[2021] IEHC 112

THE HIGH COURT

[2020 No. 3036 P.]

BETWEEN

EDMUND ANTHONY O'NEILL

PLAINTIFF

AND

THE COMMISSIONER OF AN GARDA SÍOCHÁNA, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

JUDGMENT of Mr. Justice Allen delivered on the 19th day of February, 2021

1. On 11th September, 2020 I gave judgment on a motion on behalf of the plaintiff, a Garda Superintendent who was suspended on pay, for a number of reliefs but principally for an interlocutory injunction requiring the Garda Commissioner to lift his suspension. *O'Neill v. Commissioner of An Garda Síochána* [2020] IEHC 448.

2. For the reasons set out, I refused all reliefs. As the judgment was delivered electronically, the parties made their submissions in relation to costs in writing. The defendants submit that the plaintiff should be ordered to pay their costs. The plaintiff submits that the costs should be reserved to the trial judge, alternatively that there should be a stay on any order for costs pending the final disposal of the action.

3. Counsel for the plaintiff rely on what is asserted to be "*… a surviving general rule, (post the 2008 amendment of Order 99), that the costs of an interlocutory injunction be reserved to the trial judge…*". There is no such rule. Nor was there ever such a rule. It is true that for many years the practice was that the costs of many interlocutory applications, including applications for interlocutory injunctions, would be reserved to the trial judge but as Peart J. long ago observed those days are long gone.

4. The dawn of the modern enlightenment was the Rules of the Superior Courts (Commercial Proceedings), 2004 which inserted O. 63A into the Rules of the Superior Courts. O. 63A, r. 30 provided that in the case of commercial proceedings:-

> *"Upon the determination of any interlocutory application by a Judge, the Judge shall make an award of costs save where it is not possible justly to adjudicate upon liability for costs on the basis of the interlocutory application."*

5. The policy underlying O. 63A, r. 30 of discouraging the bringing of unnecessary or inappropriate interlocutory applications or the defending of necessary or appropriate applications was extended to all cases by the Rules of the Superior Courts (Costs) 2008 which introduced a new sub-rule 4A into O. 99, r. 1 which provided :-

> *"(4A) The High Court or the Supreme Court, upon determining any interlocutory application, shall make an award of costs save where it is not possible justly to adjudicate upon liability for costs on the basis of the interlocutory application."*

6. Following the coming into force of ss. 168 and 169 of the Legal Services Regulation Act, 2015 on 7th October, 2019, a recast O. 99 was introduced by the Rules of the Superior

Courts (Costs), 2019, which came into effect on 3rd December, 2019. Order 99, r. 2(3) now provides:-

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

7. In *ACC Bank plc v. Hanrahan* [2014] 1 I.R. 1 the Supreme Court was immediately concerned with the correct approach to the allocation of the costs of a motion for summary judgment and in doing so the court considered the rationale for O. 99, r. 1(4A) generally. Clarke J. (as he then was) said:-

> *"3.2 The reason for the introduction of that rule seems to me to be clear. While, historically, there had been a tendency to reserve the costs of most motions to the trial judge, a view has been taken that this can lead to injustice for, at least in very many cases, a judge who has heard a motion is in a better position than the trial judge to consider the justice of where the costs of that motion should lie. This will especially be so in cases where the trial court will not have to revisit the merits or otherwise of the precise issue that was raised by motion. For example, if there is a dispute over discovery then that dispute will have been resolved before the case comes to trial. Of course, discovered documents may well be relied on at the trial and, indeed, in some cases may turn out to be decisive. But, at least in the vast majority of cases, the fact that the documents, with the benefit of hindsight, have turned out to be either very useful or of very little use, will not add very much, if anything, to an assessment of whether the positions adopted by the parties on a discovery motion were reasonable or appropriate. A judge hearing a discovery motion will, therefore, in almost all cases, be in a better position than the trial judge to decide where the costs of such a motion should lie. Like considerations apply to many other cases such as motions for further and better particulars.*
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> *3.3 It is, of course, the case that such motions are very much 'events' in themselves. There are issues as to the appropriate scope of discovery or particulars. They are decided once and for all on the motion. The merits of the results of those motions are not, in the vast majority of cases, in any way revisited at the trial.*
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> *3.4 Slightly different considerations seem to me to apply in cases where, at least to a material extent, some of the issues which are before the Court at an interlocutory stage arise or are likely to arise again at the trial in at least some form. As I noted in Allied Irish Banks v. Diamond [2011] IEHC 505, and as approved by Laffoy J. in Tekenable Limited v. Morrissey & ors [2012] IEHC 505, somewhat different considerations may apply in cases where the interlocutory application will, to use language which I used in Diamond and which Laffoy J. cited in Tekenable 'turn on aspects of the merits of the case which are based on the facts'".*

