THE HIGH COURT

[2021] IEHC 393

[2015 No. 407 P]

BETWEEN

DAVID GOULDING

PLAINTIFF

AND

THE GOVERNOR OF MOUNTJOY PRISON, THE IRISH PRISON SERVICE, THE MINISTER FOR JUSTICE & EQUALITY, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

JUDGMENT of Ms. Justice Niamh Hyland delivered on 18 May 2021

Summary

1. The plaintiff seeks a remittal of the within proceedings to the District Court and the defendants are consenting to same. The only issue between them is how the costs incurred in the High Court to date should be treated. The plaintiff's position is that he should receive a costs order on the High Court scale as of now, being the date of remittal; the defendants' position is that the costs to date should be reserved to the District Court judge hearing the case, and that, if awarded, they should be assessed on the District Court scale, or alternatively, on the High Court scale. I conclude that it is for the District Court judge to decide on costs to date, along with all other costs in the case, at the conclusion of the proceedings, and that the costs should be reserved; but that if the District Judge decides to award the costs incurred in the High Court to either party, they should be measured on the High Court scale.

Background

2. The case arises from the plaintiff's detention in Mountjoy Prison for approximately four months from 2012 to 2013, during which time he was held on the D1 wing for protection prisoners and had to share a single person cell with at least one other prisoner for 23 hours a day, without in-cell sanitation. By way of plenary summons issued on 20 January 2015, the plaintiff sought declaratory relief and damages. The declaratory relief sought included declarations that the conditions of his detention amounted to a breach of his right to dignity and his right not to be subjected to inhuman and degrading treatment, and that the practice of "slopping-out" breached his right to dignity and respect for his private life.

3. A statement of claim was filed on 29 April 2015, followed by a notice for particulars on 4 September 2015. No further steps were then taken in the proceedings pending a decision in what might be described as the "lead" case, i.e. *Simpson v. Governor of Mountjoy Prison* [2017] IEHC 561, one of a series of cases that challenged the lack of in-cell sanitation in prisons. Ultimately, in that case, declaratory relief was granted by White J. to the effect that Mr. Simpson's constitutional right to dignity had been breached but no damages were awarded, inter alia because of his untruthful and exaggerated evidence. The Supreme Court, on appeal, awarded Mr. Simpson €7,500 and varied the declaration so that it included a declaration that there had been a breach of the plaintiff's constitutional right to protection of the person.

4. After the decision in *Simpson* was delivered on 14 November 2019, replies to particulars were delivered by the plaintiff's solicitor on 11 May 2020.

5. Following *Simpson*, the State set up a compensatory scheme which offered several rates of compensation and a set amount towards legal costs (known as the Scheme of Settlement) to plaintiffs who had commenced similar proceedings. By letter of 19 June 2020 the defendants made an open offer to the plaintiff under the terms of this compensatory scheme wherein they offered the plaintiff €2,674 in damages and €1,000 towards the plaintiff's measured legal costs. This offer was refused by the plaintiff by letter on 16 November 2020.

Motion to remit

6. By way of Notice of Motion dated 5 November 2020 the plaintiff sought the following reliefs:

> *"(i) An order pursuant to Order 49, Rule 7 RSC, remitting the herein proceedings to Dublin District Court.*
>
> *(ii) An order for the Plaintiff's costs to date, on the High Court scale.*
>
> *(iii) The costs of the herein motion."*

7. The Notice of Motion was grounded on the affidavit of William Slattery, solicitor for the plaintiff sworn on 3 November 2020. Simon Watchorn of the National Treasury Management Agency swore a replying affidavit on behalf of the respondent on 10 February 2021 where he objected only to the approach of the plaintiff in relation to costs, but not to the application to remit. At paragraph 16 of his affidavit, Mr. Watchorn avers:

