

THE HIGH COURT

[2022] IEHC 235

RECORD NO. 2013/12706/P

BETWEEN

GALWAY ROSCOMMON EDUCATION & TRAINING BOARD

PLAINTIFF

AND

ORLA MACKEN WALSH

DEFENDANT

JUDGMENT of Ms. Justice Niamh Hyland delivered on 14 April 2022

Introduction

1. This is an application for leave to discontinue the proceedings by the plaintiff. The motion to discontinue has been the subject of a reasonably lengthy hearing, not because the defendant objects to the plaintiff discontinuing the proceedings against her, but because she argues that the plaintiff should pay legal practitioner/client costs (formerly known as solicitor /client costs) rather than party and party costs, on the basis that s.169(4) of the Legal Services Regulation Act ("the 2015 Act") requires the payment of reasonable costs on discontinuance unless the Court orders otherwise. The defendant submits that such costs must, in the light of the 2015 Act, be interpreted as legal practitioner/client costs. The defendant argues that even if this approach is not accepted, the conduct of the plaintiff during and after the proceedings is such that she is entitled to legal practitioner/client costs under the principles identified in *Trafalgar Developments Ltd. v Mazepin* [2020] IEHC 13.
2. The plaintiff has offered to discontinue on the basis that it will pay the defendant's reasonable costs on a party and party basis. It stoutly denies that reasonable costs mean legal practitioner/client costs, arguing instead that "reasonable" is a limiting word in circumstances where no such limitation previously appeared in Order 26, Rule 1 of the Rules of the Superior Courts ("the RSC"), which provides simply for "costs" in the context of a discontinuance. Further, the plaintiff rejects the argument that the defendant can frame the case as one where the *Trafalgar* principles apply, noting that none of the arguments put forward come close to establishing the type of conduct identified by Barniville J. in that case as justifying an Order for legal practitioner/client costs.

Facts

3. The facts in brief are as follows. The defendant was a teacher for many years and retired in 1996 due to ill health. She received a pension from her employer, the plaintiff. She then regained her health and went back to teaching in 1998, this time for the Department of Education and Skills. In 2005 the pension that she was being paid by the plaintiff was stopped by them on the basis she was not entitled to same given that she was teaching again. There was no attempt at that stage to recoup the pension payments already paid. However, in 2013 the plaintiff sought a repayment of the pension payments between 1998 and 2005 and when same was not forthcoming, issued proceedings in November 2013 seeking payment of the sum of €150,211.53, representing the amount of pension allegedly wrongly paid. A defence was filed but no counterclaim was raised. The defendant then retired in 2014 from her job with the Department of Education. The proceedings dragged on and it was not until 2021 when the matter was about to go to

trial on a preliminary issue as to whether, under the relevant statutory scheme, the defendant was in fact entitled to retain her pension despite going back to teaching, that the plaintiff altered its position. That preliminary issue was fixed for 9 March 2021. The defendant's legal submissions were provided on 11 January 2021. On 3 March 2021, the plaintiff wrote indicating its intention to discontinue and the trial date was vacated. Because terms of discontinuance could not be agreed, the motion before me, being a motion for liberty to discontinue on identified terms, was brought by the plaintiff on 22 March 2022.

4. Moreover, in correspondence, the plaintiff accepted that it owed the defendant money in respect of payments from 2014 i.e. the date upon which she stopped teaching. A sum was offered to her in respect of the years 2014 to 2021 and it seems that that sum is now close to being paid. Because there was no counterclaim, the payment of that sum is strictly speaking outside the ambit of the proceedings.
5. The defendant issued proceedings in 2020 and served them in 2021 in relation to the balance of the pension denied to her i.e. from 2005 to date. Those proceedings are ongoing. There now appears to be a concession on the part of the plaintiff that the defendant is also entitled to a pension for 2005-2014 and there has been some correspondence between the parties in that respect and an offer made by the plaintiff.
6. It is fair to say that the defendant's original position i.e. that she did not owe the plaintiff any money in respect of pension paid, has now been accepted by the plaintiff and that the plaintiff further accepts that the defendant was wrongly denied her pension from 2005 onwards. The question I must consider is what costs she is entitled to following this unhappy sequence of events.

