

THE HIGH COURT

[2004 No. 19212 P]

BETWEEN

COLM MURPHY

PLAINTIFF

AND

THE LAW SOCIETY OF IRELAND

DEFENDANT

**EX TEMPORE JUDGMENT of Mr. Justice MacGrath delivered on the 13th day of November, 2019.**

1. The plaintiff, Mr. Murphy, sought damages for misfeasance in public office, negligence, defamation and breach of confidence. For reasons expressed in the judgment of the court delivered on 31st July, 2019, his claims were dismissed.
2. The principal claims made in misfeasance in public office and negligence were determined to be a collateral challenge to valid, subsisting and unchallenged orders and were deemed to be in impermissible attack on those orders. The court found, in the alternative, that those claims have not been made out on the facts and/or on the law. Prior to and in the course of submissions in the case, the court was requested by the parties to deal with all issues, including alternative arguments of defence advanced on behalf of the defendant. This was largely due to the procedural history of the case which has previously been heard the High Court and, on appeal, in the Supreme Court. Mr. Murphy was successful in the Supreme Court and the case was remitted to the High Court for further hearing. I am informed by the parties that Mr. Murphy was successful in obtaining orders for costs in respect of the previous hearings.
3. I now deal with the cost's application made by the defendant, the successful party in these proceedings. Mr. Murphy S.C. on behalf of the defendant submits that costs should follow the event and that the society should be awarded its full cost. Mr. Craven S.C. on behalf of the plaintiff submits that the court has a discretion in relation to costs and in the exercise of that discretion it should take into account what he describes as the express and implied criticisms of the defendant by the court in its judgment.
4. McKechnie J. observed in *Godsil v. Ireland* [2015] 4 I.R. 535, that it is essential in furtherance of the high constitutional right of effective access to the courts on the one hand and the high constitutional right to defend oneself, having been brought there, on the other, that our legal system makes provision for costs orders. He described it as an essential safeguarding tool to regulate litigation and the conduct and process thereof, by ensuring that it is carried on fairly, reasonably and in proportion to the matters in issue. Thus, as he observed, a party who institutes proceedings in order to establish rights or entitlements, which are neither conceded nor compromised, is entitled to an expectation that he will, if successful, not have to suffer costs in so doing. Describing the position of the defendant, he observed that if the advanced claim is one of merit to which the defendant has no answer, then the point should be conceded. In that way the defendant has significant control over the legal process including participation and attendance. If the defendant should contest an unmeritorious point, the consequences are the defendants to

suffer. On the other hand, if the defendant successfully defeats a claim and thereby has been justified in the stance adopted, it would likewise be unjust for him or her to have to suffer any financial burden by so doing. Therefore, the rule applies to a defendant as it applies to plaintiff.

5. While O. 99, r.1(1) provides that the costs of and incidental to every proceeding in the Superior Courts shall be in the discretion of those courts, it is also provided in O. 99, r. 1(3), that the cost of every action, question or issue tried (*by a jury*) should follow the event unless the court, for special cause, to be mentioned in the order, shall otherwise direct. In *Godsil*, McKechnie J. observed that although acknowledged as being discretionary, a court which is minded not to apply this rule can only do so on a reasoned basis, clearly explained and one rationally connected to the facts of the case to include the conduct of the participants. Thus, the discretion so vested is not at large but must be exercised judicially. He continued at p. 11 of the judgment: -

*“..the overarching test in this regard, as described by Laffoy J in Fyffes plc v DCC and Ors is justice related. It is only when justice demands, should the general rule be departed from. On all occasions when such is asserted the onus is on the parties who so claims.”*

