

**THE HIGH COURT**

[2022] IEHC 237

**High Court Record No. 2020/208 CA**

**Circuit Court Record No. 2018/3274**

**IN THE MATTER OF THE LANDLORD AND TENANT (AMENDMENT) ACT 1980**

**BETWEEN**

**BAZSONT LIJIMITED T/A STARBUCKS (LIFFEY VALLEY)**

**PLAINTIFF/APPELLANT**

**-AND-**

**BVK HIGHSTREET RETAIL LIFFEY PROPERTY LIMITED**

**DEFENDANT/RESPONDENT**

**RULING of Mr. Justice Woulfe as to Costs delivered on the 7th day of April, 2022**

**Introduction**

1. This is the ruling of the Court in respect of the appellant's application for the costs of their motion for discovery on appeal to this Court, and in the Court below, in favour of the appellant. The application was contained in their written submissions on costs dated the 14th January, 2022.
2. The respondent opposes the appellant's application for costs, for the reasons set out in their written submissions on costs dated the 28th January, 2022. The respondent submits that an order making the costs of discovery "costs in the cause" is the most appropriate costs order, or without prejudice thereto, that it is open to the Court to reserve costs in circumstances where the extent of the appellant's "victory" in relation to the one category of documents awarded is not yet ascertainable, pending the making of discovery. It is submitted in the alternative that, if this Court were minded to award costs in any amount to the appellant, such costs should be limited to the High Court (with the costs orders in the lower Courts vacated); such costs should be limited to a portion of the High Court costs to reflect the partial success; and there should be a stay on execution of any costs order pending determination of the proceedings.
3. On the 10th December, 2021, this Court delivered a judgment allowing in part the appellant's appeal against an order of the Circuit Court and ordering discovery of one of two categories of documents sought, subject to an amendment to the wording of this category: see [2021] IEHC 773.
4. It may be useful to set out a brief history of the matter to put this costs application in context. These proceedings arise against the backdrop of a landlord and tenant relationship in respect of Unit 21, Liffey Valley Shopping Centre, and concern the appellant's claim for a new tenancy pursuant to the provisions of the Landlord and Tenant (Amendment) Act 1980, in respect of the property. In correspondence the appellant originally sought five categories of documents. During the course of the correspondence the appellant confirmed that three of these five categories were no longer sought, but a new sixth category was sought along the way.
5. Agreement was not reached in correspondence on the remaining three categories, i.e. categories 3, 4 and 6, and the appellant brought a motion before the County Registrar seeking an order for discovery of these three disputed categories. In her order dated the

20th November, 2019, the County Registrar refused categories 3 and 4, and allowed category 6 in terms identical in part to terms previously offered by the respondent in correspondence, but including also some additional language as had featured in the appellant's wording of category 6.

6. The appellant appealed that order to the Circuit Court, and by order dated the 16th November, 2020, Her Honour Judge Linnane dismissed the appeal and affirmed the order of the County Registrar.
7. The appellant appealed again to this Court against the Circuit Court's refusal to grant discovery in respect of categories 3 and 4. As stated above, in my judgment delivered on the 10th December, 2021, I allowed the appeal in part and ordered discovery of the documents in category 3, subject to an amendment of the wording of this category as set out in para. 31 of my judgment. I did, however, refuse discovery of the documents sought in category 4, on the basis that these documents did not relate to any matter in question in this action.

#### **The Applicable Legal Principles**

8. The parties are in agreement that an award of costs is governed by ss. 168 and 169 of the Legal Services Regulation Act 2015, and O. 99, r. 2 of the Rules of the Superior Courts (as substituted by S.I. No. 584 of 2019). Section 168, in material part, provides as follows:-

"(1) Subject to the provisions of this Part, a Court may, on application by a party to civil proceedings, at any stage in, and from time to time during, those proceedings –

(a) order that a party to the proceedings pay the costs of or incidental to the proceedings of one or more parties to the proceedings...

