THE HIGH COURT

DUBLIN CIRCUIT COUNTY OF THE CITY OF DUBLIN

[2021] IEHC 42

High Court Record No. 2019 No. 423 CA

Circuit Court Record No. 2013 No. 004737

BETWEEN

KESTUTIS NAUDZIUNAS

PLAINTIFF

AND

OKR GROUP

DEFENDANT

(NO. 2)

JUDGMENT of Mr. Justice Richard Humphreys delivered on Monday the 1st day of February, 2021

1. In *Naudziunas v. OKR Group (No. 1)* [2020] IEHC 566 (Unreported, High Court, 17th November, 2020), I decided that the proceedings should not be dismissed on grounds of delay and indicated a provisional view of costs following the event, subject to submissions to the contrary. Such submissions have now been made and in that regard I have received helpful assistance from Mr. Darren Lehane S.C. (with Mr. James Lawless B.L.) for the plaintiff and from Mr. Frank Beatty S.C. and Mr. Roland Rowan B.L. for the defendant.

2. The plaintiff seeks his costs, whereas the defendant seeks one of a number of alternative options, including:

   (i). no order as to costs;

   (ii). costs being reserved;

   (iii). costs being limited to those of the High Court;

   (iv). measuring costs, which was referred to in written submissions although that didn't particularly feature in the oral submissions on behalf of the defendant.

Legal context

3. The broad legal context for costs is well traversed. Costs follow the event in general, although there is a limited discretion to depart from that approach: see in particular *Dunne v. Minister for the Environment* [2007] IESC 60, [2008] 2 I.R. 775. The Legal Services Regulation Act 2015, s. 169, now expresses this in particular statutory terms in cases to which it applies.

4. The costs of interlocutory matters should normally be determined at the time rather than being reserved pursuant to O. 99, r. 2(3) RSC. Maybe if O. 99, r. 2(3) RSC didn't exist I could give more mileage to the argument that costs could be reserved, but, given that the rules are as they are, some stronger reason than is available here has to be provided to persuade the court not to decide on costs of an interlocutory motion at the interlocutory

stage. Special rules can apply in particular circumstances, for example in environmental law, but the general rules are the ones of particular relevance here, bearing in mind that of course there is always a limited jurisdiction to depart from those rules.

Application of law to the present case

5. The context here is that this is ordinary civil litigation between private law entities. Particular emphasis was placed by the defendant on s. 169(1)(a) to (c) of the 2015 Act regarding conduct before and during the proceedings, whether it was reasonable to raise the points and the manner in which the parties conducted part or all of their case. That approach is illustrative of the way in which, counter-intentionally, s. 169 has encouraged submissions to depart from the normal rule, because it lists a large number of factors which can have relevance in a vast number of cases. But departure from the default position remains an exception, not something to be strongly indicated merely because one or more of the s. 169(1) factors could be viewed in a way that could arguably be favourable to the losing side (which would be the case in an enormous number of instances). In any event, and while it doesn't really make any difference because I am taking the defendant's points into account anyway, I don't think the 2015 Act in fact strictly applies here, for two reasons. Firstly, the proceedings were commenced before s. 169 came into force, and secondly s. 169 applies where a party is entirely successful in "proceedings", and is not phrased so as to apply to individual interlocutory applications.

6. Reliance is placed on the fact that there was inordinate delay overall including some delays by the plaintiff, albeit that there were also some by the defendant. But that is not the sort of litigation conduct that normally warrants significant departure from the ordinary rule of costs following the event in the context of a motion to strike out, especially where there is some responsibility on both sides. Having regard to all the matters submitted, it seems to me that such matters are insufficient to displace the normal rule that costs follow the event.

7. The defendant submitted that it would be "a travesty of justice" if it ended up being liable to pay €67,195 in costs (that figure being what the plaintiff is said to be looking for, although it doesn't mean that costs will adjudicate at that level) in respect of a claim of €60,000 damages. Strong words. Are they justified?

