[2019] IEHC 694

THE HIGH COURT
CIRCUIT APPEAL

2019 No. 392 CA

BETWEEN

TANAGER DESIGNATED ACTIVITY COMPANY

PLAINTIFF

AND

RONAN RYAN

DEFENDANT

PAMELA FLOOD

NOTICE PARTY

JUDGMENT of Mr Justice Garrett Simons delivered on 25 October 2019

INTRODUCTION

1. This supplemental judgment addresses the question of which party, if any, should bear the costs of the appeal from the Circuit Court. The principal judgment was delivered on 7 October 2019, *Tanager DAC v. Ryan* [2019] IEHC 659. As appears from the principal judgment, Mr Ronan Ryan, the defendant to the proceedings, was successful in his appeal against an order of the Circuit Court dated 15 August 2019. The order of the Circuit Court had granted leave to the plaintiff, Tanager DAC, to execute an order for possession in respect of Mr Ryan's family home notwithstanding the existence of a protective certificate under the Personal Insolvency Act 2012. The order of the Circuit Court was set aside by order of this court.

2. If the ordinary rule in relation to costs under Order 99 of the Rules of the Superior Courts were to apply, then Mr Ryan, as the successful party, would be entitled to his costs in this court and in the court below.

3. Notwithstanding that it was unsuccessful in resisting the appeal, and that this court found that it was not entitled to an order granting leave to execute, Tanager submits that this court should make no order as to costs. Instead, each party should bear its own costs. The basis for this submission is explained under the next heading below.

SUBMISSIONS OF THE PARTIES

4. Mr Rudi Neuman, BL, counsel on behalf of Tanager, advances the argument that there should be no order as to costs under four broad headings as follows. First, the appeal represented a form of "test case" in that the principal judgment is the first judgment of the High Court interpreting Section 96 of the Personal Insolvency Act 2012 ("*the Personal Insolvency Act").* Secondly, the special costs rules under Section 97 of the Personal Insolvency Act should be applied, by analogy, to an application under Section 96. Thirdly, it would be unjust to make a costs order in favour of Mr Ryan in circumstances where it is common case that he owes a significant amount of money in mortgage arrears to Tanager. Fourthly, in exercising its discretion in relation to costs, the court should have cognisance of the fact that the principal judgment contains a finding that Mr Ryan breached his duty of disclosure under Section 118.

5. In response, Mr Keith Farry, BL, counsel on behalf of Mr Ryan, submits that the ordinary rule, i.e. that costs follow the event, should be applied. Counsel emphasises that the

application was made pursuant to Section 96, and that, accordingly, the special costs rules under Section 97 do not apply. The special costs rule under Section 97(4) is described as the only costs "carve out" under the entire Act. Reference is made to Section 115A(14) which provides that the court, in an application under that section, shall make such other order as it deems appropriate, including an order as to the costs of the application.

6. In rebutting the argument that the case represented a form of "test case", counsel very helpfully referred me to the judgment of the High Court (McDonald J.) in *Re Finnegan (A Debtor)* (No. 2) [2019] IEHC 137.

DISCUSSION

7. The four arguments advanced on behalf of Tanager are addressed in sequence under separate headings below.

(1). Test case

8. The ordinary rule in relation to costs under Order 99 of the Rules of the Superior Courts is that the losing side must pay the winning side's costs. This is described in legalese as "costs follow the event". The rationale underlying this rule is that a party who has been put to the expense of either pursuing or defending legal proceedings in respect of which that party is ultimately successful should be able to recover a contribution towards their costs from the other side. The logic being that had the other side either conceded the proceedings (if a defendant) or had not pursued the proceedings (if a plaintiff), then the successful party would not have had to incur the legal costs.

9. This rationale has been expressed more eloquently by the Supreme Court in *Godsil v. Ireland* [2015] IESC 103; [2015] 4 I.R. 535, [19] and [20] as follows.

