THE COURT OF APPEAL

UNAPPROVED
Appeal Number: 2022/67
Neutral Citation Number [2023] IECA 238

Whelan J.
Binchy J.
Allen J.

IN THE MATTER OF THE EMPLOYMENT EQUALITY ACT, 1998
AND IN THE MATTER OF THE EQUALITY ACT 2004,
AND IN THE MATTER OF THE WORKPLACE RELATIONS ACT, 2015

BETWEEN/

OLUMIDE SMITH

APPELLANT/PLAINTIFF

- AND –

CISCO SYSTEMS INTERNETWORKING (IRELAND) LIMITED

RESPONDENT/DEFENDANT

JUDGMENT of Ms. Justice Máire Whelan delivered on the 4th day of October 2023

Introduction

1. This judgment is directed towards the proper allocation of costs arising from the recusal application brought by the appellant/plaintiff in the within proceedings on the 16th March 2023 the subject of judgments of this court [2023] IECA 186. The preliminary view of the court with regard to the issue of costs is specified at para. 102 of the judgment of Whelan J. with which Binchy and Allen JJ. concurred, which stated: -

> *"In light of O. 99 of the Rules of the Superior Courts and s. 169 of the Legal Services Regulation Act, 2015, as amended, the respondent is entitled to the costs of the failed recusal application - same to be ascertained in default of agreement."*

The appellant/plaintiff was invited to make submissions were he to contend for a different order in relation to costs. The parties have furnished written submissions on the issue.

Submissions of the appellant/plaintiff

2. Mr. Smith has provided detailed submissions. It is necessary to observe at the outset that this application is confined solely and exclusively to a consideration of the proper allocation of costs in regard to the recusal application which was directed towards two members of the panel assigned to hear the appellant/plaintiff's appeal which was scheduled for the 16th March 2023.

3. Mr. Smith in his submissions argues in great detail in effect that the substantive judgments delivered by the court are erroneous on a wide set of bases and relying on various authorities. Various articles of Bunreacht na hÉireann and Orders and Rules of the Superior Courts are cited in the course of his contentions. However, in large measure these arguments are directed towards the substantive decisions and judgments and are not appropriate as issues to be raised unless in the context of an application by the appellant/plaintiff pursuant to Art. 34 of the Constitution to seek leave to appeal to the Supreme Court against the decision of this court. Therefore it is not appropriate to engage with the legal arguments which are detailed in very extensive submissions which are directed towards the merits of the judgments delivered herein [2023] IECA 186.

4. The key arguments directed towards the issue of costs on the part of the appellant/plaintiff include:-

(a) that since the court and the registrar had advance knowledge of the intended recusal request and the appellant/plaintiff was complying with the confidentiality clause of the Judicial Council Act, 2019 *"following the Court's refusal to facilitate my relist request dated 02-03-2023"*, the appellant/plaintiff submits that *"it is unfair and oppressive to penalise me*

with Costs pursuant to s. 169 of the LSRA having complied with the State's said confidentiality clause in the Judicial Council Act 2019".

5. Further it is contended that the respondent/defendant *"was only served my email thread in paragraph 6(b) based on the Order of Whelan J. who suspended the confidentiality clause protecting Allen J. and Binchy J. indefinitely, whereas both said panel members failed to raise any objection to the removal of their confidentiality rights protection as per their disclosures in their belated 27-page and 5-page prejudiced individual Judgments."*

6. The appellant/plaintiff further contends: -

"Both Allen and Binchy JJ. manipulated, selected and concealed the facts about the fair procedures issues submitted in my subsequent two Complaints against the aforesaid Judges lodged with info@ihrec.ie postmarked '27th June 2023 at 21:51' and '28th June 2023 at 12:50'".

