THE COURT OF APPEAL - UNAPPROVED

High Court Record No: 2018/15M
Court of Appeal Record No.: [2023] IECA 264

Whelan J.
Faherty J.
Binchy J.

IN THE MATTER OF THE JUDICIAL SEPARATION AND FAMILY LAW REFORM ACT 1989, AND THE FAMILY LAW ACT, 1995

BETWEEN/

B N

APPLICANT/
RESPONDENT

- AND –

D O'H

RESPONDENT/
APPELLANT

JUDGMENT of Mr. Justice Binchy delivered on the 27th day of October 2023

1. This is an appeal from an order made by the High Court in family law proceedings, whereby the trial judge ordered the appellant to pay the respondent 60% of the costs of the proceedings. This order was made by the trial judge to reflect his conclusion that the appellant (who was the respondent in the court below) had caused the proceedings to be significantly elongated by making very serious false allegations about the conduct of the

respondent (the applicant in the court below) both before and during the marriage of the parties. These allegations, the trial judge concluded, had been advanced by the appellant "…in all probability ….to paint the [respondent]in the worst possible light" and "..to coerce him to capitulate to her demands in respect of the property , the children and all financial and related matters. – or failing that to help secure victory in court" (para.161 of the judgment of the High Court). The trial judge further concluded that the making of the allegations by the appellant amounted, in all of the circumstances, to gross and obvious misconduct. He considered that the most appropriate way of addressing this conduct was not to reflect it in the orders he made for the provision of the parties and their children, but rather in the orders that he made in relation to the costs of the proceedings. He considered, in some detail, the general principles applicable to costs, as well as a number of authorities specifically addressing costs in family law proceedings. At paras. 370-371of his judgment, he stated:

> *"370. Traditionally, the courts have approached costs in family law proceedings differently to the approach adopted in most other areas of law. There has been a view that costs ought not to be awarded ordinarily in family law proceedings and that view has prevailed for good reason. Apart from the relationship dynamic at play courts are frequently dealing with a struggle to see proper provision made where resources are limited. Courts need to be and have been mindful of the reality that any award of costs against a party may impact on and alter what the court has just earlier determined constitutes proper provision. So there is a balance to be struck in this regard, as an added dimension, when considering awarding costs against a party to family law proceedings. That is not to say that proper provision and costs are not separate and distinct considerations but rather that the decisions on both do involve some overlap insofar as the factors to be considered are concerned.*

371. In this case the court is keenly aware of the need for this exercise and has measured its decision on costs in light of the lump sum award, the financial resources of the parties and all of the circumstances."

2. At paras. 382-383, the trial judge concluded as follows:

"382.This Court is quite satisfied that the case was elongated and particularly bitter because the [appellant] made untrue allegations of rape and sexual assault against the [respondent]. The untrue allegations of physical abuse of the eldest son would probably not on their own have added significantly to the length of the hearing or the bitterness. Those allegations are in a completely different category and arise in circumstances where both parents have been shown by the evidence to have been unable to deal properly with the behaviour of the eldest son.

383. The open offer or offers of the [appellant] to deal with the [respondent's] concerns about being wrongly accused of rape and sexual assault were wholly inadequate. The [respondent's] requests or demands in this regard were understandable as he did need, and was entitled, to protect his reputation and his character. The additional time taken by these allegations was entirely the fault of the [appellant] because she made those very serious allegations of a criminal nature against the [respondent]. If the untrue allegations of rape and sexual assault did not exist the case would have been considerably more straight forward. Indeed one might well contend that it probably would not have troubled the court at all."

3. At para. 387, the trial judge held:

"Although the court considers that the untrue allegations of rape and sexual assault added at least 66% to the costs of this case it will award to the applicant 60% of the costs agreed by the parties or determined by adjudication."

It is against that determination that the appellant now appeals. I should add that the order of the trial judge includes all reserved costs, so that the appellant is required to discharge 60% of the costs of those matters in respect of which costs were reserved. So far as I can ascertain, there are three motions to which this applies.

