

APPROVED

[2022] IEHC 429



**THE HIGH COURT
ADMIRALTY**

2018 No. 6336 P.

BETWEEN

BRIGID HUGHES

PLAINTIFF

AND

**THE OWNERS AND ALL PERSONS CLAIMING AN INTEREST IN THE
F.V. KERRI HEATHER**

DEFENDANTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 26 July 2022

INTRODUCTION

1. This judgment addresses the appropriate costs order to be made in respect of an application to join additional defendants to an admiralty action. The application was withdrawn after having been part-heard.

PROCEDURAL HISTORY

2. These proceedings take the form of an admiralty action. The claim arises out of the tragic death of Mr. Leonard Hughes. Mr. Hughes had been a member of the

NO REDACTION REQUIRED

crew of *The Kerri Heather* on 16 November 2016 and had fallen overboard. Despite immediate attempts to rescue him, Mr. Hughes was not recovered alive.

3. The defendants, as named in the proceedings, are the owners and all persons claiming an interest in *The Kerri Heather* (“*the vessel*”). The plenary summons identifies the defendant, more specifically, as the then owner of the vessel, Mr. John O’Connor.
4. Mr. O’Connor entered an appearance to the proceedings on 2 November 2018. Following a motion for judgment in default, Mr. O’Connor delivered a defence on 20 March 2019. It is pleaded, *inter alia*, that Mr. O’Connor had not been the operator of the vessel at the time of the accident.
5. Mr. O’Connor died on 9 June 2019. The death of the defendant clearly has procedural consequences for the admiralty action. The approach taken by the plaintiff was to issue a motion seeking to join two adult children of the late Mr. O’Connor to the proceedings as defendants (“*the intended defendants*”). It is stated in the grounding affidavit that Mr. O’Connor had transferred ownership of the vessel to a joint tenancy family partnership and that, upon his death, ownership of the vessel passed by survivorship to the intended defendants as joint tenants. There is no suggestion that the two adult children have any personal liability for the accident. It is not, for example, suggested that they were the owners of the vessel at the relevant time nor that they had any involvement whatsoever in its operation. Indeed, it appears that, as of the date of the accident, the vessel had been chartered out by the then owner to a third party.
6. The motion to join the intended defendants issued on 9 April 2021 and ultimately came on for hearing before me on 20 June 2022. At the hearing of the motion, I

queried the propriety of joining the intended defendants to the proceedings. The claim would appear to take the form of what is sometimes described as a statutory right of action *in rem* or a *quasi in rem* claim. More specifically, it would appear to be a claim as against the owner of the vessel at the time of the accident rather than against the vessel itself. This is subject to the caveat that had the owner of the vessel failed to defend the proceedings, then the claim might ultimately be enforced against him by the sale of the vessel. However, in circumstances where the then owner had entered an appearance and delivered a defence, the proceedings would appear to be properly directed against him *in personam*. The proceedings would, of course, continue to have certain attributes of an action *in rem*.

7. If this is the proper characterisation of the claim, then it is difficult to understand why it would be necessary to join the *subsequent* owners of the vessel as defendants to the proceedings. Whereas the intended defendants, as persons who now have an interest in the vessel, would clearly be entitled as a matter of fair procedure to participate in the proceedings if they so wished, they would not have any personal liability in circumstances where they were neither the owner nor operator of the vessel at the time of the accident.
8. The intended defendants have indicated that far from proposing to defend the proceedings, they are prepared to transfer *gratis* ownership of the vessel to the plaintiff. It has been explained that the intended defendants consider that the value of the vessel is approximately €15,000.
9. I adjourned the hearing of the motion in order to allow the plaintiff an opportunity, if she so wished, to file written submissions setting out the legal basis upon which the two intended defendants could be joined to the

proceedings. A period of two weeks was allowed in this regard, with a further two weeks thereafter for the intended defendants to file any written submissions if they so wished.

10. In the event, no written submissions were filed. When the matter returned before the court on 25 July 2022, counsel on behalf of the plaintiff indicated that the motion to join was not now being pursued.
11. The only outstanding issue between the parties is, therefore, in respect of costs. The intended defendants have applied for their costs on the basis that they had been put to the time and trouble of resisting the motion which has not now been pursued. Counsel on behalf of the intended defendants also drew the court's attention to open correspondence wherein the intended defendants had indicated that they were prepared to transfer ownership of the vessel to the plaintiff. It would seem that in circumstances where no basis has been put forward to suggest that the intended defendants have personal liability, the extent of their potential exposure is capped at the value of the vessel.
12. Counsel on behalf of the plaintiff submits that there should be no order as to costs. Counsel draws attention to the fact that the plaintiff is impecunious.

DECISION

13. The default position in respect of legal costs is that a party who has been entirely successful in proceedings is entitled to recover their costs from the losing side: see section 169 of the Legal Services Regulation Act 2015. This principle is applied, by analogy, to the costs of interlocutory motions by the recast Order 99 of the Rules of the Superior Courts.

14. The fact, if fact it be, that a litigant is of limited financial means is not a reason for disapplying the ordinary rules in relation to costs. As explained by the Court of Appeal in *McFadden v. Muckno Hotels Ltd* [2020] IECA 153 (at paragraphs 11 and 12), impecuniosity is not included as one of the criteria prescribed by the Legal Services Regulation Act 2015, and that to decide to make no order as to costs solely on the grounds of impecuniosity would appear to run contrary to the intent of the legislature.
15. In the present case, there has not been any formal adjudication upon the motion by the court. This is because the motion has been withdrawn rather than pursued. Nevertheless, it seems to me that the principle which underlies the costs rules summarised above applies by analogy. The intended defendants have been put to the time and trouble of resisting an application which, at first blush at least, appears to have been without foundation, and which, crucially, has since been withdrawn. The intended defendants also took an entirely responsible attitude to the proceedings, flagging in correspondence and replying affidavits that there was no legal basis for the application to join, and then putting forward an offer to transfer *gratis* ownership of the vessel.
16. Having regard to this, it seems to me that the conduct of the plaintiff in pursuing the application to hearing was unreasonable. Accordingly, a costs order will be made in favour of the intended defendants in respect of the motion. Such costs to be adjudicated under Part 10 of the Legal Services Regulation Act 2015 in default of agreement between the parties. There will be no stay on the costs order in circumstances where the intended defendants are not parties to the proceedings and thus there is no necessity to await the final determination of same.

17. Any further application in these proceedings is to be made to the Admiralty Judge (McDonald J.). The matter will be listed, remotely, for directions on 6 October 2022 at 10.30 am.

Appearances

Patrick Barrett for the plaintiff instructed by O'Sullivan Hogan

Fionán Ó Muirheartaigh for the intended defendants instructed by Augustus Cullen
Law

Approved
Gemma S. Mans