7. Fourthly, it is contended that this court should apply *"... the same rule that the said Circuit Court judge applied 05-Mar-2020 pursuant to s. 169(2) of the LSRA. The Court of Appeal should deny Costs to the Defendant ...".* The appellant/plaintiff asserts that the judgment of Whelan J. in [2023] IECA 186:-

"at [14] omitted the facts in breach of fairness and I submitted on 16-Mar-2023 that [2022] IESCDET 107 struck out the Costs Order dated 15-Jun-2022 that Binchy J. issued in error having disproportionately failed to carry out the said Legal Test of my means pursuant to s. 169(2) of the LRSA (sic) and that The Court of Appeal subjected me to disproportionate costs via simultaneous cases in the period 24-Jun-2022 to 03-Jan-2023 until I missed the four months window within which to seek a further remedy at the European Court of Human Rights in relation to [2022] IESCDET 107 that apparently endorsed the Decision of the Circuit Court Judge dated 05-Mar-2020 pursuant to s. 169(2) of the LSRA."

The respondent/defendant, Cisco contend that it is entitled to its reasonable legal costs, particularly by reason that it has been *"entirely successful".*

The law

8. The principles governing the making of costs orders including interlocutory applications has been the subject of a good deal of judicial consideration. However, the correct starting point must in all cases be sections 168 and in particular s. 169 of the Legal Services Regulation Act, 2015 (LSRA).

9. Section 168(1) which came into operation on the 7th October, 2019 provides: -

"Subject to the provisions of this Part, a court may, on application by a party to civil proceedings, at any stage in, and from time to time during, those proceedings -

(a) order that a party to the proceedings pay the costs of or incidental to the proceedings of one or more other parties to the proceedings …"

10. Section 168(2) provides: -

"Without prejudice to subsection (1), the order may include an order that a party shall pay -

(a) a portion of another party's costs,

(b) costs from or until a specified date …

(c) costs relating to one or more particular steps in the proceedings,

(d) where a party is partially successful in the proceedings, costs relating to the successful element or elements of the proceedings, and

(e) interest on costs from or until a specified date, including a date before the judgment."

11. Section 169(1) provides: -

"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."

12. Order 99, rr. 2 and 3 of the Rules of the Superior Courts are clearly relevant also in respect of the interlocutory application seeking the recusal and the issue of costs. Order 99, r. 2 provides: -

"Subject to the provisions of statute (including sections 168 and 19 of the 2015 Act) and except as otherwise provided by these Rules:

(1) The costs of and incidental to every proceeding in the Superior Court shall be in the discretion of those Courts respectively.

(2) No party shall be entitled to recover any costs of or incidental to any proceeding from any other party to such proceeding except under an order or as provided by these Rules.

(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.

(4) …

(5) An order may require the payment of an amount in respect of costs forthwith, notwithstanding that the proceedings have not been concluded.

3(1) The High Court, in considering the award of the costs of any action or step in any proceedings, and the Supreme Court and Court of Appeal in considering the awarding of the costs of any appeal or step in any appeal, in respect of a claim or counterclaim, shall have regard to the matter set out in section 169(1) of the 2015 Act, where applicable."

13. Thus it is clear, particularly in light of O. 99, r. 2(3) that it is appropriate that this court determine, address and make an appropriate award of costs at the conclusion of an interlocutory application unless *"it is not possible justly to adjudicate upon liability for costs"* on the basis of the said application. No arguments advanced suggest convincingly that it is otherwise than appropriate to determine the issue of the proper allocation of costs in respect of this interlocutory application.

14. The essential effect of s. 169(1) is that to use common parlance where a party is entirely successful in an application "costs follow the event" unless the court orders otherwise. Collins J. in *Pembroke Equity Partners Limited v Corrigan and Anor.* [2022] IECA 142

made a number of apposite observations which are relevant to the instant case. He noted that the said principle has been considered by *"... the Supreme Court in Godsil v Ireland [2015] IESC 103, [2015] 4 IR 535"* to be *"the overriding starting point in any question of contested costs"*. He further observed at para. 26: -

> *"... section 169(1) cannot be read in isolation. It must, firstly, be read with the provisions of section 168 of the 2015 Act. More importantly ... it must be read with the provisions of Order 99 RSC, Rule 3(1) which provides in relevant part that:*
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> > *'The High Court, in considering the awarding of the costs of any action or step in any proceedings ... shall have regard to the matters set out in section 169(1) of the 2015 Act, if applicable.'"*

