[2020] IEHC 78

THE HIGH COURT

[2010 No. 11561 P]

BETWEEN

CARLOS TESCH (A MINOR) SUING BY HIS FATHER AND NEXT FRIEND PETER TESCH

PLAINTIVE

AND

DUBLIN BUS AND EDDIE O'SULLIVAN

DEFENDANTS

JUDGMENT of Mr. Justice Kelly, President of the High Court delivered on the 24th day of February, 2020

Introduction

1. The issue which falls to be determined in this judgment is the extent to which the plaintiff is entitled to recover from the defendants "*all costs of and incidental to an application to take the plaintiff into wardship outside the jurisdiction*" in the circumstances which have occurred. That expression in parenthesis is reproduced from an order made by Irvine J. on consent on 6th May, 2014. A major dispute exists between the parties as to what precisely is covered by those terms of that order.

Background facts

2. On 4th February, 2009 the then minor plaintiff, who is a Spanish national, suffered catastrophic injuries in an accident involving the defendants. His case on liability was heard before Cross J. over four days in March 2013. Judgment was given in favour of the plaintiff with a reduction of 30% being made for contributory negligence. That decision was given on 24th April, 2013 and was the subject of an appeal to the Supreme Court. The decision of Cross J. was upheld by that court on 12th March, 2014.

3. The matter then returned to the High Court for the quantum of damages to be established. The action was compromised with the plaintiff being awarded a sum of €9 million against the defendants. There were a number of terms to the settlement which were reproduced in the order made by Irvine J. on 6th May, 2014. The order recites as follows:-

> *"And it appearing that a settlement has been reached herein subject to the approval of the court and on reading the pleadings herein*
>
> *And counsel for the plaintiff undertaking that an application will be made to the appropriate court in Spain in such form as is prescribed by the rules of that court for a declaration regarding the plaintiff's mental capacity to manage his property and affairs and for such further orders as may be required*
>
> *The court doth approve of the settlement and having regard to the findings on liability already made herein being 70% against the defendants and 30% against the plaintiff*

By consent

It is ordered and adjudged that the plaintiff do recover against the defendants the sum of €9 million and costs of action to include reserved costs and the costs of discovery and all costs of and incidental to an application to take the plaintiff into wardship outside the jurisdiction when taxed and ascertained."

4. The order then went on to direct payment out of part of the monies to the plaintiff's solicitor on foot of an undertaking to discharge specified sums and the balance of €7,594,589.81 was directed to be paid into court to the credit of the action. That sum was to be placed in BIAM GRU Cash Fund pending further order.

5. It is common case that the defendants paid to the plaintiff's solicitor and into court the respective shares of the settlement sum. The defendants also paid the plaintiff's costs of the action which were ultimately agreed in the sum of €1,213,527.29 in November 2014.

6. The defendant's only remaining liability in costs are those arising "*of and incidental to an application to take the plaintiff into wardship outside the jurisdiction*". It is that liability that has given rise to the issue that falls to be determined by me.

Events subsequent to the settlement

7. The final paragraph of the order of Irvine J. of 6th May, 2014 directed that the matter be listed for mention before her on 3rd June, 2014. The case was so listed and I have been provided with a transcript of what occurred then as well as a copy of the order made by the judge on that occasion.

8. Counsel for the plaintiff informed Irvine J. that the plaintiff's mother had raised a number of questions in relation to how payments came about and why those payments had been directed even though she had been kept informed at all stages what those payments were likely to be. Counsel for the plaintiff was of the view that following meetings with the plaintiff's solicitor the mother's concerns in that regard had been allayed "*at least a little*" but he pointed out that if she wished to travel over and makes her views known to the court that she had been told that the case could be adjourned for that purpose. He also informed the judge that inquiries had been made in relation to the wardship system of the Spanish courts. He said:-

"I suppose we're just concerned that if there isn't a way of allaying Mrs. Tesch's fears to her satisfaction that that might cause difficulty in relation to future payments or indeed these payments in terms of family law proceedings in Spain, it was a family lawyer who wrote to Mr. McMahon raising these concerns."

