THE HIGH COURT

[2014 No. 2799P]

BETWEEN

CAROL AND JOHN MORRISSEY

PLAINTIFFS

AND

THE NATIONAL ASSET MANAGEMENT AGENCY LIMITED,

CAPITA ASSET SERVICES (IRELAND) LIMITED,

THE MINISTER FOR FINANCE, IRELAND AND THE ATTORNEY GENERAL.

DEFENDANTS

JUDGEMENT of Mr Justice David Keane delivered on the 19 July 2017

Introduction

1. This judgment deals with the costs of the plaintiffs' unsuccessful discovery application against both the NAMA defendants and the State defendants in the above-entitled proceedings. I gave judgment in that application on 24 March 2017. It can be found under the citation [2017] IEHC 193. This judgment should be read in conjunction with that one.

2. The parties agree that, under s. 183 of the National Asset Management Agency Act 2009 ('the 2009 Act'), the present action falls within the category of legal proceedings to which Chapter 3 of the 2009 Act applies. The discovery application was an interlocutory application within those proceedings. It follows that it is governed by s. 189 of the 2009 Act. That section states:

> '189.—(1) At the conclusion of each interlocutory application in any legal proceedings to which this Chapter applies, the court concerned shall make orders as to costs in respect of the application and, having received submissions from the parties as to the levels of those costs, the court shall measure those costs.
>
> (2) Costs measured under subsection (1) shall be enforceable against the party directed to pay those costs. If the party fails to discharge those costs within 30 days of the court order measuring those costs, the court may on the application of any party to the proceedings or of its own motion impose terms as to the continuation of the proceedings pending the discharge of the costs.

Arguments

3. The NAMA defendants seek an order for their costs of the discovery application against the plaintiffs on the basis that the application failed and the court should apply the usual rule that the costs of the application follow the event.

4. The plaintiffs seek an order for the costs of their unsuccessful discovery application against the NAMA defendants or, in the alternative, an order that each party should bear its own costs. They do so on eight separate grounds. In setting them out here, I have endeavoured to more shortly paraphrase those I more clearly understand. The others appear in quotation marks. They are as follows:

> (i) These proceedings should be viewed as public interest litigation or as a test case brought by the plaintiffs in the public interest.
>
> (ii) The defendants refusal to make voluntary discovery of the categories of documentation sought was unreasonable.
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> (iii) The discovery previously furnished by the NAMA defendants on a voluntary basis was deficient in form and content
>
> (iv) The plaintiffs were obliged to seek discovery because these proceedings are being conducted on affidavit and, in the circumstances, documentary evidence is critical to the plaintiffs' case.
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> (v) 'The plaintiffs should not be penalised for having to open law to the court to outline the legal principles applicable to discovery in this case as it (sic) would have had to do so in any event in the separate motion (against the State defendants) in the same proceedings which was (sic) also heard by the Court over the course of the trial.'
>
> (vi) 'The plaintiffs should not be penalised for seeking discovery of documents which they would have had to have sought in any event by way of an application for further and better discovery.'
>
> (vii) 'The plaintiffs had to prepare extensive written submissions to address the issue of *res judicata* in respect of some categories of discovery as alleged by the defendants up to the hearing of the motions, at which stage the defendants advised the court that they would no longer pursue this ground of challenge to the motion.'
>
> (viii) 'Counsel on behalf of NAMA and Capita offered additional discovery to the plaintiffs after the plaintiff brought the motion for discovery. But for bringing the motion it is reasonable to believe that such an offer would not have been forthcoming.'

5. I have considered these arguments as carefully as I am able, and none of them is persuasive.

6. First, this is a private law action in which the plaintiffs seek damages against both NAMA and the State defendants and in which the NAMA defendants counterclaim for summary judgment against the plaintiffs in the amount of €32,516,390.55, plus interest on that sum accruing from 16 April 2014. There is no doubt that, in one sense, where the lawfulness of the actions of a public body is challenged in a private law action involving that entity, there is a public law element in those proceedings. But it is equally clear that these proceedings have been brought by the plaintiffs – as is their perfect entitlement - in the pursuit of their own private interests. I

can see nothing sufficiently exceptional about the nature or circumstances of this case that would warrant a departure on public interest grounds from the general rule that costs should follow the event; see *Dunne v Minister for the Environment & Ors* [2007] IESC 27.