15. Collins J. distils down the import of that provision in the context of an interlocutory application as had been held in *Daly v. Ardstone Capital Limited* [2020] IEHC 345 noting:-

> *"27. According to Murray J. in Daly v Ardstone Capital Limited the effect of this provision is that 'at least in a case where the party seeking costs has been entirely successful - it should lean towards ordering costs to follow the event'*. (para. 15(d)). *Murray J. was specifically addressing the costs of interlocutory applications. I agree with his analysis of the interaction of section 169(1) and Order 99, Rule 3(1) in this context. I would add that there is nothing surprising about a broad presumption - and that is all it is - that a party who is 'entirely successful' in an interlocutory application should get their costs."*

Collins J. makes clear that the interrelationship between the relevant Rule of the RSC and the statutory provisions -

> *"... clearly reflects a policy that costs should generally be determined on the determination of interlocutory applications (subject to the important qualification, ... that it must be possible to do so 'justly'). It appears to me that, if costs are*

generally to be determined at interlocutory stage, it can only be on the basis of a general rule that the successful party should get their costs."

16. It is to be recalled that in *Daly v Ardstone Capital* Murray J. clarified in a systematic fashion the principles to be applied in determining costs of an interlocutory application having due regard to sections 168 and 169 of the LSRA and the relevant rules. The following aspects of his judgment are worthy of note and are of particular relevance in the context of this application for costs: -

"14. Section 169, in introducing a definitive expression into primary legislation of the rule that costs should be awarded to the successful party, has limited that principle to both the costs of civil proceedings as a whole (as opposed to costs of a step in such proceedings and thus of interlocutory applications, McFadden v Muckross Hotels Limited [2020] IECA 110 at para. 30) and to a party who has been 'entirely successful' in such proceedings (a phrase the effect of which may not in every case be entirely clear). However, in relation to the application with which I am concerned here (a discovery application), the combined effect of the new Order 99, Rules 2(1) and (3) (replicating respectively the old Order 99, Rules 1(1) and 1(4a)), and of s. 168(2)(c) and (d) and s. 169(1)(a) and (b) (to which Order 99, Rule 3(1) requires regard to be had in determining the costs of any step in proceedings) to achieve, the same essential consequence as the pre-2015 Act regime.

15. In particular, these provisions combine to present the following principles insofar as costs of an interlocutory application are concerned:

(a) The general discretion of the Court in connection with the ordering of costs is preserved (section 168(1)(a) and O. 99, R. 2(1)).

(b) The Court should, unless it cannot justly do so, make an order for costs upon the disposition of an interlocutory application (O.99, Rule 2(3)).

(c) In so doing it should 'have regard to' the provisions of s. 169(1) (O. 99, Rule 3(1):

(d) Therefore - at least in a case where the party seeking costs has been 'entirely successful' it should lean towards ordering costs to follow the event (s.169)(1).

(e) In determining whether to order that costs follow the event the Court should have regard to the non-exhaustive list of matters specified in s. 169(1)(a) - (g) (O. 99, R. 3(1)):

(f) Those matters include the conduct of the parties before and during the proceedings and whether it was reasonable for a party to raise, pursue or contest one or more issues (s. 169(1)(a) and (b))."

The event

17. This was a discrete application and delivery of the judgments of the court [2023] IECA 186 disposes of the issue of recusal as far as this court is concerned. Therefore it follows that this court should make a determination in respect of the costs since the recusal application has been disposed of in this court. Further, by any metric the respondent/ defendant has been entirely successful within the meaning of s. 169(1) of the LSRA and accordingly in the exercise of its discretion the court ought to be predisposed towards ordering costs in favour of the latter party as in effect *"following the event"*.

18. It is appropriate to consider whether the appellant/plaintiff has reasonably raised, pursued or contested one or more issues which would entitle this court to make an order otherwise than in accordance with the norm whether arising from the nature or circumstances

of the case or the conduct of the parties or other factors including those specified at s. 169(1)(a) – (g) inclusive.

