[2020] IEHC 446

THE HIGH COURT

Record No. 2015-1418 P

BETWEEN

CHRIS GORDON

PLAINTIFF

- AND -

THE IRISH RACEHORSE TRAINERS ASSOCIATION

DEFENDANT

Judgment of Mr. Justice Bernard Barton delivered the 9th day of September 2020

Introduction

1. This is the judgment of the Court on the Plaintiff's application for costs at the conclusion of an eight-week trial in defamation proceedings in which the Jury gave a verdict for the Plaintiff on the 25th March 2020. The action was adjourned to facilitate the preparation of submissions.

2. Having succeeded in his claim for damages, the Plaintiff sought orders for the costs of the proceedings to include all reserved costs and costs of discovery together with the costs of an earlier trial, which had had to be aborted. The Defendant opposed the application on a number of grounds and invited the Court to depart from the normal rule that costs follow the event. The essence of the case made in this regard was that the Defendant had in effect succeeded on a number of issues, furthermore the trial had been unnecessarily prolonged by the Plaintiff, accordingly, the costs associated therewith should be awarded or allowance therefore made to the Defendant. It follows that the central question to be addressed on the application for the costs of the proceedings is whether the Court should accede to the Plaintiff's application or exercise its discretion in the manner sought by the Defendant, about which more presently. The costs of the mistrial are a separate issue.

3. For a background to the case and the issues left to the Jury see the judgments of the Court in *Gordon v. The Irish Racehorse Trainers Association* [2020] IEHC 363 and *Gordon v. The Irish Racehorse Trainers Association* [2020] IEHC 425. Suffice it to say at this juncture that the case concerned seven defamatory statements five of which had been met, inter alia, with the defence of qualified privilege. The Plaintiff pleaded express malice by the Defendant in the publication of the statements. Of these, the jury found malice proved in the publication of the first, second, fifth and sixth statements but not the seventh.

4. In relation to the third defamatory statement, an article in the August 9th edition of the 'The Irish Field' 2014, two issues were left to the Jury, the first, whether the Plaintiff had proved that Noel Meade was speaking on behalf of the Defendant when he made the statements ascribed to him in the article and the second, whether his remarks were understood to refer to the Plaintiff. The Jury answered both questions in the affirmative. The fourth statement, an alleged petition to have the Plaintiff removed as head of security of the Turf Club, was withdrawn from the Jury on the Defendant's application, for insufficiency of evidence. A brief summary of the written and oral submissions made on behalf of the parties follows.

Defendant's Submissions

5. It was submitted by Mr Rogers that in so far as any award for costs was to be made in favour of the Plaintiff, the Court should in the first instance exercise its discretion by restricting the award to Circuit Court costs having regard to the provisions of s. 17 (1) of the Courts Act 1981 as amended by s. 14 of the Courts Act 1991 (the 1981 Act, as amended) and further by making a differential order as to costs in favour of the Defendant having regard to the provisions of s. 17 (5) of that Act. In support of this submission, reliance was placed on a letter written by the Defendant's solicitor, dated 30th January 2020, where it was made clear to the Plaintiff that the Defendant was a company limited by guarantee and that the liability of the members to contribute to its debts was limited to €1500, as a consequence of which no more than this sum could be recovered by way of damages and costs. The letter was written without prejudice save as to costs.

6. Accordingly, if the action was to proceed at all the Defendant sought to have the trial take place in the Circuit Court as the lowest court with jurisdiction in which defamation proceedings could be brought, however, the request was rebuffed, and the trial proceeded in the High Court. It was also contended that as the Plaintiff had prolonged the proceedings unnecessarily, particularly by failing to concede until the conclusion of the evidence that the occasions of publication were privileged, he should bear the associated costs. With regard to the exercise of the Court's discretion the Defendant relied on *Mangan v. Independent Newspapers Ltd* [2003] 1 I.R.442 and *O'Connor v. Bus Atha Cliath* [2003] 4 I.R. 459.

