[2020] IEHC 472

THE HIGH COURT

[2015 No. 5549 P]

BETWEEN

DANA ROSEMARY SCALLON

PLAINTIFF

AND

INDEPENDENT NEWS AND MEDIA PLC TRADING AS THE IRISH INDEPENDENT AND TRADING AS THE SUNDAY INDEPENDENT AND TRADING AS THE SUNDAY WORLD AND TRADING AS THE BELFAST TELEGRAPH

DEFENDANT

JUDGMENT of Mr. Justice Richard Humphreys delivered on Wednesday the 8th day of July, 2020

1. The plaintiff complains of defamation arising from various publications on 10th and 11th July, 2014. On 3rd June, 2015 she issued a writ in the High Court of Justice in Northern Ireland, suing the publisher of the Sunday World, namely Sunday Newspapers Ltd.

2. She issued a plenary summons in this jurisdiction seeking damages for defamation on 9th July, 2015. This time, although the same solicitors were used, a different entity was sued, Independent News & Media plc. The plaintiff delivered a first statement of claim on 23rd October, 2015.

3. On 21st March, 2016 the defendant's solicitors told the plaintiff's solicitors, KRW Law, that they had sued the wrong defendant, and that information was delivered at a time when the plaintiff was still within the maximum potential two-year limitation period. That indicated a degree of commendable fair play by INM and their legal advisers that they had stated the position clearly before the limitation period had expired. However, the plaintiff's solicitors did not take the necessary action on foot of this crucial letter. Instead, they wrote back on 4th April, 2016 belligerently rejecting the idea that they had named the wrong defendant, and asserting that the owner of the company that publishes material is liable in defamation. They also raised the suggestion that the defendant might join the Sunday World as a third-party. That unfortunately misunderstands relevant court procedure. Tellingly perhaps, the letter also asked about the defendant's insurance policy. That could, on one view, be suggestive of the view that one shouldn't spend too much time worrying about the legal niceties because the matter mightn't trouble the court. Overall, one has to view the letter of 4th April, 2016 as a significant misstep by the plaintiff's solicitors. They had been put on notice that they had the wrong defendant. They still had time to make inquiries and to rectify the position, but instead they doubled down on the existing course. Failure to take the opportunity that they had at that point has led directly to the current situation.

4. On 29th November, 2016 they delivered a document which purports to be a second statement of claim. It is not headed as an amended statement of claim. A defence was delivered on 7th September, 2018.

5. On 26 November, 2018 the Northern Irish proceedings referred to above were settled with an apology.

6. On 3rd October, 2019 the plaintiff filed a motion seeking summary relief and on 9th March, 2020 the defendant filed the present motion to strike out the proceedings. It was quite logically agreed by the parties to take the defendant's motion first.

7. On 3rd July, 2020 that motion was part-heard and adjourned for a further clarifying affidavit on behalf of the defendant. On 6th July, 2020 the plaintiff applied *ex parte* for short service of a new notice of motion to add further defendants. I granted the order for short service although the motion didn't actually issue.

8. On 8th July, 2020 the plaintiff renewed the application and despite some misgivings on behalf of the defendant, I granted the order for short service again and made the motion returnable for later that day, which was the only way to facilitate the plaintiff's application given the at that point highly imminent expiry of the limitation period for any possible torts with a 6-year limitation period. I have now received helpful submissions on the motion to add defendants and the motion to strike out, from Mr. Mel Christle S.C. (with Mr. Eamonn Dornan B.L.) for the plaintiff and from Mr. Eoin McCullough S.C. (with Mr. Brian Gageby B.L.) for the defendant.

Was the plaintiff entitled to amend the statement of claim?

