THE COURT OF APPEAL

UNAPPROVED

Record Number: 2023 112
High Court Record Number: 3712P
Neutral Citation Number [2023] IECA 336

Noonan J.

Faherty J.

Allen J.

BETWEEN/

AOIFE MOORE

PLAINTIFF/APPELLANT

-AND-

EOGHAN HARRIS AND TWITTER

DEFENDANTS/RESPONDENTS

-AND-

Record Number: 2023 113
High Court Record Number: 3711P

BETWEEN/

ALISON MORRIS

PLAINTIFF/APPELLANT

-AND-

EOGHAN HARRIS AND TWITTER

DEFENDANTS/RESPONDENTS

JUDGMENT of Mr. Justice Noonan delivered *ex tempore* on the 2nd day of October, 2023

1. The appeal before the court today is an appeal from a costs order made by the High Court in a *Norwich Pharmacal* application brought by the plaintiffs in these two joined proceedings. The plaintiffs Ms. Morris and Ms. Moore are bringing defamation proceedings against the first named defendant arising out of certain postings on a number of accounts maintained with Twitter, and the plaintiffs sought a *Norwich Pharmacal* order directing Twitter to disclose certain information concerning a number of Twitter accounts. And to that end the plaintiffs issued a notice of motion seeking an order accordingly and that motion was issued on the basis that the plaintiffs would discharge Twitter's costs of the motion and the costs of complying with the order.

2. Now the posture Twitter adopted throughout these proceedings was that they were not opposing the making of the order. I think the expression was used that they *"were agnostic"* in relation to whether the order was or was not made but they were certainly not opposing the order.

3. However, the issue did arise as to what the precise terms of the order would be and there was some dispute in advance of the hearing between the parties in that respect, complicated somewhat by the fact that a statement of claim had not been delivered until quite late, in fact shortly before the motion was heard by the plaintiffs.

4. Nonetheless, the High Court held in the course of giving an *ex tempore* judgment by the trial judge Mr. Justice Sanfey, that Twitter were entitled, in fact, what he said was, at p. 3 of his judgment:

> *"They Twitter were not obliged to simply accept the terms of the order sought by plaintiff. They were entitled to come before the court and to have those orders thrashed out and they did so, and they did so on the basis of the assurances in the grounding affidavit that their costs would be paid."*

And he goes on to say further on in the same paragraph -

> *"An application to the court would always have been necessary and Twitter could not in my view have agreed to provide the information without a court order."*

5. Now in bringing the application before the court, both of the plaintiffs swore affidavits and in her affidavit Ms. Moore said the following at para. 48: -

> *"In respect of the second defendants involvement in the matter as set forth herein before I say and believe that based on all information known to me as at the time of swearing hereof the second defendant appears to have become 'mixed up' in the wrongdoing innocently. For that reason the reliefs sought in the notice of motion provide that the applicant do pay to the second defendant the costs of the motion and the costs of complying with this order and so forth."*

6. And of course I should have said in relation to what the judge commented with regard to the entitlement of Twitter to come before the court to have the order *"thrashed out"* as he described it, that is not a finding which has been appealed.

7. With regard to the costs, Mr. Justice Sanfey said that he considered, and I agree with him, that the trope "winner or loser" was not appropriate in the circumstances of this particular case and s. 169 was in those circumstances not particularly material. I think that that is entirely correct because this was an application that from the get go was based on an undertaking by the plaintiffs to discharge their costs.

8. With regard to the actual hearing before the High Court there was, as we have heard today, a dispute about the terms of the order. There were three issues in particular that were the subject matter of dispute, the first being the suggestion made by Twitter that it should be confined to a period of 60 days from the making of the order. That was something that was vigorously contested by the plaintiffs and the trial judge sided with the plaintiffs on that aspect of the case and held that it would not be appropriate. But again, in fairness, it wasn't quite as simple as it might seem in the sense that matters didn't become, perhaps, crystallised to the extent that they ought to have been until the statement of claim was delivered, as I say, very late in the day.

9. There were also issues agitated before the High Court concerning the disclosure of re-tweets of the original tweets and whether they should be investigated on a per tweet basis which were two additional issues on which Twitter prevailed before the High Court.

10. And although it might be said on one view of matters that the plaintiffs won on one issue and failed on others, that does not appear to me to be particularly material because this is not a *Veolia* type situation where the court is required in some way to try and dissect what happened in terms of the length of time that any particular issue may or may not have taken before the High Court and the requirement that might therefore arise to allocate costs on the basis of who succeeded on what issues. That does not appear to me to be relevant or appropriate in the circumstances of this case.

11. But I think the fundamental point here is that in bringing this application on the basis that the plaintiffs would pay the costs, and I note in that regard that the plaintiffs expressly accepted that Twitter were an innocent party in this matter, it must have been within the plaintiff's contemplation that the precise contours of the order that would ultimately be made

could potentially be the subject of some level of dispute which might require resolution by the court as indeed it transpired to be the case.

12. Therefore, I do not accept the proposition that because Twitter contested the terms of the order as opposed to the making of an order of any kind in the first place, the plaintiffs are thereby relieved of their sworn undertaking, given freely in the affidavits to which I have already referred.