7. While recognising that the Jury had awarded damages in the sum of €300,000, an amount well in excess of the Circuit Court jurisdiction, the case made was that notwithstanding the prosecution of the proceedings in the High Court the Plaintiff well knew the maximum which could be recovered on foot of any judgement was €1500. Apart altogether from this aspect of matters, the Court was urged to exercise its discretion by taking into account (i) the issues on which the Defendant had been successful and, as mentioned already, (ii) the failure of the Plaintiff to concede the Defendant's entitlement to rely on the defence of qualified privilege until the closing speeches to the Jury, thereby unnecessarily prolonging the trial. The Defendant sought an order for the resulting costs and for an order setting off the amount thereof against the costs awarded to the Plaintiff.

8. In relation to the first of these, the issues on which the Defendant had been successful, it was argued that the principles set out in *Veolia Water UK plc v Fingal County Council (No. 2)* [2007] 2 IR 81 (hereinafter "*Veolia Water*") applied and that these had found their way into and were mandated by provisions of s.169 (1) of the Legal Services Regulation Act, 2015 (the 2015 Act). As the Defendant had succeeded in having the 4th statement withdrawn from the Jury and the Plaintiff had failed to prove malice in respect of the seventh statement the time and costs involved in meeting these issues should also be taken into account and awarded or allowance therefore made to the Defendant.

9. With regard to the issue of qualified privilege, it was argued that a definite allowance should be made in accordance with the *Veolia Water* principles to take account of the

unnecessary prolongation of the trial; the concession with regard to qualified privilege made at the conclusion ought properly to have been made at the outset. As to making a definite allowance in relation to these matters, the Court was referred to the judgment of Finlay-Geoghegan J. in *Sony Music Entertainment (Ireland) Ltd. v Universal Music Ireland Ltd*. [2017] I.E.C.A 96. In making a partial order in favour of the winning party the Court should indicate in its decision the percentage by which the issues won by the losing party contributed to the overall cost of the proceedings and thereupon make a net order.

10. The matter didn't end there. With respect to the 5th statement, the meeting in the Keadeen hotel, it was argued that the Plaintiff advanced a position markedly different from that pleaded at para 12 of the Statement of Claim. Although the Defendant was ultimately unsuccessful on this statement, the stark change from the pleaded position to one which reflected the evidence given at trial was significant and relevant to costs. The argument advanced in support of this contention was that had the Defendant known from the outset the position which the Plaintiff would ultimately adopt at trial in relation to the meeting, aspects of witness evidence could have been shortened or completely avoided, consequently, the resulting additional costs ought not to be visited on the Defendant.

11. In the event, the trial took 30 days whereas when these factors were taken into account it would have taken far less, at which Mr. Rogers suggested twenty days would have been sufficient. Against this estimate, due allowance having been made for the unnecessary waste of court time, the net trial costs to which the Plaintiff was entitled should be limited to 10 days. In this regard I understood the costs in question to be costs the trial if prosecuted in the Circuit Court.

Plaintiff's Submissions

12. Mr. Harty rejected as preposterous the proposition that the Defendant's liability for damages and costs was limited to the amount guaranteed by the Defendant Association's members. He argued that in the context of meeting its just debts a company limited by guarantee was in the same position and was to be treated no differently from a company limited by shares. He drew the attention of the Court to the statement of the law to this effect set out in the 4th edition of Courtney "The Law of Companies" at Chapter 32 para. 32.001. It followed that the proposition advanced on behalf of the Defendant was bad in law and conflated the company's liability to meet its debts as they fell due with the liability of the members to contribute in the event of insolvency.

13. Subject to any stay the Court might impose in the event of an appeal, the Plaintiff was entitled to enforce the judgment by orders of execution in accordance with the Rules of the Superior Court. While the amount guaranteed by the members is limited and payment may be called for in the event of insolvency, this was but one of the sources of funds to which recourse might be had by the Defendant or a liquidator in order to meet its debts. The company may be in control of or have access to considerable funds, such as outstanding membership fees, grants from Horse Racing Ireland or other debtors, assets and /or cash reserves. Neither the nature of the company nor the content of the letter of January 30th. 2020 was relevant to the issue of costs.

