APPROVED
NO REDACTION NEEDED

THE COURT OF APPEAL

CIVIL

Appeal Number: 2023/312

Neutral Citation: [2024] IECA 255

Pilkington J.

Allen J.

Butler J.

BETWEEN/

JOHN COULSTON

PLAINTIFF/RESPONDENT

- AND –

PATRICK DOYLE

DEFENDANT/APPELLANT

JUDGMENT of Mr. Justice Allen delivered on the 29th day of October, 2024

1. On 26th July, 2024 ([2024] IECA 195) I delivered a judgment on the substance of this appeal, with which Pilkington and Butler JJ. agreed. For the reasons then given, the conclusion was that the appeal would be dismissed and the judgment and order of the High Court affirmed.

2. At para. 82, the Court expressed the provisional view that the respondent should have an order for his costs of the appeal but in case the appellant should wish to contend for any other costs order, afforded him the opportunity to file and serve a short written submission. The ten day time limit in the text of the judgment did not take account of the fact that the long vacation was imminent, and the Court of its own motion extended the time for any submission in relation to costs to 10th September, 2024.

3. On 10th September, 2024, the appellant's solicitors posted a letter to the Court of Appeal Office, which arrived on the following day. The respondent's solicitors did not object that the submission was filed late, or that it was not copied to them until 20th September, 2024.

4. The entirety of the appellant's submission in relation to the allocation of costs was that the respondent's costs of the appeal should be limited to 75% on the basis that while the respondent had successfully opposed the appeal, the Court – it was said – had rejected some of his arguments (paras. 54, 55 and 65) and had not dealt with the appellant's third ground of appeal, concluding (para. 77) that this was a matter for another day. It was not suggested that the respondent's arguments which were not accepted increased the time required to deal with the appeal or otherwise added to the costs.

5. In *Veolia Water UK Ltd. v Fingal County Council* [2006] IEHC 240 Clarke J. (as he then was) considered the principles to be applied in allocating costs in complex litigation. This was not complex litigation. It was an appeal against a judgment and order of the High Court to vacate a *lis pendens* and restraining the appellant from registering any further *lis pendens* in relation to the same property.

6. In *Veolia* Clarke J. emphasised that the overriding starting position was that costs should follow the event. He said, at para. 2.8:-

"2.8 However, as indicated above, it seems to me that the starting point of any consideration of costs has to be to identify what the 'event' is and, thereby, identify the winning party. In the ordinary way, if the moving party required to bring either the proceedings as a whole (where the costs of the litigation as a whole are under consideration) or a particular interlocutory application (where those costs are involved) in order to secure a substantive or procedural entitlement, which could not be obtained without the hearing concerned, then that party will be regarded as having succeeded even if not successful on every point. The proceedings, or the relevant application as the case may be, will have been justified by the result. Where the winning party has not succeeded on all issues which were argued before the court then it seems to me that, ordinarily, the court should consider whether it is reasonable to assume that the costs of the parties in pursuing the set of issues before the court were increased by virtue of the successful party having raised additional issues upon which it was not successful."

7. The respondent, citing s. 169 of the Legal Services Regulation Act, 2015, submits that he was entirely successful in resisting the appeal and accordingly is presumptively entitled to an order for costs. That is correct.

8. The respondent submits that the onus is on the appellant to clearly identify the basis on which he contends that the Court should depart from the ordinary rule. That is correct.

9. At para. 54 of the substantive judgment, I summarised the appellant's submission on the appeal as to the jurisdiction of the High Court to vacate a *lis pendens*. For the reasons set out at paras. 55 to 62, it was transparently misconceived. Accordingly, it was unnecessary to contemplate whether the submission was an entirely new argument or a refinement of the argument made in the High Court. More to the point for present purposes, it is not suggested that the respondent's objection that the point had not been argued below added to the costs.

If the respondent's objection did not add to the costs, the fact that it was not accepted cannot be a reason for reducing the costs.

10. Similarly, I had no hesitation in rejecting, at para. 65, the hypothesis advanced by the respondent – without a scintilla of evidence – that he might have been granted a power of sale by the mortgagee which he did not have under the mortgage. It did not add to the costs.

11. The appellant's third ground of appeal was that the High Court judge erred in finding that the appellant had been validly appointed as receiver over the appellant's property. It is now suggested that this was not dealt with in the substantive judgment. But it was: at paras. 71 to 77. As I identified at para. 76, the appellant was seeking to anticipate objections and arguments which he apprehended would or might be advanced in contemplated further proceedings. It was that which I found, at para. 77, was a matter for another day. The issue on the appeal was whether the judge had erred in deciding what he had been asked to decide and this Court decided that he had not.

12. The gravamen of *Veolia* is that the court may depart from the ordinary rule where the overall successful party – specifically in lengthy and complex commercial litigation – has raised and pursued issues which have added significantly to the costs but on which it has been unsuccessful. It is not authority for the proposition that the court should parse the arguments advanced in a run of the mill appeal and limit the overall successful party on a fractional basis to the costs of the issues on which it has succeeded.

13. This was an appeal which progressed in the ordinary way and was heard in half a day. If, for the sake of argument, the oral hearing might have been a little shorter if the respondent had not pursued all the grounds which it pursued, there is no suggestion that the overall costs would have been any less.

14. I am not persuaded to depart from my indicative view that the wholly successful respondent is entitled to an order for its costs.

15. The appellant also asks for a stay on *"any"* final orders pending an application for leave to appeal to the Supreme Court *"in particular in relation to the inherent jurisdiction point and whether the receiver has locus standi."* The respondent submits that the appellant has failed to identify any arguable ground.

16. I am satisfied that the respondent is correct. The genesis of the appeal was an application to the High Court by a receiver who did not have a power of sale to vacate a *lis pendens* by which he asserted he was affected in his ability to sell the property. However, by the time the application was heard, the respondent's case was that he was a person affected by the *lis pendens* otherwise – additionally – than in relation to the sale. The High Court found that the respondent fulfilled the requirements of s. 123 of the Land and Conveyancing Law Reform Act, 2009 and made an order on the basis of the clear and uncontested statutory jurisdiction.

17. Moreover, as noted in the substantive judgment, there was no appeal against the findings of the High Court that the registration of the *lis pendens* was an abuse of process. As the respondent points out, the High Court refused an application for a stay pending the appeal to this Court and there was no appeal against that refusal. The object and effect of a stay on the substantive order of this Court would be to facilitate an abuse of process and to impose a stay on an order which the respondent has been free to execute for the last year.

18. I can discern no arguable ground of appeal. The Court could not possibly countenance facilitating a continued abuse of process.

19. As to a stay on the order for costs, there is no suggestion that the respondent's bill might be drawn and adjudicated upon before any leave application will be determined.

20. There will be an order dismissing the appeal and affirming the judgment of the High Court and an order that the respondent recover from the appellant his costs of the appeal,

including, for the avoidance of doubt, the written submission in relation to the costs of the appeal, to be adjudicated in default of agreement.

21. As this judgment is being delivered electronically Pilkington and Butler JJ. have authorised me to say that they agree with it and the orders proposed.