Discontinuance

7. Order 26(1) of the RSC provides in relevant part as follows:

"1. ... Save as in this rule otherwise provided, it shall not be competent for the plaintiff to discontinue the action without leave of the Court, but the Court may before, or at, or after, the hearing or trial, upon such terms as to costs, and as to any other action, and otherwise, as may be just, order the action to be discontinued, or any part of the alleged cause of complaint to be struck out. The Court may, in like manner, and with the like discretion as to terms, upon the application of a defendant, order the whole or any part of his alleged grounds of defence or counterclaim to be withdrawn or struck out, but it shall not be competent to a defendant to withdraw his defence, or any part thereof, without such leave."

8. Laffoy J. in *Shell E & P Ltd v McGrath (No. 3)* [2007] 4 IR 277 set out the basic rules applicable to discontinuance. In short, the Court has a discretion as to what Orders it will make in the context of permitting discontinuance. A key concern for a court in granting liberty to discontinue is the question of costs. A court will not ordinarily refuse to allow a party to discontinue proceedings. As identified in the judgment of Noonan J. in *Joint Stock*

Company Togliattiazot v Eurotoaz Ltd [2019] IEHC 342, there is no requirement for the party seeking to discontinue to provide reasons for same.

Reasonable costs under Section 169(4)

9. Since the enactment of the 2015 Act, as noted above, there is a specific legislative provision i.e. s.169(4), that addresses legal costs in the context of discontinuance as follows:

"(4) Unless the court before which civil proceedings were commenced orders otherwise, or the parties to those proceedings agree otherwise, a party who discontinues or abandons the proceedings after they are commenced (including discontinuance or abandonment of an appeal) is liable to pay the reasonable costs of every other party who has incurred costs in the defence of the civil proceedings concerned until the discontinuance or abandonment."

10. To determine this motion, I must consider the meaning of "reasonable costs" in the context of s.169(4). What is striking about s.169(4) is that it specifically describes the nature of the discontinuing party's obligation insofar as costs are concerned. That is not the case in relation to costs under s.168 and s.169, where the term "costs" is simply used without any description of same. Costs are not defined in the definition section in the 2015 Act and nor is the word reasonable. However, the Act does address the concept of reasonable costs in the context of adjudication by an adjudication officer. Section 155(1) provides that Schedule 1 of the Act shall apply to the adjudication of a bill of costs by a legal costs adjudicator. Section 155(3) provides that in determining an application for the adjudication of legal costs, the legal costs adjudicator shall, to the extent which he or she considers necessary, consider and have regard to the entire case or matter to which the adjudication relates and the context in which the costs arise. Section 155(4) provides that the legal costs adjudicator shall, as respects a matter or item the subject of the application, *inter alia*, determine whether it was appropriate that a charge be made for the work/disbursement and determine what a fair and reasonable charge for that work/disbursement would be in the circumstances. Section 155(4)(d) gives the adjudicator the power to determine whether the costs relating to the matter or item were reasonably incurred.

11. From that description of s.155, one can see that the concept of reasonableness is employed on various occasions. That approach is continued in Schedule 1 entitled "*Principles Relating to Legal Costs - Sections 150 (4) and 155*". Paragraph 1 provides as follows:

"A Legal Costs Adjudicator shall apply the following principles in adjudicating on a bill of costs pursuant to an application pursuant to section 154:

- (a) that the costs have been reasonably incurred, and*
- (b) that the costs are reasonable in amount".*

12. When determining whether the costs are reasonable, a set of criteria are identified for the adjudicator to consider, if applicable. I identify at the end of this judgment my views on certain of those criteria relevant to this case.
13. In short, the concept of reasonableness is the predominant principle to be applied by costs adjudicators in adjudicating on applications. Therefore, in deciding upon this application, although the parties have characterised it as a straight choice between party and party costs and legal practitioner/client costs, my obligation is to apply the legislation which identifies with specificity the type of costs to be awarded. That dictates that I must identify what I consider to be reasonable costs in the context of the notice of discontinuance served.
14. I should at this point explain my understanding of the two different approaches. Party and party costs are generally taken to be those where a court directs one party to a cause to pay the costs of another party to the same cause. Legal practitioner/client costs on the other hand, per Laffoy J. in *Dunne v Fox* [1999] 1 I.R. 283, are taken to be as follows;

"Under...a taxation on a solicitor and client basis, the range of costs allowable encompasses all costs other than expenditure which is shown to be of an unreasonable amount or to have been unreasonably incurred...the general thrust...is that the onus of proving that an item of expenditure was of an unreasonable amount or unreasonably incurred is on the party against whom the costs are being taxed."

