**THE HIGH COURT**

**[2023] IEHC 71**

**Record Nos. 2016/9612P**
**2016/9611P**
**2016/9610P**

**BETWEEN:**

**DECLAN JOHN RAFFERTY**
**FINTAN PAUL O'FARRELL AND**
**MICHAEL CHRISTOPHER MCDONALD**

**PLAINTIFFS**

**-AND-**

**THE GOVERNOR OF PORTLAOISE PRISON, THE MINISTER FOR JUSTICE, THE ATTORNEY GENERAL AND IRELAND**

**DEFENDANTS**

**Ruling of Mr. Justice Cian Ferriter on costs, delivered this 14th day of February 2023**

**Introduction**

1. This is my ruling on the plaintiffs' application for costs, and the defendants' cross-application for a "differential costs order" pursuant to s.17(5) of the Courts Act, 1981, as amended, arising from my judgment of 12 January last ([2023] IEHC 13) in which I awarded each of the plaintiffs damages for false imprisonment of €2,500 ("my judgment").

**The plaintiffs' costs application**

2. It is accepted that, in accordance with the terms of s.17(1) Courts Act, 1981, as amended, if I am to award costs to the plaintiffs, those costs can only be on the Circuit Court scale as the Circuit Court was the lowest court which had jurisdiction to make an order for damages of €2,500 for false imprisonment (the District Court has no jurisdiction to hear and determine false imprisonment claims).

3. The plaintiffs seek their full Circuit Court costs, to include a certificate for senior counsel, on the basis that they were entirely successful in their proceedings such as to engage the default rule found in s.169 Legal Services Regulation Act, 2015 ("s.169") that a party who

has been entirely successful is entitled to an order of costs against the unsuccessful party. They submit, further, that the complexity of the issues arising in the proceedings were such as to justify a certificate for senior counsel. The defendants dispute that the plaintiffs were entirely successful within the meaning of s.169 and say that the plaintiffs should be entitled to no more than 50% of their costs on the Circuit Court scale, with no certificate for senior counsel.

4. Section 168 of the 2015 Act addresses the general power of the court to order costs. S.168(1) of the 2015 Act provides that "*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 other parties to the proceedings*." S.168(2)(d) empowers a court, where a party is partially successful in proceedings, to order costs relating to the successful element or elements of the proceedings. S.169 provides that "*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…*"

5. These provisions were considered by Murray J. in his judgment in the Court of Appeal in *Higgins v Irish Aviation Authority* [2020] IECA 227. When considering the proper approach to the question of assessing whether a party was "entirely successful" within the meaning of s.169, Murray J. said (at para. 16) that he was inclined to agree with what Simons J. described as the "pragmatic conclusion" reached by him (Simons J.) in *Náisiúnta Leichtreach Contraitheoir Éireann v the Labour Court* [2020] IEHC 342 namely that in determining whether a party has been successful for the purposes of s.169 (1), "*the correct approach is to look beyond the overall result of the case and to consider whether the proceedings involve separate and distinct issues*."

6. As is clear from my judgment, these proceedings involved a number of separate and distinct issues on both liability and quantum. The defendants mounted a vigorous defence on liability, claiming that the Governor was protected by the defence of justification when acting on foot of the warrants which resulted in the plaintiffs' unlawful detention in Portlaoise prison and that, as a fall-back, the plaintiffs were not entitled to succeed on the grounds of consent, waiver, acquiescence and/or estoppel. The defendants lost on those issues. In relation to quantum, the defendants maintained that the plaintiffs were entitled to no damages, or next to no damages, on the basis of the doctrine of contemptuous damages. The defendants lost on that issue. However, the defendants did succeed in defeating the plaintiffs' principal contention in support of their claim for substantial damages, namely that a period of some 4 years of actionable false imprisonment entitled

them to substantial damages notwithstanding their underlying conduct in the commission of the offences for which they were convicted and notwithstanding that they had been validly sentenced to a period of imprisonment in England which was longer than the period of imprisonment in fact served in Ireland.

7. In my view, this is accordingly a case in which the plaintiffs were partially and not entirely successful. In light of the amount of hearing time and written submissions devoted to the issues on which the plaintiffs were successful and the defendants were unsuccessful, I believe an appropriate award of costs would be 75% of the Circuit Court costs.

8. I also believe it would be appropriate to grant a certificate for senior counsel as part of the Circuit Court costs given the complexity and range of the issues involved across liability and quantum.