14. Mr. Harty also submitted that the Defendant had established no special circumstances, as required by the jurisprudence on the question, which would warrant the Court departing from the normal rule that costs follow the event. Furthermore, he argued that while Order 99 had been amended to take account of the 2015 Act, s.169 (1) did not displace this overriding principle nor, significantly, did the Act amend s.94 of the Courts of Justice Act 1924, (the 1924 Act), which provides for costs orders in civil jury trials. Consequently, as the event costs are to follow envisaged by s. 94 is a judgment in proceedings tried by judge and jury the Plaintiff was entitled to an order for full costs.

15. With respect to the *Veolia Water* principles, it was submitted these do not apply to civil jury trials in the manner suggested by the Defendant. In this regard, the Court was referred to the 4th Edition of Delany and McGrath on Civil Procedure, Chapter 24 section C. 2. (a) and to the case of *ACC Bank v Johnston* [2011] IEHC 500 wherein Clarke J. dealt with the meaning of "event" costs are to follow and the difficulties sometimes encountered by the court in identifying the relevant event or events in complex litigation. Mr. Harty submitted that no such difficulty arose in these proceedings; the event was readily identifiable. The kernel of the Plaintiff's case as pleaded was that he had been subjected to a campaign of defamation by the Defendant, an assertion borne out by the verdict. Accordingly, the event was the action for damages in respect of which he had been made an award; this was the event costs are to follow; the Plaintiff was entitled to the reasonable costs incurred in maintaining the proceedings.

16. Nor did it follow from the withdrawal of the fourth impugned statement or from the failure to prove malice in respect of the seventh that the costs thereof should be awarded to the Defendant and set off against the Plaintiff's costs or that such costs should be confined to the issues on which he had been successful. Rather, having succeeded in the action, the Plaintiff was entitled to his full costs. In support of this proposition, the Plaintiff relied upon the judgment of the Supreme Court in Cooper-Flynn v. RTE [2004] 2 I.R. 72 wherein the plaintiff unsuccessfully appealed, *inter alia*, against an order that she should pay the costs of the third defendant.

17. It had been submitted that the answer by the jury to the first question that she had not induced the 3rd defendant to evade his tax obligations constituted a '*special cause'* within the meaning of Order 99 (1) (3) of the Rules of the Superior Courts (the Rules) and that it was inappropriate in the circumstances that she should have to bear the third defendant's costs. It was argued that this finding was "*of immense significance*" and that she had obtained "*something of value*" in the form of the answer to Question 1 in respect of which the proceedings had been instituted.

18. The Supreme Court held that the plaintiff was not entitled to an order for costs in respect of the one question on which she had succeeded. The 'sting' of the defamation relied on by the plaintiff was that she had advised and encouraged one or more persons to evade their tax obligations, an allegation the jury found to be true. That this was not found to be the case in respect of the third defendant did not in the circumstances constitute a special cause within the meaning of Order 99 r. (1) (3). Mr Harty argued the Defendant should

not be entitled to the costs of the issues on which the Plaintiff had been unsuccessful; the jury found the 'sting' of the defamatory statements when taken together had been established.

19. Finally, the proposition that the Plaintiff ought to be deprived of the costs associated with the establishment by the Defendant of the defence of privilege on the grounds mentioned earlier was without merit and misconceived in law. The onus of proof on the issue rested on the Defendant, accordingly, the Plaintiff was entitled to await evidence thereof to the point, if necessary, of having the issue determined by the Jury, especially in circumstances where, as here, express malice had been pleaded. The concession was made when the Plaintiff was satisfied, after evidence on the issue was given, that the Defendant was entitled to rely on the defence and was, therefore, no longer an issue for the Jury.