> *"While no Defence has been delivered in these proceedings, as noted above, the State developed a template Defence, which was adapted following the delivery of the judgment of the Supreme Court in Simpson. The Defence admits that detention on a regime without in-cell sanitation gives rise to a breach of rights protected by Article 40.3 of the Constitution, that such breach is actionable and capable of giving rise to a claim in damages. The Defence makes specific reference to the compensation scheme put in place following the Supreme Court judgment in Simpson. Significantly, the Defence continues to deny any entitlement to declaratory relied. Equally significantly the admission in relation to the breach of rights protected by Article 40.3 is confined to the rights of privacy and dignity. The Defence not only makes no admission in relation to other claimed breaches, in particular to claims breaches of the right not to be subjected to inhuman and degrading treatment, it actively contests such claims".*

8. A replying affidavit was sworn by Mr. Slattery on 3 March 2021 which (quite inappropriately) consisted largely of legal argument.

Arguments of the parties

The Plaintiff

9. The plaintiff argues that he should be entitled to costs to date on the High Court scale as it was necessary to commence proceedings in the High Court given the declaratory relief sought, and that, in making an offer under the compensatory scheme, the defendants had conceded the validity of the declaratory relief sought. He relied on the passage in *Simpson*, where McMenamin J. noted that it was appropriate for Mr. Simpson to have initiated proceedings in the High Court (paragraph 147).

10. The plaintiff submits that the proceedings could not have been initiated in a court of lower jurisdiction as neither the District nor Circuit Court have jurisdiction to grant general declaratory relief. In the affidavit of Mr. Slattery, he avers that:

> *"8. In circumstances where the Defendants have admitted liability, there is less of a need for the Plaintiff to pursue declaratory relief. Therefore, the Plaintiff seeks a remittal of his case in order to bring it to a resolution. The District Court would appear to be the most appropriate jurisdiction to hear the case, given its similarity to the facts of Simpson, in which €7,500 was awarded.*
>
> *9. The Plaintiff seeks an order granting him his costs to date on the High Court scale, on the basis that liability has been accepted and he has been vindicated in seeking a declaration that his constitutional rights were breached. If the Plaintiff's case had proceeded in the High Court, it is beyond question that the declaratory relief would have been granted, just as it was in Simpson".*

11. Separately, the plaintiff argues that open offer is an "event" such that the case was now moot within the meaning of *Godsil v. Ireland* [2015] 4 I.R. 535, thus entitling the plaintiff to costs to date.

The Defendants

12. The defendants say that at no point has the plaintiff identified why it was necessary to pursue declaratory relief and argue that the level of damages that the plaintiff might expect was always likely to be firmly within the jurisdiction of the District Court. Accordingly, the proceedings did not need to be instituted in the High Court, and that the plaintiff is not entitled to the additional costs of the High Court in circumstances where he has abandoned his claim to declaratory relief and now seeks to remit the matter to the court in which the proceedings ought to have been commenced.

13. Second, they strongly contest that the offer of damages and legal costs under the State's compensatory scheme is an admission of liability entitling the plaintiff to damages, arguing that many matters remain to be determined between the parties.

14. Relying on *Parkborough Ltd. v. Kelly* [2008] IEHC 401 (discussed below), the defendants argue that to obtain costs at this stage would be extraordinary and unprecedented, with adverse consequences for other cases before the courts.

Discretion in relation to the costs of remittal

15. Remittal of a case from the High Court to the District Court is governed by s. 25 of the Courts of Justice Act 1924, which provides for an application for remittal to either the

Circuit or District court on the application of either party, upon such terms, and subject to such conditions, as to costs or otherwise as may appear to be just. Order 49, r. 7 of the RSC mirrors this statutory provision, providing for remittal upon such terms as to costs or otherwise as may appear just.

