



**AN CHÚIRT UACHTARACH
THE SUPREME COURT**

**S:AP:IE:2021:000148
[2023] IESC 33**

**O'Donnell C.J.
O'Malley J.
Woulfe J.
Hogan J.
Murray J.**

Between/

MARK SMITH

Plaintiff/Appellant

AND

**MARK CUNNINGHAM, KEVIN SOROHAN, ANN-MARIE SOROHAN AND
PAUL KELLY PRACTICING UNDER THE STYLE AND TITLE OF
PAUL KELLY & COMPANY, SOLICITORS**

Defendants/Respondents

RULING of the Court delivered on the 30th day of November 2023 (Costs)

1. As evident from the judgment of 25 May 2023 ([2023] IESC 13), the plaintiff in these proceedings succeeded before the High Court in his claim that his action in negligence against the fourth named defendant (his former solicitor) was not statute barred. That decision was reversed by the Court of Appeal. The plaintiff failed in an attempt before this Court to overturn that decision and reinstate the decision of the High Court. The fourth named defendant now seek its costs against the plaintiff, while the plaintiff makes a corresponding application against the fourth named defendant, seeking his own costs or such variation thereto as the Court shall think reasonable and fair. The facts and circumstances giving rise to the claim of the plaintiff against his former solicitor, and the reason Murray J. (with whose judgment all members of the Court agreed) concluded that the claim was statute barred are recited in his judgment and the separate, concurring judgment of Hogan J. [2023] IESC 13.
2. The fourth named defendant's position is straightforward: the matter proceeded by way of the trial of a preliminary issue as to the application of the Statute of Limitations to the plaintiff's claim in tort (it was accepted that his claim in contract was barred). He has lost that issue, and – the fourth named defendant says – it is, having been *entirely successful* in its defence on that issue, entitled to its costs.
3. The plaintiff, in resisting the fourth named defendant's application for costs and in support of his own, highlights what he perceives as the injustice of the position in which he finds himself: he says that through absolutely no fault of his own he has suffered a loss as a consequence of his solicitor's negligence in connection with the conveyance of his house. He was, he says, not even aware

that he was a victim of the alleged negligence of his solicitor until the Contract for Sale was rescinded. It is, he said, an '*appalling vista*' and a '*grave injustice*' that a victim should now be '*doubly punished*'. He says that his proceedings were in the nature of a '*test case*' and that the law has now been clarified, and that the effect of his proceedings has been to highlight a potential injustice arising from the operation of the Statute of Limitations in claims for economic loss or property damage to which the legislature may have to attend.

4. Citing a range of authority, but in particular the decisions in *Dunne v. Minister for the Environment* [2007] IESC 60, [2008] 2 IR 775, and *Cork County Council v. Shackelton* [2007] IEHC 334, the plaintiff observes the hardship that would follow from an order for costs, and stresses the following '*special circumstances*' of the case:

- (i) The reasons the plaintiff brought the proceedings,
- (ii) The claim that the plaintiff was justified in bringing proceedings,
- (iii) The fact that in accordance with the law at the time the proceedings were instituted, the plaintiff was justified in thinking that he was entitled to issue proceedings to protect his constitutional rights.
- (iv) The importance of the requirement that his solicitor would carry out its duties, functions and the fiduciary nature thereof, and act conscientiously as an officer of the Court.

- (v) His claim that any reasonable victim would have thought he was protected in the circumstances in which he found himself by the ethics of the profession, the law and the guidance of the Law Society of Ireland in matters of this nature,
 - (vi) His belief that were the legal position other than as he contended it to be in these proceedings, it would not be necessary for a victim to consult one solicitor after another so as to ensure that the first solicitor or the second solicitor or the third solicitor etc. carried out their duties to a unsuspecting and innocent client.
5. It is necessary when considering applications of this kind to bear in mind three propositions, and a distinction that follows from them: (a) the normal rule is that a party that is successful in legal proceedings will recover their costs from their unsuccessful opponent, (b) there are exceptions to that principle resulting in some cases in no such order being made, and (c) in some very particular circumstances (and most relevantly, where the proceedings involve a substantial issue of significant public interest) the Courts will award costs in favour of an unsuccessful party against the successful party.
6. The relevant distinction is between (b) and (c): as explained in the course of the judgment in *Friends of the Irish Environment v. The Legal Aid Board* [2023] IECA 190 (*'Friends'*), while litigation will often involve important points of law which it is in the public interest to determine, this does not of itself mean that such a case can be characterised as a *'test case'*, nor does it mean that a

party who brings such proceedings can expect, even if they lose, to recover their costs. While the categories of case in which an unsuccessful party might obtain their costs are not closed, they have (as it was put it in *Friends*) ‘by and large tended to involve foundational issues of constitutional or of European law’. They have also, almost invariably, comprised proceedings taken against the State or State bodies.

