



Unapproved

No Redaction Needed

THE COURT OF APPEAL

Neutral Citation Number [2020] IECA 343

Record Number: 2019/503

Noonan J.

Power J.

Collins J.

BETWEEN/

SUKHPREET SINGH PUNN

APPELLANT

- AND -

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Ms. Justice Power delivered on the 7th day of December 2020

1. The appellant sought and obtained leave to apply for judicial review of the respondent's decision to revoke his permission to reside in the State. At an early stage in the proceedings, the respondent gave an undertaking to the appellant which, effectively, rendered the proceedings moot. This appeal concerns the subsequent refusal of the High Court (Humphreys J.) on 11 November 2019 to award to the appellant the costs of the leave application ([2019] IEHC 794).

Background

2. On 24 January 2019 the respondent purported to revoke a Residence Card issued to the appellant pursuant to Regulation 27(1) of the European Communities (Free Movement of Persons) Regulations 2015 and Article 35 of Directive 2004/38/EC. The appellant had 15 working days within which to request a review of that decision. He was informed that his permission to remain in the State would be revoked pending the outcome of any such review. Having sought a review, he was refused temporary permission to remain pending the outcome thereof. On 20 June 2019, the appellant filed an application for judicial review of the respondent's refusal in this regard.

3. On Monday, 8 July 2019, the leave application was heard by Humphreys J. He granted the application and the order was perfected on the same day. Paragraph 3 of the order provided that the Notice of Motion was to be served on the respondent within seven clear days of the date of perfection of the order. However, paragraph 4 provided that the appellant was required to serve the other documents, namely, *'a copy of the statement of grounds, all affidavits and exhibits that were before the Court at the leave stage and the applicant's written legal submissions not later than [Friday] the 12th day of July 2019'* and that, in default of such service, the costs of the leave application *'shall not be recoverable'*.

4. I pause at this point to observe that paragraph 4 was included in the order of Humphreys J. by operation of High Court Practice Direction HC81- Asylum, immigration and citizenship list (hereinafter 'the Practice Direction'). Whereas Order 84, rule 22(3) of the Rules of the Superior Courts ('RSC') provides that a notice of motion must be served within seven days after perfection of the order granting leave (or within such other period as the court may direct), the Practice Direction imposes an additional obligation on applicants to serve the Statement of Grounds, affidavits and submissions by the Friday of the week in which leave has been granted. The Practice Direction further provides that every order granting leave shall include a default provision such

that the costs of the application shall be reserved provided that there has been compliance with the service stipulations of the Practice Direction.

5. The Practice Direction thus sets out the standard terms of a default order at the leave stage of a judicial review application. From its Explanatory Note it is clear that the Practice Direction does not preclude any individual applicant from seeking directions that any particular step or requirement should not apply in a given case. Since no application for a direction to vary the default terms of the Practice Direction was made, those terms were adopted in the order of 8 July 2019 and, more particularly, in paragraph 4 thereof.

6. Following the making of that order, the appellant's Cork based solicitors hand delivered the relevant papers to Pearis Solicitors, their town agents, in Dublin on Thursday, 11 July 2019. The Notice of Motion duly issued from the Central Office the next day, that is, Friday, 12 July 2019. However, contrary to the terms of the order, the town agents served all the documents—the Notice of Motion, the Statement of Grounds, the Affidavit and the Submissions—in one bundle, on the Chief State Solicitor's Office ('the CSSO') on Monday, 15 July 2019. The evidence establishes that the appellant's solicitor ('Mr Coughlan') was not aware of the failure to comply with terms of the order at this point.

7. The appellant's application for an interlocutory injunction was to be moved on 29 July 2019. Shortly before the hearing, the respondent, through counsel, gave an undertaking to grant a 'conditional' six-month Stamp 4 immigration permission to the appellant pending the outcome of the review. Such conditional permission was to cease upon the conclusion of the review process and was to be extended should the process take longer than six months. The application for an injunction, therefore, did not proceed as the undertaking, in effect, rendered the proceedings moot.

8. The following day Mr Coughlan wrote to the CSSO setting out his understanding of what had been agreed the previous day between counsel for the parties. He also observed that counsel for the respondent had indicated some default on the part of the appellant in respect of post-leave service and that this would have costs consequences. He continued: *‘I should . . . be most obliged to learn of the precise manner in which the Respondent believes the Applicant to have been in default of the non-statutory Practice Direction.’* A telephone conversation, thereafter, ensued between the solicitors for the respective parties.

9. Mr. Coughlan wrote again to the CSSO on 15 August 2019 setting out the circumstances regarding the service of papers. He explained how he had spoken to Ms McDonnell, Office Manager at Pearts Solicitors who were his town agents. She was a member of the Court Services Users’ Group. She had, he reported, understood that the delivery of the documents within 7 days would have been acceptable and considered as being ‘within time’. He further explained that Ms McDonnell’s understanding had emerged from a meeting of the Court Services Users’ Group in which, apparently, a representative of the CSSO had discussed the difficulty created by the service of papers in ‘a piecemeal fashion’. Mr Coughlan confirmed his agreement with the proposed terms of the settlement offer with the exception of *‘the exclusion of the leave costs’*. He suggested that the issue of costs be held over while various matters were clarified, and that it could be raised before the court at a future date if not be resolved before then.

10. On 7 October 2019, the Chief State Solicitor’s Office (‘the CSSO’), on behalf of the respondent, made an open offer, in writing, to grant temporary permission to the appellant to remain in the State and to discharge the costs of the proceedings *‘excluding the costs of the leave application’*. It was further stated that if the applicant did not agree to strike out the proceedings

on those terms, then reliance would be placed on that letter to seek the costs of the proceedings from that date.

11. Mr. Coughlan replied on 11 October 2019 noting the ‘*unfortunate issue*’ that had arisen in respect of the ‘leave’ costs. He set out, again, how the late delivery of papers had arisen in ‘good faith’ based on the town agent’s understanding that the CSSO preferred all the papers to be delivered together. He explained how his client was of limited means and that he did not have the benefit of legal aid. He assured the CSSO that he was trying to do the right thing. He indicated that these issues would be raised before the Judge and directions would be sought in relation to a costs hearing.

