

THE HIGH COURT

Record Number: 2016/7316P

BETWEEN/

JOHN DALY

PLAINTIFF

- AND -

ARDSTONE CAPITAL LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Murray delivered on the 29th day of June 2020

1. While the plaintiff in this case prevailed in obtaining some relief on foot of his application for further and better discovery ([2020] IEHC 200), his success was only partial.
2. He won three distinct aspects of his application. I held that the plaintiff was entitled to further and better discovery of the spreadsheet appearing as exhibit CQ 3 to the affidavit of Connor Quigley sworn on the 4 July 2019, together with the e-mail by which that spreadsheet was sent to the defendant. Because the plaintiff had succeeded in obtaining discovery of that document, I ordered that the defendant should also discover any other documents relating to any entitlement or promise of the kind alleged by the plaintiff. I directed that the defendant make further and better discovery of all residential investment presentations issued that included the plaintiff's profile. I also required the defendant to swear an affidavit addressing specific issues arising from the deletion by the defendant of the plaintiff's e-mails following the termination of his employment.
3. However, I refused significant parts of the relief claimed by the plaintiff. I determined that he had not made out a case on the established principles that he was entitled to further and better discovery in relation to Promotes promised or paid to other employees of the same category as the plaintiff, of residential investor profiles or of documents demonstrating the pursuit of other property acquisition and/or development and/or fund generation projects not inside the scope of the AVP or ARP by the defendant's partners or employees during the period of employment.
4. The plaintiff now asks the Court to make an order that he recover the costs of the application for further and better discovery, noting that he succeeded in obtaining some of the relief claimed in the motion. The defendant, relying upon its claim that significant time and argument was spent litigating categories of discovery to which the plaintiff was not entitled, asks that the Court either make an order for the defendant's costs or a substantial part thereof, or in the alternative that the costs be reserved to the trial of the action.
5. Although this application was at hearing for less than a day, the parties exchanged detailed legal submissions addressing each of the separate respects in which an order for further and better discovery was sought. It is thus possible to identify a number of distinct issues that fell for determination by the Court, to clearly isolate the matters on which the plaintiff prevailed, and those on which the defendant succeeded, and to decide with reasonable accuracy the time and resources directed to those questions. Furthermore, while these various questions came before the Court on foot of a single

application for further and better discovery, each of these issues presented a distinct claim for relief in the form of an application for further and better discovery of particular categories of documents.

6. Thus, the plaintiff succeeded in an argument that, essentially, depended on the correct interpretation of two categories of the discovery – categories 1(i) and category 3(i). He also succeeded in his contention that the defendant should be required to deliver a further affidavit of discovery addressing the deletion of his e-mails. At the same time, he failed to discharge the burden imposed upon him by the authorities in respect of the complaints he made arising from categories 1(ii), 3(ii), and category 4. It is relevant in this regard that I noted in my judgment (para. 28) that the stance adopted by the defendant in relation to category one was, having regard to a lack of clarity in the drafting of that category, understandable, and that this aspect of the application could have been avoided by clearer drafting. However, at the same time I adopted the view that the failure of the defendant to make proper discovery in connection with the deleted e-mails should have been addressed by the swearing of the appropriate affidavit before the application came to be heard by the Court (see para. 61 of my judgment).
7. It appears to me that the respective successes, failures and defaults of the parties cancel each other out. The plaintiff was required to bring an application to obtain relief arising from three issues successfully agitated by him, the defendant was required to incur costs in resisting an application in respect of three issues on which it succeeded. Each occupied a roughly equal amount of time. In respect of one of the issues on which the plaintiff succeeded, the defendant's default was significant. However, I believe that the edge this would otherwise give the plaintiff is counterbalanced by the fact that in relation to another issue on which the plaintiff succeeded, he contributed to the need for the application because of the manner in which the relevant category was framed and I believe the defendant was entitled to adopt the position he did regarding it.
8. The legal regime governing the awarding of costs in place at the time this application was initiated was defined by the general discretion of the Court in connection with costs as it appeared in the former Order 99 Rule 1(1), the reference in Order 99 Rule 1(3) to the costs of every '*action, question and issue tried*' following the event, the direction in Rule 1(4) that the costs of every issue of fact or law raised on a claim or counterclaim should, unless otherwise ordered, '*follow the event*', together with the requirement imposed by Order 99 Rule 1(4A) that the Court should upon determining any interlocutory application make an award of costs save where it was not possible justly to adjudicate upon liability for costs on the basis of that application.
9. These various provisions fell to be applied in the light of the decision of Clarke J. (as he then was) in *Veolia Water UK plc v. Fingal County Council (No.2)* [2006] IEHC 240, [2007] 2 IR 81. That case decided four things of relevance to this application. First, that in an interlocutory application of any significance in the litigation, the starting point is that the successful party should obtain their costs (at para. 2.6). Second, that a party is successful for this purpose even though they may not have '*succeeded on every point*'

