THE COURT OF APPEAL
CIVIL

Court of Appeal Record No. 2019/424

High Court Record No. 2019/6068P

Whelan J.
Haughton J.
Murray J.

Between:

MICHAEL HEFFERNAN

Appellant/Plaintiff

and

HIBERNIA COLLEGE UNLIMITED COMPANY

Respondent/Defendant

JUDGMENT of Mr. Justice Murray delivered on the 22nd day of June 2020

1. Following the delivery on April 29 of judgment in this matter the parties have presented a draft order on which they agree, save in respect of the question of the costs of the appeal. Each has filed additional submissions addressed to that issue. This ruling in respect of those costs should be read in conjunction with the determination of the underlying appeal ([2020] IECA 121). There, I rejected the appellant's claim that Twomey J. had erred in refusing the appellant's application for an injunction by reason *inter alia* of an offer made by the respondent shortly before the hearing of that application. I held that in consequence the trial Judge had

erred in awarding some costs of the application against the appellant. However, I held that the date from which such costs should run should be changed. Most importantly, I determined that there was an imbalance in the Order for costs made by the trial Judge and that by reason of that latter conclusion, I decided that the costs of the interlocutory application up to the date of the offer should be awarded to the appellant. Whelan J. and Haughton J. agreed with that judgement.

2. The appellant says that having obtained (a) an order that he recover the costs incurred by him prior to the date fixed for the acceptance of the respondent's offer, and (b) a modification of the order for costs made in favour of the respondent by the High Court, he has prevailed in the appeal and should obtain an order for the costs of the appeal.

3. The respondent contends that of the 16 grounds of appeal delivered by the appellant, he failed on 11 of those grounds. It says that only one of the grounds of appeal, No. 15, pertains to the costs of the injunction other that those awarded by Twomey J. It says that much of the appellant's notice of appeal and submissions are taken up with his complaint pertaining to the manner in which the trial Judge relied upon the respondent's letter of 12 September 2019, the fact that the Affidavits were not opened in full and the reference to policy considerations by the trial Judge. The respondent's counsel notes that in its decision, this Court affirmed that the manner in which the trial Judge heard the application and reached the substantive conclusion which he did was appropriate in the circumstances, also affirming that the decision to award costs to the respondent was properly within his discretion.

4. Detailing the events before Twomey J., the respondent says that in point of fact what it terms *the extant costs* (these being the costs of the interlocutory injunction other than those

awarded by Twomey J. in favour of the respondent) were actually reserved by the Court on foot of an application by counsel for the appellant. It further submits that despite this decision, the appellant did not *"necessarily succeed in his appeal in any binary way".* It contends that the *lion's share* of the appellant's appeal pertained to the approach of the trial judge at the hearing and the reliance upon the Respondent's letter of offer.

5. In making their respective submissions, neither party addressed themselves to the provisions of ss. 168 and 169 of the Legal Services Regulation Act 2015 nor of Order 99 of the Rules of the Superior Courts as introduced by the Rules of the Superior Courts (Costs) Order 2019 SI 584/2019. The relevant sections of the 2015 Act came into force on 7 October 2019 and the new provisions of Order 99 took effect from 3 December 2019. Both thus pre-dated the High Court judgment and the latter pre-dated the bringing of this appeal. Because the parties have not submitted otherwise, I propose to address the application as having been made under the law as it stood prior to the introduction of these provisions. In so doing, however, I am not determining whether the provisions in question operate in respect of proceedings generally or appeals in particular pending at the time of the coming into effect of the Act or the Rules. That is an issue which may require argument in an appropriate case.

6. Prior to its repeal and replacement in December 1999, Order 99 Rule 1(3A) (introduced by SI 485 of 2014, Rules of the Superior Courts (Court of Appeal) Act 2014), provided as follows:

> *"(3A)Subject to sub-rule (4A), the Court of Appeal shall, when determining liability for the costs of an appeal or an application for leave to appeal, have regard to—*

(a) the number and extent of the issues raised, pursued or contested by the respective parties on the appeal or application and

(b) whether it was reasonable for a party to raise, pursue or contest the issue, or issues, concerned.