12. As the parties were unable to resolve the issue that had arisen, the Appellant applied to the court on 14 October for a hearing date on which the issue of costs could be resolved.

13. On 24 October 2019 Mr Coughlan swore an Affidavit setting out, in detail, the background to the proceedings and exhibiting, following a waiver, the ‘without prejudice’ correspondence that had passed between the parties. He also exhibited a letter from Ms McDonnell (see para. 9 above) which set out the basis of her understanding that service of all documents together within seven days of the making of the order would have been acceptable to the CSSO. Mr Coughlan pointed out in his Affidavit that ‘*the Respondent has not suggested that any prejudice has been occasioned by the delivery of the papers herein on Monday the 15th of July 2019 rather than Friday the 12th of July 2019*’.

14. By letter of 6 November 2019, the CSSO took issue with an averment at paragraph 10 of Mr Coughlan’s Affidavit and, in particular, the town agent’s contention that the CSSO had previously expressed a difficulty with the service of papers in a ‘piecemeal’ fashion. The minutes of all meetings of the Court Service Users’ Group held since October 2017 had, it was stated, been

checked. The only time the service of judicial review papers had been discussed was on 10 October 2017 which was prior to the issuing of the Practice Direction. The letter confirmed that no representative of the CSSO had made a statement to the effect that non-compliance with the Practice Direction was acceptable.

The High Court

15. On 11 November 2019, the matter came before Humphreys J. Both sides had filed written submissions. The only sworn evidence before the court was the Affidavit of Mr Coughlan. Judgment was delivered that same day.

16. In his judgment, Humphreys J. noted that the proceedings were moot and could be struck out and that the issue of the costs of the leave application was the only point of contention that fell to be addressed. He set out the history of the proceedings and considered the provisions of the Practice Direction, observing that its default terms were to apply unless otherwise ordered. He noted the benefits conferred by the Practice Direction in terms of his not having to pronounce pointlessly and laboriously all standard terms at length every Monday.

17. Referring to paragraphs 3 and 4 of the order of 8 July 2019, the trial judge considered (at para. 2) that *‘the costs of the leave application have to that extent already been disposed of’*. Citing correspondence from the appellant’s solicitors’ town agents to the effect that they *‘were not aware that the papers had to be filed in a shorter period that [sic] that set out in s. 8B(1) of High Court 81’*, the trial judge considered that this suggested that they had neither informed themselves of the form of the default order, generally, nor of the terms of the actual order made. In his view, *‘no particular injustice’* had been shown by the applicant.

18. Humphreys J. rejected the submission that *‘a generic order was applied without individualised judicial consideration’* as a misunderstanding. He stated (at para. 6) that he *‘would*

have been more than willing to entertain and consider any application to vary the default terms set out in the Practice Direction'. However, no such application had been made. If it had been, *'it would have received individualised judicial consideration'*. He noted what he described as the *'homespun logic'* in the appellant's submission that the delay of one day in the service of documents did not make any difference to the respondent. In his view, it was in the very nature of a time limit that some cases will fall just beyond them and that this was such a case. The trial judge added *'that this isn't about whether or not I should now allow a day's grace. It's about the fact that the leave order, including the order as to costs of the leave has already been made and perfected months ago'* (para 7).

19. To the complaint that but for the existence of the Practice Direction, the appellant would have received the costs of the leave application, the trial judge responded that *'There may be a sense in which that is a valid point, but so what? The Practice Direction does exist and has produced extremely beneficial results in terms of improving efficiency in the list.'*¹ He then considered that the Practice Direction was superseded by the actual order made and was, thus, no longer relevant.

20. Concerning Mr. Coughlan's averment that the CSSO had complained about the piecemeal service of judicial review papers during discussions in the Court Service Users' Group, the trial judge set out, in some detail, (at para. 9) the position of the CSSO in this regard. He noted the rather ominous warning given in the letter of 7 October as to the consequences that would follow if the appellant pursued the application for the costs of the leave application. He was satisfied that the appellant's solicitors' town agents did not seem to have read the order and certainly did not comply with it. There had been no application made *'in the proper manner'* to amend the

¹ Emphasis in original.

order. The costs of the leave application had already been disposed of and the application before the High Court was ‘*totally misconceived*’.

21. Humphreys J., therefore, made an order that the proceedings be struck out and that the costs be awarded to the appellant to be taxed in default of agreement other than (a) the costs already disposed of in the order of 8 July 2019 and (b) the costs incurred after 8 October 2019. In respect of (b), having heard additional submissions, the trial judge made an order that those costs be awarded in favour of the respondent, to be taxed in default of agreement. He held that the two orders could be set off against each other. A stay was granted on the entire order as to costs, until the determination of the appeal herein.

Grounds of Appeal

22. The appellant contends that the trial judge erred and misdirected himself in law in a number of respects, including, by:

1. concluding that no particular injustice had been shown to the appellant in circumstances where, notwithstanding his success in bringing the application, most of his costs were denied because a one-day default in the service of the proceedings and where no prejudice had been caused to the respondent;
2. suggesting that the court’s discretion on costs could have been invoked on 8 July 2019 by applying to the court to vary the default terms of the Practice Direction notwithstanding that the circumstances which created the difficulty for the appellant only arose after the default order was made and only came to his attention a number of weeks later;
3. failing to take account the fact that no individualised assessment of the circumstances had preceded the ‘unless order’ and where the appellant had not previously defaulted; appearing

to conflate a statutory time limit with the time limit set out in the Practice Direction; failing to take account of the provisions of Order 99 of the Rules of the Superior Courts ('RSC') to the effect that 'costs follow the event'; punishing, effectively, the appellant for the default of '*some applicants*' who cause delays in the list by failing to serve papers '*until close to the nominated return date*'; and concluding that the respondent was prejudiced by a one working day delay in the service of these proceedings; and

4. holding that the issue was not about allowing a day's grace but was rather, about the fact that the leave order, including, the order as to costs of the leave application had already been made months ago; finding that the '*punchline*' was that the costs of the leave application had already been disposed of by the order of 8 July 2019; and (c) failing to acknowledge that he had a discretion to release the appellant from the consequences of the default or '*generic*' part of the order granting leave.

