THE HIGH COURT

[2017 No. 154R]

BETWEEN

MICHAEL GLADNEY

PLAINTIFF

AND

D. H. AND F.H.

DEFENDANTS

JUDGMENT of Mr. Justice MacGrath delivered on the 6th day of June, 2019.

1. This is an application by the second defendant for an order pursuant to O. 63, r. 9 of the Rules of the Superior Courts discharging the order of the Master of the High Court made on the 20th December, 2017 joining her to the proceedings, or in the alternative an order pursuant to O. 19, r. 28 or the inherent jurisdiction of the court striking out the proceedings against her.

2. The plaintiff is the Collector General and an officer of the Revenue Commissioners duly authorised to collect tax and interest. The first defendant submitted a return in respect of a liability for capital gains tax based on self-assessment. The liability to tax is stated to have arisen from gains made on the sale of stocks and shares. The entitlement to the shares formed part of a dispute in family law proceedings between the first defendant, and his ex-wife, the second defendant. An order for judicial separation was made on consent on 21st June, 2016. It is part of the first defendants case, that in implementation of the settlement of the family law proceedings that a portfolio of securities would be sold and capital gains tax paid. The shares were sold on 31st August, 2016 and a calculation was made in respect of the tax payable on the gain. A self-assessment form, CG1, was completed by the first defendant on 29th March, 2017. The return was duly assessed and on 12th May, 2017 and the plaintiff sought payment. The first defendant believes that any liability should be equally borne with the second defendant from funds which were the subject matter of the settlement in the family law proceedings. The tax was not paid. Correspondence was entered into between the plaintiff and the first defendant and by letter of 3rd July, 2017, the plaintiff made it clear to the first defendant that his liability arose by virtue of the fact that he had made the return and that it was not open to the plaintiff to sue multiple third parties in respect of the liability. The letter stated:-

> *"… This liability arises on foot of a return made by you. It is not open to Revenue to sue multiple third parties in respect of it. If you believe that third parties are liable in some way, it is up to you to pursue whatever legal redress is open to you against them separately. Please note we are now instructed to pursue this debt through the Courts. I strongly recommend you obtain legal advice. "*

3. On 5th July, 2017 a summary summons issued the amount claimed being based on the assessment together with interest. The summons was served on 10th November, 2017 and an appearance was entered by the first defendant on 15th November, 2017.

4. The first defendant then brought an application to join his wife from whom he had separated, as a co-defendant to the proceedings. The application came before the Master of the High Court on 20th December, 2017. He also sought to have her solicitors joined, on the basis that they held funds from which the tax should be paid. The plaintiff opposed the application but the Master acceded to it in respect of the second defendant but not in respect of her solicitor. The summons was amended and was served by the plaintiff on the second defendant.

5. On 26th February, 2018, solicitors representing the second defendant wrote to the plaintiff seeking confirmation of the plaintiff's attitude to the application at the time it was made. They also sought confirmation of whether the plaintiff intended to proceed against the second defendant and if not, they invited the service of the notice of discontinuance. The letter concluded "*obviously no cost will arise on foot of this action*". A reply by letter of 28th February, 2018 stated that it was the court who joined the second defendant as a co-defendant and that the plaintiff was a stranger to the facts asserted by the first defendant:-

> *"… and awaits your clients replying affidavit to the matters as set out to date. As you know, if your client does not rebut matters set out on affidavit, they will stand as uncontested evidence. If it is the case that your client does not believe she should be joined it is up to your client to bring the appropriate application to court to set aside the order".*

The application to set aside the order of the Master

6. By notice of motion dated 23rd April, 2018 the second defendant made application for the order now sought. It is contended that the proceedings are unsustainable and are bound to fail. Reliefs are also sought in respect of an alleged breach of the *in camera* rule because the first defendant, in affidavits sworn in these proceedings referred to matters which are alleged to be subject to that rule without seeking an appropriate order to lift its operation in the circumstances.