7. This provision reflected, but did not supplant, the general jurisdiction of the Court in awarding the costs of an appeal to examine the issues presented by both parties to the appeal, to condition its order for costs by reference to whether any party can be said to have won the '*event'* and to reduce an award of costs in favour of a party who has obtained relief in the appeal if it agitated issues on which it did not prevail or sought relief which he did not obtain, in the circumstances considered in *Veolia Water UK plc v. Fingal County Council (No.2)* [2006] IEHC 240 [2007] 2 IR 81 as subsequently explained in *MD v. ND* [2015] IESC 66, [2016] 2 IR 438 at paras. 2.4 to 2.7.

8. However, it might be observed that the Sub-Rule did not expressly predicate the jurisdiction of the Court to reduce the costs ordered in favour of a successful appellant upon a finding that the presentation of an unmeritorious argument has materially increased the costs of the appeal, and it does not limit that jurisdiction to 'complex' cases as it has been suggested the decision in *Veolia* decides. Clearly, however, both considerations will be of some relevance in applying the rule to any given case.

9. The resulting principles fall to be applied in this application by reference to the following considerations.

10. First, the appellant has obtained relief which he would not have secured had he not appealed. That relief was in no sense *de minimis*, and in those circumstances he is entitled to recover at least some of his costs.

11. Second, however, his victory was only partial. Here, it was the appellant's case that he was entitled to all of his costs of the action and/or that no order for costs should have been made against him. He failed in obtaining either such relief. Having succeeded on only part of the '*event'* as defined by the relief sought in his appeal, and the respondent having accordingly prevailed in the argument advanced by it on an important aspect of the appeal, the appellant is not entitled to expect that all of his costs will automatically follow.

12. Third, while the allocation of costs of an appeal is not properly reduced to a headcount of the grounds of appeal, it is the case that the appellant's challenge to the decision of the trial Judge to award costs against him was very much focussed upon the correctness of the Court's underlying decision to refuse the injunctive relief because of the offer made by the respondent before the hearing. The arguments he advanced in this regard and the response of the respondent to those arguments occupied a substantial part of his oral and written submissions. He thus failed on a not insignificant aspect of his appeal.

13. Moreover, insofar as he challenged the basis for the High Court Judge's decision to refuse the injunctive relief claimed because of the offer made by the respondent, I think that the appellant's stance comes within the circumstances envisaged by Sub-Rule (3A): ultimately this Court found that the trial Judge was entitled in the management of his own list to conclude that the respondent's offer obviated the need for injunctive relief and to base his disposition of the application on that on that decision. The appellant always faced a substantial hurdle in seeking

to contend that this Court should interfere in this exercise by the trial Judge of his discretion. It was at all times open to him in this appeal to accept that the High Court Judge was entitled to reach this decision, but to contend – as the Court concluded – that it necessarily followed that the costs up to the date of the offer should have been awarded to him.

14. Fourth, and following from this, as matters transpired here the error in the trial Judge's decision under appeal arose not from any mistake he made in deciding to refuse the injunctive relief but from the manner in which he proceeded to determine the consequent costs. In this regard, the award of costs must take account of the fact that he adopted this approach at the urging of the respondent, who stood over his decision in this regard at the appeal.

15. Balancing these variables, it is necessary to apply what Clarke CJ has described as '*a relatively broad brush approach'* (*MD v. ND* at para. 3.3). That being so, I am of the view that the appropriate order is that the appellant recover two thirds of the costs of this appeal (including this application for costs). This reflects the fact he obtained relief on appeal he would not otherwise have obtained, that it was the respondent's stance which necessitated the appeal and that in practical terms the benefit he has secured was not insubstantial. The deduction of one third reflects a combination of my estimate of time spent and cost incurred in addressing arguments in relation to which the appellant lost and the extent of the relief he claimed which he did not obtain.

16. Whelan J. and Haughton J. are in agreement with this ruling and the Order I propose.