15. The defendant argues that the reference to "reasonable costs" implies that the legal practitioner and client basis applies by default i.e. all reasonable costs incurred except those that are not properly chargeable under s.154(4). This provides for an application to the Chief Legal Costs Adjudicator for adjudication where a legal practitioner has provided a bill to the client and the client consider that a matter or item is not properly chargeable. The plaintiff on the other hand seeks reasonable costs on a party and party basis.
16. These competing arguments require a consideration of the significance of the distinction between party and party costs and legal practitioner/client costs, having regard to the 2015 Act and the amendment of Order 99 of the RSC following the enactment of the 2015 Act. It is necessary to consider both the original and revised wording of the relevant provisions of Order 99 in this respect. Order 99, rule 10(1) provides that Part III of Order 99 applies to costs which are to be paid to a party to any proceedings by another party to the proceedings. Order 99, rule 10(2) to (3) provides:

"(2) Subject to sub-rule (3), costs to which this Part applies shall be adjudicated on a party and party basis in accordance with section 155 and Schedule 1 to the 2015 Act."

(3) The Court in awarding costs to which this rule applies may in any case in which it thinks fit to do so, order or direct that the costs shall be adjudicated on a legal practitioner and client basis".

17. The previous Order 99, rule 10(2) provided as follows:

"(2) Subject to the following provisions of this rule, costs to which this rule applies shall be taxed on the party and party basis, and on a taxation on that basis there shall be allowed all such costs as were necessary or proper for the attainment of justice or for enforcing or defending the rights of the party whose costs are being taxed."

18. The new Order 99, rule 11 provides:

"A legal practitioner and client adjudication shall be conducted in accordance with section 155 and Schedule 1 to the 2015 Act, and such of these Rules as are applicable to legal practitioner and client costs".

19. The previous Order 99, rule 11(1) provided:

"(1) On a taxation as between solicitor and client, all costs shall be allowed except insofar as they are of an unreasonable amount or have been unreasonably incurred".

20. As noted by McDonald J. in *Hyper Trust Limited v FBD Insurance* [2021] IEHC 279, the existing version of Order 99 was introduced following the enactment of the 2015 Act. As he observes, the only distinction between the two scales of costs made by the 2015 Act in relation to their quantification is that contained in s.155(6). This requires the legal costs adjudicator in the context of the adjudication of costs as between client and legal practitioner to have regard to any agreement under s.151 of the 2015 Act. That permits a legal practitioner and a client to make an agreement in writing in relation to the amount or manner of payment of costs.

21. The only place in the Act where I could identify an explicit reference to party and party costs was at s.161(6) which provides for a review of the determination of the legal costs adjudicator. This requires that the Court hearing any such review should be the Court that heard the proceedings to which the costs relate *"if the adjudication the subject of the review is in relation to party and party costs"*. I interpret this section as meaning that if a court orders an award of costs against a party, and there is a review against the adjudicator's determination on those costs, the same court should hear that review. That provision makes obvious sense but is not particularly illuminating as to the distinction between the two types of cost approaches post the 2015 Act.

22. The original distinction between the two cost approaches was summarised by Laffoy J. in *Dunne v Fox*. She noted that the two different bases comprehend not only the different ranges of costs that are allowable, but also differences in the imposition of the burden of proving that the costs are within the relevant range. She referred to the previous wording of Order 99, rules 10 and 11, and, on that basis, held that the onus of showing that the expenditure comes within the range of party and party costs lies on the party who incurred it and who claims it is allowable. In contrast, she noted that the general thrust of Order 99, rule 11 (solicitor/client costs) was that the onus of proving that an item of

expenditure was of an unreasonable amount or unreasonably incurred was on the party against whom the costs were being taxed.