9. I am not sure this question makes a huge difference, but I had better answer it anyway for completeness. The plaintiff's solicitor claims on affidavit that he was entitled to deliver an amended statement of claim, without leave, at any time prior to the expiry of time for reply under O. 28, r. 2. However, that averment misunderstands the provision. The rules of court allow two time windows - what Hilary Delany, Declan McGrath & Emily Egan McGrath, *Delany and McGrath on Civil Procedure*, 4th ed., (Dublin, Round Hall, 2018), at p. 280, call "*certain limited time periods*". They are:

    (i). four weeks from the appearance – the amended statement of claim was not delivered during that time; and

    (ii). before the time limited for the reply – that didn't apply either because the defence had not been delivered as of the date on which the second statement of claim was purportedly delivered so the time for reply hadn't even begun. It seems to me that even disregarding the irregularity that the amended statement of claim was not headed as an amended statement of claim, and the further irregularity that it did not clearly specify the amendments, it was delivered at a time when leave of the court was required but not sought, and so should be struck out or at least disregarded.

Defendant's motion

10. The defendant seeks an order under O. 19, r. 28 of the Rules of the Superior Courts striking out the plaintiff's claims as disclosing no reasonable cause of action or as frivolous or vexatious, having no reasonable prospect of success, being bound to fail and/or being an abuse of process.

11. The principles were set out recently by Cregan J. in *Irish Bank Resolution Corporation Ltd. v. Purcell* [2014] IEHC 525, [2016] 2 I.R. 83, at 111-112. The plaintiff's claim must be

treated at its high water mark: see *per* Clarke J., as he then was, in *McCourt v. Tiernan* [2005] IEHC 268 (Unreported, High Court, 29th July, 2005) and *Salthill Properties Ltd. v. Royal Bank of Scotland plc* [2009] IEHC 207 (Unreported, High Court, 30th April, 2009).

Are the wrong defendants named?

12. The affidavits on behalf of the defendant establish that the defendant is not the publisher and is not trading as the entities named in the title to the proceedings. The publishers are three separate companies in the INM Group: Independent Newspapers (Ireland) Ltd., Sunday Newspapers Ltd. and Independent News and Media Ltd.

13. Unfortunately for the plaintiff, all three companies are named in black and white in the offending publications as being the publishers, so even the most minimal research would have established the position. Admittedly, in addition to naming the publishers, there are also references to INM - the Sunday World states it is printed by "*INM*" and the other two newspapers say they are "*INM Companies*" - but that doesn't make Independent News and Media plc the publisher in law of those newspapers. There is nothing to show that the defendant is the publisher of the three publications in question or the electronic publication at issue here. The INM website and other publications may describe INM as a publisher, but that doesn't make them an appropriate defendant, either generally or in these proceedings.

14. Reliance is placed on various judgments of the Superior Courts including *INM v. Director of Corporate Enforcement* [2018] IEHC 319 (Unreported, High Court, Noonan J, 1st June, 2018), at para. 2, which states that INM "*publishes a number of well-known newspapers*." That, however, is shorthand. INM is the holding company of publishers of a number of newspapers. Particular formulations in judgments don't change the reality of corporate arrangements. In any event, that case dealt with the appointment of an inspector to the parent company, so by definition the parent company was the appropriate defendant. There is no analogy with the present case and nor is there in relation to the other cases relied on, including *DPP v. Independent News & Media plc* [2017] IECA 341 (Unreported, Court of Appeal, 20th December, 2017). What's notable about that case is that in the High Court judgment, *DPP v. Independent News & Media plc* [2015] IEHC 882 (Unreported, High Court, 24th April, 2015), at para. 2, O'Malley J. notes that the very point at issue here that INM plc is the parent company of the publisher. In *Metro International S.A. v. Independent News & Media plc* [2005] IEHC 309, [2006] 1 I.L.R.M. 414, the question of who was the publisher in law in the context of defamation in publications by subsidiary companies simply wasn't addressed. Those cases were decided in other contexts. Outlines of fact in such cases don't bind the court for all future purposes and certainly don't decide the point at issue here. Any such cases couldn't decide by a side-wind as a matter of law for the purposes of all future litigation whether a parent company was the publisher of something published by the subsidiary.

15. Another case that articulates the distinction that is relevant here is *Independent News and Media and Independent Newspapers Ireland Limited v. Ireland (Application no. 55120/00)* (European Court of Human Rights, 16th June, 2005), where at para. 9, the

express distinction is drawn between INM as a parent company and Independent Newspapers Ireland Limited as publisher in the context of the law of defamation.