The Law

Statutory Provisions on Costs

23. When the High Court judgment in this matter was delivered, an award of costs was governed by the legal regime that operated under the former Order 99, r. 1 RSC. Order 99, r.1(1) provided that '*the costs of and incidental to every proceeding in the Superior Courts shall be in the discretion of those Courts respectively*'. Order 99, r. 1(3) RSC articulated the general principle that costs follow the event, unless the court otherwise directs. However, the legislative basis for awarding costs had been modified some weeks before the hearing with the enactment of the Legal

Services Regulation Act 2015 which came into force on 7 October 2019. Thereafter, a recast Order 99, took effect from 3 December 2019.²

Practice Direction HC 81

24. On 17 December 2018 the President of the High Court issued a Practice Direction in respect of the Asylum, Immigration, and Citizenship list. The Explanatory Note annexed to the Practice Direction states that: -

“The Practice Direction is intended to constitute general guidance, for the assistance of parties concerned, as to procedural steps or requirements that the court will normally expect. It does not preclude any individual applicant from seeking directions that any particular step or requirement should not apply in any given case, without prejudice to the overriding legal and professional duties of parties and legal representatives to the court.”

25. Paragraph 8(1)(b) of the Practice Direction provides as follows:

“(1) Where an order granting leave is made -

[...]

(b) unless the Court otherwise orders, the default terms of the order shall include provision that

(i). the applicant shall issue and serve the originating notice of motion within seven days of perfection of the order granting leave (in default of which any stay granted on giving leave shall lapse and the applicant’s costs of the leave application shall not be recoverable);

(ii). the applicant shall serve the respondent(s) with a copy of the statement of grounds, all affidavits and exhibits that were before the court at the leave stage

² Order 99 as amended by S.I. No. 584/2019 - Rules of the Superior Courts (Costs) 2019

and the applicant's written legal submissions, by close of business on the Friday of the week in which leave was granted (or such longer period as may be specified in the order), and in default of such service the applicant's costs of the leave application shall not be recoverable;

(iii). the originating notice of motion shall be returnable for the third Monday in Term after the granting of leave; and

(iv). the costs of the application shall be reserved provided that the stipulations of paragraphs (i) and (ii) of this sub-paragraph are complied with."

26. Where a party proposes to make an interim, interlocutory or procedural application in the Asylum, Immigration and Citizenship List, including, an application to extend time, then, pursuant to s. 9(1)(b) of the Practice Direction it *'shall not be necessary to serve a formal notice of motion in making such an application; save as to discovery in which case a notice of motion is required, or where the court in a particular case directs that a motion be brought.'*

Extension of Time Limits

27. Order 122, r. 7 RSC confers upon the court the power to extend or abridge time limits imposed by the Rules or fixed by court orders. It provides:

"Subject to any relevant provision of statute, the Court shall have power to enlarge or abridge the time appointed by these Rules, or fixed by any order enlarging time, for doing any act or taking any proceedings, upon such terms (if any) as the Court may direct, and any such enlargement may be ordered although the application for same is not made until after the expiration of the time appointed or allowed."

28. It is a matter of settled law that the court has jurisdiction to exercise its discretion to grant or refuse an extension of time to an 'unless' order, including, in circumstances where a party has

already failed to comply with time limits specified in such an order. In *Samuels v. Linzi Dresses Ltd* [1981] Q.B. 115, the defendants missed a deadline within which they were ordered to deliver particulars to the plaintiff. They were granted an extension of time and an order was made that unless the particulars were served by a specified date, their defence and counterclaim would be struck out. They delivered the particulars three days after the extended time for so doing had expired. The court, nevertheless, granted an extension of time. The plaintiff appealed and argued that the lower court had no jurisdiction to grant such an extension where the defendants had failed to comply with an 'unless order'. Such a failure, it was argued, meant that the action was, effectively, dead. The defendants resisted the appeal. Relying on Lord Denning's observations in *Reg. v Bloomsbury and Marylebone County Court Ex parte Villerwest Ltd.* [1976] 1 WLR 362, 366, they argued that the court always has the power 'to bring an action to life again'. The Court of Appeal considered the relevant authorities and found that the lower court had not erred in the exercise of its discretion. It confirmed the court's jurisdiction to extend the time, including, in circumstances where an 'unless order' has been made. It was, primarily, a question for the discretion of the judge. Roskill L.J. observed that the court should use this power '*cautiously and with due regard to the necessity for maintaining the principle that orders are made to be complied with*'.

29. In *Brennan v. Kelly* [1988] ILRM 306, McKenzie J. adopted and applied the reasoning in *Samuels* in this jurisdiction. He made an order extending time to enable the plaintiff to deliver particulars notwithstanding that the time limit specified in an earlier 'unless order' had been exceeded by almost three years. Referring to *Samuels*, the court in *Brennan*, held that it had jurisdiction to extend time, noting that the plaintiff's solicitors, and not the plaintiff himself, were to blame for the delay that had ensued. A critical factor in the court's decision was the

determination that no prejudice to the defendant would result from permitting the extension of time. It found that the balance of justice required making the order in the plaintiff's favour.

30. Carswell J. in *Hughes v. Hughes* [1990] N.I. 295 accepted the reasoning in *Samuels* but, on the facts of that case, chose not to extend a deadline in circumstances where the '*plaintiff's solicitors completely disregarded [the time limits set by the court] . . . and took no step to redress their default . . .*'. Where an applicant seeking an extension makes no attempt to explain the delay or provides no excuse for it, then the starting position for the court, according to Carswell J., is that the application should *prima facie* be refused. This presumption may be rebutted where the applicant can show that there are other factors in his favour or that the balance of prejudice makes it necessary, in the interests of justice, for an extension to be granted. It was the plaintiff's display of wanton indifference to the time constraints imposed by the court, that led Carswell J. in *Hughes* to exercise his discretion against granting an extension of time.

