THE HIGH COURT

[2021] IEHC 99

[2013 / 1925 P]

BETWEEN

STEPHANIE MOLONEY

PLAINTIFF

AND

CASHEL TAVERNS LIMITED (IN VOLUNTARY LIQUIDATION)

AND

LIBERTY INSURANCE DAC

DEFENDANTS

Ruling of Mr. Justice Heslin delivered on the 11th day of February 2021

1. This short ruling should be read in conjunction with the judgement given by me, on 10 December 2020.

2. For the reasons set out in the said judgment, I decided that the relevant insurance company, being the second named Defendant, was entitled to repudiate liability in respect of the relevant insurance policy. I was satisfied that the Second Named Defendant had validly repudiated liability and that it had undoubtedly discharged the burden of proof in that regard. Thus, no moneys were, or are, payable on foot of the relevant policy of insurance and the Plaintiff has no entitlement to recover from the Second Named Defendant. I was obliged to dismiss the Plaintiff's claim against the Second Named Defendant for the reasons detailed.

3. I have carefully considered the written submissions which have since been provided on behalf of the Plaintiff, in circumstances where the parties did not reach agreement on the issue of costs and where the Second Named Defendant submits that *"...as the second named defendant has been "entirely successful" in its defence of this claim, in accordance with the provisions of the Legal Services Regulation Act , 2015, costs should follow the event and we are instructed to seek an order for costs to include reserved costs, the costs of making discovery and of legal submissions."*

4. The general rule is, of course, that "costs follow the event" and I am satisfied that the burden rests on the Plaintiff, being the unsuccessful party, to demonstrate why the general rule should not be followed in this case. As the Supreme Court (McKechnie J.) made clear in *Godsil v Ireland* [2015] IESC 103, (at para. 23):

> *"23. The general rule is that costs follow the event unless the court otherwise orders: O. 99, r. 1(3) and (4) of the Rules of the Superior Courts ("RSC"). This applies to both the original action and to appeals to this Court (Grimes v. Punchestown Developments Co. Ltd & Anor [2002] 4 I.R. 515 ("Grimes") and S.P.U.C. v. Coogan & Ors (No.2) [1990] 1 I.R. 273). Although acknowledged as being discretionary, a court which is minded to dis-apply this rule can only do so on a reasoned basis, clearly explained, and one rationally connected to the facts of the case to include the conduct of the participants: in effect, the discretion so vested is not at large but must be exercised judicially (Dunne v. The Minister for the Environment, Heritage and Local Government & Ors [2008] 2 I.R. 775 at 783-784) ("Dunne"). The*

"overarching test" in this regard, as described by Laffoy J. in Fyffes plc v. DCC plc & Ors [2009] 2 I.R. 417 ("Fyffes") at p. 679, is justice related. It is only when justice demands, should the general rule be departed from. On all occasions when such is asserted the onus is on the party who so claims."

5. Later in the same judgment , Mr Justice McKechnie stated (at para.52):

"Costs Follow the Event:

52. The overriding start point on any question of contested costs is that the general principle applies that namely, costs follow the event. All of the other rules, practises and approaches are supplementary to this principle and are designed to further its application or to meet situations where such application is difficult, complex or indeed even impossible.

6. In *Veolia Water UK plc -v- Fingal County Council* [2006] IEHC 240, Clarke J (as he then was) stated (at 2.5):

"...the overriding starting position should remain that costs should follow the event. 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. Similarly it seems to me that the courts generally (and the Commercial Court in particular) should be prepared to deal with the costs of contested interlocutory applications on the basis of an analysis of whether there were proper grounds for bringing, on the one hand, or resisting, on the other hand, the relevant application."

7. It is fair to say that the Second Named Defendant has been entirely successful, the event being the dismissal of the Plaintiff's case.

8. Section 169 (1) of the Legal Services Regulation Act, 2015 ("the 2015 Act") provides as follows:-

"169(1) A party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings, unless the court orders otherwise, having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties, including—

(a) conduct before and during the proceedings

(b) whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings,

(c) the manner in which the parties conducted all or any part of their cases,

(d) *whether a successful party exaggerated his or her claim,*

(e) *whether a party made a payment into court and the date of that payment,*

(f) *whether a party made an offer to settle the matter the subject of the proceedings, and if so, the date, terms and circumstances of that offer, and*

(g) *where the parties were invited by the court to settle the claim (whether by mediation or otherwise) and the court considers that one or more than one of the parties was or were unreasonable in refusing to engage in the settlement discussions or in mediation.*

9. On behalf of the Plaintiff it is submitted that the "*conduct*" of the Plaintiff should be "*given due recognition by the Court not making any Order as to costs against the Plaintiff".* Regarding the conduct relied upon in this regard, reference is made to the fact that discovery in the case came to over a thousand pages and it submitted that *"it was agreed, on behalf of the Plaintiff, that the Second Named Defendant did not need to prove a single document in evidence",*

10. It is certainly the case that the parties, between them, agreed at the commencement of the trial that documents could be admitted without formal proof. This contributed to the efficient running of the trial and was something for which the Court expressed its gratitude to both parties. It does not follow, however, that an agreement reached between the parties at the start of a trial which ensured that unnecessary time was not wasted means that the party which is entirely successful at the trial should be deprived of their entitlement to costs. This would be to create a manifest injustice.

