THE HIGH COURT

[2022] IEHC 647

Record Number: 2018/484 CA

BETWEEN

ROSARIE O'MAHONY

PLAINTIFF

AND

START MORTGAGES DESIGNATED ACTIVITY COMPANY

DEFENDANT

Record Number: 2018/510 CA

BETWEEN

ROSARIE O'MAHONY

PLAINTIFF

AND

START MORTGAGES DESIGNATED ACTIVITY COMPANY

DEFENDANT

Record Number: 2020/10 CA

BETWEEN

START MORTGAGES DESIGNATED ACTIVITY COMPANY

PLAINTIFF

AND

ROSARIE O'MAHONY

DEFENDANT

COSTS RULING of Mr. Justice Mark Heslin delivered on the 24th day of November 2022

Introduction

1. This ruling on the question of costs should be read in conjunction with the judgment delivered in this matter on 4th November 2022 (neutral citation [2022] IEHC 629) ("the judgment"), para. 126 of which stated, *inter alia,* the following:

> *"The evidence before the court in the present case puts beyond doubt that Start DAC is the owner of the relevant charge; that the right to seek possession arose; and is exercisable on the facts. There is simply no issue disclosed by the evidence which would render a plenary hearing necessary. The attempts to oppose the possession claim fall very well short of anything which could conceivably constitute a stateable grounds of defence. The relevant proofs have been made out comprehensively and in a manner which rules out any legal or factual basis upon which the possession claim could be dismissed, even if the matter went to go to a plenary hearing (something which the interests of justice plainly do not require). Nor is there any conceivable basis for a valid challenge to the substitution application. By*

virtue of being the sole registered-owner of the relevant charge, Start DAC is the one and only appropriate plaintiff."

Entirely successful

2. For the reasons set out in the judgment Start Mortgages Designated Activity Company ("Start") was entirely successful and Ms. O'Mahony ("the defendant") was entirely unsuccessful (in what were 7 separate applications, all of which related to Start's application for possession of certain property owned by the defendant, the subject of a mortgage and charge of which Start is the registered owner). The significance of the foregoing is clear when one looks at Section 169(1) of the Legal Services Regulation Act of 2015 Act ("the 2015 Act"), which states:

"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." (Emphasis added).

3. As the judgment makes clear, all issues were decided in favour of Start, which is the "*entirely successful*" party for the purposes of section 169 (1) of the 2015 Act. As the entirely successful party, Start enjoys a presumptive right (*per* s. 169(1) of the 2015 Act) to an award of costs against the defendant.

Starting point

4. In *Pembroke Equity Partners Ltd v Corrigan & Galligan*, [2022] IECA 142 Collins J for the Court of Appeal, stated:

"Section 169(1) embodies the general principle that costs follow the event (expressed in terms of a party who is entirely successful being entitled to an award of costs unless the Court orders otherwise). That, according to the Supreme Court in Godsil v Ireland [2015] IESC 103, [2015] 4 IR 535 is the "overriding start point on any question of contested costs." While Godsil was a pre-2015 Act case, in my view that same principle animates its provisions and those of Order 99 (recast)".

5. I will presently refer to both *Godsil* and to Order 99 of the Rules of the Superior Courts ("RSC") but at this juncture, and for the benefit of the defendant, it is appropriate to refer to what is often called the "normal rule" in relation to costs, which, in the manner explained by the learned

judge in *Pembroke Equity Partners Ltd,* has its statutory reflection in Section 169(1) of the 2015 Act.

The normal rule

6. 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*" (i.e. that the successful party is entitled to their costs as against the unsuccessful party). It is also settled law that the burden rests on the party seeking to resist a costs order to show that the costs should *not* follow the normal rule. For the defendant's benefit, the 'event', for the purposes of costs, was Start's success in all 7 applications, in which the defendant was entirely unsuccessful.

Order 99

7. Order 99 Rules 2 and 3 of the Rules of the RSC provide:

"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.

3. (1) ***The High Court, in considering the awarding of the costs*** *of any action or step in any proceedings, and the Supreme Court and Court of Appeal in considering the awarding of the costs of any appeal or step in any appeal, in respect of a claim or counterclaim,* ***shall have regard to the matters set out in section 169(1)*** *of the 2015 Act, where applicable. (2) For the purposes of section 169(1)(f) of the 2015 Act, an offer to settle includes any offer in writing made without prejudice save as to the issue of costs."* (Emphasis added).

Discretion

8. Although O.99, r.2(1) of the RSC provides that costs are in the *discretion* of the court, this court is not 'at large' in the exercise of that discretion. This is because the court is mandated to have regard, in particular, to the various items set out in s.169(1) of the 2015 Act. The effect of O. 99 and s.169 is that Start is *prima facie* 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.