7. Second, several of the plaintiffs' arguments – specifically, that the defendants' failure to make voluntary discovery was unreasonable; that the voluntary discovery previously made by the defendants was deficient in content or form; that the plaintiffs were obliged to open the law on discovery at length in one application or the other; and that the plaintiffs are, in any event, entitled to further and better discovery of the documentation concerned – invite the court to revisit or reconsider the merits of the discovery application. That is something that the court cannot do as it is *functus officio* in that regard.

8. On this point, I note with some surprise that the very extensive written submission on costs furnished by the plaintiffs contains an opening section entitled 'key facts', several of the assertions in which are difficult, if not impossible, to reconcile with the findings of fact in the judgment, in particular those set out in it at paragraph 43.

9. Third, insofar as these proceedings are being conducted upon affidavit, it is because the parties, including the plaintiffs, agreed to that procedure. It is a rudimentary procedural principle that trial on affidavit is only appropriate where there is little, if any, dispute between the parties on issues of fact. I struggle to follow, and cannot accept, the plaintiffs' argument that the trial procedure to which they have agreed (an unusual one in a plenary action), required them to bring an application for discovery of documentation to which I have held they were not entitled, such that they should be awarded their costs of that unsuccessful application.

10. Fourth, while I accept that certain concessions of law were made by the defendants in argument and (more significantly) that, during the course of the lengthy hearing, the defendants agreed to make voluntary discovery of certain categories of documentation until then in dispute, the fact remains that the plaintiffs continued to press their application - with the benefit of those concessions of law and despite the defendants' agreement to make that additional agreed discovery - to its unsuccessful conclusion.

11. In those circumstances, if this were a matter governed solely by Order 99 of the Rules of the Superior Courts ('RSC'), I would exercise the discretion conferred under O. 99, r. 1 to order that the costs of the question of discovery should follow the event pursuant to O. 99, r. 3, there being no special cause to direct otherwise, and would do so having concluded that it is possible to adjudicate justly on liability for the costs of the said interlocutory application, in accordance with O. 99, r. 4A.

Constitutionality of s. 189

12. The plaintiffs point out that one of the claims they advance in the underlying proceedings is that s. 189 of the 2009 Act is a provision capable of limiting, curtailing or excluding their right of action and, as such, is either inapplicable or invalid as in breach of their constitutional rights; or in breach of s. 3 of the European Convention on Human Rights Act 2003, as being in breach of the State's obligations under various articles of the Convention; or in breach of various articles of the Charter of Fundamental Rights of the European Union, which the plaintiffs contend applies because the NAMA Act involves the implementation of EU law by the State.

13. On one view, this creates an obvious difficulty in that, if the strict application of s. 189 of the 2009 Act in the context of the present costs hearing is capable of having the effect of unconstitutionally or unlawfully limiting, curtailing or excluding the plaintiffs right of action to challenge the constitutionality or lawfulness of a strict application of the section, then the plaintiffs are caught in a 'catch 22' situation and justice is put to the hazard. Indeed, rather unhelpfully, the NAMA defendants' submissions on this point merely emphasise how acute the plaintiffs' potential dilemma is. They point to the express terms of s. 189(1) in arguing that the only submissions that the parties are permitted to make on the costs of an interlocutory application governed by the section are submissions 'as to the levels of those costs', thereby (through somewhat circular logic) excluding any argument as to the constitutionality of the section.

