Neutral Citation: [2014] IEHC 190

THE HIGH COURT

[2013 No. 9924 P]

BETWEEN

PATRICK MCKILLEN

PLAINTIFF

AND

IRISH BANK RESOLUTION CORPORATION LIMITED (IN LIQUIDATION), KIERAN WALLACE, EAMONN RICHARDSON, B OVERSEAS LIMITED, MISLAND (CYPRUS) INVESTMENTS LIMITED, DAVID BARCLAY, FREDERICK BARCLAY, MAYBOURNE FINANCE LIMITED AND ELLERMAN INVESTMENTS LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Paul Gilligan delivered on the 20th day of March, 2014

1. It is quite clear to this Court that the main protagonists in these proceedings are the plaintiff and the Barclay associated defendants, the issue being the control of a substantial sum of money as loaned originally by Anglo Irish Bank to the plaintiff, and which loan the special liquidators proposed to sell to the highest bidder. The background to the proceedings has been in the public domain for some time and does not need to be repeated here. The reality is that no independent wrong was alleged against the special liquidators and at a very early stage when the proceedings came before this Court, it was clearly indicated that if the plaintiff was successful in purchasing the loans, these proceedings would become moot. In the particular circumstances, the plaintiff was successful in purchasing his own loans and thus, the issue in the proceedings was resolved by the fact of the decision of the special liquidators to sell to the plaintiff his own loans. In these circumstances there is no event for the costs to follow and in this regard Mr. Gallagher S.C. on behalf of the Barclay associated defendants, has consented to an order that as between the Barclay associated defendants and the plaintiff each side shall bear their own costs of the proceedings to date.

2. Mr. Ferriter S.C. on behalf of the special liquidators, submits to the Court that they are, in the particular circumstances, not to be left out of pocket on behalf of the taxpayer and that there has been an event in that the plaintiff and the Barclay associated defendants have resolved their differences and the plaintiff is not now proceeding against the special liquidators. In particular, Mr. Ferriter refers to the fact of the discovery application that was made on behalf of the plaintiff against the special liquidators and the costs that were involved on the part of the special liquidators in preparing the discovery and deposing to the relevant documentation in an extensive affidavit. The plaintiff made several applications for discovery against third parties and in each case he was obliged to meet, in accordance with the Rules of the Superior Courts, the costs of those third parties in having to prepare and depose an affidavit. He poses the question to the Court as to why the special liquidators should be left in any different position to those parties in the particular circumstances and submits, in effect, that if the Court was disposed not to make an order for full costs in favour of the special liquidators, they should at least be entitled to the costs of the discovery application. In the particular circumstances the costs of discovery of the special liquidators were reserved to the trial judge.

3. The issue as regards costs and proceedings becoming moot is extensively dealt with by Clarke J. in *Cunningham v. The President of the Circuit Court and the Director of Public Prosecutions* [2012] IESC 39 in his judgment as delivered in the Supreme Court on 21st June, 2012.

4. He states at para. 4.6 of the judgment:-

> "4.6 However, in this case there never will be a decision on the substantive merits of the appeal and there never will, therefore, be a decision as to whether in the light of the result of an appeal on the merits it is appropriate to award the costs of the High Court to Ms. Cunningham. This case fairly and squarely raises the question of the proper approach to costs of proceedings which have become moot.
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> 4.7 In that context counsel for Ms. Cunningham places reliance on my decision in the High Court case of *Telefonica 02 Ireland Ltd v. Commission for Communications Regulations* [2011] IEHC 380. Section 6 of that judgment concerns the proper principles to be applied by the courts in relation to the costs of a moot issue. I see no reason to differ from the views which I expressed on that occasion. In summary and for the reasons set out in *Telefonica*, 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. At para. 6.4 of my judgment in *Telefonica*, I noted that a similar approach had been adopted by this Court in respect of the costs of a challenge to certain intended procedures of the Commission to Inquire into Child Abuse where the issues in the case had become moot by reason of a change of policy of that Commission subsequent to the decision of the High Court in *Murray & Anor v. Commission to Inquire into Child Abuse* [2004] 21.R. 222, and while an appeal was pending to this Court.
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> 4.8 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..."

5. The special liquidators regarded themselves as a necessary party to be joined in these proceedings as co-defendants. They took a view that they were entitled to protect their own positions and accordingly delivered a defence and were the subject matter of an order for discovery in favour of the plaintiff as against them with the costs of that order reserved to the trial judge. I am satisfied they were a necessary and proper party to the proceedings. The plaintiff is not now continuing his action as against the special liquidators as they have become moot, but the change of circumstances is not a matter beyond the control ofthe special liquidators as they, in fact, were the persons who took the actual decision which they knew was going to bring an end to these proceedings. I fully accept that the proceedings being rendered moot was not a matter that could have influenced the special liquidators in any way

in their decision, but nevertheless proceedings being rendered moot was as a result of that decision and they are a proper party to the within proceedings and thus the situation that presents itself before the Court is unusual in that regard. In the circumstances, I am satisfied that the Court has a discretion with regard to an order as to costs in favour of any party and may, depending on the circumstances, make an order for costs in favour of the plaintiff. It also has to be borne in mind that by reason of the decision of the special liquidators, the plaintiff has achieved the object of the exercise in maintaining these proceedings in the first place, albeit by a different mechanism. The plaintiff is not seeking any costs as against any party in the proceedings. Mr. Ferriter on behalf of the special liquidators urges the Court that if the Court is not minded to grant an order for full costs as against the plaintiff in favour of the special liquidators, that consideration be given to awarding to the special liquidators the costs of having to comply with the order for discovery, it being urged upon the Court that the essential reason for the discovery as against the special liquidators was to advance the plaintiff's case as against the Barclay defendants. The principal basis of Mr. Ferriter's submission is that all of the third parties against whom orders for discovery were made were entitled to be paid their costs of discovery by the plaintiff and he urges that no differentiation be made in the particular circumstances that arise herein.

6. However, it is quite clear that the Rules of the Superior Courts provide that a non-party to proceedings shall be entitled to the costs of making discovery where such an order is made by the Court.

7. Accordingly, I am of the view that it is not appropriate to make a differentiation as between the costs as incurred by the special liquidators and the costs of discovery as reserved.

8. If the plaintiff was not continuing the proceedings as against the special liquidators for a reason other than that they had become moot, then quite clearly the authorities are of the view that a plaintiff who elects to begin proceedings and then abandons them for whatever reason must pay the defendants costs. As Keane C.J. stated *in Callagy v. Minister for Education* (Unreported, the Supreme Court, 23rd May, 2003):-

> "If he wants the defendant to pay the costs he must be prepared to go the full length of the proceedings, obtain the relief that he sought and then invite the court to award costs in the ordinary way as follow the event."

9. In this case as previously referred to herein, these proceedings have become moot not due to entirely external events, but due to the very fact of the subject matter of the proceedings coming to pass in the plaintiffs favour by reason of the sale to the plaintiff by the special liquidators of his own loans. It could not be said that the sale of the loans was due to the unilateral action of one of the parties. In essence, they were all involved in the very fact that led to the proceedings becoming moot as between them.

10. In the particular circumstances, without being overly prescriptive, and in the absence of significant countervailing factors, I see no reason to depart from the ordinary rule that the court should lean in favour of making no order as to costs in cases which have become moot and accordingly, the order of this Court will be that by consent there will be no order as to costs as between the plaintiff and the Barclay associated defendants and no order as to costs as between the plaintiff and the first three named defendants.