8. *Heffernan v. Hibernia College Unlimited Company* [2020] IECA 121 was a case in which the Court of Appeal was concerned with an appeal against an interlocutory costs order made in the High Court under the old regime but the terms of what was O. 99, r. 1(4A) were identical to the present O. 99, r. 2(3). Murray J. said:-

> *29. The relevant principles are clear. At the time of the hearing before the High Court, O.99, r.1(3) RSC provided the general rule that costs should follow the event. The Court was given the power to direct otherwise for special cause, to be mentioned in the order. Order 99 Rule 1(4A) RSC provided that the Court, upon determining any interlocutory application, should make an award of costs save where it was not possible justly to adjudicate upon liability for costs on the basis of the interlocutory application. That provision reflected both the preference articulated in the case law pre-dating the introduction of O.99, r.1(4A) RSC that those bringing and defending interlocutory applications should face a costs risk in the event that the Court determines that the stance they adopted was wrong (Allied Irish Banks v. Diamond (Unreported, High Court, 7 November 2011) at p. 6 of the transcript of the ex tempore judgment of Clarke J.), and the fact that there will be cases in which it is not possible to determine where the proper burden of the costs of an interlocutory application should lie without the benefit of discovery, a complete marshalling by the parties of relevant evidence and in some cases an oral hearing (Dubcap Ltd v. Microcorp Ltd (Ex tempore Unreported, Supreme Court, 9 December 1997 at p.4)."*

9. In support of the application that the plaintiff should pay the costs of the motion, counsel for the defendants point first to the fact that the application was unsuccessful in its entirety, and then *seriatim* to the identification, analysis and ruling on the many issues raised on behalf of the plaintiff. The court, it is said, found that the plaintiff had not made out a fair issue to be tried, still less a strong case that was likely to succeed, that his suspension was invalid. It is submitted that the court can adjudicate upon the liability for costs without risk of injustice.

10. In support of the argument that the costs of the motion should be reserved, counsel for the plaintiff rely on a wide range of *dicta* in relation to the function of the court on an interlocutory motion, specifically on a motion for an interlocutory injunction. The court, it is said, is not finally deciding any factual or legal aspect of the controversy. At the trial, the evidence may be different and more ample and the law debated at greater length. Rather against their position, I should have thought, counsel emphasise that the purpose of interlocutory relief is to keep matters in statu quo until the hearing of the action. This, it is said, is a case in which matters may come to light by way of discovery or new evidence not available to the plaintiff at the time of hearing of the interlocutory application which may bring about a result which now seems improbable. The fundamental premise of the defendants' application for costs, it is said, is that the plaintiff failed, variously, to make out a fair case or a strong case. This, it is submitted, puts this case squarely into the category in which the court cannot adjudicate upon the question of costs without a risk of injustice. While the court may have examined the facts presented, it has not examined and has not determined the facts of the case. The

defendants, it is said, cannot assert that the evidence as presented on the motion will be the same as that which will be presented at trial. It cannot, it is said, be asserted that a review of all the relevant evidence will nevertheless lead to an adverse outcome for the plaintiff.

11. Although the disposal of an interlocutory application may "*turn on aspects of the merits of the case which are based on the facts*" it does not necessarily follow that the trial judge, who will be in a position to resolve the disputed issues of fact will be in a better position to decide where the costs of an interlocutory motion should lie than the judge who heard the motion.

12. Part of the reason for the introduction of the costs regime which is now to be found in O. 99, r. 2(3) was to discourage parties from bringing unreasonable applications or from resisting reasonable ones. The outcome of a motion is undoubtedly a factor which must be taken into consideration in adjudicating the liability for the costs, but it is not the only consideration. As Clarke J. said in *ACC Bank plc v. Hanrahan* it may not necessarily be just that a plaintiff who secures an injunction on the basis of contested facts should have an order for costs even in a case where the likely outcome of the motion might have been fairly clear. Conversely, it may not necessarily be just that a plaintiff who fails to secure an interlocutory injunction because the facts as he has asserted them to be are contested by the defendant should have to pay the costs. There may be a balance to be struck. In a case, such as this, in which the plaintiff has failed to meet the required evidential threshold for the making of the orders sought, it may be said that the application ought not to have been made. On the other hand, it may transpire at trial that the facts as asserted on the motion were correct.

