THE HIGH COURT

[2022] IEHC 603

Record No. 2020/212 CA

BETWEEN

LERATO TSIU

PLAINTIFF/APPELLANT

AND

CAMPBELL CATERING LIMITED

T/A ARAMARK IRELAND

DEFENDANT/RESPONDENT

COSTS RULING of Mr. Justice Mark Heslin delivered on the 2nd day of November, 2022

Introduction

1. This ruling in relation to the question of costs should be read in conjunction with the judgment delivered by this court on 28 June 2022 ("the judgment") concerning an appeal by the Plaintiff/Appellant ("the Plaintiff") against an Order made by the Circuit Court on the 19 December 2020, determining that the Plaintiff's claim was 'statute barred' and should be dismissed. For the reasons set out in the judgment, this court found in favour of the Plaintiff and determined that it would be unconscionable to permit reliance on the Statute of Limitations ("the Statute"). In short, the Plaintiff has been wholly successful on her appeal and on the preliminary point of law. Both parties filed written legal submissions on the question of costs (dated 11 and 12 July 2022, respectively) which have been carefully considered.

Discretion

2. The Defendant/Respondent ("the Defendant") submits that the Court should exercise its discretion on the question of costs and, having regard to the particular circumstances of the case and the issues which arose, make no order as to costs. A key aspect of the defendant's written submissions (dated 11 July 2022) on the question of costs, is the emphasis on this court's discretion. However, this court is by no means 'at large' in relation to the exercise of such a discretion and to illustrate why this is so, the following seems relevant.

The 'normal' rule

3. The 'normal rule' is that 'costs' should '*follow the event*'. The event is plainly the success of the Plaintiff's application. Any party urging the court to depart from the normal rule (and to make no order as to costs would represent a major departure) faces the onus of demonstrating that justice requires this. As the Supreme Court made clear in *Grimes v. Punchestown Developments Co. Ltd* [2002] 4 I.R. 515:

> *"The normal rule is that costs follow the event. However, there are circumstances where a court on the facts of a case determines that the normal rule will not apply. Indeed**, a successful applicant may not succeed in obtaining an order for costs if the facts indicate features which are unsatisfactory as to the way in which they acted**, see for example Donegal County Council v. O'Donnell (unreported, High Court, O'Hanlon J., 25 June 1982). **The burden is on the party making an application to show that the order for costs should not follow the general rule**."* (Emphasis added)

4. I am satisfied that the facts in the present case do not indicate features which are unsatisfactory as to the way in which the defendants acted such as would justify a departure from the normal rule. In my view it would be to create an injustice if the successful party did not obtain an order

in respect of their costs of this application. In *Godsil v. Ireland* [2015] 4 I.R. 535, Mr. Justice McKechnie put matters in the following terms:

> *"[23] The general rule is that costs follow the event unless the court orders otherwise: O.99, r.1(3) and (4) of the Rules of the Superior Courts 1986. This applies to both the original action and to appeals to this court (Grimes v. Punchestown Developments Co. Ltd [2002] 4 I.R. 515 and S.P.U. C. v. Coogan (No. 2) [1990] 1 I.R. 273.* ***Although acknowledged as being discretionary, a court which is minded to disapply this rule can only do so on a reasoned basis, clearly explained, and one rationally connected to the facts of the case to include the conduct of the participants: in effect, the discretion so vested is not at large but must be exercised judicially*** *(Dunne v. Minister for the Environment [2007] IESC 60, [2008] 2 I.R. 775 at pp. 783 and 784). The 'overarching test' in this regard, as described by Laffoy J. in Fyffes plc the DCC plc [2006] IEHC 32, [2009] 2 I.R. 417 at para. 16, p. 679, is justice related. It is only when justice demands should the general rule be departed from. On all occasions when such is asserted the onus is on the party who so claims."* (Emphasis added).

5. I am satisfied that there is no rational basis, rooted in the facts of the case, including the parties' conduct, which would entitle the court to disapply the normal rule.

The 2015 Act

6. The normal rule has been given statutory expression in s.169 of the Legal Services Regulation Act 2015 ("the 2015 Act"). By virtue of the 2015 Act, this court's discretion is materially circumscribed per statutory provisions. It is useful to quote from the 2015 Act as follows:

S. 169

7. Section 169(2) of the 2015 Act ("the 2015 Act") states:

"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, 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.*
>
> *(2) Where the court orders that a party who is entirely successful in civil proceedings is not entitled to an award of costs against a party who is not successful in those proceedings, it shall give reasons for that order."*
>
> (Emphasis added)

Order 99

8. Order 99, Rules 2, of the Rules of the Superior Courts ("RSC") provide:

"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.

