THE COURT OF APPEAL

Unapproved

Neutral Citation Number [2020] IECA 61
Record Number: 2019/400

Faherty J.
Ní Raifeartaigh J.
Power J.

BETWEEN/

CIARA GANNON MAGUIRE

PLAINTIFF/APPELLANT

- AND -

EILEEN O'CALLAGHAN

DEFENDANT/RESPONDENT

- AND -

THE ATTORNEY GENERAL

NOTICE PARTY

JUDGMENT of Ms. Justice Power delivered on the 4th day of March 2021

Background

1. The issue of principle in this appeal was whether there exists a bar to a court ordering the trial of a preliminary issue in circumstances where the constitutional validity of legislation is to be raised in the proceedings. Where a trial court will be called upon to consider the constitutional principle of avoidance of declarations of invalidity, the question that fell to be addressed by this Court was whether this was a matter which must be considered exclusively within the context of a unitary trial.

2. In the High Court, Noonan J. heard and determined the respondent's application for the trial of a preliminary issue, namely, whether the appellant's claim was statute barred by reason of s. 9(2)(b) of the Civil Liability Act 1961 (hereinafter 'the Act'). The appellant's reply was that if her claim was so statute barred, then s. 9(2)(b) of the Act was repugnant to the Constitution. On 28 June 2019, Noonan J. delivered judgment and ruled that the interests of justice favoured granting the respondent's application. The High Court Order directed the trial of two preliminary issues which, in the principal judgment, I referred to as 'the limitations issue' and 'the constitutional issue'.

3. This Court delivered its judgment on 6 October 2020 (see [2020] IECA 273). The appeal was dismissed, and the Order of the High Court was upheld.

4. The question of costs was adjourned. The parties were permitted to deliver written submissions. The respondent and the appellant filed submissions dated 2 November 2020. The Attorney General, by letter dated 10 November 2020, adopted a neutral position on costs but confirmed that he was not seeking any costs order in his favour. The appellant, thereafter, filed a reply dated 24 November 2020 to the respondent's submission on costs. Finally, on 25 November 2020, the respondent filed a reply to the appellant's submission on costs.

Submissions

The respondent's position

5. The respondent claims that she has been '*entirely successful'* in defending the appeal and submits that she is, therefore, entitled to an award of costs, including, the costs of defending an application for a stay on the High Court order pending the appeal, costs in that application having been reserved by this Court on 1 November 2019.

6. In support of her claim, the respondent points out that the appellant has failed on all grounds set out in her appeal. She submits that this Court's judgment, effectively, stated the

law as it stood, namely, that there exists established precedent to support the view that both a limitations issue and a constitutional issue may be determined by way of the procedure permitted under Order 25 RSC. The answer to the question of whether this was an appropriate case in which to order the trial of a preliminary issue was clear cut, particularly in circumstances where the constitutionality of that provision has already been upheld in *Moynihan v. Greensmyth* [1977] I.R. 55.

7. The respondent submits that this Court found that the appellant's argument in relation to 'the insurance issue' (which was alleged to have rendered the limitations issue moot) was one that could be raised before the trial judge hearing the preliminary issues. In her view, this Court had found that the interlocutory order of Noonan J. was one made in the course of the management of litigation and that there was nothing in his judgment to suggest that his discretion had been exercised in such a manner as to imperil the administration of justice. She claims that not only has she been 'entirely successful' in the appeal but that it was not reasonable for the appellant to seek to overturn the High Court's ruling in the face of a weight of authorities against her. She, therefore, seeks her costs with all outlays and disbursements to be adjudicated in default of agreement.

The appellant's position

8. The appellant argues that costs should be reserved to the trial judge. The taxed costs of the High Court and Court of Appeal would wholly undermine any benefit from her medical negligence claim. She also contends that the application for the trial of a preliminary issue before the High Court and on appeal had become, in reality, a hearing as to how best the litigation in question could be 'case managed'. The learned authors *Delany*

and McGrath, she points out, have observed that the costs of case management hearings are often dealt with by being made 'costs in the cause'.[1]

9. In the appellant's view, the principal judgment '*materially alters*' the directions that will govern the trial of the preliminary issues in '*a way that differs significantly from the High Court judgment and order*'. When compared to her situation following the High Court judgment, she contends that this Court's judgment now places her in a '*more advantageous*' position in several respects.