> "Inter partes litigation for those unaided is, or can be, costly: certainly it carries with it that risk. It is therefore essential in furtherance of the high constitutional right of effective access to the courts on the one hand and the high constitutional right to defend oneself, having been brought there, on the other hand, that our legal system makes provision for costs orders. This is also essential as a safeguarding tool so as to regulate litigation, and the conduct and process thereof, by ensuring that it is carried on fairly, reasonably and in proportion to the matters in issue. Whilst the importance of such orders is therefore clearly self-evident, nevertheless some observations in that regard, even at a general level, are still worth noting. A party who institutes proceedings in order to establish rights or assert entitlements, which are neither conceded nor compromised, is entitled to an expectation that he will, if successful, not have to suffer costs in so doing. At first, indeed at every level of principle, it would seem unjust if that were not so but, it is, with the 'costs follow the event' rule, designed for this purpose. A defendant's position is in principle no different: if the advanced claim is one of merit to which he has no answer, then the point should be conceded: thus

> in that way he has significant control over the legal process, including over court participation or attendance. If, however, he should contest an unmeritorious point, the consequences are his to suffer. On the other hand, if he successfully defeats a claim and thereby has been justified in the stance adopted, it would likewise be unjust for him to have to suffer any financial burden by so doing. So, the rule applies to a defendant as it applies to a plaintiff."

10. The general rule is, therefore, that costs follow the event. The court nevertheless retains a discretion in respect of costs. The courts have long since recognised that in some instances the bringing of proceedings will have served a public interest in that the judgment of the court has clarified the law in a particular area. The court will, therefore, on occasion depart from the general rule where proceedings are regarded as having been in the public interest and as representing a "test case".

11. The Supreme Court has emphasised in *Dunne v. Minister for Environment* (No. 2) [2008] 2 I.R. 775 that there is no *predetermined* category of cases which falls outside the general rule that costs follow the event. The judgment also confirms that, where a court departs from the normal rule as to costs, it is not completely at large but must do so on a reasoned basis, indicating the factors which, in the circumstances of the case, warrant such a departure. Factors such as (i) whether the proceedings were seeking a private personal advantage, and (ii) whether the legal issues raised were of special and general public importance are potentially relevant but are not necessarily determinative.

12. The traditional exemplar of a public interest litigant is a person who is advancing a cause in respect of which neither they nor any other individual has a financial or proprietary interest. This might be the situation in respect of proceedings which, for instance, seek to protect a national monument or to vindicate some aspect of electoral law. Part of the rationale for exempting such a person from the general rule that costs follow the event is that an area of law might not otherwise be clarified in the public interest for the lack of a litigant who is prepared to undertake the risk of an adverse costs order. A litigant who would have no financial or proprietary interest in the outcome of the proceedings is less likely to institute proceedings than a litigant who does.

13. The corollary of this is that where there is an obvious party who has a private and, in particular, a commercial interest, in pursuing proceedings, then no adjustment to or departure from the general rule in relation to costs is necessary in order to bring forth litigation.

14. The argument for departing from the general rule that costs follow the event will be stronger where one of the parties to the proceeding is a public authority. This is illustrated by the judgment of the High Court (Clarke J.) in *Cork County Council v Shackelton (No. 2)* [2007] IEHC 334 ("*Shackelton*").

> "Test cases can arise in very many different circumstances. Where there is doubt about the proper interpretation of the common law, the Constitution,

> or statute law involving the private relations between parties, and where the circumstances giving rise to those doubts apply in very many cases, then it is almost inevitable, as a matter of practice, that one or a small number of cases which happen to be first tried will clarify the legal issues arising.
> Where the proceedings involve entirely private parties then there does not seem to me to be any proper basis for departing from the ordinary rule in relation to costs, notwithstanding the fact that the case may properly be described as a test case. *There is no good reason for depriving a successful private party of its ordinary entitlement to costs simply because the case in which it succeeded happens to be a test case.**
> However it seems to me that different considerations may apply, at least in some cases, where one of the parties is a public authority. To take a case at the other end of the spectrum from the purely private litigation which I have just considered, one can envisage circumstances where a court was faced with difficult questions of construction in relation to legislation of widespread and general application which was introduced by a particular ministry and in circumstances where that ministry is a necessary and proper party to the proceedings under consideration. An analogous situation might arise where Ireland was a necessary party. In those circumstances it seems to me that it is open to the court to weigh in the balance in considering costs the fact (if it be so and to the extent that it is so) that the litigation may have been necessitated by the complexity or difficulty of legislation for which, of course, either the Minister concerned or Ireland was, in substance, responsible.
> I appreciate that this case is, to some extent, is in an intermediate position. [Cork County Council] is not, of course, responsible for the legislation. It has had the same difficulties as everyone else in attempting to grapple with the legislation which, to put it at its kindest, might be described as opaque. However it also needs to be noted that the ministry responsible for the introduction of that opaque legislation is also the ministry responsible, in significant part, for providing funding to Cork along with all other local authorities. In those circumstances it seems to me that this case is much nearer, in substance, to a case directly involving the party responsible for the legislation in the first place than to a purely private dispute."
> *Emphasis (italics) added.