Background

4. The parties were married more than 10 years ago. There are three children of the marriage, A boy, B, a girl, and C, a boy, all of whom are dependent children for the purposes of the proceedings. For a considerable time, both parties have enjoyed well remunerated employment in their chosen careers, in which each of them are highly successful. The marriage of the parties broke down, irretrievably a number of years ago, following which the appellant vacated the family home taking the dependent children of the parties with her to reside with her parents, who reside in close proximity to the family home of the parties.

The proceedings

5. The respondent issued the proceedings by way of special summons on 4th April 2017. Having summarised the history of the relationship of the parties, including the breakdown of the marriage, the respondent sought the following orders:

1) Orders pursuant to s.11 of The Guardianship of Infants Act, 1964 granting the parties joint custody of the dependent children of the marriage, as well as an order directing that the children be returned to the family home with the respondent having responsibility for their day- to-day care;
2) Interim orders regularising access pending the determination of the proceedings;
3) Interim orders directing payment by the appellant to the respondent of periodic maintenance for the support and maintenance of both the respondent and the dependent children;

4) An order directing the appellant to pay to the respondent such periodical and lump sum payments for the support of the respondent as the court shall deem equitable and just;

5) Property adjustment orders;

6) Pension adjustment orders;

7) An order extinguishing the share of the appellant in the estate of the respondent.

6. The special summons was grounded upon the affidavit of the respondent. In this affidavit, the respondent again deposes as to the history of the relationship of the parties. He then proceeds to address the financial circumstances of the parties and, in some detail, the means of the parties including their respective incomes, assets and liabilities. At para. 21 of his affidavit, the respondent avers that the eldest child of the parties, A, has been prone to prolonged temper tantrums which each of the parties have found very challenging to manage. He avers that each of the parties have, from time to time, resorted to slapping A in an attempt to control these episodes. The respondent avers that in the course of one of these temper tantrums, the appellant knocked A to the ground and during the course of another episode, the appellant slapped A across the face.

7. The appellant continues in his affidavit to aver that in February 2017, his wife threatened to make allegations of child abuse against him and to report him to Tusla with a view to preventing him from securing a permanent position in his field of work.

8. The respondent then addresses a number of other matters relating to the deterioration of the relationship of the parties that are not relevant for present purposes. At para. 37 of his affidavit, the respondent describes an incident in which the parents of the appellant, according to the respondent, accused him of repeatedly sexually assaulting the appellant and also made allegations in respect of his conduct towards A. These allegations, the respondent avers, were subsequently repeated by the appellant in another conversation. The respondent

further avers that following the departure of his wife, with the children, from the family home, to the appellant's parents' home, he drove to the appellant's parents' house in order to see the children. The respondent avers that when he arrived, the appellant came out from the house and made further allegations of "rape, assault and refusal to make mortgage repayments as against me".

9. On 10th April 2018, the respondent issued a motion seeking orders, pursuant to s.47 of the Family Law Act 1995, directing the appointment of a suitably qualified expert to carry out an assessment concerning the future welfare of the dependent children and regulating the custody and/or access of the dependent children of the marriage pending the determination of the proceedings. This motion was grounded on an affidavit of the respondent also sworn on 6th April 2018. In this affidavit, the respondent avers that since the appellant left the family home, she has sought to restrict and limit his access with the children. He avers that he did not see them at all for 52 days, and then he saw them only under heavily restricted and controlled circumstances. He avers that he was denied any access to them at all since 18th February 2018. The respondent avers that the appellant sought to justify her behaviour by making untrue and exaggerated complaints against him. He avers that these complaints and allegations are utterly contrived in order to justify the appellant's removal of the children from the family home and her denial of any meaningful access to the children by the respondent. He describes the allegations made by the appellant as being false, although he does not get into the details of the allegations in this affidavit.