10. First, on the limitations issue, the appellant argues that this Court's assessment reserved to the trial judge the prospect of limited evidence being adduced should that be considered necessary. Neither this, she claims, nor the Attorney General's awaited replies to O. 60, rr. 1 and 2 notices were '*contemplated*' in the judgment of the High Court. Second, on the constitutional issue, the appellant claims that this Court's judgment leaves it to the trial judge to determine whether evidence is required beyond that set out in the agreed facts. Moreover, the confirmed participation of the Attorney General is, in the appellant's view, '*significant*' and '*alters radically*' the pleadings before the High Court. She submits that the participation of the Attorney General has been '*determined*' in a manner that is '*wholly advantageous*' to the appellant. Finally, she claims that this Court has addressed (at para. 120 of its judgment) in a '*common sense manner*' the '*stark evidential deficit*' contemplated by the absence of the respondent from the trial of the constitutional issue. The respondent's position has 'softened' and the reference (at para. 119 of the judgment) to it being for the trial judge to determine whether the respondent should be required to stay for the second issue were she to succeed on the first, '*goes far beyond what was ordered by the High Court which left no scope for the point to be raised'*.

[1] *Delany and McGrath on Civil Procedure* (4th ed., 2018) paragraph 24–85 citing *Cork Plastics (Manufacturing) v Ineos Compounds UK Ltd* [2007] IEHC 247, [2011] 1 I.R. 492.

11. Additionally, the appellant contends that this Court's observation to the effect that the trial judge will decide how best to deal with any claims concerning a potential evidential deficiency or other obstacle to justice goes *'far beyond what was ordered by the High Court*'. Referring to a comment in the principal judgment to the effect that '*it would be preferable if the two issues were to be considered within the context of one preliminary trial at which all parties were represented',* she submits that this is '*an important finding*' on a *via media* which would allow an efficient hearing of the preliminary issues while vindicating the appellant's right to a fair trial. These comments, in her view, '*reverse in part the High Court judgment, which had ordered two discrete issues to be tried'*.

The Attorney General's position

12. The Attorney General's position is that he remains neutral on the issue of costs but confirms that he is not seeking any order of costs in his favour. He has no view as to the form of the costs order which this Court might now make.

The appellant's reply

13. In replying submissions dated 24 November 2020, the appellant asserted that it was '*not correct*' for the respondent to say that she was '*entirely successful'* in the appeal and she identified what she contends are issues on which she, the appellant, either '*succeeded on appeal*' or '*improved her position*'. Recalling the procedural history of the case, she claimed that a major argument had related to the facts and to the potential for an evidential gap arising. She had participated in a *bona fide* and constructive manner to agree facts for the trial of the first preliminary issue. The High Court had '*refused*' to make orders against the Attorney General and had '*erred*' in awarding the costs of the motion to the defendant. The appellant contends that '*the Court in giving directions*' in a case where a constitutional provision may be struck down '*must have regard to the added degree of procedural*

complexity this will entail'. In light of the '*modification*' of the High Court's approach, she submitted that the High Court costs order should be varied to correspond with the costs order made for the appeal.

14. The respondent's costs submissions, it is claimed, do not take into account the consequences of this Court's judgment on the '*remaining issues*' and the changed position of the Attorney General. The respondent had submitted that there was no need for the Notice Party's involvement in the first preliminary issue. The appeal was thus '*necessary*' to ensure that the Attorney General was a party to the trial of that issue and his participation therein '*changes the entire focus of the proceedings'*.

15. This Court's judgment, the appellant claims, is '*notable*' for its '*determination*' of the '*remaining issues*' and the manner in which preliminary issues concerning O. 60 r. 1 and O. 60 r. 2 Notices may be resolved. She submits that '*for the first time'* an appellate court has considered the possibility of an interpretation issue (under O. 60, r.2) and a validity issue (under O. 60, r.1) '*being determined together as preliminary issues 'in tandem', should that course recommend itself to the trial judge*'. It will now be for the trial judge to decide whether those issues are to be determined as '*separate and distinct*' as held by the High Court or heard '*in tandem*' as discussed by this Court (at para. 120 of its judgment). The prospect of evidence being taken by the trial judge will have to be considered by the case management judge and thus this Court's judgment will have '*future consequences'*—a further reason why reserving all costs would be appropriate.

