THE HIGH COURT

[2023] IEHC 238

2022 No. 563P

BETWEEN

DONEGAL COUNTY COUNCIL

PLAINTIFF

AND

FRANK MCBREARTY

DEFENDANT

JUDGMENT of Ms. Justice Eileen Roberts delivered on 5 May 2023

Introduction

1. This judgment relates to the plaintiff's motion in which it seeks the following reliefs against the defendant: –

(1) Summary judgment, pursuant to the court's inherent jurisdiction, for the costs of the proceedings;

(2) In the alternative, an order pursuant to Order 26, rule 1 of the Rules of the Superior Courts ("**RSC**") permitting the plaintiff to discontinue the proceedings and awarding the plaintiff the costs of the proceedings;

(3) Judgment in default of defence against the defendant pursuant to Order 27, rule 9 of the RSC and

(4) an order for the costs of the plaintiff's motion.

2. The matter was heard by this court on 27 April. By that date a defence and counterclaim had been delivered by the defendant and accordingly the plaintiff did not proceed with the application for judgment in default of defence. There may however be costs consequences relevant to that aspect of the plaintiff's motion.

3. In order to deal with the reliefs sought, it is necessary to set out a brief summary of the background to the proceedings, the court orders made to date and the circumstances in which it is now agreed that the proceedings have largely become moot.

The parties and the background to this dispute

4. Mr McBrearty is an elected member of Donegal County Council (the "**Council**"). At a meeting of the Council held on 31 January 2022, the Council resolved to suspend him with immediate effect for a period of one month (the "**Suspension**") due to his allegedly disruptive behaviour at that meeting. The Suspension was imposed pursuant to the provisions of Part 6 and Schedule 10 of the Local Government Act 2001, as amended, and was due to expire on 27 February 2022. The effect of the Suspension was to deny Mr McBrearty an entitlement to attend meetings of the Council during the period of the Suspension.

5. Despite the Suspension, Mr McBrearty attended the next council meeting on 7 February 2022 (while the Suspension was still in place). That meeting was then adjourned to 21 February 2022.

6. On 14 February 2022 the present proceedings were commenced by plenary summons. The Council issued a notice of motion on that same date seeking an interlocutory injunction restraining Mr McBrearty from attending, speaking at or taking part in meetings of the Council for the duration of the Suspension. The High Court gave liberty

to the Council to serve short notice of that motion returnable for 17 February 2022 and reserved the question of costs of that short service motion.

7. On 17 February 2022, following a contested hearing at which Mr McBrearty appeared in person, Mr Justice Allen granted the Council the injunction they sought restraining any attendance by Mr McBrearty at Council meetings until the expiry of the Suspension at midnight on 27 February 2022. This court has been provided with a transcript of that injunction hearing and reference will be made to relevant parts of the court transcript in this judgment.

8. The Order of the High Court dated 17 February 2022 set out in detail the terms of the time-limited injunctions against Mr McBrearty and the court ordered that the Council should recover from Mr McBrearty the costs of the interlocutory motion, such costs to be adjudicated in default of agreement. No stay was imposed on those costs.

9. It is agreed that Mr McBrearty did not attend the Council meeting on 27 February 2022 and no issue arises in relation to his compliance with the High Court Order.

10. An appearance was entered by Mr McBrearty in person on 2 March 2022.

11. On 8 July 2022 the Council's solicitors wrote to Mr McBrearty indicating that *"[H]aving regard to the fact that the Suspension has since lapsed, it appears to us that the proceedings are now substantially moot*". A proposal was made in that open letter that the proceedings "*be now struck out with no further order*". It was explained that if Mr McBrearty accepted that proposal, "*the costs order made by the High Court on 17 February 2022 will remain in force but you will not be liable for the other costs of the proceedings*". Essentially, this proposal would have preserved the benefit of the injunction costs order for the Council and allowed the proceedings to be struck out with Mr McBrearty being liable for no further costs.

12. The letter continued – " *[I]f you refuse to agree to this proposal, the Council will deliver a Statement of Claim and will, in due course, rely upon this letter to fix you with the full costs of the Proceedings (that are not already covered by 17 February Order)*". The letter recommended that Mr McBrearty obtain legal advice in relation to the proposal and that failing a response by Mr McBrearty within seven days, "*we will proceed to deliver a Statement of Claim*".

13. No response was received from Mr McBrearty to this letter.

14. The Council delivered a statement of claim on 5 August 2022 under cover of a letter addressed directly to Mr McBrearty.