13. Quite apart from that I think it is important to emphasise that this is not a rehearing of the matter that was heard by the High Court and both this Court and the Supreme Court have repeatedly said that costs orders, as with other discretionary orders, will not be interfered with unless they fall outside the range of judgment calls that are reasonably open to the trial court, even if this Court or another appellate court might have been inclined to make a different order, in the absence of a clear error of principle or injustice arising. That is, I think, succinctly stated by Mr. Justice Murray in speaking for this Court in his judgment in the case of *Heffernan v Hibernia College* which is reported at [2020] IECA 121. That was also a costs appeal that came before this Court. In that particular case, it concerned an interlocutory injunction, but that's not particularly relevant in the context of what Mr. Justice Murray had to say at para. 30 of that judgment:

> *"It's also clear that the exercise by the High Court of its discretion in calibrating these various considerations* [and he is there referring obviously to considerations with regard to the allocation of costs] *should not be lightly upset by an appellate court as the Supreme Court has most recently explained in the context of the balancing exercise undertaken by a trial court in making discovery orders 'it should not be overturned on appeal unless the appellate court is satisfied that the determination of the court below was outside the range of judgment calls which were*

> *opened to the first instance court'"* [and that's a quotation taken from *Waterford Credit Union v J&E Davy*.]

And then Mr. Justice Murray goes on to say:

> *"The exercise of such restraint by an appellate court has been repeatedly stressed in the context of first instance decisions in respect of costs* (See Delany & McGrath's *Civil Procedure* 4th ed. at paras. 24.777 to 24.285). *However, and at the same time, an appellate court retains jurisdiction to interfere with a costs order where the trial judge has erred in principle or failed to attach weight to the appropriate factors relevant to the particular decision in hand."* [And he refers to *Godsil v Ireland* [2015] IESC 103 at paragraph 69].

14. I am satisfied that when one has regard to those principles there is no basis in the present case for the suggestion that the costs order made in this case by the trial judge was one that was not well within his discretion, or within the range of judgment calls that were open to the High Court. and the onus is on the appellants to demonstrate otherwise. In my view they have manifestly failed to do so.

15. Further, the suggestion, it has to be said now, withdrawn, that the public interest requires that the appellants' costs be paid lest there be a chilling effect on other applicants for *Norwich Pharmacal* orders is one I simply cannot fathom in circumstances where it is diametrically opposed to the stated basis upon which the plaintiffs brought this application, namely that they would pay Twitter's costs.

16. I note that despite the fact that that suggestion has been properly, in my view, withdrawn by counsel for the plaintiffs today, nonetheless there was in my view an improper attempt to discredit Twitter made in the written submissions that were put before this Court.

17. It is in the teeth of the sworn averment by the plaintiffs that Twitter is an innocent party in this and I think that reflects little credit on the plaintiffs. I am glad to see, as I have said, that counsel has withdrawn that today. However, it seems to me it should never have been advanced in the first place.

18. The same principle, that is to say, that the undertaking by the plaintiffs to pay costs is also, I think, in the teeth of the alternative submission made by the plaintiffs that they have in effect won the event by getting an order. That is in my view *nihil ad rem* in an application of this kind where there is a clear undertaking given in advance, and it seems to me that really at the end of the day the appellants' appeal is predicated on the suggestion that in effect their undertaking only applies in circumstances where there is consent to the order they seek in the terms they seek it. And that seems to me to be a patently unstatable proposition, even as I say, at face value it evidently cannot be correct.

19. So in those circumstances I am satisfied that there is no merit in this appeal which I would dismiss.

Faherty J.: I have listened to the judgment just delivered by my colleague Mr. Justice Noonan and I entirely agree with his analysis and the conclusions he has reached as to why the appeal should be dismissed. I would just add a couple of short words.

To my mind, the plaintiffs/appellants here have not set out or made out any valid reason as to how the High Court judge erred in coming to the conclusion he did on costs. And as Judge Noonan has said, an appeal court is very reluctant, or will be very reluctant, to interfere with the exercise of a trial judge's discretion, including his discretion on costs in the absence of clear error or injustice. And that's having regard to the case law which Judge Noonan has quoted. And, here, to my mind, there's no detectable error in the High Court judge's

assessment of the issues that arose before him on foot of the costs issue that he dealt with in March 2023.

The order he made, to my mind, was entirely within the range of orders he could make, particularly given the following:

Firstly, the nature of the applications before the judge, which he dealt with in his substantive judgment. Secondly, the plaintiff's own acknowledgment of the nature of such applications, but more fundamentally, as Judge Noonan has referred to, the plaintiffs' averments in their respective affidavits that they should bear the costs of the applications and indeed of the costs of compliance. And nothing said by the plaintiffs today suffices, in my view, for this Court to somehow ignore those averments, or direct that the plaintiffs should be allowed bypass them and impose costs orders on the respondent.

It is also, I think, worth saying that, to my mind, it's not sufficient, or in order, for the plaintiffs to now seek to drill down into the nitty gritty of what was won or lost as between the parties in the substantive hearing. This ignores, effectively, the nature of the application and the finding of the trial judge, and, more importantly, also ignores the plaintiffs' own acknowledgment, which they gave on affidavit and the undertaking that they gave that they should bear the costs.

So, for all the reasons Judge Noonan has said, and for the reasons I have set out myself, I too would dismiss this appeal.

Judge Allen: I have listened carefully to the judgments delivered by my colleagues and there's nothing I can usefully add. I too would dismiss these appeals.