16. For the foregoing reasons, the appellant claims that costs of the High Court motion and the appeal should be reserved to the trial of the action. Without prejudice to that submission, she submits that an order reserving to the trial judge two-thirds of her costs and all of the respondent's costs would be an option, should the Court consider that the mootness issue (on insurance - see para. 8 above) was pursued without due cause.

The respondent's reply

17. The respondent disputes the appellant's submission that the hearings before the High Court and the Court of Appeal had concerned how best the litigation could be 'case managed'. On the contrary, the appellant had sought to overturn the decision of the High Court based on a principled argument that a court could not order the trial of a preliminary issue where the constitutional validity of legislation was raised. That, in the respondent's view, was the main 'event' for the purposes of deciding costs and, on that event, the appellant had failed.

18. Additionally, the Appellant had expended considerable time in written and oral submissions contending that the preliminary limitations issue was moot because of the existence of professional indemnity insurance in respect of Dr O'Callaghan's former general practice. The respondent argues that it was always within the discretion of the High Court to decide to take evidence and the possibility of oral evidence being given, should that prove necessary or desirable, had not been out-ruled by the High Court. This Court's judgment (at para. 90) had stated the law as it stands and it did not change how the trial of preliminary issues operates in the High Court. The trial judge would always have had the discretion to give such directions as are required to remedy any potential evidential deficiency arising from the mode of hearing the preliminary issues.

19. As to the contention that this Court's judgment materially altered the directions governing the trial of the preliminary issues, the respondent disagrees. The comments (at para. 120 of the judgment) regarding the possibility of an interpretation issue and a validity issue being determined together, were made *obiter*. To describe them as reversing, in part, the order of the High Court Judge, mischaracterises that *dicta*. It is clear from their context and from this Court's judgment that these were '*not matters for this Court to determine on this appeal*'.

The Law

20. When the High Court delivered its ruling in this case, costs were governed by the legal regime that operated under the former Order 99, r. 1 RSC. Order 99, r. 1(1) provided that *'the costs of and incidental to every proceeding in the Superior Courts shall be in the discretion of those Courts respectively*'. Order 99, r. 1(3) RSC articulated the general principle that costs follow the event, unless the court otherwise directs. The legislative basis for awarding costs was modified some months later with the enactment of the Legal Services Regulation Act 2015 on 7 October 2019. Thereafter, a recast Order 99, took effect from 3 December 2019.[2]

21. The broad discretionary authority granted under the former Order 99 regime was interpreted by Clark J. (as he then was) in *Veolia Water UK plc v. Fingal County Council* (No. 2) [2006] IEHC 240, 2 I.R. 81 wherein he confirmed (at para. 9) that: -

> *"Parties who are required to bring a case to court in order to secure their rights are, prima facie, entitled to the reasonable costs of maintaining the proceedings. Parties who successfully defend proceedings are, again prima facie, entitled to the costs to which they have been put in defending what, at the end of the day, the court has found to be unmeritorious proceedings."*

22. Thereafter, the Supreme Court in *Dunne v. Minister for the Environment and Others* [2007] IESC 60, [2008] 2 I.R. 775 sketched the contours of when the court may exercise its discretion to depart from the general rule. Murray C.J. observed (at para. 27) that such an issue fell to be determined *'on a case by case basis'.* In *Cork County Council v. Shackleton and Others* [2011] 1 I.R. 443, Clarke J. (as he then was), while acknowledging the role of discretion in any analysis of costs, drew attention to the limitations placed upon a court when considering a departure from '*the ordinary rule'.* Judicial discretion must be '*exercised in a reasoned way*' against the background of appropriate principles (at para. 12). Thus, in

[2] Order 99 as amended by S.I. No. 584/2019 - Rules of the Superior Courts (Costs) 2019

Child and Family Agency v. O.A. [2015] IESC 52, [2015] 2 I.R. 718, MacMenamin J., whilst confirming that costs are a discretionary matter, nevertheless, pointed out (at para. 4) that a judge is not '*at large'* when considering such an application and must exercise his or her discretion within jurisdictional criteria established by law. A trial judge is only entitled to depart from the general rule as to costs if satisfied that it is appropriate to do so.