7. In support of this application, the second defendant in an affidavit sworn on 23rd April, 2018, complains that she should not have been joined as a co-defendant and that she was not put on notice of the application. She further complains that the application was irregular and was brought in a "*haphazard and reckless manner*" and that the first defendant "*… appears intent on placing the responsibility for the present proceedings on anybody but himself*". It is alleged that the first defendant's affidavit is scandalous as it is replete with references to orders, evidence and documents generated within family law proceedings in breach of the *in camera* rule. By letter dated 14th February, 2018 solicitors acting on her behalf wrote to the plaintiff requesting that they serve a notice of discontinuance. A further letter was sent on 26th February, 2018 seeking information as to the course of action which the plaintiff proposed to take. It is the second defendant's contention that while the plaintiff replied on 28th February, 2018, no definite position was adopted by it regarding the discontinuance of the proceedings.

8. In response the first defendant swore an affidavit on 14th June, 2018. He avers that the second defendant is properly joined in circumstances where he alleges that, on foot of the order made in the family law proceedings. she or her solicitor are holding the funds from which the tax is to be paid. He believes that the concern of the second defendant for the *in camera* rule is disingenuous and that she is seeking to hide behind the rule in order to avoid compliance with a court order. He states that the tax which is due cannot be paid until the second defendant complies with the order made in the family law proceedings. The first defendant states he has fully complied with his obligations under the order in those proceedings.

9. When this application came before the court on 7th February, 2019, the first defendant informed the court that up to the time of the separation, joint returns had been made but that on this occasion he had made an individual return. Given the legal issues which arose and the fact that he did not have legal representation, the matter was adjourned to allow time for further consideration of issues which had arisen. Since then this application has been overtaken by developments.

10. Ms. Elizabeth Quinn, solicitor for the plaintiff, in an affidavit sworn on 4th March, 2019 states that the claim in the proceedings is based on the return made by the first defendant. Having considered the information deposed to in his affidavits and in particular that the parties were formally separated by court order on 21st June, 2016 it became apparent that the proceedings were not properly founded. The first defendant was not assessable on the stated basis as he and the second defendant had been formally separated and could not be considered to be living together for the purposes of the Taxes Consolidation Acts. Ms. Quinn informed the court that steps had been taken to issue amended notices of assessments. Seemingly, an amended return had been filed by the first defendant in December, 2017 which was not accepted because the original notice of assessment had not been appealed and was subject to enforcement. She exhibits a letter written to both parties on 27th February, 2019 in which she called upon them to consent to strike out the motion and the proceedings, with no order for costs. The first defendant, in his reply, queried the reference to a return made in 2017, but expressed his thanks to the plaintiff for what he described as its honourable approach to the matter. On 5th March, 2019, the solicitors for the second defendant, Ms. Vivienne Filgate, replied, advising:-

> *"the motion listed for further hearing on Wednesday at 10:30 AM is our appeal/motion to vacate the order joining our client as a co-defendant. As you have already indicated to court that you agree that the Master had no power to make that order, the court should be in a position to vacate that order on Wednesday. Once the court makes that order, it is a matter between you and the defendant how you wish to proceed."*

Nothing was said in respect of the proposal regarding costs in the event that the proceedings were struck out. However, this issue is addressed in an affidavit sworn by Ms. Filgate on 11th March, 2019. She emphasises the contents of two letters sent by the plaintiff to the first defendant prior to the making of the application to join her client as co-defendant. On 3rd June, 2017, the plaintiff wrote "*the liability arises on foot of a return made by you. It is not open to Revenue to sue multiple third parties in respect of it…*" and that this position was restated by letter dated 19th June, 2017:-

> *"As already advised on 9th June unfortunately, Revenue is not a party to these proceedings outlined therein nor the Court order nor indeed the terms of Consent. It is therefore not open to Revenue to bring any action to enforce either the Court order or the terms of Consent. This is entirely a matter for you and your legal representatives. In the meantime, the tax remains your liability and remains outstanding…".*

11. Ms. Filgate contends that the plaintiff has at all times maintained that the proceedings are founded upon a return made by the first defendant. She also asserts that the plaintiff had previously accepted that the liability was the sole responsibility of the first defendant. The second defendant never submitted a tax return, no assessment was raised against her, no liability arises and therefore there is no basis for the plaintiff to pursue her.

