggested, it would therefore not be either reasonable or proportionate for this court to award the respondent his costs in the High Court.

24. Having reviewed the papers, the sequence of events and submissions, I am not satisfied that the threshold of conduct required to be established against a successful appellant to warrant the making of the order for costs sought against the successful appellant is made out in the instant case.

25. Accordingly, in this case having due regard to the jurisprudence, the exceptionality of the *Tracey* principles which were not successfully invoked in this instance and the distinguishability of the central facts in this case from the jurisprudence, including *Moorview, Lismore* and *M.D. v N.D.* [2016] 2 IR 438, a proportionate exercise of the court's discretion, in light of O. 99 Recast and ss. 168 and 169 of the 2015 Act, warrants that the order of the High Court in respect of the costs of the respondent's motion brought for non-compliance with the Directions Order falls to be vacated and no order as to the costs of the said motion are made. There will be no order as to costs otherwise, (including in relation to this application directed towards the proper allocation of said costs), save and except in respect of the appeal against the revisit judgment as provided at para. 128 in the judgment [2022] IECA 154 and as referred to at para 2 (*ii*) above.

26. Faherty and Binchy JJ. concur with this judgment.