Costs and Discretion

31. As noted above, the former Order 99, r. 1(3) of the RSC articulated the general principle that costs follow the event, unless the court otherwise directs. This well-established principle that was confirmed by Clarke J. (as he then was) in *Veolia Water UK plc v. Fingal County Council (No. 2)* [2006] IEHC 240, 2007 2 I.R. 81 wherein he stated that: -

"Parties who are required to bring a case to court in order to secure their rights are, prima facie, entitled to the reasonable costs of maintaining the proceedings. Parties who successfully defend proceedings are, again prima facie, entitled to the costs to which they have been put in defending what, at the end of the day, the court has found to be unmeritorious proceedings."

32. The Supreme Court in *Dunne v. Minister for the Environment and Others* [2008] 2 I.R. 775 sketched the contours of when the court may exercise its discretion to depart from the general rule.

Murray C.J. observed that such an issue fell to be determined ‘*on a case by case basis*’. The decided cases indicate the nature of the factors which may be relevant to such an exercise. It is those factors, or some combination thereof, which determine the issue in the context of an individual case.

33. In *Cork County Council v. Shackleton and Others* [2011] 1 I.R. 443, Clarke J. (as he then was), while acknowledging the role of discretion in any analysis of costs, drew attention to the limitations placed upon a court when considering a departure from ‘*the ordinary rule*’. Judicial discretion must be ‘*exercised in a reasoned way*’ against the background of appropriate principles (at para. 12). Thus, in *Child and Family Agency v. O.A.* [2015] 2 I.R. 718, MacMenamin J., whilst confirming that costs are a discretionary matter, nevertheless, pointed out that a judge is not ‘*at large*’ when considering such an application and must exercise his or her discretion within jurisdictional criteria established by law. A trial judge is only entitled to depart from the general rule as to costs if satisfied that it is appropriate to do so.

34. More recently, this Court in *Chubb European Group SE v. The Health Insurance Authority* [2020] IECA 183, considered the effect of recent legislation and a recast Order 99 on the issue of judicial discretion and costs.³ Murray J. noted that while the updated legal framework is largely consistent with the principles of earlier legislation relating to costs, it no longer contains the earlier language that ‘*costs follow the event*’ but requires, rather, that a party be ‘*entirely successful*’ in order to be ‘*entitled*’ to costs.

Submissions

The Appellant

³ The Legal Services and Regulation Act 2015 and Order 99 RSC (Costs) Order 2019, S.I. 584/2019.

35. The appellant contends that the trial judge erred by concluding that he did not have jurisdiction to grant relief against the consequences of the appellant's failure to comply with time limits set out in the order of 8 July 2019 or otherwise. He had, erroneously, treated the matter as *res judicata* or 'in some way closed' because the order in question had been made and perfected 'months ago'. Humphreys J. had not considered the individual merits of the appellant's application and had failed 'to engage in the necessary case by case fact-specific exercise of judicial discretion in coming to the conclusion that the appellant should not recover the costs of the leave application'. These costs represented 'the lion's share' of the expenditure, as the proceedings had been compromised before delivery of a Statement of Opposition.

36. In making his decision, the trial judge had failed to take into account the legal principles established in *Samuels*, *Brennan*, and *Hughes*. Each case had involved applications brought by parties to grant an extension of time despite their failure to comply with an 'unless' order and, in each case, the courts had assumed jurisdiction and had made discretionary orders with careful attention to the balance of justice. While in *Samuels* and *Brennan*, the court granted relief to the party who had breached the terms of an 'unless' order, the court in *Hughes* had denied relief, in part, because of the plaintiff's solicitors' wilful disregard for the deadlines imposed by the court. The appellant submitted that while discretionary considerations could certainly bar the granting of relief, the failure of a party to comply with a time-limit, does not, in itself, prevent a court from engaging in a discretionary inquiry. The trial judge had thus erred in his failure to recognise the court's jurisdiction in this regard and to consider the appellant's application for an extension of time.

37. In oral submissions before this Court, counsel for the appellant submitted that there was no requirement to bring a formal application before the court. Paragraph 9(1)(b) of the Practice

Direction provides, expressly, that interim applications (apart from applications for discovery) may be brought, informally, before the court. That is, precisely, what had occurred in this case. She argued that it was clear from the High Court hearing that the applicant was, in fact, asking the trial judge to revisit the order of 8 July 2019 and to extend time, retrospectively. She submitted that legal submissions before the High Court had also dealt with such an application.

38. The appellant contended that, insofar as Humphreys J. did acknowledge the court's jurisdiction to vary an order his decision did not represent a proper or proportionate exercise of judicial discretion. The learned judge, it was claimed, had conflated statutory time limits with time-limits imposed by court order. This was evident in his observation that there will always be cases which '*fall just outside the line*' and that this '*is inherent in any time limit, unless or until the appellate courts determine that there can be no such thing as a fixed time limit*'. Neither the trial judge nor the respondent could point to any specific prejudice that had been suffered by the delivery of the post-leave documents just one working day after the deadline imposed by the order had expired. Further, the trial judge had failed to consider the lack of any wilful default on the part of the appellant. The '*genuine mix-up*' by the town agents, it was contended, should not become an insurmountable obstacle to a just and fair resolution. In suggesting that the town agents should be the appellant's 'target', Humphreys J. had failed to acknowledge the role of the courts' discretionary power to ensure that procedural issues do not, unnecessarily, become a bar to fairness in litigation.

39. It was submitted that the courts are not 'at large' when exercising discretionary powers in relation to costs (*Shackleton*). The normal rule is that costs follow the event. The court was referred to *Grimes v. Punchestown Developments Company Ltd* [2002] 4 I.R. 515 and *Fyffes Plc v. DCC Plc, S & L Investments Ltd, James Flavin and Lotus Green Ltd* [2006] IEHC 32 in support

of the proposition that “[t]he burden of displacing the general rule [on costs] rests with the party who asserts it should be displaced.” On this basis, the appellant submitted that, in this case, the respondent carries the burden of displacing the general rule. Whereas the trial judge believed ‘no particular injustice has been shown to the applicant’ depriving the applicant of all his leave costs was disproportionate having regard to the absence of any prejudice and to the limited extent of the default. The discretion vested in the court below had not been “exercised in a reasoned way against the background of having identified appropriate principles by reference to which the court should exercise the discretion concerned” as mandated by *Shackleton*.

