



**UNAPPROVED  
THE COURT OF APPEAL**

Neutral Citation Number [2020] IECA 315

Appeal Number: 2017/571

**Edwards J.  
Faherty J.  
Murray J.**

**BETWEEN/**

**SEAN CORRIGAN**

**PLAINTIFF/  
APPELLANT**

**- AND -**

**KEVIN P. KILRANE AND COMPANY SOLICITORS**

**DEFENDANT/RESPONDENT**

**Ruling of Ms. Justice Faherty on Costs delivered the 18<sup>th</sup> day of November 2020**

1. Judgment (hereinafter “the principal judgment”) in this matter was delivered by the Court on 8 April 2020. The appeal was allowed. Both parties have delivered submissions on the issue of costs.
2. In summary, the appellant, the successful party in the appeal, seeks his costs of having to defend in the High Court the respondent’s notice of motion to have his defamation proceedings struck out and he seeks the costs of the appeal. He submits that the task of the Court in the appeal was to find whether the words published by the respondent were capable of bearing any of the meanings ascribed to them in the appellant’s proceedings. He submits that his appeal was successful in this respect. It is submitted that the appeal was also successful in that the Court found that the trial judge erred in

considering whether the respondent's email attracted the defence of qualified privilege in circumstances where malice was pleaded by the appellant and where the appellant may wish to seek discovery to assist in the defence of a plea of qualified privilege. Furthermore, the Court held that the trial judge had no further function save to determine whether the impugned words were reasonably capable of bearing a meaning ascribed by the appellant.

3. The respondent's application is to have the costs of both the High Court motion and the appeal reserved to the trial of the action. The respondent further submits that the appellant, as a lay litigant, is not entitled to an order for his costs and that any claim he has should be restricted to his vouched expenses.

4. The respondent's submissions can be summarised as follows:

5. Albeit that the Court held for the appellant on the first issue in the appeal, namely that on the basis that there was a conflict of evidence the trial judge should have taken the plaintiff's argument at its height, the Court nevertheless concluded that this was "not entirely dispositive of whether the appellant should succeed in this appeal." It is submitted that the appropriate forum in which to make a determination on such conflict is the trial itself and for that reason the question of the costs of the motion and the appeal should be reserved to the trial of the action.

6. The second issue in the appeal was whether the trial judge erred in finding that the statements in the email of 25 November 2015 were not reasonably capable of being found to have a defamatory meaning. This Court did not agree that the words in the impugned email were reasonably capable of bearing all the meanings ascribed to them by the appellant but found that the words were capable of bearing one of the meanings ascribed to them. The respondent submits that the determination of the Court, namely that the email was capable of bearing only one of the defamatory meanings ascribed to it, has radically altered and stripped back the appellant's claim as to be virtually unrecognisable. Thus,

while the appellant's claim has been revived it has been radically altered in its scope. On this basis, the respondent contends that the appropriate forum for a decision on the question of the costs of the entire proceedings, including the respondent's motion and the appeal, is the trial of the action when it will be determined whether the impugned statement did in fact bear its solitary defamatory meaning.

7. The Court's determination on the third and final issue in the appeal was that in circumstances where the appellant had pleaded that the sender of the email was motivated by malice the trial judge should not have considered whether the email attracted qualified privilege as the question of malice had to be disposed of by the trier of fact. Counsel for the respondent argues that in the event that the appellant cannot establish malice and the defence of qualified privilege is upheld, the trial judge, having heard the evidence, will be in the best position to form a view as to whether the appellant's assertions of fact and law are capable of being sustained on the evidence.

8. By reason of the foregoing, the respondent submits that the Court should depart from the practice of deciding the issue of costs at the stage at which the costs are incurred in favour of deferring that issue to the trial of the action.

### ***Discussion***

9. The new regime relating to costs is set out in the Legal Services Regulation Act, 2015 ("the 2015 Act") and in particular sections 168 and 169 thereof. Those provisions, together with the relevant provisions of O. 99 of the Rules of the Superior Courts as they stand since 3 December 2019 govern the law relating to costs.

10. Section 169(1) provides that where the party seeking costs has been "entirely successful" in the proceedings, such party "is entitled to an award of costs unless the court orders otherwise." In determining whether to order otherwise, the court should have regard to the "nature and circumstances of the case" and "the conduct of the proceedings

by the parties”. This includes conduct both before and during the proceedings and whether it was reasonable for a party to raise, pursue and contest one or more issues. The court’s discretion in each case is required to be exercised within the jurisdictional criteria established by law.