(2) No party shall be entitled to recover any costs of or incidental to any proceeding from any other party to such proceeding except under an order or as provided by these Rules.

(3) The High Court, the Court of Appeal or the Supreme Court, upon determining any interlocutory application, shall make an award of costs save where it is not possible justly to adjudicate upon liability for costs on the basis of the interlocutory application.

(4) An award of costs shall include any sum payable by the party in favour of whom such an award is made by way of value added tax on such costs, where and only where such party establishes that such sum is not otherwise recoverable.

(5) An order may require the payment of an amount in respect of costs forthwith, notwithstanding that the proceedings have not been concluded."

Presumptive right

9. The foregoing illustrates that the 'starting point' is that the Plaintiff enjoy a presumptive *right* (*per* s. 169(1) of the 2015 Act) to an award of costs against the Defendant (given that she was the entirely successful party and the Defendant was entirely unsuccessful). In *Pembroke Equity Partners Ltd v Corrigan & Galligan,* [2022] IECA 142 Collins J for the Court of Appeal, stated: "*Section 169(1) embodies the general principle that costs follow the event (expressed in terms of a party who is entirely successful being entitled to an award of costs unless the Court orders otherwise). That, according to the Supreme Court in Godsil v Ireland [2015] IESC 103, [2015] 4 IR 535 is the "overriding start point on any question of contested costs." While Godsil was a pre-2015 Act case, in my view that same principle animates its provisions and those of Order 99 (recast)*".

10. In other words, although O. r. 2(1) of the RSC provides that costs are in the discretion of the court, the Plaintiff is entitled to an award of costs unless the nature or circumstances, including the conduct of the parties, means that the interests of justice require otherwise. In the relevant analysis, this court is mandated to have regard, in particular, to the non-exhaustive list of matters set out in s.169(1) of the 2015 Act. Having conducted that analysis, and for the reasons set out in this ruling, I am entirely satisfied that justice does not require otherwise.

Conduct

11. At para. 59 of the judgment, the Court noted that: "the Plaintiff's solicitor was criticised (not unfairly) for not responding to the Defendant's Insurer's various communications…." This is not "conduct" for the purposes of s. 169(1)(a) of the 2015 Act. This conduct did not cause any of the costs of this Appeal. What caused the need for the determination of a preliminary point of law was the Defendant's decision - despite having made representations which this Court has found raised an estoppel - to plead in their Defence that the Plaintiff's action was statute-barred. This is not a case where, for example the Plaintiff's solicitor did anything (or averred to anything) which the Court has found inappropriate. The Plaintiff's solicitor did not attempt to avoid his non-response. Furthermore, the Defendant made its decision to plead the Statute full in the knowledge of both (i) the Plaintiff's solicitor's non-response to what might be called 'overtures' from the Defendant's insurers to settle the case; and (ii) the specific form these overtures took, including the fact that no deadline for a response was ever given. All the foregoing was carefully examined in the Court's judgment.

12. In marked contrast to the facts and circumstances of the present case, the decision by Whelan J. in the Court of Appeal's judgment in *Donlon v. Burns* [2022] IECA 159 provides a recent example of "conduct" which prevented a successful party from recovering costs in relation to certain issues on which they were successful. In that case, the appellant contested the validity of a deed of appointment, dated 6 February 2013, whereby the first and second named respondents were appointed by Ulster Bank, as receivers, pursuant to powers contained in three separate security instruments each made between the appellant of the one part and Ulster Bank of the other part. At para. 89, the learned judge found as follows:

"*Having due regard to ss.168 and 169 of the Legal Services Regulation Act, 2015, as amended and O. 99 RSC;*

(i) They behaved unreasonably in refusing to consider the invalidity of this appointment when specifically raised with them by Messrs. N.J. Downes, solicitors in February 2013.

(ii) They behaved unreasonably in contesting the invalidity of their appointment under the 2004 instrument.

(iii) Their said behaviour endured for almost six years.

(iv) Their conduct was a wrongful interference with the right of the appellant to exclusive possession of the lands in the schedule to the 2004 instrument.

