THE HIGH COURT

[2024] IEHC 56

Record No. 2021/1248 P

BETWEEN

KEN FENNELL

PLAINTIFF

- AND –

BRIAN REILLY AND IRENE REILLY

DEFENDANTS

Judgment of Ms. Justice Butler delivered on the 06th day of February 2024

Introduction:

1. This judgment relates to an application made by the plaintiff for the costs of an interlocutory injunction which was granted by me against the defendants in a judgment delivered on 12 October 2023 ([2023] IEHC 554). Both parties have made helpful written submissions in which their respective positions are clearly set out.
2. The plaintiff is seeking his costs pursuant to order 99 of the Rules of the Superior Courts and section 169(1) of the Legal Services Regulation Act 2015 ("the 2015 Act"). The plaintiff contends that, notwithstanding that this was an interlocutory application, it is one in respect of which it is appropriate for the court to make an order for costs at this stage. The plaintiff notes the conclusion at paragraph 62 of my judgement that many fundamental matters were not put in issue by the defendants and also that where matters

were disputed it was on the basis of generalised assertions rather than on specific grounds. In particular, the plaintiff relies on the fact that the defendants did not dispute the serious allegations made against them regarding their interference with the receivership including harassment, intimidation and threats directed at tenants who co-operated with the receiver and at the plaintiff's property manager.

3. As against this the defendants point out that the proceedings have not concluded so they have not yet been afforded the opportunity to ventilate their defence and to adduce evidence. The defendants identify a number of issues - such as their right to exercise an equity of redemption - which have not been and indeed could not be established at the interlocutory stage. They argue "*the trial of action* [sic] *may reveal material issues and arguments of facts, evidence and law in favour of the defendants*". The defendants submit that the costs of the injunction should be made costs in the cause or, alternatively, any order for costs made against them should be stayed pending the determination of the proceedings.

Relevant Legal Principles:

4. The parties were largely agreed as to the relevance and applicability of O.99 and section 169(1) of the 2015 Act to the issue of costs on this application. In brief, O.99, r.2(1) provides that, subject to the provisions of statute, the costs of and incidental to every proceeding are in the discretion of the court concerned. Order 99, r.2(3) provides that on determining any interlocutory application the High Court "*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*".
5. In my judgement in *Thompson v Tennant* [2020] IEHC 693 I observed that the effect of O.99, r.2(3) was to reverse the pre-existing position whereby the costs of

interlocutory applications were generally reserved to the trial of the action and only decided upon following the outcome of the interlocutory application in exceptional circumstances. They are now, as a general rule, to be decided upon following the outcome of the interlocutory application and reserved to the trial of the action only exceptionally and where it is not possible for the court to justly adjudicate upon them at the interlocutory stage.

6. The basis on which that adjudication is to be made is set out in s.169(1) of the 2015 Act. Although section 169(1) does not in its terms refer to interlocutory applications (and arguably might only refer to the proceedings as a whole), it is made applicable to such applications by virtue of O.99, r.3(1). The principle expressed in the first part of s.169(1) is that a party who is entirely successful in civil proceedings is entitled to an award of costs against the unsuccessful party unless the court orders otherwise. The balance of section 169(1) sets out, on a non-exclusive basis, a list of factors to which the court may have regard in deciding whether the particular nature and circumstances of the case and the conduct of the proceedings warrants a departure from the normal rule. The manner in which these principles should be applied has been summarised, *inter alia*, by Murray J in *Chubb European Group SE v Health Insurance Authority* [2020] IECA 183 and in *Heffernan v Hibernia College* [2020] IECA 121.

7. The combined effect of O.99, r.2(3) and s.169(1) is that, in general, a party who is successful in an interlocutory application is entitled to their costs against the unsuccessful party unless the court orders otherwise. The court retains a discretion in all cases. However, it is to be expected that that discretion will not be exercised against the granting of costs to a successful party unless there are specific and identifiable factors which justify such a decision. The need for there to be a specific rationale for the exercise of the court's discretion not to award costs in favour of the successful party

is evident from s.169(2) under which an express reasoning requirement is imposed in such cases. In practical terms, unless the unsuccessful party accepts that an order for costs should be made against them, the effect of these provisions is to impose an onus on the unsuccessful party to demonstrate to the court that there are factors which, in light of the particular nature and circumstances of the case, warrant a departure from the normal rule. This may well be an easier onus for an unsuccessful party to discharge in an interlocutory application; nonetheless it remains an onus which must be discharged.

