

**THE HIGH COURT**

**[2023] IEHC 737  
Record No. 2022/132 P**

**BETWEEN**

**DAVID MURPHY**

**Plaintiff**

**-and-**

**DENIS FOLEY**

**Defendant**

**RULING of Mr. Justice Heslin delivered on the 20<sup>th</sup> day of December, 2023**

**1.** This short ruling on the question of costs must be read in conjunction with the judgment delivered on 16 November 2023 ("the judgment"), para. 117 of which stated:

*"117. For the reasons set out in this decision, the court has found the following:*

- (i) the plaintiff failed to make the requisite application to the PIAB within the statutory 2-year period (as the plaintiff has acknowledged at all material times);*
- (ii) the reason was an oversight and omission by the plaintiff's then solicitor (as the plaintiff has known since 2 December 2022);*
- (iii) the plaintiff has not established unconscionable conduct on the part of the defendant;*
- (iv) the plaintiff has not established that it would be inequitable for the defendant to rely on a statute of limitations defence;*
- (v) there is no basis upon which the doctrine of estoppel, or any other doctrine, operates so as to permit the defendant to invoke the statute of limitations;*
- (vi) the 'principle' that, because other claims brought by other individuals, arising from the same event, were settled, the defendant/insurer is obliged to settle all claims, is not known to the law;*
- (vii) still less could that 'principle' provide a basis for this court extending the statute of limitations period, where the statute was missed by reason of the mistake of solicitors acting for the would-be plaintiff."*

**2.** For the reasons set out in the judgment, this court determined that the plaintiff's claim is 'statute barred' and, accordingly, should be dismissed.

**3.** I have carefully considered the written submissions recently furnished by both sides in relation to the question of costs.

**4.** The defendant submits that the 'normal rule' (that 'costs' should 'follow the event') applies. The plaintiff submits that the court should place a 36 month-stay on the execution of a costs order, so as to allow "...a reasonable period for the determination and payment of damages by his former firm of solicitors..." in certain professional negligence proceedings.

**5.** The plaintiff submits that he will suffer very serious "prejudice" in the event of no stay being placed on the costs order. He also submits that the defendant will not suffer prejudice, or as much prejudice, if a stay is placed on the costs order. The plaintiff's position can be understood from the following extracts from his written submissions:-

- "Any costs awarded against the plaintiff in these proceedings forms part of the costs which are being sought against the plaintiff's former firm of solicitors..."
- "...the defendant's costs will almost certainly be satisfied following judgment awarded to the plaintiff by Keans's solicitors and/or their insurers";
- "...the plaintiff does not have the means to pay any costs of these proceedings awarded against him."
- "... the plaintiff suffered most extensive injuries in the incident the subject of these proceedings, which have impacted his ability to work."
- "the plaintiff will inevitably be required to contribute at least some funds towards the considerable expenses involved in the preparation of those related proceedings for trial."
- "early execution and/or enforcement of such a costs order against him may prohibit the plaintiff from having the means to pay his day-to-day expenses, let alone the means to prosecute the professional negligence proceedings"

**6.** It seems to me that certain of the foregoing submissions constitute an *ad misericordiam* argument, based on what is said to be the plaintiff's impecuniosity. It is also appropriate to note that this court has, for understandable reasons, no information or insight into either the plaintiff's assets or the funding arrangements between the plaintiff and his legal team in relation to the separate claim he is bringing against his former solicitors.

**7.** However, even if it is assumed that the plaintiff lacks the means to pay any of the costs awarded against him, there is no evidence that this reality will, or may, prevent him from proceeding with his extant case against his former solicitors. Whilst it is no function of this court to pre-determine any enforcement application, this court is not aware of any situation where an impecunious party was left without funds to meet "day to day expenses", by reason of being ordered to discharge a costs order.

**8.** In short, the submissions made on behalf of the plaintiff appear, with respect, to include 'bare' assertions which, again with respect, also ignore the old adage concerning the impossibility of obtaining 'blood' from a 'stone'.