The Respondent

40. The respondent submitted, at the outset, that any discussions between counsel as to what had transpired were not appropriate matters for submission or evidence as they were ‘without prejudice’. In any event, they were not relevant to the subject of this appeal. He supported the trial judge’s decision not to exercise jurisdiction over the appellant’s application for costs. Humphreys J. had, correctly, found that the issue of the costs of the leave application had already been determined in the order of 8 July. The principles advanced in *Shackleton*, *Dunne*, *Godsil*, and *Fyffes* were correct, but they were not relevant to the present case. An individualised assessment had not been needed because the appellant had not made an application to vary the order of 8 July. As the issue of costs had already been disposed of, the trial judge was foreclosed from any individual consideration of the particular factual matrix of this case.

41. The respondent argued that, in essence, the question to be determined was whether it was open to the trial judge make such a finding. The Practice Direction, as reflected in the order, had put the appellant on notice of the relevant deadline for delivery of documents. Relying on *Marcan*

Shipping (London) Limited v. Kefalas [2007] 1 WLR 1864 it was argued that the onus is on the person against whom the sanction operates to seek relief. It was open to the appellant on 8 July to make individualised submissions as to why the default provisions of the Practice Direction should not apply. No such submissions were made. It had also been open to the appellant to apply to vary the order, but he had not done so either on 8 July or thereafter. In failing to make submissions on the costs of the leave application on 8 July 2019, the appellant had acquiesced or, effectively, consented to that order being made in the terms indicated by the Practice Direction. Nor was there any appeal of the order. As the order had expressly directed that costs would not be recoverable unless service was effected in accordance with its terms, the costs of the leave application had not been reserved. The trial judge was, therefore, correct in finding that the issue had been disposed of. To the extent that the appellant's solicitors sought to place responsibility for the late service on the town agents, such a matter was not material as the latter were the agents of their principal.

42. The respondent sought to distinguish the present case from the authorities on which the appellant relied. First, the nature of the order made in this case was 'significantly different' from the orders made in *Samuels* or *Brennan* or *Hughes*. A refusal of the court to grant an extension of the 'unless' orders in those cases would have resulted in the termination of proceedings and the extinguishing of the litigants' opportunity to seek legal redress. By contrast, the only effect of the order of 8 July was that the costs of the application for leave were not reserved. The balance of rights and the justice of the situation were 'entirely different'. Even where an 'unless' order may be set aside, there are, invariably, stringent financial implications (costs penalties) imposed on the party to whom relief is granted. Moreover, the clear inference to be drawn from the correspondence in this case was that the appellant would not, personally, be affected by the loss of

the costs of the leave application and thus no severe injustice would be suffered by him as a result of the High Court judgment.

43. It was not necessary for the respondent to point to prejudice arising from the appellant's failure to comply with the direction of the Court. That said, it was asserted that there *would* be prejudice to the respondent if the order of 8 July 2019 was varied, because he would no longer have the specific costs protection contained in the order. Further, it was unnecessary for the respondent to establish wilful default on the part of the appellant in failing to observe the time limit. There was no requirement either on the trial judge or on the respondent to substantiate the view that granting relief in this case would undermine the Practice Direction.

44. The application before the High Court was not an application to set aside or to vary the order of 8 July and Humphreys J. had no discretion to award the costs of the leave application. At the hearing on 11 November, the only relief sought in prayer was an application for costs. Finally, the respondent submitted that the relief sought at paragraph 4(e) of the Notice of Appeal was inconsistent with the application that was made to the High Court.

Discussion

Did the trial judge have a discretion to vary the order?

45. There is no dispute that 12 July 2019 was specified, expressly, in the order of 8 July as the date by which the applicant should deliver the Statement of Grounds, affidavits and exhibits that were before the court at the leave stage. Nor is there any dispute that these documents were not served upon the respondent until 15 July 2019, that being the Monday thereafter (and the next working day).

46. It is agreed that no application to vary the terms of the order of 8 July was made, either at the time of its creation or immediately thereafter. All that said, it is clear that having regard to Order 122, r. 7 RSC and in the light of the applicable legal principles, the court has the power to ‘enlarge or abridge’ time fixed by any order. Moreover, any such enlargement may be ordered even if the application is made after ‘*the time appointed or allowed*’ has expired. The authorities relied upon by the appellant (*Samuels, Brennan, and Hughes*) provide ample support for the proposition that the court may exercise its discretionary jurisdiction when the interests of justice so require. The respondent seeks to distinguish those cases from this one by highlighting the qualitative difference, in terms of severity of outcome for the defaulting party, which a refusal to extend time would involve. It is true that more may have been at stake for the defaulting parties in those cases but such a distinction, without more, is insufficient to preclude the applicability of the general legal principles to the facts of the instant case.

47. The authorities are clear. The High Court in this case retained a discretion to extend the time limit set out in the order of 8 July even after that limit had expired. I, therefore, reject the respondent’s contention that Humphreys J. had no discretion either to vary the order or to award the costs of the leave application because the matter had already been ‘*disposed of*’ (see para. 40 above). The fact that the order had ‘*been made and perfected months ago*’ did not deprive the High Court of its power to revisit and vary that order should the interests of justice so require.

Was there an application to vary the terms of the order?

48. The next issue to be considered is whether, in fact, Humphreys J. had before him an application to vary the terms of or extend the time specified in the order of 8 July 2019 when he heard the matter on 11 November 2019. The respondent submits that the only application before

the High Court was an application in respect of costs and he points to the prayer for relief at the end of Mr Coughlan's Affidavit in support of his contention in this regard. The appellant, on the other hand, has argued that it was clear from the submissions to that court that what was, in fact, being sought by the applicant was a variation of the order of 8 July and, if necessary, an extension of the time prescribed therein.

