THE COURT OF APPEAL

Neutral Citation Number [2020] IECA 153
Court of Appeal Record Number: 2018/231
High Court Record Number: 2017/4645P

Donnelly J.
Faherty J.
Haughton J.

BETWEEN/

PATRICK MCFADDEN

PLAINTIFF/RESPONDENT

- AND -

MUCKNO HOTELS LIMITED

DEFENDANT/APPELLANT

COSTS JUDGMENT of Mr. Justice Robert Haughton delivered on the 10th day of June, 2020

1. This judgment concerns the costs of the appeal hearing before this court that resulted in the judgment of this court allowing an appeal from the order of the High Court made on 3 May 2018 (perfected on 8 May 2018) under which the respondent was awarded certain costs. In my judgment on 22 April 2020, which became the judgment of this court, I stated –

> "56. … Having regard to all the circumstances I would allow this appeal and would substitute the costs order of the High Court in favour of a no order as to costs of the application for leave of short service, of the Notice of Motion seeking interlocutory relief, and of the costs of the hearing on 22 June 2017."

The last limb of this should more accurately have referred to "…the costs of the interlocutory injunctions Motion up to 22 June, 2017" as that is the wording used in the High Court order. Costello J also awarded to the respondent "the costs of the application this day" i.e. the costs of the costs hearing before her on 3 May 2018.

2. The appellant seeks costs of this appeal, and also the costs of the costs hearing before the High Court on 3 May 2018 (see paragraphs 4, 5 and 21 of the appellant's Submission

of 11 May 2020). The respondent argues that there should be no order as to the costs of the appeal or the hearing in the High Court on 3 May 2018.

3. Both parties lodged written Submissions, and in response to the court's invitation the respondent filed a further Submission on 26 May 2020 in reply to the appellant's Submission.

Costs of the costs hearing in the High Court

4. These are sought by the appellant based on its success in this appeal and on a letter sent by its solicitors on 23 April 2018 to Mr. McFadden's solicitors in advance of the hearing on 3 May 2018, enclosing their legal submissions and stating:

> "It appears from a review of the law on this issue that the proper manner in which to deal with the issue of liability for costs is no order as to costs and that each party bears his or its own costs.
>
> Should you decide, notwithstanding, to proceed with your application on 3rd May 2018 please take notice that we will rely on this letter to fix you with the costs of that application."

5. There are a number of reasons why I would not accede to this element of the appellant's claim. Firstly the Notice of Appeal, while it does appeal the High Court order on costs in its entirety, it does not set out in the 'Orders Sought' section the order sought from this court by way of substitution in respect of the costs hearing on 3 May 2018. This may be why the respondent does not even address this aspect of costs in its first written submission. Secondly the claim for those costs now is at odds with the suggestion in the letter of 23 April 2018 that the appropriate way to deal with costs is 'no order as to costs'. Thirdly that letter does not apply to the appeal, and no 'letter as to costs' similar to that written on 23 April 2018 appears to have been written in advance of the appeal hearing (or if there was a letter written it has not been brought to this court's attention). In my view the interests of justice would be best met by making no order as to the costs of the hearing on 3 May 2018. I would therefore exercise my discretion to substitute for the High Court order granting to Mr. McFadden the "the cost of the application this day" an order that there be no order as to the costs of the costs hearing before the High Court on 3 May 2018.

Costs of the appeal

6. As to the costs of the appeal, the appellant seeks these on the basis that it won, and costs should follow the event. This is the norm under s.169(1) of the Legal Services Regulation Act 2015, unless the court decides otherwise having considered the factors set out at (a) - (g), in which case it must give reasons (s.169(2)):

> "169. (1) 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."

7. The respondent in its Submissions accepts that the appellant succeeded but suggests that there are reasons why the court should depart from the usual order and proposes that there be no order as to the cost of the appeal.

8. The first reason suggested is that 'the error lay with the trial judge'. However this could be said in every case where a litigant who is successful at first instance fails on appeal, and in itself cannot be a reason for departing from the normal rule.

9. Secondly reference is made to the undertakings given in the High Court by the appellant that led to resolution of the interlocutory injunction application. It is said that these were only given after some delay, and only after the appellant indicated that it was standing over the disciplinary investigation findings, compelling the respondent employee "to take steps to protect his position".

10. This argument might be said to engage considerations at (a), (b) and/or (c) in s.169(1), although the Submissions did not seek to relate this argument to the section in any respect. In my view this submission asks this court to revisit its principal judgment on the High Court decision on costs. In brief this court decided that the respondent proceeded prematurely for interlocutory relief without first requesting in clear and unequivocal terms undertakings that the employer would not continue the disciplinary process and would not use or rely on the investigation report received. This court also found that instructions to give further undertakings were obtained promptly that the delay in counsel confirming the undertaking to the High Court was not culpable and did not result in the respondent having to advance the interlocutory application. The submission that the respondent was compelled to take steps to protect his position – in the sense of bringing or pursuing the interlocutory application in the way that he did - does not stand up to scrutiny. Accordingly I do not consider that the appellant's conduct during the proceedings, or the extent to which it contested the motion, or any delay in confirming the undertakings given, can be a basis or reason for departing from the normal rule under s.169.

11. Thirdly 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 that can be taken into account even if a litigant has legal representation – it is not reserved to lay litigants.

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. Section169 (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 the 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.

13. It is said that this court should not take an "adverse view" in respect of certain findings in the WRC in circumstances where that decision is under appeal. I tend to agree because the appellate body may take a different view. It is indeed questionable whether the proceedings before the WRC have any relevance at all to the question of the costs of the appeal to this court.

14. The respondent does not place express reliance on any of the factors set out in s.169 (a) - (g). Factor (a) is "conduct before and during the proceedings" but I cannot see that the appellant has done anything that might approximate to poor conduct. Factor (b) is "whether it was reasonable for a party to raise, pursue, or contest one or more issues in the proceedings" i.e. in the appeal before this court; I do not consider that the appellant acted unreasonably. Factor (c) is "the manner in which the parties conducted all or part of their cases". Again there is no suggestion here, for example, that the appellant pursued an argument or issue that failed, or that we should take a *Veolia* approach to costs. None of the factors (d) - (g) have any application to this case.

15. I do not find that there is any good reason for departing from the normal rule. I would therefore award the costs of the appeal to the appellant.

As this judgment is being delivered electronically, Donnelly and Faherty JJ. have indicated their agreement with it.