THE HIGH COURT

[2022] IEHC 563

2019 342 P

BETWEEN

MICHAEL HERBST

PLAINTIFF

AND

PATRICK MCGUCKIAN, ALISTAIR MCGUCKIAN

AND GLENFORD CONSTRUCTION WICKLOW LIMITED

DEFENDANTS

COSTS RULING of Mr. Justice Heslin delivered on the 12th day of October, 2022

1. This short ruling in relation to the question of costs should be read in conjunction with the judgment delivered electronically on 1 April 2022, in which the court held that the plaintiff's delay was both inordinate and inexcusable and that the balance of justice lay overwhelmingly in favour of the dismissal of these proceedings under the *Primor* approach (*Primor plc v. Stokes Kennedy Crowley* [1996] 2 I.R. 459.)

2. The court also expressed the view that the lapse of time between relevant events (i.e. discussions and negotiations in 1999) and any likely trial (the end of 2022 at the earliest) gave rise to a substantial risk of an unjust result were this Court to permit the proceedings to continue to a trial.

3. For the reasons set out in the judgment, the court granted the reliefs sought in the 14 October 2020 motion brought by the first and second named defendants ("the defendants") wherein orders were sought dismissing the plaintiff's claim for inordinate and inexcusable delay and/or for want of prosecution, pursuant to the inherent jurisdiction of this court; and/or in the alternative, an order pursuant to O.122, r.11 of the Rules of the Superior Courts ("RSC") dismissing the said claim for want of prosecution; and/or dismissing same in the interests of justice.

4. The parties have not been able to reach agreement on the question of costs. Written legal submissions were provided by both sides and I have very carefully considered these. In the plaintiff's written submissions, reference is made inter-alia to the decision in *Bolton MDC v. Secretary of State for the Environment* [1995] 1 W.L.R. 1176, 1178 and to the statement that: "*as in all questions to do with costs, the fundamental rule is that there are no rules. Costs are always in the discretion of the court. Any practice, however widespread and long-standing, must never be allowed to harden into a rule.*" Relying on the foregoing principle, the plaintiff contends that the awarding of costs is a matter of judicial discretion.

5. The foregoing submission does not seem to me to take adequate account of three matters. First, when it comes to the question of costs there most certainly is a rule, in that the 'normal rule' is that costs should 'follow the event'. Indeed, the normal rule has been given statutory expression in s.169 of the Legal Services Regulation Act 2015, to which I will return presently. Second, although this court has discretion, it is by no means 'at large' in the exercise of that discretion and it falls to be

exercised within the 'guardrails' of relevant principles and statutory provisions. Third, a party which urges the court to depart from the normal rule faces the onus of demonstrating that justice requires this. As the Supreme Court made clear in *Grimes v. Punchestown Developments Co. Ltd* [2002] 4 I.R. 515:

> *"The normal rule is that costs follow the event. However, there are circumstances where a court on the facts of a case determines that the normal rule will not apply. Indeed,* ***a successful applicant may not succeed in obtaining an order for costs if the facts indicate features which are unsatisfactory as to the way in which they acted****, see for example Donegal County Council v. O'Donnell (unreported, High Court, O'Hanlon J., 25 June 1982). The burden is on the party making an application to show that the order for costs should not follow the general rule."* (emphasis added)

6. The facts in the present case do not indicate features which are unsatisfactory as to the way in which the defendants acted. In *Godsil v. Ireland* [2015] 4 I.R. 535, Mr. Justice McKechnie put matters as follows:

> *"[23] The general rule is that costs follow the event unless the court orders otherwise: O.99, r.1(3) and (4) of the Rules of the Superior Courts 1986. This applies to both the original action and to appeals to this court (Grimes v. Punchestown Developments Co. Ltd [2002] 4 I.R. 515 and S.P.U. C. v. Coogan (No. 2) [1990] 1 I.R. 273. Although acknowledged as being discretionary, a court which is minded to disapply this rule can only do so on a reasoned basis, clearly explained, and one rationally connected to the facts of the case to include the conduct of the participants: in effect, the discretion so vested is not at large but must be exercised judicially (Dunne v. Minister for the Environment [2007] IESC 60, [2008] 2 I.R. 775 at pp. 783 and 784). The 'overarching test' in this regard, as described by Laffoy J. in Fyffes plc the DCC plc [2006] IEHC 32, [2009] 2 I.R. 417 at para. 16, p. 679, is justice related.* ***It is only when justice demands should the general rule be departed from. On all occasions when such is asserted the onus is on the party who so claims****."* (emphasis added)

