

THE HIGH COURT

[2022] IEHC 78

Record No. 2020/7400P

BETWEEN

ERIC SOMERS

PLAINTIFF

AND

**WILLIAM J. KENNEDY, JACK FITZGERALD, SINEAD CURTIS
AND SINEAD FITZPATRICK**

DEFENDANT

JUDGMENT ON COSTS of Ms Justice Butler delivered on 8th day February 2022.

1. This is my ruling on an application for costs that has been made by the defendant in light of the judgment delivered by me on 21st January 2022. In that judgment I acceded to the defendant's application to strike out the plaintiff's proceedings on the grounds that they failed to disclose a reasonable or justiciable cause of action and that, insofar as they were premised on allegations of professional misconduct on the part of the defendant, these were matters within the exclusive remit of the Legal Services Regulatory Authority. This objection had been pleaded by the defendant in his defence and was raised by counsel for the defendant at the opening of the plaintiff's case. The effect of the judgment was that the plaintiff's plenary action which had been listed for hearing for two days did not proceed.
2. Both parties have provided helpful written submissions on costs. The defendant relies on s.169(1) of the Legal Services Regulation Act 2015, O.99, r.2 and 3 of the Rules of the Superior Courts and the analysis of those provisions by the Court of Appeal in *Chubb European Group v Health Insurance Authority* [2020] IECA 183 to argue that as costs should follow the event and as he has succeeded in full, the entire of the costs of the proceedings should be awarded to him and against the plaintiff.
3. The plaintiff made two separate submissions both to largely similar effect. The plaintiff points to portions of my judgment where I queried the approach adopted by the defendant, specifically the fact that the defendant chose not to bring a preliminary application to have the justiciability of the plaintiff's claim determined before it was listed for a plenary trial and the consequent procedural difficulties this created, not least the fact that the plaintiff had issued a number of subpoenas in preparation for a plenary trial which the subpoenaed witnesses then sought by motion to have set aside. Consequently, the plaintiff argues that the defendant is not entitled to costs or, alternatively, is not entitled to the additional costs incurred by reason of the defendant's decision not to bring a preliminary application to have the plaintiff's case struck out on the grounds which ultimately prevailed.
4. The defendant argues in response that notwithstanding my criticism of the approach adopted, the court exercised a jurisdiction that it undoubtedly had to accede to the defendant's application after the opening of the plaintiff's case and that it would be unfair to deprive him of his costs. It is pointed out that the fact this application succeeded reduced the allocated hearing time by a day. The defendant also argues that the approach adopted was procedurally preferable as if he had succeeded in a pre-trial motion then the

plaintiff could have argued on appeal that he could have explained the nature of his case better at a full hearing, which opportunity was afforded to him by his opening at the trial. I am not convinced that this latter argument has any merit. I do not think that the procedure adopted is likely to have a significant bearing on whether the plaintiff chooses to appeal the outcome. In addition, the respondent to a motion to strike out proceedings will always be given a full opportunity by the court to explain the nature of their case.

