APPROVED **[2021] IEHC 344**

THE HIGH COURT

2013 No. 13117 P.

BETWEEN

JIM STAFFORD
(AS STATUTORY RECEIVER OF HOLLIOAKE LIMITED (IN RECEIVERSHIP))

PLAINTIFF

AND

PETER RICE
SHEILA RICE
GREGORY RICE
ANGELA RICE
MARK RICE

DEFENDANTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 26 May 2021

INTRODUCTION

1. This supplemental judgment addresses (i) the incidence of costs in respect of an application to amend pleadings, and (ii) the question of whether case management directions should be stayed pending a possible appeal to the Court of Appeal. The judgment on the amendment application was delivered on 30 April 2021 and bears the neutral citation [2021] IEHC 235 ("***the principal judgment***").

(1). COSTS

2. In the principal judgment, I offered the provisional view that the Plaintiff should be entitled to recover two-thirds of his costs of the motion to amend. The Plaintiff had been entirely successful in the amendment application. The Defendants' consent to certain amendments came too late to produce any meaningful saving in costs, and the Defendants' objections to the balance of the proposed amendments have been rejected. The costs of both sides were undoubtedly increased as a result of these objections.

3. The proposed discount of one-third had been intended to reflect the fact that the necessity for the amendment application arose out of shortcomings in the initial pleadings, and an application to court would have been necessary even had the Defendants not objected to the proposed amendments.

4. The parties were invited to file short written legal submissions if they wished to contend for a different form of costs order. The Defendants filed submissions on 13 May 2021, and seek to recover all of the costs associated with the amendment application. Reliance is placed on *Porterridge Trading Ltd v. First Active plc* [2008] IEHC 42 as authority for the proposition that the respondent to an application to amend should normally recover their costs. This is because an application to court would be necessary even in the absence of any opposition. This is subject to an exception where a party makes unreasonable objection to an amendment which necessitates a separate, significant hearing with its own attendant additional costs.

5. It is submitted that the fact that the Defendants objected to some of the amendments sought did not significantly increase the costs incurred and did not result in a significant, separate hearing. Attention is drawn to the fact that the hearing finished within half a day, and that no written legal submissions were filed.

6. It is further submitted that the delay between the issuance of the motion and the ultimate hearing are attributable to the conduct of the Plaintiff. Attention is drawn to the fact that the draft amendments went through three iterations, and that the motion had been issued prior to the reconstitution of the proceedings to take account of the death of one of the defendants, and the ultimate settlement of the proceedings as against his estate and trustee in bankruptcy.

7. The Plaintiffs delivered written submissions in reply on 14 May 2021. It is submitted that significant costs were incurred by the Defendants' decision to oppose the amendment application. Reliance is placed on the judgment of the High Court (Allen J.) in *Care Prime Holdings FC Ltd v. Howth Estate Company (No. 2)* [2020] IEHC 329 ("***Care Prime Holdings***").

8. For the reasons which follow, I have concluded that the appropriate order is that the Plaintiff should recover two-thirds of the costs of the amendment application as against the Defendants.

9. The modern approach to costs is to consider the conduct of proceedings to ascertain whether it has led to additional and unnecessary costs being incurred. This approach is illustrated by the following passage from *Farrell v. Governor and Company of Bank of Ireland* [2012] IESC 42; [2013] 2 I.L.R.M. 183 (cited with approval in *Care Prime Holdings*).

> "Furthermore the courts have become more prepared, in recent times, not least because of changes in the Rules of Court, to look at individual elements of the conduct of proceedings to ascertain whether parties have acted in such a way as has, irrespective of the ultimate outcome of the case, led to additional and unnecessary costs being incurred. Apart from the undoubted justice of that approach same has the added advantage of discouraging parties from bringing unnecessary and unmeritorious applications, resisting appropriate applications or adding unnecessarily and inappropriately to the complexity (and thus the cost) of proceedings by adding a multiplicity of claims or a multiplicity of defences."

