Unapproved

No redactions needed

THE COURT OF APPEAL

CIVIL

Neutral Citation Number [2020] IECA 336

Court of Appeal Record Nos 2018/93 & 2018/110

Kennedy J

Ní Raifeartaigh J

Collins J

BETWEEN

NIAMH McDONALD

Plaintiff/Respondent

AND

TOMMY CONROY

First Defendant/Appellant

GOREY COMMUNITY SCHOOL

Second Defendant/Appellant

JUDGMENT of Mr Justice Maurice Collins delivered on 30 November 2020

PRELIMINARY

1. For the reasons set out in my judgment of 6 August 2020 (with which Kennedy and Ní Raifeartaigh JJ agreed), this Court allowed the appeals of the First Defendant (*"Fr Conroy*") and the Second Defendant ("*the School*"), set aside the Judgment and Order of the High Court and directed a rehearing of these proceedings in the High Court. The history of these proceedings and the matters at issue in them are described in detail in that judgment and this judgment should be read with it.

2. Subsequently, all the parties provided written submissions to the Court on the issue of costs. Having considered those submissions, the Court took the view that a hearing would be of assistance and it has had the benefit of oral submissions from counsel for all the parties. Counsel's written and oral submissions have been very helpful in addressing the costs issue.

THE APPLICABLE COSTS REGIME

3. Sections 168 and 169 of the Legal Services Regulation Act 2015 ("*the 2015 Act*") came into force on 7 October 2019 and a recast Order 99 (which is drafted to be read with those provisions) took effect from 3 December 2019. These appeals were pending at that stage. They were heard in January 2020. It is not clear from the 2015 Act whether

(and if so how) the provisions of sections 168 and 169 apply to an appeal initiated before, but heard after, 7 October 2019: *Chubb European Group SE v Health Insurance Authority* [2020] IECA 183, per Murray J at para 7. As Murray J also noted, an issue may also arise as to the relevance (if any) of those provisions where (as here) an appeal court is asked to make costs orders in relation to a High Court action heard and determined (including as to costs) before 7 October 2019. Again, the 2015 Act is silent on that point.

4. Of course, the practical significance of these issues depends in turn on the extent to which the new regime differs from the one it replaced. In *Chubb* the application of one regime rather than the other would not, on the facts, have produced a materially different result. However, some possible differences between the two were identified by Murray J at para 20 of *Chubb*.

5. While it did not appear from the parties' written submissions that anything necessarily turned on this issue here, the Court requested the parties to address the issue when they came to make their oral submissions. Ms Reilly (for Fr Conroy) submitted that the position was as in *Chubb*, that is to say that there was no material difference between the new and old regimes so far as the costs issues before the Court were concerned. Mr McDonagh (for the School) referred to the language of section 169(1) of the 2015 Act (which frames the basic costs rule in terms of a party "*who is <u>entirely</u> successful in civil proceedings"*) and suggested – as Murray J did in *Chubb* – that this might represent a change but did not suggest that it would make any material difference here. Finally, Mr Fitzgerald (for the Plaintiff, Ms McDonald) again did not suggest that there was any

material difference between the two regimes. While he emphasised the terms of section 169(1)(a) – which identifies "*conduct before and during the proceedings*" as a factor to which the court can have regard in deciding on costs – he did not suggest that such conduct could not be taken into account in the pre-2015 Act regime.

6. Accordingly, the consensus between the parties was that, for the purposes of addressing the issues of costs here, there was no material difference between the 2015 Act regime and the regime replaced by it.

THE COSTS ORDERS MADE IN THE HIGH COURT

7. The High Court Judge made an order for costs in favour of Ms McDonald against both Fr Conroy (including the costs of his unsuccessful counterclaim against her) and the School. In addition, he made so-called "*orders over*" against Fr Conroy and the School in respect of the costs of the Third Defendant (Dennis Brennan, sued as the nominee and agreed representative of the Catholic Church) which had been awarded against Ms McDonald when her claim against that Defendant failed.

8. There was no dispute that the costs order made in favour of Ms McDonald against Fr Conroy and the School must be set aside in light of this Court's decision on the substantive appeal.