19. In the first instance the appellant/plaintiff emphasises the confidentiality obligations arising under the Judicial Council Act, 2019, which I take as encompassing the confidentiality obligations under the Complaints Procedures specified by the Judicial Conduct Committee under the Act. He posits that it is *"unfair and oppressive"* to be penalised with costs since he complied with the law in that regard. However there was no impediment on the appellant/plaintiff simply informing Cisco that he intended to apply to the court for the recusal of two of the judges or at least to take some step to alert them that he had a preliminary application of that nature. It is important that applications of an interlocutory nature do not emerge on an ambush basis. If the appellant/plaintiff had any doubts or reservations as to his entitlement to disclose the precise details and reasons for his intended recusal application, he could have just stated to the other side that he considered himself not at liberty to identify those reasons without first raising the matter with the Court. In any event it is not in contest that the respondent/defendant had no awareness whatsoever that an application for recusal was in contemplation at the commencement of what was intended to be the hearing of the substantive appeal on the 16th March 2023. Merely because the appellant/plaintiff complied with a confidentiality clause is not a basis for the exercise of discretion in accordance with the ordinary principles. Further, and for the avoidance of doubt, the fact that the respondent/defendant was not aware in advance of an intended application that two judges recuse themselves from hearing this appeal was not a salient factor in regard to the determination of this court in the judgments in the substantive application. Compliance with the law by the appellant/plaintiff does not *per se* insulate him from the ordinary consequential application of the law in regard to costs.

20. The fact that the court, in the words of the appellant/plaintiff, *"... suspended the confidentiality clause protecting Allen J. and Binchy J."* has not been demonstrated by the appellant/plaintiff to be a material factor in regard to the determination of the proper allocation of costs in this interlocutory application. Whether or not the respondent/defendant had been notified in advance with regard to the intended application for a recusal of two of the judges assigned to hear and determine this appeal was not relevant to the substantive determination of the court in regard to the recusal application itself ultimately. Further, it is not relevant to the issue of costs.

21. The allegation made in the appellant/plaintiff's submissions that the judges in question *"manipulated, selected and concealed the facts about the fair procedures issues submitted in my subsequent two complaints against the aforesaid judges ..."* appears to me to be an intemperate set of assertions which really ought not to find a place in formal submissions being submitted to the court. At all events the bare assertion has not been presented in a manner that could enable the court to consider it in anywise relevant to the net issue of costs. In the premises I propose to merely disregard this assertion.

22. There is no basis whereby this court ought to apply *"the same rule that the said Circuit Court Judge applied 05-Mar-2020 pursuant to s. 169(2) of the LSRA"*. The events surrounding the allocation of the costs in the said Circuit Court application and indeed the treatment of the costs aspect whether by consent of Cisco or otherwise in the Supreme Court [2022] IESCDET 107 are not relevant to the determination as to costs in the instant case and no basis for such relevance has been identified.

23. The focus of the substantive judgments of this court was on the relevant facts and circumstances which obtained on the 16th March 2023 in support of the recusal applications that were advanced. When the judgment was subsequently being written it was noted that *"he emphasised that he was on Jobseeker's payment"* (para. 23 of the judgment of Whelan

J.). Text must be taken in context. The context was that at the time of writing the judgment some weeks following the hearing, the focus of the judgment was on the evidence at the hearing of the recusal application. It did not import or seek to import any suggestion that the appellant/plaintiff had found employment subsequent to the 16th March 2023. It is noted in his submissions that the appellant/plaintiff continues to be unemployed *"**I am** unemployed till present"*. The appellant/ plaintiff has not identified why his current unemployed status *per se* should in the instant case warrant a deviation from the ordinary rules as to costs.

24. Turning then to the factors relevant pursuant to s. 169(1) conduct before and during the proceedings, no conduct has been identified on the part of the respondent/ defendant that would warrant denying them the costs to which it is *prima facie* entitled or to make an order that it should recover part only of the said costs.