16. I start from the premise that, pursuant to both Order 49, r.7 of the RSC and sections 168 and 169 of the Legal Services Regulation Act 2015, I have a wide discretion in relation to costs on a remittal. It is true that in *Parkborough*, (discussed below) Laffoy J. adopted the position that she could not make an order for the costs of the proceedings up to the date of remittal as the case had yet to be determined. However, since that case was decided, the 2015 Act has come into force, s. 168(1) of which provides, *inter alia,* that a court may on application by a party at any stage in, and from time to time during, those proceedings, order that a party to the proceedings pay the costs of another party. I conclude that I therefore have jurisdiction to make the order sought by the plaintiff if I think it just to do so.

Is there an event that justifies making a costs order?

17. When determining any application for costs, one starts on the basis that costs are normally decided at the end of the proceedings by the judge who heard and determined the case, having regard to the identity of the successful party and the "event" in the proceedings, unless of course there is good reason to depart from that approach. The plaintiff argues that an "event" has already taken place here, i.e. there has been an open offer of settlement to him (and every other plaintiff who has brought proceedings in similar cases) following the decision of the Supreme Court in *Simpson*.

18. But the decision on which party has been successful for the purposes of applying s.169 will not be made until the proceedings at determined in the District Court. It is only at that stage that a decision will be made as to whether the plaintiff is entitled to damages on the legal basis claimed by him, in whole or part, and if so, the amount of damages payable.

19. I do not agree that the open offer made in this case constitutes an admission of liability. There is no such admission on the face of the correspondence and there are still many matters at issue between the parties. Neither liability nor quantum have been agreed between the parties. There will be a hearing in the District Court on both liability and quantum, even if it is the case that certain matters will no longer be contested by the defendants having regard to the decision in *Simpson*.

20. Nor does the open offer constitute an "event" for the purposes of costs or signify outright success in the litigation by the plaintiff. Open settlement offers are often made in litigation. It is a novel proposition to suggest that such an offer constitutes an event in the proceedings that should be marked by a costs order. Of course, an acceptance of the offer leading to a settlement of the case would constitute an event, if costs had not been part of the offer and required to be determined. But here, there has been no acceptance of the offer by the plaintiff, and so the case goes on.

21. Nor has there been any interlocutory ruling in the case that could be characterised as an event.

22. Second, even if the offer could be characterised as some type of event, contrary to my findings above, making a costs order on the basis of such an event at this point in the proceedings would have undesirable consequences. It would mean the High Court costs to date would be recoverable irrespective of what happened in the running of the case. For example, if the plaintiff does not meet the existing offer, or a subsequent, higher, offer, the District Judge might decide to penalise him on costs. Equally, if the plaintiff is found not to have told the truth in respect of certain matters, as happened in *Simpson*, the District Judge might reflect that in a costs order. The plaintiff may fail in certain parts of his case, and therefore not be identified as "entirely successful" within the meaning of s.169 of the 2015 Act. Equally, even if he is entirely successful, there are many matters that may impact upon his entitlement to a full award of costs, as enumerated in s.169, including his conduct, whether it was reasonable to raise issues, the manner in which the case was conducted, exaggeration of a claim, any payments into court and any offers to settle.

23. No reason has been given as to why, in this case, the normal discretion of the District Judge to deal with the entirety of the costs at the end of the hearing should be removed and a portion of the costs awarded to the plaintiff at this early point in the life of the case, before a defence has even been delivered. Order 40, r.8 (5) of the District Court Rules on remittals provides:

> *(5) The civil proceedings must be heard and determined by the Court as if they had originally been commenced in the Court.*

24. That the District Court judge who hears and determines the case should also determine the entire costs of same seems logical.

25. In coming to this conclusion, I am following the approach of Laffoy J. in *Parkborough*, where she declined to make a similar order. *Parkborough* was a case where the plaintiff sought damages against two defendants, the first of whom was her ex-employee and the second was a rival mortgage broking business who had employed the first defendant. Various allegations were made including breach of confidentiality and injunctions were sought. On undertakings being given in lieu of injunctive relief, the plaintiff sought to have the matter remitted to the Circuit Court but on the basis that the court make an order for costs on the High Court scale to the plaintiff against the defendants as it was reasonable for the plaintiff to have instituted proceedings in the High Court.