Start's position

9. On the issue of costs, Start contends that there are no special circumstances which would justify a departure from the 'normal' rule as to costs (i.e. that 'costs follow the event'). Start submits that there is nothing to displace the presumption that they are entitled to their costs and no valid basis for the court exercising its discretion to depart from the 'normal' rule.

The defendant's position

10. In opposition to a costs order, the defendant has referred to a wide range of issues which appear in a range of documents which she submitted in the wake of the judgment, including:-

(a) A document entitled "*Notice of Error/Coram Nobis No.2"*, dated 17 November which was addressed to this court (and copied to the Chief Justice and to the Attorney General);

(b) A document entitled "*Statutory Notice to file your Defence to the filed Defence & Counter Claim 8th October 2018",* dated 9 November 2022 addressed to Start (and copied to Cork Circuit Court office);

(c) A document entitled "*Statutory Notice to file your Defence to the filed Defence & Counter Claim 12th June 2013*", dated 16 November 2022 addressed to Start (and copied to Cork Circuit Court office);

11. When these documents are taken together, the principal issues raised by the defendant comprise the following:-

- That this court erred in its decision to refuse an adjournment on 18 October 2022 (see *ex tempore* ruling [2022] IEHC 595) ("the ruling");
- That this court erred by not revising and setting-aside the ruling;
- That the defendant shall move to set-aside the ruling, or to bring an application pursuant to Article 40.3 of the constitution, either of which "*will obviously undermine and tear down"* the said ruling;
- That the judgment *"is grounded and founded based upon blatant lies and perjury";*
- That the defendant's "*truthfulness and honour*" was impermissibly called into question in the judgment;
- That the court's ruling and the judgment "*are both riddled throughout with now proven lies and complete non sense and fantastical versions of imagined historical events*";
- That there has been "*concealment"* and "*false and misrepresented narrations",* which *"have been believed by all in sundry in Dublin, that have led to this unholy mess upon the two plates (rulings riddled with deceit)";*
- That, notwithstanding the judgment, the defendant has "*livened up",* by means of the service by her of what she describes as "*the recent 28-day statutory notice dated 16 November 2022"*, Circuit Court proceedings under record number 2012/3669 and that the defendant is entitled, and intends, to "*seek judgement in default*" in those proceedings;
- That Start is obliged, by 14 December 2022, to "*submit a response/defence to the served defence & counter claim dated 12 June 2013*" in Circuit Court proceedings under record number 2012/3669, despite (i) the fact that these proceedings were discontinued and (ii) notwithstanding the findings in the judgment;
- That *"any litigant can show losses of their time*" of up to €5,000 and "*on a good day one would expect a norm of 10k++ euro in costs";*

- That, based on the defendant's calculations with respect to "*special summons/civil bill possession claims, within the years of 2009 and 2013*", Start has a liability of a "*nice princely sum 25,000,000,000 euro outstanding (minimum estimate)"* and is *"insolvent";*
- That Start *"lawfully cannot enforce loan agreements";*
- That the proceedings against the defendant involve *"champerty and/or maintenance in the statutory courts";*
- That Start cannot *"pursuant to the 2015 Consumer Protection Act enforce any agreement they service, in their own name";*
- That this court's ruling and judgment are both *"ultra vires";*
- That this court's "*judicial role on the day was ultra vires*";
- That this "*court on the day unfortunately was constituted without the benefit of law, particularly lacking the fundamentals of two court acts of 1961";*
- That the defendant was entitled, notwithstanding the judgment to serve a *"28-day statutory notice for default judgement in default, dated 9 November 2022 about livening up the second extant counter claim, in matter 2017/00847 in the circuit court";*
- That Start is obliged, by 7 December 2022, to "*submit a response/defence to the served defence & counter claim dated 8 October 2018*" in Circuit Court proceedings under record number 2017/00847, notwithstanding the findings in the judgment;
- That, regardless of the judgment, this court now has a *"conflict of interest in both counter claim matters"* and that this court "*should not trespass in any way upon my counter claims";*
- That the ruling and judgment flowed from "*deceit"* on the part of Start, which "*degraded the official position"* of court into publishing the ruling and judgment;
- That the "*next move"* must be for the court to revisit the ruling and if same *"is not amended correctly or set-aside of your own accord within 14 days of receipt of this notice of error/coram nobis No.2, I shall be moving to have your subsequent ruling of 4 November 2022 set-aside also, and/or I shall lay an Article 40.3 against the State";*
- That the court has made *"unlawful statutory rulings";*
- That the court is witness to *"fraud and unlawful actions";*
- That setting aside the ruling and judgment are required by virtue of the court's duties and the declaration made on entry into office;
- That the defendant is "*Acting in national capacity; Pursuant to Articles 1-3 of Bunreacht Na HEireann; A living woman & all rights reserved".*

