



**AN CHÚIRT UACHTARACH
THE SUPREME COURT**

**Clarke CJ
MacMenamin J
Dunne J
Charleton J
O'Malley J**

Supreme Court appeal number: S:AP:IE:2019:000075

[2020] IESC 47

Court of Appeal record number 2016/233

[2017] IECA 321

High Court record number 2011/9930P

[2015] IEHC 561; [2018] IEHC 267

BETWEEN

JOHN JAMES MUNGOVAN

PLAINTIFF/APPELLANT

- AND -

CLARE COUNTY COUNCIL

DEFENDANT/RESPONDENT

Judgment of Mr Justice Peter Charleton delivered on Friday, July 24th 2020

1. Following on the delivery of the judgment of this Court on Friday, April 24th 2020, submissions were invited from the parties. These have become somewhat complex and for the sake of clarity, it is proposed to set out the ruling of the Court on costs, covering as these do multiple motions and appeals.

2. The submissions on behalf of Mr Mungovan bear the advantage of detailing all, or at least the most substantive, of the orders on costs made to date and simply suggest that there is an entitlement to all such costs. These submissions read:

The costs order required should simply precisely reverse all the previous Orders sought by — and awarded to — Clare Co Council, and which should now be awarded instead to the Plaintiff, viz:

- A. 30 May 2014, High Court, Gilligan J, Defendant's motion 14 January 2014 seeking preliminary modular trial costs in the cause; Plaintiff's motion 10 January 2014 striking out 28 – 35 be reserved to "trial of modular issue."
- B. 14 October and 2015, High Court, Keane J, reserve costs motion 14 January 2014 to trial of action; dismiss Plaintiff's motion with costs (to include reserved costs and written submissions) 10 January 2014. Stay on costs order pending determination of proceedings.
- C. 9 February 2018, Court of Appeal, separate costs hearing, Plaintiff to pay costs of appeal to be taxed in default of agreement (perfected on 4 May 2018).
- D. 11 May 2018, High Court, Costello J, Plaintiff's claims by paragraphs 17 (a) – (e) stand dismissed; Plaintiff's claims 18 (a) – (c) be struck out; Defendant recover costs of this motion (16 November 2016) and Order to be taxed in default of agreement; Plaintiff to pay costs of both motions, viz Defendant's motion 14 January 2014 and Plaintiff's motion 10 January 2014. Vacate order for stay made on costs (Keane J) 14 October 2015. No order made on stay on costs sought.

The Plaintiff entitled to his costs of the application for leave and appeal in the Supreme Court.

In the Plaintiff's respectful submission the dispositive order to be made by the Supreme Court is as follows:

Allow the appeal, reverse the orders of the High Court of the 14 October 2015 (Keane J) and Order of the Court of Appeal of the 9 February 2018 and Order of the High Court of the 11 May 2018 (Costello J) below.

Direct the proceedings be resumed to be tried in the ordinary way.

Costs to the plaintiff of the modular preliminary trial in the High Court before Keane J and of the plaintiff's motion of the 10 January 2014 and the Defendant's motion of the 14 January 2014; and of the appeal to the Court of Appeal; and of the defendant's motion of the 16 November 2016 and order thereon of the 11 May 2018; and of the application for leave and hearing in the Supreme Court.

3. Clare County Council undoubtedly caused a preliminary issue to be tried in this case which was entirely related to the time within which an applicant like Mr Mungovan must bring judicial review proceedings. That preliminary issue succeeded in the High Court and in the Court of Appeal. But, as against that, there was an earlier Supreme Court hearing which simply could not proceed as the ruling striking out all proceedings of Costello J had not also been appealed. Thus a hearing day was wasted before this Court. Matters become more complex still on a consideration of the range of factors which Clare County Council propose be taken into consideration in order to fairly dispose of the costs. Central to the argument is a proposal that the appeal was not run as it should have been and that a wasted costs order is "inescapable" because of the earlier hearing. To quote:

2.11 A five-member division of the Supreme Court sat on the 28th March 2019 to hear the Appellant's appeal from the decision of the Court of Appeal. Because of the failure of the Plaintiff to have taken any steps to appeal the decision of Costello J. by that stage, the Court having risen to consider the matter, returned and expressed a concern that in the light of the decision of Costello J. the issue sought to be agitated in S:AP:IE:000080 was potentially moot and that it wished to afford the Plaintiff an opportunity to seek leave for "a leapfrog appeal". When Senior Counsel for the Plaintiff indicated that he wished to avail of the opportunity which was being afforded to him, the Chief Justice announced that "regrettably this Court needs to adjourn this appeal to allow that application to be made and considered"

2.12 The hearing on the 28th March 2019 commenced at 11.10am. With regard to the substance of the appeal, the Court only heard from Senior Counsel for the Plaintiff and having risen to consider the issue, the Court returned at 12.25 expressing its concern to Mr. Mulloy and adjourning very shortly thereafter.

2.13 On the 10th April 2019, the Plaintiff applied to this Court for leave to make a "leapfrog appeal" from the decision of Ms. Justice Costello of the High Court of the 11th May 2018, as perfected on the 19th June 2018, as well as for an extension of the time within which to make such an application, same having expired on the 17th July 2018.