9. It is equally clear that the "*orders over"* must be set aside also. Fr Conroy and the School both made arguments to the effect that no "*order over*" against them was

appropriate in any event but I do not think it is necessary or appropriate to engage with those arguments. The simple fact is that the High Court findings of liability having been set aside, the "*orders over*" cannot survive, given that the jurisdiction to make such an order is predicated on Ms McDonald having succeeded against one or more defendants: section 78 of the Courts of Justice Act 1936.

THE COSTS OF THE APPEALS

10. Fr Conroy and the School each seek the costs of their respective appeals. Each says that the costs should follow the event and, they say, they succeeded in their appeals and that the setting aside in full of the Judgment and Order of the High Court is the relevant "*event*" here for costs purposes.

11. In response, Ms McDonald asks the Court to make no order in respect of the costs of the appeals. She emphasises that the Appellants sought the dismissal of her action on appeal and did not achieve such dismissal. Instead a retrial has been directed and her claim remains alive. That, it is said, is "*unquestionably the most fundamental "event" in respect of the grounds of appeal".*

12. To this, Fr Conroy says that it would be harsh to deprive him of any part of his costs on this basis. His challenge to the High Court Judgment had succeeded in full and many aspects of the claim had been dismissed, such as her claim in relation to alleged events occurring after Ms McDonald's 18th birthday. In similar vein, Mr McDonagh emphasised that no additional hearing time was involved in the argument that the action

should be dismissed. He also observed that remittal had not been sought by Ms McDonald. If it had been the case that Ms McDonald had accepted error on the part of the Judge and conceded the need for a retrial, but the Appellants had nonetheless proceeded with their appeals in the hope of securing a dismissal of the action, that might have had a significant impact on the assessment of where the costs should lie. However, nothing like that had occurred here. On the contrary, it was said that Ms McDonald had sought to stand over every aspect of the Judgement and Order of the High Court, including findings that were obviously unsustainable, such as the finding of false imprisonment.

13. Ms McDonald also relies on the fact that the Appellants were unsuccessful in their appeals on the issue of recusal. The School allows that the recusal issue was determined against it but says that it was arguably moot and was not, in any event, the subject of substantive submissions at the hearing. Fr Conroy makes the same point. Each of the Appellants had rested on their written submissions and no hearing time had been taken up with the issue.

14. *Vis-à-vis* the School's appeal, Ms McDonald also relies on the fact that the School "*abandoned*" its appeal on "*the highly contentious issue of vicarious liability"*.[1] She says that that issue had featured significantly in the written submissions on appeal.

15. More generally, Ms McDonald invokes the novelty and importance of the issues in the proceedings and on appeal, as well as the hardship that would be caused to her if she is

[1] Submissions in response to the School, para 32.

ordered to pay the costs of the appeal. As against the School, Ms McDonald seeks to rely on what she says was its unprincipled conduct before and during the proceedings. In his oral submissions Mr Fitzgerald stated that the *"broad backs*" of the defendants had been "*lined up against the Plaintiff*" and complained vehemently about the fact that Fr Conroy had been re-instated to his teaching position by the School subsequent to the Court decision allowing the appeals.

16. In my view there can be no argument but that the Appellants succeeded in their appeals. The High Court had found each liable to Ms McDonald and each had been directed to pay a significant sum in damages to her. The Appellants persuaded this Court that there were significant defects in the High Court judgment such that all of the findings of liability made by the Judge were set aside and a retrial ordered. While in the circumstances, the Court did not need to address the issue of *quantum*, it follows from the Court's decision on the Statute of Limitations issue that, had it been necessary to address *quantum*, the award made by the Judge could not have been allowed to stand given that it clearly related in part to claims that were statute-barred (and, as I noted at paragraph 210 of my earlier judgment, the period from April 2006 to Summer 2007 in fact represented a very significant proportion of the overall period to which Ms McDonald's claim related). In addition, the damages award made by the Judge seems to have been partially attributable to a finding of false imprisonment which was effectively conceded to be unsustainable in the course of the hearing.