15. Nothing further was heard from Mr McBrearty. The Council's solicitors next wrote to him by letter dated 10 November 2022 requiring the delivery of his defence and consenting to the late delivery of this defence within a 28-day period up to and including 8 December 2022. This correspondence complied with the warning letter provided for under Order 27, rule 10(1) RSC.

16. No defence having been delivered by Mr McBrearty, the Council then issued the present motion, which includes at paragraph 3 a request for judgment in default of defence. While the motion is undated it appears to have been filed on 22 December 2022. The motion and accompanying documents were served on Mr McBrearty on 5 January 2023.

17. Mr McBrearty then instructed solicitors and counsel. He delivered a defence and counterclaim on 16 March 2023 and a replying affidavit was sworn by him on 28 March 2023 in response to the Council's motion. That remained the state of play when this matter was heard by this court on 27 April.

The issues and the arguments advanced by the parties.

18. This application is all about legal costs. The Council claim to be entitled to the costs of the proceedings and the costs of this motion. They concede that the reliefs sought against Mr McBrearty are now moot (para 10 of the affidavit of Mr McMullin sworn 21 December 2022). The only remaining relief sought by the Council in its statement of claim is for the costs of the proceedings.

19. The Council's main argument centred on its entitlement to obtain summary judgment for its costs. The Council argues that Mr McBrearty's defence is essentially a traverse which does not identify any substantive defence to the proceedings or to the Council's application for costs. The Council argues that as Mr McBrearty does not have an arguable defence to the Council's claim, the Council is therefore entitled to an order for its costs by way of summary judgment. The Council relies on the judgment of Mr Justice Allen in the interlocutory application and the following comments (which the Council argues shows that Allen J considered the merits of the Council's claim): –

> "*The effect of the resolution is that Councillor McBrearty was suspended in accordance with law.*
>
> *While on this application it is quite clear that Councillor McBrearty is dissatisfied with the resolution of the Council, he did not make any application formally to challenge the validity of the resolution and claiming he is bound by it.…Although this is an interlocutory injunction because it will in effect in a very substantial way dispose of the substance of the litigation, I feel that I must apply the very highest standard and be pretty well satisfied that there is no answer to the case before I make the order sought and I am so satisfied*".

20. In his defence and counterclaim, Mr McBrearty accepts that the Suspension was imposed but he "*disagrees as to the lawfulness thereof*" (para 3) or that the Council adhered to proper procedures in the process (paragraph 6). He claims that the effect of the Suspension included a deduction of 10% of his salary for one year (para 11). He counterclaims that he made a protected disclosure and was "*sanctioned by* [the Council] *for this with a purported suspension with no right and/or method of appeal*" (para 4).

21. The Council says that Mr McBrearty's counterclaim is fundamentally misconceived. While some arguments are set out in legal submissions regarding the fact that Mr McBrearty is not an employee (and so outside the protection of protected disclosures), I was not addressed at all by counsel on this point.

22. In his replying affidavit sworn 28 March 2023, Mr McBrearty says that the Council was entitled to discontinue its proceedings at any point after the injunction was granted and he had complied with it. The Council did not need his consent to discontinue the proceedings and despite the letter of 8 July 2022, the Council could have simply chosen to discontinue the proceedings. Had they done so, Mr McBrearty would not have had to engage lawyers and incur legal costs. He argues that it was wholly unnecessary for the Council to serve its statement of claim where the only relief sought by it was in relation to costs. The Council did not have to demand a defence from Mr McBrearty or issue a motion seeking judgment in default against him. He says that the legal costs he has had to incur arise as a result of the decision of the Council not to discontinue the proceedings when they became moot and he seeks an order for his costs against the Council.

23. The alternative relief claimed by the Council is for leave of the court to discontinue the proceedings but subject to the direction that the Council should be awarded its costs.

Analysis

Entitlement to costs on a summary basis

24. I will deal firstly with the Council's primary contention that, by reason of the failure of Mr McBrearty to identify an arguable defence, the Council is entitled to its costs of the proceedings by way of summary judgment.

25. The Council was unable to produce any legal authority on all fours with the present case. Their primary reliance was on the decision of the Court of Appeal in *Inland Fisheries Ireland v Ó Baoill* [2022] IECA 266. In that case, the plaintiff invoked the summary jurisdiction as set out by the High Court in *Abbey International Finance Limited v Point Ireland Helicopters Limited* [2012] IEHC 374, where Kelly J held that the High Court had an inherent jurisdiction to grant summary judgment in respect of an unliquidated claim where it was satisfied that the defendant had failed to identify an arguable defence and it was very clear that the defendant had no defence.