(2) Without prejudice to subsection (1), the order may include an order that a party shall pay –

(a) a portion of another party's costs,

(d) where a party is partially successful in the proceedings, costs relating to the successful element or elements of the proceedings..."

Section 169 provides that a party who is entirely successful in civil proceedings is entitled to an award of costs against an unsuccessful party, unless the Court orders otherwise, having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties.

9. Order 99, r. 2 provides in material part as follows:

"Subject to the provisions of statute (including ss. 168 and 169 of the 2015 Act) and except as otherwise provided by these Rules:

- (1) The costs of and incidental to every proceeding in the Superior Courts shall be in the discretion of those Courts respectively.
- (2) No party shall be entitled to recover any costs of or incidental to any proceeding from any other party to such proceeding except under an order or as provided by these Rules.
- (3) The High Court, the Court of Appeal or the Supreme Court, upon determining any interlocutory application, 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."

### **Submissions of the Parties**

10. The appellant submits that, in the light of the statutory provisions, a key issue for the Court is whether the appellant was "entirely successful" or "partially successful". While the appellant was not successful in obtaining both categories of documents sought, the appellant contends that it is arguable that the appeal to this Court was "entirely successful", and proper discovery could not have been obtained by it without prosecuting the appeal.
11. Even if the appellant is deemed to have been only "partially successful", the appellant submits that having regard to the general discretion in s. 168(1)(a) and O. 99, r. 2(1), such a party may still succeed in obtaining all of their costs in an appropriate case: per Murray J. in *Higgins v. The Irish Aviation Authority* [2020] IECA 277, at para. 10. To refuse a "partially successful" party from obtaining all of their costs, the respondent must demonstrate that the appellant "raised unmeritorious points in the appeal, or that any of the points in which he was unsuccessful materially increased the costs of the appeal hearing": per Faherty J. in *Corrigan v. Kevin P. Kilrane & Company Solicitors* [2020] IECA 315, at para. 15.
12. In their submissions the respondent accepts part of the appellant's submissions at the level of principle. They go on to highlight some comments made by Murray J. in *Chubb European Group SE v. the Health Insurance Authority* [2020] IECA 183, regarding the difference between the old costs regime whereby costs should, unless otherwise ordered, "follow the event" and the new regime which refers to whether a party is "entirely successful" or "partly successful".
13. The respondent submits that "the event" for the purpose of determining costs in the instant application is the appellant's entire application for discovery, and not just its latest appeal. The overall position as regards the three categories of discovery sought is stated to be as follows:
  - (i) The appellants "victory" on its second appeal in respect of category 3 has the potential to prove entirely pyrrhic, given the explicit exclusion of pre-contractual negotiations;
  - (ii) The respondent has been entirely successful with regard to category 4; and

- (iii) In essence, the respondent's wording has been preferred to that of the appellant with regard to category 6.

**Decision**

14. As regards the exercise of the Court's discretion to award the costs of the appeal to this Court, the starting point in my opinion is the result of the appeal. The appeal was successful in obtaining discovery of one category of documents, albeit with amended wording, but was unsuccessful in obtaining discovery of the second category sought.
15. Section 168(2)(d) of the 2015 Act expressly provides that where a party is partially successful in any proceedings, the Court may order that the unsuccessful party pay only the costs relating to the successful element of the proceedings. In *Corrigan*, the Court of Appeal held that such an order could be viewed as appropriate where the partially successful party has raised unmeritorious points, and it is clear that the raising of those points has materially increased the costs of the hearing. In the present case, I am of the opinion that the appellant did raise an unmeritorious point regarding one of the two categories of discovery sought, i.e. category 4, and that this materially increased the costs of the appeal hearing, given the separate nature of the two categories.
16. In the circumstances, I am satisfied that the most appropriate costs order is that the respondent pay one half of the appellant's costs of the appeal to the High Court, such costs to be adjudicated upon by the Office of the Legal Costs Adjudicators in default of agreement between the parties. As regards the costs in the Court below, I am satisfied that a similar order should be made, notwithstanding the additional complications regarding category 6. I do not propose placing any stay on the execution of these costs orders.