# UNAPPROVED
# THE COURT OF APPEAL

**Neutral Citation Number [2021] IECA 6**
**Appeal Number: 2018/143**

**Faherty J.**
**Haughton J.**
**Power J.**

**BETWEEN/**

**WILLIAM MULROONEY**

**PLAINTIFF/ APPELLANT**

**- AND -**

**BRENDAN J. LOONEY FORMERLY PRACTICING UNDER TITLE OF STYLE OF BRENDAN J. LOONEY SOLICITORS**

**FIRST NAMED DEFENDANT**

**- AND –**

**FORENSIC SCIENCE NORTHERN IRELAND**

**SECOND NAMED DEFENDANT/ RESPONDENT**

**Ruling of Ms. Justice Faherty delivered on the 15th day of January 2021**

**1.** The Court delivered its judgment in the above matter on 27 July 2020 dismissing the plaintiff's appeal of the Order of the High Court dated 6 March 2018. At para. 86, the Court advised that it would make an order for costs in favour of the successful respondent to the appeal (FSNI) unless either party within fourteen days of the judgment made application to the Court in respect of the costs order it proposed to make.

**2.** The plaintiff and FSNI have both made submissions. The plaintiff concedes that since he has been unsuccessful in his appeal FSNI is entitled to its costs in the appeal. The

plaintiff's position is that this Court should not make any order in respect of the costs at first instance. The plaintiff's written submissions, at para. 9 thereof, suggest that no order was made in the court below in respect of costs. It is submitted that this followed a careful consideration by the trial judge of the issues and that this Court should not interfere with the decision of the trial judge.

**3.** By way of cross-appeal to the plaintiff's appeal, FSNI appealed to this Court against the Order of the trial judge whereunder FSNI was granted the costs of the motion to dismiss the plaintiff's proceedings but not the costs of the proceedings. FSNI seeks a variation of the High Court costs Order, awarding it the costs of the proceedings in the High Court as well as the motion costs.

**4.** In its Notice opposing the plaintiff's appeal, FSNI candidly admits that it had accepted the outcome of the costs hearing in the court below in the exercise of that court's discretion and that the reason it is now applying for its costs is because the plaintiff appealed the substantive Order of the High Court dismissing his proceedings. FSNI asks the Court to note that this issue was flagged before Costello J. during the Directions hearing prior to the appeal coming on for hearing. It is submitted that given the outcome of the appeal, a full costs order in respect of the costs in the court below is clearly required.

**5.** FSNI contends that it was awarded its costs of the motion to dismiss the plaintiff's proceedings by the High Court. It asserts that this is the position reflected in the Order of the High Court of 6 March 2018 dismissing the plaintiff's claim on the grounds that the proceedings were an abuse of process and ordering that FSNI recover from the plaintiff "the costs of this day when taxed and ascertained". I accept that the import of the 6 March 2019 Order was to award FSNI its costs of the motion to dismiss.

**6.** It is well established that where a trial judge had heard and determined all matters pertaining to proceedings an appellate court will be *"very reluctant to interfere with any*

*such discretion by a trial judge",* as per Hamilton C.J in *Spencer v. Kinsella* [1999] IESC 16 (at para. 6). For an appellate court to interfere, it is generally necessary that it be established that the trial judge made an error in principle in the manner in which the question of costs was approached, or that there was a clear and material error in the way in which the appropriate principles were applied. In *ACC Bank Plc v. Hanrahan & Anor* [2014] IESC 40, Clarke J. (as he then was), speaking for the Court, stated:

> *"2.1 It was not disputed by counsel and the Court accepts that in general an appeal court should be slow to interfere with the way in which a trial court deals with a question of costs when there is either no challenge to the underlying substantive order made in the proceedings on the application in question or where any such challenge is unsuccessful. A trial judge is in a good position to take into account all relevant factors in determining where the justice of the case in respect of an award of costs lies. It follows that, in order for an appellate court to interfere with a trial judge's determination on costs in such circumstances, it is necessary that it be established either that the trial judge made an error in principle in the manner in which the question of costs was approached or that there was a clear and material error in the way in which the trial judge applied the appropriate principles in the adjudication of the question of costs in all the circumstances of the case. In other words, either the overall approach must have been wrong in some material respect or there must be a clear and material error in the way in which a proper approach was executed. It seems to me that the case law of this Court on appeals against costs orders is consistent with that broad approach."*

Furthermore, the principles enunciated in *Veolia Water plc v. Fingal County Council* [2001] 2 I.R. 81 may require the Court to consider whether it needs to depart from *"the default position"* to reflect the fact that the costs of the litigation have been materially

increased because of unmeritorious actions taken by one or other of the parties to the litigation.