9. Accordingly, I will make an order that the plaintiffs recover 75% of their costs from the defendants, those costs to be assessed on the Circuit Court scale and with a certificate for senior counsel, such costs to be adjudicated in default of agreement.

**The defendants' Differential Costs Order application**

10. Section 17(5) of the Courts Act, 1981 (as substituted by section 14 of the Courts Act, 1991) ("s.17(5)") provides for what has become known in practice as a "differential costs order". The subsection states:

> *"(a) Where an order is made by a court in favour of the plaintiff or applicant in any proceedings (not being an appeal) and the court is not the lowest court having jurisdiction to make an order granting the relief the subject of the order, the judge concerned may, if in all the circumstances he thinks it appropriate to do so, make an order for the payment to the defendant or respondent in the proceedings by the plaintiff or applicant of an amount not exceeding whichever of the following the judge considers appropriate:*
>
> *(i) the amount, measured by the judge, of the additional costs as between party and party incurred in the proceedings by the defendant or respondent by*

*reason of the fact that the proceedings were not commenced and determined in the said lowest court, or*

*(ii) an amount equal to the difference between –*

*(I) the amount of the costs as between party and party incurred in the proceedings by the defendant or respondent as taxed by a Taxing Master of the High Court or, if the proceedings were heard and determined in the Circuit Court, the appropriate county registrar, and*

*(II) the amount of the costs as between party and party incurred in the proceedings by the defendant or respondent as taxed by a Taxing Master of the High Court or, if the proceedings were heard and determined in the Circuit Court, the appropriate county registrar on a scale that he considers would have been appropriate if the proceedings had been heard and determined in the said lowest court.*

*(b) A person who has been awarded costs under paragraph (a) of this subsection may, without prejudice to his right to recover the costs from the person against whom they were awarded, set off the whole or part thereof against any costs in the proceedings concerned awarded to the latter person against the first-mentioned person."*

11. Section 17(5) has been considered in a number of cases, including *O'Connor v Bus Átha Cliath* [2003] 4 IR 459 ("*O'Connor*"), *Mangan v Independent Newspapers* [2003] 1 IR 442 ("*Mangan*") and the recent Court of Appeal decisions in *Moin v Sicika* and *O'Malley v McEvoy* [2018] IECA 240 ("*Moin*") and *McKeown v Crosby and Vocella* [2021] IECA 139 ("*McKeown*").

12. In *Moin*, the Court of Appeal made differential costs orders in two cases where the High Court awards in damages for personal injuries (in assessment only cases) were well within the jurisdiction of the Circuit Court and where in each case the defendant had sent a letter warning of the fact they would make a differential costs order application if and when damages were awarded below the High Court level. In his judgment in *Moin*, Peart J. stated (at para. 21) that although the power to make a differential costs order is a matter for the exercise of the trial judge's discretion, there is a clear legislative objective favouring cases being brought in the correct jurisdiction and "*it is incumbent upon a trial*

*judge in circumstances where an award is significantly within the jurisdiction of a lower court to make a differential order unless there are good reasons for not doing so. The trial judge must have regard to the clear legislative purpose and have regard to all the circumstances of the case at hand which are relevant to the exercise of his/her discretion*." He added (at para. 24) that the onus is on the plaintiff to ensure that the proceedings are conducted in the lowest court that has jurisdiction to make an award in an amount that it is reasonable to expect in all the circumstances.

13. In a passage cited with approval by Peart J. in *Moin*, Murray J. (as he then was) stated as follows in *O'Connor*:

> *"In my view, when the order made by a court in favour of a plaintiff falls well within the jurisdiction of a lower court than that making the award, it is incumbent on the trial judge to have specific regard to the nature of the claim and all the reasons for which the plaintiff's claim fell within the lower jurisdiction or as the section puts it, all the circumstances of the case. Unsuccessful defendant[s] should not be wantonly burdened with the costs of defending a claim in the higher court when it could reasonably have been brought in the lower court."*

14. That passage and the judgment of Peart J. in *Moin* were also cited with approval by Noonan J. in his judgment in the Court of Appeal in *McKeown*. In that case (which was also a personal injuries case), the Court of Appeal granted a differential costs order to the defendant where that court on appeal awarded €41,000 damages at a time when the Circuit Court jurisdiction for such damages was €60,000. Noonan J. (at para. 22) also emphasised that:

> *"There is of course a wide range of circumstances where the court might properly consider exercising its discretion against making a s.17(5) order where, for example, something unpredictable or uncertain occurs at trial which might not reasonably have been anticipated. Or there might be cases in which it is reasonable to assume that the general and special damages together will fall into the High Court jurisdiction so as to make it appropriate to commence the proceedings there. An apportionment of liability might have the effect of reducing the damages within the jurisdiction of a lower court where the full value was undoubtedly, or at least arguably, within the higher jurisdiction. An item of special damage might be disallowed with the same effect. The plaintiff might have commenced proceedings in the High Court on the basis of medical opinion subsequently determined at trial*

*to have been incorrect. These are all circumstances that may fall to be considered by the court in the exercise of the discretion conferred by the section."*

15. While the Court of Appeal decisions referred to above related to personal injuries cases, it is clear that the principles discussed in those cases are not confined to the personal injuries context; indeed, *Mangan* involved a defamation action. It is clear from the authorities that s.17(5) embodies a legislative policy in favour of cases being taken in the lowest court appropriate to those cases in order to ensure that the defendants are not faced with higher costs than they should have been and, further, that scarce court resources are properly used. If an award is significantly within the jurisdiction of the lower court, the default position is that a differential costs order should be made unless there are good reasons not to do so. While the sending of a differential costs order letter on the part of the defendant might well be a very relevant factor in a court determining whether or not to make such an order, the absence of such a letter cannot operate positively in a plaintiff's favour when such an order is sought. This is so because the onus fundamentally remains on a plaintiff to take their case in the appropriate court. The test remains that of whether the case could and should reasonably have been brought in the lower court.

16. In support of their application for a differential costs order the defendants submitted:

(i) It was not reasonable to bring the cases in the High Court. An award of €2,500 was less than 5% of the Circuit Court jurisdiction in false imprisonment cases of €75,000 in damages. It was comprehensively within the Circuit Court jurisdiction and predictably so.

(ii) The plaintiffs ought to have known that there was a real risk that they would get very low damages in light of the defences to quantum raised by the defendants.

(iii) There was no interconnection between these proceedings and the plaintiffs' article 40 proceedings which required these proceedings to be issued in the High Court. The cases were eminently suitable for the Circuit Court and could, and should, have been brought there.

(iv) The fact that a differential costs letter had not been sent by the defendants was an irrelevant factor. The absence of such a letter did not make the maintenance of the

proceedings in the High Court any more justifiable in light of the level of award they achieved. In short, the plaintiffs took on a risk by maintaining their proceedings in the High Court and they lost that risk.

(v) There was no basis for the proposition that the plaintiffs' case was a test case. It was never acknowledged or treated as such, certainly not on the defendants' side and was run squarely on its own terms.

17. The plaintiffs' resisted the defendants' application for a differential costs order. In support of this position, they submitted as follows:

(i) These cases involved issues properly suited to determination by a High Court judge, in the light of the complexity of the issues and the complex and nuanced caselaw involved. An unusual feature of the case was that it was a plenary action with a judicial review-type "substructure". It involved oral evidence and cross examination of witnesses as well as detailed written and oral submissions on a range of legal issues, including extensive interpretation of conflicting Supreme Court judgments from the earlier article 40 proceedings.

(ii) It was not predictable that the level of award obtained would have been as low as it was. There was a dearth of guidance as to the level of award applicable to the situation in which the plaintiffs found themselves, which involved a claim for false imprisonment for 4 years, a very lengthy period of false imprisonment. This was an area said to be insufficiently charted in the prior case law such as to render it very difficult to advise as to likely outcome and therefore choice of correct jurisdiction.

(iii) The plaintiffs lay emphasis on the approach of McCracken J. in *Mangan* that a relevant factor there, weighing against the award of a differential costs order, was that in a jury trial context it was difficult to reasonably estimate the level of damages. In *Mangan*, a jury had awarded Circuit Court damages in a High Court defamation trial and McCracken J. held that a differential costs order was not appropriate *inter alia* because of the difficulty in predicting and advising on the level of damages likely to be awarded by a jury "*where the views of juries can differ enormously on the question of damages*" (at 448). The plaintiffs contended that this was analogous to the situation in which they found themselves when instituting the proceedings here.

(iv) It was said that this was, in practice, a test case as there were some six other High Court cases where damages have been claimed for false imprisonment in a transfer of sentenced persons context and those cases had not been progressed pending, at least in part, the outcome of this case (and pending, in part, the outcome of the *G.E.* case discussed in my judgment).