**9.** I make these comments because, this court is not 'at large' in relation to the exercise of discretion with respect to costs. The exercise of discretion must be within the 'guardrails' established by statute. Section 169 of the Legal Services Regulation Act, 2015 (the "2015 Act") is of particular relevance, wherein it provides:

*"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)

**10.** Not only are there no circumstances which would justify a departure from the 'normal rule', an aspect of the plaintiff's "conduct" is that the plaintiff insisted on a trial of the preliminary issue and sought to invoke the principles articulated in *Murphy v Grealish* [2009] IESC 9 despite knowing, since 2 December 2022, that (i) his claim is statute barred; and (ii) the reason for this was an oversight and omission by the plaintiff's former solicitor (i.e. not anything the defendant or his Insurer said, did or failed to do).

**11.** In *Godsil v. Ireland* [2015] IESC 103, the Supreme Court (McKechnie J.) highlighted the important role which costs play in the administration of justice, stating:-

*"19. Inter partes litigation for those unaided is, or can be, costly: certainly it carries with it that risk. It is therefore essential in furtherance of the high constitutional right of effective access to the courts on the one hand and the high constitutional right to defend oneself, having been brought there, on the other hand, that our legal system makes provision for cost orders. This is also essential as a safeguarding tool so as to regulate litigation and the*

conduct and process thereof, by ensuring that it is carried on fairly, reasonably and in proportion to the matters in issue. Whilst the importance of such orders is therefore clearly self-evident, nevertheless some observations in that regard, even at a general level, are still worth noting.

20. A party who institutes proceedings in order to establish rights or assert entitlements, which are neither conceded nor compromised, is entitled to an expectation that he will, if successful, not have to suffer costs in so doing. At first, indeed at every level of principle, it would seem unjust if that were not so, but it is, with the "costs follow the event" rule, designed for this purpose. A defendant's position is in principle no different: if the advanced claim is one of merit to which he has no answer, then the point should be conceded: thus in that way he has significant control over the legal process including over court participation or attendance. If however, he should contest an unmeritorious point, the consequences are his to suffer. On the other hand, if he successfully defeats a claim and thereby has been justified in the stance adopted, it would likewise be unjust for him, to have to suffer any financial burden by so doing. So, the rule applies to a defendant as it applies to a plaintiff.

...

22. There is a second justification, again at the level of principle, for this jurisdiction: it was mentioned in *Farrell v. Bank of Ireland* [2012] IESC 42, Clarke J. at para. 4.12. This justification is that in the absence of such a mechanism, both the bringing and defending of proceedings could be used for abusive purposes. In effect, the financial weight of a litigant could determine the extent to which, if at all, a particular claim or defence could be pursued, and certainly in some circumstances, could exercise an overly controlling influence on the process. Such of course would be inimical to justice and could seriously disable the judicial role, as ultimately issues which should be determined, may never even reach the point of adjudication. This would be highly undesirable. Accordingly, it is crucial to have such a means available so that the Court, where appropriate, can dissuade and if necessary even punish, exploitative conduct and unprincipled parties." (emphasis added)

**12.** In *Permanent TSB Group plc v. Skoczylas* [2020] IECA 152, the Court of Appeal (Collins J.) analysed the proper approach to a consideration of whether to place a stay in respect of an order for costs, stating:-

"44. The principal's discussed in *Godsil v Ireland* apply to the execution of orders for costs and not merely the making of such orders. To hold otherwise would be to fundamentally undermine the role of costs, and the function of costs orders, in the administration of justice. The making of [a] costs order would be an entirely hollow protection for successful litigants if such order were not, in general, immediately enforceable." (emphasis added)

**13.** I pause to say that the plaintiff is seeking to bring about the "entirely hollow protection" of a stayed costs order, which the Court of Appeal identified. At para. 44 of the judgment in *Permanent TSB v. Skoczylas*, Mr Justice Collins went on to state:

*"A successful party has a legitimate expectation that where costs are awarded in his favour that he may take all. To recover those costs from the unsuccessful party. Where it is sought to suspend that entitlement by the granting of a stay, the onus rests with the party seeking such a stay to satisfy the court that it is in the interests of justice to do so. Such days are of course frequently granted pending appeal."* (emphasis added)

**14.** in the present case, the plaintiff makes clear that he does not intend to appeal this court's decision. I acknowledge that the granting of a stay is not confined to a situation where an appeal is brought [See Delaney and McGrath on Civil Procedure, at 25–27]. However, the onus of establishing that a stay is required in the interests of justice is for the plaintiff to discharge in the present case. For the reasons set out in this ruling, I am not satisfied that the plaintiff has discharged this onus.