12. Ms. Filgate further avers that while the plaintiff opposed the application to join the second defendant before the Master, the plaintiff's refusal to issue a notice of discontinuance since that time has left her client with no option but to bring this application. While the plaintiff has acknowledged that the proceedings against the second defendant cannot properly be maintained, it has refused to issue the notice of discontinuance and thus costs have been incurred. She maintains that any contention of the plaintiff that the information supplied in the affidavits of the first defendant in the course of these proceedings had resulted in the decision which it has now taken could only be correct regarding the proceedings against the first defendant. She describes the plaintiff as having adopted a curiously inactive attitude. Emphasis is placed by Ms. Filgate on the contents of her letter of the 28th February, 2018, inviting an application to court to set aside the order. The plaintiff placed the second defendant in a position where she had no choice but to bring the application and incur costs. The second defendant now seeks her costs against the plaintiff.

13. On behalf of the plaintiff, Ms. Quinn swore a further affidavit on 13th March, 2019 in which she repeats that the Irish tax system operates on a self-assessment system for tax purposes and as such, it is not for the Revenue Commissioners to attempt to ascertain what individual tax payers owe or to verify a taxpayer's personal circumstances. The first defendant filed a return in his name only, but on both defendants' behalf. As has come to light, he ought not to have filed the return in such manner in light of their judicial separation. The Revenue Commissioners have been placed at the centre of a family law dispute and the suggestion that the plaintiff should have discontinued proceedings against the second defendant, according to Ms. Quinn, is wholly unreasonable. She avers that it is only in the course of the proceedings that a change of circumstances has become evident and that both defendants ought to have filed returns. The second defendant has failed to file a return in respect of the liability in breach of her legal obligations to do so. A notice of assessment has now issued to her. She refers to the averment of the first defendant regarding the retention of monies and maintains that she was entitled to afford due weight to the contents of his sworn affidavit. She rejects Ms. Filgate's assertion that the plaintiff ought to have accepted the contents of the first defendant's letters as representing the full factual matrix as between the parties, without any input from her client. The first defendant's averments amounted to a serious allegation that the second defendant had a significant tax liability which she had failed to declare. These are significant countervailing factors which would not have emerged had the plaintiff not taken the position it did in these proceedings.

14. Ms. Quinn confirms separate notices of assessment were issued on 1st March, 2019. Therefore the notice of assessment on which liability for sums claimed in these proceedings is no longer operative. These new assessments were raised not because of a unilateral act of the plaintiff, but on the basis of the undisputed facts now available to it. The second defendant has not denied that she has a liability. The plaintiff believes that no order as to costs should be made.

15. Counsel for the second defendant submits that his client did not place the Revenue at the centre of the family law proceedings. While it may be that the plaintiff was a reluctant participant at the time of the initial application, it was a voluntary participant thereafter. The issues in these proceedings are separate and distinct from any other or future proceedings concerning family law or tax matters. It is also contended that the second defendant has not sought to lift the *in camera* restriction and to place her defence on affidavit. She reserves the right to contest the debt. He further submits that a sensible approach was taken by the second defendant when her solicitors wrote on 26th February, 2018.

16. When this application was first opened before the court emphasis was placed by counsel for the second defendant, Ms. Browne S.C., on the issue of whether the second defendant had been properly joined and whether certain paragraphs in the affidavit of the first defendant should be struck out as being scandalous. It was submitted that there is no proper basis for the joinder of the second defendant as the proceedings arose on foot of a liability based upon the non-payment of tax due on foot of a notice of tax assessment which was not directed to her and in which notice she was not named.

