[2020] IEHC 219

THE HIGH COURT

Record Number: 3287S/2010

BETWEEN/

START MORTGAGES DAC

PLAINTIFF

- AND -

JOSEPH MC NAMARA AND JOSEPH HARRIS

DEFENDANTS

JUDGMENT of Ms Justice Power delivered on the 15th day of May 2020

Background

1. This case came on for hearing on 27 January 2020, wherein the motion to dismiss the proceedings for want of prosecution brought by the second named defendant ('the applicant') was opposed by the plaintiff ('the bank').

2. After the hearing, further submissions were filed by both parties.

3. Having heard the parties and considered their submissions, including, their written submissions, judgment was delivered on 7 April 2020 ([2020] IEHC 187).

4. In the light of the COVID-19 pandemic and in accordance with the recent direction of the Chief Justice and the President of the High Court, that judgment was delivered to the parties, electronically, by way of email on the same day.

5. The court held that the balance of justice required the dismissal of the proceedings for want of prosecution on the grounds of inordinate and inexcusable delay. The delay caused serious prejudice to the applicant and gave rise to a substantial risk of unfairness should the matter proceed to trial.

Costs

6. The parties were invited to communicate, electronically, with the Court on any issues arising from the judgment, including, the question of costs. They were advised that if there were such issues and the parties did not agree thereon, concise written submissions should be filed, electronically, with the Office of the Court within 14 days of the delivery of the judgment, subject to any other direction given in the judgment.

7. By email of 21 April 2020, the solicitors for the applicant made an application for costs, to include '*the costs of the motion and those of the proceedings, any and all any reserved costs together with the costs of discovery, such application for costs to be adjudicated in default of agreement on the basis that costs follow the event'*.

8. On 22 April 2020 the Court directed that the bank be notified of the aforesaid application for costs.

9. By letter dated 27 April 2020, the solicitors for the bank responded, stating that the bank did not object to an order for costs being made in favour of the applicant. However, they submitted that the costs of the making of discovery should not be awarded, because of the applicant's failure to provide the bank with an Affidavit of Discovery.

10. On 28 April 2020, the solicitors for the applicant replied. They submitted (a) that costs follow the event; (b) that the bank was invited by letter pre-motion to discontinue and it ignored the request; (c) that the bank contested the matter with vigour, filing several affidavits and having the matter adjourned on three occasions; (d) that the bank did not candidly disclose the internal memo and/or that it consciously and deliberately paused the proceedings; and (e) that the bank contested the legal points and arguments with vigour and, ultimately, did not succeed.

11. By letter dated 30 April 2020 the bank's solicitors submitted that whereas they did not object to an order for costs, as set out in their letter of 27 April 2020, they did not accept that the bank had failed to disclose an internal memo, nor did they accept that this document proved that proceedings had been paused, deliberately.

Decision

12. It is a well-established principle of law that, as a general rule, costs follow the event, unless, for special reasons, the court otherwise directs. This principle was confirmed by Clarke J. (as he then was) in *Veoila Water UK plc v Fingal County Council (No. 2)* [2006] IEHC 240, 2007 2 I.R. 81. He described the approach to this principle in the following terms:

> *"Parties who are required to bring a case to court in order to secure their rights are, prima facie, entitled to the reasonable costs of maintaining the proceedings. Parties who successfully defend proceedings are, again prima facie, entitled to the costs to which they have been put in defending what, at the end of the day, the court has found to be unmeritorious proceedings."*

13. Section 169 of the Legal Services Regulation Act 2015 provides as follows:

> *"Costs to follow event*
>
> *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."*

14. Order 99, r. 2 of the Rules of the Superior Courts (as amended) states as follows:

> *"2. Subject to the provisions of statute (including sections 168 and 169 of the 2015 Act) and except as otherwise provided by these Rules:*
>
> *(1) The costs of and incidental to every proceeding in the Superior Courts shall be in the discretion of those Courts respectively."*

14. The starting position, therefore, in this application for costs, is that costs should follow the event. That said, the question of costs is, of course, a matter that ultimately comes within the discretion of the trial judge. In *Child and Family Agency v O.A.* [2015] 2 I.R. 718, MacMenamin J., whilst confirming the long-established principle that costs are a

discretionary matter, nevertheless pointed out that a judge is not '*at large'* in considering a costs application and that he or she must exercise his or her discretion in each case within jurisdictional criteria established by law. A trial judge is only entitled to depart from the general principle if satisfied that it is appropriate to do so.

15. In this case, the bank issued proceedings against the applicant in 2010. From an early stage in that litigation, the applicant liaised with the bank and set out his defence to the claim. He engaged a firm of solicitors and was represented at the bank's motion for summary judgment. When the matter was transferred for plenary hearing, he filed a full Defence to the claim. Thereafter, he was served with a motion for discovery. In or about the same time, he and his solicitors were endeavouring, proactively, to clarify his position vis-à-vis the bank's claim.

16. On 11 November 2013, an Order for Discovery was made against the applicant. An internal bank memo of 18 November 2013 exhibited by the applicant indicates that following an earlier phone call from the applicant's solicitor, the bank conveyed its intention to carry out a review and advised the applicant that it would get back to him by the end of November 2013. At that point, matters went into abeyance. Thereafter, the bank took no further step in the proceedings until the applicant's motion to dismiss issued.

17. As noted (see para. 5), in delivering judgment, I found that the balance of justice required the dismissal of the proceedings for want of prosecution on the grounds of inordinate and inexcusable delay. Having regard to the parties' respective constitutional rights of access to justice and to fair procedures and applying the relevant principles emanating from the case law, I concluded that the delay in question caused serious prejudice to the applicant and gave rise to a substantial risk of unfairness should the matter proceed to trial.

18. I am satisfied that the applicant is entitled to the costs of the motion to dismiss, having succeeded in that application. Furthermore, I am satisfied that he is also entitled to the costs of defending the proceedings. The reason for exercising my discretion in favour of awarding such costs to the applicant is based upon the fact that he was brought into costly proceedings that, subsequently, were shelved. If a party commences litigation and obliges another to engage solicitors and to instruct counsel for the purpose of defending a claim, then, it would be unconscionable, in my view, to allow that party, effectively, to 'change its mind' by leaving matters lie thereby burdening the person sued with all of the costs he or she incurred in defending such litigation that, ultimately, went nowhere.

19. In fairness to the bank, the only objection raised in relation to the application for costs concerns the making of discovery (see para. 9). Having regard to the circumstances that obtained in or about the time when the Order for Discovery was made (see para. 16), I am satisfied that the applicant is entitled to the costs he incurred in responding to the motion for discovery. He is not, however, entitled to the costs of making discovery, since no Affidavit of Discovery was filed.

15. In view of the foregoing, I will make an order for costs to the applicant in line with the terms of this judgment, such costs to be adjudicated in default of agreement.