The judge then inquired as to what counsel wished her to do. This was the response.

"That's a good question Judge. I suppose – I suppose just to allow Mrs. Tesch an opportunity to attend court and that, I suppose, those payments might be explained to her. In any event, Judge, I think the matter is going to have to go back for the purposes of the ward of court issue, so hopefully it won't waste too

much of the court's time to perhaps give a short period to explain those payments to Mrs. Tesch. That's what she's asked for, Judge, so really, I suppose, I am asking on her behalf now."

9. The Judge was assured that the relevant monies had been paid by the defendants. The judge pointed out that Mrs. Tesch was not the next friend of the minor plaintiff and that she (the judge) was reluctant to start engaging with other parties. However, she said she would be prepared to direct certain special damages to be paid by the plaintiff's solicitor, for example, the fees due to Beaumont Hospital. At the conclusion the judge thanked the solicitors for the defendants for attending and said this:-

"I don't think there's any need for you to attend again because you've complied effectively with the court's direction in terms of you have cast off (sic) the monies, the subject matter of the settlement, so I don't think I should be running your costs up any further by asking you to attend again.

Counsel: Well, that was the only point that I was going to raise in relation to having Mrs. Tesch flown over, and I would just have – I don't know if that's going to come into the terms of a costs order in the substantive proceedings, if there are collateral or other issues.

Judge: Well, there can't be – the defendants can't be asked to pay any additional costs in relation to any – in relation to any –

Counsel for the plaintiff: We don't have any difficulty with that.

Judge: - any representation by the plaintiff's mother before the court. She's not the next friend even.

Counsel for the plaintiff: Very good, Judge, yes, I agree

Judge: So I don't think the defendants –

Counsel: I just want to –

Counsel for the plaintiff: We accept that. We accept that.

Judge: This could not fall to be discharged by the defendants, so I'll dispense with the need for the defendant's solicitors to attend on the next occasion."

10. On 3rd June the judge ordered the solicitor for the plaintiff to make payments to Beaumont Hospital and other entities as set out in the original settlement order of 6th May, 2014.

11. The matter came back before Irvine J. on 24th June, 2014 for mention in the presence of counsel for the minor plaintiff, counsel for the next friend and the solicitor for the mother of the minor plaintiff.

12. An order made on that occasion records that the payments to Beaumont Hospital and the other entities had been made and the court directed that an application was to be made to have the plaintiff made a ward of court. In addition, the judge made orders for the payment by the solicitor for the plaintiff of substantial sums of money totalling €664,832.76 to Eversheds solicitors for transmission to the mother of the minor plaintiff and the matter was listed again before Irvine J. on 22nd October, 2014.

13. The matter came back before Irvine J. on 29th July, 2014 in the presence of counsel for the plaintiff only. The order made on that occasion recites the three earlier orders and then goes on as follows:-

> *"And it appearing that an application will be made to have the plaintiff made a ward of court in Spain and that it is for the benefit of the plaintiff to make the payments set forth in the schedule to this order in the meantime."*

Payments specified in the schedule were directed to be effected.

14. There were a series of other applications made to the courts in this jurisdiction seeking payment out of funds on behalf of the minor plaintiff in respect of his medical and nursing treatment in Spain. Meanwhile what was happening about the wardship application in Spain?

The Spanish proceedings

15. The affidavit evidence before me including that from Ms. Olatz Alberdi Rey, a barrister representing the plaintiff's mother together with other material exhibited shows that the following is what happened.

16. The plaintiff's mother filed a legal incapacity claim to be appointed as the plaintiff's guardian in October 2014. The plaintiff's father delivered a defence to that claim on 10th November, 2014 and the matter was heard by a judge on 17th November, 2015. Judgment was delivered on 30th November, 2015 and the plaintiff's mother was confirmed as guardian. The plaintiff's mother was notified of that order on 5th December, 2015 and on 11th January, 2016 the plaintiff's father appealed that order. The mother filed her opposition to that appeal in March 2016. On 22nd March, 2017 an appeal court judgment was delivered dismissing the father's appeal. From that decision the father filed an application to the Supreme Court of Spain for admission of a further appeal from the decision of the appeal court judgment of March 2017.

