

# THE HIGH COURT

[2021] IEHC 624

[2021 No. 4095P.]

**BETWEEN**

**BEAUMONT HOSPITAL BOARD AND MARIE MURRAY**

**PLAINTIFFS**

**AND**

**GEMMA O'DOHERTY**

**DEFENDANT**

## **JUDGMENT of Mr. Justice Allen delivered on the 5<sup>th</sup> day of October, 2021**

1. On 9<sup>th</sup> July, 2021, for the reasons given in a written judgment – [2021] IEHC 469 – I made an interlocutory order pursuant to s. 33 of the Defamation Act, 2009 directing the removal, and restraining the further publication, of three videos which had been posted on the defendant's website <https://gemmaodoherty.com>; and restraining the publication of any defamatory statements of or about the plaintiffs or the first plaintiff's staff pending the trial of the action.
2. For the reasons given at para. 84 of that judgment, I expressed the provisional view that the appropriate order in relation to the costs of the interlocutory motion was that they should be costs in the cause but allowed the parties two weeks within which they might file brief written submissions as to what other costs order might be made.
3. The plaintiffs, by their solicitors, have declared themselves supportive of the proposed costs order.

4. The defendant – who represents herself – filed a costs submission, the thrust of which was that no order for costs should be made at this stage. I think that the defendant may have misunderstood the nature of the interlocutory hearing and order and the nature and effect of the proposed costs order. Or perhaps it was that the defendant anticipated that the plaintiffs, rather than accepting the provisionally proposed costs order, might apply for the costs of the interlocutory motion.

5. The application the subject of my earlier judgment and order was made by motion on notice to the defendant, grounded on the affidavits of Mr. Ian Carter, the chief executive officer of Beaumont Hospital, and Ms. Marie Murray, the director of nursing at the hospital. The plaintiffs asked for interlocutory orders: that is, orders which would be effective until the trial of the action as opposed to permanent orders. The premise of the application which I heard was that the plaintiffs' claims for permanent injunctions and damages would in due course be the subject of a full trial on oral evidence, in all probability by a judge sitting with a jury. What I had to decide was whether, in the meantime, the defendant should be permitted to repeat what she had said about the plaintiffs. For the reasons given, my decision was that she should not. On the evidence before the court on the hearing of the interlocutory motion, I was satisfied that the words complained of were defamatory of the plaintiffs and that the defendant had no defence to the action that was reasonably likely to succeed. My judgment, however, contemplated the possibility that the plaintiffs might fail at the trial of the action. It was for that reason that the order was made on the plaintiffs' usual undertaking as to damages and it was for that reason that I was inclined to make the costs of the motion costs in the cause: meaning that whoever ultimately fails at trial will have to pay the costs of the motion as well as the action.

6. The first point made by the defendant in her costs submission is that the application in this case was made *ex parte* on 14<sup>th</sup> June, 2021 without any notice to her. That

misunderstands the procedure. The application made on behalf of the plaintiffs on 14<sup>th</sup> June, 2021 was an application for short service. The volume of business in the chancery list is such that in the ordinary way there is an interval of some weeks between the time a motion is issued and the time at which it comes before the court. If a litigant – more usually the plaintiff but it can sometimes be the defendant – wants a hearing sooner than the ordinary list allows, he or she may apply to the list judge for an early return date. That is necessarily done without notice to the other side. All that is then decided is whether the applicant has established the urgency of the application and, if so, when it might be facilitated. In this case all that happened on 14<sup>th</sup> June was that the plaintiffs were given permission to issue a motion returnable for 18<sup>th</sup> June, 2021.

7. The second point made by the defendant is that what she describes as the “*hearing*” on 18<sup>th</sup> June, 2021 was unfair. Specifically, she complains that the hearing was attended on the plaintiffs’ side by their lawyers only; did not allow for witness testimony or cross examination; and that the defendant was not allowed time to gather additional evidence.

While these arguments go to the substance of the hearing rather than the costs, I think that I need to say that these, too, are based on a misunderstanding of the nature of the application. The motion, as I have said, was brought on notice and was grounded on two affidavits filed on behalf of the plaintiffs. The defendant brought with her to court on 18<sup>th</sup> June an affidavit which she had sworn and had stamped that morning, and which was permitted to be filed in court. Save in the most exceptional circumstances, interlocutory motions are heard and decided on affidavit evidence: and that is what was done in this case. The reason why attendance on the plaintiffs’ side was limited to the lawyers was – as I believe the defendant well knows – the capacity of the courtroom to accommodate a physical hearing with the required social distancing. In ordinary times Mr. Carter and Ms. Murray would have been in attendance in court but the format of the hearing would have been no different.

8. The third point that the defendant makes is that the subject of her videos was a matter of the most acute public interest and that the substance of the action remains undecided and therefore that there should be no order as to costs. This submission raises but does not clearly recognise the distinction between two principles. The first is that in a case which raises a point of law of exceptional and general public interest the court may depart from the ordinary rule that costs should follow the event. The second is that in deciding whether it can justly adjudicate on liability for the costs of an interlocutory motion, the court will have regard to whether the issue on which the interlocutory application turned might have to be revisited by the trial judge, who might be in a better position to decide where responsibility for the costs should lie. My provisional view in this case was that – however unlikely it might be thought to be – the defendant might succeed at trial and that the costs of the motion should follow the conclusive determination of the action. That recognised that the substance of the action remains undecided. There is no public interest in the dissemination of baseless allegations. Whether the defendant can adduce evidence at the trial which she could not point to on the hearing of the motion remains to be seen.

9. In three pages of close print the defendant rehearses her allegations against the plaintiffs and rails against the perceived injustice of the hearing of the motion. She refers to the potential injustice of making an award of costs at this stage: but that is not what I provisionally proposed, and it is not what the plaintiffs seek. It was precisely to the eventuality that the defendant might ultimately win that the proposed costs order was directed. The ultimate responsibility for the payment costs which are made costs in the cause will depend on the outcome of the cause. If the defendant prevails, she will have her costs of the motion and action. If she loses, she will almost certainly be ordered to pay the plaintiffs' costs.

**10.** Ms. O’Doherty’s peroration is that “*the court should proceed along the lines of its first thought: that no order for costs be made at this stage in this case.*” Without being absolutely sure, I am nevertheless reasonably confident that, in the end, Ms. O’Doherty does not argue against the costs order which I provisionally proposed.

**11.** The costs of the motion, and the plaintiffs’ costs of the application for short service, will be costs in the cause.