THE HIGH COURT

[2021] IEHC 434

[2017 No. 10917 P.]

BETWEEN

JANET ACHESON

PLAINTIFF

AND

LOUGHSHINNY MOTORCYCLE SUPPORTERS CLUB LTD

AND

MOTORCYCLE UNION OF IRELAND (SOUTHERN CENTRE) LTD

DEFENDANTS

AND

BMW AUTOMOTIVE (IRELAND) LTD

AND

KEARYS OF CORK UNLIMITED COMPANY

AND

KEARYS KINSALE ROUNDABOUT UNLIMITED COMPANY

THIRD PARTIES

COSTS RULING delivered by Ms. Justice Eileen Creedon delivered on the 25th day of June, 2021

1. BMW Automotive (Ireland) Ltd. issued a motion in these proceedings on the 10th of October 2019 seeking an order pursuant to inter alia s. 27 of the Civil Liability Act 1961 setting aside the third party proceedings brought against BMW Automotive Ireland Ltd. by the defendants on the grounds that the said third party proceedings had not been served as soon as was reasonably possible.

2. Judgment was delivered by this Court in relation to that motion on the 16th of April 2021 in which it was held that the third party notice was served as soon as was reasonably possible and the court declined to set aside the third party proceedings.

3. In that judgment, the parties were asked to agree costs or alternatively in that judgment the costs of the motion were reserved to the hearing of the action subject to hearing any submissions on costs from the parties within 14 days.

4. Submissions in respect of costs have now been received by the court from both the defendants and from BMW Automotive (Ireland) Ltd. the first named third party.

5. The Court has considered the judgment which it delivered on the 16th April 2021 together with the written submissions lodged on behalf of the defendants and the replying submissions lodged on behalf of the first named third party.

6. The Court does not intend to traverse these submissions again in full here as they will be on the Court record and have been exchanged between the parties.

7. The defendants submit to the court that the costs of the interlocutory application should be awarded to the defendants with a stay on those costs to be adjudicated in default of agreement pending the conclusion of the proceedings.

8. The defendants referred the Court to Delaney & McGrath "*On Civil Procedure*" (4th Ed.) and in particular paras. 24 – 24, 24 – 33 – 34 and paras 27 – 78 to 24 – 84 of that text and attached copies of the relevant text for the convenience of the court.

9. The defendants also referred the Court to the Legal Services Regulation Act, 2015. The defendants submit that the 2015 Act applies to costs in all civil proceedings which includes costs with regard to interlocutory applications and civil proceedings. They point the Court to s. 169 (1) of the 2015 Act which they say uses the phrase "entirely successful" as being the criterion which informs the court on how the question of costs is to be decided. They argued that as the application concerned a discreet issue which will not again be revisited and therefore has been conclusively determined by the Court, deciding that issue in favour of the defendants the Court should exercise its discretion to award costs of the application to the defendants to be adjudicated in default of agreement with a stay on those costs pending the conclusion of the proceedings.

10. In that regard they referred the Court to the case of *F&C Reit and Alte Leipzeiger, F&C Reit Property Asset Management plc v. Friends First Managed Pension Funds Ltd.* [2017] IEHC 383 and the further case of *Minister for Agriculture v. Alte Leipzeiger A.G.* [2000] 4 IR 32.

11. The defendants submit that the reservation of costs will result in the trial judge having to revisit the issue removed from the hearing of the application and that the mandated approach according to the established principles both under O. 99 (as recast) of the Rules of the Superior Courts and under the Legal Services Regulation Act 2015 indicates that the court should award the costs of the application to the defendants with a stay on those costs pending the conclusion of the proceedings.

12. In their submissions, the first named third party drew the Court's attention to the applicable rules and legislation under what they termed the "old regime" and what they termed the "new regime". They confirmed that under the old regime as a general rule costs follow the event unless for special reasons the court otherwise directs as articulated in O. 99 r. 1 (3) of the Rules of the Superior Courts as it stood prior to the amendments which came into force on the 3rd December 2019.

13. They confirmed that the legislative basis for the awarding of costs changed on the 7th October 2019 with the coming into force of ss. 168 and 169 of the Legal Services Regulation Act 2015 with effect from the said date. They went on to confirm that O. 99 of the Rules of the Superior Courts was subsequently amended inter alia to take into account the contents of ss. 168 and 169 of the 2015 Act by the Rules of the Superior Courts (Costs) Order 2019 SI 584/2019 with effect from the 3rd December 2019. They went on to argue that neither the legislation or the rules state clearly the point at which either are triggered in relation to applications that have been initiated before they commenced and in that regard opened a number of judgments of the Superior Courts as set out in detail in their submissions.

14. Those cases dealt with the issue of retrospectivity and particularly the finding in the case of *Sweetman v. Shell ENP Ireland Ltd.* [2016] 1 IR 742 that except in relation to procedural matters, changes in the law should not take effect retrospectively. In that case it was held that an award of costs was more than merely procedural and that substantive rules as to costs were in the nature of vested rights. Accordingly, it was argued that unless this Court is satisfied that the changes brought about by ss. 168 and 169 of the Act and the new provisions of O. 99 are purely procedural, it appears that it would be appropriate for the court to determine the issue of costs pursuant to the law which pertained when the present action commenced namely the old regime as set out. They went on to argue however that if the court is satisfied that the application of the old or new regime would not produce a materially different result it may choose to consider the position under both regimes without definitively deciding which is to apply as was done by Murray J. in *Chubb European Group SE v. Health Insurance Authority* [2020] IECA 183. In that regard they set out the relevant provisions of the 2015 Act together with the principles summarised by Murray J. in *Chubb European Group SE.*

15. They go on to argue that in relation to interlocutory applications, O. 99 r. 1 (4 A) of the former Rules provided as follows: -

> "The High Court or 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".