10. This approach is now given statutory expression in the provisions of Part 11 of the Legal Services Regulation Act 2015 ("***LSRA 2015***"). The principal determinant of costs is success in the proceedings. This applies also to success in interlocutory applications, save where it is not possible justly to adjudicate upon liability for costs on the basis of the interlocutory application: see Order 99, rule 2(3) of the Rules of the Superior Courts.

11. The court does, of course, have discretion to depart from the default position. The factors to which the court is to have regard in the exercise of its discretion are to be found at section 169 of the LSRA 2015. The principal considerations are the particular nature and circumstances of the case, and the conduct of the proceedings by the parties. Relevantly, the court is to have regard *inter alia* to whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings.

12. It should be explained that the concept of reasonableness in this context means more than simply that the party pursued an issue in good faith (*MV Lady Madga* [2021] IECA 51). Something more is required. It might, for example, have been reasonable for a party to pursue an issue in circumstances where the law on the point had not been clear. It will also be relevant to consider whether the pursuit of the issue on which the party was unsuccessful had any meaningful effect on the length of the hearing or entailed the parties incurring additional costs.

13. I turn now to apply these principles to the circumstances of the present case. The law on the amendment of pleadings is clear. The Defendants' opposition to the amendment application was unjustified, and predicated on an overly narrow reading of the judgment in *Smyth v. Tunney* [2009] IESC 5; [2009] 3 I.R. 322. The fact that the Defendants opposed the amendment application had the consequence that a motion which could have—and should have—been dealt with on a consent basis on a Monday motion day had, instead, to be assigned a specific hearing date.

14. The costs of the half-day hearing will have been a multiple of those which would have been incurred had the amendment application been dealt with as a "short" motion. Such a "short" motion would normally be dealt with by junior counsel alone, and the brief fee allowed on adjudication under Part 10 of the LSRA is likely to be no more than €500 or €750. By contrast, the brief fee allowable on a contested half-day hearing is likely to be in the range of €2,000 to €3,000. A similar ratio is likely to apply to the solicitors' fees.

15. The figure of two-thirds represents a fair approximation of the balance remaining once the Defendants' costs of a notional "short" motion are set-off against the level of costs recoverable in respect of a half-day hearing. If anything, it is generous to the Defendants.

16. This approach of netting-off costs is broadly consistent with that adopted in *Care Prime Holdings.* The moving party in that case was allowed seventy per cent of its costs of the amendment application. Allen J. held that the normal rule that the respondent to an amendment application is entitled to its costs is displaced where the motion was vigorously opposed and was transferred from the Monday list into the list to fix dates and assigned a half day for hearing. The fact that, in contrast to the case before Allen J., no written submissions were filed on the amendment application before me does not affect the principle enunciated. Rather, it is something which will reduce the amount of costs recoverable on adjudication before the Legal Costs Adjudicator.

17. Finally, it should be explained that the Defendants have queried whether Part 11 of the LSRA 2015 has *retrospective* effect. The provisions were commenced on 7 October 2019, that is, a number of months after the motion to amend the pleadings had first issued on 13 August 2019. Importantly, the new provisions were in force in advance of the first return date and prior to any affidavit having been filed by the Defendants. By the time the amendment application ultimately came on for hearing on 22 April 2021, the provisions had been in force for some eighteen months. Most, if not all, of the costs

incurred will relate to work carried out subsequent to the new provisions having been commenced.

18. Having raised this query, however, the Defendants, in their written legal submissions, suggest that "there is nothing in the new legislative provisions" which disturbs the pre-2019 principles governing the costs of an application to amend pleadings. The written submissions appear to proceed on the pragmatic assumption that the LSRA 2015 does apply. Certainly, the court has not been addressed on any of the case law in respect of retrospectivity and costs rules, such as *Klohn*, Case-167/17, EU:C:2018:833.

19. In circumstances where the question of retrospective effect has not been fully argued before me, and where it appears to be accepted that it would not affect the outcome of the costs application in this case, I make no finding on the question.