10. The appellant swore a replying affidavit to the respondent's motion seeking various reliefs on 11th May 2018. This is a lengthy affidavit, and so far as is relevant to this appeal, the appellant avers, *inter alia*, that the respondent demonstrated anger and violence towards A and that at all material times he has failed to act appropriately in his management of A. She deposes that he has physically abused A by, *inter alia*, hanging him upside down,

drilling his (the respondent's) fingers into A's temples, restraining A physically, hitting him with a wooden spoon and locking him in rooms. For her part, the appellant denies that she has ever slapped A, as asserted by the respondent.

11. The appellant avers that during the period of time between September 2016 to March 2017, she was forced by the respondent to have sexual intercourse with him or in the alternative that the respondent had sexual intercourse with her while she was asleep. She avers that her objections to this conduct went unnoticed by the respondent who would respond by saying: *"I am just making love to my wife in my bed in my house".* She avers that she has been informed that the respondent has spoken to his colleagues about the *"false"* allegations that she has made against him, while on the other hand she has spoken only to confidential appropriate agencies in relation to the parties' problems at home.

12. The appellant avers that in January 2018 she was afraid that she was going to *"go under"* due to the strain of the situation and she sought the assistance of the Rape Crisis Centre. She avers that she was advised by the counsellor to whom she spoke that the counsellor would have to make a mandatory report to Tusla, and the counsellor also advised the appellant to speak directly to Tusla, and the appellant did so on 20th February 2018.

13. The appellant refers to an application issued by the respondent seeking access to the children which had been returnable before the District Court on 16th February 2018, but the respondent withdrew that application for no reason. She accuses the respondent of a lack of candour in failing to mention this application. She refers to efforts that she made to arrange access by the respondent to the children. The appellant also refers in this affidavit to an application made on her behalf for a protection order which was granted, *ex parte,* by the District Court on 17th April 2018 and to the return date for the barring order application on 21st May 2018.

14. The appellant's application for a barring order proceeded on that date, and was dismissed by the district judge. As will be seen, the trial judge placed some reliance on the decision of the district judge to dismiss the application. For his part, the respondent places significant reliance upon the fact that, at the time of swearing of the information necessary for the protection order and barring order, the appellant would have been in receipt of the affidavits of the respondent of 6th April 2018 and would have been aware that, in these proceedings, the respondent had made averments drawing the attention of the court to the allegations of the appellant. I will return to these matters in due course.

15. On 31st July 2018, following a fully contested hearing. MacGrath J. in the High Court made an interim order regulating access by the parties to the children.

16. On 25th October 2018, the appellant swore a further affidavit in these proceedings. She referred to the matters of fact as pleaded in three previous affidavits sworn by her in the proceedings, including her affidavit of 11th May 2018, and confirmed that she relies on the matters of fact as pleaded in those three affidavits. At paras. 14 and 15, the appellant avers:

> *"14. I say that I am extremely cognisant of the fact that I wish to seek to continue to improve relations inter parties which have been nothing short of toxic on the part of the applicant. At all material times my primary motivation has been and continues to be the safety, welfare and wellbeing of our three children and most particularly the ceasing of the bad treatment and restraining of A.*
>
> *15. Therefore it is very difficult and upsetting for me to make the allegations hereunder as against the applicant, which I have not averred to in previous affidavits as the behaviour was specific to me only and not relevant to the substance of the previous applications before this honourable court concerning the children. I beg to refer to a transcribed copy of the DAR from the District Court hearing in Limerick above referred to upon which marked with the letters "COG 1" I have endorsed my name*

part of the swearing hereof. I confirm my evidence before the District Court in every respect."

