

APPROVED

[2021] IEHC 751



THE HIGH COURT

2016 No. 3533 P

BETWEEN

DONAL CAREY

PLAINTIFF

AND

PAUL SWEENEY
(TRADING AS PAUL SWEENEY FINANCIAL SERVICES)

CANTOR FITZGERALD IRELAND LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 7 December 2021

INTRODUCTION

1. This judgment addresses the final form of orders to be made in respect of an application to amend pleadings. The principal judgment was delivered on 27 October 2021, and bears the neutral citation [2021] IEHC 620. As appears, the plaintiff was successful in its application seeking leave to amend its pleadings. The application had been contested by the second named defendant, and this had necessitated the setting aside of two days for the hearing of the motion.

NO REDACTION REQUIRED

COSTS

2. The principal judgment had set out the court's provisional view in relation to costs as follows:

“Insofar as the allocation of legal costs is concerned, my *provisional* view is that the plaintiff is entitled to recover two-thirds of his costs of the motion for leave to amend. Whereas an application to court was necessitated, it could have been dealt with as a “*short*” motion in a Monday list but for the second named defendant's unsuccessful objection. In the event, the application to amend ran into a second day. This costs order is proposed for reasons similar to those explained in *Stafford v. Rice* [2021] IEHC 344. If either party wishes to contend for a different form of order, they should file written legal submissions within three weeks of today's date.”

3. The second named defendant delivered short submissions on 16 November 2021; the plaintiff much longer submissions on 29 November 2021. The second named defendant queried whether the written submissions on behalf of the plaintiff had been delivered out of time and whether same had been formally filed in the Central Office of the High Court.
4. Notwithstanding the slight delay in the delivery of the plaintiff's submissions and their length, I am satisfied that all submissions made are properly before the court and I have had regard to the full exchange of correspondence in preparing this judgment. I would simply observe that written legal submissions on costs must both be emailed to the appropriate registrar and filed in the Central Office.
5. The second named defendant submits that the costs of the application to amend should either (1) be made costs in the cause, i.e. the costs will be awarded to whichever party is ultimately successful in the proceedings, or (2) be reserved to the trial judge. It is submitted that the amended pleas will be separately ruled upon at trial, and if the second named defendant is correct, should never have been raised by the plaintiff.
6. With respect, neither approach suggested by the second named defendant would be appropriate in this case. As appears from Order 99, rule 2 of the Rules of the Superior Courts, the default position is that the court ruling upon an interlocutory application, such

as, relevantly, an application to amend pleadings, should decide the allocation of the costs of such motion. In other words, the judge hearing the interlocutory application should decide the issue of costs themselves, rather than to leave the matter over to be addressed at a future date. The only exception to this is where it is not possible justly to adjudicate upon liability for costs on the basis of the interlocutory application.

7. The focus for costs purposes will, therefore, be on the outcome of the interlocutory application, and on the conduct of the parties in respect of that application. Here, the outcome was clear-cut: the plaintiff succeeded in obtaining leave to amend its pleadings notwithstanding the spirited opposition of the second named defendant.
8. However, in the context of an application to amend pleadings, it is the conduct of the parties which has the greatest bearing on the appropriate costs order. An application to amend will normally only be necessary because the moving party did not fully plead its case from the outset. As explained by the High Court (Clarke J.) in *Porterridge Trading Ltd v. First Active plc* [2008] IEHC 42, the costs of an application to amend will generally be awarded against the party seeking the amendment unless the reason why the amendment was required stemmed from some failing by the other side to the proceedings. This is subject to an exception where a party makes unreasonable objection to an amendment which necessitates a separate, significant hearing with its own attendant additional costs.
9. These principles have been applied in two recent written judgments, *Care Prime Holdings FC Ltd v. Howth Estate Company (No. 2)* [2020] IEHC 329 and *Stafford v. Rice* [2021] IEHC 344. In each case, the notional costs of a short motion were netted off against the notional costs of the much longer contested motion. This resulted in a notional balance in favour of the party seeking the amendment. A similar exercise had been envisaged as part of the costs order proposed in the principal judgment, i.e. the

plaintiff is entitled to recover two-thirds of his costs of the motion for leave to amend. If anything, this notional balance is generous to the second named defendant: the costs of a two day hearing would be much greater than a short motion dealt with on a Monday listing. In the two cases cited above, the comparison had been between a Monday listing and a half day hearing.