17. It follows, in my view, that the Appellants are presumptively entitled to recover all their costs of the appeals from Ms McDonald: *Godsil v Ireland* [2015] IESC 103, [2015] 4

IR 535. That is the appropriate starting point. The issue then is whether Ms McDonald has made out a case for any departure from that starting position.

18. As to the argument that the appeals involved novel and important points of law, it is difficult to disagree with Counsel for the School when he observed that one of the notable features of these proceedings – both in the High Court and before this Court on appeal – has been the failure of Ms McDonald to engage in any meaningful way with the legal issues arising and her insistence that the only significant issue was the relative credibility of herself and Fr Conroy. As is apparent from my earlier judgment, the Court certainly considered that certain of the issues presented by the appeals were novel and difficult. However, in considering those issues, the Court obtained only limited assistance from the submissions made by Ms McDonald. That being so, it seems to me that it would be wholly unjust to deny the Appellants their costs on this basis. In any event, while some of the issues arising on the appeals were novel, the fundamental complaints made by both Appellants – that the Judge had made serious errors in his assessment of the evidence – did not raise any novel issue. All of those complaints were, of course, upheld by this Court.

19. Equally, in my view, the conduct of Fr Conroy and the School does not provide any basis for departing from the default position that they should get their costs of the appeals. It need hardly be said that the Court cannot take any view on the allegations which have been made by Ms McDonald. Nor is the Court in any position to form a view as to whether (as is suggested) there is or has been any form of improper "*combination*" between Fr Conroy and the School. In his oral submissions, Mr

Fitzgerald strongly criticised the School's decision to re-instate Fr Conroy to his teaching position. While I can readily understand that such a decision might cause distress to Ms McDonald, no effort was made to explain how that decision could have any relevance to the question of where the costs of the appeals should fall.

20. A more substantial argument made by Ms McDonald is that the Appellants sought the dismissal of her action, whereas the Court ultimately directed a re-hearing by the High Court. On that basis, it is said, the Appellants have only been partly successful in their appeals and ought not to get all their costs. That argument may appear to have some superficial force but, on analysis, I believe that it is unconvincing, for a number of reasons:

- In the first place, it should be recalled that significant aspects of Ms McDonald's claim were, in fact, finally determined by this Court in favour of the Appellants (the claim in respect of the period after Ms McDonald turned 18).

- Secondly, while it is true that the Appellants did not succeed in persuading the Court that, as a matter of law, Ms McDonald *did not* have a cause of action against them for assault by reason of having (allegedly) consented to the (alleged) sexual contacts with Fr Conroy, it is not the case either that the Court determined that she *did* have any cause of action in the circumstances. That is so also in relation to the issue of whether there is a cause of action for grooming. This Court did not decide that issue one way or the other, for the reasons

explained in my judgment. In my opinion, it would not be correct to say that Ms McDonald succeeded on these issues.

- Thirdly, I agree with the Appellants that the arguments on the issue of whether the proceedings should be dismissed or remitted for rehearing did not take any material additional time over and above the time that would have necessary in any event for the Appellants to make the case that the judgment should be set aside because of the Judge's failure to address the issue of consent (on which, of course, the Appellants succeeded). The relevant legal principles, and the evidence given in the High Court, would have had to have been examined in any event. If the Appellants had confined themselves to seeking a retrial, the appeals would not have been materially narrower in their ambit and the hearing would not have been materially shorter. Therefore there was no material increase in the costs of the appeals (and no serious suggestion to the contrary was indeed made on Ms McDonald's behalf). In these circumstances, the decision of the High Court (Clarke J) in *Veolia Water UK plc v Fingal County Council* [2006] IEHC 240, [2007] 2 IR 81, as explained and applied by the Supreme Court in *MD v ND* [2015] IESC 66, [2016] 2 IR 438, indicates that there ought not to be any deduction from the costs that would otherwise be payable by the unsuccessful Plaintiff. It was not suggested by Ms McDonald that section 169(1) mandates a departure from the approach indicated by these authorities.