17. The appellant then proceeds to make allegations that the respondent forced her to have sexual intercourse with her during the Christmas period of XXXX, at which time the parties were engaged to be married. She describes this allegation in some detail. In the course of the District Court hearing, the respondent responded to this allegation by pointing out that he had reviewed many text messages exchanged between the parties during that period all of which were demonstrative of a loving and affectionate relationship. The appellant continues with averments alleging that between September 2016 and February 2017 she repeatedly woke up in the middle of the night because the respondent was digitally penetrating her and that on one occasion she awoke to find him having sex with her. She avers that she tried to use every excuse she could think of to get the respondent to stop and when she protested he claimed that *"he was just having sex with his wife"* as of right. The appellant further avers that she believes that the respondent had drugged her on a number of occasions and gives details of these allegations. She again refers to her attendance at the Rape Crisis Centre in or about January 2018. She also alleges that the respondent had been tracking her movements electronically.

18. The appellant caused the issue of a motion on 22nd November 2018 seeking an order providing for the review of the parties and the children of the marriage by the assessors who had already conducted an assessment of the family, at the request of the court, pursuant to s.47 of the Family Law Act, 1995 and s.32 of the Children and Family Relationship Act, 2015. In the context of that motion, the respondent swore an affidavit in which he denied, categorically, all allegations of *"ill behaviour, ill temper, and aggression"* towards the appellant and the children. The respondent averred that:

"It is as a result of the respondent's [i.e. the appellant]) making of false allegations against your deponent, and in particular the pending prosecution against your deponent for breach of the protection order, which your deponent wholly and categorically denies, that I now find myself in further difficulty in respect of my employment."

19. At this point I should explain that the appellant had made a complaint that the respondent had violated the protection order made by the District Court in May 2018, and notwithstanding that the subsequent barring order application had been dismissed, the respondent was prosecuted for violating the protection order. This prosecution proceeded before the District Court on January 2019 and was dismissed. However, in the intervening period, the respondent had sought a permanent position within his employment and in that context, it came to the attention of his employer that this prosecution was pending. The revelation of this prosecution to his employer caused the respondent some difficulties and delayed his ultimate appointment to the position he sought. Nonetheless, he secured that position following the dismissal of the prosecution.

The Trial in the High Court

20. At the very outset of the trial, counsel for the respondent made it plain that the allegations made by the appellant against the respondent were a real issue in the case. In response, the trial judge inquired to what extent the respondent was asking the court to engage once more in all of the allegations that had been dealt with in the District Court at the hearing of the barring order application and at the hearing regarding the alleged breach of the protection order. To that inquiry, counsel for the respondent replied: *"None of those, Judge."* The trial judge then inquired as to whether the extent to which he had to hear evidence in relation to the allegations was relevant only as regards the issue of fault insofar as that is relevant in the context of the relief claimed by the respondent in the proceedings

and perhaps also to the issue of custody or access. Counsel replied that the court would be entitled to take into account the making of the allegations, whether they are credible and if not, to take them into account in considering the conduct of the appellant. From the exchanges that took place between counsel and the Judge regarding this issue, it was clear that the trial judge was concerned about the impact of these issues on the duration of the case. The trial judge made it clear that the proceedings before the court were family law proceedings, and he stated that he was not going to allow the case to evolve into a criminal hearing or a defamation action.

21. In response to all of this, the appellant made the following open offer:

"*1. Not to rely on the allegations/averments that [the respondent]. sexually assaulted me, including rape, in these proceedings or at all.*

2. [The appellant] accepts that there is a difference of opinion/averment as to what happened.

3. [The appellant] accepts that [the respondent]. did not intend to cause any harm to her.

4. The appellant confirms that she will not discuss these allegations in any setting save for personal, private, or confidential therapeutic environment."

22. Counsel for the appellant added that the appellant would make the following two statements in evidence:

"*1. I do not withdraw the allegations that [the respondent] did these things to me, but in the hope of reaching an agreement and in the interest of moving matters forward for everybody's sake, I am prepared to undertake not to pursue them in any legal forum.*

2. In the hope and context of an agreement being reached in respect of [the respondent's] conduct towards the children in the past, I am agreeable not to pursue

them with a third party agency such as Tusla, the CFA, the HSE and [the respondent's] employer. I am also agreeable that if contacted by any such agency, that I will inform them that I do not wish them to be pursued. I very much hope that no issues as to unwanted behaviour by [the respondent] towards the children arises in the future."