**7.** In *M.D v. N.D.* [2015] IESC 52, Clarke J., at para. 2.10, considered that:

> *"a trial judge considering costs issues under the Veolia principles must be afforded a significant margin of appreciation both as to the question of whether it is appropriate to deviate from the default position in the first place but also as to the manner and extent to which any appropriate deviation should occur."*

**8.** However, as said by MacMenamin J. in *Child and Family Agency v. O.A.* [2015] IESC 66:

> *"a judge is not at large in considering a costs application, may not apply a policy on costs awards, and must exercise his or her discretion in each case within jurisdictional criteria established in law."* (at para. 1)

**9.** Thus, as already observed, an appellate court will set aside an order for costs if it reaches the conclusion that the trial judge has erred in principle, failed to take relevant factors into account or otherwise inappropriately exercised his or her discretion (see *Acc Bank Plc v. Hanrahan & Anor).*

**10.** The plaintiff's contention in the within case is that the trial judge did not so err in his decision as regards costs. Counsel submits that following the judgment of the High Court on 20 February 2018, the matter of costs was left over to 6 March 2018 for argument. It is contended that at the costs hearing counsel for FSNI sought an order restraining the plaintiff from issuing further proceedings concerning FSNI without the prior leave of the President of the High Court (commonly referred to as an Isaac Wunder Order). It is submitted that this application was not made on any formal or even informal notice to the plaintiff's solicitor or counsel. Counsel asserts that this application was objected to in the strongest possible terms by the plaintiff's then counsel and that the trial judge, having

considered the submissions of both parties, rejected the application for an Isaac Wunder Order. Counsel further contends that it was in those circumstances that the trial judge was pleased to make no order as to costs in the proceedings.

**11.** For its part, FSNI contends that it has achieved total success in the proceedings, both in the High Court and in this Court. It refutes the plaintiff's contention that this was not necessarily the case. FSNI asserts that the only point which the plaintiff appears to identify on which it said FSNI failed is the issue of an Isaac Wunder Order. It is submitted that the plaintiff's position on this issue is unrealistic and entirely ignores the fact that the plaintiff's case was dismissed as an abuse of process at the interlocutory stage. It is submitted that there are factual inaccuracies in the plaintiff's submissions and that the submissions do not appear to reflect correctly the record of the proceedings in the High Court.

**12.** It is accepted by FSNI that following delivery judgment on 20 February 2020, it was indicated to the trial judge that in seeking its full costs FSNI would also seek to apply for an Isaac Wunder Order against the plaintiff. The question of costs was thus adjourned to 6 March 2020 on consent with the trial judge directing that any application for an Isaac Wunder Order should be made separately by way of motion on notice. The matter came back before the trial judge on 6 March 2020. Counsel for FSNI submits that it was specifically clarified before Coffey J. on that date that an application for an Isaac Wunder Order was not being made at that time. Having heard submissions, the trial judge made a limited costs order in favour of FSNI to be taxed in default of agreement but did not award FSNI the full costs of the proceedings.

**13.** Counsel submits that the issue of contention between the parties is on the somewhat nuanced question of whether an application for an Isaac Wunder Order was in fact made on 6 March 2020 or whether an intention to make such an application was simply

indicated. It is submitted that, in either event, that issue occupied no significant time before the High Court, was not a significant component of the proceedings and did not materially add to the costs of the case. Counsel thus contends that even if the plaintiff's version of events on 6 March is correct, the law is against him on the real issue, which is whether the matter of the Isaac Wunder Order gives rise to a basis on which to depart from the general rule that a party who has been successful in litigation should get its costs.

**14.** FSNI argues that the trial judge erred failing to make a costs order in its favour in circumstances where the proceedings were abusive by their nature and the High Court was duty bound to dismiss them on FSNI's motion. It is asserted that FSNI did not in any way increase the costs of the litigation and there were no other exceptional circumstances in the case to warrant a departure from the general rule. FSNI fully accepts that the learned trial judge was aware of and considered the applicable principles in determining the question of costs before the High Court. It is submitted, however, that the failure to make a costs order in favour of FSNI can only have resulted from a clear and material error in the way in which those principles were applied. It is submitted that it will only be in very rare cases that a party who succeeds in having proceedings being dismissed as an abuse of process pursuant to the inherent jurisdiction of the court, or struck out or dismissed pursuant to O.19, r.28 by reason of disclosing no reasonable cause of action or where the proceedings have been shown to frivolous or vexatious, will not get its costs. This is because such proceedings should not have been brought in the first instance and the courts are duty bound to dispose of same by dismissing them or striking them out. FSNI submits that a departure from the general rule in such cases should only be considered in truly exceptional circumstances, none of which are present in this case.