6. On the basis of the authorities, McKechnie J., suggested that it may be possible in certain instances to loosely group together cases for the purposes of either the rule, or the exceptions, but that nevertheless it remains the situation that one cannot rigidly define or prescriptively describe the type, kind or category of case which by virtue of such classification, will always fall within the rule or within the exception, as the case may be. Cases may inevitably be borderline, some of which will sit either side of the rule. Jurisprudence on the topic has developed more by reference to the exceptions than the rule. McKechnie J. observed that courts have discussed this issue under a number of headings such as the conduct of the parties, test cases, where the decision might have significant knock-on effects or where the proceedings are said to involve public interest challenges. That the conduct of a party may be taken into account is evident from the decision in *Mahon v. Kenna* [2010] 1 I.R. 336, again cited by McKechnie J in *Godsil*.
7. Nevertheless, as recognised in both *Godsil* and in *Veolia Water UK plc v. Fingal County Council* [2007] 1 I.R. 690 by Clarke J. (as he then was), the overriding starting position remains that costs should follow the event.
8. It seems clear, that the defendant, the Law Society of Ireland, has been successful in the defence of their proceedings and, therefore, this is the event which costs must normally follow. It does not appear to me that it is open to the court, where the defendant has achieved an outcome in its favour in respect of all claims made, that the more sophisticated principles described in *Veolia* by Clarke J. are applicable. Thus, such approach, which is considered by *Delaney and McGrath on Civil Procedure*, (4th ed., 2018) at chapter 24, where complex cases might give rise to multiple issues having more than one event, does not arise in this case.

9. The principle which was identified by Clarke J. as being the starting position, that a party who wins an event should get its full costs, must be acknowledged. Nevertheless, as was stated by Murray C.J. in *Dunne v. Minister for the Environment* [2007] 1 I.R. 194, as a counterpoint to the general rule, the court has a discretionary jurisdiction to vary or depart from that rule if, in the special circumstances of the case, the interests of justice require that it should do so. He observed that there was no predetermined category of cases which fall outside the full ambit of that jurisdiction; and he acknowledged that departure from the general rule is one which must be decided by a court in the circumstances of each case. As Delaney and McGrath point out at para. 24-34 (*Delaney and McGrath on Civil Procedure*, (4th ed., 2018) at p. 927), the factors identified as justifying the departure from the general rule must relate to the facts of the particular case including the conduct of the parties and not to any extraneous matters.
10. Applying the above principles to this case, it seems to me, as a matter of principle that the defendant should be entitled to an order for costs but in determining whether it should be entitled to an order for its full costs, the court is entitled to take into account its observations on the defendant's conduct as described in its judgment. These matters, to which Mr. Craven S.C. refers, include the nature of the defendant's response to queries raised arising out of the O'Dowd investigation, that the taking of further reasonable and simple steps such as making a phone call may have obviated the necessity for an order for substituted service and may have had an effect on the timing of the s. 18 proceedings and not unimportantly, although I have already found that the plaintiff contributed to this state of affairs, the maintenance by the Society that an undertaking had been given to court, when this was not reflected in the order of the court and is one which I have found not to have existed on the facts.
11. Further, I must also bear in mind the court's observations in relation to the manner in which the [REDACTED] matter was introduced into the attachment and contempt proceedings; and perhaps somewhat as a more subsidiary point, what the court described as the combative approach adopted by the Society, who were not alone in this regard, as evidenced in internal communications on certain issues.

### **Decision**

12. For all of these reasons, I am satisfied that while the defendant is entitled to an order for costs, in the interests of justice and for the reasons outlined above this is not an appropriate case in which the defendant should be awarded an order for its full taxed costs. I believe that this is an appropriate case in which to make a partial costs order.
13. Given that the defendant has succeeded in the defence of the various claims raised and pursued by the plaintiff, it appears to me that the defendant should be entitled to substantially the greater portion of its costs. Nevertheless, it also appears to me that failure to make some deduction from, or to make some division in respect of costs is to fail to reflect the court's observations, as discussed above, and would not be in accordance with the overall interests of justice.

14. In the circumstances, therefore, I have come to the conclusion that the costs recoverable by the defendant should not exceed 80% of those measured when taxed and ascertained. Therefore, in the exercise of the court's discretion on the basis of the principles outlined above, I am satisfied that the defendant should be entitled to an order for costs to the extent of 80% of its full costs when taxed and ascertained.