Decision;

The Law

(1) Companies Limited by Guarantee;

20. A company limited by guarantee is defined by s.1172 of the Companies Act 2014 (the 2014 Act) to mean:

> *"…a company which does not have a share capital and which, as provided under section 1176(2)(d), has the liability of its members limited by the constitution to such amount as the members may respectively thereby undertake to contribute to the assets of the company in the event of its being wound up."*

There are two key distinguishing features between a company limited by guarantee and an ordinary limited liability company, namely, it does not have a share capital and its members' liability is limited to the amount of their guarantee. However, the law relating to incorporation and its consequences, corporate civil litigation, corporate contracts, capacity and authority, members' remedies, groups of companies, duties of directors, statutory regulation of directors' transactions, corporate borrowing, schemes of arrangement, examinerships, investigations and inspectors is broadly similar for companies limited by guarantee as it is for limited companies.

21. Significantly s.655 of the 2014 Act, which makes provision for the liability as guarantors of past and present members, is disapplied by s 1193(1) to companies limited by guarantee. The principal distinction between a company limited by guarantee and an ordinary limited liability is that the former has no issued share capital. Rather than issuing a share capital, instead of paying money the members undertake or guarantee to make a payment up to a certain amount at some point in the future.

(2) Costs

22. With regard to the awarding of costs, the Court has an inherent discretionary jurisdiction recognised by O. 99 r. (2) (1) of the Rules of the Superior Courts, the exercise of which is regulated by law. The general rule is encompassed in O.99 r. 3 (1), amended to take account of the 2015 Act, which provides that in considering the awarding of costs the

High Court or the Court of Appeal or the Supreme Court as the case maybe shall have regard to the matters set out in s. 169 (1) of the Act. In essence, costs follow the event 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 the matters set out at sub paragraphs (a) to (g) of the rule. The original rule, which provided that costs follow the event, was described by Denham J., as the 'normal rule'. See *Grimes v. Punchestown Development Company Ltd* [2002] 4 I.R. 515, at 522, the same wording utilised in s. 94 of the 1924 Act.

23. The rationale for the rule was explained by Clarke J., (as he then was) in *Veolia Water* at 85:

> *"(T)he overriding starting position should remain that costs should follow the event. Parties who are required to bring a case to court in order to secure their rights are, prima facie, entitled to reasonable costs of maintaining the proceedings. Parties who successfully defend proceedings are, again prima facia, 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."*

In its application, the rule requires the identification of the 'event' from which the costs order is to flow. This is generally a straightforward exercise, however, as Clarke J noted in *Veolia Water, "there are certain cases where even a determination as to what the 'event' is, maybe a matter of some complexity*". In a similar vein, Bingham M.R. stated in *Roache v News Group Newspapers Ltd* [1992] E.W.C.A Civ. J1119-5 at para 18 that, in more complex cases, "*it is necessary to investigate with some care who is really the winner and who is really the loser or, as it is sometimes put, to identify the event which costs are to follow.*"

24. The traditional starting position to applying the general or normal rule that costs follow the event is for the court to ascertain which party has won and which party has lost the case overall rather than by taking the result on individual issues as the 'event' which costs are to follow. In practice courts refrain from awarding costs according to the relative success of the parties save in certain circumstances, generally encountered in complex litigation such as identified in *Veolia Water* and *Sony Music,* supra, where several 'events' may be identified. Thus, the normal rule is that the party who wins the case should have the full costs thereof even though one or more of a number of claims advanced or issues raised may have been lost, as in *Cooper-Flynn* supra, unless these transpire to be wholly unmeritorious. This approach has also been held to be appropriate even if the proceedings are heard on a modular basis. See *Short v. Ireland* [2004] IEHC 235.

25. What may well be categorised as a more sophisticated approach to the awarding of costs emerged in response to the difficulties more often than not encountered in complex (mainly commercial) litigation where multiple claims/ issues are made or raised whereby several 'events' may be involved and/ or the circumstances of the case are such that the requirements of justice warrant a departure from or displacement of the general rule. See *Viola Water* and *Sony Music*; supra; *Fyffes plc v DCC plc* [2009] 2 I.R. 417, at 679;

Mennolly Homes v. Appeal Commissioners [2010] IEHC, 56; and *McAleenan v. AIG Europe Ltd* [2013] 3.I.R. 202.