**Discussion**

**15.** As is clear from the submissions of the parties, the issue before this Court is confined to the costs of the proceedings in the court below.

**16.** It cannot be gainsaid but that FSNI were entirely successful on all points raised by the plaintiff in the High Court in opposition to FSNI's motion. This led to the dismissal of the proceedings. The starting point, therefore, is that FSNI was entitled to the costs of the proceedings as well as the motion. In my view, no good reason has been put forward by the plaintiff as to why FSNI should not have been awarded the costs of the High Court proceedings in their entirety. The plaintiff advances the proposition that on 6 March 2020 FSNI applied for an Isaac Wunder Order against the plaintiff without that application being on notice and that the application in those circumstances amounted to conduct on the part of FSNI that warranted the trial judge making no order for costs in the proceedings. There is, however, no evidence before this Court that an application for an Isaac Wunder Order was made on 6 March 2020 and I note that the plaintiff has not produced the DAR to corroborate his contention in this regard. More fundamentally, the plaintiff has not persuaded this Court, even if the issue of the Isaac Wunder Order was revisited by FSNI on 6 March 2020, that that constituted conduct which justified the trial judge departing from the usual order.

**17.** There is no basis for the plaintiff's submission that some issue arising from how FSNI or its lawyers conducted the proceedings caused the trial judge to exercise his discretion against making a full costs order. Insofar as this is intimated in the plaintiff's submissions it is entirely unsubstantiated, to my mind. The plaintiff goes no further than to suggest that something of apparent relevance can be gleaned from the case law cited in his submissions. It is contended that support for the plaintiff's submission can be gleaned from *R. (On the application of Srinivasan solicitors) v. Croydon County Council* [2013] EWCA

Civ 248 and *Otkritie Capital International Limited v. Threadneedle Assets Management Limited* [2017] EWCA Civ 274.

**18.** In *R. (On the application of Srinivasan solicitors),* costs were denied to the successful party on the grounds, *inter alia*, of having pursued grounds of application in judicial review proceedings on wrong criteria, having abandoned or re-shaped litigation *"at the eleventh hour"* and having been *"very much the author of its own misfortune"* in litigation *"which had not been economical, as the real point has not been focused on at an early stage".* In *Otkritie Capital International Limited*, it was concluded that the first instance court was within its discretion to make a costs order departing from the general rule based upon conduct that was found to fall below acceptable standards in the conduct of litigation.

**19.** In my view, the plaintiff's reliance on these authorities is entirely misconceived. As far as the present case is concerned, the height of the plaintiff's efforts to impugn FSNI is the attempt to characterise the issue of the Isaac Wunder Order as one of sufficient seriousness as warranted the trial judge not making a full costs order in favour of FSNI. In my judgment, the plaintiff's efforts in this regard fall substantially short of establishing conduct which would warrant a departure from the usual rule. Even if it is the case that an application for an Isaac Wunder Order was moved on 6 March 2020 (and there is no evidence that it was) without notice to the plaintiff, no reasonable basis has been advanced to argue that the action of FSNI, or its lawyers, in that regard came within the parameters of the sort of conduct that might properly influence a court not to make an order for costs in favour of an otherwise successful party. The plaintiff's submissions fall far short of establishing a basis on which the trial judge should properly have exercised his discretion against making a full costs order in favour of FSNI. No evidence has been adduced that the trial judge made any criticism of FSNI or its lawyers for the conduct of the proceedings

despite the plaintiff in his written legal submissions inviting this Court to infer or assume that such criticism was or may have been made and was warranted. FSNI has been wholly successful in its application to dismiss the proceedings in their entirety, resulting in those proceedings being dismissed as an abuse of process. That was the Order of the High Court and that Order has been affirmed unanimously by this Court.

**20.** In the circumstances of this case, I am satisfied that the trial judge erred in principle in not awarding the costs of the proceedings to FSNI. I will therefore allow FSNI's cross-appeal and order the plaintiff to pay the costs of the proceedings to include the costs the motion to dismiss. As already conceded by the plaintiff, FSNI is entitled to its costs in the appeal. All costs are to be adjudicated in default of agreement.

**21.** Haughton J. and Power J. have confirmed their agreement with this ruling.