49. The Explanatory Note of the Practice Direction provides that an individual applicant is not precluded from seeking directions that any particular step or requirement should not apply in any given case. It, thus, acknowledges, that the Court retains a significant latitude to depart from its provisions. It seems to me that an applicant seeking to extend, by one day, the time limits imposed by the default provisions would have little difficulty in coming within the broad latitude afforded by the Practice Direction.

50. In his judgment, the trial judge stated he would have been '*more than willing*' to entertain an application to vary the terms of the order but that no such application was made. If it had been so made, he said that it would have received '*individualised judicial consideration*'. It is true that there was no formal application to amend the order brought by way of Notice of Motion and grounded upon an Affidavit. However, I am satisfied that no formal application was required because the Practice Direction explicitly provides that it is not necessary '*to serve a formal notice of motion*' when making an interim or procedural application, such as, the one which the applicant in this case sought to move.

51. Moreover, whilst it is true that Mr Coughlan's prayer at the end of his Affidavit sought only the relief that the respondent pay the applicant the costs of the proceedings, it is evident from the contents of that Affidavit that the deponent was seeking to resolve the dispute that had arisen in respect of the leave costs. For this reason, I am also satisfied that an application to vary the original

order of 8 July may be inferred from the contents of Mr Coughlan's Affidavit's content and that such a request was implicit in his plea.

52. Thus, whilst the trial judge was of the view that the matter before him was not about whether he '*should now allow a day's grace*' or not, respectfully, I must disagree. In the light of the correspondence which had passed between the parties since the making of the order of 8 July, and having regard to the context in which the matter came before Humphreys J., namely, the inability of the parties to resolve the one outstanding issue of the order's default provision on costs, it seems to me that the question of whether that order could be varied by permitting a one day extension of the time limit specified therein was, in substance, the essence of the matter that was before the High Court on 11 November. In coming to this view, I am persuaded by the fact that, notwithstanding that such relief was not sought, formally, in the prayer, the substance of Mr Coughlan's Affidavit was concerned with it. Indeed, the whole purpose of swearing that Affidavit was to explain the context in which the one-day delay in delivering the documents had occurred. I am, therefore, satisfied that the application to amend the original order by extending the time specified therein was, in substance, the matter that was before the High Court judge.

What constituted a reasonable time?

53. The respondent's contention that the appellant was on notice of the Practice Direction and had the opportunity to apply to vary the order on 8 July but never attempted so to do is unavailing. Such an observation entails overlooking the facts of the case. Whereas the order was made on 8 July 2019, it is evident that the appellant's solicitors did not become aware of their town agents' error until the end of that month when a proposed settlement of the matter was in process (see para. 8 above). The trial judge focused on the agents' statement (exhibited in Mr Coughlan's Affidavit)

that they had not been aware that the papers had to be filed in a shorter period than that set out in s. 8B(I) of High Court 81 (see para. 17 above) but he failed to consider that statement in the context of what immediately followed it, namely, Ms McDonnell's account of discussions within the Court Services Users' Group pertaining to service of documents. Admittedly, the CSSO takes issue with that position but it must be observed that no sworn evidence was filed to controvert it nor was Mr Coughlan cross-examined on his Affidavit.

54. Mr Coughlan's letter of 30 July 2019, which is exhibited in his sworn testimony, indicates that he only became aware on 29 July 2019 that the respondent would be raising an issue in respect of the default in service of post-leave documents. Term ended the following day and the long vacation ensued. Throughout August, Mr Coughlan tried, unsuccessfully, to resolve the issue through correspondence. The matter was then listed 'for mention' early in the new term, on 7 October 2019, and adjourned for one week. In his letter to the CSSO of 11 October, Mr Coughlan highlighted the fact that his firm would be raising the issues before the Judge on the next date and '*asking for directions*' in relation to a costs hearing. On the adjourned date, 14 October 2019, the applicant was given a date the following month (11 November 2019) for hearing.

55. Given this time frame, it is difficult to see how any serious criticism could be levied against the appellant for not having sought to vary the order of 8 July any sooner than he did. Yet, it is precisely such criticism that underpins the trial judge's approach to the matter. He rejected the applicant's complaint that a generic order had been applied without individualised judicial consideration, stressing that he would have been '*more than willing*' to entertain and consider any application to vary the default terms of the order '*if it had been brought within a reasonable time*'. The problem is, however, that nowhere in his judgment does the trial judge give any consideration to, let alone indicate, what, in this case, would have constituted a reasonable time for the bringing

of such an application. In his view, *‘the issue was simply ignored until the case was over’*. Respectfully, I disagree. Such criticism does not withstand scrutiny. Both the chronology of events and Mr Coughlan’s correspondence demonstrate that the issue was far from ignored. On the contrary, active steps were taken to try to resolve it. In the circumstances that prevailed and in the light of the chronology set out above, it is difficult to identify any delay on the part of the appellant in attempting to resolve the issue once it had been brought to his solicitors’ attention.

Prejudice

56. When dealing with applications to extend time limits, a court, generally, will consider what, if any, prejudice might accrue to the non-defaulting party should the relief sought be granted. In *Brennan*, McKenzie J., for example, reasoned as follows (at p. 3): -

“If I felt that the defendant would be unreasonably prejudiced in defending the action now the balance of justice would be in his favour. However, I believe that the defendant would not be so prejudiced, and by granting the relief which the plaintiff seeks, I am not being unfair to the defendant so as to prevent him from prosecuting his defence.”

During the hearing of this appeal, the Court put a question to counsel for the respondent and asked what objection, in *principle*, could have been made, had an application to extend time been brought the day or the week following the marginally late delivery of the post-leave documents, or indeed, had it been made just before the beginning of the long vacation. Whilst, understandably, counsel indicated that she would have had to have taken her client’s instructions at the time, it is difficult to conceive of any *principled* objection which the respondent could have raised had an application to extend time been made in the immediate aftermath of the minor delay. This is not a case in which, for example, the respondent was put to any further expense by the delay. Nor, indeed, did the intervening time period created by the long vacation have any demonstrable effect in terms of

visiting prejudice upon the respondent. Nothing had happened between the delivery of the documents and the hearing of the application that had placed the respondent in any position other than the one in which he would have been, had the documents been served one day earlier or an application to vary the order brought sooner.