2.14 The Defendant's Notice was filed on the 18th April 2019 and leave was granted by this Court on the 6th September 2019 [2019] IESCDET 203 for the appeal bearing Supreme Court record number: S:AP:IE:2019:000075.

2.15 Notwithstanding the Plaintiff filed his Notice of Intention to Proceed with this appeal on the 20th September 2019, it was not until the 6th November 2019 that the Plaintiff's Written Legal Submissions in respect of S:AP:IE:2019:000075 materialised, in contravention of the deadline for same, which was the 4th October 2019. Furthermore and as appears from those Submissions, save for a commencement section entitled "Procedural Correction", such were identical to the Written Legal Submissions as filed in S:AP:IE:2018:000080, on the 12th December 2018.

- 2.16 It was only following the issue of a letter from the Supreme Court Office of the 1st November 2019 advising of a Case Management Hearing on the 8th November 2019 that the Plaintiff's Directions Booklet materialised on the 6th November 2019 and it is of significance that no application was ever made to this Court by the Plaintiff for an Order dispensing with, or varying the requirements of Practice Direction SC 19, pertaining to the Case Management Booklet and the Submissions.
- 2.17 In accordance with the directions of Mr. Justice O'Donnell at the Case Management hearing on the 8th November 2019, the Defendant filed its Written Submissions in S:AP:IE:2019:000075 on the 13th November 2019.
- 2.18 The Supreme Court reconvened on the 21st January 2020 to hear the appeals S:AP:IE:2018:000080 and S:AP:IE:2019:000075. Senior Counsel for the Plaintiff commenced his opening of the appeal at 11.06am and concluded at 12.31pm. Senior Counsel for the Defendant thereafter responded until the Court rose for lunch, resumed at 2.05pm and continued until 2.35pm when Senior Counsel for the Plaintiff began his Reply which finished at 2.40pm.
- 2.19 Whatever way one looks at it, the costs incurred by the hearing of the 28th March 2019 were "wasted costs" and a wholly unnecessary use of Court time which was occasioned by the litigation strategy that had been deployed by the Plaintiff. The inescapable conclusion is that responsibility for such occurrence rests fairly, squarely and solely with the Plaintiff.
4. At some length, other points are also made. The argument is that no costs should be made on the direct appeal from Costello J necessitated by the misconstruction of the effect of that order; that all orders of the High Court and the Court of Appeal be made back-to-back; that reflection should occur of the wasted time and cost of pleading malicious falsehood; that any damages claim which inflates a claim unnecessarily should impact on costs. Other points are also made. All of these points are taken into consideration. Clare County Council ask that the concessions made in the course of the hearings be recorded unassailably in any ruling the Court makes and that the Court also clarify what is to go back to the High Court.
5. Costs are at the discretion of a court under s 169 of the Legal Services Regulation Act 2015, and see order 99 r 1 of the Rules of the Superior Courts. Ordinarily, costs follow the event, as r 1 specifically states. The exercise of this discretion as to the award of costs by the High Court or on appeal requires an overall view and is not easily disturbed, being as it is a discretionary matter and one where the ruling will be made in the context of findings of fact and law best adjudicated by the judge or court making same. Elaborate rulings are not needed, simply reference to relevant factors. The largest factors which arise here are that: firstly, Mr Mungovan won the appeal; secondly, that undoubtedly there was wastage along the way with the hearing being abandoned first of all and then recommenced when this Court made a determination for leave that enabled the core issue

to be considered; thirdly, that matters were over-pleaded and included confusion as to the place of malice and as to a defamation suit being supposedly incorporated into a judicial review; fourthly, a plenary summons action yielded the temptation to turn that judicial review into an action in damages; fifthly, that Clare County Council diverted this into a preliminary issue, which has now been lost.

6. As the matter is returning to the High Court for a unitary trial, and as there has been no ruling on whether a local authority may maintain such a register as was done here, this Court specifically making no ruling on this matter, or exclude someone in Mr Mungovan's position, and as many aspects of the claim have been now rightly abandoned, the slate on costs should now be wiped clean and clarity brought to where the parties stand. In the light of all of that, 40% of the costs in all of the courts and on all of the motions and steps should be awarded to Mr Mungovan.

7. Finally, Clare County Council has requested clarity as to what is to be retried. That clarity arises from the final paragraph of the Court's judgment in this case. To quote:

24. In the result, the plaintiff Mr Mungovan must succeed on the time point. The matter will be remitted to the High Court for a unitary trial to decide:

- The validity of the policy of Clare County Council in the context in which it was taken;
- Whether the plaintiff was validly excluded by that policy;
- What steps he took to assert his rights;
- Whether laches or acquiescence or any other principle of equity should bar the plenary action;
- If there is invalidity in the policy, was there malice by the county council such as to ground a tort action for misfeasance in public office; and
- Whether any aspect of defamation can validly be asserted; it seems to have been abandoned on the hearing of this appeal.

8. It may be worthwhile noting in addition that the claim in malicious falsehood was abandoned during the appeal hearing and that was stated in terms in an earlier case management hearing. That means that the only tort claim left is that of misfeasance in public office. The parameters of that tort have been otherwise explained and need not be repeated here. Should the possibility of damages arise, again the Court is expressly not suggesting that there is either liability or lack of liability, these were expressly limited by Mr Mungovan's counsel during the hearing of the appeal to a period from late September 2011 to March 2013.