26. In *Inland Fisheries* Whelan J stated at para 50 of her judgment that "…*the critical determination reached by Pilkington J was, in substance, that the appellants had not raised any relevant defence to the respondent's claim*…". The appellant argued that the trial judge had erred by determining the matter in a summary manner. Whelan J stated at para 143 that "*the applicable test for the grant of summary judgment under the Abbey jurisprudence is the same as that applied in summary summons proceedings*". She also noted at para 144 that Kelly J in *Abbey* "*did not identify any specific reason why the inherent jurisdiction identified and articulated by him would not also be available to a wider cohort of cases outside of the commercial list*".

27. It is clear that, in appropriate cases, the court has jurisdiction to proceed by way of summary judgment in plenary proceedings. In *Shawl Property Investments Limited v*

A&B [2019] IEHC 649, the High Court was asked to consider whether a defendant was entitled to insist that an application for permanent injunctions restraining trespass must be heard by way of oral evidence. The plaintiff contended on the facts that it could proceed by way of an application for summary judgment, relying on the judgment of Kelly J in *Abbey*. Allen J allowed it to do so having regard to the well-established principles for the requisite threshold for summary judgments as set out by the Supreme Court in *Aer Rianta Cpt v Ryanair Limited* [2001] 4 IR 607. As Kirwin notes in *Injunctions: Law and Practice (3rd Ed 2020)* in relation to the High Court decision in *Shawl*:

> "*As to the appropriate approach where questions of law are involved, Allen J. adopted the approach of the Supreme Court in Danske Bank A.S. v Durkan New Homes [2010] IESC 22. This requires the court to consider questions of law on a summary application only where the issues arising are relatively straightforward and there is no real risk of injustice in determining such issues. As such, the circumstances in which a permanent injunction may be considered by the mechanism of the summary judgment procedure are very rare*".

28. In *Inland Fisheries*, Whelan J noted at para 146 that *"[T]he approach of the Superior Courts makes clear that a conservative approach must be adopted to an application of the disposition of the plenary suit summarily.*" Referring to the principles outlined by McKechnie J in *Harrisrange Ltd v Duncan* [2003] 4 IR and applying them to the facts before her, she dismissed the appeal. She stated at para 154:

> "*It is true that great care must be taken by the courts in bringing plenary proceedings to an end summarily, but the balance of justice requires that where a purported defence, including new evidence or material in its totality, discloses no reasonable answer to the plaintiff's claim, the court has an inherent jurisdiction*

to grant summary judgment where same is warranted, having duly considered all material facts for the appropriate management of litigation and of the courts."

29. I do not believe that *Inland Fisheries* provides authority for the summary application in this case. There are many differences. As the court acknowledged in *Inland Fisheries* (at para 155), that was a case in which there had been extensive proceedings, where the pleadings had closed and where over a decade had elapsed since the institution of those proceedings. It was a case where the summary judgment approach in the context of the factual matrix obtaining was held to be "*overwhelmingly warranted*" and where it was found to have "*represented the correct and balanced approach on the part of the trial judge where no stateable or bona fide defence was shown*" (para 155).

30. *Inland Fisheries* (and the cases cited in that judgment) was a case in which the court was being asked to make substantive orders on a summary basis having regard to the pleadings and evidence available. In this case, by contrast, a plaintiff who acknowledges the proceedings to be moot, seeks an order for its legal costs on the basis that if the case ran, the defendant would be unsuccessful and so the plaintiff should thus be awarded its costs on a summary basis without any actual determination of the substantive issues whether on affidavit or otherwise. I am not satisfied to make an order for summary judgment for the costs of these proceedings in those circumstances. I do not believe it appropriate, where there has been no consideration on the merits, for this court to determine how the costs of the proceedings should be borne assuming a hypothetical trial. While Allen J was satisfied to grant an interlocutory injunction in this case, in the full knowledge that this would likely bring an end to the proceedings, nevertheless he recognised (as was of course the case) that he was not making any final findings of law or fact. He stated:

"*while I have expressed myself satisfied as to the strength of Donegal County Council's case, nevertheless, this is an introductory application and it is made on the basis that they are going to give an undertaking to pay damages if any judge later is persuaded that the order which is sought today ought not to have been made*".

Discontinuance

31. The alternative relief sought by the Council is for leave to discontinue the proceedings but subject to the direction that the Council be awarded its costs.