26. Laffoy J. at page 7 quoted Delaney and McGrath on *Civil Procedure in the Superior Courts*, 2nd Ed. (para 8.12) to set out the "normal position" i.e. that if costs are reserved in High Court proceedings and then remitted to a court of lower jurisdiction, the winning party awarded reserved costs "*will be entitled to the costs of the proceedings in the High Court up to the date of remittal at the High Court scale*".

27. Ultimately the Court found that it was reasonable for the plaintiff to initiate the proceedings in the High Court and followed the "normal practice" and remitted the matter to the Circuit Court, reserving the High Court costs of both sides in the cause rather than awarding them to the plaintiff.

28. In respect of the specific question as to whether an order for the costs up to the remittal should be made at remittal stage, she observed as follows:

> *"The plaintiff initiated a plenary action in this Court. The defendants defended it. The outcome of a defended plenary action is determined by a plenary hearing on oral evidence. There has been no such hearing in this case. If the order to remit is acceded to, and I have already indicated to the parties that I intend acceding to it, the plenary hearing will take place in the Circuit Court. The outcome will identify "the event" by reference to which the fundamental rule in relation to where liability for costs should lie will be determined, although, of course, it will be at the discretion of the Circuit Court Judge whether the fundamental rule is applied. Until then, the Court has no jurisdiction to make an order as to who is to be liable for the costs. In this case, the contest between the parties is still alive. While the defendants proffered the undertakings sought, they did so without admission of liability and in the context that they were contesting allegations of wrongdoing on their part" (page 8).*

29. As identified earlier in this judgment, I consider I have jurisdiction to make the order sought by the plaintiff under s.168. But the rationale Laffoy J. identifies for not making an order at the date of remittal is equally apposite in the instant circumstances.

30. For the above reasons, I refuse the plaintiff's application for an order for costs at this point in the proceedings.

Reasonableness of issuing proceedings in the High Court

31. The plaintiff also made an alternative argument to the effect that it was reasonable for him to bring the matter in the High Court and this entitled him to a costs order at this point in the proceedings. It does not follow that a correct decision on the part of the plaintiff as to where the proceedings should be issued means that an award in respect of costs incurred to date should be made now. For the reasons I set out above, the decision on costs to date should be reserved to the District Judge.

32. However, as identified in *Parkborough*, the question as to whether the proceedings were correctly brought in the court first seised with the dispute are relevant in deciding whether to make what was called the "usual" order i.e. an order reserving the costs of the proceedings in the High Court, thus entitling the party who is awarded those reserved costs an order on the High Court scale of costs. Laffoy J. held that:

> *"The breath of the discretion which is given to the Court under s. 25 must encompass consideration of whether the plaintiff acted reasonably in initiating the proceedings in the High Court or not. If the Judge of the High Court, when dealing*

with the application to remit, could conclude that it was not reasonable to commence the proceedings in the High Court no doubt it would be open to him or her to provide for displacing the normal practice by ordering that the reserved costs should be at the lower Court scale, if the plaintiff was ultimately awarded costs". (page 8).

33. This is an important issue, since the jurisdiction of the District Court in relation to costs of a case remitted under s.25 of the 1924 Act is identified under O. 40 r. 8(7) of the District Court Rules as follows: "*Costs, where allowed in any such civil proceedings, must be in accordance with the provisions of the Schedule of Costs*".

34. Therefore, if I did not make the "usual" order which permits any costs awarded up to the date of remittal to be on the High Court scale, the District Court judge could only award costs for that portion of the case that took place at High Court level on the District Court scale. Those costs are at a significantly different level to the costs that are allowed at High Court level.

35. To decide whether to make the "usual" order, I must therefore decide whether it was reasonable to bring the matter in the High Court. In the circumstances of this case, that is a surprisingly difficult decision.

