



**UNAPPROVED
THE COURT OF APPEAL**

**Neutral Citation Number [2021] IECA 11
Appeal Number: 2017/589**

**Costello J.
Faherty J.
Power J.**

BETWEEN/

ANTHONY ELLIOTT AND ANNE ELLIOTT

**PLAINTIFFS /
APPELLANTS**

- AND -

ACC BANK PLC, PATRICK CONDON AND JAMES HALLEY

**DEFENDANTS /
RESPONDENTS**

Ruling of Ms. Justice Faherty delivered on the 18th day of January 2021

1. Judgment in this matter was delivered by the Court on 13 October 2020 (“the principal judgment”). The plaintiffs’ appeal was dismissed. At para. 138 of the principal judgment, I indicated a provisional view that as the second and third defendants could provisionally at least be deemed “*entirely successful*” for the purposes of the Legal Services Regulation Act 2015 (“the 2015 Act”), an award of costs in their favour should follow and that if the plaintiffs wished to submit that an alternative order should be made they had liberty to deliver written submissions within fourteen days of delivery of the

judgment with the second and third defendants thereafter each having fourteen days to deliver their replying submissions on costs.

2. Submissions have now been received from all relevant parties. As the successful parties in the appeal, both the second and third defendants seek their costs.

3. The plaintiffs' position is that the Court should make no order as to costs given what is described by the plaintiffs in their written submissions as the "unusual circumstances" surrounding the preliminary hearing on the Statute of Limitations issue which formed the basis of the High Court judgment under appeal. They also point to the fact that it was not unreasonable for them to have challenged, during the course of the appeal, the judgment of this Court in *Cantrell v. AIB* [2019] IECA 217 given that same had only recently been delivered. The plaintiffs also contend that they were successful as regards the third issue in the appeal, namely whether the trial judge erred in determining that no *prima facie* case in negligence was made out against the third defendant.

4. The submission of the second defendant is that the plaintiffs did not succeed in relevant regard, either in the High Court or in this Court. He submits that there was nothing in the particular nature and circumstances of the case or the conduct of the proceedings by the second defendant which would merit a departure from the normal rule. He further contends that the only unusual circumstances surrounding the preliminary hearing were those attributable to the plaintiffs' conduct in not obtaining a supportive expert report to ground proceedings for negligence and breach of contract against two professionals and serving a notice of trial and calling the case on for hearing in the absence of such a report.

5. It is submitted that the case was decided largely on the evidence of the first plaintiff and that there was no novel application of the existing law in relation to the accrual of a cause of action in contract or negligence and the relevant provisions of the Statute.

6. The third defendant, likewise, seeks his costs and submits that, in short, the judgment of the Court contains no reasons for disentitling him, as the successful defendant, to an award of costs against the plaintiffs. It is contended that there is simply no basis for the Court to depart from the former dispensation adopted by courts that “costs should follow the event”, or from the statutory framework set out in s.169(1) of the 2015 Act. It is contended that the third defendant’s conduct of the proceedings in the High Court and in this Court has been exemplary, both before and during the proceedings. Counsel points to the fact that as early as March 2015, the third defendant’s solicitors wrote to the plaintiffs contending that their claim was baseless and without merit and inviting them to file a Notice of Discontinuance, with the third defendant agreeing to bear his own costs to date if they did so. It is submitted that in light of their decision not to so discontinue the proceedings the plaintiffs must now bear the costs of same.

7. It is submitted that the second and third defendants were entirely correct in pursuing the issue of the Statute of Limitations as a preliminary issue and that had such a course of action not been taken by them a significantly increased amount of scarce judicial time and resources of the High Court would have been unnecessarily expended on hearing an entirely unmeritorious claim. Counsel also points to the plaintiffs’ conduct where, both in the week prior to and at the commencement of the hearing of the action on 12 October 2017, they sought wide-ranging discovery of documentation, together with an adjournment to amend their pleadings to include a pleading of fraudulent concealment, notwithstanding that the proceedings had issued in 2013 and that they themselves had set down the matter for hearing on 5 July 2016.