23. A similar view was expressed in the UK case of *Excelsior Commercial & Industrial Holdings v Salisbury* [2002] CP. Rep 67 by Lord Woolf, where he states as follows;

"15. 44.4(2) and 44.4(3) [of CPR] draw a distinction between the difference in substance between a standard order for costs and an indemnity order for costs. The differences are two-fold. First, the differences are as to the onus which is on a party to establish that the costs were reasonable. In the case of a standard order, the onus is on the party in whose favour the order has been made. In the case of an indemnity order, the onus of showing the costs are not reasonable is on the party against whom the order has been made..."

24. However, the difficulty with relying on the decision in *Dunne* re the onus of proof and the line of case law that follows that approach, is that *Dunne* is explicitly based on the previous versions of Order 99, rules 10 and 11 quoted above. Those have now been repealed and been replaced with a provision that explicitly provides that a party and party adjudication shall be conducted in accordance with s.155 and Schedule 1 to the Act. McDonald J. in *Hyper* observes that Order 99, rule 10(3) continues to make a distinction between party and party and legal practitioner/client and envisages that adjudication of costs on a legal practitioner and client basis should be treated as an exception to the general rule prescribed by Order 99, rule 10(2). Nonetheless, at paragraph 70 he observes as follows:

"The plaintiffs here appear to believe that, if an order for adjudication of their costs is to be made on a legal practitioner and client basis, they will fare better (in terms of the recovery of their costs from FBD) than they would on a party and party taxation."

25. That comment may be read as reflecting a view that the distinction may not be as acute as before. That certainly appears to me to be the case having regard to the new legislative regime. In particular, I have some doubts as to whether the position in relation to the onus of proof as identified above by Laffoy J. has survived the new legislative regime. Section 154 sets out very fully how an application for an adjudication should be brought and who may bring such an application. Section 155 addresses the principles that are to be applied and Schedule 1 describes those in greater detail, as well as the matters to be considered when a costs adjudication is being carried out. None of those refer to a differing onus of proof depending on whether party and party or legal practitioner/client adjudications are being carried out, even though s.154 deals with both types of adjudications. Given that one of the purposes of the 2015 Act was to increase transparency in relation to legal costs and in their adjudication in default of agreement, it seems undesirable that a rule or practice should be applied i.e. a differing onus of proof depending on the nature of the costs Order, that cannot be identified by considering either the Act or Order 99 and that clearly derived from the now repealed wording of Order 99.

26. Returning to the dispute between the parties, case law suggests that the word “reasonable” as a descriptor of costs is not determinative of whether they should be party and party costs, or legal practitioner/client costs. In *Doyle v Donovan* [2020] IEHC 119, Simons J., considering the question of costs, stated as follows at paragraph 32:

“I propose to make an order pursuant to Order 99, rule 10(3) of the Rules of the Superior Courts (as amended by Rules of the Superior Courts (Costs) 2019) directing that the costs shall be adjudicated on a legal practitioner and client basis. For the avoidance of any doubt, the intention of this order is that the plaintiff will recover costs at a higher level than the usual “party and party” basis, and that the adjudication will allow all reasonable costs (even if such costs are not strictly speaking “necessary” in the sense that the term is understood for the purposes of adjudication).”

27. By way of contrast, in *Hyper*, the Central Bank as part of its regulatory regime had indicated it expected that in certain circumstances a regulated financial services provider should agree to pay the “reasonable costs” of customer plaintiffs. McDonald J. rejected an argument based on *Doyle* that reasonable costs should be legal practitioner/client costs, observing:

“That is not to say, however, that party and party costs might not also constitute “reasonable costs”. It is important to keep in mind, in this context, that Schedule 1 to the 2015 Act expressly makes clear, in para. 1, that a Legal Costs Adjudicator, in adjudicated on a bill of costs, is required to apply the principle that the costs have been reasonably incurred and that the costs are reasonable in amount. That principle applies to both party and party costs and legal practitioner and client costs”.