16. They argued that as an equivalent provision is now contained in O. 99 r. 2 (3) of the Rules (As Amended) it appears that the approach to be taken by the Court in dealing with the costs of an interlocutory application has not been altered by the recent changes in the law and that under both the old and new regimes the Court is required to adjudicate upon and make a costs order in respect of an interlocutory application unless it is not possible at that juncture justly to adjudicate upon the costs of the application. In that regard they quote from the case of *Dupcap Ltd. v. Microcrop Ltd.* [1997] 12 JIC 09 01, 1998 WJSE – SC 6503 (Unreported, Supreme Court 9th December 1997) where Keane J. *stated inter alia* as follows: -

> *"It is right to say, of course, that while there is no rule of court or even of practice to that effect, the normal procedure on the hearing of an interlocutory application is to reserve the costs to the trial judge. The reason for that is obvious: there may and very frequently will be matters which can only be resolved by the court of trial on oral evidence at a plenary hearing of the action and indeed matters may come to light by way of discovery or by way of new evidence not available to the parties at the time of the hearing of an interlocutory application which may bring about a result which seemed unlikely or improbable at the time of the hearing of the interlocutory application, so for that reason it is quite normal on the hearing of the interlocutory applications to reserve the costs."*

And the case of *O'Dea v. Dublin City Council* [2011] IEHC 100 which are set out in full in their submissions together with the case of *Allied Irish Bank & Ors. v. Diamond* given on

7th November 2011 and submit that the principles identified in these cases are not confined to applications for interlocutory injunctions and that they have been applied by the courts in the context of other types of interlocutory motions including unsuccessful applications for summary judgment in which leave to defend is granted and the matter is remitted to plenary trial.

17. In the case of *ACC Bank plc. v. Hanrahan* [2014] IESC 40 in the Supreme Court, Clarke J. having considered the issue of summary judgment and motions for discovery went on to state as follows at para. 3.4 and 3.5: -

> *"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"".*

18. In the present case the first named third party went on to argue that the affidavit evidence placed before the court in the context of the present motion disclosed a number of factual conflicts in relation to issues which are likely to arise again at the trial of the action including significant factual dispute as to what was agreed between the parties in respect of specialist testing and retrieval of data from the motorcycle. In that regard, they made reference to para. 77 and para. 99 of this Court's judgment and in particular para. 99 where the court held that it would: -

> *"Not be able to resolve the conflict of evidence in the affidavit evidence in respect of any purported agreement that was reached between the parties as to the technical examination of the motorbike within the parameters of this application and in the absence of any evidence from Mr. Godolphin".*

19. They went on to identify a number of factual matters pertaining to the merits of the case upon which they argue the trial judge may ultimately have to make findings resulting in a definitive ruling as to where the true facts lie and submit that in the specific circumstances of this motion the trial judge is likely to be better placed to rule on the issue of the costs of this motion because he or she is likely to be in a position to make a determinative ruling on many of the factual issues which have influenced the outcome of the present application but have not yet been the subject of a final determination.

20. In light of the foregoing they argue that it is not possible to justly adjudicate on the issue of the costs of the motion at this juncture because of the number of factual issues which are in dispute between the parties and which are likely to require to be considered and determined in due course by the trial judge.

Determination

21. Having considered the submissions of both parties the court is satisfied that the approach to be taken by the court in dealing with the costs of an interlocutory application has not been altered by the recent changes in the law and that under both the old and new regimes the court is required to adjudicate upon and make a costs order in respect of an interlocutory application unless it is not possible at that juncture justly to adjudicate upon the costs of the application.

22. In reaching its decision in its principal judgment as to whether the third party notice was or was not served as soon as was reasonably possible, this Court was not able to resolve the conflict of evidence in the affidavit evidence in respect of any purported agreement that was reached between the parties as to the technical examination of the motorbike within the parameters of the application and in the absence of any evidence from Mr. Godolphin.

23. In reaching its decision the court made an objective assessment as to whether in the whole of the circumstances of the case and its general progress the third party notice was or was not served as soon as reasonably possible in accordance with the Court of Appeal decision where it considered the Supreme Court decision in *Connolly v. Casey* in *Greene & Anor. v. Triangle Developments Ltd. & Ors*. [2015] IECA 249 in which Finlay Geoghegan J. stated as follows at para 25:-

> *" In my view, following the approach of the Supreme Court in Connolly v Casey, it is incumbent on a trial judge, when faced with an application such as present before the High Court, to look not only at the explanations which were given by a defendant for any purported delay, but also to make an objective assessment as to whether, in the whole circumstances of the case and its general progress, the third party notice was or was not served as soon as is reasonably possible."*

24. The Court having made such an assessment, determined that the third party notice was served as soon as reasonably possible. However, having made such a determination the Court is satisfied that the application disclosed a number of factual conflicts in relation to issues which are likely to arise again at the trial of the third party proceedings and that in the specific circumstances of this application the trial judge is likely to be better placed to rule on the issue of costs of this motion and that accordingly it is not possible for this court justly to adjudicate upon liability for costs on the basis of the interlocutory application. The Court affirms its decision at para. 106 of its judgment that the costs of this application should be reserved to the hearing of the action.