

THE HIGH COURT

[2021] IEHC 626

[2016 No. 8887P.]

BETWEEN

WILLIAM J. P. EGAN

PLAINTIFF

AND

**MICHAEL FENLON, BARRY SULLIVAN, GERARD BURNS, RAY DEVINE,
SHANE O’CONNOR, JOHN FLANNERY, SEAMUS HERATY, PADRAIC BREEN,
MARGARET NEILE, TOM O’DONNELL, SEAMUS O’BRIEN, PAT DONLON,
PAUL DORAN, DAN CURLEY, PADDY FLYNN, JOE O’LOUGHLIN, DES
FURLONG, JOHN DIVER, CARMEL MAGEE, PETER CRINNION, TOM O’SHEA,
LEONARD RASMUSSEN AND JOE SYNNOTT**

DEFENDANTS

JUDGMENT of Mr. Justice Allen delivered on the 5th day of October, 2021

1. On 4th February, 2021 I gave judgment on a motion on behalf of the defendants for an order pursuant to O. 19, r. 28 of the Rules of the Superior Courts striking out the proceedings on the grounds that they disclose no reasonable cause of action, or an order pursuant to the inherent jurisdiction of the court striking out the proceedings on the grounds that they are frivolous and vexatious and bound to fail. *Egan v. Fenlon & Ors.* [2021] IEHC 75.
2. In short, I found that while the plaintiff was not entitled to convert his action for damages for defamation into an action for a free standing correction order, neither had he by

attempting to so do altogether abandoned his action so that it was bound to fail. Accordingly, the plaintiff was driven back to the position as it stood immediately before he wrote the letter of 10th May, 2019 which had given rise to the defendants' motion but was not entirely defeated.

3. The issue now to be determined is where the costs of that motion should lie.

4. The defendants argue that they should be awarded the costs. They point to the finding at para. 12 of my judgment of 4th February, 2021 that the letter appeared to have been written in response to motions which had been brought by the defendant for particulars and discovery in an attempt to take out of the case any issue as to any previous professional difficulties which the plaintiff may have had; to the finding at para. 56 that the letter was ineffectual to do what it tried to do; and to the finding at para. 57 that the plaintiff was not entitled to prosecute the action otherwise than as an action for damages for defamation.

5. While acknowledging that they have not been entirely successful on their application, the defendants argue that given "*the particular nature and circumstances of the case*" they should have the costs.

6. First, it is said, the defendants were successful on the central issue on the motion – which was whether the action could be prosecuted as an action for a correction order – so that it was reasonable for the defendants to "*raise, pursue and contest*" the issue: Legal Services Regulation Act, 2013, section 169(1)(b). Secondly, it is said, the plaintiff persisted in his position until part-way through the hearing of the motion when (as I noted at para. 50 of my earlier judgment) the plaintiff indicated that he would withdraw the letter if he needed to, to keep his action alive, or to revive it. This is said to go to the plaintiff's conduct of the motion (s. 169(1)(a) and (c)) as well as to the reasonableness of the defendants raising, pursuing and contesting the issue (section 169(1)(b)). Thirdly, it is said, the plaintiff's letter would have infected the litigation with uncertainty which, unless resolved, would have immediately

complicated the disposal of the defendants' motions for discovery and particulars and ultimately the disposal of the action. Fourthly, it was said, the court found the plaintiff's letter to have been a strategic interlocutory move and not, as the plaintiff had contended, a clarification of what the plaintiff wanted all along. This, it was said, went to conduct (section 169(1)(c)). Fifthly, it was said, although the defendants had lost the argument that the action was bound to fail or that the plaintiff was estopped from resiling from the position taken in his letter, the reality was that the action could proceed no further until, by letter dated 17th February, 2021 – after the judgment was delivered – the plaintiff confirmed that he wished to prosecute his claim for damages.