(2). STAY ON CASE MANAGEMENT DIRECTIONS

20. The Plaintiff's solicitors have put forward a timetable for the exchange of pleadings, with a view to bringing these long running proceedings on for hearing. In response, the Defendants' solicitors do not object to the proposed timetable, but insist that all directions should be stayed pending a possible appeal to the Court of Appeal against the decision to grant leave to amend the pleadings. Put otherwise, it is contended that the directions should be stayed for twenty-eight days, and, in the event an appeal is filed within that time, should be further stayed pending the determination of the appeal.

21. For the reasons which follow, I propose to make the directions sought and will not place a stay on same.

22. The considerations relevant to the grant of a stay pending an appeal have very recently been considered by the Supreme Court in *Krikke v. Barranafaddock Sustainability Electricity Ltd* [2020] IESC 42. As explained in those judgments, a risk of injustice will

often arise in the case of an appeal because of the unavoidable time which must elapse between the determination of the High Court and an appellate hearing and decision. In the event that the order made on the stay application is *different* to the order made on the outcome of the appeal proper, then one of the parties may have suffered injustice in the interim. This risk can be reduced, but cannot always be eliminated. One approach is to seek to align the decision on a stay application, so far as possible, with the *likely* outcome of the appeal.

23. One of the factors to be taken into consideration in deciding whether or not to impose a stay is the strength of any appeal. In the present case, the grounds for appealing the principal judgment are weak. The principal judgment applied well-established principles governing the amendment of pleadings to the particular circumstances of this case. The Defendants' opposition to the amendment application was predicated on an overly narrow reading of the judgment in *Smyth v. Tunney* [2009] IESC 5; [2009] 3 I.R. 322. The Defendants' position is irreconcilable with the more recent authority of *Moorehouse v. Governor of Wheatfield Prison* [2015] IESC 21.

24. Given that the prospects of the Defendants' succeeding in an appeal are slight, the balance of justice lies in ensuring that progress is made in readying this long running litigation for trial. These proceedings have been in existence for more than eight years now and it is in the interests of both sides that they be brought on for hearing. The directions sought will simply bring the case to the stage of motions for discovery. This will not cause any prejudice to the Defendants. If it transpires that the nature and extent of the discovery sought would be materially different depending on whether or not the amendments have been properly allowed, then the question of a stay may be revisited on the adjourned date. It is in neither side's interest that the proceedings become becalmed yet again.

CONCLUSION AND FORM OF ORDER

25. The Plaintiff is to recover two-thirds of the costs of the amendment application as against the Defendants. The Plaintiff is also to recover the costs of the "costs" application, i.e. the costs of the written legal submissions of 14 May 2021 and the hearing on 18 May 2021. Separately, the Defendants are entitled to the additional costs incurred in their having to file an amended Defence. The costs associated with the drafting of an amended Defence would not have been incurred "but for" the fact that the Plaintiff's case had not been fully pleaded from the outset.

26. All such costs are to be adjudicated, i.e. measured, in default of agreement by the Office of the Chief Legal Costs Adjudicator under Part 10 of the LSRA 2015. A stay is placed on the execution of the costs orders pending the determination of the proceedings.

27. The following directions are given in respect of the exchange of pleadings and discovery. This timetable has been modified from that proposed so as to take account of the August holiday period.

16/06/2021	Amended Summons and Statement of Claim to be delivered
30/06/2021	Amended Defence to be delivered
14/07/2021	Reply, if any, to be delivered
28/07/2021	Requests for voluntary discovery to be sent
01/09/2021	Replies to requests for voluntary discovery to be sent
24/09/2021	Motions for discovery, if any, to be issued and made returnable before Simons J. on 4 October 2021

28. An updated set of papers is to be filed in the List Room by the Plaintiff's solicitor on or before 29 September 2021. The case will be listed before me for further case management on Monday, 4 October 2021. The parties have liberty to apply in the interim.

Appearances

Joe Jeffers for the Plaintiff instructed by Hayes Solicitors (Dublin)
Roughan Banim, SC and Elizabeth Gormley for the Defendants instructed by O'Hagan Ward & Co

Approved