

THE HIGH COURT

[2021] IEHC 810
[2021 No. 3615 P.]

BETWEEN

EMER LALLY

PLAINTIFF

AND

BOARD OF MANAGEMENT OF ROSMINI COMMUNITY SCHOOL

DEFENDANT

JUDGMENT of Ms. Justice Butler delivered on the 17th day of December, 2021

1. This is the court's ruling on costs consequent on a judgment delivered on 4th October, 2021 ([2021] IEHC 633). In that judgment, I granted the plaintiff's application for an interlocutory injunction to restrain the defendant holding a disciplinary hearing into certain allegations against her pending the determination of legal proceedings in which the plaintiff challenges the fairness and validity of the disciplinary process. The plaintiff now seeks the costs of the injunction on the basis that she has succeeded in full and that these costs should follow the event. The defendant opposes this application and contends that the costs of the interlocutory application should be reserved to trial or, alternatively, that the plaintiff's costs should be made costs in the cause.
2. Both parties agree that the costs of interlocutory applications are now governed by O. 99, r. 2(3) of the Rules of the Superior Courts which provides:-

"The High Court... upon determining any interlocutory application, shall make an award of costs save where it is not possible justly to adjudicate upon liability for costs on the basis of the interlocutory application."

The defendant argues that as this rule reflects the wording of the old O. 99, r. 1(4), authorities which considered to the previous rule remain instructive. The authorities cited by the defendant (including *ACC v. Hanrahan* [2014] 1 IR 1 and *AIB v. Diamond* (Unreported, 7th November, 2011)) are ones which suggest that the interlocutory applications in which it will not be possible for the court to justly adjudicate on liability for costs will include applications for interlocutory injunctions where the issues before the court at the interlocutory stage will be revisited at the full trial or where the interlocutory application turns on aspects of the factual merits of the case. It is contended that the issues in this application will be revisited and determined at trial and, consequently, that the costs should be reserved to the trial judge.

3. The defendant's fall-back position, that the plaintiff's costs of the interlocutory motion should be costs in the cause, proposes a mid-way solution under which the plaintiff would never become liable for the defendant's costs of unsuccessfully opposing the injunction but would only recover her own costs in the event that she is ultimately successful in the proceedings. In the defendant's view, it would be manifestly unfair for it to have to bear the plaintiff's interlocutory costs should it succeed at trial. In my view, this latter submission is effectively a contention that the pre-2008 position should prevail to the effect that the party which is ultimately successful at trial should not, for that reason alone, have to bear the costs of interlocutory applications in which it was unsuccessful.

4. The plaintiff's submission is based on a broader reading of the rules which invoke not only O. 99, r. 2(3) but also O. 99, r. 3(1), which provides:-

"The High Court, in considering the awarding of the costs of any action or step in any proceedings... in respect of a claim or counterclaim, shall have regard to the matters set out in section 169(1) of the 2015 Act, where applicable."

This in turn invokes s. 169(1) of the Legal Services Regulation Act, 2015 which gives statutory effect to the "costs follow the event" principle, by providing:-

"A party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings, unless the court orders otherwise, having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties, including—"

There follows a list of the type of factors which are likely to have a bearing on the exercise of the court's discretion focusing on the conduct of the parties, their conduct of the litigation (including offers of settlement) and the reasonableness of their actions.

5. The plaintiff sets out a chronological history of the pre-litigation procedure and points out that, at the time the defendant withdrew the first comprehensive report and replaced it with the second comprehensive report in July, 2021, it accepted liability for the plaintiff's costs up to that point. Apart from this, no specific argument is made by either side as to the other side's conduct or the reasonableness of their actions and, consequently, the factors listed in s. 169(1) do not really have a bearing on the decision I have to make. This, I think, is of some relevance, because, although the section does not limit the exercise of the court's discretion by reference to these factors alone, the fact that they are listed gives a strong indication that the legislature intended that the costs follow the event principle would normally prevail unless circumstances of this type strongly suggest that it should not. For similar reasons, I might observe that, whilst the authorities under the old O. 99, r. 1(4) do have some continuing relevance, they now have to be looked at in a context where there is a clear statutory impetus towards a court dealing immediately with the costs arising on foot of its interlocutory decisions and statutory guidance as to the exercise of the court's discretion as regards the types of circumstances in which it might be appropriate to depart from the normal rule. Thus, whilst the court retains an overriding discretion as to whether to make an order for costs at this point and as to what that order should be, the circumstances in which it should decline to do so are necessarily exceptional and limited.