because it can in that situation be said that in that situation the application '*will have been justified by the result*' (at para.2.8). Third, that in some cases where a party does not succeed on every issue, it may be appropriate that the Court reduce the costs of the successful party to subtract from the award in its favour the costs attributable to the issues on which its opponent succeeded. This is the proper course of action where a case is not straightforward and where it is reasonable to assume that the costs of the parties in pursuing the set of issues before the court were increased by virtue of the successful party having raised additional issues upon which it was not successful (at para. 2.8). Fourth, that there will be cases in which there are a multiplicity of issues and in which each party has prevailed on an equal number of those issues, so that it can be concluded that there is in truth no real winner, and thus that no order for costs should be made in favour of either (see para. 3.9).

10. This application falls within the fourth of these categories. Bearing in mind in particular the fact that this was an interlocutory application (in relation to which neither the new nor the old version of Order 99 made any direct reference to an 'event') and in circumstances where each allegation of default – although brought under the general rubric of an application for further and better discovery – represented in theory a distinct relief, I do not believe that it can be thus said that there was an 'event' in the sense explained by Clarke CJ in *MD v. ND* [2015] IESC 66, [2016] 2 IR 438 at paras. 2.4 to 2.7. This is not a matter in which it is possible to identify who is '*really the winner and who is really the loser*' (*Roache v. News Group Newspapers Ltd. and ors.* [1998] EMLR 161 at p. 166). This, it should be observed, is not uncommonly the case with applications for discovery involving multiple issues (*James Elliott Construction Ltd. and anor. v. Lagan* [2016] IEHC 444 at para. 13).
11. While the plaintiff, although referring briefly to the Legal Services Regulation Act 2015 primarily argued his position by reference to the provisions of Order 99 to which I have referred, the defendant argued its position by reference to the provisions of ss. 168 and 169 of the 2015 Act. The latter provisions cannot be applied without regard to 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 (which was before this application was heard but, as I have stated, after it was issued).
12. Neither party can be criticised for this confusion. Neither the Act nor the Rules appear to state clearly the point at which either are triggered in relation to applications that have been initiated before they commenced. There have been proceedings in which the legislation has been applied to such proceedings (see *Allied Irish Banks plc v. Doran* [2020] IEHC 210 and *Zalewski v. The Workplace Relations Commission* [2020] IEHC 226) and cases where the issue has been noted but reserved for future argument (see *PT v. Wicklow Co Co.* [2019] IECA 346 at para. 44). In circumstances where I have heard no argument as to how the new provisions apply to an application pending at the time of the commencement of the provisions, I do not propose to address that issue. In a case in which there are identified differences between the position under the 2015 Act and the

pre-existing discretion vested in the Court by the old Order 99, questions may well present themselves as to the point at which one regime replaces another in respect of a pending application. The provisions of s.27 of the Interpretation Act 2005, and the issue of when provisions addressing the awarding of costs are procedural and when they are substantive, will be relevant to that question (and see *Sweetman v. Shell E&P Ireland Ltd.* [2016] IESC 58, [2016] 1 IR 742).