23. More recently, this Court in *Chubb European Group SE v. The Health Insurance Authority* [2020] IECA 183, considered the effect of recent legislation and the recast Order 99 on the issue of judicial discretion and costs.[3] Murray J. considered (at para. 20) that while the updated legal framework is largely consistent with the principles of earlier legislation relating to costs, it no longer contains the earlier language that '*costs follow the event*' but requires, rather, that a party be '*entirely successful*' in order to be '*entitled*' to costs, unless the Court orders otherwise.

Discussion

24. If this Court is satisfied that the respondent has been 'entirely successful' in defending this appeal then, on the face of it, she is '*entitle*d' to her costs '*unless the Court orders otherwise*'. In determining whether to '*order otherwise*' the Court may have regard to several matters set out in s.169 of the Act of 2015, including, the conduct of the parties before and during the proceedings, and whether it was reasonable for a party to raise, purse or contest one or more issues.[4]

25. The appellant contends that the respondent was not '*entirely successful*' and makes a number of submissions in support of this claim. She submits that the Attorney General's participation in the trial of the first preliminary issue has been '*determined*' in a manner

[3] The Legal Services and Regulation Act 2015 and Order 99 RSC (Costs) Order 2019, S.I. 584/2019.
[4] See section 169 of the Act of 2015.

wholly advantageous to the appellant.[5] To my mind, her submission in this regard is misconceived. This Court did not '*determine*' the Attorney General's participation in the trial of the first preliminary issue. It noted (at para. 118) '*his stated intention*' to participate therein—the consequence of which was that the appellant could apply for directions in respect of the filing of any outstanding pleadings.

26. It is true that it was not until the hearing of the appeal that confirmation was furnished by the Attorney General in respect of his participation in the trial of the first issue. However, when it comes to the bearing, if any, which this development should have on costs, the question which this Court must consider is whether it would have decided the case differently had the concession by the Attorney General not been made. Because the core issue in this case involved a point of principle, namely, whether there exists a bar to ordering the trial of a preliminary issue where the constitutional validity of legislation is to be raised in the proceedings, I am satisfied that this Court would not have decided that issue differently had the aforesaid concession not been made. The Attorney General's stated intention to participate in the limitations issue was helpful in that it provided comfort to the appellant that she would not be disadvantaged or hindered at the trial of the first preliminary issue in the way that she had feared she might have been.

27. Moreover, the Attorney General's confirmed participation in the limitations issues does not detract from the fact that the respondent was successful in defending the appeal. Nor does it, in my view, fall within the type of *'*conduct*'* contemplated by s. 169 (1) of the Act of 2015 which might, possibly, attract a penalty in terms of costs. Even if I am wrong in this regard and should consider the unsuccessful appellant as being entitled to a 'discount' on costs by virtue of an allegedly late concession, then any such 'discount' would have to be made against costs which the Attorney General could, arguably, seek to recover from the

[5] See para. 13 of the Appellant's Submissions dated 2 November 2020.

appellant. As Notice Party, he had participated, successfully, in the appeal in order to uphold the point of the principle that a trial of a preliminary issue may be ordered in proceedings where constitutional issues will be raised. In circumstances, however, where the Attorney General is not seeking his costs, it seems to me that the comfort brought about by his stated intention to participate in the limitations issue cannot benefit the appellant when it comes to costs. It is certainly not a reason for reducing or discounting the costs entitlement of the successful respondent.

28. The appellant further claims that, in several respects, the Court's judgment is more advantageous to her pleaded challenge and that it '*alters*' the directions that will govern the trial of the preliminary issues. She points to the fact that this Court's assessment *'reserved to the Trial Judge the prospect of limited evidence'* being adduced and that it left the constitutional issue '*to the Trial Judge to determine whether evidence was required beyond the agreed facts*'. These cited references to what the trial judge may decide or determine cannot be deemed to constitute a 'new' approach introduced or adopted by this Court. The trial judge always retains a discretion to give whatever directions are required, in the interests of justice, to remedy any potential evidential deficiency that may arise in the course of a trial of a preliminary issue. Such discretion was underscored at several points throughout the principal judgment. Indeed, there are express references to the precedent case law in this regard, most notably, the High Court's judgment in *O'Sullivan v. Rogan & Moran* [2009] IEHC 456 and the Supreme Court's decision in *O'Sullivan v. Ireland, the Attorney General* [2019] IESC 33.