**15.** The plaintiff is seeking a stay pending the outcome of proceedings to which the defendant is not a party. I acknowledge that the foregoing factor does not disentitle the plaintiff to seek a stay [See *Permanent TSB v Skoczylas* para 49]. However, an entitlement to seek a stay on that basis does not relieve the plaintiff of the need to discharge the onus of proof aforesaid.

**16.** The effect of this court's judgment is to bring finality to the plaintiff's proceedings against the defendant. With respect to a stay concerning a final order, the Court of Appeal stated the following in *Permanent TSB v. Skoczylas*:

*"57. Thus while the court still retains a discretion to stay a final order, the starting point must be to uphold the vindicated rights of the successful litigant; it is essentially affording the unsuccessful litigant a degree of mercy, it is not protecting his or her interests from any possible future harm arising from the successful litigant enforcing the rights established by the litigation."*

**17.** Viewing matters to the foregoing 'lens' argues strongly for refusing the stay sought. This is not a situation where the court is required to fashion an order which balances the interests of the plaintiff and defendant, so as to create the least risk of injustice and avoid irreparable harm to either party, until such time as their respective rights are finally determined, insofar as the dispute *inter se* is concerned. The final determination has been given (in the form of this court's judgment, coupled with explicit confirmation that the plaintiff will not be appealing the judgment). Again, that argues for no stay being placed on the cost order.

**18.** The plaintiff argues in his written submission that he will suffer very significant "*prejudice*" if a stay on the costs order is refused. Furthermore, the plaintiff argues that he will suffer far greater prejudice if a stay is not granted, than the defendant will suffer if it is.

**19.** With respect, it does not seem to me that "*prejudice*" is the correct term for what is, in truth, the consequences for the plaintiff of having to face a costs order, the making of which reflect the interests of justice.

**20.** By contrast, a defendant who is denied the opportunity to enforce an order for their costs, the making of which reflects that they were entirely successful and the plaintiff was entirely unsuccessful, very obviously suffers prejudice (and the plaintiff seeks to deny the defendant of his right to enforce the costs order for no less than 3 years).

**21.** Whilst the plaintiff describes a claim for professional negligence against his former solicitors as the "related proceedings", the defendant in the present proceedings is not a party to same. Nor can the outcome of the former have any implications for the plaintiff's rights against the defendant in these proceedings. At para. 98 in *Permanent TSB v Skoczylas*, the Court of Appeal stated the following:-

*"The company is presumptively entitled to enforce the costs order if and when that order becomes final and conclusive... It would, in the court's view, be a significant injustice to the company to suspend the costs order - potentially for many years - to permit Mr Skoczylas to pursue proceedings against the State, in respect of alleged wrongs for which the company bears no responsibility in law."*

**22.** In the present case, the interests of justice require an order for costs in the defendant's favour. The defendant is entitled to enforce that order when it becomes final. The logic of the Court of Appeal's decision in *Permanent TSB v Skoczylas*, seems to me to apply equally to the present situation, i.e. it would be a significant injustice to the defendant to suspend his costs order for 36 months to facilitate the outcome of legal proceedings in which the defendant is not involved and over which the defendant has no control.

**23.** The plaintiff's involvement in separate legal proceedings and the consequences of his involvement in same do not seem to me sufficient to discharge the onus of proving that the interests of justice require a stay, given that no appeal is being made against this court's determination which is, therefore, final in respect of the dispute between the parties.

**24.** Section. 169 of the 2015 Act creates a presumptive right to costs on the part of an "entirely successful" party to proceedings.

**25.** The defendant has been entirely successful in its application and is entitled to (i) an order dismissing the plaintiff's claim; and (ii) an order for the costs of the proceedings, including the present application, against the plaintiff, to include all reserved costs, such costs to be adjudicated in default of agreement, without a stay on that order.