7. Earlier, I made reference to the Legal Services Regulation Act 2015 ("the 2015 Act") s.169(1) of which provides the following:

> *"(1) A party who is* ***entirely successful*** *in civil proceedings* ***is entitled to an award of costs*** *against a party who is not successful in those proceedings, 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, including–*
>
> *(a) conduct before and during the proceedings,*
>
> *(b) whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings,*
>
> *(c) the manner in which the parties conducted all or any part of their cases,*
>
> *(d) whether a successful party exaggerated his or her claim,*
>
> *(e) whether a party made a payment into court and the date of that payment,*
>
> *(f) whether a party made an offer to settle the matter the subject of the proceedings, and if so, the date, terms and circumstances of that offer, and*

(g) where the parties were invited by the court to settle the claim (whether by mediation or otherwise) and the court considers that one or more than one of the parties was or were unreasonable in refusing to engage in the settlement discussions or in mediation.

(2) *Where the court orders that a party who is entirely successful in civil proceedings is not entitled to an award of costs against a party who is not successful in those proceedings it shall give reasons for that order."* (emphasis added)

8. It cannot be in doubt that the defendants have been 'entirely successful' in their application. The plaintiff did not succeed on any aspect, despite the contents of the affidavits and exhibits proffered by the plaintiff and the undoubted skill with which his counsel opposed the application. O.99, r.2 of the RSC provides:

"2. Subject to the provisions of statute (including sections 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.

(4) An award of costs shall include any sum payable by the party in favour of whom such an award is made by way of value added tax on such costs, where and only where such party establishes that such sum is not otherwise recoverable.

(5) An order may require the payment of an amount in respect of costs forthwith, notwithstanding that the proceedings have not been concluded."

In light of the foregoing, as the entirely successful party, the defendants enjoy a presumptive right (*per*. s. 169(1) of the 2015 Act) to an award of costs against the plaintiff (who was entirely unsuccessful).

9. Although this court heard a motion rather than making a determination of the underlying merits of the pleaded claim, it was a motion which, by reason of the defendants' success, brought finality to the proceedings. The 'event', for the purposes of costs, was the defendants' entirely successful application, which the plaintiff was entirely unsuccessful in his attempt to oppose. Although O.99, r.2(1) of the RSC provides that costs are in the *discretion* of the court, and as I mentioned earlier, this court is not at all 'at large' in the exercise of that discretion; in that the court is mandated to have regard, in particular, to the various items set out in s.169(1) of the 2015 Act, which I have already quoted *verbatim.* Taking O. 99 and s.169 together, the position is that the defendants, as the entirely successful party, are entitled to an award of costs unless the nature or circumstances of this particular case, including the conduct of the parties, means that the interests of justice require otherwise.

10. In essence, the plaintiff submits that there are special circumstances which justify a departure from the 'normal' rule as to costs (i.e. that 'costs follow the event'); whereas the defendants submit that no circumstances exist to displace the presumption that they are entitled to their costs and the defendants assert that there is no basis for this Court to exercise its discretion to depart from the normal rule.

"Hybrid" claim

11. As to what the plaintiff asserts to be special circumstances, it is submitted that the plaintiff's claim was a 'hybrid' one for specific performance and also damages in lieu of specific performance and that, when planning was refused in 2017, the damages in lieu of specific performance element of the hybrid claim required a transfer to the High Court. The plaintiff submits that it would be unfair not to fashion a costs order in favour of the plaintiff for the Circuit Court proceedings.

12. As regards the foregoing, the plaintiff brought a single set of proceedings which began life in the Circuit Court and which the plaintiff subsequently applied to have transferred to this Court. Although the defendants did not appear for the transfer application, they had previously made their position 'crystal-clear' in correspondence i.e. they regard the plaintiff's claim as without merit in light of the facts pertaining.

13. In this court's judgment, a very detailed analysis was given of the chronology of all relevant events charting the claim's progress, or lack thereof, both in the circuit court and, thereafter, in this court. It is that single claim in respect of which the plaintiff's delay was inordinate and inexcusable and in respect of which the balance of justice favoured dismissal. It would be entirely inimical to justice to make any order for costs in *favour* of the plaintiff in these circumstances, which is something the plaintiff *inter alia* contends for. Insofar as any costs orders were made by the Circuit Court in favour of the plaintiff, they should stand. Where the Circuit Court made any costs orders in favour of the first and or second named defendants, they should also stand. Where the Circuit Court made any orders reserving costs, the first and second named defendants are entitled to same, in circumstances where the case has been brought to finality by virtue of the defendants' entirely successful application.