29. Moreover, there was nothing in the ruling of the High Court which had in any way delimited the trial judge's discretion in terms of the directions that may, ultimately, be given. The only direction Noonan J. specified was to stipulate what the law requires, namely, that the constitutional issue be heard *after* the limitations issue. The principal judgment underscored the fact that Noonan J. had correctly identified the sequence in which the two

discrete issues should be determined and, contrary to the appellant's submission, this Court's judgment has not altered or modified any aspect of the Order of Noonan J. It was always and remains open to the trial judge to decide how best to manage the trial of the preliminary issues in a manner that best serves the interests of justice.

30. In the same vein, I do not accept that the order of the High Court '*left no scope*' for the raising of the issue of the respondent's presence at the trial of the constitutional issue. Once again, the trial judge would always have had the discretion to decide whether or not to direct that all parties be present for the trial of both issues. Referring to observations made in para. 120 of the principal judgment to the effect that '*…it would be preferable if the two issues were to be considered within the context of one preliminary trial at which all parties were represented*', the appellant submits that this constitutes '*an important finding*' on a '*via media*' which would allow an efficient hearing of the preliminary issues while vindicating the appellant's right to a fair trial. These comments, she submits, '*reverse in part the High Court judgment, which had ordered two discrete issues to be tried*'.

31. The appellant's submission in this regard cannot be sustained. Firstly, what is quoted does not constitute a '*finding*' by the Court. Moreover, what was actually stated in the principal judgment was

> '*. . . . that it would be preferable if the two issues were to be considered within the context of one preliminary trial at which all parties were represented—**whilst, of course, adhering to the sequence directed by Noonan J. in his order of 23 July 2019. Whatever may transpire, these are not matters for this Court to determine on this appeal**.'* (Emphasis added.)

That being so, the contention that this Court, in dismissing the appeal, had somehow reversed, in part, any aspect of the High Court judgment is entirely misplaced.

32. The same must also be said of the contention that this Court's judgment had altered (whether '*materially*' or '*radically*') the directions that will govern the trial of the preliminary issues. The 'directions' which will govern the trial will be, entirely, a matter for

the trial judge whose ultimate discretion, as already noted, was underscored several times throughout the judgment. The comment as to what this Court considers preferable was clearly made *obiter* and was followed by an express confirmation that it was not, in any event, a matter that fell to be determined on this appeal. It was and remains within the discretion of the trial judge to decide what the interests of justice require when hearing and determining the preliminary issues.

33. Finally, as to the reasonableness of the respondent contesting the appeal, I consider that this was an entirely appropriate course of action to take in circumstances where the weight of the case law supported the ruling of the High Court judge. In his judgment, Noonan J. had set out and considered that case law and had applied it, carefully, to the facts of the case. The respondent was, thus, justified in defending the appeal.

Conclusion

34. This appeal arose from a ruling of the High Court in response to an application pursuant to O. 25 RSC directing the trial of a preliminary issue. The respondent's motion before the High Court was opposed by the appellant. Having been refused a stay on the order of the High Court, the appellant brought an application for a stay before this Court and the costs of that application were reserved. The appellant then prosecuted her appeal and was unsuccessful on all grounds.

35. I do not consider that this Court's judgment has filled any alleged or perceived lacuna in the relevant jurisprudence on the point of principle that was raised by the appellant. This Court confirmed existing case law to the effect that the limitations issue and the constitutional issue *are* discrete issues and *are* susceptible to determination by way of a trial of a preliminary issue. The appeal did not, in my view, have any '*added degree of procedural complexity*' such as would warrant a departure from the general principle on costs, whether as reflected under the former or current framework (see para. 21 above).

36. It follows that the respondent was '*entirely successful'* in defending the appeal and is 'entitled' to her costs. For the reasons set out above, I am satisfied that an award of costs should be made in her favour and that there are no circumstances such as would alter her general entitlement to recover the costs she has incurred in defending the appeal.

37. I would, therefore, make the following orders:

(i) an order refusing the reliefs sought in the Notice of Appeal dated the 21st August 2019 and affirming the Order of Noonan J. dated June 28th, 2019; and

(ii) an order directing that the appellant pay the respondent's costs in the appeal, including, the costs of the stay application which were reserved on the 1st November 2019, all outlays and disbursements, to be adjudicated in default of agreement.

38. As this judgment on costs is being delivered remotely, Faherty and Ní Raifeartaigh JJ. have indicated their agreement with its reasoning and with the conclusions reached in respect thereof.