THE HIGH COURT

[2021] IEHC 476

[Record No. 2020/228 CA]

BETWEEN

TESLEEM OJEWALE

PLAINTIFF/APPELLANT

AND

CAROLINE KEARNS AND FRANK KEARNS

DEFENDANTS/RESPONDENTS

JUDGMENT of Ms. Justice Nuala Butler delivered on the 7th day of July, 2021.

1. This judgment follows the court's earlier judgment in the same case [2021] IEHC 431 and should be read with that judgment. The earlier judgment allowed the plaintiff's appeal from the decision of the Circuit Court striking out his proceedings as being statute barred and awarding costs against him. That issue had been determined by the Circuit Court as a preliminary issue at the request of the defendants. The substantive proceedings between the parties (a claim for personal injuries arising from a road traffic accident) remain extant. This judgment deals with the costs of the appeal.

2. Both parties have provided helpful written submissions and their respective positions can be briefly outlined. The plaintiff relies on the general principle that costs follow the event in seeking the costs of the preliminary issue in both the Circuit and High Courts. The plaintiff also seeks a certificate for senior counsel on the basis that the issues in the appeal were complex and because of what is characterised as the defendant's reluctance to accept the applicability of previous case law.

3. The defendants concede that the plaintiff should be entitled to the costs of the Circuit Court application but submit that no order should be made as regards the costs of the appeal or, alternatively, that the costs of the appeal should be made costs in the cause and reserved to the trial judge in the Circuit Court. The legal basis for differentiating between the plaintiff's costs in the Circuit Court and in the High Court is not entirely clear. A number of reasons are advanced as to why costs should not be ordered against the defendants in respect of this appeal, or at least not at this stage. If followed, those reasons, which relate to the complexity of the issues and the fact that there were proper grounds for raising and trying those issues, apply equally to the proceedings in the Circuit Court. In suggesting that the costs of the appeal be made costs in the cause in the substantive Circuit Court proceedings, the defendants point to the fact that the plaintiff's action is fully defended and may not succeed. No particular argument is made as regards a certification for senior counsel.

4. The plaintiff's submissions note that the proceedings were instituted prior to the commencement of s.169 of the Legal Services Regulation Act 2015 and refer to a number of cases in which the potential retrospectivity of that provision is considered. The defendant's submissions are made on the basis of O.99 of the Rules of the Superior Courts as it stood prior to amendments made subsequent to the commencement of s.169 and no mention is made of the 2015 Act. The plaintiff also refers to my own judgment in *Construgomes and Carlos Gomes SA v. Dragados Ireland Limited* [2021] IEHC 139 to

suggest that the difference between the pre-2015 Act and post-2015 Act regimes is not material for present purposes – i.e. as regards the application of the costs follow the event principle to the outcome of this interlocutory application. In circumstances where the plaintiff does not contend that the 2015 Act would make a material difference or should be applied and the defendant has assumed its non-application and thus has not canvassed the issue either way, I do not propose addressing the question of the potential retrospectivity of s.169 of the 2015 Act. Instead, I propose proceeding on the basis that broadly speaking the parties accept the principle that costs follow the event should apply and that the issue between them is the identification of "an event", in essence whether the interlocutory character of this judgment precludes it from being an event to which the principle should be applied. Further, assuming that my earlier judgment is an "event", I must consider whether the arguments raised by the defendants constitute special circumstances such that the normal rule should not be applied in this case. I note that the defendants set out the provisions of O.99, r1(4A) in their submissions but have not expressly argued that it would not be possible for the court "*justly to adjudicate upon liability for costs on the basis of the interlocutory application".*

5. Much of the difference between the parties turns on their characterisation of the "interlocutory" nature of the order made and, consequently, on whether that order is a final order comprising an event for cost purposes. The term interlocutory is used to describe an order made during rather than at the conclusion of legal proceedings. It frequently refers to an order that is not final but instead is one which applies provisionally until final orders are made at the conclusion of proceedings when the substantive issues between the parties can be fully determined. In those circumstances many of the issues between the parties on the interlocutory application will be revisited by the court in the substantive trial. This is classically so in the case of interlocutory injunctions – notwithstanding that the formulation of certain elements of the tests to be applied to such injunctions reflects the fact that the decision must be made at a time when the factual dispute between the parties remains unresolved.

6. However, that is not invariably the case. There are also circumstances in which a court may be called upon to rule on an issue during the course of proceedings when neither the ruling itself nor the circumstances underlying it will be revisited at any later stage in the proceedings. A ruling made in these circumstances is interlocutory in the sense of being made during the course of rather than at the conclusion of the proceedings, but the judgment delivered on the issue and any order made will not be provisional in nature. The judgment and order will be final as regards that particular issue. Although the rules treat of "interlocutory" applications generally, the extent to which the interlocutory order is provisional or final may have a bearing on the issue of costs. So too might the extent to which an interlocutory order can be seen as part and parcel of the preparation for trial so that even if it is final in nature (such as an order for discovery), the costs of obtaining that order might be regarded as part of the costs of the ultimate event, i.e. the trial. Obviously, an application for costs in any of these circumstances will have to be addressed in the context of the particular circumstances of the case and in light of the relevant statutory provisions and rules of court.