23. As had been submitted by her counsel, the appellant gave evidence in the terms of or consistent with the statements above. This gave rise to an exchange between the trial judge and counsel for the appellant. Counsel for the appellant stated that the appellant was relying upon the affidavits and her sworn evidence, but that she was not "relying on the allegations as being a factor in these proceedings or at all." Counsel reminded the court that he had not put any questions to the respondent as regards the allegations, and it was not his intention to ask the appellant any questions about them either. However, he reiterated that the appellant was not withdrawing the allegations. In response to questions from her counsel, the appellant stated that she did not wish to rely upon the allegations because, while *"these things have happened, they are in the past, there has already been an opportunity to air them, I have dealt with them, I do not believe it is going to happen again and I simply wish to move on."* The appellant confirmed that she did not wish the court to take into account the allegations when deciding on the issues in the proceedings.

Judgment of the High Court

24. The trial judge addressed the significance of the appellant's allegations, so far as these proceedings are concerned, at different points in the judgment. At paras. 34 -35 he addressed the application for a barring order before the district judge. He quoted the following passage from the decision of the district judge (the transcript of the proceedings in the District Court having been obtained for the purposes of these proceedings):

"In relation to the allegations of rape and sexual abuse I have to say that in relation to her evidence that [the appellant] was very readily confused about the dates. In

September – if the parties met in September/October XXXX and were dating and courting at Christmas XXXX I find it extremely difficult to accept that she could have been sexually abused and that she would have continued in the relationship. I find her evidence in relation to the allegations of rape to be not sufficiently precise. I would take it that if she was raped that she would know precisely the date and the hour and it wouldn't be vague and I mean I don't know how their sexual relations were conducted, but if they were abnormal I would have taken it that the matter would have been raised earlier and that the parties would have gone for counselling."

25. The trial judge then described how, following the dismissal of the application for a barring order, the respondent was contacted by the gardaí about an allegation made by the appellant that he had violated the terms of the protection order. As a result, the trial judge records, the appellant was arrested (by agreement) the following day and charged with an offence under s.17 of the Domestic Violence Act 1996. He was detained in custody for between an hour and two hours and brought to court in the back of a garda van. The respondent was released on bail, and returned to court in September when he pleaded not guilty to the charge. The proceedings were heard, and the charge dismissed, in January 2019. At para. 39, the trial judge noted:

"The criminal charge had consequences for the applicant. He had to make a report to ([his employers]) concerning the criminal charge. He had to seek an order in this Court for the lifting of the in-camera rule to allow him to do so. In addition, he could not proceed to his appointment to a permanent post …. because he failed a garda vetting because of the pending criminal charge."

The trial judge noted that the respondent stated that the prosecution delayed his appointment by nine months at least, and the trial judge accepted that evidence. Moreover, the trial judge

accepted the evidence of the respondent that he felt obliged to inform his colleagues of the proceedings against him, and that he was devastated by having to do so.

26. At paras. 45 - 46, the trial judge held:

> *"45. The court is satisfied that the[respondent] dealt with the allegations throughout in an appropriate manner. He exercised a judgment in deciding on the extent of the disclosures and the court finds no fault with his judgment in that regard.*
>
> *46. The court is satisfied that the [appellant] well knew of the possible impact her actions would have on the [respondent] although she would not have known exactly how things would pan out in that regard."*

27. The trial judge noted the evidence of the respondent that, on account of the complaints of the appellant, he had frequent contacts from various social workers at Tusla between June of 2018 until May or June of 2020. The respondent gave evidence that the assessments were based on and were carried out because of 16 Tusla referrals concerning himself and the children, and that these referrals were made by the appellant or her mother, and possibly also a friend of the appellant's mother.

