APPROVED **[2024] IEHC 434**

THE HIGH COURT

2022 606 P

BETWEEN

LYNDSEY FARRELL

PLAINTIFF

AND

RAS MEDICAL LTD
(TRADING AS AURALIA CLINIC)
AHMED RAMZI SALMAN
SHADAB IMTIYAZ AHMAD

DEFENDANTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 24 July 2024

INTRODUCTION

1. This ruling determines the incidence of the legal costs of a motion seeking to set aside a default judgment. The motion was ultimately successful for the reasons set out in a reserved judgment delivered on 24 June 2024, *Farrell v. RAS Medical Ltd* [2024] IEHC 369 ("*the principal judgment*").

DISCUSSION

2. The principles governing the allocation of legal costs are set out at Part 11 of the Legal Services Regulation Act 2015 and Order 99 of the Rules of the Superior Courts (as recast in 2019).

3. The default position is that costs follow the event, i.e. the successful party will normally be entitled to recover its costs as against the unsuccessful party. Insofar as the costs of substantive proceedings are concerned, this general principle is stated at Section 169 of the Legal Services Regulation Act 2015. The position in relation to a pre-trial or interlocutory motion, such as that the subject-matter of this costs ruling, is governed by Order 99, rule 3 which provides, in relevant part, that the High Court, in considering the awarding of the costs of any step in any proceedings, shall have regard to the matters set out in Section 169(1) of the above Act where applicable. Order 99, rule 3 further provides that the High Court is obliged, upon determining any interlocutory application, to 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. The type of circumstances in which it might not be possible to adjudicate on costs are discussed in *ACC Bank plc v. Hanrahan* [2014] IESC 40, [2014] 1 I.R. 1 (at paragraphs 8 to 11 of the reported judgment). Where, as in the present case, the issues arising on the pre-trial motion are self-contained and will not have to be revisited at the trial of the action, it is appropriate for the motion judge to determine the incidence of costs.

4. A motion to set aside a default judgment typically gives rise to special considerations in respect of costs. A defendant, who has been successful in the motion, may nevertheless be ordered to pay the other side's costs. This is

because the resolution of a motion to set aside a default judgment requires the court to weigh the balance of justice. This will necessitate the court looking beyond the formal outcome of the motion when determining the allocation of costs. There may have been some culpability on the part of the defendant in allowing the default judgment to be entered in the first instance and this may need to be reflected in the costs order. Alternatively, a court may consider that the prejudice caused to a plaintiff by losing the benefit of the default judgment should be ameliorated by allowing them to recover the costs of the motion. In two recent High Court judgments, *De Souza v. Liffey Meats (Cavan)* [2023] IEHC 402 (Ferriter J.) and *Costern v. Fenton* [2023] IEHC 552 (O'Donnell J.), the successful defendant was directed to pay the costs of the motion.

5. It does not follow, however, that the moving party in an application to set aside a default judgment will inevitably be required to pay the costs of the motion. It all depends on the context. The statutory criteria pertaining to the allocation of costs include, relevantly, the conduct of the proceedings by the parties, and whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings. It is necessary, therefore, to consider whether it was reasonable for a plaintiff to resist an application to set aside a default judgment. This is especially so where such resistance has had the consequence that the legal costs have been significantly increased. This will occur where, for example, the fact that the set aside application is being opposed has necessitated the motion being escalated from a short hearing, suitable for disposal in a Monday list, to a specially fixed hearing. (See, by analogy, *Stafford v. Rice* [2021] IEHC 344). Where it is apparent from the grounding

affidavit that the motion to set aside the default judgment should be allowed, then the plaintiff would be well advised not to oppose the motion. In such a scenario, the plaintiff would normally be entitled to their costs to that point.

6. In the circumstances of the present case, it was not reasonable for the plaintiff to have resisted the motion to set aside the default judgment. As discussed in the principal judgment, the unusual feature of the present case is that the default judgment in respect of two of the three defendants had been secured *irregularly*. More specifically, the default judgment had been secured in circumstances where the High Court had been told, mistakenly, that a proposed amendment to an earlier "*unless order*" could be made on consent. This issue had been raised from the outset in correspondence from the defendants' solicitor. The issue had also been raised as part of the grounding affidavit sworn in support of the motion to set aside the default judgment. Notwithstanding this red flag having been raised by the other side, the plaintiff chose to contest the motion. This, in turn, resulted in the motion having to be assigned a hearing date in the Non Jury List (with a time estimate of two hours). This will have increased the level of legal costs incurred by the parties.

7. Having regard to the irregularity in obtaining the default judgment in respect of two of the defendants, and to the red flag having been raised, it was objectively unreasonable for the plaintiff to have resisted the motion.

8. Counsel on behalf of the plaintiff submits that the full extent of the "*special circumstances*", within the meaning of Order 27, rule 15(2), which were ultimately relied upon to justify the setting aside of the default judgment were not disclosed until the second affidavit was filed on behalf of the defendants. This second affidavit elaborated upon the medical emergency suffered by the

defendants' solicitor. This submission is correct insofar as it goes. It is not, however, an answer to the claim for costs. First, the issue in relation to the default judgment having been obtained irregularly had been raised from the very outset. Secondly, the plaintiff persisted in her opposition to the set aside motion even *after* the delivery of the second affidavit. A submission of this type will only ever have force where, as a result of the belated disclosure of some crucial fact, a party *withdraws* its opposition to an application. In such a scenario, that party would have strong grounds for seeking its costs up to that point.

CONCLUSION AND FORM OF ORDER

9. The defendants are entitled to recover their costs of the motion as against the plaintiff. The costs are to include the costs of the written legal submissions and any reserved costs referable to the motion. The costs are also to include the costs of the costs hearing. In default of agreement between the parties, the quantum of the costs is to be adjudicated, i.e. measured, under Part 10 of the Legal Services Regulation Act 2015 by the Office of the Chief Legal Costs Adjudicator.

10. There will be a stay placed on the execution of the costs order pending the final hearing and determination of the proceedings. This is because it is inappropriate that one side should be entitled to "*cash in*" a costs order prior to the determination of the proceedings. It may be, for example, that costs orders going the other way are made hereinafter which might eventuate in a net balance in favour of the plaintiff at the end of the proceedings.