8. It is submitted that contrary to the submission of the plaintiffs, the purported “unusual circumstances” surrounding the preliminary hearing in the High Court do not warrant the making of a “no Order as to costs” given the entirely unsuccessful the appeal

against the determination of the High Court: it must be considered that it was entirely unreasonable for the plaintiffs to raise and pursue the issues they did on appeal.

9. It is further contended on behalf of the third defendant that as the proceedings were incapable of compromise he was obliged to defend them as robustly as possible. He did so in such a way as to minimise the involvement of all parties and the High Court in a time-consuming, expensive and ultimately futile hearing of the action. It is submitted that the approach of the third defendant in his defence to the allegations made has been fully vindicated by the judgment of the trial judge as upheld by this Court. It is submitted that in as much as this Court recognised frailties in the judgment of the High Court these were not such as warranted a remittal to the High Court.

Discussion

10. Section 169(1) of the 2015 Act provides as follows:

“169. (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.”

11. The new regime which is set out in the 2015 Act, together with the relevant provisions of O. 99 of the Rules of the Superior Courts as they stand since 3 December 2019, now provide the backdrop against which decisions in respect of costs are to be made. The new regime is considered in the judgment of this Court in *Chubb European Group SE v. The Health Insurance Authority* [2020] IECA 183. In the course of his judgment for the Court, Murray J. set out, at para.19, the principles to be applied by the Court in determining costs post December 2019. Section 169(1) provides that where the parties seeking costs has been “*entirely successful*” in the proceedings, such party “*is entitled to an award of costs unless the court orders otherwise*”. In determining whether to order otherwise, the Court should have regard to the “*nature and circumstances of the case*” and “*the conduct of the proceedings by the parties*”. This includes conduct both before and during the proceedings and whether it was reasonable for a party to raise, pursue or contest one or more issues. The courts overriding general discretion is preserved by s.168(1)(a) and O.99, r.2(1) RSC.

12. Notwithstanding the submissions advanced on behalf of the plaintiffs, the second and third defendants can be said to have been “*entirely successful*” in these proceedings. At para. 60 of the principal judgment, the Court held that it was entirely within the discretion

of the trial judge to refuse to adjourn the hearing of the action before the High Court. The Court further held, at para. 63, that the Notice of Appeal did not encompass an appeal by the plaintiffs against the refusal to make discovery and that, in any event, the discovery sought was irrelevant to the Statute issue. At para. 81, the Court held that the decision of the trial judge to hear oral evidence on the Statute issue was not unfair and met the requisite threshold of being in the interests of justice. At para. 116, the Court held that there was no basis to depart from the reasoning of the trial judge as regards the date of accrual of the cause of action in tort against the second and third defendants.

13. The plaintiffs rely on the fact that the Court held that the trial judge was wrong to determine the third defendant's application to non-suit/dismiss their claim in circumstances where she had already ruled that the preliminary hearing would be directed solely to the "Statute issue". I am not satisfied, however, that this finding, in itself, is sufficient for this Court to conclude that no order as to costs should be made in the appeal. This is in circumstances where the Court agreed with the submission of the third defendant that the trial judge's findings on the issue of the non-suit/dismissal of the claim were *obiter*.

14. Overall, the plaintiffs' submissions on costs do not engage in any meaningful way with the salient findings of this Court in the principal judgment. In my view, therefore, they have not established any basis upon which the Court should not make an award of costs in favour of the second and third named defendants. "The particular nature and circumstances of the case", as relied on by the plaintiffs, do not warrant the no costs order sought by them. Equally, there was nothing in the conduct of the second and third defendants, either before or during the proceedings (including the appeal), to deprive them of the costs in the appeal.

15. The Court will, however, stay the execution of the costs Order for 28 days pending any application by the plaintiffs to the Supreme Court for leave to appeal. If such

application is made, there will be a stay pending the determination of the leave application and, in the event that leave to appeal is granted, there will be a stay on the execution of the costs Order pending the determination of the Supreme Court appeal.

16. Costello J. and Power J. have indicated their agreement with this ruling.