16. A further affidavit of Kevin Winters, solicitor for the plaintiff, refers to the INM Annual Report, but that doesn't establish day-to-day control of the publications by the parent company. Reference is also made to *de Rossa v. Independent Newspapers plc* [1999] 4 I.R. 432, but again the same point applies. A case from 20 years ago doesn't establish the correct defendant for defamation purposes in 2014. The fact that there are subsidiaries or associated companies or that that is acknowledged in articles of association or annual reports, does not make the parent company a publisher.

17. Mr. Christle claims that a parent company or a holding company has control over subsidiaries and thus is responsible for publications by the subsidiary, but that submission involves a misconception regarding company law. On that logic, shareholders would also be liable because they also control the corporate entity. Mr. Winters avers at para. 37 of his affidavit that, "*I say and am advised that the owner of a newspaper publication is liable for defamatory publications made in those publications*", but that unfortunately is a misconception. As Clarke J., as he then was, pointed out in *IBB Internet Service Ltd. v. Motorola Ltd*. [2011] IEHC 504 (Unreported, High Court, 9th November, 2011), at para 1.1, the separate existence of companies was "*perhaps, the most fundamental aspect of corporate law*", and that exceptions are "*rare and closely defined*". The court should be prepared to pierce the corporate veil in cases involving fraud or similar wrongdoing or where corporate affairs were run in an opaque manner that frustrates access to justice, but there is nothing like that here. The correct defendants are named explicitly in all of the publications. The plaintiff's solicitor simply failed to take the appropriate action by checking the publications, identifying the publishers named therein, and suing the correct defendants, and of course most strikingly by failing to change course when the problem emerged and there was still time to do so.

18. It is true that in Neville Cox and Eoin McCullough, *Defamation: Law and Practice*, 3rd ed. (Dublin, Claris Press, 2014), in the discussion of the definition of a publisher, it is noted that anyone involved in publication may be a publisher and it is stated that "*[i]t may extend to the proprietor of a newspaper*". That is true if the newspaper is *not* a corporate entity, but it certainly doesn't apply to the owners of a corporate publication who are not actually involved in the publication. Footnote 133 on p. 49 in Cox & McCullough cites David Price, Korieh Duodu and Nicola Cain, *Defamation* (London, Sweet & Maxwell, 2009) on this point, a text which contains a useful summary of the position. It begins at p. 26 n. 9, para. 3-03, by referring to three cases from the late 18th and the 19th Century, *R. v. Walter* (1799) 3 Esp. 21, *R. v. Gutch* (1829) Moo. & Mal. 433 and *Levien v. Fox* (1890) 11 N.S.W.L.R. 414.

19. Looking at those cases it is clear that they establish that the owner of a (non-corporate) newspaper may be both civilly and criminally liable although the possibility of exceptions is acknowledged in the later caselaw. The origin of that approach however, very much predates the development of company law, a point made very clearly by Price, Duodu and

Cain in *Defamation* where they say at pp. 26-27, "*[t]here is 19th Century authority to the effect that the "proprietor" of the publication in question will also be liable. However, the cases are primarily concerned with unsophisticated organisations where the publication is owned by an individual who will in any event be vicariously liable for the acts of his employee journalists. The modern day "proprietors", such as Rupert Murdoch and Richard Desmond are in legal terms simply directors and shareholders, even if their effective influence is the same. Directors are generally only liable where they have some personal involvement which amounts to authorising, directing or procuring the tortious act i.e. the publication of the defamatory statement. Michael Foot's attempt to show "authorisation" by Mr. Murdoch in relation to an article in The Sunday Times by virtue of the latter's alleged control over the editorship and political direction of the newspaper was never tested as the case settled.*"

20. That position is reinforced by the other authority referred to in Cox & McCullough which is *Evans v. Spritebrand* [1985] 1 W.L.R. 317, in which Slade L.J. said at p. 329 that "*a director of a company is not automatically to be identified with his company for the purpose of the law of tort*" and discussed liability in terms of whether the director had "*authorised, directed and procured*" the commission of the tort.