7. Finally, the defendants recalled the observation at para. 52 of the judgment (in the course of dealing with the estoppel argument) that any costs incurred by the defendants as a result of the writing of the letter of 10th May, 2019 or the plaintiff's determination to stand over it could be dealt with by way of a costs order, rather than a substantive order dismissing the action. This, it was said, was consistent with the principle that procedural failures should be dealt with by appropriate costs orders rather than by orders which would affect the likely outcome of the proceedings *per se*. *Moorview Developments v. First Active* [2011] 3 I.R. 615

8. The plaintiff does not argue that he should have the costs of the motion but rather that the costs should either be costs in the cause or reserved to the trial.

9. The plaintiff focusses on the findings, at paras. 55 and 57, of the judgment. The finding at para. 57 was that while the plaintiff was not entitled to maintain a defamation action without claiming damages, there had been no application to amend the statement of claim and the letter of 10th May, 2019 was ineffectual as to what it tried to do. The finding at para. 55 was that the defendants had not so altered their position in reliance of the plaintiff's letter that it would be unjust to allow him to change his position. The net effect of this, it is

said, is that the plaintiff is maintaining a claim for damages as he is entitled to do, and the defendants have not been successful in their application to strike out the action.

10. The plaintiff argues that because his letter was ineffectual as to what it tried to do, it is not clear how the defendants are in a position to assert that they were successful in the application. The defendants have not, it is said derived any benefit from the application, which was not, it is said, an application which they had to bring. The intended effect of the letter of 10th May, 2019, was to narrow the range of issues in dispute between the parties and to remove the claim for damages in proceedings marked by a considerable degree of bitterness and in which truth had been pleaded in the defence.

11. Counsel were agreed as to the applicable principles to be applied, which are those set out in the judgment of Murray J. in *Chubb European Group SE v. The Health Insurance Authority* [2020] IECA 183. The judgment is so well known that it is not necessary to quote from it.

12. The first principle is that the award of costs on an interlocutory is in the discretion of the court.

13. Second, interlocutory applications should lead to a determination on costs unless it is not possible to justly make that determination. While the plaintiff submitted, as an alternative to making the costs of the motion costs in the cause, that they should be reserved, it was not suggested that it was not possible to justly decide where the costs should lie or that the trial judge might be in a better position to make that assessment. The issue as to the effect of the plaintiff's letter which gave rise to the motion has been decided and will not be revisited at the trial and the court is obliged by law to deal with the costs at this stage.

14. The defendants acknowledge – as they must – that they were not entirely successful in their application so that they are not “*entitled*” to an award of costs, but they point to the

particular nature and circumstances of the case and a number of the factors to which the court, by s. 169(1) of the Act of 2013, is to have regard.

15. It seems to me that what the plaintiff's argument boils down to is a submission that the motion achieved nothing, and so was pointless. That, in my view, is difficult to reconcile with the argument that the costs of both parties should be costs in the cause. If, in truth, the motion was pointless and achieved nothing, it could reasonably be said that the plaintiff was successful: but it is not.

16. In a case in which there is little agreement, it is common case that the object of the letter of 10th May, 2019 was to shape the progress of the case – immediately to so narrow the issues as to limit the particulars and discovery orders which had already been sought by the defendants, and eventually the run of the trial. If, as I observed in my earlier judgment, the effect of the letter on the breadth of the discovery relevant and necessary for the fair disposal of the action was not obvious, it will now never be known because those motions will now be decided on the pleadings, without regard to the letter.

17. I am satisfied that it was not only reasonable but necessary for the defendants to raise, pursue and contest the issue of the effect on the progress of the action of the letter of 10th May, 2019. While all three motions travelled together for a time and were listed for hearing on the same day, it was agreed on the morning on which they were first listed for hearing that the motion to strike out should be dealt with first. This was perfectly sensible because the disposal of the motion to strike out would inevitably dictate either the necessity for a determination of the motions for particulars and discovery, or the basis upon which those motions should be dealt with.