Trial avoided

14. It is also submitted that the defendants' success in their motion has resulted in the plaintiff not having a full court hearing, as the trial of the action has been avoided. It is true to say that the avoidance of a full trial has represented a 'saving' in costs but that does not provide any basis for denying the entirely successful party their costs to date.

Interlocutory applications

15. The plaintiff refers to a number of interlocutory applications and adjournments prior to the motion to dismiss. These do not constitute special circumstances.

Forbearance

16. It is also submitted that the plaintiff gave the defendant periods of 'forbearance' in an effort to reach a solution; and it is said that these periods of forbearance create 'complexities' when it comes to costs and that a 'discount' should be applied to reflect this.

17. Insofar as the plaintiff's submissions take issue with the evidence which underpinned this Court's decision and/or the way in which this Court considered the evidence (including forbearance periods) it is appropriate to make clear that it is wholly impermissible for any party to mount a 'collateral

attack' on a judgment of this Court, whether in the context of arguing that the party in question should be awarded costs, or is entitled to avoid a liability to pay costs, or otherwise. As Noonan J. stated in the Court of Appeal's decision in *Mongan & Ors. v. Clare Co. Co*. [2020] IECA 317 (Unreported, Court of Appeal, 20 November 2020):

> *"4. This proposition, amounting as it does to an impermissible challenge to the judgement of this court, is advanced in support of the contention that there should be no order as to the costs of the appeal and cross-appeal or an adjusted costs order granting some percentage benefit to the respondents. It seems to me that such a submission is to be deprecated for the reasons I have identified."*

18. Having made the foregoing clear, all periods of forbearance were taken into account (and excluded from the calculation of delay) when the court considered the defendants' motion and this is clear from the judgment delivered. The plaintiff laid considerable emphasis on these periods of forbearance, contending that they provided an answer to the defendants' motion, but they were entirely unsuccessful in that contention. It is not unfair to say that periods of forbearance agreed between the parties were for their mutual benefit at that point. Having regard to the foregoing, it does not seem to me that those periods of forbearance create any complexities whatsoever, in the context of fairly determining the question of costs. They certainly do not in my view constitute special circumstances which would justify a departure from the normal rule.

Development of jurisprudence 2010 - 2016

19. A submission is made on behalf of the plaintiff with reference to the development of the jurisprudence in relation to applications to dismiss, as it has evolved since 2010 (when proceedings were issued) and 2016 (when the case was listed for hearing in the circuit court). The foregoing does not seem to me to constitute any basis for departing from the normal rule in the present case.

Receivership of the third named defendant

20. It is contended that the third named defendant going into receivership means that no order for costs should be made, by reason of that factor alone or, in the alternative, on the basis of that factor coupled with the refusal of planning permission later on. The third named defendant's receivership, and the prejudice to the first and second named defendants, is dealt with in the court's judgment, in the context of the plaintiff's delay prior and subsequent to same, as is the decision to refuse planning. By no means are these issues which would justify penalising the entirely successful party in respect of the costs to which they are *prima facie* entitled.

Swearing of affidavit

21. The plaintiff contends that it would be unfair to burden him with all of the costs in circumstances where a Mr. Declan Stone still did not swear any affidavit. I fail to see the logic in the foregoing submission. Quite apart entirely from the fact that there was no evidence before the court that the plaintiff had asked Mr. Stone to swear any affidavit as to his recollection of events, the more fundamentally important point is that the plaintiff has been entirely unsuccessful in his opposition to the defendant's motion.

Sale to 3rd defendant

22. Among the other submissions made on behalf of the plaintiff is that the defendants did not inform him, at the time, of a sale to the 3rd named defendant; that the failure to obtain planning permission in 2017 led to what was described as a loss of opportunity on the plaintiff's part; and

that the failure of the defendants to bring a motion to dismiss the circuit court proceedings had the effect of prolonging matters and increasing the plaintiff's costs. All the foregoing are issues dealt with in the Court's judgment. Even if these submissions do not constitute a collateral attack on the judgment (by way of a contention that different findings should be made than are set out in this court's decision), none of these are circumstances which would justify a departure from the normal rule that costs follow the event.

6-acre site

23. Various submissions are made with reference to the pleaded case, including that it was pleaded at paragraph 10 of the equity civil bill that the plaintiff had been hindered in the development of his land, full particulars of which would be provided at the hearing of the action; whereas particulars were not sought regarding the 6-acre site with development potential.