7. The judgment in this case is one made at an interlocutory stage in the proceedings but is itself final in nature. The defendants have, as they were perfectly entitled to do, raised a defence based on the Statute of Limitations against the plaintiff. Rather than having that issue determined at the trial of the proceedings, the defendants brought a motion requesting that the issue of whether the proceedings were statute barred be determined as a preliminary issue. Had the court decided that the proceedings were statute barred that would have been determinative of the entire of the plaintiff's claim and costs would have naturally followed that determinative event. However, having decided that the plaintiff's claim is not statute barred, the case will now proceed before the Circuit Court which will decide if the defendants were negligent as alleged. Issues concerning the timing of the institution of the proceedings will not be re-visited. Thus, the plaintiff has been entirely successful on the Statute of Limitations point. Further, the plaintiff's success on this point is not provisional. The court's judgment represents a final determination of this issue in the plaintiff's favour.

8. It is possible in principle for the outcome of an application to constitute an event if decided one way but not to constitute an event if decided the other way. Nonetheless I would be cautious in adopting such an approach. Given the high costs of litigation and that many of the decisions made by a litigant are informed by the risk of having to pay not only their own costs but also the other side's, it may be inequitable to refuse costs to a party who faced a significant costs risk in successfully defeating an interlocutory application.

9. I acknowledge the defendants' entitlement to raise and rely on the Statute of Limitations in defending of the plaintiff's claim. In that sense it was, as the defendants submit, perfectly proper to seek to have that issue determined, including by way of preliminary issue if substantial trial costs might thereby have been avoided. However, issues pursuant to the Statute of limitations can be and frequently are determined at the trial of the substantive action. By successfully applying to have the statute point determined as a preliminary issue, the defendants created an additional stage in the proceedings in respect of which quite significant legal costs have now been incurred. Whilst there was nothing improper in the defendants raising this preliminary issue, the costs consequences of having done so unsuccessfully cannot be avoided simply by pointing to the fact that the substantive proceedings remain to be determined and the plaintiff might not ultimately win.

10. It is of course correct for the defendants to observe that the plaintiff's substantive proceedings remain extant, that those proceedings are being fully defended and the plaintiff may yet end up as the overall loser in the context of this litigation. However, for the reasons already canvassed I do not think that that has a material bearing on how the costs of this application should now be allocated.

11. I also acknowledge that the issue raised was complex. Although there is a Supreme Court judgment which I regarded as a binding precedent, the facts of this case vary somewhat from those giving rise to the Supreme Court judgment. Essentially, the task

facing the defendants was to distinguish the factual circumstances of this case sufficiently from those in *Renehan v. T. & S. Taverns Limited* [2015] 3 IR 149 to persuade the court that the legal reasoning in that judgment was inapplicable to the facts of this case. Thus, whilst the issues were complex in an overall sense, they were issues upon which there is already a body of precedent. Further, I am conscious that in any personal injury case arising out of a road traffic accident, the defendants will almost invariably have an insurer acting on their behalf whereas the plaintiff will not. Decisions taken in the context of the litigation which may have costs consequences will not affect the defendants personally as the associated costs risk will be borne by their insurer. Had the defendants succeeded in this application, the resulting judgment may have been of broader significance and of benefit to the insurer in the context of other claims which might then, arguably, also fall outside the relevant statutory time limits. The plaintiff's only interest is in his own claim and the additional costs risk created by virtue of having this issue disposed of by way of preliminary issue fell on the plaintiff personally.

12. In light of these observations I am satisfied that my earlier judgment which finds in the plaintiff's favour on the preliminary issue raised by the defendants is an event to which the general principle that the costs should follow the event applies. There was nothing untoward in the defendants raising this issue nor in seeking to have it determined by way of preliminary issue. However, having done so and having significantly increased the costs of the litigation by doing so, the defendants must now bear the costs of having been unsuccessful in their application. Consequently, I am going to award the costs of this application to the plaintiff. This means that not only is the order of the Circuit Court, including the order for costs made against the plaintiff, set aside but I will make an order for the plaintiff's costs of the application and the appeal in both the Circuit Court and the High Court.

13. The plaintiff has sought a certificate for senior counsel on the basis of the complexity of the case and on the basis of the defendant's reluctance to accept the applicability of previous case law. I will grant that certificate on the basis of the complexity of the case, noting that the defendants also relied on the complexity of the case in seeking that no order for costs should be made against them.

14. Finally, the defendants argue that making an award for costs in favour of the plaintiff at this stage might be unfair if the defendants ultimately succeed at the trial of the action. This argument is made to support an application that the costs of the appeal should become costs in the cause which would then be recovered by the successful party in the substantive proceedings. For the reasons already set out in this judgment I do not think that would be an appropriate order to make in the circumstances of this appeal.

15. As the plaintiff points out, there is no express application made by the defendants for a stay on any order for costs that might be made in the plaintiff's favour. However, it seems to me that the defendants have identified in their written submissions a potential injustice which might arise if the costs of this appeal have to be paid by the defendants to the plaintiff in advance of the substantive proceedings being determined by the Circuit

Court particularly if the plaintiff were to lose the substantive claim and have an order for costs made against him. Acknowledging that the defendants have not made any specific submissions as regards a stay, I will nonetheless impose a stay on the orders for costs which I have made in favour of the plaintiff pending the determination of the substantive proceedings in the Circuit Court.