57. Given the very minimal default on the part of the appellant in the instant case and in the absence of any possible principled objection to an application to extend time, it seems to me, having regard to the harsh consequences which flowed for the appellant, that the trial judge was incorrect in declining to deal with the application that was in substance before him. Justice required that the application to extend time ought to have been considered, on its merits. If, having done so, the trial judge was of the view that the application ought still to be refused then a reasoned decision for so concluding, based on the facts of the case, would have been required.

58. There is a notable absence in the judgment of Humphreys J. of any reference to the *actual* prejudice that would be suffered by the respondent should the application to extend time have been granted. Whereas the learned judge stated that *'it isn't correct to say that there is no prejudice to the respondent'* he did not identify any specific prejudice to the respondent and instead observed that the prejudice arises from the fact that the incentive (for other applicants) to serve papers on time *'will be removed or diluted'*. With respect to the learned trial judge, such reasoning, from the particular to the general, is unsound.

59. The trial judge explained the role of the Practice Direction in mitigating intentional delays. In his view, any given list *'can be a delicate ecosystem'*. Indulgence *'can quickly snowball into creating backlogs affecting other litigants'* who are *'voiceless in any individual application'*. Important as maintaining an ordered list may be, there was no evidence before the trial judge that granting, retrospectively, a one-day extension of time in this case, might have disrupted the delicate

balance of the asylum list's 'ecosystem'. Moreover, the 'mischief' which the Practice Direction sought to redress (the intentional last-minute delivery of documents necessitating applications for adjournments) simply did not arise on the facts of this case. The respondent's readiness to meet the case on 29 July was not prejudiced or impaired in any way by the fact that the documents had been delivered as a bundle on Monday, 15 July instead of some of them being delivered, separately, on Friday, 12 July. As the delay had no impact whatsoever on this case, there was no reason to assume that remedying the effect of the delay by granting the relief sought, would have had any 'knock-on' effect on other cases. Counsel for the respondent pointed to the prospect of prejudice resulting from losing the protection of a costs liability. However, this point bears no relation to any prejudice caused by reason of the one-day delay in the delivery of documents.

The nature of the default and its implications

60. Whereas in *Hughes*, the solicitors for the plaintiff had completely disregarded the requisite time limits and had made no attempt to rectify their error, the appellant's solicitors, in this case, displayed no such behaviour approaching wilful disregard for time limits when failing to comply with the Practice Direction. Moreover, and contrary to the trial judge's finding that nothing was done, once the error had been discovered, they sought to address it with the respondent, immediately, and they raised it with the trial court as soon as it was possible to do so. In *Hughes*, the behaviour of the plaintiff's solicitors in flouting the court's strictures, weighed heavily in the court's analysis and ultimate decision not to grant an extension. While not dispositive of the outcome in an application to extend time, the absence of any wilful or reckless disregard for time limits on the part of the appellant's solicitors was another factor that ought to have been considered in a considered judicial assessment of the matter.

61. Without any impact analysis, the trial judge found that ‘*no particular injustice*’ has been shown to the appellant. I cannot agree. Nor am I inclined to attribute any significant weight to the respondent’s observation that it could be inferred from Mr Coughlan’s letter of 11 October 2019 that the appellant himself would not absorb the costs of the leave application. Mr Coughlan had pointed out that the appellant was of limited means and that he had a valid claim which had been resolved in his favour. There was no legal aid scheme to support the appellant in seeking justice. In this situation, in the normal course of events his solicitors (who, effectively, acted on a contingency basis), would have been entitled to the benefit of the general rule that costs follow the event, unless for a principled reason, the court determined otherwise. Practitioners who represent clients who do not have the financial means to pay for legal services but who are no less entitled to pursue the vindication of their rights ought not to be burdened, disproportionately, with having to bear the costs of inadvertent and minor errors that give rise to no prejudice. I am persuaded that the trial judge ought not to have pointed to the town agents as a potential (though uncertain) ‘target’ but ought to have engaged in a substantive analysis of whether the deprivation suffered by the appellant by reason of the one-day delay was proportionate having regard to all the circumstances of the case.

The interests of justice

62. In approaching the matter in the manner in which he did, the trial judge, for the most part, considered himself deprived of any discretion to vary or amend the order of 8 July. To the extent that he did engage in a discretionary assessment, he failed to do so in a manner that was appropriate or proportionate. The facts of the application before him clearly called for an individualised assessment based on a reasoned and principled analysis. Had such an assessment been conducted

in this case, it would have enabled the court to consider and weigh all relevant factors—including, the question of whether any prejudice would arise if the relief sought had been granted, the prospective harm suffered by the party seeking relief, the behaviour of the parties concerned and all other relevant circumstances of the case—in order to determine whether justice required the court to vary the default order so as to allow the application of the general rule on costs to be applied in this case.

63. The Practice Direction itself, on which so much reliance was placed by the trial judge, contemplates and provides for the non-application of its terms where the interests of justice so require. To find that an individualised judicial assessment of the merits of the application was required in this case cannot be construed as undermining or devaluing the importance of the Practice Direction, generally. Nor, in my view, would an individualised assessment here have created the kind of ‘slippage’ which the trial judge appears to have feared. ‘Slippage’, by its nature, does not flow from considered individualised assessments. Extending a time limit, for good and rational reasons, in this specific case would not have had ‘*a knock-on effect on all litigants*’ nor was there any reason to conclude that it would have resulted in other applicants seeking to protract proceedings, unnecessarily. The present case involved a narrowly circumscribed set of facts involving an inadvertent rather than wilful failure to comply with the terms of the Practice Direction and no impact on any other parties would have flowed from a variation of the order of 8 July.