21. These kind of situations have nothing to do with the present case. There is simply no basis to suggest that the defendant knew anything about the offending articles or was in any way involved in the day-to-day running of the subsidiary companies so as to make it liable.

Can this problem be cured by the plaintiff's motion to add further defendants?

22. On the basis of the factual averments in the affidavit submitted on behalf of the defendant (which are not effectively countered), it is clear that the defendant in these proceedings was simply the owner of the publishers and was not itself involved in publication. Thus, at their high water mark, the proceedings as currently constituted are not stateable or alternatively are bound to fail. The general principle is that a claim should not be struck out if it could be saved by amendments: see *Sun Fat Chan v. Osseous Ltd* [1992] 1 I.R. 425.

23. Would an amendment save these proceedings? On the one hand, no amendment would save the proceedings as against Independent News & Media plc, so the action needs to be struck-out against the existing defendant anyway. In a more normal case, an error in the name of a defendant can be corrected by order of the court depending on whether it is a clerical error or more substantive one. Order 63, r. 1(15) of the Rules of the Superior Courts doesn't apply because suing a subsidiary instead of a parent company is not a clerical error: see *Sandy Lane Hotel Ltd v. Times Newspapers Ltd and Others* [2009] IESC 75, [2011] 3 I.R. 334. Order 15, r. 13 is wider, allowing rectification of the misjoinder or non-joinder of parties. While the authorities are not totally consistent as noted at *Delany and McGrath on Civil Procedure* (pp. 342-347), if a case is "*clearly or manifestly statute barred" per* MacMenamin J. in *O'Connell v. Building and Allied Trades Union* [2012] IESC 36, [2012] 2 I.R. 371 (at para. 52.2, p. 389), as against a proposed new defendant, there is no point adding such a defendant.

24. The plaintiff's last minute motion seeks an order pursuant to O. 15, r. 13 to add what would have originally been the correct defendants to the proceeding, but does not otherwise seek to amend the statement of claim. The statement of claim seeks the following substantive reliefs:

(i). damages for defamation;

(ii). damages for malicious falsehood;

(iii). damages for loss of reputation;

(iv). damages for breach of constitutional rights under Article 40.3.2; and

(v). damages for breach of privacy.

25. As well as establishing a stateable case to add additional defendants, the normal test *per* Clarke J., as he then was, in *Cunningham v. Springside Properties Ltd*. (Unreported, High Court, 2nd February, 2007), is that such an order will ordinarily be granted except where prejudice may occur by reason of the timing of the joinder either to the existing parties or to the proposed defendant. The submissions of the existing defendant may well be of assistance and such existing defendant has standing to make submissions as to why additional defendants should not be joined: see *Allied Irish Coal Supplies Ltd. v. Powell Duffryn Intl. Fuels Ltd*. [1997] IESC 11, [1998] 2 I.R. 519.

26. One then turns to the individual claims in the statement of claim to assess whether it is proper that new defendants should be added. Firstly, in relation to the defamation claim, a two-year limitation period under s. 11(2)(c) of the Statute of Limitations 1957 (as amended by s. 38 of the Defamation Act 2009), applies and there is no provision for further extension. Thus, the proposed action against the three additional defendants is clearly statute barred and no purpose would be served by adding them where that claim is bound to fail.

27. As regards malicious falsehood, the grounding affidavit for the motion doesn't aver that the plaintiff has a good cause of action and there is nothing on affidavit to suggest that the plaintiff has any evidence that the publication was malicious as opposed to simply being a mistake. There is nothing to suggest any reality to the malicious falsehood claim, which in the context seems to be just an attempt to dress-up a defamation action into something totally different simply to beat the current exigency of the Statute of Limitations. To that extent it seems to be a last minute legal escape hatch smashed open by the plaintiff's counsel without too much thought as to whether it is really leading anywhere. I don't think I'd be doing the plaintiff a favour anyway by letting that proceed much further because it seems to me it's going nowhere, even if there had been an averment that there was a good cause of action.