13. In deference to the defendant's legal arguments and for ease of reference, I have replicated the provisions of Order 99 Rules 2 and 3 as they now stand and ss. 168 and 169(1) of the 2015 Act in the Appendix to this judgment.
14. Section 169, in introducing a definitive expression into primary legislation of the rule that costs should be awarded to the successful party, has limited that principle to both the costs of civil proceedings as a whole (as opposed to costs of a step in such proceedings and thus of interlocutory applications, *McFadden v. Muckcross Hotels Ltd.* [2020] IECA 110 at para. 30) and to a party who has been '*entirely successful*' in such proceedings (a phrase the effect of which may not in every case be entirely clear). However, in relation to the application with which I am concerned here, the combined effect of the new O.99 Rules 2(1) and (3) (replicating respectively the old Order 99 Rules 1(1) and 1(4A)), and of s. 168(2)(c) and (d) and s.169(1)(a) and (b) (to which Order 99 Rule 3(1) requires regard to be had in determining the costs of any step in proceedings) is to achieve, the same essential consequence as the pre-2015 Act regime.
15. In particular, these provisions combine to present the following principles insofar as costs of an interlocutory application are concerned:
 - (a) The general discretion of the Court in connection with the ordering of costs is preserved (s.168(1)(a) and O.99 R.2(1)).
 - (b) The Court should, unless it cannot justly do so, make an order for costs upon the disposition of an interlocutory application (O.99 Rule 2(3)).
 - (c) In so doing, it should '*have regard to*' the provisions of s.169(1) (O.99 Rule 3(1)):
 - (d) Therefore – at least in a case where the party seeking costs has been '*entirely successful*' – it should lean towards ordering costs to follow the event (s.169(1)):
 - (e) In determining whether to order that costs follow the event the Court should have regard to the non-exhaustive list of matters specified in s.169(1)(a)-(g) (O.99 R.3(1)):
 - (f) Those matters include the conduct of the parties before and during the proceedings, and whether it was reasonable for a party to raise, pursue or contest one or more issues (s. 169(1)(a) and (b)).
16. The application of these requirements takes me to the same point as I have outlined at paragraph 7 above and for the same essential reason (albeit, perhaps, *via* a more

tortuous route). The plaintiff was not entirely successful, but he did prevail in some significant respects. The defendant, at the same time, succeeded in defeating important and distinct aspects of the application. This occurred in a context in which, while arising in the course of a single application for '*further and better discovery*', each complaint in relation to various categories in fact sought a distinct and separate relief. Taking account of the matters on which he did not prevail, and the provisions of s.169(1)(b) in particular, it is appropriate to make no order as to costs.

17. Finally, the defendant observes a typographical error in the order I proposed in my judgment at para. (iv)(e): the date there should be changed from 25 May 2018 (as it appears at paras. 62 and 66 of my judgment) to 15 March 2018.

APPENDIX

Rules of the Superior Courts Order 99 Rules 2 and 3

2. Subject to the provisions of statute (including sections 168 and 169 of the 2015 Act) and except as otherwise provided by these Rules:

- (1) The costs of and incidental to every proceeding in the Superior Courts shall be in the discretion of those Courts respectively.
- (2) No party shall be entitled to recover any costs of or incidental to any proceeding from any other party to such proceeding except under an order or as provided by these Rules.
- (3) The High Court, the Court of Appeal or the Supreme Court, upon determining any interlocutory application, shall make an award of costs save where it is not possible justly to adjudicate upon liability for costs on the basis of the interlocutory application.
- (4) An award of costs shall include any sum payable by the party in favour of whom such an award is made by way of value added tax on such costs, where and only where such party establishes that such sum is not otherwise recoverable.
- (5) An order may require the payment of an amount in respect of costs forthwith, notwithstanding that the proceedings have not been concluded.

3.(1) The High Court, in considering the awarding of the costs of any action or step in any proceedings, and the Supreme Court and Court of Appeal in considering the awarding of the costs of any appeal or step in any appeal, in respect of a claim or counterclaim, shall have regard to the matters set out in section 169(1) of the 2015 Act, where applicable.

(2) For the purposes of section 169(1)(f) of the 2015 Act, an offer to settle includes any offer in writing made without prejudice save as to the issue of costs.

Legal Services Regulations Act 2015 s.168(1) and (2) and s.169(1):

168.(1) Subject to the provisions of this Part, a court may, on application by a party to civil proceedings, at any stage in, and from time to time during, those proceedings—

- (a) order that a party to the proceedings pay the costs of or incidental to the proceedings of one or more other parties to the proceedings, or
- (b) where proceedings before the court concern the estate of a deceased individual, or the property of a trust, order that the costs of or incidental to the proceedings of one or more parties to the proceedings be paid out of the property of the estate or trust.

(2) Without prejudice to subsection (1), the order may include an order that a party shall pay—

- (a) a portion of another party's costs,

- (b) costs from or until a specified date, including a date before the proceedings were commenced,
 - (c) costs relating to one or more particular steps in the proceedings,
 - (d) where a party is partially successful in the proceedings, costs relating to the successful element or elements of the proceedings, and
 - (e) interest on costs from or until a specified date, including a date before the judgment.
- (3) Nothing in this Part shall be construed as—
- (a) restricting any right of action for the tort of maintenance, or
 - (b) restricting any right of a trustee, mortgagee or other person, existing on the day on which this section commences, to be paid costs out of a particular estate or fund to which he or she would be entitled under any rule of law or equity

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.