

THE HIGH COURT

[2017 No. 3298P]

BETWEEN

PAT MCCARTHY

PLAINTIFF

AND

GERRY TWOMEY

DEFENDANT

Ex tempore JUDGMENT of Mr Justice David Keane delivered on the 10th December 2019

Introduction

1. I gave judgment in this personal injuries action on 25 October 2019 under the neutral citation [2019] IEHC 719 ('the judgment').
2. On 3 December 2019, the parties made submissions on who should bear the legal costs of the proceedings. This is my ruling on that issue.

The usual rule

3. On behalf of the defendant Mr Twomey, Mr O'Hagan S.C. submits that I should apply the usual rule under the old O.99, r. 3(1) of the Rules of the Superior Courts, as amended ('the RSC'), which provided in material part that the costs of every action shall follow the event unless the Court, for special cause, to be mentioned in the order, directs otherwise.
4. That rule is now enshrined in s. 169(1) of the Legal Services Regulation Act 2015 ('the 2015 Act'), which came into operation on 7 October 2019 and 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. Under s. 169(2) of the same Act, 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.
5. The new O. 99, r. 2(1) of the RSC, which came into operation on 3 December 2019 – the day on which I heard the application for costs in this case – restates the fundamental principle recognised under the old O.99, r. 1(1) that the costs of and incidental to every proceeding shall be at the discretion of the court. But that rule is now expressly made subject to the provisions of s. 169 of the 2015 Act.
6. Under s. 169(1), in considering the nature and circumstances of the case, and the conduct of the proceedings by the parties, the factors to be considered include whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings.
7. Mr O'Hagan argues that Mr Twomey's entirely successful defence of the proceedings is the event that the legal costs should follow and that there is nothing in the nature or circumstances of the case that would warrant a departure from the usual rule.

Is there cause to depart from the usual rule?

8. On behalf of Mr McCarthy, Mr Maher S.C. points to various aspects of the judgment that, he submits, establish that the nature and circumstances of this case warrant a departure from the usual rule on two broad grounds: first, that Mr McCarthy succeeded on a number of issues, although his failure on others led ultimately to the dismissal of his action; and second, that the court should refrain from ordering Mr McCarthy to pay Mr Twomey's legal costs due to Mr McCarthy's personal circumstances. Mr Maher argues that, on either or both of those grounds, the court should make no order on the costs of these proceedings.

Were there complex issues in the case?

9. Mr Maher submits, in substance, that this was a complex case, which raised multiple issues, certain of which were resolved in Mr McCarthy's favour. Thus, Mr Maher contends, there was more than one event.
10. More specifically, Mr Maher identifies six separate contested issues that are addressed in the judgment.
11. The first was whether various duties were imposed on Mr Twomey as a construction work client under the relevant provisions of the Safety, Health and Welfare at Work Act 2005 ('the Act of 2005') and the Safety, Health and Welfare at Work (Construction) Regulations 2013 ('the 2013 Regulations') (paras. 22–32 of the judgment).
12. The second was, if so, whether Mr McCarthy's injury had been caused by the failure of Mr Twomey to comply with one or more of those duties (paras. 33–43).
13. The third was whether Mr Twomey owed certain duties to Mr McCarthy as his de facto employer, whether at common law or under the Act of 2005 (at paras. 44–53).
14. The remaining three issues were addressed in the judgment as technical and procedural arguments (at paras. 54–57). The fourth was whether there had been inordinate and inexcusable delay by Mr McCarthy in bringing these proceedings. The fifth was whether an adverse inference should be drawn from his failure to serve a notice of claim within the time permitted by s. 8 of the Civil Liability and Courts Act 2004. And the sixth was whether Mr Condon, the builder, was a concurrent wrongdoer with Mr Twomey, for whose acts and omissions Mr McCarthy had become responsible by operation of s. 35(1)(i) of the Civil Liability Act 1961.
15. While acknowledging that Mr McCarthy had failed on the second and third issues, resulting in the failure of his claim, Mr Maher pointed to Mr McCarthy's success on the first, fourth, fifth and sixth issues as the basis for the argument that this was a complex case involving more than one event.
16. That argument seems to me to invoke the principles identified by Clarke J in *Veolia Water UK plc v Fingal County Council (No. 2)* [2006] IEHC 240, [2007] 2 IR 81, albeit that Mr Maher does not invite the court to award Mr McCarthy the costs of any of the issues upon which he succeeded but rather submits that the court should make no order at all on the costs of the proceedings.

17. In my judgment, this was not a 'complex case' in the sense in which Clarke J used that term in *Veolia*. As Clarke J later clarified in *ACC Bank plc v Johnston* [2011] IEHC 500, (Unreported, High Court, 24 October 2011), the overriding principle remains that the costs of legal proceedings follow the event. While various causes of action involve several constituent elements (and, often, alternative constituent elements), it does not follow that the establishment of every such element is a separate issue or event, rendering every such action a complex case. Even where distinct causes of action, relating to separate events, are advanced in a single set of proceedings, it does not necessarily follow that, if they are not all resolved in favour of the same party, they will be treated as separate events. The starting point is that the successful party in the proceedings gets full costs. The court should consider departing from that approach only where, by raising additional grounds or issues found to be unmeritorious, the successful party has materially added to the costs of the proceedings.
18. I do not consider that to have been the position here. While, in the pleadings they exchanged, Mr Twomey did raise or engage with Mr McCarthy on each of the four issues on which Mr McCarthy prevailed, those issues were barely touched upon in evidence or argument. The central controversy at trial was whether Mr McCarthy's significant injury was the result of any breach of duty by Mr Twomey for which Mr Twomey was liable in damages to Mr McCarthy. In my view, the resolution of that controversy in Mr Twomey's favour was the event in this case.

Mr McCarthy's personal circumstances

19. Mr Maher argues that Mr McCarthy's personal circumstances warrant a departure from the default requirement under s. 169(1) of the Act of 2015 that Mr Twomey, as the successful party, is entitled to the costs of these civil proceedings against Mr McCarthy, the unsuccessful party.
20. In support of that contention, Mr Maher prays in aid the finding (at para. 56 of the judgment) that Mr McCarthy was a credible and honest witness, who has endured a traumatic accident that has left him with a permanent disability in his right eye. In addition, Mr Maher asks the court to note Mr McCarthy's status as a married man in his sixties with four adult children.
21. However, I do not think that those factors are enough to deprive Mr Twomey, who was obliged to defend the proceedings and who did so successfully, of his costs.

Conclusion

22. For the reasons I have given, I will order that Mr McCarthy pay Mr Twomey's reasonable costs of the proceedings, those costs to be adjudicated upon in default of agreement.