32. Order 26, rule 1 of the RSC provides in relevant part as follows:

"*The plaintiff may, at any time before receipt of the defendant's defence, or after the receipt thereof before taking any other proceeding in the action (save any interlocutory application) by notice in writing in the Form No 20 in Appendix C, wholly discontinue his action against all or any of the defendants or withdraw any part or parts of his alleged cause of complaint, and thereupon he shall pay such defendant's costs of the action, or, if the action be not wholly discontinued, the costs occasioned by the matter so withdrawn. …The court may before, or at, or after, the hearing or trial, upon such terms as to costs, and as to any other action, and otherwise, as may be just, order the action to be discontinued, or any part of the alleged cause of complaint to be struck out*."

33. Laffoy J, in her judgment in the High Court in *Shell E&P Ireland Ltd v McGrath (No. 3)* [2007] IEHC 144, [2007] 4 IR 277 at page 300 stated "*[t]he issue before the court on this application under O. 26, r.1 is what provision in relation to costs on allowing the plaintiff to discontinue its claim renders justice as between the plaintiff and the defendants*". I believe the same issue arises in the present case.

34. The Council argues that notwithstanding the general rule that a plaintiff discontinuing its action must pay the costs of the defendant, this is an appropriate case for the plaintiff to be awarded its costs. Reliance was placed on the decision in *Flynn v Breccia* [2017] IECA 163 where, on day 12 of the hearing, the plaintiffs withdrew their claims against the receiver for negligence and breach of duty following receipt by them of a letter on the previous evening. The Court of Appeal stated (at para 51) that it was satisfied "*the letter was a decisive document which the plaintiffs were entitled to regard as having addressed their concerns such that it was no longer desirable or necessary to continue the proceedings against the Receiver*". The trial judge in that case determined that each party should bear their own costs. This was explained by Peart J at para 2 of his judgment as the trial judge's view that "…*the justice of the situation would be met if the costs to which each of the parties were otherwise entitled to as against each other were simply set off one against the other*."

35. Peart J said at para 28 of his judgment:

> "*Even though the trial judge proceeded with the costs issues under Ord. 99 of the Rules of the Superior Courts, he did so by carrying out a balancing exercise of the competing claims when deciding how his discretion should be exercised. That same exercise is one that he would need to have done had he dealt with the matter under Ord. 26.*"

36. He further held at para 53 that:

> "*I am satisfied that upon the discontinuance of these claims by the plaintiffs (with the Court's leave), the trial judge's jurisdiction to make a costs order exists under Ord. 26 of the Rules of the Superior Courts. Allowing him to make such order as to costs as he considered to be just. In my view, it was open to the trial*

judge to conclude that it was just in all the circumstances that the plaintiff should be considered to have an entitlement to the costs of the negligence and breach of duty claims, even though they were withdrawn as explained herein. I am not satisfied that there is any basis for interfering with the manner in which he exercised his discretion in this regard. It was also, as I later state, just in the circumstances of this case to set off one set of costs against the other by making no order as to costs".

37. I believe that the circumstances in *Flynn* can be distinguished from the present case. In *Flynn,* claims were withdrawn upon receipt of correspondence which addressed the plaintiff's concerns and no longer required that aspect of the claim to be litigated. There was no suggestion that the plaintiffs could or should have discontinued at an earlier point. In the present case nothing of this nature is suggested. Indeed the letter from the Council's solicitors recognises that the proceedings were largely moot by July 2022 (and indeed before then). Nothing changed in that regard since that date – but the Council did not discontinue the proceedings.

38. The relevant authority therefore appears to be the decision in *Shell.* In that case Laffoy J granted the plaintiff liberty to discontinue its claims against the defendants and directed that the plaintiff pay the defendants' costs to the date of discontinuance. The court held that it was neither possible nor appropriate on an application under Order 26, rule 1 of the RSC for the court to enter upon a consideration of the merits of the issues raised by the plaintiff on its claim. The court also held that in the context of an application under Order 26, rule 1, it was immaterial that the legal rights which the plaintiff was asserting were derived from the exercise by a public body of statutory functions. The issue between the plaintiff and the defendants remained a private law issue. The court also held that it was immaterial that the plaintiff had previously

obtained an interlocutory injunction, particularly since that injunction had been discharged.