17. On 20th December, 2017 the plaintiff's father's application for admission of the appeal to the Supreme Court was refused and the appointment of the mother as guardian was made final. The plaintiff was notified of this on 23rdJanuary, 2018. On 9th February, 2018 a statement of the plaintiff's incapacity and the appointment of the mother as guardian was made final. She then commenced proceedings in Spain in order to enable her to transfer the funds held in this court to be transmitted to the appropriate court in Spain. An order on her application was made by a Spanish judge on 13th February, 2019.

The Irish proceedings

18. Meanwhile, while the dispute was going on in Spain between the parents of the plaintiff, various applications were made to this court in respect of the funds remaining here. On 20th April, 2015 Binchy J. on hearing counsel for the plaintiff and the solicitors for the plaintiff's mother directed the plaintiff's solicitor to forthwith pay into the court to the credit of the action a sum of money which remained in the client account of the solicitor pursuant to the order of Irvine J. of 6th May, 2014.

19. On 22nd June, 2015 Binchy J., having heard counsel and solicitor for the defendants and the solicitor for the plaintiff's mother, directed payments be made in respect of the application to have the plaintiff made a ward of court in Spain.

20. On 22nd May, 2017 a motion was listed before me on foot of which I directed payment out of funds for the minor's benefit. A similar application was made on 30th July, 2018 and a further order on 27th May, 2019. Finally, on 20th June, 2019 I made an order for the transfer of the remaining funds in court to Spain, having been satisfied that there was an appropriate court order made in Spain and an account under the control of that court to which they could be transferred. I directed retention of a sum of €175,000 in this court.

21. In addition to the instances that I have mentioned there were also other appearances before this court calculated to amount in all to 18 appearances in court in this jurisdiction.

22. A very substantial bill of costs has been prepared by the solicitors for the plaintiff. The bill of costs does not include any court applications or work performed after 22nd May, 2017 and six such applications were made before this court since that date.

23. I am not concerned on this application as to the quantum of these costs but whether the defendants are liable for some or any of them having regard to the order made by Irvine J. on 6th May, 2014.

***Inter partes* correspondence**

24. A good deal of *inter partes* correspondence was exhibited but much of it has little to do with the question of principle which I have to decide. However, a number of letters do warrant specific mention because they highlight the dispute which exists between the parties. I begin with the letter of 3rd November, 2014 in which the defendant's solicitors in writing to the plaintiff's solicitors said:-

> *"As you know my clients are responsible to pay the costs of the wardship application in this case.*
>
> *We would be very grateful if you would please indicate the present position in respect of the wardship application."*

Thus from the beginning the defendant accepted a liability to the plaintiff in respect of wardship costs as identified in the order of Irvine J. of 6th May, 2014.

25. This resulted in the bill of costs to which I have already referred being presented by the plaintiff's solicitors to the defendants in a sum of €195,938.86. That bill was received by the defendant's solicitors under cover of a letter of 7th March, 2018 which read as follows:-

> *"We enclose bill of costs relating to the work vis-à-vis wardship.*
>
> *We should be obliged if you or your legal costs accountant could revert within seven days as our principals are anxious to conclude this long outstanding matter."*

