THE COURT OF APPEAL

Record Number: 2014/100
High Court Record Number: 1987/1461P
Neutral Citation Number [2024] IECA 64

Noonan J.

Faherty J.

Haughton J.

BETWEEN/

GERARD BUTLER

PLAINTIFF/APPELLANT

-AND-

RODNEY REGAN AND LEONARD REGAN (IN THEIR CAPACITY AS PERSONAL REPRESENTATIVES OF THE LATE BRIAN REGAN DECEASED)

DEFENDANTS/RESPONDENTS

COSTS RULING of the Court delivered on the 21st day of March, 2024

1. The principal judgment herein ([2024] IECA 52) dismissed the appellant's appeal in its entirety, subject to one outstanding issue on the question of the proper allocation of the costs of the High Court proceedings (see para. 186 - 187 of the judgment of Faherty J. herein).

2. Following delivery of the principal judgment, the Court directed that a further short hearing on costs would take place for the purpose of considering two discrete issues, first

regarding the costs awarded by the High Court and second, the costs of this appeal. This hearing was convened for the purpose of hearing oral submissions from the parties on these issues but when the Court sat, the appellant produced a written submission running to 45 pages with accompanying documents which were emailed to the Court on the afternoon of the bank holiday immediately preceding the costs hearing. The Court however agreed to accept these submissions and documents and has now had the opportunity of fully considering them.

3. Dealing first with the High Court costs, the appellant succeeded in his claim against the respondents following a 20 day trial in that court. Although the appellant was successful and obtained a substantial decree for damages in his favour, he did not succeed on all the issues he had agitated at first instance. Accordingly, the trial judge determined that the plaintiff would not be entitled to his full costs of the hearing.

4. The trial judge held that the issues in respect of which the appellant did not succeed *"occupied a very small part of the litigation in its entirety"*. It appears from the transcript that the judge was advised by the registrar that the trial had taken 19 days and having been so informed, he found that *"two of the 19 days might not have been fully spent in the litigation"*. Accordingly, he found that the respondents *"should not have to bear the costs of 19 days litigation or bear the costs of the last two of the 19 days of the litigation"* and awarded the appellant 17/19 of his costs. He clarified that in so finding, he did not find that the costs of any witnesses should be disallowed, the *"fortunate result"* of that being that it was the solicitors and counsel for the appellant who were *"likely to get a hit"*.

5. At a subsequent for mention hearing in relation to the question of special damages, the costs were again mentioned and counsel for the appellant advised the judge that the trial had in fact run for 20 days and not 19 as previously thought. The appellant accordingly

argued that the correct apportionment of costs should be 18/20 rather than 17/19. The judge however declined to amend his earlier order on the basis that there was *"no use in changing the fractions… I decided it on principle"*.

6. At the costs hearing before this Court, the respondents argued that the fair allocation of costs is quintessentially a matter for the trial judge and it is well settled that this Court will not in the normal way interfere with such an exercise of discretion, particularly in the context of costs. It nonetheless remains the position that this Court is free to correct error or injustice where it arises.

7. It seems to the Court clear that the intention of the trial judge in apportioning costs was to disallow two days out of the entire hearing while making clear that the costs and expenses of all of the plaintiff's witnesses would be recoverable. While the judge declined to change the 17/19 fraction on the basis of *"principle"*, it is not clear to this Court what principle could justify such an arbitrary fraction in circumstances when it was clearly not apposite where the trial had in fact taken 20 days, rather than the 19 the judge had been advised when he made the order. In the view of this Court, the justice of the case accordingly requires that the appellant should be entitled to 18/20 of his costs in the High Court and to that very limited extent, we will allow the appeal.

8. Turning now to the question of the costs of the appeal, the first 26 pages of the appellant's written submissions are taken up with complaints about the conduct of the trial, in particular, by the respondents. This constitutes an impermissible attempt to revisit and reagitate matters which were the subject of the appeal that has now been finally determined by the principal judgment. The Court must accordingly disregard these submissions.

9. The same submissions feed into the appellant's contention that the conduct of the respondents should not only deprive them of their costs but entitle him to his. In support of

that contention, the appellant places reliance on the judgment of the Supreme Court in relation to costs in *Mahon Tribunal v Keena & Anor* [2009] IESC 64 in which Fennelly J., speaking on behalf of the Court, held that in exceptional cases, the court has a jurisdiction to order a successful party to pay the costs of an unsuccessful party. The appellant purports to pray this in aid, not for the purpose of seeking his costs of the appeal, but rather of urging upon this Court that there should be no order as to the costs of the appeal.

10. As has already been explained however, any issues concerning the conduct of the litigation by the respondents have been already agitated and decided in this appeal and in particular, the Court made no finding in that regard adverse to the respondents, notwithstanding what was then and is now urged by the appellant. In those circumstances, this contention forms no basis for a departure from the normal principles to be applied in allocating costs.

11. In the final section of his written submissions entitled *"Plea for compassion and mercy"*, the appellant highlights his personal circumstances and the fact that he suffers from significant health issues, both physical and mental, as do other members of his immediate family. He also draws attention to his poor financial circumstances and has furnished the Court with a number of medical reports and financial and other documents in support of this plea.

12. The statutory provisions regarding the award of costs in litigation is to be found in s. 169 of the Legal Services Regulation Act, 2015, which section is entitled *"Costs to follow event"*. The section provides in relevant part:

> *"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 …"*

13. The section proceeds to set out a number of matters to which the court may have regard in determining how costs should be awarded in any particular case. Notably, these do not include the health or financial circumstances of a party. While the Court expresses its sympathy to the appellant on the predicament in which he finds himself, it must do justice between the parties in the light of the relevant circumstances, which include that the appellant elected to bring this appeal and has been unsuccessful. The appellant's personal circumstances are not matters which should deprive the respondents of their *prima facie* statutory entitlement to an order for costs in their favour in respect of the appeal.

14. Although it might be said that the respondents have not been *"entirely successful"* in the appeal having regard to the appellant's success in relation to the High Court costs order already dealt with, it is nonetheless clear that the respondents have been overwhelmingly successful on all issues and the High Court costs question in reality made little or no significant contribution to the time taken by the substantive appeal. The Court is thus satisfied that the respondents should be entitled to their costs of the appeal. Having regard however to the appellant's success on the costs order made by the High Court, we are of the view that the justice of the case is best met by making no order as to the costs of the hearing on costs before this Court.