24. Again, these submissions relate to issues which were addressed in the Court's judgment. Moreover, they do not constitute a basis for denying costs to the entirely successful party. Insofar as these are submissions which relate to the manner in which the case progressed, that very issue was dealt with extensively in the court's judgment, wherein there was careful consideration, *inter alia,* of the *Primor* principles having regard to the particular facts, as a result of which the Plaintiff's claim was dismissed on delay grounds.

Latitude

25. The plaintiff's opposition to an order for costs is summarised in the following terms in the final paragraph of his written submissions:

> *"During the hearing of the application it was submitted on the part of the plaintiff that the plaintiff gave the applicants, being the first and 2nd named defendant's, considerable latitude and trust to honour their agreement. Whilst the court has found that the delay is inordinate and that the delay is inexcusable and that the balance of justice to the balance in favour of a dismissal of the proceedings, it is submitted that there are special circumstances which exist and which ought to justify a departure from the 'normal' or general rule that costs should 'follow the event'. The appropriate order in the interests of justice is that there be no order as to costs for either the motion or of the substantive proceedings prior to the motion on the part of the 1st and 2nd named defendants which issued on 14 October 2020."*

26. It is fair to say that at various points in the plaintiff's written submissions, he argues variously for (i) an order for costs in his favour; (ii) no order for costs; and (iii) a 'discount' in respect of his liability for costs. In concluding this ruling, it seems to me to be useful to return to sub-paragraphs (a) to (g) of section 169 (1) of the 2015 Act and to make the following comments:

(a) ***conduct before and during the proceedings*** - No adverse findings have been made in respect of the conduct, during the proceedings, of the first or second named defendants;

(b) ***whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings*** - The defendants have been entirely successful in their application to strike out the plaintiff's proceedings for want of prosecution/ inordinate and inexcusable delay for the reasons detailed in this court's judgement and, thus, this subsection cannot avail the plaintiff.

(c) the manner in which the parties conducted all or any part of their cases – There have been no adverse findings in respect of the first or second named defendants in this regard.

(d) ***whether a successful party exaggerated his or her claim -*** This is not a relevant matter in the present case.

(e) ***whether a party made a payment into court and the date of that payment*** - On 9 March 2018 the defendants' solicitors wrote to make clear that they were willing to bear their own costs if an application was made by the plaintiff to strike out the proceedings. That letter stated inter-alia: "*We suggest that you make an application on the next motion date to strike it out and our clients are prepared to pay their own costs… failing which we will use this letter to seek our costs".* This suggestion was not taken up by the plaintiff. In a further letter sent on 12 October 2018 on behalf of the defendants, it was made clear that they would be seeking costs should the plaintiff proceed with the transfer application. The plaintiff made a transfer application and, in the manner explained in this court's judgement, delayed both prior to and subsequent to that application.

(f) ***where the parties were invited by the court to settle the claim (whether by mediation or otherwise) and the court considers that one or more than one of the parties was or were unreasonable in refusing to engage in the settlement discussions or in mediation -*** The foregoing is not relevant in the present case.

Conclusion

27. I have considered very carefully all submissions made on the question of costs, the principal submissions having been set out in this short ruling. Having done so, I am entirely satisfied that the plaintiff has not demonstrated that grounds exist which would justify a departure by this court from the 'normal rule' that costs should 'follow the event'.

28. Insofar as s.169 (2) requires reasons to be given for a departure from the normal rule, it is not possible, in my view, to identify any such reasons. I am not satisfied that there special or countervailing circumstances which would disentitle the entirely successful party from receiving their costs.

29. Although sub-paragraphs (a) to (g) of s.169 of the 2015 Act comprises a 'non-exhaustive' list, a consideration of the facts and circumstances of this case, in light of those statutory provisions, fortifies me in the view that it would be to create a patent injustice not to award the entirely successful party their costs in the present case.

30. I am entirely satisfied that justice does not require any departure from the normal rule. The appropriate orders to be made as follows:

(a) The Court DOTH ORDER the plaintiff's claim be hereby dismissed for want of prosecution for inordinate and inexcusable delay pursuant to the inherent jurisdiction of this Court;

(b) And the Court DOTH ORDER that the first and second named defendants be entitled to the entire costs of the motion dated 14 October 2020 (including the application in relation to costs) to be adjudicated on in default of agreement;

(c) And the Court DOTH ORDER that the first and second named defendants be entitled to the costs of the proceedings, including the costs of the proceedings in the circuit court, and including any reserved and discovery costs, to be adjudicated on in default of agreement.