28. Referring to an argument advanced on behalf of the appellant that it was the respondent who introduced the allegations into these proceedings, the trial judge stated at paras. 74 – 75:

> *"74. The [respondent] accepted that he was the one who brought it to this Court's attention these allegations. It was he who first brought the Court's attention to the allegations that had been made against him.*
>
> *75. While much play was made by the [appellant] in her case about the [respondent] first bringing the allegations into the case the simple fact of the matter is that the allegations are in the case because the [appellant] made them and has refused to withdraw them. This is returned to later in the judgment."*

29. Later in the judgment, at paras. 129 and following, the trial judge considered the evidence of the appellant regarding the allegations. He noted that she stood over the allegations and did not wish to withdraw them, stating that she was not prepared to perjure herself. The trial judge noted, at para. 135, that the appellant had confirmed that she did not wish the court to take the allegations into account in its ultimate decision. At para. 136, the trial judge stated:

> *"136. There is something quite absurd about the position adopted. Firstly, the court is being asked to decide on child welfare issues where one parent is standing over her sworn affidavit evidence that the other parent raped her and sexually assaulted her and in the same breath states that she does not wish to take these allegations into account. And this is where there are also allegations by her against the father of child abuse. Secondly, although not withdrawing the allegations it appears to be suggested by the [appellant] that the [respondent] has no reason to raise and to visit the allegations and defend himself against them. It appears to be suggested also that the court should not concern itself with their veracity because the accuser although standing over the allegations does not wish to rely upon them. The position adopted by the applicant is completely untenable and is an affront to justice."*

30. At para. 159, the trial judge stated that he did not find the allegations made by the appellant, either in regard to the treatment of the eldest child A, or in relation to crimes allegedly committed by the respondent against the appellant, to be credible. At para. 161 he concluded:

> *"However, the manner in which [the appellant -] acted after arriving at that decision [that the marriage was over] in December 2017 is lamentable – as her subsequent behaviour was wrong in so many respects. And it was avoidable and would have been*

avoided if she had instead been more reasonable in approaching a fair resolution to the various problems that the marital breakdown gave rise to. Instead she embarked on a campaign which, judging by the evidence before the court, was in all probability designed to paint the [respondent] in the worst possible light. It was intended to coerce him to capitulate to her demands in respect of the property, the children and all financial and related matters – or failing that to help secure victory in court."

31. At paras. 314 – 317, under the heading "Findings" the trial judge set out his conclusions regarding the allegations of the appellant as follows:

"314. A central issue, if not the central issue, throughout the hearing of this case over the seven day period was the credibility of the allegations of rape and sexual assault made against the [respondent] – which issue the court must consider the civil standard of proof – on the balance of probabilities.

315. On this issue, there is the [appellant's] assertion that it was the [respondent] who brought these allegations into the case. Firstly, the truth is that the allegations are in the case because the[appellant] made them and repeated them to her parents – and repeated them during the dispute and on affidavit. Secondly, the [appellant's] apparent efforts to neutralise the court's ability to address these allegations is misconceived. The court must look at the credibility of such allegations in the overall context given the child welfare concerns involved in the decision concerning custody and contact – and even if the position be that the [appellant] no longer wishes in the proceedings to "pursue" those allegations. Even if the court was prepared to allow the [appellant] to somehow park the allegations, and it is not, it would be wrong to do so when the court is addressing the issues of custody and contact and the suggestion of a co- parenting regime. The court would not be addressing the child welfare issues

in the case if it ignored allegations of rape and sexual assault made by one party against the other and which allegations have not been withdrawn. These allegations must be considered as well as the allegations of physical abuse of the eldest child made by the [appellant] against the [respondent]. Thirdly, the court could not do justice inter parties by leaving such allegations unaddressed and hanging in the ether.

316. In this regard, the court is satisfied that the allegations of rape and sexual assault are not the truth. Unfortunately, these allegations appear to the court to be an ill-considered attempt by the [appellant] to construct a particular narrative in the hope that doing so would gain traction and leverage and assist in negotiating or achieving the best terms of dissolution of the partnership. The [appellant] was wrong to make these allegations against the [respondent] and could not but have been aware of the gravity of the allegations she made and repeated.