26. In *ACC Bank v. Johnston* [2011] IEHC 500 Clarke J. (as he then was) acknowledged the difficulties which can arise in connection with the identification of the event or events costs are to follow in complex litigation. Referring at para 2.2 of the judgement to Order 99, r. (1) (4) of the Rules then in force, which speaks of the costs of every issue of fact or law following the event, he considered it important to make one significant distinction which, in my judgment, is particularly apposite to the matter in hand and merits repetition here:

> *"There is a very great difference between the different elements that go to making up a cause of action, on the one hand, and a series of entirely separate causes of action, potentially dependent on different facts, on the other hand"*

27. Having identified the elements which need to be established by the party making the claim before an award can be made in, by way of example, a cause of action for breach of contract or in tort, the learned judge continued at para 2.3

> *"… At each step in that road, there may be disputes between the parties. Liability may be contested. Causation may be disputed. The amount of damages, whether generally or in respect of particular items, can be the subject of significant controversy. However, in the ordinary way, in such cases, the "event" is the claim which the Plaintiff makes for damages. Elements which go to establishing that claim are merely steps on that road. Where a plaintiff succeeds in obtaining damages then prima facie, the plaintiff has succeeded in the "event" for the plaintiff could not have obtained those damages without going to court."*

28. By way of contrast there may be cases involving two or more wholly discrete elements to the claim brought where it is possible to characterise each of them as an "event" in itself or there may be entirely distinct causes of action between the same parties which might well give rise to separate "events", each carrying its own costs, where the only thing in common, apart from the identity of the parties, is that they arose out of the same very general background. Conversely, claims for damages in tort and for breach of contract arising out of the same set of circumstances between the same parties although strictly speaking two separate causes of action could hardly be reasonably categorised as two separate "events," unless perhaps there were very unusual circumstances which I find it difficult to envisage.

29. As with the determination of all other issues in the suit, the Court is required to treat the parties with equanimity when exercising its discretion in making an order for costs. To proceed otherwise would run the risk of offending the fundamental right to equality before the law guaranteed by Article 40.1 of the Constitution; hence the general rule that the successful party should have the costs of the proceedings. The jurisprudence is all one way, any variation or departure from the general rule must be founded on a reasoned decision in which the special or unusual circumstances of the case warranting the

departure are indicated. See *Fyffes Plc, supra; Dunne v. Minister for the Environment* [2008] 2 I.R. 775 at 783, and *McAleenan v AIG (Europe) Ltd* [2013] 3 I.R. 202.

30. Given the nature of the proceedings, particular reference must be made to s. 94 of the Courts of Justice Act 1924 which provides for the right to trial by jury in civil cases and for the costs in such cases. The relevant portion of the section for present purposes reads *"…the costs of every civil action, and of every civil question and issue, tried by a jury in the High Court…shall follow the event, unless, upon application made, the Judge at the trial shall for special cause shown and mentioned in the order otherwise direct;"*

Reliance was placed by the Defendant on the provisions of s. 169 (1) of the 2015 Act which are set out below:

"(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—

(a) conduct before and during the proceedings,

(b) whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings,

(c) the manner in which the parties conducted all or any part of their cases,

(d) whether a successful party exaggerated his or her claim,

(e) whether a party made a payment into court and the date of that payment,

(f) whether a party made an offer to settle the matter the subject of the proceedings, and if so, the date, terms and circumstances of that offer, and

(g) where the parties were invited by the court to settle the claim (whether by mediation or otherwise) and the court considers that one or more than one of the parties was or were unreasonable in refusing to engage in the settlement discussions or in mediation."

Mr Rogers placed particular emphasis on the use of the phrase "…entirely successful…" utilised in the section.