17. The provisions of O.15, r.13, as considered in a number of cases was the subject of discussion. Reliance was placed on a number of authorities, including the decision of Peart J. in *Melia v Melia* [2004] IEHC 321. Peart J. was not satisfied that the plaintiff could avail of O. 15 in circumstances where there was no direct cause of action against the insurer other than by virtue of s. 76 of the Road Traffic Act 1961. The rule could not be used as a catch all to avail a plaintiff who otherwise has no entitlement to proceed. The provisions of this rule were also discussed in *Kennedy & Ors v. Casey t/a Casey & Company* [2015] IEHC 690, in somewhat similar provisions were considered in *Kelly v Rafferty* [1948] K.B.D. 187 where the court refused to join a person as a defendant who was not a necessary party to the action.

18. By the time the application returned to the court the underlying circumstances had changed. The plaintiff issued two separate assessments seeking to recover the outstanding taxes and interest against both defendants, on an individual and equal basis. The plaintiff maintains that this action was taken because of the information and evidence which emerged during the course of the application. In particular it has become clear that mistakes had been made by the first defendant in submitting returns in his own name and by the failure of the second defendant to make a return and to controvert the first defendant's averments concerning the background circumstances.

19. It is accepted by the plaintiff that the service of the new notices of assessment results in the original assessment upon which the proceedings was based being overtaken. The original notice of assessment can no longer be relied upon and therefore while the proceedings remain in existence it is inevitable that they must come to an end. Counsel has referred the court to the authorities relevant to the assessment of costs when an issue becomes moot. While the proceedings are still extant, given the inevitability of their conclusion, it has not been suggested that the court should operate on principles which differ from those applicable to cases where proceedings have in fact been already determined or have otherwise come to an end.

20. Order 99 of the Rules of the Superior Courts, as amended, in so far as it is relevant, provides that generally speaking, the costs of and incidental to every proceeding shall be in the discretion of the court. Nevertheless, O. 99, r. 1(3) also provides:-

> *"Subject to sub-rule (4A), the costs of every action, question, and issue tried by a jury shall follow the event unless the Court, for special cause, to be mentioned in the order, shall otherwise direct.*

21. In *Curtin v. Dáil Éireann* [2006] IESC 27, Murray C.J. emphasised that it would neither be desirable nor possible to lay down one definitive rule according to which exceptions are made to the general rule regarding costs. He observed that the discretionary function of the court to be exercised in the context of each case militates against such a definitive rule of exception. Other authorities since then have further addressed the issue in considerable detail.

22. In *Telefonica O2 Ireland Ltd v. Commission for Communications Regulation* [2011] IEHC 380, Clarke J. (as he then was) commented that mootness can arise for a number of different reasons. Observing that mootness may arise as a result of external factors, Clarke J. stated that in many such cases the equity of both parties' position will be much the same. Analysis led him to believe that, in the absence of other significant countervailing factors, a court should favour making no order as to costs when proceedings become moot because of factors entirely outside the control of the parties. The position might be otherwise if the mootness has arisen from the actions of some, but perhaps not all, of the parties to the proceedings.

23. In *Cunningham v. President of the Circuit Court* [2012] 3 I.R. 222 Clarke J. (as he then was) revisited the matter and observed at paras. 24 and 25:-

> *"…[A] court, without being overly prescriptive as to the application of the rule, should, in the absence of significant countervailing factors, ordinarily lean in favour of making no order as to costs in cases which have become moot as a result of a factor or occurrence outside the control of the parties but should lean in favour of awarding costs against a party through whose unilateral action the proceedings have become moot.*
>
> *[…]*
>
> *It must, of course, be acknowledged that some cases which have become moot may not fit neatly into the category of proceedings which have become moot due to entirely external events, on the one hand, or due to the unilateral action of one of the parties, on the other hand. In particular there will be cases where the immediate reason why proceedings have become moot is because a statutory officer or body has decided not to go ahead with a threatened course of action (such as the criminal prosecution in this case). However, the reason why it may have been necessary or appropriate for that statutory officer or body to adopt a changed position may, to a greater or lesser extent, be due to wholly external factors."*