11. The new regime applying post 3 December 2019 was considered by Murray J. in *Chubb European Group SE v The Health Insurance Authority* [2020] IECA 183. At para. 19, Murray J. set out the principles to be applied by the court in determining costs issues post December 2019.

*“(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) In considering the awarding of costs of any action, the Court should ‘have regard to’ the provisions of s.169(1) (O.9, r.3(1)).*

*(c) In a case where the party seeking costs has been ‘entirely successful in those proceedings’, the party so succeeding ‘is entitled’ to an award of costs against the unsuccessful party unless the court orders otherwise (s.169(1)).*

*(d) In determining whether to ‘order otherwise’ the court should have regard to the ‘nature and circumstances of the case’ and ‘the conduct of the proceedings by the parties’ (s.169(1)).*

*(e) Further, the matters to which the court shall have regard in deciding whether to so order otherwise 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)).*

*(f) The Court, in the exercise of its discretion may also make an order that where a party is ‘partially successful’ in the proceedings, it should recover costs relating to the successful element or elements of the proceedings (s.168(2)(d)).*

*(g) Even where a party has not been ‘entirely successful’ the court should still have regard to the matters referred to in s.169(1)(a)-(g) when deciding whether to award costs (O.99, r.3(1)).*

*(h) In the exercise of its discretion, the Court may order the payment of a portion of a party’s costs, or costs from or until a specified date (s.168(2)(a)).”*

**12.** In *Veolia Water UK Plc. v Fingal County Council (No. 2)* [2006] IEHC 240, [2007] 2 I.R. 81, a case which preceded the 2015 Act, Clarke J. (as he then was) described the entitlement to costs in the following terms:

*“Parties who are required to bring a case to court in order to secure their rights are, prima facie, entitled to the reasonable costs of maintaining the proceedings. Parties who successfully defend proceedings are, again prima facie, entitled to the costs to which they have been put in defending what, at the end of the day, the court has found to be unmeritorious proceedings.”*

**13.** In *M.D. v N.D.* [2016] 2 I.R. 438, the learned judge further elaborated on the proper application of the *Veolia Water* principles:

*“The proper application of the Veolia principles does not involve the court in simply determining that an otherwise successful party was unsuccessful on one or more points raised. It is necessary, in order to depart from the principle that costs follow the event, that it be ‘clear’ that the raising of those additional unmeritorious points actually and materially increased the costs of the case. For example, it is by no means clear that the costs of a judicial review hearing which finishes within a day which involved five points would be, to any material extent, greater than the costs of a similar judicial review proceeding to also finish within a day which involved only three points. In such a case, the fact that one or more of the relevant points were lost by the otherwise successful party might dwell not, therefore,*

*legitimately lead to the view that it was clear that the costs had been increased.*

*The court must not only be satisfied that the otherwise successful party has raised unmeritorious points but also that it is clear that the raising of those points has materially increased the costs of the litigation as a whole.” (at para. 9)*

**14.** In this case, the respondent’s position, in the face of the appellant’s application for his costs in the appeal, is that this Court should leave the issue of the costs of the appeal to the trial judge. In my view, the respondent’s arguments constitute an attempt to re-argue issues aired at the appeal hearing and which have been determined by the Court. They do not in any meaningful way engage with the consequences of the Court’s findings in the principal judgment, the outcome of which is that the appellant has revived proceedings that had been struck out in their entirety by the High Court.

**15.** It is most definitely not the case that the appellant has been “entirely successful” in the appeal given that he did not persuade the Court that the words in the impugned email were reasonably capable of bearing all the meanings ascribed to them. However, in my view, bearing the provisions of s.169(1)(a)-(g) of the 2015 Act in mind, none of the respondent’s arguments leads reasonably to a conclusion that the costs in the appeal should be deferred until the action has been determined because the appellant was not “entirely successful”. In short, the respondent has not persuaded the Court that the appellant raised unmeritorious points in the appeal, or that any of the points on which he was unsuccessful materially increased the costs of the appeal hearing.

**16.** The salient issue, as I have ready alluded to, is that the appellant has been successful in reviving (albeit on a very much restricted basis) a libel action that was struck out in its entirety in the court below. Accordingly, in the exercise of its discretion, the view of the Court is that the appellant is entitled to his costs in the appeal. These costs, however, are limited to his reasonable outlay given that he was at all material times a lay litigant.

**17.** In the circumstances of the case, the Court further proposes to deal with the costs award in the High Court by vacating same and replacing it with a no costs order.

**18.** Both Edwards J. and Murray J. have indicated their agreement with the proposed costs order.