- Fourthly, and finally, I accept the argument made by Counsel for the School in this context. The Appellants had to proceed with their appeals in order to establish error on the part of the Judge such that the Judgment and Order against them should be set aside. They succeeded in doing so. If, in advance of the hearing of the appeals, error had been conceded and a retrial offered by Ms McDonald, the Appellants would have then had to decide whether or not to proceed with their appeals. If they had resolved to proceed notwithstanding such an offer, and then failed to achieve a dismissal of the action, they would certainly have been at risk in terms of the costs of the appeals. However, nothing like that occurred here. Nothing was conceded by Ms McDonald. The Appellants had to proceed with their appeals and, having done so, succeeded in all of their substantive grounds of challenge to the Judgment and Order of the High Court.

21. In the circumstances here, therefore, I am not persuaded that the fact that this Court declined to dismiss Ms McDonald's claim, and instead remitted it for rehearing by the High Court, justifies any departure from the starting point indicated above.

22. There is then the recusal issue. No hearing time was taken up on that issue but it was maintained as a ground of appeal by the Appellants and was addressed in some detail in the respective written submissions. While noting that it was arguably moot in light of my other findings on the appeal, I addressed the issue in my judgment because I was of the view that it would not be fair to the Judge to leave it unresolved.[2] For the reasons

[2] Judgment, at para 212.

set out in my judgment, I concluded that "*the application for recusal did not come close to meeting the applicable threshold"*.[3]

23. In my view, justice requires some recognition of the Appellants' failure on the recusal issue. However, I do not believe that any significant deduction from the costs otherwise payable to the Appellants would be justified in the particular circumstances here. In my view, the justice of the case would be met by directing that (i) the costs attributable to the preparation of the Appellants' respective written submissions on the recusal issue shall not be recoverable by them from Ms McDonald and (ii) the corresponding costs of Ms McDonald (the costs of preparing its written submissions on the recusal issue) shall be payable by the Appellants, those costs to be set off by way of deduction against the costs payable by Ms McDonald. The quantification of these costs will be a matter for the Legal Costs Adjudicator.

24. In my view, the same approach should be taken in relation to the costs of the vicarious liability issue. Accordingly, (i) the costs attributable to the preparation of the School's written submissions on the vicarious liability issue shall not be recoverable by it from Ms McDonald and (ii) the corresponding costs of Ms McDonald (the costs of preparing its written submissions on the vicarious liability issue) shall be payable by the Appellants, those costs to be set off by way of deduction against the costs payable by Ms Donald. Again, the quantification of these costs will be a matter for the Legal Costs Adjudicator.

[3] Judgment, at para 224.

25. Subject only to those deductions, Fr Conroy and the School are entitled to their costs of the appeals against Ms McDonald in my view.

26. I will address the question of a stay on those orders at the end of this judgment.

WHAT ORDERS SHOULD BE MADE IN RESPECT OF THE COSTS OF THE HIGH COURT HEARING?

27. In his written submissions, Fr Conroy accepts that it "*may be tempting at first blush to conclude that the costs of the first hearing should be reserved to the hearing of the action and/or that costs should follow the event"*. However, he says, many of the issues which occupied hearing time in the first trial will not feature in a retrial which will be "*a slimmed down retrial*".

28. Fr Conroy accordingly asks the Court to direct Ms McDonald to pay him all the costs of the High Court "*or such proportion of the costs of the hearing of the High Court shall deem meet*" by reference to the hearing time taken up with matters outside the parameters of the pleadings and issues found on appeal to have been statute-barred, with the balance of the costs (i.e. those costs not the subject of an immediate order in favour of Fr Conroy) "*being reserved to be made costs in the cause".* Alternatively, it is suggested, the Court should make no order in relation to the balance of costs not made the subject of an order in favour of Fr Conroy.

29. A broadly similar approach was taken by the School in its written submissions. The School says that the costs of the High Court hearing should not simply be reserved. That, it says, would be a significantly unfair to it. It too makes the point that, on a rehearing many of the significant issues dealt with before Eager J and in the appeal will not form part of the case, including events after Ms McDonald's 18th birthday and the her complaints about the disciplinary process undertaken that had been undertaken by the School. The School had repeatedly objected that the disciplinary process was not relevant to any issue in the proceedings but, while the Judge had belatedly upheld that objection, the School had been compelled to address it, not least in its lengthy cross-examination of Ms McDonald. The costs of those matters should not, it is submitted, be left to the judge hearing the retrial. Instead (so it is submitted) the School should be awarded its costs in respect of those issues.