13. In striking the balance in this case I found the judgments of my colleagues in two cases to be particularly helpful.

14. The first is that of McDonald J. in Paddy Burke(Builders) Limited v. Tullyvaraga Management Company Limited [2020] IEHC 199. That was quite a complicated case in which a management company claimed that the holder of a charge over part of a development was bound by agreements later made between it and the mortgagor, and had secured an interlocutory injunction in the Circuit Court. For the reasons given in his judgment on the substantive appeal ([2020] IEHC 170) McDonald J. found that the management company's case was based on mere assertion and that it had not established even a serious issue to be tried and he allowed the appeal and discharged the injunction. When he came to deal with the costs, however, McDonald J. emphasised that he had come to the conclusion which he had on the basis of the evidence then before the court and that a different picture might possibly emerge at the trial. He was satisfied that there were no circumstances in which it might be just that the management company should recover its costs of the interlocutory application or appeal but that an award of costs to the appellants might give rise to a real risk of injustice. McDonald J. found that if the management company were to succeed at trial, it would mean that the action should never have been defended. He eliminated the risk of injustice so identified

by making the appellants' costs of the application to the Circuit Court and of the appeal costs in the cause, so that their entitlement to those costs would depend on their success in defending the action. Because the management company had failed to meet the threshold test for the granting of the injunction, he made a declaration that irrespective of the outcome of the action the management company would not be entitled to its costs of the injunction application to the Circuit Court or of the appeal.

15. The rationale of *Paddy Burke(Builders) Limited v. Tullyvaraga Management Company Limited* was followed by Keane J. in O'Donovan v. Over-C Technology Limited [2020] IEHC 327. That was an employment case in which the court found that the plaintiff had made out a sufficiently strong case to justify the making of an interlocutory order for the payment of his salary. ([2020] IEHC 291) When he came to deal with the costs, Keane J. held that the plaintiff's application for an employment injunction had been successful and that *prima facie* there was nothing to warrant a departure from the normal principle that the costs should follow the event. However, in the same way that McDonald J. in *Paddy Burke(Builders) Limited* had recognised that a plaintiff who had failed to secure an interlocutory injunction might prevail at trial, Keane J. in *O'Donovan* recognised that a plaintiff who had secured an interlocutory injunction might fail at trial. Keane J. said that the substance of the plaintiff's case as to the nature and scope of the terms of his contract of employment and whether they had been breached were matters that would be revisited at the trial, at which point a different picture might – or might not – emerge. Keane J. found that the justice of the case would be met by making an order in the same terms as that which had been made by McDonald J. in In *Paddy Burke(Builders) Limited v. Tullyvaraga Management Company Limited* [2020] IEHC 199, namely that the plaintiff's, but not the defendants', costs of the interlocutory motion should be costs in the cause.

16. In O'Donovan v. Over-C Technology *Limited [2021] IECA 37 the Court of Appeal took a different view* of the substance of the plaintiff's case and allowed the defendant's appeal. In those circumstances the court did not come to a cross-appeal by the plaintiff against the costs order made by the High Court but if nothing else the judgment on the substantive appeal goes to show that what may be thought to be a strong case likely to succeed may later unravel.

17. To explain the conclusion which I have come to as to how the costs of the motion should be dealt with it is not necessary that I should rehearse in detail my analysis of the application, but it is, I think, useful, to recall the broad outline of the case made.

18. By the time I heard the plaintiff's motion on 25th and 26th June, 2020 the plaintiff had, on one view, been suspended on pay for thirteen months. His suspension, however, had not been legally continuous but had been effected by five successive orders made under the Garda Síochána (Discipline) Regulations, 2007 each for about three months at a time. The stated grounds for first four suspension orders were the same, namely, the plaintiff's alleged disclosure of confidential information in relation to a criminal investigation and his alleged presence in a public house in the company of another member of An Garda

Síochána who had allegedly ingested a substance suspected of being a controlled drug. Those four orders covered the period from 16th May, 2019 to 1st May, 2020. During that time the plaintiff became the subject of a further criminal and disciplinary investigation into alleged inappropriate interference with the administration and processing of fixed charge penalty notices issued in relation to road traffic offences and related District Court summonses. The fifth suspension order which was made on 27th April, 2020 and which took effect from 1st May, 2020 relied on the ongoing criminal and disciplinary investigations into those matters, as well as the ongoing criminal investigation into the alleged disclosure of confidential information and the disciplinary inquiry into the incident in Hurler's Bar, upon which, by then, a Board of Inquiry had been convened.

19. The affidavit of the plaintiff on which his motion for interlocutory relief was grounded was sworn by him on 27th April, 2020. If it was not sworn before his solicitor was notified of the further suspension order made on the same day, it had plainly been drafted before then. Moreover, one of the reliefs sought by the plenary summons issued on 28th April, 2020 was an injunction restraining the continuation or renewal of the suspension beyond 1st May, 2020, which was the date on which the fourth suspension order had been due to expire. The suspension order of 27th April, 2020 was put before the court by an affidavit of the plaintiff's solicitor, but it is clear that no thought was given to what effect it might have had on the nature of the application or its prospects of success.