15. The High Court in *Shackleton* ultimately decided that the justice of the case required that no order for costs be made in favour of the public authority notwithstanding that it had succeeded in the proceedings. The exercise of the court's discretion in respect of costs was informed by the fact that the legislation at issue, i.e. Part V of the Planning and Development Act 2000, was "opaque", "ill worked out" and difficult to construe.

16. The principles in *Shackleton* have recently been applied in the specific context of the personal insolvency legislation by the High Court (McDonald J.) in *Re Finnegan (A Debtor) (No. 2*) [2019] IEHC 137. McDonald J. identified three points of distinction between the

circumstances at issue in *Shackleton* and those arising in the case before him as follows. (See paragraphs [20] to [22] of the judgment).

(i). The provisions of the Personal Insolvency Act cannot be said to be opaque or ill thought out. Whereas the interpretation of the legislation has occasionally given rise to difficulty and debate, it cannot be properly characterised in the same way as the provisions of the Planning and Development Act 2000 which were so trenchantly criticised by Clarke J. in *Shackleton*.

(ii). The interpretation of the provision of the Personal Insolvency Act at issue in *Finnegan* (Section 115A(2)) had not previously given rise to doubt or concern in a significant number of cases, nor had it given rise to debate amongst practitioners and lawyers.

(iii). None of the parties in *Finnegan* were in a position equivalent to the public authority in *Shackleton*. It will be recalled that the judgment in *Shackleton* attached significance to the fact that Cork County Council was funded by the Minister of Government who was ultimately responsible for the legislation in question.

17. I respectfully adopt McDonald J.'s analysis of the implications of the judgment in *Shackleton* for proceedings under the Personal Insolvency Act.

18. I turn now to apply these principles to the facts of the present case. The first two points of distinction identified by the judgment in *Finnegan* apply equally to the statutory provision at issue in the present case. As appears from the principal judgment, the appeal concerned the interpretation of Section 96 of the Personal Insolvency Act. This provision is neither "opaque" nor "ill worked out". There was no suggestion in the submissions of counsel at the hearing before me in September 2019 that the interpretation of the section had given rise to doubt or concern in the practical operation of the legislation.

19. For the reasons explained in the principal judgment, I concluded that the mistaken reliance on Section 96 arose primarily as the result of an unwillingness on the part of Tanager to face up to the reality of the amended insolvency legislation. See paragraphs [73] *et seq*. of the principal judgment.

20. The third point of distinction identified in *Finnegan,* namely the absence of a public authority as a party to the proceedings, applies a *fortiori* to the present case. The possession proceedings are between a creditor and a debtor, and do not involve a personal insolvency practitioner (as had been the position in *Finnegan*). Therefore, even if the case had been a "test case", the ordinary rule that costs follow the event would still apply. As stated in *Shackleton,* there is no good reason for depriving a successful private party of its ordinary entitlement to costs simply because the case in which it succeeded happens to be a test case.