26. That letter was responded to on 15th March, 2018 in the following terms insofar as relevant:-

> *"In the first instance you might please note that my principals dispute entirely the plaintiff's entitlement to recovery of the costs set out in the bill of costs. It would seem to the defendant that the claim for the plaintiff's costs herein as against the defendant herein is misconceived.*
>
> *In so far as the defendant is concerned the plaintiff's entitlement to costs arises on foot of the High Court consent order of 6th May, 2014 which provides for, in addition to the costs of the action (which were negotiated and paid some years ago) that the plaintiff will also be entitled to recover as against the defendant 'all costs of and incidental to an application to take the plaintiff into wardship outside the jurisdiction ….'. On that basis it appears that the only costs recoverable as against the defendant herein are the costs in respect of such wardship application.*
>
> *The defendant is of course prepared to deal with and engage in discussions in respect of the quantum of such costs of the application to take the plaintiff into wardship but nothing beyond such.*
>
> *Perhaps you would be kind enough to favour me with copies of all orders herein in pursuance of which the plaintiff purports to claim such additional costs as against the defendant.*
>
> *Perhaps you would also be kind enough to favour me with copies of all supporting vouchers and documentation in respect of all disbursements claimed in the bill of costs.*
>
> *Presumably there were Spanish lawyers retained to deal with the application to have the plaintiff taken into wardship in the Spanish jurisdiction. You might clarify the position in respect of any such costs which may have been incurred.*
>
> *On receipt thereof matters will be given consideration, however, it is suggested that in the circumstances of this particular matter and the history of this particular matter that the insistence by you of a response within seven days is unreasonable.*

On receipt of the detail and orders requested above matters will be considered in conjunction with my principals and I would anticipate reverting to you thereon once I am in receipt of my principal's further instructions."

27. The final letter to which I wish to make specific mention is that from Behan and Associates by way of advice to the solicitors for the defendant. The letter reads insofar as it is relevant:-

"The bill of costs presented as outlined previously in my view is entirely misconceived as it includes costs of the normal applications which would arise in any wardship matter, for payment out and so forth and the bill is drawn to a total of €195,938.86. It seems to me that the vast majority of these costs are the wards own liability which arise in respect of the normal wardship proceedings.

The costs which Dublin Bus have a liability for, however, are the costs as per the order of 6th May, 2014 which provides for the plaintiff to recover costs of the proceedings (which I of course previously dealt with) and in addition 'all costs of and incidental to an application to take the plaintiff into wardship outside the jurisdiction'.

Thus it seems to me that all Dublin Bus have a liability for are the normal costs of taking the plaintiff into wardship. The fact that the plaintiff was going to be taken into wardship in another jurisdiction in my view does not add anything further to the costs. Certainly the bill of costs as presented does not claim any additional costs of taking the plaintiff into wardship outside the jurisdiction but it seems to me it is the normal work which would be entailed in connection with any wardship matter.

As I said previously the bill of costs in my view is entirely misconceived as regards the costs which Dublin Bus have a liability for.

In the normal course of events one would anticipate a solicitor's professional fee in respect of a wardship application of somewhere in the order of €5,000 to €7,500 at the upper end. As the matter is I suspect a little more involved in view of the fact that the plaintiff was being taken into wardship out of the jurisdiction I would suggest that it might be appropriate to provide for a solicitor's professional fee of say €12,500.

Counsel's fees for the drafting of the wardship application in my view would be the norm and possibly a brief fee then of circa €1,500 at the upper level.

Thus I would suggest that the appropriate costs which Dublin Bus has a liability for would be somewhere along the following lines."

The letter then went on to set out the professional fee of €12,500 plus VAT giving a total of €15,375 in respect of the solicitor, a total of €3,013 to counsel and various other

outlays including the cost of medical affidavits giving a grand total of €19,823. The letter concluded:-

> *"As it is quite apparent there is a huge gulf between what has been claimed and what in my view is appropriate and I think it is doubtful that the matter is settleable, however, possibly you might be disposed to writing to the plaintiff's solicitors and maybe even enclosing a cheque in the above sum in full and final settlement of the defendant's liability under the provisions of the order of 6th May, 2014. Whilst I would have no difficulty in contacting Mr. Wilkins on this basis it seems to me that there is a difficulty in Mr. Wilkins getting instructions and there may be a difficulty in him 'getting this across the line'."*

28. Those letters demonstrate the impasse which has been reached between the parties concerning the implications of the consent order made by Irvine J. and its practical consequences in money terms.

29. This matter was heard on affidavit evidence together with oral evidence from Mr. Noel Guiden a legal costs accountant.

The order of Irvine J.