30. In its written submissions, the order sought by the School on foot of its analysis was that the "*School should be awarded 50% of the costs of the High Court hearing as against the plaintiff and no order should be made in respect of the balance of the costs of the High Court hearing."* During the oral hearing, the Court noted that, while it had had to review a number of aspects of the High Court hearing in order to address the grounds of appeal, it had not been asked to carry out (and had not carried out) a root and branch review of the whole hearing. Therefore the Court was not in position (even if it was otherwise feasible or appropriate) to form any judgment as to what proportion of the overall High Court hearing was properly attributable to any particular issue or issues. The Court also indicated its view that it would not be appropriate to undertake such an exercise at this stage, solely for the purposes of deciding issues of costs.

Recognising that difficulty, Counsel suggested that it would be met by the Court making an order awarding the costs of specified issues to the School, in lieu of an order formulated in terms of percentages.

31. Ms McDonald says in contrast that the "*general rule*" is that the costs of the High Court hearing should await the outcome of the retrial, citing *MK v JPK (No 3) (Divorce: Currency)* [2006] IESC 4, [2006] 1 IR 283. She submitted that there is no basis for deviating from that general rule here and therefore the costs of the High Court should either be made costs in the cause or reserved to the High Court for determination at the end of the retrial. Ms McDonald disputes any characterisation of the time spent addressing the School's disciplinary process as wasted time. She says that the Judge had not so held but had rather held that no claim in damages could be pursued by reason of any complaint she had about the School's process.

32. Ms McDonald also makes the point that the recusal application made by the Appellants had failed in the High Court and their appeal on that issue had also been unsuccessful. The recusal issue would not be any part of a retrial. Therefore, if the Court were to take the approach urged by the Appellants, it would appear to follow that the Court should make an order in favour of Ms McDonald in relation to the costs of the recusal issue in the High Court.

33. As its title suggests, *MK v JPK (No 3)* was a family law case. On the application of the wife, the High Court had granted a decree of divorce along with ancillary relief. The husband appealed, and the Supreme Court allowed the appeal and sent the matter back

to the High Court to determine the issue of proper provision. The Supreme Court directed that the costs of the first trial should be determined by the trial judge on the retrial. The wife was again successful in the High Court and that court awarded her the costs of both trials. The husband appealed that order on the basis that it would be unfair and unjust that he should pay the costs of both trials. Addressing this aspect of the husband's appeal, McCracken J (with whom the other members of the Court agreed), observed that there was "*no doubt that the general rule in actions for damages where a retrial has been ordered is that costs follow the event in relation to both trials, and the question of the costs of the first trial are dependent on the outcome of the retrial.*"[4] That rule is not an absolute one, however, as is illustrated by the order made by the Supreme Court in *MK v JPK (No 3)* itself, with the Court directing that each party should bear their own costs of the first trial. The fact that the proceedings were family law proceedings was a significant factor in that decision.

34. There was no dispute that the "*general rule*" is in the terms articulated by McCracken J in *MK v JPK (No 3).* The rationale for such a rule appears reasonably clear. The ultimate winner in litigation should recover their costs, including the costs of any previous trial, because the ultimate outcome establishes that that party was entitled to succeed all along. That is so whether that party succeeded in the first trial or not.

35. The application of that general rule here would suggest that the Court should reserve the costs of the High Court trial to the judge who hears the retrial. Reserving the costs, rather than making them costs in the cause, would appear to me to be the appropriate

[4] At para 24.

order. As already observed, the rule that the costs of the first trial should follow the event at the retrial is not absolute and it appears to me that if such costs were to be made costs in the cause, that could unduly tie the hands of the judge hearing the retrial. At the level of principle, there may be many factors that might make it unjust to require the unsuccessful party to pay the full costs of two trials. *MK v JPK (No 3)* provides one example, albeit in the specific context of family law litigation. There are many other examples. Where, for instance, a party succeeded at a retrial on the basis of arguments not advanced and/or evidence not led at the first trial, it might be unjust to burden the unsuccessful party with two sets of costs. Where a party is allowed to amend its pleadings to make a new claim and that new claim leads to success at a retrial, there would appear to be an obvious injustice in requiring the unsuccessful party to pay the costs of the first trial. Such factors may well be relevant here.