5. In considering the somewhat *sui generis* features of this case I have borne two separate considerations in mind. The first is that the defendant is in principle entitled to his costs, having succeeded in full in having the plaintiff's proceedings struck out. He has been entirely successful in that regard and I accept that there is no basis for treating the defendant as if he had been only partially successful or as if there had been some issue of significance in the case which, notwithstanding his overall victory, had been determined against him.
6. However, I do not think that is the end of the matter as the issue is not just whether the defendant is entitled to his costs but what those costs should be. The plaintiff raises an argument of substance as to whether the defendant should be awarded the additional costs that would normally arise in the context of a plenary action listed for trial as distinct from the costs of a preliminary application. The costs of litigation in this jurisdiction are, by any standards, high. Certain types of litigation are even more expensive than others, with the costs of plenary actions in the Chancery list being towards the higher end of the range involving as they do both the marshalling of evidence and witnesses and potentially complex legal argument. Whilst it is not generally a matter for the court to determine the actual sum that an award of costs should entail, experience would suggest that the costs of having a discrete legal point argued as a preliminary issue on foot of a notice of motion will generally be lower, sometimes significantly lower, than the costs of a plenary trial.
7. Although the defendant was correct in asserting that the court had jurisdiction under O.25, r.1 to hear and determine a point of law raised by the pleadings at the trial, it does not necessarily follow that full trial costs should be awarded. In my view, where there are various procedural mechanisms open to a litigant to have an issue determined, all else being equal the litigant should avail of the mechanism which adds least expense to the overall cost of the proceedings. Of course, there may well be circumstances in which all else is not equal and there may be a specific reason why a particular procedural route has been chosen, albeit that it may not be or appear to be the most cost efficient. For example, the procedure that is ostensibly more cost efficient may add a considerable delay to having the proceedings finalised. The defendant has not suggested that there was any such reason in this case.
8. The extent to which different procedural choices will give rise to different levels of legal cost may also be unclear at the time those choices have to be made. For example, a defendant may have a legal argument which, if successful, will dispose of some but not all of a plaintiff's case. Unless the determination of the point would significantly reduce the number of witnesses required and consequently the length of the trial, bringing a

preliminary application might add to rather than reduce the costs of an action which is going to proceed to trial in any event. Each case will depend on its own circumstances and obviously a court should be very cautious about second-guessing the procedural decisions lawyers have to make at a time when the outcome of the litigation cannot be known. Again, this is not the case here as the defendant's intention was always to achieve an outcome whereby the plaintiff's plenary action would never actually proceed. Consequently, the defendant had a direct choice between, on the one hand, bringing the type of preliminary application that is frequently brought under O.19, r.28 of the Rules of the Superior Courts and/or the inherent jurisdiction of the court and, on the other, allowing the matter to be listed for plenary hearing and proceeding to trial. The latter option is inevitably more expensive than the former, but the defendant nonetheless chose the latter route to achieve an outcome that could equally well have been achieved by the former.

9. In addition to the costs of the hearing, in this instance the fact the case remained listed for trial resulted in the plaintiff issuing subpoenas to compel the attendance of certain witnesses at the trial. This in turn prompted the issuing of 5 separate motions by the persons on whom the subpoenas were served seeking to have them set aside. In his submission on costs the defendant argues that these subpoenas were inappropriately issued, but this is not a matter that has been determined by the court either way. Of more significance is the fact that the subpoenas would not have been issued at all if the trial had not been listed for hearing, despite the defendant's intention to move to have the proceedings struck out. Whatever about the status of the subpoenas which were issued, it was certainly not unreasonable for the plaintiff to take steps to prepare for a trial which was listed for imminent hearing
10. I should note that I do not ascribe any adverse motive to the defendant in this regard. He was the subject of litigation brought by the plaintiff in which very serious allegations were made, inappropriately, against him and others. I have no doubt the defendant simply wanted the litigation disposed of and was not consciously choosing a method of doing so which was not the most cost efficient. Nonetheless, given the very high cost of litigation, I think it is incumbent on both sides of a case to ensure that it is conducted in the most cost effective manner possible so that the ultimate costs burden - no matter who has to bear it - will be as low as possible.
11. Bearing all of these factors in mind and in light of the reasons set out above I propose to do the following. I will make an order for costs in favour of the defendant to be adjudicated in default of agreement. That order will encompass the costs of and incidental to the proceedings against him (which proceedings have now been struck out) but will not include the costs of a plenary trial. Instead, the costs of the hearing which took place before me are awarded to the defendant on the basis that they should be adjudicated as the costs of a motion to have the justiciability of the plaintiff's proceedings determined as a preliminary issue which motion was listed for a full days hearing in the Chancery list. I will not make any orders in respect of the costs of the motions brought to set aside the subpoenas.