The judge went on to state at paras. 26 and 27:-

> *"[26] In that context it is, of course, important to note that statutory officers and bodies have an obligation to exercise their powers in a proper manner. If circumstances change then it is, of course, not only reasonable but necessary for such officers and bodies to reflect the new circumstances by adopting a position (even if different) which takes into account the circumstances as they have come to be. The mere fact, therefore, that a statutory officer or body adopts a changed position which renders judicial review proceedings moot does not, of itself, necessarily mean that it is appropriate to characterise the proceedings as having become moot by reason of a unilateral act of one party.*
>
> *[27] If there were no change in underlying circumstances and if the statutory officer or body had simply changed his or its mind or adopted a new and different view, then such a characterisation might be appropriate. Where, however, there is an underlying change of circumstance, it is necessary to consider the extent to which it can properly be said that the proceedings have become moot by reason of the unilateral act of one party, on the one hand or, in reality have become moot by reason of a change in underlying circumstances outside the control of either party, on the other hand. The result of any such analysis should play an important role in the court's consideration of the justice of where the costs of proceedings rendered moot should lie."*

24. Regarding the proof of the existence of an external factor, Clarke J. observed:-

> *4.11 It does, however, seem to me that, where the immediate or proximate cause of proceedings becoming moot is the action of such a statutory officer or body but where it is sought to argue that the true underlying reason is an external factor outside the control of that officer or body, it is incumbent on the officer or body concerned to place before the court sufficient evidence to allow the court to assess whether, and if so to what extent, it can fairly be said that there*

was a sufficient underlying change in circumstances sufficient to justify, in whole or in part, it being appropriate to characterise the proceedings as having become moot by reason of a change in external circumstances. Against those general observations it is necessary to turn to the circumstances in which these proceedings became moot.

25. The issue was further considered in great detail by McKechnie J. in *Godsil* a decision upon which counsel for the second defendant places particular emphasis:-

> *"52. The overriding start point on any question of contested costs is that the general principle applies that namely, costs follow the event. All of the other rules, practises and approaches are supplementary to this principle and are designed to further its application or to meet situations where such application is difficult, complex or indeed even impossible.*
>
> *53. For the rule to apply quite evidently there must be an "event(s)", which is capable of identification. In most cases that will not cause a difficulty, but in some it might….*
>
> *54. There has also been some debate about what might constitute an "event" for the purpose of O. 99, r. 1(4) of the RSC: r. 1(3) is in the same form but applies to jury trials. In Roache v. News Group Newspapers Ltd & Ors [1998] E.M.L.R. 161, Bingham M.R. at p. 166 equated the event with "who is really the winner and who is really the loser or, as it is sometimes put, to identify the event which costs are to follow". Several Irish cases have likewise adopted such an approach: see Mangan v. Independent Newspapers (Ireland) Ltd [2003] 1 I.R. 442, Fyffes (para. 23 supra) and Grimes (para. 23 supra), to name but a few.*

26. Importantly, he stated at para. 58:-

> *58. It seems to me that even where the substantive point has become moot, the first inquiry which a court must make on a follow on cost application is to decide whether or not there exists an "event" to which the general rule can be applied. If such can be identified there will be no necessity to resort to the principles discussed in Cunningham. In fact, it was precisely because of the absence of such event, that it was necessary in Cunningham to assess the cost issue by reference to some other criteria. The question which therefore arises is, whether by an examination of the circumstances of this case, an "event", in the sense understood by O. 99 r. 1(4), can be identified by reference to which the cost issue can be determined. "*

27. In *M.K.I.A. (Palestine) v. The International Protection Appeals Tribunal* [2018] IEHC 134 at para. 6, Humphreys J. summarised the position thus:-