6. As I commented in my judgment in *Thompson v. Tennant* [2020] IEHC 693:-

"The other difficulty with the defendant's argument is that O. 99, r. 2(3) requires the High Court to make an award of costs upon determining an interlocutory application unless it is not possible justly to adjudicate upon liability for costs. The fact that the trial court may be in a better position to assess the costs of the interlocutory application after the substantive trial is held does not mean that it is

not possible for the court which has determined the interlocutory application to justly adjudicate upon costs. There is quite a conceptual distance between something not being possible and the alternative being better. The defendant's submission is tantamount to inviting the court to revert to the pre-2008 position and to leave the resolution of the interlocutory costs to the conclusion of the substantive trial simply because the trial court will be in possession of all the evidence the parties wish to adduce and arguments they wish to make. The test is not whether the trial court will be better placed to make that adjudication but whether it is not possible for the interlocutory court to do so – accepting of course that it must be possible to carry out that adjudication "justly".

Taking these considerations into account, I am of the view that there was a discrete issue to be determined on the interlocutory injunction, namely whether it was legally appropriate to allow the disciplinary process to proceed pending the determination of the substantive proceedings in light of the specific issues raised by the plaintiff in those proceedings. The outcome of that issue did not depend on the outcome of the disciplinary process nor of the substantive proceedings themselves. The defendant may well succeed in refuting the allegations of unfairness and objective bias made against it and thus may succeed in defending the substantive proceedings. Equally, if and when the disciplinary process is conducted, the plaintiff may well be found to have committed the acts which are alleged against her. These are, in my view, separate and distinct matters to the question of whether the plaintiff should be put in jeopardy of losing her employment before those issues are determined. As Murray J observed in *Heffernan v Hibernian College Unlimited Company* [2020] IECA 121 the post-2008 amendments to the Rules reflect a preference that *"those bringing and defending interlocutory applications should face a costs risk in the event that the court determines that the stance they adopted was wrong"*.

7. This is not a case where the grant or refusal of the interlocutory injunction either allows or prevents the continued exercise of substantive rights on a basis which may transpire to have been incorrect at trial. The real issue in this case was about the timing of the disciplinary process relative to the timing of the litigation. As noted above, that issue is both capable of being and was resolved without it being necessary to either decide or assume what the outcome of the substantive proceedings will be. I acknowledge the intention of the defendant to stand over the integrity of its disciplinary process, which it is of course fully entitled to do. However, it was open to the defendant to voluntarily agree to suspend the process pending the outcome of this litigation. An agreement of that nature on the defendant's part would not have entailed any concession as to the validity of its disciplinary process nor prevented the defendant from robustly defending it at trial. Having chosen not to agree to any postponement and having litigated, unsuccessfully, its entitlement to proceed with the disciplinary process, the defendant should bear the costs of the interlocutory application. I have no hesitation in concluding both that it is possible to justly adjudicate upon liability for costs at this stage and in concluding that the defendant should be ordered to pay the plaintiff's costs of the interlocutory application.

8. Finally, the parties were also asked to agree the form of order that the court might make in light of the earlier judgment. I understand from the plaintiff's submissions that her solicitors have suggested a form of order to the defendant's solicitor and whilst this has not been formally consented to, equally no objection has been raised to the terms of the order proposed. As those terms seem to me to be appropriate, I am happy to make the order in the terms proposed by the plaintiff's solicitors.