(v) They threatened to sell the said lands when not entitled to do so.

(vi) Then put the property up for sale or threatened to do so when not entitled to do so.

(vii) They failed to comply in a timely manner with the clear order of Cross J. made in June 2018 within 6 weeks therein specified.

(viii) They caused hardship to the appellant, a litigant in person, by failing to ensure that the inspection of the original instruments as comprised of Land Registry dealings by him as ordered by the High Court took place ahead of the hearing of the substantive action on 15 January 2019".

13. I refer to the foregoing passage from *Donlon* to highlight how very different the facts and circumstances of the present case are, and to illustrate both the type of behaviour which may amount to conduct as contemplated by s. 169(1)(a) of the 2015 act and why a solicitor's failure to respond to invitations to settle a case, which invitations laid down no deadline for a response, is certainly not "conduct" for the purposes of s. 169(1)(a) in my view.

14. In the defendant's written submissions on costs, the following is set out under the heading "Conduct before and during the proceedings":

> "*The accident, the subject matter of the proceedings occurred on the 4th December 2013. An application was not made to the Injuries Board on behalf of the Plaintiff until more than two years after that date and it was acknowledged as having been received on the 8th December 2015. The Plaintiff's claim was therefore statute* ***barred unless the Plaintiff could establish that the Defendant was estopped in the particular circumstances which occurred, from relying upon the Statute of Limitations.***" (Emphasis added)

15. The plaintiff has established precisely that (i.e. for the reasons set out in the judgment, the defendant is not entitled to rely on the Statute). The Defendant's submissions continue as follows:

> *"It is submitted that* ***the Defendant's Insurers acted entirely appropriately and reasonably in that their representative communicated with the Solicitor of the Plaintiff for the purpose of confirming an admission of liability by the Defendant and also suggested that a settlement meeting or settlement discussions should take place****. The Defendant's Insurer's representative made a number of efforts to contact the Plaintiff's Solicitor and on each occasion left a message requesting that he might revert to him. In contradistinction to the efforts made on behalf of the Defendant's Insurers, the Plaintiff's Solicitor failed to respond or even to acknowledge the approaches which were made to him. The injuries suffered by the Plaintiff in the accident were relatively minor and*

straightforward and no reasonable explanation has been provided as to why settlement discussions could not have been at least attempted following the original approach. The conclusion of the proposed claim being brought on behalf of the Plaintiff at that time would have been to the benefit of the Plaintiff herself in addition to avoiding potentially unnecessary proceedings and additional costs."

16. The decision to deliver a Defence containing an objection based upon the Statute was one made by the Defendant in the full knowledge of relevant facts (i.e. the non-response by the Plaintiff's solicitor to invitations to settle the case, and the nature of those invitations). This court is also entitled to take it that the Defendant had the benefit of legal advice when deciding to deliver such a Defence. The point at issue in this appeal is not whether it was reasonable or appropriate for the Insurer to invite settlement. It could hardly be suggested that invitations of that sort were otherwise and this Court certainly did not hold that it was unreasonable or inappropriate for invitations to settle to have been made. The point, however, is that it was "unconscionable" to file a Defence which relied on the Statute in the wake of the invitations and representations which were in fact made (having regard to the fact of, timing of and content of same) in the manner which is explained in this Court's judgment. It was the Defendant's decision to file that Defence which gave rise to the need for the determination of a preliminary issue. That decision caused the legal costs to be incurred not the failure of the Plaintiff's solicitor to respond to invitations (which did not set any 'hard' deadline for a response).

17. The fact that the Plaintiff's solicitor did not respond to a number of overtures from the Defendant's Insurers was looked at closely in the Court's judgment. It is a statement of the obvious that the Defendant's submissions on the question of costs do not and cannot constitute an appeal against this Court's findings. In saying this I mean no disrespect and do not suggest for a moment that the Defendant's submissions constitute a collateral attack on the facts found. I do, however, take the view that the submissions which is made by the Defendant with respect to the conduct of the Plaintiff's solicitor does not represent a complete analysis of the findings in the judgment and does not take sufficient account of the Defendants' conduct. For example, the court found as follows at para. 76 of the judgment:

> "76. When explicitly referring to settlement, **the Insurer did not state or in any way suggest that the medical report had to be furnished and/or that negotiations had to be concluded within the following 10 days. Nor, as I observed earlier, did the Insurer express any frustration whatsoever, on 23 November 2015, about what it perceived to be any lack of response or any lack of progress; and there was no hint in the 23 November 2015 communication that, unless there was a response within a set period (be that of days or weeks), the Insurer's stance would change.**" (Emphasis added)

18. The Defendant's submissions also contain the following:

> *"It is submitted that having regard to the timeline outlined above, it was entirely reasonable and correct for a Defence to be delivered on behalf of the Defendant which contained an objection based upon the Statute of Limitations. At the very least a prima facie case could be made that the Plaintiff's claim was statute barred."*

19. The foregoing is certainly no basis to deprive the entirely successful party of an order for costs to which they are prima facie entitled. The Defendant' submissions continue:

> *"The original Affidavit grounding the application by the Plaintiff/Appellant to have the issue determined as a preliminary one (sworn by Mr. Reilly) did not contain an averment to the effect that he believed, following the receipt of the various emails from the Defendant's Insurers, that it would not be necessary to issue proceedings or make an application to PIAB within the time permitted by Statute.*
>
> *There was no evidence whatsoever before the Circuit Court that Mr. Reilly had been 'misled or lulled into a false sense of security' that the Statute would not be relied upon by the Defendant. In fact, in the course of submissions made on behalf of the Plaintiff in the Circuit Court, it was argued that this was not necessary but rather the test to be applied was whether objectively 'someone' might reasonably have been lulled into a 'false sense of security'. It was not argued that Mr. Reilly had been, as this evidence was not before the*

Court. It is notable that even though the Replying Affidavit delivered on behalf of the Defendant (and sworn by Mr. Greg Murphy) referred to and specifically commented upon the failure of Mr. Reilly to make such a case, no further Affidavit was sworn by Mr. Reilly for the purpose of the Hearing of the application before the Circuit Court.

Only after the Circuit Court determined that the 'test' as to whether or not an individual had been 'lulled into a false sense of security' was a subjective one and emphatically rejected the argument that it might be 'subjective' was a further Affidavit sworn by Mr. Reilly for the purpose of the Appeal to this Honourable Court.

In addition to the foregoing, the original Affidavit grounding the application incorporated an averment (at paragraph 5) that the Plaintiff was entitled to rely upon the discoverability provisions of the Statute of Limitations (Amendment) Act, 1991 and not only was no supporting factual basis provided at the Hearing of the application before the Circuit Court, it was conceded that this argument was not being relied upon. A further argument initially presented in the Affidavit sworn by Mr. Brown was to the effect that it would be unconscionable for the Defendant to be allowed to rely upon the Statute of Limitations. Again, no basis whatsoever was provided to justify or support such an argument. At no stage in the course of the Hearing of the application before the Circuit Court, or indeed, before this Honourable Court, was it ever suggested that the Defendant or its representatives had acted improperly or that the Plaintiff had been 'taken short'."

20. This court considered the entirety of the evidence in this case. A critique by the defendant of affidavits sworn on behalf of the plaintiff in respect of the Circuit Court hearing does not, in my view, provide any basis for depriving the plaintiff of the costs in respect of the hearing by this Court of an application in which the plaintiff was entirely successful. Without prejudice to the foregoing, the Defendant chose not to concede this appeal despite receiving the Plaintiff's affidavits in advance of the hearing. Rather, the matter was fully contested by the Defendant's legal team comprising of solicitor, junior and senior counsel. The decision to file a Defence which relied on the Statute is the "source of the Nile" in terms of the costs created thereafter, but there were also opportunities, including in advance of the hearing of this appeal, for the Defendant to concede that reliance on the Statute was unconscionable, in light of what the Defendant has known all along (i.e. the fact, timing and nature of the invitations and representations made by its Insurer). The Defendant chose not to avail of any such opportunity.

21. The fact that it was not suggested that "the Defendant or its representatives had acted improperly" is no basis for depriving the entirely successful party of their presumptive right to costs. The key question was unconscionability and for the reasons detailed in the judgment it would be unconscionable for the Defendant to rely on the Statute. The point of law appeal did not hinge on whether any party was "taken short". That was not the test and the issue is not at all relevant to the fair determination of the costs question. It was the Defendant's purported reliance on the Statute notwithstanding their representations, via their Insurer, which this court found "unconscionable". There was no question of anyone taking anyone "short". It is simply that the Defendant instructed its legal team to defend the case on the basis that the claim was Statute barred. They have failed in that defence.