28. In summary, those cases make it clear that in the case law to date, the concept of reasonable costs, albeit in a context other than s.169(4), can in principle apply both in the context of both party and party costs and legal practitioner/client costs.
29. The sharp distinction between what is recoverable in the two situations may in my view have been somewhat altered by the 2015 Act. In particular, s.154 may be of relevance here since this section addresses applications for the adjudication of legal costs and makes provision, *inter alia*, for an adjudication where a person has been ordered by a court to pay the legal costs of another person (s.154(1) to (3)), as well as the situation where a client wishes to have the bill of costs provided by his or her own legal practitioner adjudicated (s.154(4)) or where a legal practitioner wishes to have the bill provided to his or her client adjudicated upon (s.154(5)). The legal principles to be applied in these different situations are not stated to differ in the 2015 Act. Indeed Schedule 1 specifically refers to s.154 and, as noted above, identifies that a legal costs adjudicator must consider whether the costs have been reasonably incurred and whether they are reasonable in amount. That does not suggest to me a distinction in principle between the two sets of costs under the Act. Given that, it is somewhat difficult to understand how a radically different approach can now be contended for when a court orders a party to pay

legal practitioner/client costs to another party, given that the principles that will be applied in any adjudication will be those that derive from the 2015 Act i.e. reasonableness.

30. It is of course true that there is a very long line of case law identifying the difference between the two approaches, even after the 2015 Act. Moreover, Order 99, rules 10 and 11 maintain the distinction between the two approaches, although the RSC are of course subservient to the 2015 Act. Neither party is arguing that the distinction between the two approaches has been deprived of all significance by the 2015 Act. The parties clearly do not believe this to be the case, given that one party is forcefully arguing for party and party costs and the other is equally forcefully arguing for legal practitioner and client costs.
31. However, given my reservations expressed above about the extent to which the distinction remains meaningful under the Act, and my concern that any Order I make adhere closely to the wording of the Act, rather than being based on concepts neither defined nor clearly identified in the Act, I have decided to proceed exclusively on the basis of the wording of s.169(4). This requires me to award reasonable costs unless I decide otherwise. Here, no basis has been suggested upon which I should depart from the reasonable costs approach. I will therefore identify what I consider reasonable costs to be and the approach to be adopted by the solicitors when seeking to agree the costs.

Trafalgar criteria

32. My conclusion above means that I do not have to consider whether the conduct complained of by the defendant would have come within the categories set out in the *Trafalgar* case, which provides the basis for a court to make a legal practitioner/client Order. However, for the sake of completeness I will indicate my views on this dispute. In short, it does not seem to me that any of the matters complained of by the defendant come within what might be described as the *Trafalgar* categories.
33. Complaint is made of the fact that the plaintiff prosecuted an opaque case without providing proper particulars. That does not approach the threshold identified in *Trafalgar*. The obligation to particularise a case is identified in case law. Had the defendant considered the plaintiff had failed to meet that threshold, she was entitled to seek further and better particulars. She did not do so. The defendant also sought to argue that the plaintiff had pleaded there was a fiduciary relationship between the parties and as such had a special obligation to particularise its claim. Counsel for the defendant has cited no law in respect of that proposition. Further I cannot treat the relationship as being a fiduciary one simply because of a plea. I cannot decide the case, or any aspect of it, in the context of an application for discontinuance, and thus I am precluded from treating this as a case where there was an established fiduciary relationship. Even if there was, I am not persuaded this would impose an enhanced obligation in relation to particulars. In any case, the defendant has not persuaded me that a failure to particularise a claim could be the basis for a costs Order intended to mark the disapproval of the Court about the manner in which a case has been prosecuted.