31. The first observation to be made in this regard is that although the subsection provides that nothing in the section is to be construed as effecting specified provisions of the Planning and Development Acts there is no express amendment of other statutory provisions relating to the making of costs orders. Specifically, in the present context, there is no express amendment of s. 94 of the 1924 Act. Without intending to comment on the effect of the provision in general or in relation to other legislative provisions, if s. 169 (1) of the 2015 Act was intended to be construed in a way which alters or otherwise

effects the wording of s. 94 of the 1924 Act, in my judgment the Oireachtas would have had to have so provided when enacting the section. It chose not to do so. The section is still in force and thus governs the application for costs herein.

32. Finally, it is appropriate to refer to s. 17 (1) and (5) of the1981 Act as amended by s. 14 of the Courts Act 1991, which provides as follows:

"(1) Where an order is made by a court in favour of a plaintiff or applicant in proceedings…and the court is not the lowest court having jurisdiction granting the relief the subject of the order, the plaintiff shall not be entitled to recover more costs than he would have been entitled to recover if the proceedings had been commenced and determined in the said lowest court…"

"(5)(a) Where an order is made by a court in favour of the plaintiff or applicant in any proceedings (not being an appeal) and the court is not the lowest court having jurisdiction to make an order granting the relief the subject of the order, the judge concerned may, if in all the circumstances he thinks it appropriate to do so, make an order for the payment to the defendant or respondent in the proceedings by the plaintiff or applicant of an amount not exceeding whichever of the following the judge considers appropriate;

(i) the amount, measured by the judge, of the additional costs as between party and party incurred in the proceedings by the defendant or respondent by reason of the fact that the proceedings were not commenced and determined in the said lowest court, or

(ii) an amount equal to the difference between-

(I) the amount of the costs as between party and party incurred in the proceedings by the defendant or respondent as taxed by a Taxing Master of the High Court or, if the proceedings were heard and determined in the Circuit Court, the appropriate county registrar, and

(II) the amount of the costs as between party and party incurred in the proceedings by the defendant or respondent as taxed by a Taxing Master of the High Court or, if the proceedings were heard and determined in the Circuit Court, the appropriate county registrar on a scale he considers would have been appropriate if the proceedings had been heard and determined in the said lowest court."

Subsection (b) goes on to make provision for a set-off of the whole or part of the costs awarded under subsection (a) against the costs awarded to the plaintiff.

33. It is appropriate to observe, particularly in the context of an application for costs in a claim for damages tried by a jury, that the use of the phrase *"if in all the circumstances he* (the judge) *thinks it appropriate to do so*" in the sub-section confers a discretion on the trial judge and that an order for costs under s.17 (5) is not consequential on an award made within the jurisdiction of the court below, rather, it is a matter for the trial judge to

decide whether in the circumstances of the case such an order should be made. The discretion vested in the court must be exercised judiciously, which in this context means not only having regard to the circumstances of the case but also to the object for which the provision was enacted. See *Moin v Sicika and O'Malley v. McEvoy* [2018] IECA 240

34. Whereas legal advisers in deciding in which court to issue proceedings, for example in respect of a liquidated sum or for damages for negligence in a personal injury action to be tried by a judge alone, might be expected to be able to estimate within reasonable parameters the likely range or level of damages should the plaintiff succeed, the situation is very different in actions for trespass to the person and defamation brought in the High Court where the views of juries can vary enormously. Estimating the level of damages which might be awarded in such cases is at best problematic; the jurisprudence of recent decades in particular illustrates very well the diversity which can occur in the levels of award.

35. The circumstances may be such that if successful it was not at all unreasonable or irresponsible to have initiated and prosecuted the proceedings in the High Court even though the award by the jury ultimately fell within the jurisdiction of the Circuit Court. Furthermore, there may also be unforeseen developments which occur in the course of the litigation, particularly during the trial, which may have a dampening effect on the level of damages awarded. In deciding whether or not to make an order under subsection (5) where they occur these are matters which must also be considered by the trial judge. See the judgment of the Supreme Court delivered by McCracken J., in *Mangan*, supra, at p 448.