22. The judgment teased through the evidence and reached findings of fact which are clearly set out. To those facts, well-established legal principles were applied and the outcome was that the Defendant was entirely unsuccessful in the appeal. I am satisfied that taking full account of the issue of conduct, there is no rational, facts-based reason to deprive the entirely successful party of their costs. The following was also submitted on behalf of the Defendant:

"In the event of this Honourable Court making an Order of costs in favour of the Plaintiff/Appellant, it will result in the Plaintiff's Solicitors effectively being ***rewarded for their failure to take the obvious and reasonable step of responding to the invitation made by the Defendant's Insurers to engage in settlement discussions.*** *It is respectfully submitted, that on the grounds of public policy, this would be inappropriate.*

In conclusion, it is respectfully submitted that the particular nature and circumstances of this case, to include the conduct of the proceedings by the parties, is such as to allow this Honourable Court to depart from the 'normal rule' and to make no Order as to costs." (Emphasis added.)

23. It is clear from the foregoing that the 'conduct' which, according to the defendant, should deprive the plaintiff of their presumptive right to an order for costs, concerns the failure to respond to invitations to settle the proceedings. At the hearing before this Court, it was argued on behalf of the defendant that this 'conduct' meant that the appeal should be dismissed. In other words, the conduct now relied upon as a justification for no order as to costs being made was the very conduct carefully considered by this court in the context of its analysis of the entirety of the evidence. The judgment, which went against the Defendant, provides a far fuller analysis of 'conduct' than the Defendant's submissions as regards costs. The outcome of the Court's analysis included the facts as found at para 76 of the court's judgment. Earlier in this ruling I quoted para 76 *verbatim*. A fair summary is that the Defendant's Insurer never suggested that negotiations had to be concluded within a particular time-frame; never expressed frustration at the lack of response; never set a 'hard' final deadline; and never indicated that in the absence of a response, the Insurer's position would change. For the purposes of the submissions which the defendant now makes, the foregoing findings of fact are of fundamental relevance to any fair analysis of the 'conduct' issue.

24. In an email dated 23 December 2015, which was sent to the Defendant's Insurer, in response to the assertion that the claim was statute barred, the Plaintiff's solicitor stated: "*Crucially, a Defendant can be "estopped" (prevented) from using the Statute of Limitations as a Defence if by their conduct it would be unjust to permit them to do so*." That email went on to refer to the decision in *Murphy v Grealish* (cited by the Court at para. 65 of its judgment). Thus, *before* it instructed its legal team to put in a Defence which relied on the Statute, the Defendant was well aware of the Plaintiff's attitude. Notwithstanding this, the Defendant proceeded to deliver a Statute of Limitations Defence. It was *that* decision which gave rise to the costs and - as the entirely unsuccessful party in this point of law appeal – I am satisfied that the Defendant should be ordered to pay them.

<u>Conclusion</u>

25. In conclusion, I am entirely satisfied that there are no facts or circumstances, including conduct, which would allow the Court to depart from the normal rule and make no order as to costs. To make no order as to costs would, in my view, be to create a manifest unfairness and would be a decision inconsistent with s.169 of the 2015 Act (and this Court very obviously lacks any jurisdiction to exercise its discretion unfairly and contrary to statute). For these reasons final orders should be made as follows:

> **THE COURT DOTH allow the appeal from the order of the learned Circuit Court Judge dated 19 December 2020.**
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> **THE COURT DOTH determine the preliminary point of law directed to be tried pursuant to Order 34, rule 1 of the Circuit Court Rules and finds that the Plaintiff's claim is not statute barred pursuant to section 11 of the Statute of Limitations, 1957, as amended by the Statute of Limitations (Amendment) Act, 1991, as amended by the Personal Injuries Assessment Board Act, 2003, and the Civil Liability and Courts Act, 2004.**
>
> **THE COURT DOTH vacate the order for costs made by the learned Circuit Court Judge on 19 December 2020 and in lieu thereof DOTH ORDER that the Plaintiff shall be entitled to her costs in the Circuit Court and the High Court (costs in the High Court to include a certificate for Senior Counsel and to include written submissions), such costs to be adjudicated in default of agreement.**