30. Counsel for the plaintiff argues that the order of Irvine J. made on 6th March, 2014 provides that the defendant must be liable not merely for the costs of the application to take the plaintiff into wardship outside the jurisdiction but also for all costs incidental to that. He contends, by reference to case law, that the expression "and incidental to" has and indeed must have a meaning more expansive than the mere award of costs simpliciter. He referred me to a number of decisions chief amongst them being that of Sir Robert Megarry V.C. in *In Re Gibson's Settlement Trust* [1981] Ch 179. In that case that judge said:-

> *"If the order for costs is not for costs simpliciter, but for the costs 'of and incidental to' the proceedings (and this is the language of the order in the present case), the words 'incidental to' extend rather than reduce the ambit of the order. It is true that in In Re Fahy's Will Trusts [1962] 1 WLR 17 it was held at first instance that in order for the taxation on a common fund basis of the costs 'of and incidental to the negotiations leading up to this order' the words 'and incidental to' confined the costs to those which were consequent upon the negotiations, and excluded those incurred before negotiations commenced. In that case, however, no cases were cited in argument, and the judge was told that there was no authority on the meaning of the words 'and incidental to', and what they added to 'costs' in an order for costs.*
>
> *I find great difficulty in seeing on what basis it can be said that the addition of these words drives out the right to antecedent costs which the Pecheries and Frankenburg cases established. The words seem to me to be words of extension rather than words of restriction. The litigant is to have the costs 'of' the proceedings and also the costs 'incidental to' the proceedings. This phrase cannot*

mean that the costs 'of' the proceedings are to be included only if they are also 'incidental to' them. The chief taxing master referred me to In re Llewellin [1887] 37 Ch. D. 317, a case on the application of capital money under the Settled Land Act 1882. By section 21(x), such money may be applied in payment of costs, charges and expenses 'of or incidental to' the exercise of powers under the Act; and Stirling J. at p.326 considered the force to be given to the words 'incidental to'. He said that they meant that in addition to the costs, charges and expenses which 'directly and necessarily' arose out of the exercise of powers under the Act, the words included those which were incurred 'casually or incidentally in the course of that exercise'. In Department of Health and Social Security v. Envoy Farmers Ltd. [1976] 1 WLR 1018, 1021, Jupp J. in considering the words 'incidental to' in relation to costs, adopted a dictionary definition that a thing was 'incidental' if it occurred 'in subordinate conjunction with something else'. However, Wright v. Bennett [1948] 1 KB 601 provides a warning that it is important to identify the something else to which the thing is incidental. The cost of documents used on an appeal cannot be brought within the costs 'of and incidental to' the appeal if they were prepared for use in the lower court, and so are the costs of and incidental to the proceedings in that lower court, and not the appellate court."

This passage incorporates reference to virtually all the case law on the topic to which I was referred. Counsel for the plaintiff thought that the quotation from the judgment of Stirling J. contained a misprint and that "casually" ought to have been "causally". However, reference to the actual decision demonstrates that Megarry V.C. correctly reproduced the quotation.

31. The *Gibson* case is authority for the proposition that the words "and incidental to" are words of extension and thus cover more than the mere costs of the wardship proceedings. Costs incurred in subordinate conjunction with the wardship are included as part of the defendant's liabilities. But it is important to bear in mind that per *Wright v. Bennett* the incidental costs are referable to the wardship outside the jurisdiction and nothing else.

The bill of costs

32. The bill of costs in the total sum of €195,938.86 was exhibited before me.

33. It is not necessary to go through it line by line. A perusal of it demonstrates that there are two major elements involved in the bill. The first relates to the costs of the various applications made to this court for payments out over the years to entities within and without the jurisdiction referable to the medical and nursing needs of the plaintiff. The solicitor for the plaintiff avers to the "enormous amount of work" on his part in relation to "applying for payments out and managing the fund". The contention is that the costs involved in these matters were incidental to the wardship application.

34. The second major part of the bill of costs relates to the solicitor's involvement in the proceedings in Spain including the giving of evidence in that jurisdiction. The translation of judgment No. 248 of the Provincial Court of Madrid demonstrates the nature of the proceedings between the plaintiff's parents. The legal grounds for the plaintiff's father's

appeal are set out in the judgment as being that "*the applicant, who is a parent but not a guardian of the incapacitated person, contends the fact that the incapacitated persons mother, and not the appellant, was considered to be better suited for being appointed as guardian*". The contention that is made is that the solicitors involvement in that litigation is to be considered as incidental to the application to take the plaintiff into wardship.