28. In addition, there is the question of prejudice. Mr. McCullough submits that the publisher of the *Belfast Telegraph* would be prejudiced because the defence contends that the *Belfast Telegraph* does not circulate in this jurisdiction, so that entity could have put in a

conditional appearance challenging jurisdiction. Admittedly, jurisdictional questions could still be raised even if the proceedings were amended, but they would be raised in the context of an existing highly convoluted set of proceedings that have gone on for five years without any stateable claim in fact existing in the absence of the amendment that is now sought. Mr. McCullough also makes a point in relation to Sunday Newspapers Limited trading as the *Sunday World*, that pursuant to the CJEU decision in *Shevill v. Presse Alliance SA,* Case 68/93 (Court of Justice of the European Union, 7th March, 1995) for the purposes of the Brussels Convention of 27th September, 1968 on jurisdiction and the enforcement of judgments as amended by the accession conventions, one can sue the publisher of defamatory material in the jurisdiction in which it is established for worldwide damages or sue in individual jurisdictions for damages in those jurisdictions. The defendant points out that the plaintiff has already recovered damages in Northern Ireland, yet there is nothing in the statement of claim to limit the damages sought to publication within this jurisdiction. Hence, it is submitted that on the face of things the plaintiff is seeking to recover on the double. That certainly does nothing for the argument that the present action is a suitable vehicle to be reprogrammed for any such new claims.

29. The absence of any averment that there is any evidence to support the claim of malicious falsehood is also relevant in the sense that *Kennedy v. Midland Oil Company* (1976) 110 I.L.T.R. 26, is authority for the proposition that where a party is not in a position to refer to any evidence in support of a plea, that plea should be struck out. There is simply nothing to suggest that there will be any evidence to establish malice.

30. Moving on then to the claim of loss of reputation, there is no tort of loss of reputation separate to defamation so there is simply nothing in that claim. It is one that is not known to the law.

31. The action for a breach of constitutional rights also fails because one cannot sue for breach of constitutional rights unless the relevant nominate tort is "*basically ineffective*" to protect the plaintiff's rights: see *Hanrahan v. Merck Sharp Dohme (Ireland) Ltd.* [1988] I.L.R.M. 629. The plaintiff had a potential cause of action in defamation against the three defendants, but that has been allowed to become statute barred. Failure to avail of the appropriate remedy doesn't render appropriate a remedy that would not otherwise be so.

32. Finally, the claim for breach of privacy is academic in the context of the present complaint about an inaccurate story. That claim seems to hang on printing a picture of the plaintiff, but she is a public figure, so publishing her picture (or at least an unobtrusive, unremarkable picture) taken in a public place where photography might reasonably be expected doesn't give rise to any cause of action separate from the defamation. If she can't sue for defamation because that is statute barred, she cannot achieve the same result by a side-wind. She also has the subsidiary problem that no good cause of action is averred to in her solicitor's affidavit.

33. Even if I am wrong that the malicious falsehood and privacy claims are not tenable, the action as proposed to be reconstituted against new defendants in relation to those two issues with the existing action struck out in its entirety as against the existing defendant

would bear so little resemblance to the existing proceedings as to make the present case (with all its now irrelevant procedural complexity), a totally unsuitable vehicle for such a process. It would be to turn the present lifeless proceedings into a legal Frankenstein's creation, to be jerked lumberingly into artificial animation.

34. In summary then the mutually reinforcing reasons why the addition of new defendants should not be allowed are as follows:

(i). allowing the motion would not amount to an amendment, but a totally new case with the existing case failing in its entirety - that in itself admittedly is not a sufficient reason on its own because that could apply in any case where a sole defendant is substituted, but it takes on additional importance because of the subsequent points;

(ii). the principal thrust of the action is in defamation and that fails both against the existing and the proposed new defendants because it's manifestly statute barred;

(iii). the claims regarding constitutional rights and loss of reputation are untenable and the proposed claims of malicious falsehood and breach of privacy are not only not supported by an averment that there is a good cause of action but are not backed up by anything to show that there is any evidence to support them;

(iv). on the face of things, those two claims are highly tenuous, if not frivolous, and something of a legal stratagem to circumvent the statute given that the primary relief is now statute barred;