8. Both parties have brought the court's attention to a series of cases, some of which predate the changes now evident in O.99, specifically dealing with the costs of interlocutory injunctions. Whilst earlier cases tended to emphasise the rationale for reserving the costs of interlocutory injunctions to the trial of the proceedings, later cases have sought to identify the distinction between the residual group of cases in which it remains appropriate to reserve the costs to the trial of the action and those cases in which the general statutory principle of ordering costs at the conclusion of an interlocutory application should now apply. Broadly speaking, the distinction identified is that between cases dependent on factual issues in respect of which a different picture may emerge at trial and cases turning on legal issues such as the adequacy of damages or the balance of convenience which will not be addressed again at the substantive trial (see *Glaxo Group Ltd v Rowex Ltd* [2015] 1 IR 185).

Analysis and Application to this Case:

9. This distinction is helpful, but I do not think that the circumstances in which a decision should be made on the costs of an interlocutory application are necessarily limited to cases where the interlocutory decision has turned on matters such as the adequacy of

damages or balance of convenience. In addressing whether the costs of an interlocutory application should be ordered immediately or reserved to the trial, the court should look at the issues raised on the interlocutory application itself and the evidence adduced by the parties to support or contest those issues. The court should then ask itself whether it was appropriate for the unsuccessful party to have moved or opposed the interlocutory application in light of those issues and on the basis of that evidence.

10. This recognises that a party may ultimately be successful in proceedings whilst having unnecessarily and unsuccessfully opposed interlocutory relief to which the other side was entitled. Equally an unsuccessful party may have properly and successfully opposed interlocutory relief which was sought against them. The costs of an interlocutory application can add considerably to the overall costs of litigation and the legislative and rule changes clearly intend that the party who is unsuccessful in the litigation overall should not necessarily be burdened with those costs. Thus, the costs of an interlocutory application should be determined by reference to whether the relief sought in that discrete application was properly sought (or opposed) and should be granted on that basis unless it is not possible to adjudicate justly on that issue until the determination of the proceedings.

11. In this case the plaintiff's underlying proceedings seek an order for possession of the secured property along with injunctive relief to restrain the defendants' interference with the receivership. The defendants' defence contends, *inter alia*, that the transfer of their loan and the plaintiff's appointment as receiver are invalid and that the transferee of the loan (which is not a party to these proceedings) will not be able to make good title in order to effect a sale of the property.

12. The plaintiff's interlocutory application was based on narrower grounds and sought orders restraining the defendants, their servants or agents, from interfering with the

receivership and trespassing on the property. The affidavit evidence adduced on behalf of the plaintiff was comprehensive and established an on-going lack of co-operation by the defendants with the receivership. At the more serious end of the scale it established that after the receiver had taken possession of the premises, the defendants unlawfully repossessed it and installed tenants, diverting the rent paid by those tenants from the receiver. However, at the most serious end of the scale it established that the defendants, through their agent, intimidated, threatened and harassed tenants who co-operated with the receiver and made an implicit death threat against the plaintiff's property manager.

13. None of this affidavit evidence was disputed by the defendants. The defendants did not offer any undertaking that they would cease this behaviour or that they would co-operate with the receiver in his management of the property. The defendants have not pointed to any particular sub-paragraph in s.169(1) upon which they rely to suggest that the court should not make an order for costs against them at this stage. Nor have they pointed to any factor outside of those listed in s.169(1) which might have a bearing on the exercise of the court's discretion. In essence the only argument made on behalf of the defendants is that the court has a discretion and, notwithstanding the outcome of the interlocutory application, they might yet succeed trial. In my view this is not a sound basis upon which the plaintiff should be refused his costs at this stage.

14. In the circumstances, the question to be asked is not whether the defendants might ultimately succeed at trial by establishing a breach of their rights pursuant to consumer protection legislation or otherwise. Rather the question is whether it was reasonable and appropriate for them to have opposed an interlocutory application seeking an injunction restraining them from interfering with the receivership and taking possession of the property. In particular it must be asked whether it was appropriate for them to have done so to do so without contradicting the plaintiff's evidence or adducing relevant

evidence on the matters on which the plaintiff's application was based. Manifestly it was not.

15. In all of the circumstances I do not think this is a case in which it would not be possible to justly adjudicate on the costs of the interlocutory application. I have no hesitation in finding that those costs should be awarded to the plaintiff who was successful in an application which the defendants' conduct forced him to bring.

16. In circumstances where the plaintiff has not actively opposed the imposition of a stay I will accede to the defendant's request and stay the execution of this costs order until the determination of the proceedings. I will also grant the plaintiff liberty to apply to the High Court in respect of the stay at any time subject to the usual notice being provided to the defendants.