36. While there may be cases where it may be appropriate to direct that the costs of the first trial be costs in the cause – for instance in single issue proceedings with a binary outcome – this is decidedly not such a case in my view. There is a range of possible outcomes here. Whatever the costs this Court sends back to the High Court to await the determination of the retrial should, in my view, be in the form of reserved costs, so that the High Court has appropriate flexibility to deal fairly with those costs, in light of the manner in which the retrial proceeds and its ultimate outcome.

37. The more difficult and contentious question is whether, as Ms McDonald argues, all the costs of the first trial should simply be reserved or whether, as the Appellants submit, the Court should make orders for costs in their favour in respect of what they submit

are discrete issues which have been finally determined, with the residual costs being reserved to the High Court

38. At the level of principle, it appears to me to be correct that the costs of issues that have now been finally determined, one way or another, should be decided at this stage. The alternative is to reserve those costs back to the High Court. In my view, however, this Court is in a better position than the High Court would be to decide where these costs should lie.

39. Here, I am satisfied that there are a number of issues canvassed before the High Court that added materially to the length of the hearing and which are no longer in the proceedings. There are three such issues in my view: (1) the recusal issue; (2) the statute of limitation issue relating to the claim made by Ms McDonald for acts occurring after she turned 18 and (3) the issue relating to the school disciplinary process. Each of these issues took up significant hearing time before the High Court (the Appellants say that the time taken for the recusal application was relatively brief but that is to ignore the very significant impact that it had on the running of the trial). None will be part of any retrial. Issues (1) and (2) have been finally determined by this Court. Issue (3) was ultimately ruled by the Judge to be outside the scope of the proceedings and that determination was not the subject of appeal by Ms McDonald. The Court did, however, become familiar with the issue in the course of the appeal hearing.

40. In my view, Ms McDonald should have her costs of issue (1) against Fr Conroy and the School. As regards issues (2) and (3), Fr Conroy and the School are entitled to their

costs against Ms McDonald. While issue (3) may have concerned the School more directly than Fr Conroy, the pursuit of the issue by Ms McDonald undoubtedly added materially to Fr Conroy's costs and it is appropriate therefore that the costs order should be in favour of both Appellants. The quantification of those costs will again be a matter for the Legal Costs Adjudicator.

41. The Appellants argues that the costs of the grooming issue should also be awarded to it. I do not agree. First, it is not clear to me that any significant part of the hearing can properly be attributed to the grooming issue. Secondly, as Ms McDonald points out, this aspect of her claim "*remains live*". That latter point also applies to the claims made and evidence heard regarding the Cologne trip. This was said not to have been pleaded. However, it was in fact referred to in particulars. In any event, it is presumably going to form part of any retrial and that being so I do not consider that there is any basis for making an order for costs in favour of the Appellants at this stage. Similarly, I do not think that there is any basis for making an order for costs at this stage arising from another issue canvassed by the School, namely the case made and the evidence given about what occurred in Fr Conroy's bedroom in the Gambia.

42. The parties criticise one another in relation to various other aspects of the High Court hearing, the calling of witnesses, the length of cross-examination and so on. I do not believe that this Court is in any position to form a clear view on these complaints such as might justify any further departure from the general rule that the costs of the High Court should be reserved.

43. Accordingly, I would make the following orders in respect of the costs of the High Court hearing:

- Ms McDonald to recover the costs of the recusal issue.

- The Appellants to recover the costs of dealing with the claims of Ms McDonald in relation to the period after her 18th birthday.

- The Appellants to recover the costs of the school disciplinary issue.

- The remaining costs are reserved to the High Court for determination following the retrial.

44. It would be helpful if the parties could agree on the precise form of order to give effect to the above.

SHOULD ANY COSTS ORDERS BE SUBJECT TO A STAY?