Decision

12. Just as the defendant did in opposition to the substitution/possession application (which opposition was entirely unsuccessful) the defendant has repeated, in the context of seeking to avoid an order for costs in favour of Start, a range of allegations which are as *serious*, as they are *entirely devoid* of any basis in fact. Given this court's findings in the judgment, it was utterly inappropriate for the defendant to have repeated what are no more than 'bare' or 'mere' assertions (but baseless allegations which could have a serious and damaging effect on others). No sense of grievance renders it permissible to make (in this instance, to repeat) very serious allegations, including of fraud and deceit on the part of others, which, in the manner explained in the judgment, have no support whatsoever when one looks at the facts which emerge from

an analysis of the evidence. This must be deprecated in the very strongest and clearest of terms. Plainly, to make a range of baseless assertions provides no grounds whatsoever to avoid a costs order in respect of applications in which the defendant was wholly unsuccessful.

13. It should also be said that the judgment explained (for the benefit of the defendant who was not legally represented), the significance of the *res judicata* principle. Paragraph 97 of the judgment states, *inter alia,* that "*...a practical example of the res judicata principle…is that where one party brings an action against another and judgment is given by the court, the plaintiff cannot bring another action against the same party for the same cause. Similarly, the res judicata principle ensures that a litigant cannot engage in an abuse of process by challenging in later proceedings, a final decision made against her or him by a court of competent jurisdiction in earlier proceedings in which she, or he, had a full opportunity of contesting matters."* The defendant's efforts to 're-animate' Circuit Court proceedings, by means of two 28-day notices, despite the findings by this court as set out in the judgment constitutes, without doubt, a breach of the *res judicata* principle. For the avoidance of doubt both 28-day notices are a nullity. Despite the defendant's unilateral attempts to require Start to deliver 'defences', these attempts are wholly inappropriate in light of the judgment. Nor do those impermissible efforts to try and litigate in the Circuit Court, issues which have been determined *against* the defendant for reasons set out in the judgment, constitute any basis for not awarding costs to Start (which has been entirely successful in the 7 applications dealt with in the judgment). Similarly, for the defendant to raise, in opposition to an application for costs, issues which have already been determined in the judgment, or issues which the defendant could have but failed to raise in the proceedings on foot of which the judgment was given, also constitutes a breach of the *res judicata* principle and is plainly no basis for the court to refuse costs to Start.

14. It must also be said that, in the context of her opposition to Start's application for costs, the defendant has mounted an attack on both this court's ruling (18 October) and judgment (4 November). This is not at all permissible or appropriate. On this topic, I gratefully adopt the guidance given by Noonan J. 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."*

15. It is a matter for the defendant to take such legal advice as she may or may not wish to take, with respect to what options she may or may not have, in the event that she wishes to challenge this court's ruling and/or judgment. However, even from a first-principles perspective, this court cannot entertain what is, in substance, an appeal against its *own* judgment, regardless of whether these submissions are made qua objection to an order for costs against the defendant or qua appeal (more accurately, a demand that the court quash its own decisions). In short, the defendant's submissions challenging the merits of this court's ruling or judgment certainly do not provide any valid basis to deny costs to Start.

16. In *Godsil v. Ireland* [2015] 4 I.R. 535 (at para. 23), Mr. Justice McKechnie explained the proper approach of the court to the question of costs in the following manner:

> *"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).

17. I have carefully considered all issues canvassed by the defendant in opposition to the application by Start for costs. Despite the range of 'bare' assertions made by the defendant, there was and is no basis, grounded in evidence, for any adverse findings with respect to Start's conduct. I find myself entirely unable to identify any reasoned basis, rooted in the facts, which might justify a departure from the 'normal' rule. Whereas s.169 (2) of the 2015 Act 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 are any special or countervailing circumstances which would disentitle the entirely successful party from receiving their costs. Although sub-paragraphs (a) to (g) of s.169 of the 2015 Act comprises what might be called a 'non-exhaustive' list, a consideration of all the facts and circumstances of this case, in light of those statutory provisions, fortifies me in the view that it would be a clear injustice *not* to award the entirely successful party their costs in the present case.

In summary

18. This court must condemn the making by the defendant, under the guise of an objection to a costs award, of a series of allegations against a range of parties, which are as serious as they are untethered to fact. It must also deprecate the efforts taken by the defendant, in the wake of this court's ruling and judgment and in flagrant breach of the *res judicata* principle, to try and litigate issues, in circuit court proceedings, which were decided upon in the judgment. For the reasons set out in this costs' ruling, justice requires that the court does *not* depart from the 'normal rule' that 'costs' should 'follow the event'. Start is entitled to an order for costs to include all reserved costs, to be taxed or adjudicated in default of agreement, and is invited to submit a draft final order to reflect the court's findings.