21. Moreover, one of the parties to proceedings under the Personal Insolvency Act will, almost by definition, have a *commercial interest* in pursuing the litigation. It will be recalled that part of the rationale for departing from the general costs rule in public interest litigation is that in the absence of a party with a private interest in the outcome, the legal issue might not otherwise be brought before the courts for resolution. By contrast, certain creditors in personal insolvency proceedings will be well funded companies who will have a vested interest in pursuing certain lines of argument. In some instances, a creditor will own hundreds or even thousands of securities. The cost of pursuing an argument in a "test case" will be more than justified by the potential benefit to that creditor of succeeding in the argument. I intend no criticism of such creditors. They are, as is any litigant, entitled to pursue all legitimate and reasonable arguments before the courts. I simply draw attention to the fact that the commercial reality is such that these litigants will not require the "carrot" of a special rule in relation to costs in order to cajole them into bringing the arguments before the court.

22. For all these reasons, I have concluded that there is no public interest element to the appeal proceedings which might justify the court exercising its discretion to depart from the normal rule that costs follow the event.

(2). *Section 97(4) / Costs Rule*

23. As explained in the principal judgment, the Personal Insolvency Act provides two procedures by which a creditor may seek to mitigate—to use a neutral term—the effect of the grant of a protective certificate. Section 96(3) allows a creditor to apply to court for leave *inter alia* to execute against the debtor or his or her property notwithstanding the existence of a protective certificate. Section 97 allows an aggrieved creditor to apply for an order directing that the protective certificate shall not apply to that creditor.

24. Tanager chose to pursue applications under both sections. This resulted in a situation whereby two appeals came before the High Court via different procedural routes, with each appeal raising, in substance, the same question, namely whether Tanager should be entitled to enforce its security notwithstanding the grant of a protective certificate.

25. For the purposes of the costs application, Tanager seeks to call in aid the special costs rules provided for in the case of an application under Section 97. See sub-section 97(4) as follows.

> "(4) In determining the costs of the application the court shall have regard to the objective that all the parties to such an application should bear their own costs unless to do so would cause a serious injustice to the parties to the application."

26. Notwithstanding the absence of an equivalent provision under the neighbouring section, Section 96, counsel an behalf of Tanager argues that the same approach to costs should apply by analogy.

27. With respect, I cannot accept that the legislation should be read in this way. First, applying a literal approach to interpretation, this court must take cognisance of the absence of an equivalent costs rule under Section 96. Had the Oireachtas intended that the normal rule in relation to legal costs was to be disapplied in the case of applications under both sections, then it would have stated so in terms. The two sections appear side-by-side in the Act, and, accordingly, the omission from Section 96 of a provision equivalent to sub-section 97(4) can only be read as deliberate.

28. Secondly, even if one were to adopt a purposive approach to interpretation, the same result would follow. The rationale underlying the costs rule under Section 97(4) appears to be that any dispute as to the application of a protective certificate to a particular creditor should be dealt with on a cost-neutral basis, i.e. the default position is that each party is to bear its own costs. The legislation thus provides a streamlined procedure whereby a creditor can "appeal" the issuance of a protective certificate without exposing either itself or the debtor to costs. The approach actually adopted by Tanager in this case was to make two separate applications, one under Section 96 and the other under Section 97. Whereas the legislation does not necessarily preclude such a twin track approach, the approach does entail the introduction of a level of procedural complexity which appears to be inconsistent with the objective underlying Section 97. Were sub-section 97(4) to be interpreted as applying to both types of application, then this would encourage the making of dual applications. This would appear to be inconsistent with the legislative intent of providing a streamlined procedure under Section 97.

29. Had Tanager confined itself to an application under Section 97, it would have the protection of the costs rules under Section 97(4) (subject always to the "serious injustice" test). Having chosen to adopt another route, however, Tanager cannot complain that it has lost the protection.

30. For the reasons set out above, I am satisfied that the application under Section 96 is not subject to the special costs rules under Section 97(4).

31. Finally, it should be reiterated that the appeal proceedings before me were confined to the application under Section 96, and that there is a separate appeal pending in the High Court Personal Insolvency List in relation to the application under Section 97.

(3). *Indebtedness*

32. Tanager advances the argument that it would be unjust to make a costs order in favour of Mr Ryan in circumstances where it is common case that he owes a significant amount of money in mortgage arrears to Tanager.

33. The purpose of the making of costs orders in legal proceedings has been explained in detail by the Supreme Court in the passages from *Godsil v. Ireland* set out at paragraph 9 above. As appears, the purpose is to ensure that a party who has been put to the trouble of pursuing or defending proceedings will receive some contribution towards their costs in

the event that they are ultimately successful in the litigation. Costs orders also have a function in ensuring discipline in legal proceedings.