36. The foregoing observations concerning the variation in jury awards are not intended nor are they to be taken in any way as a criticism of trial by civil jury, quite the contrary. It is infinitely preferable to have serious cases involving causes of action concerned with the vindication of fundamental rights guaranteed by the Constitution, such as the rights to bodily integrity, a good name and individual liberty, determined by a jury of fellow citizens rather than by a judge sitting alone. As the great commentator on the common law Blackstone observed, trial by jury is looked upon as the glory of English law. Of the many attributes is the protection of the litigant from the caprice of the judge. See Blackstone's Commentaries on the Common Law 14th ed. Book 111 chap. 23.

37. The jurisprudence with regard to the status of jury verdicts is all one way. There is a long line of authority which recognises the 'sanctity' or special respect that is to be accorded to the verdict of a jury; it is not to be easily cast aside by an appellate court, even if a different view would have been reached had the court heard the case at first instance. The verdict must be viewed from the position most favourable to the plaintiff and should not be disturbed unless the result is so disproportionate to the injury or wrong done as to warrant intervention. See *McGrath v Bourne* (1876) I.R.10 C.L.160 at 164; *Foley v. Thermocement* 90 ILTR 92 at 94; *Reddy v. Bates* [1983] I.R.141 at 151 and [1984] I.R.L.M. 197 at 200; *De Rossa v. Independent Newspapers Plc* [1999] 4 I.R. 432 at 462;

Leech v. Independent Newspapers ltd [2015] 2 I.R. 214 at para 120 and *Higgins v. Irish Aviation Authority* [2020] IECA 157 at para 35.

Whether Circuit Court Costs Appropriate; S.17 Courts Acts 1981/91

38. I accept as correct in law Mr. Harty's submission that in the determination by the Court of legal liability, damages and costs a company limited by guarantee is to be treated no differently from any other juristic or natural person; the capacity of the Defendant to meet the judgment is not relevant to these deliberations. Liability for the breach of a legal duty and the imposition of an appropriate remedy is determined by the application of legal principles in accordance with the law and not by reference to the ability of the unsuccessful party to satisfy the judgment. Whether by reason of impecuniosity or for other reason the successful party may be unable to execute the judgment these considerations are immaterial in this context; execution is a separate and distinct process.

38. It follows that the limitation on the liability of the members of the Defendant to contribute cannot measure the liability to meet a remedy provided by law and imposed by the Court for a breach of its legal obligations, in this case the amount of the adjudged damages and costs. As a corollary to this, I cannot accept the proposition that by virtue of the limit of the contributions the amount which can be recovered for damages and costs is no more than the aggregate sum and that by virtue of the letter of January 30th 2020 the Plaintiff ought to have remitted the proceedings for trial in the Circuit Court, as the lowest court in which defamation proceedings may be brought. The corporate structure of the Defendant could not, in any event, have compelled the Plaintiff to bring the proceedings in the Circuit Court and has no bearing on the question of costs.

Conclusion

39. It follows that as the Jury has awarded an aggregate of €300.000 damages, a sum well in excess of the jurisdiction of the Circuit Court, the provisions of section 17 (1) and (5) of the 1981 Act, as amended, have no application, accordingly, the exercise of the Court's discretion in the manner sought by the Defendant does not arise. The outcome self-evidently bears out the decision to bring the proceedings in the High Court.

Whether Full or Partial Costs; Whether More Than One Event

40. It would appear that the application of s.169 of the 2015 Act and the *Veolia Water* principles to civil jury trials has yet to be considered. Turning to the provisions of s.169 (1) these appear, in my judgment, to reflect in statutory form the jurisprudence represented by *Veolia Water* and the several decisions mentioned earlier which followed it. The phrase "…*entirely successful*…" must be viewed in context and construed with the wording utilised in the provision as a whole. In this regard, it is notable that the discretion vested in the court is made subject to the "…*the particular nature and circumstances of the case*…" and the conduct of the proceedings by the parties, including the matters specified at sub paras (a) to (g).