> *"So it seems then the law applicable in relation to costs of a moot action can be summarised as follows:*
>
> *(i). The first inquiry that a court is required to make is to decide whether or not there existed an 'event' to which the general rule that costs follow the event can be applied (see Godsil).*
>
> *(ii). An act that could only be regarded as an explicit acknowledgment and admission of the legal validity of the plaintiff's challenge is such an event, as in Godsil.*
>
> *(iii). Thus the event must normally in some way be caused by the applicant's proceedings; per MacMenamin J. in Matta.*
>
> *(iv). If the proceedings are moot due to a factor outside the control of either party, the view should be taken that there is no event in the Godsil sense and therefore the default order is no order as to costs, as discussed in Cunningham.*
>
> *(v). If the proceedings are moot due to a factor which is within the control of one party but that has no causal nexus with the proceedings or which relates, as it is put in Cunningham, to an underlying change in circumstances, then again there seems to be no event in the Godsil sense, so the court should lean in favour of no order (see per MacMenamin J. in Matta at para. 20).*
>
> *(vi). Finally, if the proceedings are moot due to a factor within the control of one party that does have a causal nexus with the proceedings then there is an event in the Godsil sense and the default order should be costs in favour of the other party (see Cunningham and Godsil in particular)"*

28. Counsel for the plaintiff submits that the usual order that costs follow the event does not strictly speaking apply because there has been no determination of the issue in this case. It is submitted that this court must look at the underlying reason why the new assessments were issued. The intended termination of the proceedings is not the result of a unilateral act on the part of the plaintiff. It was a decision which was taken in light of the circumstances which have emerged that the first defendant had filed an incorrect tax return and the second defendant had filed none. The fact that she held shares was not subject to the *in camera* rule. She either held shares or she did not. She may or may not have a liability to pay tax, nevertheless she is obliged to make a return. Her version of events remains unknown. It is submitted that all parties are responsible for the events which have transpired.

29. Counsel for the second defendant submits that in accordance with the principles outlined by McKechnie J. in *Godsil v. Ireland* [2015] 4 I.R. 535 the court must consider whether there has been an event. If it is satisfied as to what the event is, there is no necessity to look to the criteria as outlined in *Cunningham v. President of the Circuit Court* [2012] 3 I.R. 222. The event in these proceedings is not the raising of new assessments, rather it is, or will be, that the proceedings will terminate in consequence of the plaintiff's actions.

30. It is clear, therefore on the authorities, that the first inquiry upon which the court should embark is to determine whether an *event* has taken place within the meaning of the rule. An analysis of the facts of the decisions referred to above is instructive.

31. In *Godsil* the plaintiff challenged provisions of the Electoral Acts which had the effect of prohibiting her, as an undischarged bankrupt, from election to the Dáil or the European Parliament. Between the date of the institution of the proceedings and the hearing date a change in the laws occurred which rendered the proceedings moot. The court was satisfied that an "event" within the meaning of the rule had been established. McKechnie J. observed at para 63:-

> *"The actions of the respondents, despite their protestations that the same were driven by policy considerations, can only reasonably be understood, in the vastly truncated time period involved, as being in direct response to the proceedings as issued. It is difficult to recall any other comparable example, where by combination of the executive and legislative branches of government, a constitutional challenge has been so responded to. Such can only be regarded as being an explicit acknowledgment and admission of the legal validity of the challenge as mounted. In effect, if the claim was unmeritorious, it could hardly be deserving of legislative amendment. Therefore, I am entirely satisfied that in this case, there exists an "event", by which the issue of costs should be determined."*

32. The court was satisfied that a causal connection had been established between the proceedings and the action taken by the State to amend the legislation, which rendered the proceedings moot. There was an event and the plaintiff was awarded her costs.