45. The Court invited the parties to address the issue of a stay in their oral submissions. Ms McDonald seeks a stay on any orders for costs made by the Court pending the retrial. Any such stay is strongly opposed by Fr Conroy. The School does not oppose a stay, expressing the view that it is a matter for the Court.

46. Ms McDonald suggests that she could not prosecute her claim to a retrial in the absence of a stay. That, it is said, would be a significant injustice, in light of the Court's finding that there ought to be such a retrial. Conversely, Fr Conroy says that it would be an injustice to him should he not be permitted to recover his costs at this stage. Fr Conroy goes so far as to ask the Court to stay any retrial pending the discharge of those costs by Ms McDonald, though making it clear that his principal concern is that the costs should not be subject to any stay. Fr Conroy emphasises that, in his defence of the claim, he is not "*backed*" by the School or anyone else.

47. Counsel for Fr Conroy brought the attention of the Court to *Permanent TSB Group Holdings plc v Skoczylas* [2020] IECA 152 which, in her submission, supports the argument that the costs should not be subject to a stay. In *Permanent TSB Group Holdings plc v Skoczylas,* the Court declined to grant a stay on orders for costs made against Mr Skoczylas. In doing so, the Court emphasised the importance of costs in the administration of justice, citing the decision of the Supreme Court in *Godsil v Ireland* to which I have already made reference. Counsel placed particular reliance on the following passage from the Court's judgement in *Permanent TSB Group Holdings plc v Skoczylas*:

> *"42. The principles discussed in Godsil apply to the execution of orders for costs and not merely to the making of such orders. To hold otherwise would be to fundamentally undermine the role of costs, and the function of costs orders, in the administration of justice. The making of costs orders would be an entirely hollow protection for successful litigants if such orders were not, in general,*

immediately enforceable. A successful party has a legitimate expectation that where costs are awarded in his favour that he may take all lawful steps to recover those costs from the unsuccessful party. Where it is sought to suspend that entitlement by the granting of a stay, the onus clearly rests on the party seeking such a stay to satisfy the court that it is in the interests of justice to do so. Such stays are, of course, frequently granted pending appeal. Such a stay has been ordered by this Court but the additional stay now sought by Mr Skoczylas is quite different in nature and scope."

48. In *Permanent TSB Group Holdings plc v Skoczylas,* the Court had earlier given judgment which, subject only to the possibility of an appeal to the Supreme Court, had finally disposed of all matters in the proceedings: *In the matter of Permanent TSB Group Holdings plc* [2020] IECA 1. The Court had been asked to put a stay on its costs orders pending application to the Supreme Court for leave to appeal and it had done so. Mr Skoczylas then sought a further stay on those orders pending the determination of separate actions he had brought against the State. There was an issue as to whether the Court had jurisdiction to grant a stay in such terms but the Court proceeded on the assumption that it had jurisdiction to do so. It nonetheless refused to grant the stay, for the reasons set out in detail in its judgment. The key factor, from the Court's point of view, was that the effect of such a stay would be to suspend indefinitely the entitlement of the successful party to recover its costs, pending the determination of proceedings in which it was not a party, in circumstances where the orders for costs were final and the proceedings in which they had been made had been finally determined.

49. That is not the case here, in my view. It is true that the orders for costs being made by this Court have the same status as the orders at issue in *Permanent TSB Group Holdings plc v Skoczylas*, that is to say those orders are final and conclusive subject only to the possibility of an appeal to the Supreme Court. But the crucial difference is that, unlike the position in *Permanent TSB Group Holdings plc*, the proceedings here have not been finally determined. Rather, this Court has directed a retrial, at which Ms McDonald may succeed. Obviously, that will be a matter for the High Court to decide and it would be inappropriate for this Court to offer any prediction as to the likely outcome of a retrial. In my view, however, Ms McDonald clearly has an arguable claim against the Defendants.