(v) These proceedings were properly instituted in the High Court in circumstances where they were "interconnected" with the plaintiffs' article 40 proceedings which had been dealt with in the High Court (and the Supreme Court on appeal).

(vi) At no point, whether in its pleadings, through correspondence or by application to the court did the defendants make the case that the proceedings were more appropriate for the Circuit Court or that the proceedings should be remitted to the Circuit Court. In that context, reliance was placed on the fact that no differential costs order letter was sent by the defendants at any point during the proceedings.

(vii) The plaintiffs sought to distinguish *Moin* by pointing to the fact that, there, the defendant had sent a differential costs order letter some 15 months prior to the High Court trial and that the level of award (which was well within the Circuit Court jurisdiction) could predictably have been the likely outcome of that personal injuries case.

(viii) There was no evidence that the costs in the Circuit Court would likely have been any lower than in the High Court in terms of the level of counsel engaged or the time taken to deal with the cases. The trial would likely have taken as long in the Circuit Court as it did in the High Court and there was no evidence that the defendants' costs would have been materially lower in the Circuit Court given the complexity of the issues involved.

18. In my view, it is not appropriate to grant a differential costs order in favour of the defendants in this case. While the award achieved by each of the plaintiffs was very low, such as to *prima facie* entitle the defendants to a differential costs order, in my view there were very particular circumstances which amount to good reason for not making such an order and which lead me to the conclusion that it was reasonable of the plaintiffs to have maintained their proceedings in the High Court.

19. Firstly, as far as the court is aware, these were the first cases in which the question arose as to whether the defendants should be liable in false imprisonment as a result of defective detention warrants issued pursuant to the provisions of s.7 Transfer of Sentenced Persons Act, 1995 as amended and, if so, what factors should influence the court's assessment of damages for such false imprisonment. As is clear from my judgment, complex and wide-ranging issues arose which engaged important questions of principle, which required a number of rounds of detailed written submissions and which required extensive consideration in my judgment. In that sense, the cases were particularly appropriate for the High Court.

20. Secondly, in terms of the policy underpinning the power to award differential costs orders, I believe that the plaintiffs' advisers responsibly advised that these cases be brought in the High Court in circumstances where a period of some 4 years of actionable false imprisonment might reasonably have been thought to merit damages in the High Court jurisdiction, or certainly not so far from the High Court jurisdiction as to run the risk of a differential costs order being made. The principal reasons for the award of low damages stemmed from the court's analysis of the appropriate approach to damages for false imprisonment in respect of a transferred prisoner where that prisoner's period of false imprisonment in this jurisdiction overlapped entirely with the period of lawful imprisonment which that prisoner otherwise faced serving in the jurisdiction from which they had been transferred. Such an analysis was not found in the existing case law and was novel in that sense.

21. Thirdly, while the cases were not presented to me as test cases as such, they raised important and novel questions and, as such, the analysis set out in my judgment is likely to have useful precedential effect for other litigation in being in which damages for false imprisonment in a transfer of sentenced prisoners context arises. This stands to benefit the State defendants. I do not believe it fair or appropriate to penalise the plaintiffs in costs in the circumstances, particularly where the plaintiffs were successful in respect of other important points of principle relating to the application of the tort of false imprisonment to transferred prisoners who were unlawfully detained on foot of defective warrants under the 1995 Act.

22. Fourthly, while, as noted earlier, it is not necessary, in order to successfully apply for a cost differential order, for a defendant to have sent a costs differential order warning letter, the absence of any such letter or any suggestion in correspondence here that these cases were more appropriate for the Circuit Court tends to support the view that the defendants were content in light of the important issues of principle arising in these cases

for the cases to be dealt with in the High Court (an understandable approach if I may say so).

23. Accordingly, in my view, having regard "*to the nature of the claim and all the reasons for which the plaintiff's claim fell within the lower jurisdiction*" (being the approach to the application of the statutory test articulated by Murray J. (as he then was) in his judgment in the Supreme Court in *O'Connor*), I will refuse the defendants' application for a differential costs order.

24. It is important to emphasise, however, that other plaintiffs seeking to claim damages for false imprisonment in a transfer of sentenced persons context are now fully warned as to the proper approach to, and likely level of damages in, such cases and will have no ready answer to an application for differential costs orders in future cases.