(v). even if, contrary to the foregoing, the malicious falsehood and privacy claims had any real substance, if one subtracts the statute-barred defamation claim and the misconceived constitutional and reputation claim from the action as proposed to be reconstituted, what is left at best are just disconnected fragments of claims that bear so little resemblance to the existing case as to make this an unsuitable vehicle to be transmogrified into a receptacle for those claims;

(vi). no amendment is sought to the statement of claim, simply the addition of new defendants, but much of the statement of claim would not make complete sense with multiple defendants – it would need extensive amendment and no such amendment is sought;

(vii). there is significant prejudice caused to the proposed new defendants by parachuting the proposed new action into a highly complex and convoluted five-year piece of litigation that has come to a juddering end in a legal *cul de sac*;

(viii). there is a specific complexity and, therefore, prejudice in relation to the questions relating to the Brussels Regulation as noted above; and

(ix). there is also a specific complexity and prejudice regarding the contradiction between the existence of the Northern Irish proceedings and the fact that the statement of claim is not limited to publication in the State.

35. In all the circumstances it would not be appropriate to add new defendants. Therefore the consequence of finding that the wrong defendant has been named is that the action is bound to fail.

Order

36. The order will therefore be as follows:

(i). I will refuse the plaintiff's motion to add new defendants; and

(ii). I will allow the reliefs sought by the defendant and will strike out the claim in its entirety as bound to fail.

37. That outcome is a pity in the sense that the plaintiff did have a reasonably weighty cause of action to begin with, at least judged by reference to the outcome of the Northern Irish proceedings. The claim fails not through any real fault of the plaintiff herself, but through a series of errors by the plaintiff's solicitors. Firstly, in not taking cognisance of the publishers named on the face of the publications and in naming the wrong defendant; and secondly, in persisting in that course despite the problem being pointed out, until the limitation period expired, at which point the proceedings were doomed. Counsel, who don't seem to have been engaged until after that point-of-no-return, valiantly attempted to pull the matter out of the fire, but the problem is not remediable. I should emphasise though that the outcome does not take away from the fact that it has been accepted that the statements complained about regarding the plaintiff were totally erroneous.

Postscript regarding Costs – Friday, 24th July, 2020

38. Having heard the parties on the question of costs, Mr. Eoin McCullough S.C. has applied for costs against the plaintiff on the basis that they follow the event. Mr. Eamonn Dornan B.L. has resisted that on behalf of the plaintiff. Mr. Barra McGrory Q.C. appears representing KRW Law Solicitors on the question which I raised with the parties of whether there should be a costs order against the plaintiff's solicitors.

39. If an issue arises as to whether there should be costs against a solicitor, the court, under O. 99, r. 9, as it now is, can make whatever order is just. There are two options for applying that provision. The more conventional option is to order the costs in the normal way and then consider making an order over as against the solicitor. Alternatively, cone could leave the party out of the equation and simply make a costs order against the solicitor.

40. I considered whether it was worth looking at the option of cutting out the middleman and first considering the O. 99, r. 9 issue, but in these particular circumstances, Mr. McCullough was not seeking costs against KRW Law and Mr. Dornan said he was not taking issue with the plaintiff's solicitors either. So that being the position at this point in

time, it seems to me appropriate to proceed to consider costs against the plaintiff first and then, if necessary, I can come back to the question of an order over.

41. Mr. Dornan applied for further time to consider the matter and demanded an affidavit from the defendant and a bill of costs, but that is a misunderstanding of the procedure. There is no need for a notice of motion or an affidavit in order to apply for costs and there is no need for a bill of costs either at the stage of seeking an order for costs. That level of detail comes later in the process. He submitted that the defendant had not set out a theory of costs, but that is a misunderstanding. The theory is that costs follow the event. He said that the defendant cannot be awarded the costs of the entire proceedings because the plaintiff already has the costs for two motions: one in June, 2018 from O'Connor J. in relation to a motion for judgment in default of a defence; and another for the costs of a strike-out motion in default of an affidavit of verification. That objection is also a misunderstanding. An order for the costs of the proceedings does not disturb particular costs already awarded.