10. The proposed costs order thus takes into account all relevant considerations, i.e. the outcome of the application to amend; the fact that same was necessitated by shortcomings in the initial pleadings; and the increase in costs resulting from the motion having been unsuccessfully contested.
11. None of these considerations will be affected by the ultimate outcome of the proceedings. If it transpires that the second named defendant is successful in its defence of the proceedings, then the default position is that it would be entitled to recover the costs of the trial as against the plaintiff. (This is subject always to the discretion of the court to depart from the default position). None of this would detract from the finding of this court that it had been unreasonable (in the special sense that the term is used in the context of costs) for the second named defendant to have opposed the application to amend. This opposition had the result of putting the plaintiff to unnecessary expense.
12. It also had the effect of delaying the progress of the proceedings: the main action has been becalmed for some nine months since the motion to amend first issued in February 2021. The making of a costs order in these circumstances serves a secondary purpose of ensuring discipline in legal proceedings. Without in any way trespassing upon the undoubted entitlement of a party to oppose a procedural application, they should do so in the certain knowledge that there may be costs consequences for them if unsuccessful.
13. In summary, this court is in as good as, if not a better, position than the trial judge to address the costs of the application to amend. This court heard the application over two

days, and fully understands the issues that arose thereon. The modified costs order proposed in the principal judgment is intended to reflect the fact that the second named defendant's opposition to the amendments resulted in all sides incurring additional, unnecessary costs.

14. In summary, the plaintiff is entitled to recover two-thirds of the costs of the motion to amend. The plaintiff is also to have the costs of the written submissions dated 29 November 2021 prepared in relation to the costs application. The second named defendant will be entitled to its costs arising from the requirement to file an amended defence. Costs to be adjudicated upon, i.e. measured, under Part 10 of the Legal Services Regulation Act 2015 in default of agreement between the parties.
15. The next issue which arises in relation to costs is as to whether there should be a stay on the order. I propose to grant a stay. It is unsatisfactory for parties to "*cash in*" costs orders obtained during the course of proceedings. This is because the final costs position may be different at the end of the proceedings. A party which has, for example, lost a number of interlocutory applications along the way may ultimately be successful on the substantive issues in the case. In such a scenario, it is proper that the various costs orders be set-off against each other, with the outstanding balance being paid to which ever party is appropriate.
16. Accordingly, I will place a stay on the execution of the costs order pending the determination of the within proceedings. This is the standard approach which has been adopted, and there does not appear to me to be any sound basis for departing from that in the present case. The plaintiff is at liberty if it so wishes, to have the costs measured (adjudicated) in the interim.

TIMETABLE FOR DELIVERY OF DEFENCE

17. The proposed order suggested in the principal judgment was that the second named defendant would deliver its defence within 28 days. The second named defendant has made the point in written submission that it wishes to raise particulars arising out of the amendments. This is a reasonable request, and can be accommodated within a timetable which ensures that the proceedings are kept on track. These proceedings are of a relatively old vintage and it would be unsatisfactory for there to be further delay.
18. Accordingly, the following directions are made:
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| 21 December 2021 | Amended statement of claim to be delivered |
| 28 January 2022 | Any request for particulars to be served |
| 25 February 2022 | Replies to particulars to be served |
| 25 March 2022 | Amended defence to be delivered |
19. The parties may agree any revision to this timetable by consent. The parties have liberty to apply to this court as necessary.

Appearances

Esmonde Keane SC and Alan Keating for the plaintiff instructed by Augustus Cullen Law LLP
Paul Gardiner SC, John Breslin SC and Stephen B Byrne for the second named defendant
instructed by Maples and Calder (Ireland) LLP

Approved
Gemma S. Mans