14. The NAMA defendants go on to make a separate point about the fact that the plaintiffs have already benefitted from a costs order in their favour under s. 189 of the 2009 Act, in respect of the NAMA defendants' unsuccessful application to have the proceedings transferred to the Commercial Court; see the judgment of Kelly J (as he then was) on that application, which can be found under the neutral citation [2014] IEHC 343. For my part, I cannot see how that gives rise to any estoppel (or inhibition of any other kind), particularly when one considers that NAMA accepts the constitutional validity of the section and, even if it did not, could hardly have established standing to challenge it on the basis that the imposition of a requirement upon it to discharge a measured costs order in an interlocutory application within 30 days of the making of such order would limit, curtail or exclude its right of access to the courts.

15. However, for two reasons, I conclude that the particular dilemma apprehended by the parties does not, in fact, arise in the specific circumstances of the present application.

16. First, I have already indicated that in this case, even if I was exercising the broad discretion conferred on the court under O. 99 of the RSC (or, I should add, adopting a construction of s. 189 consistent with the exercise of such a discretion, as Finlay Geoghegan J did, albeit *obiter*, in *Treasury Holdings Ltd v NAMA* [2012] 1 IR 782), I would still have reached the conclusion that costs should follow the event, finding no special cause to direct otherwise and being satisfied that it is possible to adjudicate justly on liability for the costs of the present interlocutory application at this point in the litigation.

17. Second, in those circumstances, no issue yet arises concerning the potential effects of the proposed order on the plaintiffs' right of access to the courts or on their right to litigate. I reach that conclusion because where s. 189 'bites' (if at all) in relation to the right to litigate or the right of access to the courts is in s. 189(2), whereby if a party fails to discharge the costs awarded in an interlocutory application within 30 days of the order measuring those costs, 'the court may on the application of any party to the proceedings or of its own motion impose terms as to the continuation of the proceedings pending the discharge of the costs.' There is no evidence before the court at present concerning the plaintiffs' means and, accordingly, no evidence to suggest that an order to pay a certain sum in measured costs within 30 days will give rise to any obvious difficulty. Even if it could be established that the payment of such a sum is not within the plaintiffs' means, there is as yet no evidence that any of the defendants intends to apply to court for any order in relation to the continuation (or non-continuation) of the proceedings pending the discharge of those costs, or that the court is disposed to make such an order of its own motion. Accordingly, it seems to me, that any consideration of the constitutional validity of s. 189(2) is premature, where all that is at issue now is the appropriate order to be made under s. 189(1).

Measurement of costs

18. The NAMA defendants have produced in court without objection a legal costs accountant's report which values those defendants' legal costs of the discovery application on a party and party basis at €89,998.83.

19. In response, the plaintiffs asserted, not for the first time, that they were not given an adequate opportunity to instruct their own

legal costs accountant on the issue, in consequence of their decision to discharge their former solicitors and to instruct new solicitors very shortly before the date fixed for the hearing of the costs application. I wish to reiterate my rejection of that submission. Regrettably, it is necessary to set out a short chronology of the relevant events once again.

20. I gave judgment on the application on 24 March 2017, and adjourned the hearing of the costs application to 28 April 2017. On that date, the plaintiffs sought an adjournment of three weeks to enable each of the parties to obtain a legal costs accountant's report, to consider the contents of each, and to exchange written submissions on the relevant issues. I adjourned the matter for two weeks to 12 May 2017. Counsel for the NAMA defendants was in personal difficulty on that date and I adjourned the matter for a further two weeks to 26 May 2017. On that occasion, the plaintiffs sought a further adjournment to 1 June 2017, to which the defendants did not object. On 1 June 2017, Counsel for the NAMA defendants indicated that their legal costs accountant's report was not yet ready. On 15 June 2017, Counsel for the NAMA defendants confirmed that they had furnished their legal costs accountant's report in compliance with the court's direction, and the court then fixed 30 June 2017 for the hearing of the application. The plaintiffs were directed to furnish any legal costs accountant's report they may wish within 7 days of that date (15 June 2017).

21. Against that background, the plaintiffs' solicitors purported to make an *ex parte* application to come off record on 20 June 2017. I directed that any such application be brought by motion in accordance with the appropriate rule of court.