11. Unsurprisingly, the Plaintiff has cited no authority in support of the foregoing submission. Insofar as the Plaintiff relies on *Dardis v Poplovaka* [2017] IEHC 249 and *McEvoy -v- Meath County Council* [2003] IEHC 31, the foregoing authorities concern the question of penalising a litigant's negative conduct by way of an appropriate costs order and neither case offers any support for the submission made. What the Plaintiff characterises as the "*reward or recognition*" justly due to the Plaintiff for approaching the trial of the dispute *"in the most efficient and cost-effective method*" runs contrary to fundamental principles of fairness and justice as it is, in reality, to ask the Court to penalise the successful party. It can also be said that the approach taken to the admissibility, without formal proof, of documents, has resulted in a tangible benefit for *both* parties, the Plaintiff included. This is because the Plaintiff would be facing, but for the very sensible approach agreed at the start of the trial, a potentially much larger liability in respect of costs, had the trial been avoidably and unnecessarily longer, due to each of the many relevant documents having to be proved formally by the relevant witnesses.

12. It was also argued on behalf of the Plaintiff that she confined her case to a single substantive issue and this justified not having a liability for the Second Named Defendant’s costs. Furthermore, it was submitted that the proceedings dealt with a “*novel*” and substantive point of law which will be of benefit in future litigation concerning

the interpretation and application of Section 62 of the Civil Liability Act, 1961. The fact that the Plaintiff pursued the single substantive issue which she wished to pursue does not justify the penalisation of the successful party. I am also satisfied that the case which I decided was not one which concerned any novel point of law. Nor was this a case which hinged on the interpretation of Section 62 of the 1961 Act, despite the submissions as to costs furnished by the Plaintiff, to that effect. There was no dispute as to the proper interpretation of Section 61 of the 1961 Act. This was not truly "*a test case",* despite the Plaintiff's submissions. Rather, the case turned on its particular facts and at the heart of the dispute was whether, having regard to the specific wording of a specific policy of Insurance and the particular facts of the case, the Second Named Defendant was entitled to refuse cover.

13. It was also submitted that the judgment of this Court will be of particular value to the Second Named Defendant. This is a submission I do not accept, in circumstances where so much hinged on the specific facts of this particular case. I am entirely satisfied that it is not a valid basis to penalise the successful party, in circumstances where the Plaintiff's case – although made with vigour and skill - was, for the reasons explained in detail in this Court's judgment of 10 December 2020, entirely unsuccessful, a decision which flowed from the evidence before the Court as examined in great detail in the said judgment.

14. The fact that the Plaintiff sustained injury and obtained a Decree against the First Named Defendant (which played no part in the trial) does not, it seems to me, justify a departure from the general rule which would be to penalise the Second Named Defendant which was entirely successful. Nor do I believe that a submission on behalf of the Plaintiff based on *"the consideration of access to justice*" justifies the penalisation of the successful party to the proceedings which the Plaintiff chose to bring and which the Second Named Defendant defended successfully.

15. In submissions as to costs, the Plaintiff also seeks to rely on certain correspondence, including that of 12 October 2020, as sent by the Second Named Defendant the day before the hearing commenced and headed "*Without Prejudice Save As to Costs*". The Plaintiff's submissions place particular reliance on the contents of same including the following extracts: "*In a time where all citizens have been asked to restrict their movements for Public Health reasons, it is irresponsible to insist on proceeding with this action which is pointless litigation*" *and "Senior Counsel has advised our client that it should seek their full costs not only as against your client but also as against your firm, pursuant to Order 99, Rule 7".* In the said correspondence, the Second Named Defendant committed to bearing its own costs if the case was withdrawn by 2pm.

16. With regard to the foregoing, it is plain that the Plaintiff decided *not* to withdraw the case by the relevant deadline or at any point. Nor is it suggested that if that correspondence had been sent earlier, the Plaintiff would have agreed to withdraw her proceedings. Furthermore, it is not suggested in the Plaintiff's submissions or in any of the correspondence which is referred to in those submissions that the Plaintiff was anxious,

on 12 October 2020, to consider the proposal to withdraw her case, but regarded the 2pm deadline as being too short to enable proper consideration. The fact is that the Plaintiff, as she was perfectly entitled to, chose to bring a case and chose not to withdraw it. Had she done so on 12 October 2020, it appears that she would not have had to face any liability for the Second Named Defendant's costs. This was not the choice she made, however, and following a fully-contested hearing, the Plaintiff has been wholly unsuccessful. It might also be said that the Plaintiff did not need to be written to in order for the Plaintiff to give consideration to withdrawing her case. That was an option which was, at all material times, open to her to consider and to explore.