33. The facts of *Cunningham* are instructive. The plaintiff sought to prohibit a trial on criminal charges relating to alleged blood product contamination on the grounds of delay. In the High Court, McKechnie J. held that while there had been delay, the balance of justice favoured the continuation of the proceedings. He refused the application and made no order as to costs. Both sides appealed with the Director of Public Prosecutions appealing against the order for costs but not against the finding that there had been delay. While the appeal was pending the DPP made a decision not to proceed with the prosecution. A *nolle prosequi* was entered. The plaintiff was written to informing her that the DPP had kept the evidential basis for the prosecution under review and was satisfied that it was not now such that the prosecution could be sustained.

34. In considering why the proceedings had become moot, the court was satisfied, on the evidence, the case was at the end of the spectrum where it might be said that the proceedings had become moot due to a unilateral decision of the DPP. Nevertheless, there was an evidential deficit as to the reason why that decision was taken. Clarke J. observed:-

> *"5.1 The real problem with which this court is faced is that there is a virtual absence of evidence as to the true reasons why the DPP came to the view that the criminal proceedings against Ms. Cunningham were no longer sustainable. It is true, of course, as was noted by counsel for the DPP in oral argument, that the well established jurisprudence of this court makes clear that the DPP cannot be obliged to give reasons for decisions as to whether or not to prosecute. However, it seems to me that counsel for Ms. Cunningham was also correct when she suggested that there was no barrier, in an appropriate case, to the DPP giving reasons and that it also followed that there may be consequences of an absence of reasons being given.*
>
> *5.2 It is, of course, the case that it is entirely appropriate for the DPP to keep pending criminal proceedings under review and it is equally appropriate for the DPP to discontinue such proceedings in the event that circumstances change in a way which leads the DPP to the view that the proceedings should no longer go to trial. However, where, as here, this court is required to assess whether, and if so to what extent, it can truly be said that there were changes in underlying external circumstances which led to the discontinuance of the criminal trial then it is impossible for this court to carry out any reasonable analysis of the situation without information and evidence.*
>
> *5.3 For example, on the facts of this case, one question which might well have to be asked was as to whether any changed circumstances pre or post-dated the trial of the judicial review proceedings for it is difficult to see how circumstances that were already in being when Ms. Cunningham was put to the expense of running the trial of these judicial review proceedings in the High Court could have any significant bearing on the proper order for costs. To the extent that there might be changed circumstances in existence which were unknown to the prosecuting authorities at any material time then the reason why the changed circumstances had not been discovered at that time might itself be an important factor. There may, of course, be limits as to the extent to which it would be appropriate for this court to go into minute detail on questions such as those which I have noted (there would be little point in replacing a full hearing on the merits of a moot appeal with an overly detailed consideration of the minutiae of why the trial might be said to have become moot). On the other hand it does seem to me that this court is left in a position where the amount of information available to it as to the circumstances in which these proceedings became moot falls far short of being sufficient to allow the court to form a view on the issue of the real reason why these proceedings became moot. This court does not know whether there were sufficient external factors arising after the judicial review proceedings were heard in the High Court, or if such factors were present but unknown at that time, whether knowledge of those factors could reasonably have been obtained by the prosecuting authorities prior to that time, sufficient to justify characterising these proceedings as ones which have become moot by virtue of external factors*. As pointed out earlier the onus is on the statutory officer or body who wishes to assert external factors to at least put sufficient information before the court to allow a judgment to be made on such questions." (emphasis added)

35. Thus, while it was appropriate to characterise the case as one which became moot by reason of the unilateral action of the DPP, nevertheless, if it was desired by the DPP that the court should treat the proceedings as having become moot by reason of external factors, it was incumbent on the DPP to place sufficient evidence before the court to facilitate the determination of the extent and materiality of such factors and whether they arose, or were reasonably discoverable, before or after the costs in this case were incurred. The DPP failed to put forward such evidence. Costs were awarded to the plaintiff.

Decision

36. I am satisfied that the facts of the instant case are more akin to circumstances in which a unilateral decision has been taken to terminate proceedings, rather than one in which there is an event to which the general rule may be applied. In my view, to characterise the termination of these proceedings as being the result of an event, because a decision has been taken to discontinue them, or that further notices have been served, without reference to the reasons why that decision was taken, is to oversimplify matters.