25. With regard to s. 169(1)(b) the application was wholly unsuccessful. No ground was identified which warranted bringing the application for the recusal of the two judges on the panel. I am satisfied on balance that it has not been established that it was reasonable or proportionate to raise, pursue or contest the issue of recusal as against the two judges in the interlocutory application moved and heard before this court on the 16th March 2023.

26. With regard to the manner in which the parties conducted the application, I find no evidence has been identified as to the manner in which Cisco conducted itself in meeting the recusal application which either led to excess additional delays or unreasonableness on its part or otherwise which would warrant interfering with the ordinary rules in regard to costs. Its conduct in responding spontaneously to the application ensured that there was no delay notwithstanding that it is not in dispute that it had no advance warning that the said application was in contemplation at all - leaving aside the issue as to whether Mr. Smith was entitled to assume that he ought not divulge the basis on which he was moving the application which was perfectly reasonable on his part. I do not see that the provisions of s. 169(1)(d),

(e), (f), or (g) are engaged at all in the context of this application. No argument on the part of the appellant/ plaintiff is directed specifically or meaningfully towards any of the said provisions.

27. With regard to s. 169(2) I do not see that it has engaged either since it is Cisco who has been entirely successful and no maintainable case has been made out whereby this court in the exercise of its discretion might conclude that despite that fact it is not entitled to an award of costs against the applicant.

28. The financial means of the appellant/plaintiff is not a basis *per se* for refusing an application for costs. Impecuniosity is not one of the factors identified in s. 169 of the LSRA. Neither is it explicitly identified as a factor to be taken into account on any reading of O. 99, rr. 2 or 3. It is not generally open to the court without more to merely decide to make an order that there be no order as to costs exclusively on the grounds of impecuniosity of the unsuccessful party. Had the legislature intended that impecuniosity was to be a factor taken into account routinely in the exercise of the statutory scheme as to costs, it would have provided for same under the Act. Mr. Justice Haughton in this court in *McFadden v Muckno Hotels Limited* [2020] IECA 153 made the following observations: -

> *"11. ... Reliance is placed on the respondent's financial circumstances, which it is submitted this court can take into account. The proceedings were taken because his employment at the time was threatened, and he has since been dismissed; the WRC has found his dismissal to be unfair, although that decision is currently under appeal. It is said that he is currently unemployed and that a costs order would lead to 'financial hardship'. It is submitted that this is a factor which can be taken into account even if a litigant has legal representation - it is not reserved to lay litigants.*
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> *12. No binding or persuasive precedent is cited to support the proposition that the court should take into account the possibility that a costs order against the*

respondent would lead to financial hardship. Section 169(1) at (a) - (g) sets out a non-exhaustive list of matters that the court can take into account if departing from the normal rule. Impecuniosity is not one of the matters listed. It is something that may engender sympathy for an unsuccessful litigant, and it may be that a costs order against a respondent will affect his ability to continue to engage legal representation, although this is not in fact said and indeed there is no evidence before the court to show financial hardship. I do not consider that it is a good reason for not granting the appellant its costs in the instant case. Were this court to decide to make no order as to costs of the appeal solely on the ground of impecuniosity in my view it would run contrary to the intent of the legislature as expressed in s. 169. However I would leave to another occasion the question of whether there may be circumstances in which impecuniosity may be taken into account."

I am in agreement with those measured observations.

29. In my view this court is entitled to have regard to the fact that given his current circumstances which the court entirely accepts, that he is unemployed, it is understood that he is experiencing circumstances of impecuniosity. Nevertheless, that *per se* does not identify or establish any valid or sound basis from deviating from the ordinary rule that the successful party is entitled to their costs and as such, accordingly I conclude that the respondent/ defendant, Cisco, is entitled to its costs of this interlocutory application. However, lest the immediate enforcement of the said order might in anywise impede the appellant/ plaintiff in his pursuance of the within appeal to its conclusion, I would direct that execution on foot of the order for costs be stayed pending conclusion of the above entitled appeal before this court.

30. Binchy and Allen JJ. have authorised me to say that they concur with this judgment.