34. Next, the defendant also complains about a lack of explanation for discontinuance. However, as identified above, it is well accepted that there is no need to give a reason for discontinuance.
35. The defendant also relies upon delay and the lateness of the notice of discontinuance. The defendant cannot rely on the period up to 2005 in circumstances where she was obtaining her pension during those years and therefore was not prejudiced by any delay. In respect of the years after the plaintiff had stopped her pension but had not sought recovery i.e. 2005 to 2012, the defendant could have issued proceedings seeking payment of her pension but did not do so. From 2014 there was undoubtedly delay on the plaintiff's side in progressing these proceedings, but the defendant had a remedy in that she could have attempted to have the case struck out for delay but did not do so. Moreover, it seems to me from reviewing the correspondence that between 2018 and 2021, responsibility for the delay in getting the preliminary matter on lay largely at the door of the defendant. But in any case, the defendant has produced no case law suggesting that standard litigation type delay alone, of the type present here, could provide a basis for awarding legal practitioner/client costs.
36. Next the defendant criticises the plaintiff for its conduct in that, prior to the commencement of the proceedings, it accused the defendant of fraudulent deceit and misrepresentation in a letter of 10 June 2013, although there was no evidential basis for same. I deprecate the reference to deceit, given that the plaintiff appeared to have no basis for same, but when the defendant called upon the plaintiff not to repeat this allegation in a letter of 10 July 2013, the plaintiff duly complied and did not refer to same in the proceedings. The single reference in this case to deceit (however inappropriate) cannot alone constitute the basis for an award of legal practitioner/client costs. Nor can I see that there was any collateral purpose in the proceedings as alleged by the defendant – they were a straight attempt to obtain repayment of the sums that the plaintiff argued were owing.
37. Finally, there is an unimpressive argument made that the plaintiff's conduct since making the decision to discontinue entitles the defendant to legal practitioner/client costs, the conduct in question being the plaintiff's attempt to pay the defendant monies that it considers are owing to her. First, that is not a matter within the ambit of these proceedings given that there was no counterclaim. Second, I am not satisfied on the evidence that there is any evidence of misconduct by the plaintiff in this regard. Rather it is the defendant who appears to be dragging her heels in relation to responding to the queries of the plaintiff in this respect.

Reasonable costs in the instant case

38. Given that I have decided not to characterise the costs as either party and party or legal practitioner/client but rather have decided to simply make an Order providing that the defendant is entitled to her reasonable costs, the circumstances of the discontinuance should be considered when identifying those costs. That regard may be had to the overall circumstances in deciding upon costs is clear from the wording of s.155 and Schedule 1. In support of his conclusion that the nature of the proceedings as a test case were to be

taken into account in adjudicating on costs, McDonald J. in Hyper referred to s.155(3) where an adjudicator is permitted to consider and have regard to the entire case or matter to which the adjudication relates, to s.155(5)(a) where the adjudicator is required to ascertain the nature, extent and value of the work and to Schedule 1 where the adjudicator is to consider the complexity and novelty of the issues involved in the legal work. I adopt that approach in the instant case.

39. Here, the relevant circumstances are as follows. The plaintiff initially sought damages from the defendant, prosecuted the case for nine years, agreed to the trial of a preliminary issue and decided to discontinue the case on the eve of the trial of the preliminary issue, having received the written submissions of the defendant (see paragraph 5 of the affidavit of David Leahy sworn on behalf of the plaintiff on 22 March 2022). At first blush it may seem unusual that, not only is the case being discontinued and the plaintiff withdrawing any claim for monies from the defendant, it is in fact offering the defendant money both in the context of these proceedings and related proceedings. But on closer examination, this is a logical approach, in circumstances where there is no middle ground. Either the defendant was not entitled to her pension and had to repay it or was always entitled to her pension including after she went back to work as a teacher). The entire context must be considered when seeking to agree costs.

Reasonable costs – summary

40. Turning now to the matters set out in Schedule 1 at paragraph 2, two appear deserving of comment. In relation to (a) i.e. the complexity and novelty of the issues involved, I consider the issues were complex. The plaintiff, who administers the relevant statutory Scheme, did not appear to understand its full nature and effect for many years, moving from a position where it believed the defendant owed it money under the Scheme to a position where it believed it owed the defendant money under the Scheme. For similar reasons, in relation to (b), the skill or specialised knowledge relevant to the matter, I consider specialised knowledge was required by the defendant's lawyers.
41. Accordingly, I will make an Order giving liberty to the parties to discontinue the proceedings on the basis that the defendant recover her reasonable costs of these proceedings having regard to the nature of the matter to include:
- all pleadings;
 - an appropriate number of consultations;
 - all written submissions;
 - costs of a junior and senior counsel;
 - reasonable instruction and brief fees in respect of the hearing of the preliminary issue.
42. In relation to the costs of this motion, it seems to me that the most appropriate course is to make no Order as to costs. If either party wishes to submit arguments against that

approach, they should provide written submissions no later than *26 April*. In the absence of submissions, no Order as to the costs of the motion will be made.