7. While the issue of when time begins to run in a claim in negligence against a solicitor by a former client to recover pure economic loss may be important, it does not come within the category of case in which costs have been awarded to the losing side (and see similarly *Sobhy v. Chief Appeals Officer* [2022] IESC 16, *An Taisce v. An Bord Pleanála* [2022] IESC 18, and *Right to Know CLG v. Commissioner for Environmental Information* [2022] IESC 28). The Court sees nothing in the facts here to merit granting the plaintiff any part of his costs: his claim against his solicitor was found to be barred on the application of conventional principle and well established authority – albeit arising in a context in which the application of those principles and authorities may (as was acknowledged in the substantive judgment) give rise to difficulties of application in some cases. As was also observed in the judgment of Murray J., however, this was not a marginal case.

8. The factors to be taken into account in deciding whether to exempt a successful party from some or all of the costs that would normally follow their failure in litigation may raise related, but will always present distinct, issues. Here, the Court is working on a broader canvas, and in a case involving a point of law of

importance (which, of course, will be almost all of the cases that are granted leave to appeal in this Court) this Court is entitled, in determining whether to exempt the unsuccessful party from the costs that otherwise follow, to have regard to a wide range of considerations. These include the overall context in which the proceedings were brought, the general importance of the issues of law arising in those proceedings, the conduct of the parties to the proceedings, the question of whether (as was the case in *Lee v. Revenue Commissioners* [2021] IECA 114), the State (where State bodies are defendants) could have avoided the need for the proceedings through basic precautions in the process of drafting of legislation, the issue of whether (as was the case in *Shackelton*) the case was a test case, the strength of the unsuccessful party's position on any issue of law, and the question of whether the party was pursuing the proceedings in the public interest, or in the protection and vindication of a private interest.

9. However, the strong presumption is that the successful party will obtain their costs, and it is a matter for the party seeking to be exempted from that consequence to establish exceptional circumstances that merit depriving their opponent of the entitlement they otherwise enjoy to recoup the costs they have incurred in connection with the proceedings they have successfully pursued, or defended, as the case may be. Here, it is relevant that the fourth named defendant is a private party, and more relevant again that (a) the plaintiff has never provided any explanation for why proceedings were not brought within the statutory limitation period, given that he was aware of his cause of action two years after it accrued, (b) that there had been no adjudication as to the negligence or otherwise of the fourth named defendant, and (c) that, as we have

just referenced, the Court has concluded that this was not, on the basis of the authorities, a marginal case.

10. That said, there are reasons for granting the plaintiff some relief from the costs of the entire action. Generally, it is to the benefit of the solicitors' profession and their insurers that there has been clarification as to the principles governing the accrual of a cause of action in the circumstances of a conveyancing transaction such as arose here. The plaintiff has suffered *a* loss as a consequence of the manner in which his home was conveyed to him (whoever the cause of that loss may have been), and it is a fact that a High Court judge found in favour of the plaintiff having regard to the principles applied by the Court in *Brandley v. Deane* [2017] IESC 83, [2018] 2 IR 741. Having obtained that victory, it is to be expected that the plaintiff was entitled to proceed to defend it before the Court of Appeal.

11. Taking account of these matters, the Court will make no order as to the costs incurred in the High Court and Court of Appeal. However, the Court of Appeal judgment was clear, unequivocal and has been found to be correct. The plaintiff nonetheless proceeded to appeal that decision, and that being so it would be wrong to deprive the successful defendants of any costs. Balancing these various factors, and bearing in mind the necessary discretion enjoyed by the Court in allocating costs, the costs being ordered against the plaintiff will be limited to those incurred in connection with the appeal to this Court.