20. In my judgment of 11th September, 2020 I analysed closely the arguments made on behalf of the plaintiff. In very broad terms the argument was that the criminal investigation into the alleged disclosure of confidential information – of which the plaintiff was adamant that he was innocent – had gone on too long; that there was no substance to the alleged incident in Hurler's Bar – the investigation of the plaintiff's involvement in which, it was said, could not have survived the decision of the Director of Public Prosecutions not to prosecute the member suspected of having ingested cocaine; and – by reference to a report called the O'Mahoney Report on the exercise of Garda discretion in dealing with fixed charge penalty notices which was written on 28th March, 2013 – that there could have been no substance to the investigation into the alleged interference with fixed charge penalty notices and summonses.

21. Contrary to the arguments made on behalf of the plaintiff, I found that he had not established a strong case that was likely to succeed that the investigation of the alleged disclosure of confidential information had gone on too long and that he had not established such a case that his suspension was not justified by reference to the other grounds. I did, however, note that the criminal investigation into the alleged disclosure of information had been going on for a very long time, and was still ongoing long after the subject of the underlying investigation by the Garda National Bureau of Criminal Investigation had been charged and returned for trial.

22. In contemplating whether the picture that may emerge at trial may be different to that apparent on an interlocutory motion, there is a difference between a case where there is a conflict of evidence and a case in which the evidential ground has not been laid for the

order sought. The plaintiff's case was that the criminal investigation into the alleged disclosure of information had gone on for too long and ought long since to have been concluded. The evidence on the motion was that the investigation had gone on for a long time but absent evidence as to what had been done, or even, precisely, what the plaintiff was suspected of having done, it was not possible to assess whether it had gone on too long. On the other hand, the defendants' answer to the complaint was to say that the plaintiff had not laid the ground for it rather than – by contrast with the incident in Hurler's Bar and the investigation into the fixed penalty notices – to explain in any detail what that investigation had entailed. I can readily imagine that such an investigation might be delicate to the point that the authorities might not be prepared to divulge the details but that was not the position taken by the defendants.

23. While, as I said in my judgment on the substantive application, I believe that the plaintiff's suspension might have been justified by reference to the investigation into the incident in Hurler's Bar alone, the fact is that the suspensions until 1st May, 2020 were based on both the investigation into the disclosure of information and the incident in Hurler's Bar. If the criminal investigation had been concluded earlier, and the outcome had been what the plaintiff is adamant that it must have been, I think that the plaintiff's suspension would have been reviewed. In that event it would have been a matter for the Commissioner to decide whether a continuation of the suspension was warranted by reference to the disciplinary inquiry alone. Similarly, while I found that the plaintiff had not made out an arguable case that his suspension was not justifiable by reference to the criminal and disciplinary investigations into the fixed penalty notices, the fact is that those investigations, although ongoing for some time, were not relied on as grounds for the plaintiff's suspension until 27th April, 2020 and then as additional grounds. While I am resolute in my conclusion that the plaintiff on his interlocutory motion failed to lay the ground for the injunctions which he sought, I am persuaded – with some misgivings – that this is a case in which, if it ever comes to trial, a different picture may emerge.

24. I find that it is not impossible to contemplate that the plaintiff may by discovery or new evidence find support for what for the moment is a mere assertion that he ought to have been exonerated of suspicion of disclosing confidential information and that had he been so exonerated his suspension might not have been continued or renewed.

25. I am satisfied that this is a case in which I can justly adjudicate upon the liability for costs on the basis of the interlocutory application. If the case comes to trial, the trial judge will decide the substantive case on the basis of the evidence adduced at trial. He or she ought not be burdened with reviewing the evidence and arguments made on the interlocutory application.

26. The interlocutory application was founded upon mere assertion and sought to upset the status quo. I am satisfied that it would not be just that the defendants should ever be exposed to paying the plaintiff's costs. This is not a case in which the duration of the criminal investigation will necessarily be determinative, but it is the plaintiff's central complaint and on which a clear picture may emerge at trial. I cannot rule out the

possibility – however unlikely it may appear at this stage – that the action might succeed. In that event it would not be just that the plaintiff would be fixed with the costs of the interlocutory motion which was refused on the basis that he had not, at that stage, made out his case.

27. I have concluded that the policy of discouraging unmeritorious interlocutory applications can be achieved by making no order as to the plaintiff's costs of the motion and that any risk of injustice to the plaintiff can be avoided by making the defendants' costs of the motion costs in the cause.