THE COURT OF APPEAL

Neutral Citation Number: [2020] IECA 212
Record Number: 2018/125

Whelan J.
Donnelly J.
Power J.

BETWEEN/

AIG EUROPE LIMITED

RESPONDENT

- AND –

ANTHONY FITZPATRICK

APPELLANT

JUDGMENT of Ms. Justice Máire Whelan delivered on the 30th day of July 2020

Context

1. This judgment is directed to the issue of costs incurred before this court in connection with the above entitled appeal in respect of which judgment was delivered on 9 April 2020, [2020] IECA 99. The said judgment dismissed the appeal brought against the order made by Meenan J. in the High Court on 13 March 2018 refusing the appellant's application to dismiss the proceedings for inordinate and inexcusable delay and/or want of prosecution pursuant to the inherent jurisdiction of the court and further refusing to set aside the *ex parte* renewal of the summary summons made by order of Noonan J. on 12 January 2015.

2. At the date of the hearing of the appeal the legislative basis for the awarding of costs was governed by ss. 168 and 169 of the Legal Services Regulation Act 2015, which became operative on 7 October 2019, together with the Rules of the Superior Courts (Costs) 2019 (S.I. No. 584/2019) which became operative on 3 December 2019 introducing a recast O. 99.

Submissions of the appellant and respondent in relation to costs

3. The unsuccessful appellant contends that the court should exercise its discretion and make no order as to costs. It is acknowledged that the appellant entered into a contract with the respondent's predecessor, Chartis Europe Limited, which was his professional insurer in the month of January 2012 and on foot of same agreed to pay the respondent the sum of €250,000 within six weeks of 23 February 2012 by way of contribution towards the compromise of High Court litigation entitled *Mount Kennett Investment*

Company and Anor. v. O'Mara and Ors. (Record No. 2005/1657P). The said payment was not made. The summary summons issued on 14 September 2012 seeking payment of the sum but the respondent did not succeed in effecting personal service of the summons on the appellant.

4. By order of Noonan J. on 12 January 2015 the said summons was renewed and an order for substituted service was granted. Service was thereby effected on 6 February 2015. The appellant contends that:-

> "No steps were taken in the proceedings between February 2015 and May 2017 until a notice of intention to proceed was issued on the 11th May, 2017. The appellant's solicitor entered an appearance on the 8th June, 2017."

5. The appellant's motion seeking *inter alia* to dismiss the proceedings for want of prosecution and inordinate and inexcusable delay issued on 14 June 2017 and was heard and determined by Meenan J. thereafter, culminating in his order of 13 March 2018 refusing all reliefs sought. It appears that the respondent subsequently sought and obtained judgment against the appellant in the sum of €250,000 which said order is the subject of a stay.

6. The appellant asserts in written submissions that in his affidavit sworn on 10 November 2017 he had averred that he had "no recollection of receiving the summons prior to the 10th May, 2017."

7. The appellant in his submissions refers to the provisions of O. 99 as it stood prior to 3 December 2019 and to that extent relies on the pre-existing law. He invokes s. 169(1) of the Legal Services Regulation Act 2015 which said provision clearly states that:-

> "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…"

Section 169 then provides that the court may have regard to *inter alia* the conduct of the parties before and during the proceedings.

8. The appellant relied on the Supreme Court decisions in *Dunne v. Minister for the Environment* [2007] IESC 60, [2008] 2 I.R. 775 and *Curtin v. Clerk of Dáil Éireann* [2006] IESC 27, both of which actions were brought against State entities, constitutional office holders and the State itself.

9. The appellant also places reliance on the Supreme Court decision in *Crofter Properties Ltd. v. Genport Ltd. (No. 2)* [2005] IESC 20, [2005] 4 I.R. 28 citing the following passage at p. 39: -

> "While the usual order is that costs follow the event, the Court has a discretion. The claim of the plaintiff has to be viewed in light of all the circumstances of the case,

which included the behaviour of the plaintiff and the extensive proceedings on the counterclaim."

10. The conduct of the respondent particularly relied upon by the appellant is the element of delay and whilst conceding that there is not a public interest dimension which can be invoked by the appellant in this appeal on the issue of costs, he argues:-

> "…nevertheless it is submitted there was an element of delay on the respondent's part and the appellant did aver to the fact he engaged in an attempt to deal with the matter via the respondent's Mr. Harry Fehily."

The appellant seeks that the court exercise its discretion and make no order as to costs against him.

11. The respondent contends that costs should follow the event in the ordinary way and seeks an order for costs in its favour.

Discussion

12. Having carefully reviewed both the provisions of O. 99, rr. 1(1), 1(2), 1(3) and 1(4) as cited by the appellant in written legal submissions and the approach adopted by the respondent and having considered the recast O. 99, I am satisfied that the application of the differing regimes would not in this particular case produce a materially different result with regard to the costs application under consideration.

13. The "event" in question in the instant case is the outcome of the appeal against the order of Meenan J. refusing to grant the appellant's application to strike out the proceedings for inordinate and inexcusable delay and/or want of prosecution. Any delay on the part of the respondent as alleged by the appellant must be viewed in light of the finding of this court on the issue and any delay on the part of the respondent must be viewed in light of the appellant's conduct.

14. I am satisfied that the appellant has not identified any factor or matter under s. 169(1) of the 2015 Act which would warrant the court exercising a discretion to deviate from the general rule that costs should follow the event. The salient averments in the affidavit of Wayne Finn dated 28 September 2017 regarding attempts to effect service of the summary summons on the appellant were not satisfactorily addressed by the appellant in his affidavit. It is clear that John Somers, the summons server, repeatedly attempted to effect service of the proceedings on the appellant at Limerick City and at Sixmilebridge in County Clare. The evidence is consistent with the appellant making himself unavailable to facilitate service. Neither does the appellant deny the averments which indicate that the summons server attended the appellant's place of business on 22 October 2012 and telephoned the appellant informing him of the purpose of the call and that the appellant indicated he was not available. On 25 October 2012 it appears that the appellant again did not cooperate to facilitate service. It appears that on repeated visitations to the appellant's then place of business at Newenham Street in Limerick City when service was attempted, the receptionist asserted that the appellant was either at a meeting or that he

was busy. Whilst the appellant asserts that he does not have a recollection of receiving the summons prior to 10 May 2017, he does not contradict the averments of Mr. Wayne Finn, nor does he in any meaningful way contest the record of attempted service of Mr. Somers. Neither does the evidence support a contention that the appellant "engaged in an attempt to deal with the matter via the respondent's Mr. Harry Fehily."

Conclusions

15. I am satisfied that, irrespective of which costs regime is applied, the appellant has failed to identify any principled basis upon which this court could reasonably exercise its discretion to deviate from the normal rule in relation to costs, namely that costs follow the event.

16. This court agreed with the judgment of Meenan J., rejecting all the appellant's grounds of appeal and the respondent was "entirely successful" in its opposition to the appeal. In the circumstances, the respondent is entitled to recover the costs incurred. Accordingly, the court will make an order dismissing the appeal, together with an order for costs in favour of the respondent, same to be adjudicated in default of agreement.

17. Donnelly J. and Power J. have confirmed their agreement with this judgment.

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