50. Precisely because the Court does not know what the outcome of a retrial will be, it must seek to identify "*a regime which minimises the overall risk of injustice*": per Clarke J (as he then was) for the Supreme Court in *Okunade v Minister for Justice v Minister for Finance* [2012] IESC 49; [2012] 3 IR 152, at para 67. As the Supreme Court (again per Clarke J) observed in *Dowling v Minister for Finance* [2013] IESC 37; [2013] 4 IR 576, this is the appropriate approach where any court is deciding, in advance of a final determination on the merits, whether to make any form of interim intervention. That is, in substance, what this Court is doing here.

51. In the event that Ms McDonald succeeds in her claim on a retrial, she will presumably be entitled to significant damages and costs (though, as already discussed, there may be an issue as to the proper extent of those costs). That may enable her to address her liability to the Defendants arising from the costs orders made by this Court in these

appeals. Success in the proceedings would also provide important vindication to Ms McDonald who alleges that she has been the victim of significant wrongdoing by the Defendants.

52. However, Ms McDonald says that unless this Court puts a stay on those costs orders against her, it is likely that she would not be in a position to proceed with her claim. That contention has not been seriously challenged by either Fr Conroy or the School (which, as already noted, does not oppose the application for a stay). Absent a stay, any costs orders may be executed immediately against Ms McDonald (subject of course to the quantum of those costs being agreed or, in default of agreement, measured by the Legal Costs Adjudicator). Such a process of execution could significantly undermine her capacity to proceed with her claim.

53. On the other hand, Fr Conroy says that granting a stay will cause hardship to him. He has no "*backer*" and is funding his defence himself. Undoubtedly, that must have been a serious burden for him to date and he must be understandably anxious at the prospect of facing into a retrial, with the further costs that will involve. However, it is not suggested that, in the event that a stay is granted, Fr Conroy would not be in a position to fund his defence at the retrial.

54. All cases such as this "*involve the risk that, when the dust has settled, it will be seen that some person or body has suffered either by the intervention of the court or, equally, by its non-intervention*" (*Okundade,* at para 67). Here, if the Court grants a stay, that

gives rise to a risk of injustice to Fr Conroy. On the other hand, if a stay is refused, that risks injustice to Ms McDonald.

55. In my view, the greater risk of injustice arises should a stay be refused. For the reasons set out in my earlier judgment, I concluded that "*the interests of justice clearly require a rehearing of these proceedings, burdensome as that will be for the parties*" (at para 230). That being so, it would not be in the interests of justice for the Court now to make an order for costs in terms that would have the effect of preventing such a rehearing or that would give rise to a real risk of that outcome. The issues raised in these proceedings are, in my view, too important to be decided by default. While an order staying the costs may cause hardship to Fr Conroy, the balance of justice, in my view, clearly weighs in favour of the granting of a stay in the circumstances here. The position taken by the School is another fact which weighs in favour of Ms McDonald, though I recognise that there is a significant difference in resources as between Fr Conroy and the School.

56. I would therefore stay all the orders for costs to be made by this Court pending the conclusion of the retrial. As regards the orders in respect of the costs of the appeals, the adjudication of those costs in accordance with Part 10, Chapter 4 of the 2015 Act should not be stayed in my view. Fr Conroy and the School should be permitted to proceed to adjudication of those costs, which will in turn trigger the application of Section 30(1) of the Courts and Court Officers Act 2002 (as amended), which provides for interest on costs. For obvious reasons, the limited appeal costs awarded to Ms McDonald (the costs of addressing the issues of recusal and vicarious liability in her written submissions on appeal) should be adjudicated at the same time so that the appropriate

set-offs can be determined and applied. Any further steps, including any process of execution, in relation to the costs of the appeals will be stayed. As regards the remaining orders for costs (those relating to the High Court), the stay will cover adjudication as well as execution. It clearly makes sense that all cost orders relating to the High Court trial should be adjudicated together rather than in a piecemeal fashion. That will enable that the Legal Costs Adjudicator to undertake its task with the benefit of having a comprehensive picture of the proceedings. That should save a modicum of time and money for the parties, though any such saving will be as nothing in the context of the time and money committed to these proceedings to date and the further time and money likely to be absorbed before they are finally determined.

Kennedy and Ní Raifeartaigh JJ have indicated that they agree with this judgment.