39. In *Shell*, the plaintiff argued that it was forced to bring the proceedings and seek injunctive relief because of the unlawful actions of the defendants and accordingly the plaintiff had acted reasonably in bringing the proceedings. In dealing with that argument Laffoy J stated at para 42

> "*In my view, in asking the court to exercise its discretion on the basis that the proceedings were necessitated by the unlawful actions of the defendants, the plaintiff is failing to adhere to the proposition it has urged on the court and which the court accepts, that the court should not enter upon a consideration of the merits of the issues raised either on the plaintiff's claim or on the counterclaims.*"

40. The Council could have discontinued the proceedings at any time after 28 February 2022. By that stage the Suspension had expired and the Council had secured the objective of the proceedings. The Council argues that one of the implications arising from discontinuance, had they taken this action, would have been that Mr McBrearty would have been awarded his costs of the proceedings. The Council says this would have amounted to an injustice in circumstances where by virtue of the granting of the injunction the council had obtained all of the reliefs which it sought in the proceedings. This proposition in my view ignores two points. Firstly at that point in time Mr McBrearty had little or no costs in relation to the proceedings. He had represented himself at the injunction hearing and had taken no further steps beyond that. Furthermore, the Council had obtained an order for its costs of the interlocutory hearing from Allen J with no stay. Any additional costs on the Council's own part would have been minimal at that point.

41. The Council point out that they made a reasonable proposal to Mr McBrearty in their solicitor's letter dated 8 July 2022. I agree entirely that this proposal was reasonable and appropriate. The Council says that as Mr McBrearty refused to consent to that proposal, this required the Council to continue to prosecute its claim. I do not agree with that proposition. It appears to me that the Council had effectively three options once they had issued the letter dated 8 July 2022. Firstly they could have taken no further steps. This would have avoided any further legal costs being incurred by either side, albeit leaving the proceedings in abeyance. Secondly, the Council could have served a notice of discontinuance. They did not require leave of the court or Mr McBrearty's consent to do this. This step would have exposed the Council to liability for Mr McBrearty's costs to that date. However those costs would have been minimal and the Council had an order for costs against Mr McBrearty in respect of the injunction itself. Thirdly, the Council could have taken the course of action it did in fact take which was to proactively drive on the proceedings, causing further costs to be incurred both by itself and by Mr McBrearty. I do not believe that the Council was compelled to take this course of action because of Mr McBrearty's failure to agree to their proposal. Mr McBrearty did not refuse the proposal – he simply failed to respond to it. While it would have been sensible for him to do so, he was a lay litigant at that time without legal representation. There was no legal requirement on him to respond and the Council could easily have discontinued the proceedings in any event. It is difficult to understand why, when the Council itself acknowledged the proceedings to be moot, the Council then sought to drive on the proceedings, it would appear for the purposes of recovering costs from Mr McBrearty which would otherwise not have been incurred.

42. The proactive steps taken by the Council included not only the delivery of a statement of claim (effectively confined to costs) but also taking steps to require Mr McBrearty to deliver a defence and issuing a motion against him in respect of his failure to do so within the time permitted by the RSC. The statement of claim states that Mr McBrearty required delivery of a statement of claim. However, that appears to relate to the standard averment in the appearance entered by Mr McBrearty in March 2022. There was no pressure applied by Mr McBrearty on the Council to advance the proceedings, as appears to be suggested by this plea.

43. In the circumstances, I conclude that this court should not depart from the normal rule that the discontinuing plaintiff should pay the defendant's costs to the date of discontinuance. The Council was solely in control of when it decided to discontinue the proceedings.

44. It is clear from the decision in *Shell* that notwithstanding the discontinuance of the plaintiff's claim, from the defendant's perspective the substantive dispute between the parties remains. In the present case there is no application to discontinue the counterclaim and it would not ordinarily fall away if the Council discontinued its claim. Similarly, a discontinuance cannot deprive a defendant of his right to damages on foot of a plaintiff's undertaking given in interlocutory proceedings. However, counsel for Mr McBrearty at the hearing indicated his instructions that the defence and counterclaim could be struck out if the Council discontinued the proceedings.

45. While I will hear the parties in relation to the final form of order, and will list this matter for that purpose at 10:30 AM on 17 May, I make the following orders: –

(1) I refuse an order for summary judgment to the Council as sought at para (i) of their notice of motion.

(2) I grant leave (insofar as this is necessary) to the Council to discontinue its proceedings under Order 26, rule 1 of the RSC on the basis that the Council should pay Mr McBrearty's costs of the proceedings to the date of discontinuance (excluding the reserved costs for the short service motion in respect of which I make no order). Such costs to be taxed in default of agreement. For the avoidance of any doubt, this order does not in any way amend the order for costs made by Allen J in favour of the Council in respect of the interlocutory injunction and such costs order continues to stand.

(3) On consent of Mr McBrearty, I direct that the defence and counterclaim be struck out on the discontinuance of the proceedings. This will bring all aspects of these proceedings to a conclusion.

(4) I will hear the parties on 17 May in relation to the costs of this motion insofar as there may be any argument on whether same is included within the scope of the costs of the proceedings to date .