22. On 30 June 2017, the plaintiffs had still not produced a legal costs accountant's report. I re-fixed the hearing of the application for 11 July 2017 and directed that any motion by the plaintiffs' solicitors to come off record be issued forthwith, returnable to 7 July 2017. A motion to come off record issued on the same day, returnable to that date.

23. In the course of hearing the motion to come off record on 7 July 2017, it became apparent for the first time that it was the plaintiffs who wished to discharge their solicitors rather than those solicitors who no longer wished to act for the plaintiffs. Subsequently, Mr Morrissey swore an affidavit on 11 July 2017 in which he purported to identify a contradiction between the grounding affidavit sworn on behalf of his solicitors, which contains an averment that he sought to discharge them 'in recent days' prior to 10 July 2017, and a letter he exhibited from those solicitors dated 10 July 2017, in which they state that he wrote to them 'nearly a month' prior to that date, advising them that they did not have his instructions to act. Unaccountably, while complaining about that apparent contradiction on the part of his former solicitors, Mr Morrissey has failed to clarify either in that affidavit or otherwise, precisely when he determined to discharge those solicitors and specifically what communications he had with them in that regard.

24. In view of the evident confusion just described, I adjourned the motion to come off record to the date of the costs application, 11 July 2017. On that date, a new firm of solicitors (who had been represented in court on 7 July 2017, although without then having any right of audience) lodged a notice of change of solicitors and proceeded to represent the plaintiffs. Counsel for the plaintiffs then sought an adjournment on the basis of that change in representation, which I refused in reliance upon the relevant statement of principle set out in the decision of the Supreme Court in *Kavanagh & Anor v McLaughlin & Anor* [2015] IESC 27 (at paras. 2.2 and 2.3). However, it was by then too late to deal with the costs application that day (due to the pressure of other court business) and, having refused that application for an adjournment, I was nevertheless obliged to adjourn the matter for hearing to today's date, 19 July 2017.

25. In those circumstances, I wish to reiterate my understanding of the relevant procedural principle, namely, that 'while a party is more than free to change its legal representation, it cannot do so in circumstances which affect the run of the case or, at least, cannot do so without taking a significant risk that the court will not be sympathetic to an adjournment where that course of action would sufficiently affect the orderly conduct of the court's business (to the detriment of other litigants) and might also prejudice the interests of other parties to the case' (at para. 2.3 of the judgment of Clarke J in *Kavanagh*, already cited).

26. The State defendants have not produced a bill of costs, nor a legal costs accountant's report on so much of those costs as would tax on a party and party basis. At the hearing of the costs application, those defendants submitted that the Court should view the second use of the word 'shall' in s. 189(1) – *i.e.* its appearance in the clause 'and, having received submissions from the parties as to the levels of those costs, the court shall measure those costs' – as directory rather than mandatory; see, *e.g.*, *Cork County Council v Valuation Tribunal* [2007] IEHC 311 (per Dunne J); and *Breen v Governor of Cork Prison* [2004] IEHC 243 (*per* Smyth J). This would mean taking the same view of the proper construction of the word 'shall' in that clause as Finlay Geoghegan J took of its use in the phrase 'shall make orders as to costs', which appears earlier in the same sub-section. This entails treating its use as directory, rather than mandatory, in nature, when viewed in light of the scheme of the statute as a whole and the requirements of the Constitution.

27. Very fairly, the NAMA defendants indicated that, if the court was not disposed to make an order for measured costs in their favour, they too would be content with an order for their reasonable costs of the application to be taxed in default of agreement.

28. Having already concluded that each of the defendants is entitled to an order for its costs, it seems to me fairest all round to make those orders on the more usual basis that the said costs are to be taxed in default of agreement, and that is what I will do. It is unnecessary to consider here what the implications of the terms of the orders I propose to make are for the potential applicability, or non-applicability, of s. 189(2) of the 2009 Act in those circumstances.