18. As Murray J. observed in *Chubb*, it is not always easy to identify the winner and the loser of an interlocutory motion. In a straightforward case the identification of the winner and loser may turn on no more than whether the order sought was made or refused but often

the position may be more nuanced. The plaintiff's steadfast position was that he was entitled to restructure the case by writing the letter which he did. The action, of course, was commenced by the plaintiff and so, to that extent, it might be said to have been his case. By the time the letter was written, however, the pleadings had closed and there were two outstanding interlocutory motions. If on first glance the plaintiff was attempting to modify his case, in truth, in my view, he was attempting to modify the basis on which the defendants could defend it. To the extent that the outcome of the motion was a finding that the plaintiff was not entitled to do what he attempted to do, it could fairly be said that he was unsuccessful. It seems to me that the substance of the issue between the parties was the plaintiff's entitlement to move the goalposts and that on that issue it was the defendants who prevailed.

19. The defendants relied on the statement of principle by Clarke J. (as he then was) in *Moorview Developments v. First Active* [2011] 3 I.R. 615:-

“One of the policy reasons why it is said that it is important that a jurisdiction of the type which I have identified exists, is to prevent parties having a ‘free ride’ as to how they conduct litigation, designed for their benefit, without there being any real risk of a meaningful costs order being made against them. Courts have consistently expressed the view that procedural failures (even relatively serious ones) should not be met by orders which would affect the likely outcome of the proceedings per se, but rather should be dealt with by means of costs orders if at all possible. The deterrent of making a party have to pay any costs incurred by its own procedural failures is important. Likewise, it is important that procedural failures should not get in the way of coming to a just result for the case as a whole unless those procedural failures have made it difficult to give a fair trial. However, if parties are effectively absolved from the practical consequences of any costs orders, then it is

difficult to see how a practice which confined the court to dealing with procedural failure through costs orders could be justified.”

20. As counsel for the plaintiff point out, that case was immediately concerned with the issue as to whether, and if so the circumstances on which, a director of a limited company might be made personally liable for costs of unsuccessful limitation brought by the company, but I think that the general principle in the cited passage is engaged.

21. After careful consideration I have concluded that the just determination of responsibility for the costs of the defendants’ motion should not depend on the formulation of the order sought by the notice of motion. The real issue in controversy on the motion was whether the plaintiff was entitled to prosecute the action otherwise than as an action for damages for defamation. I accept the defendants’ submission that this was an issue which needed to be resolved one way or the other before the action could progress and in particular to allow the parties to know the basis upon which the action would be tried. Given that the plaintiff’s declared object in writing the letter of 10th May, 2019 was to limit the particulars which he might be ordered to provide and the extent of the discovery he might be ordered to make, it was necessary, also, that the court should adjudicate on the efficacy of the letter to do what it purported to do. I cannot accept the plaintiff’s submission that because the letter was ineffectual to do what it tried to do, it cannot be said that the defendants were not successful. Nor, in my view, can it properly be said that the defendants did not derive anything from the motion. The outcome of the motion is that the plaintiff is obliged to do what the defendants contended he was obliged to do and what he insisted he was not obliged to do.

22. I am satisfied that it was reasonable and necessary for the defendants to raise, pursue and contest the issue as to the basis upon which the action might be prosecuted and that

although the defendants did not obtain an order in the terms sought, they were substantially successful on the issue.

23. The plaintiff, by taking and persisting in the position which he took, has added to the costs of both sides. To make those additional costs costs in the cause would be to expose the defendants to the risk that they would have to bear that additional burden if the plaintiff succeeds at trial. That, in my view, would not be a just outcome.

24. At the hearing of the costs application I discussed with counsel the form of order that ought to be made on the motion. Rather than refusing to make an order in the terms sought I believe that the appropriate form of order is an order that the plaintiff is not entitled to prosecute the action otherwise than an as action for damages for defamation.

25. There will be an order that the plaintiff pay the defendants' costs of the motion, but I will stay execution on foot of that order pending the determination of the action.