64. Had the trial judge conducted a principled analysis of the application to extend time, the appellant would have had the benefit of an assessment of the arguments for and against the application. Had such an assessment been conducted, the trial judge would have weighed the fact that (i) the delay in question was minimal; (ii) the cause thereof was inadvertent; (iii) immediate

efforts were made to resolve the error, once known; (iv) the loss of the leave costs was, relatively, substantial; and (v) the potential prejudice to the respondent was non-existent—against the fact that (i) there had been a delay in complying with the order; (ii) the default terms of the Practice Direction thus applied; and, arguably, (iii) that there was not, strictly speaking, a ‘formal’ application before the court. The point is that had such a balancing exercise been conducted by way of individualised judicial consideration of the merits of the case, the trial judge would have been in a position to focus on where the balance of *justice* was to be found.

Decision

65. This position is clear as to the correct approach to be adopted when this Court reviews, on appeal, a discretionary decision of the High Court. It was summarised in *Collins v. Minister for Justice* [2015] IECA 27, with reference (at para. 79) to what MacMenamin J. stated in *Lismore Builders Ltd (in Receivership) v. Bank of Ireland Finance Ltd & Ors* [2013] IESC 6, namely: -

“that while the Court of Appeal (or, as the case may be, the Supreme Court) will pay great weight to the views of the trial judge, the ultimate decision is one for the appellate court, untrammelled by any a priori rule that would restrict the scope of that appeal by permitting that court to interfere with the decision of the High Court only in those cases where an error of principle was disclosed.”

66. The critical point in this appeal is that the trial judge fell into error, firstly, in failing to exercise his discretion by approaching the issue before him as if it were *res judicata*. Thereafter, to the extent that, in his judgment, he touched upon discretionary issues, he did not do so in a manner that was fair or proportionate. He dismissed, without analysis, the issue of ‘injustice’ to the appellant (see para. 61) and he concluded, by a flawed reasoning process, that prejudice had been suffered by the respondent (see para. 58 above).

67. The appellant may be regarded as having been ‘entirely successful’ in his claim because the institution of proceedings led to the respondent’s undertaking which rendered the proceedings moot. Were it not for the default provisions of the Practice Direction, he would have been entitled to his costs and the burden of displacing that rule would have rested on the respondent. The facts of this case establish that an inadvertent error led to a minimal delay in the delivery of the documents. That delay in no way impacted upon the respondent nor did it cause the slightest prejudice thereto. ‘But for’ the Practice Direction, it seems to me that there is nothing to show that the general rule should have been displaced in this case.

68. Nevertheless, the Practice Direction is there and its default provisions were reflected in the order of 8 July. There was nothing unusual or, indeed, unlawful about this. However, once an issue of potential injustice arose by reason of its application in this individual case, the appellant was entitled to bring the matter before the court and to have it considered and assessed in order to establish what the interests of justice required. The appellant did not delay in bringing the matter before the court on the first available opportunity. He was entitled to raise that matter, informally, with the trial judge. Once that had occurred, the learned judge, in my view, ought to have dealt with the matter on its merits. Instead, he rejected the application as ‘*totally misconceived*’. He criticised the appellant’s failure to apply to vary the order within a reasonable time without addressing his mind to what might have constituted a reasonable time in this case. He was obliged to consider and determine the merits of the informal but no less valid application that was before him. That, in my view, is what the interests of justice required.

69. For the reasons set out above, I would allow the appeal.

70. In terms of the orders that should follow, I have considered whether this matter should be remitted to the High Court for a further consideration on the merits. For several reasons, I have

come to the view that, having regard to the specific circumstances presented herein, an order remitting the matter would not be the appropriate order to make in this case. First, the issue which this Court has been asked to hear—whilst not decided on its merits—was, nevertheless, addressed, in part, by the trial judge. Whereas his fundamental error in law was approaching the matter as if it were *res judicata*, he, nevertheless, expressed himself, in his final judgment, on several matters of merit in relation to the issue that was before him. Second, the law makes it clear that this Court has jurisdiction to determine the issue, where it has been raised and argued in the court below. In *McGowan v. The Labour Court* [2013] 3 I.R. 718, the Supreme Court (at para. 17) accepted that, where the interests of justice so require, an appellate court may determine an issue that was fully argued before but which was not the subject of a determination by the High Court. Order 86A, r.2(1) RSC also expressly recognises that this Court ‘*may exercise or perform all the powers and duties of the court below*’ and ‘*may give any judgment and make any order which ought to have been given or made and may make any further or other order as the case requires*’. Third, the question before the Court does not depend on the resolution of any issue of fact but is, fundamentally, a question of law. Moreover, I am satisfied that both parties have already had an opportunity to argue their case, comprehensively, before the High Court. They both made submissions on the merits to the court below and they both enjoyed the same opportunity to do so before this Court. Thus, it cannot be said that a refusal to remit, in this instance, would deprive the unsuccessful party of its right to an appeal on the merits. Finally, having regard to the relatively minor mistake that gave rise to the significant dispute on costs, it seems to me that a remittal of proceedings would, inevitably, give rise to an even further proliferation of the overall costs of these proceedings. It does not appear to me to be either in the interests of the parties or, indeed, the public interest, to generate such an escalation in costs.

71. I would, therefore, allow the appeal without remitting the matter to the trial judge. I would vacate the order of Humphreys J., to the extent that he declined to award to the appellant (a) the costs of the order of 8 July 2019 and awarded to the respondent (b) the costs incurred after 8 October 2019. I would make an order awarding the appellant the costs of the leave application together with all High Court costs incurred after 8 October 2019.

72. Finally, I would make a presumptive order that the costs of this appeal be awarded to the appellant. If the respondent wishes to contend for an alternative form of order, he will have liberty to apply to the Court of Appeal Office within 14 days for a brief supplemental hearing on the issue of costs. If such hearing is requested and results in an order in the terms already proposed by the court, the respondent may be liable for the additional costs of such hearing. In default of receipt of such application, the presumptive order will take effect.

As this judgment is being delivered remotely, Noonan and Collins JJ. have indicated their agreement with the reasoning and conclusions reached in respect of this appeal.