8. I think not. First of all, there is no rule that costs cannot exceed the amount in dispute. Maybe one could make an argument for such a rule, but so far it doesn't exist. Secondly, the defendant claimed costs in both courts below and would have claimed costs in the High Court if it won. Admittedly, it didn't get full costs below, but it can't take much credit for that because it looked for them. Finally, the defendant is alluding in submissions to seeking leave to appeal to the Supreme Court, which would significantly increase the costs at a stroke. Presumably it won't be saying that it would be a travesty of justice if hypothetically it applies for and gets such leave, wins there and gets costs in four courts that together vastly exceed the amount in dispute. Ultimately, there is more validity in Mr. Lehane's characterisation of his opposite number's submission as meaning that "the travesty of justice is that he lost."

Whether the court should measure costs

9. Measurement of costs is sought in written submissions. That was not withdrawn, although it wasn't particularly pursued in oral submissions. For completeness I have considered that option, but I don't think it's appropriate. There is a specialist mechanism of adjudication to determine the quantum of costs. Some situations call for measuring costs, such as for example to put down a marker about some specific issue or alternatively to limit the costs available to a particular party having regard to particular circumstances. Measurement of costs may also be an option where the costs are going to be relatively modest and to measure them provides simplicity and certainty and avoids the costs of the adjudication process itself (or where for example there are two counterbalancing costs orders, it may be simpler to measure both sets of costs as equal to avoid a pointless process of adjudication and set-off). However, none of these kinds of situations really apply here, so I will leave the quantum of costs to the specialist mechanism of adjudication in the absence of any sufficient reason to measure them.

Application for a stay on costs

10. The defendant sought a stay on the costs which was to some extent resisted, it being pointed out that the onus to show that a stay is warranted is on the party seeking such a stay (*Minister for Communications, Energy & Natural Resources v. Wymes* [2020] IECA 274 (Unreported, Court of Appeal, Faherty J. (Kennedy and Ní Raifeartaigh JJ. concurring), 6th October, 2020)). That is of course true, but the normal approach is that interim or interlocutory awards of costs are stayed until the final order and that costs of a final order are normally stayed pending possible appeal. There are a number of reasons why that is normally in the interests of justice. If the defendant wins ultimately it will get an order for costs which could then be set off against any interim award. The meaningfulness of that procedure would be undermined if the interim costs had already been paid. The defendant here placed considerable emphasis on what it claims are its prospects of winning the substantive issue and argued that costs should be reserved on that basis. But speculation about the ultimate outcome is not, under rules of court, a basis for reserving interim or interlocutory costs. Rather it would represent a valid argument for awarding costs, but staying them to the ultimate outcome so that they could then be set off if necessary.

Costs of the costs hearing

11. This issue was also included in the plaintiff's application and it seems to me that the costs of the costs hearing should also follow the event. That is particularly so where the court expresses a preliminary view which the losing party then fails to displace: see *per* Murray J. (Haughton and Binchy JJ. concurring), in *Allied Irish Bank PLC v. Griffin* [2020] IECA 339 (Unreported, Court of Appeal, 1st December, 2020) at para. 7.

Order

12. This appeal illustrates that you can make a federal case out of anything. The present matter began as a fairly humble and routine motion in the Dublin County Registrar's Court and has worked its way up to the point that the defendant is now talking about seeking leave to appeal to the Supreme Court. It is of course free to do so and I make no comment on that. From my point of view, when giving the No. 1 judgment, I didn't have

any great intention of trying to write a judgment for the ages; or even for the law reports. This matter really involves the application of fairly uncontroversial and established legal principles to the particular detailed facts of one individual application out of a myriad of equally routine fact-dependent examples. At the risk of oversimplification, the No. 1 judgment could be summarised by saying that in the circumstances of this case, the defendant can't fail to provide a defence without being motioned, take 28 months to finalise discovery, itself launch a battery of procedures, and above all strongly object to the plaintiff's attempt to serve notice of trial, and then turn around 4 months after that strenuous objection to moving the matter forward and successfully ask for a dismiss of the entire proceedings on grounds of delay. The present judgment can be summarised by saying that costs follow the event. These are not revolutionary propositions.

13. For the reasons set out above, the order as to costs will be:

(i). all costs orders below set aside;

(ii). costs of the application to strike out the proceedings to be awarded to the plaintiff against the defendant including costs in the County Registrar's Court, the Circuit Court and the High Court, as well as the costs of the costs hearing in the High Court and including all reserved costs in any of those courts; and

(iii). a stay on the execution of those costs until the final determination of the action.