17. On behalf of the Plaintiff it is also submitted that the correspondence of 12 October 2020 impugned the professional integrity of the Plaintiff's solicitors and was "*both entirely unjustified and unacceptable".* I do not regard the contents of the 12 October 2020 correspondence as impugning the professional reputation of the Plaintiff's solicitors. This is not, however, an issue I need to decide because any determination of the issue, either way, does not alter what justice requires in terms of an order for costs. At this juncture, it seems appropriate to emphasise that the cases of both parties were prepared and presented with obvious professionalism and skill and that is a testament to the relevant instructing solicitors on both sides, as well as to Junior and Senior Counsel. More relevant for the purposes of this costs ruling is that there is no application made to this Court for an order pursuant to Order 99, Rule 7. Nor, in my view, does the fact or contents of the 12 October 2020 correspondence justify any departure from the general rule that costs follow the event.

18. It is also submitted that the contents of the 12 October 2020 correspondence *"greatly heightened the conflict between the parties*" and "*also served to be utterly non-conducive to the conduct of the case in a temperate manner during the course of the hearing on the 13th/14th of October last.*" The foregoing is a submission I do not accept not least because, as well as articulating their positions with great skill and obvious commitment to their respective clients, both Senior Counsel conducted the case before me with courtesy and professionalism. As is often the case, for very understandable reasons the trial included certain robust exchanges but the respective positions adopted were clarified and, taken in the round, it would not be fair to characterise the conduct of the trial as "intemperate". Furthermore, it is entirely obvious from the pleadings that, regardless of the 12 October 2020 correspondence, there was already a significant issue between the parties and one in respect of which their positions were diametrically opposed and which was set down for trial as the only available means of dealing with the dispute. The parties' positions were conflicting prior to an irrespective of the 12 October 2020 correspondence.

19. For the Plaintiff, it is submitted that there was "*no attempt by the Second Named Defendant to settle or otherwise compromise the proceedings*". Even if I were to disregard entirely the correspondence of 12 October 2020 (and it does not seem to me that I should, given that it provided an option to the Plaintiff to avoid liability for the Second Named Defendant's costs, albeit a very short "window" to avail of that option),

the foregoing submission is not one that can avail the Plaintiff, so as to deprive the successful Defendant of its costs. In my view, the fact that the Second Named Defendant objected to the Plaintiff's claim and chose to defend it fully rather than compromising in advance of a trial is no justification for the Second Named Defendant to be penalised on the question of costs, given that the stance adopted by the Second Named Defendant in opposing the Plaintiff's claim has been found to be entirely justified, as is clear from the contents of this Court's judgment dismissing the Plaintiff's claim.

20. The Plaintiff's reliance on *Higgins v Irish Aviation Authority* [2020] IECA 277 (a case where a "*Calderbank*" letter, sent two weeks prior to an appeal and which was not accompanied by an offer to pay costs up to that date, was described by the Court of Appeal (Murray J.) as being *"less than effective*") does not provide a basis for departing, in the present case, from the general rule that costs should follow the event. It is also important, to bear in mind what Mr. Justice Murray said in the same case (at para. 10) namely: *"If a party is 'entirely successful' all of the costs follow unless the Court exercises its discretion to direct otherwise having regard to the factors enumerated in s.169(1)".*

21. In light of the foregoing legal principles and legislative provisions it is clear that, where a party is successful, they will be entitled to an award of costs unless there is a reason why justice requires that costs should not be awarded in their favour. The appropriate questions to be asked are (1) Has either party to the proceedings been '*entirely successful'* in the case, this being the phrase used in s.169(1)? (2) If so, is there any reason why, having regard to the matters specified in s.169(1)(a) – (g), all of the costs should not be ordered in favour of that party? The answer to the first question is "*yes*". In the present case, the Second Named Defendant has been entirely successful. The answer to the second question is "*no*" and that is an answer which is given after very careful account has been taken by the Court of all relevant factors, including the contents of the Plaintiff's written submissions as to costs.

22. Having taken all relevant factors into account and having regard to the legal principles and legislative provisions, I am satisfied that there is no basis which would justify a departure from the general rule. The appropriate order to make is for an Order for costs in favour of the Second Named Defendant, to include reserved costs, the costs of making discovery and of legal submissions, with such costs to be adjudicated in default of agreement, in the normal way.