37. Unlike in *Cunningham* the plaintiff in this case has advanced reasons why it has decided to adopt the course which it has now taken. It substantially relies on what are described as mistakes to which all parties contributed and it contends that when the true situation was verified on affidavit, a decision was made to take a different view of the assessment upon which the proceedings were based.

38. It seems clear on the authorities that where there is a change in circumstances, it is not only reasonable but necessary for a statutory officer to take that into account. This may result in a change of position, rendering proceedings moot.

39. Nevertheless, in the circumstances, and in line with the authorities to which I have referred, I am satisfied that the evidential burden is on the plaintiff to establish that the proceedings have become moot because of external factors and to adopt the words of Clarke J. in Cunningham "*to place sufficient evidence before the court to enable it to determine the extent and materiality of such*

factors and whether they arose, or were reasonably discoverable, before or after the costs in this case were incurred",

40. Having considered the evidence, I am not satisfied that any new features, facts or matters emerged following the letter of the 26th February, 2018 written by the solicitors for the second defendant, of which the plaintiff was not already in possession or which ought to have been in the knowledge of the plaintiff. Further, the correspondence both before and after the application to the Master and indeed when viewed in its entirety indicates that the plaintiff was aware of the legal basis upon which proceedings in these matters are maintained. I am therefore not satisfied, on the evidence, that the plaintiff has established that the proceedings have become moot because of external factors. In principle, therefore, it seems to me that the second defendant is entitled to an order for costs.

41. It is also clear from the authorities, that in determining the issue of costs, the court must attempt to do justice as between the parties. The above principles have been developed for this reason. While the authorities referred to do not specifically address the issue of a partial costs orders, it seems to me that in the interests of justice consideration ought to be given to whether there are factors which require to be taken into account in addressing whether the plaintiff ought to be burdened with a full order for costs, or whether otherwise it is just that the second defendant should not receive her full costs.

42. In my view, a number of factors ought to be taken into account in the assessment of this issue. First, the position which the plaintiff found itself in is somewhat unusual. It is clear from correspondence that before the first defendant brought his application to the Master the plaintiff's view was that it was not legitimate for it to join the second defendant to the proceedings. Second, it was not open to the first defendant to seek to join the second defendant as a third party in light the rules regarding summary proceedings in Revenue matters. If it had been, it may very well be that the issue now being considered might not have arisen and it may have been dealt with in a different way. Third, the order made by the Master, and which was opposed by the plaintiff, imposed upon the plaintiff the burden of proceeding against a party which it had no wish to join. Fourth, the plaintiff did not appeal the order or to seek to have it otherwise set aside. The relevant application was made by the second defendant having been served with the proceedings. Fifth, having found itself in the position whereby the second defendant was seeking to be released from the proceedings, in circumstances where it must have been aware that the joinder of the second defendant was at best legally frail, it persisted with the proceedings against her. Seventh, the second defendant made no application for costs as against the first defendant. There may be a reason for this, given that the order against which the appeal/application to set aside has been made was obtained in favour of plaintiff, albeit at the behest of the first defendant. Eight, although I have already addressed this in a substantive way, it seems to me that I should afford some weight to the circumstances which the plaintiff ascribes to its change of view. I believe that I must also afford due weight to the second defendant's submission that the debt will be contested and that her affidavits have not been specific in this regard because of her objection based on disclosure of matters which are the subject of the *in camera* rule, although I make no ruling on this. Finally, although the second defendant denies that any act on her part has sought to embroil the plaintiff in a greater dispute on family law issues, one cannot but have sympathy for the plaintiff and the manner in which the proceedings progressed possibly against its better judgment.

43. Taking all of these factors into account, I am satisfied that the second name defendant is entitled to an order for her costs against the plaintiff, but that the order should be restricted to recovery of 60% of such costs when taxed and ascertained.