35. Are the defendants liable for these two costs elements having regard to the wording of the order?

Discussion and decision

36. I have already referred to the relevant case law on the construction to be given to the expression "incidental to". They are words of extension and cover more than the costs of the wardship proceedings in Spain simpliciter. But such additional costs must be incidental to the wardship and nothing else.

37. The claims made in the bill of costs in respect of the "enormous amount of work" of "applying for payments out and managing the fund" cannot be regarded as incidental to the wardship application. They were applications which had to be made because the dispute between the parents in Spain went on for many years and thus the fund remained in this jurisdiction. Recourse had to be had to that fund on behalf of the plaintiff on many occasions so as to ensure his medical and nursing care and wellbeing. Such applications could not in my view be regarded as incidental to the wardship. The applications involved payments out because there was no finality in the wardship application before the Spanish courts. Had the wardship proceeded in a timely fashion such applications would have been made within the wardship and the defendants would have no costs obligations in that regard. It would be no different if in another case without a foreign element, wardship had been sought in this jurisdiction and for one reason or another was delayed over a period of years for whatever reason. In such circumstances applications would continue to be made for payment out of the funds in court standing to the credit of the plaintiff in the suit rather than in wardship but they could not be regarded as incidental to the wardship thus creating a cost obligation on the defendants. It follows that the defendants have no obligations in costs in respect of the applications made in this jurisdiction for payments out from the funds lodged in this court. Incidentally the actual management of the fund in court was not carried out by the solicitor but by the Courts Service.

38. The position insofar as there are claims made concerning the plaintiff's solicitor's involvement in the Spanish proceedings between the parents is that they likewise cannot be regarded as incidental to an application to take the plaintiff into wardship in Spain. They are incidental to a dispute between the parents which delayed that wardship application and the defendants bear no obligations in costs to the plaintiff in that regard.

39. In my opinion the order of Irvine J., recognising that the application for wardship would be taking place in another jurisdiction, made the defendants liable for incidental additional costs that such a procedure would involve. Thus, for example, the obtaining of Spanish legal advice, the translation of documents, the conduct of correspondence with Spanish

lawyers relevant to the wardship application would be covered. But the expansive interpretation which is sought to be given to that expression so as to cover much of what is contained in the bill of costs is in my view unjustified.

40. There is a further aspect of the matter which seems to me to fortify the construction which I place on the order. This was an order made on consent. The wording of the order was chosen not by the Judge but by the parties. The order did no more than record a contract between the parties as to their respective liabilities. Thus the order falls to be viewed not merely as a court order but also as a record of the bargain made between the parties. I cannot accept that at the time that bargain was made that it was the common intention of the parties that the defendants should be liable for the sort of costs now sought to be visited upon them.

41. Furthermore my decision is consistent with the observations made by Irvine J. as reproduced at para. 9 of this judgment.

42. The making of orders of this type in respect of a contemplated wardship application concerning a plaintiff are not unusual when catastrophic injury cases are settled. In many instances the plaintiffs in such litigation have lost capacity and fall to be admitted to wardship. Defendants in such circumstances frequently agree to accept the costs liability for an uncontested application to have the plaintiff taken into wardship. Here the formula of words used was different to the norm which seems to me to be an acknowledgment of the fact that further costs were likely because of the wardship taking place in Spain. But it does not follow that the defendants were accepting or are liable for the costs of the applications for payments out or in respect of the plaintiff's solicitor's involvement in disputes between the plaintiff's parents.

43. The defendant's liability goes no further than the costs of the wardship application in Spain and such incidental costs that had to be incurred of the type that I have already identified in the judgment. The liability does not extend to costs incurred in the payment out applications or involvement in the *inter partes* dispute between the parents in Spain.

44. I direct that this bill be adjudicated. The defendant's liability will be limited in accordance with the terms of this judgment.