42. Mr. Dornan also complained the motion to dismiss could have been brought earlier – but so what? That does not mean the plaintiff is not liable for costs. He submitted that it is not clear what the event is, but that is a misconception. The event is the dismissal of the proceedings. He said the defendant was not entitled to any costs because of its dilatory behaviour as he characterised it, but the plaintiff has already been compensated for that by means of the existing costs orders which will stand in any event, subject to any possible set-off in the event of costs being awarded against the plaintiff.

43. He submitted that the court should consider Mr. Winters' affidavit in relation to the procedural history for the purposes of the defendant's costs application, but that affidavit does not provide a sufficient basis to displace the default order that costs follow the event. He suggested that the defendant should respond to Mr. Winters' affidavit before the costs matter could be decided, but no response is necessary for the purposes of the present application. The affidavit is largely about what Mr. Winters sees as the reasonableness of his position, revisits to that extent the ruling already made and, if anything, shows a determination to proceed with an application that is bound to fail.

44. The general rule is that costs follow the event: see *Dunne v. Minister for the Environment and Others* [2007] IESC 60, [2008] 2 I.R. 775. It is up to the loser to demonstrate the special reasons why that does not apply and that has not been done here. That rule has also been reinforced by s. 169 of the Legal Services Regulation Act 2015. Asking for further time is not such a reason. If an *ex tempore* judgment is given, even with a written version to follow, the parties should normally be in a position to deal with costs straight away. Mr. Dornan has already had the concession of one adjournment, and nothing substantial has been advanced as to why yet a further adjournment would be in the interests of justice or indeed would make any difference. And, of course, one has to have regard to the fact that repeated listings are just going to incur further costs for the defendant.

Order - costs

45. I will award the defendant the costs of the entire proceedings as against the plaintiff including the motions to have the proceedings struck out, the plaintiff's motion for summary judgment and the plaintiff's motion to add defendants, other than any interlocutory costs already awarded in favour of the plaintiff which stand and which the defendant can set off against the costs in favour of the defendant in lieu of actually paying such costs.

46. I will deal separately with whether there is any benefit in considering the question of an order over as against the plaintiff's solicitor under O. 99, r. 9 or indeed under any other order envisaged by rule 9.

Further postscript – O. 99 r. 9

47. Having heard the parties on this issue, the situation is that Mr McCullough is not getting involved, Mr Dornan seemed to be pinning his hopes on an appeal and had no gripes with his solicitor (whose interests he also sought to defend, strangely in the circumstances – and despite saying that an intended appeal was a factor, he didn't want the costs issue to be adjourned in case hypothetically that appeal didn't work out), and Mr McGrory contended that any alleged errors did not reach the level of gross negligence to warrant an order against his client. Following discussion, what was agreed to was just to adjourn that issue generally with liberty to re-enter so that if the plaintiff wants to revisit costs as between her and her solicitor in the hypothetical event of not winning any appeal, she would have that option.

48. But the situation does highlight a problem with the procedure – who speaks for the consumer? If costs are incurred due to a solicitor's error and a question arises as to whether the error reaches the threshold warranting a r. 9 order, what should one do if lawyers representing the consumer tell the court that client and solicitor are of one mind – the court has just got it wrong? Mr Dornan's abortive attempt to speak for his (separately represented) solicitor here just reinforced my sense that r. 9 is not very workable unless the lay client gets independent advice. Some form of *amicus curiae* would be required to speak for the consumer – particularly on appeal, because otherwise, if the trial court was the only actor that thought there was a case for considering r. 9, the appeal would be automatic in the absence of any party seeking to stand over any such result. Such a conundrum requires a more general solution, but adjourning the question for the time being is the best that can be achieved here. Very properly, as you would expect, Mr McGrory assured the court that if the issue were to revive itself, his solicitor would ensure that the plaintiff would be directed to obtain the appropriate independent advices.

Order – O. 99 r. 9

49. Accordingly, the question of whether to make any order under O. 99 r. 9 is adjourned generally with liberty to re-enter.