34. The making of costs orders is not intended to serve any wider purpose of distributive justice. A party, such as Mr Ryan, who has succeeded in legal proceedings, is entitled to recover costs against the losing side irrespective of the fact that he is a debtor of that party. The making of a costs order is intended to vindicate his right of access to the courts.

35. It should also be borne in mind that the proceeds of any costs order, when agreed by the parties or measured by the Taxing Master or Legal Costs Adjudicator, are to be paid to the solicitor and counsel acting on behalf of Mr Ryan. These are not monies which accrue to his personal advantage.

(4). *Breach of Section 118*

36. Counsel on behalf of Tanager properly draws my attention to the fact that the principal judgment contains a finding that Mr Ryan had been in breach of his disclosure obligations under Section 118 of the Personal Insolvency Act. As discussed in the principal judgment at paragraphs [123] to [125], it would be unsatisfactory if there were to be no adverse consequences for a breach of Section 118.

37. I have given careful consideration as to whether a discount should be applied to any costs order in favour of Mr Ryan to reflect this court's displeasure at the breach. Whereas costs also have a role in ensuring discipline in the conduct of proceedings, the conduct complained of will generally have had to result in additional costs being incurred unnecessarily before an adverse costs order will be made.

38. On balance, I have concluded that there is an insufficient nexus between the breach of Section 118 and the appeal proceedings to justify a departure from the ordinary costs rule. Even had the existence of the consent order for possession of March 2019 been disclosed at the time, it should not have affected the outcome of the application for the protective certificate. It is also the position that Tanager's application for leave to execute was based on broader considerations than simply non-disclosure. The non-disclosure thus did not result in additional costs being incurred unnecessarily.

CONDUCT OF THE PROCEEDINGS

39. For the reasons explained in detail at paragraphs [126] to [128] of the principal judgment, this court was critical of the approach which Tanager had taken to the question of a stay on the order of the Circuit Court of 15 August 2019. The attitude taken had the result that an application for a stay had to be brought before the High Court in August, a month during which normal court sittings are suspended and generally only urgent matters are heard. Had Tanager taken a more reasonable approach to the request for a stay, then the necessity for such an urgent court application could have been avoided. The present appeal could instead have been adjourned to the same date as the Section

97 appeal (14 October 2019) and case managed in the High Court Personal Insolvency List.

40. The judgment of the Supreme Court in *Godsil v. Ireland* indicates that one of the objectives of costs orders is to ensure discipline in the conduct of proceedings. Whereas I am satisfied that the application of the ordinary rule, i.e. that costs follow the event, on its own justifies the making of a costs order against Tanager, I should record that had I had any doubt in this regard, its conduct in relation to the stay would have tipped the balance in favour of an order against Tanager.

CONCLUSION AND FORM OF ORDER

41. The costs of the appeal proceedings fall to be determined by reference to the ordinary rule under Order 99 of the Rules of the Superior Courts, namely that costs follow the event. Notwithstanding the careful submissions made by counsel on behalf of Tanager, I am unpersuaded that there are any special circumstances which would justify a departure from the general rule. Tanager sought, as it is in principle entitled to do, to pursue an application for leave to execute as against Mr Ryan's family home notwithstanding the existence of the protective certificate. This application was ultimately dismissed on the merits. The "event" for costs purposes thus went Mr Ryan's way and, accordingly, he is entitled to an order for costs in his favour.

42. I propose to make an order directing that the plaintiff , Tanager, do pay the costs of the defendant, Mr Ronan Ryan, in respect of and incidental to the application under Section 96 of the Personal Insolvency Act 2012. The costs are to include the costs of the Circuit Court and the costs of the subsequent appeal to the High Court. The costs are to include the costs associated with the various applications made to the High Court during August and September. The costs also include all reserved costs and the costs of the "costs" hearing before me on 15 October 2019.

43. The costs order will also record that it extends to the written legal submissions filed before this court in September 2019. A certificate for counsel is also granted.