41. In terms of the application of s. 169 (1) of the 2015 Act and the *Veolia Water* principles to the circumstances of the case, the central question is whether there is in effect one event with a number of polymorphous strands or several events in the sense identified in *Veolia Water*, explained and developed in subsequent decisions referred to earlier.

Conclusion

42. In the final analysis, when the proceedings at trial are examined in their entirety, the answer to that question, on my view of the evidence, is that there is but one 'event' as that term is described and exampled in *ACC Bank*, supra. This is an action in tort, it is an example of the class of case identified therein by Clarke J (as he then was). There is one cause of action pleaded in the statement of claim for which damages were claimed, namely that the Plaintiff had, in effect, been subjected to a campaign of defamation by the Defendant in respect of which the Jury awarded damages to the Plaintiff. The 'event' is the claim for damages. The Plaintiff succeeded in the 'event' since, as it transpired, he could not have obtained the damages without bringing and prosecuting the proceedings to a successful conclusion. In the circumstances and in this context the Plaintiff has, in my judgment, been 'entirely successful' within the meaning of s. 169 (1) of the 2015 Act, accordingly, this is the 'event' costs follow in accordance with the normal rule. The costs which follow are the full costs of the action.

43. In the interest of completeness, I should add that while the failure to prove malice in respect of the seventh statement and the withdrawal by the Court from the Jury of the fourth statement were two questions or issues in the proceedings on which the Plaintiff was unsuccessful they were not 'events' in the sense already described. But even if they were, in my judgment, it was reasonable in all the circumstances for the Plaintiff to raise these on the pleadings and pursue them at trial. Furthermore, I have considered and am satisfied that before making the concession on the occasions publication that the Plaintiff was quite entitled to await the evidence led to establish the entitlement to rely on the defence of qualified privilege, an issue on which the Defendant carried the onus of proof. Having regard to the particular nature and circumstances of the case already outlined above I am also satisfied, and the Court finds that the conduct of the trial by the Plaintiff overall, including the meeting at the Keadeen hotel, was appropriate.

Aborted Trial Costs

44. When this action first came on trial before myself and a jury on the 2nd July 2019, objection was taken to the trial proceeding against the Defendant as an unincorporated association in circumstances where the Defendant was, in fact, a company limited by guarantee. The allegation that the Defendant was an unincorporated association was made in the statement of claim. The allegation was deemed admitted as it was not traversed by the defence delivered in November 2015. Mr Michael Grassick, CEO of the Defendant, verified the defence by an affidavit sworn on the 26th June 2018. On the 3rd July 2019, I made an order permitting an amendment of the pleadings to reflect the correct legal status of the Defendant, discharged the jury and reserved the costs.

45. As mentioned at the outset of this judgment, having succeeded in the action the Plaintiff now seeks an order for the costs of the aborted trial. The application is opposed. When the issue arose at the commencement of the first trial it transpired that a Company's Registration Office (CRO) search, if carried out prior to the drafting of the Statement of Claim, would have revealed the incorporated status of the Defendant, and should have been sued accordingly. The error in the pleadings would not have occurred and the mistrial would have been avoided. No CRO search was carried out.

46. However, the problem was compounded by the failure to traverse the allegation that the Defendant was an unincorporated association and thus deemed to be admitted. Mr Grassick must have known the Defence was incorrect in this regard when he swore the affidavit of verification. Had the allegation been traversed, as it ought to have been, the error would have come to a head and would have been dealt with appropriately, well in advance of the trial. It wasn't. In the circumstances, responsibility for the mistrial can fairly be laid at the door of both parties. Both were at fault, albeit for different reasons. In my judgment, the justice of the situation which arose as a result is best met by making no order as to costs in respect of the mistrial.

Ruling

47. For all these reasons the Court will accede to the Plaintiff's application for the costs of the action as heard but will make no order as to the costs of the mistrial.