36. The plaintiff relies on the following factors to justify his decision to do so: the fact that declaratory relief was sought in this case, that certain of those declarations were granted by the Supreme Court in *Simpson*, that McMenamin J. in the Supreme Court held that in spite of the moderate level of the award in the case, the special circumstances warranted that the proceedings be tried in the High Court (paragraph 147), and that declaratory relief could not have been granted in the District Court. He argues that this justified his decision to proceed in the High Court and therefore he should get his costs now.

37. However, the defendants have identified other matters that suggest it was not necessarily reasonable to issue High Court proceedings. First, the Supreme Court have identified a range of damages very much on the District Court scale. The defendants suggest that such a range was known to the plaintiff when proceedings were instituted. This appears to be confirmed by the averment at paragraph 16 of the affidavit of Mr. Slattery of 3 March 2021, solicitor for the plaintiff, as follows:

> *"From the outset, your Deponent's office operated on the assumption that damages, if awarded, would be nominal or similar to the sums awarded in the United Kingdom. The decision to initiate proceedings in the High Court was not with a view to securing High Court level damages but rather, because it offered the best prospect of achieving a successful outcome for the Plaintiff".*

38. One might take the point of view that the case is now being remitted because the plaintiff cannot assume that, if it continued in the High Court and damages were assessed at a District Court scale, High Court costs would be awarded even if declaratory relief is granted. The plaintiff might argue there is a difference between costs incurred before as

opposed to after the Supreme Court decision in *Simpson*. However, even in respect of those costs, the defendants might be successful in an argument to the effect that, where the primary relief sought was damages, the court should treat all the costs by reference to the level of damages recovered and not just post *Simpson* costs.

39. Second, the defendants argue that, by bringing a remittal application, the plaintiff is unambiguously abandoning his entitlement to seek declaratory relief and that there was no reason to seek same given that the primary relief sought was damages. This issue requires an analysis of whether the District Court would have been the correct court to determine a question of breach of constitutional rights, including whether any such breach, if established, sounded in damages. On balance that seems unlikely. Therefore, I think the plaintiff was correct in issuing in the High Court.

40. That does not mean of course that the plaintiff will recoup all costs up to the date of remittal on the High Court scale. Reserving costs means the decision whether to grant some or all of the costs incurred, including those incurred in the High Court, is reserved to the District Judge. If the District Court deems those costs incurred in the High Court to be recoverable, they are recoverable on the High Court scale.

Mootness

41. Finally, the plaintiff made what seems to me to be a misconceived argument in relation to mootness. He argues that, as defined in *Godsil*, there has been an act that is an explicit acknowledgement and admission of the legal validity of the challenge as mounted i.e. the settlement offer. He submits that I can therefore decide there is an event to which the general rule that costs follow the event can be applied. For the reasons I identify above, I do not think it correct to characterise the settlement offer as an event or indeed an acknowledgment of the legal validity of the entire challenge. Many issues remain between the parties. The defendants are still intent on defending the proceedings brought by the plaintiff, both in respect of some liability issues, and quantum. The proceedings are a very long way from being moot.

Conclusion

42. For the reasons set out in this judgment, I will make an order in the usual terms i.e. the question of the costs of the proceedings in this Court on both sides be reserved to the District Judge.

Costs of this motion

43. In relation to the costs of this motion, the defendants have been successful in resisting the plaintiff's application for a costs order at this point in time. Moreover, I am conscious of the defendants' point that there was no correspondence from the plaintiff's solicitor prior to the bringing of the motion setting out its proposal in relation to remittal, and seeking the agreement of the defendants, thus potentially obviating the need to bring a motion.

44. In the circumstances, I propose to award the costs of the motion to the defendants and place a stay on the order pending the final resolution of the proceedings in the District

Court. If either party disagree with this proposal, they should file written submissions of not more than 1,500 words within one week of the delivery of this judgment.