317. The court considers it appropriate to be as direct as this in this appraisal of the situation as any ambiguity surrounding the court's finding in this regard would, in the view of the court, leave unresolved an issue that needs to be addressed by this court and decided so that the [respondent] and the [appellant] can put the past behind them and move on."

32. The trial judge also made other negative findings against the appellant. Specifically, he formed the opinion that while *"the [respondent's] behaviour towards the mother in the presence of the children has on more than one occasion been belligerent and unacceptable …. overall the court is satisfied on the evidence, and as a matter of probability, that the mother has placed much more significant obstacles in the way of the children's contact with their father than he has done in terms of their relationship with their mother. The evidence does not indicate that the father has been proactive in this regard in the way that the mother has been".*

33. The trial judge expressly found that the conduct of the appellant in advancing the allegations, which he found to be untrue, amounted to gross misconduct. He arrived at this conclusion having reviewed a number of authorities, including the decision of Irvine J. (as she then was) in this Court in *Q.R. v. S.T.* [2016] IECA 421, as well as a decision of the High Court of England and Wales namely *S v. S* [2007] EWHC 2793 (fam) which had been considered by Irvine J. in *Q.R. v. S.T.*.

34. At paras. 299 – 301, the trial judge concluded:

> *"299. The court finds that the father did not abuse any of the children and in particular did not abuse the eldest A. Those allegations are serious but fall into a lesser category than the other allegations of rape and sexual assault.*
>
> *300. The court has carefully considered the evidence in respect of the allegations by the wife that the husband raped and sexually assaulted her. It finds that the allegations lack any credibility or cogency. The court finds that the allegations are not the truth. Making the allegations and pursuing them in the course of the disputes in the District Court proceedings and repeating them in affidavits filed in these proceedings was wrong. The approach adopted at this hearing of not withdrawing but not relying on or pursuing those allegations is against the backdrop of what happened in the District Court hearings and against the backdrop of the experts' reports referred to above. It was clearly a strategic approach adopted as a damage limitation exercise on the part of the wife. The making of these very serious and untrue allegations and pursuing them to the extent they were pursued does in all of the circumstances amount to gross misconduct on the part of the wife. She put her husband through a truly awful chain of events and experiences which he did not deserve. It is inexcusable conduct.*
>
> *301. The question remaining is should the court penalise the wife for this wrong to her husband. Would it be unjust to disregard this conduct in all of the circumstances*

of the case. At first glance one would think there could be only one answer – i.e. that disregarding such conduct would be unjust.

302. However, it would be wrong to jump to such a conclusion and the court considers that the justice of this case signals otherwise. The court does not consider that the provision should be influenced by the gross misconduct. Because the circumstances here are not such as would make it unjust to disregard the conduct when considering the provision to be made for the following reasons…"

35. It is unnecessary to get into the trial judge's reasons for this conclusion, save only to mention that one of the reasons given is that the court would consider the behaviour of the parties when considering the issue of costs. At para. 302(f), the trial judge considered and rejected the imposition of a penalty in the provision to be made for the appellant, to reflect her misconduct.

36. At paras. 370 and following, the trial judge considered the applicable principles in respect of costs in family law proceedings. He noted that the courts have traditionally approached costs in family law proceedings differently to the approach adopted in most other area of law, because, *inter alia*, any award of costs against a party in family law proceedings may impact upon and alter what the court has earlier determined constitutes proper provision. The trial judge considered a range of authorities both in relation to costs generally and more specifically in relation to costs in family law proceedings. I will address these as needs be below, but at this point it is sufficient to observe that the appellant does not seriously contend that the trial judge erred in his application of the law in relation to costs – in fact in her written submissions it is stated that "broadly speaking the Respondent/Appellant accepts the legal principles as thus set out". However, this concession is subject to qualifications which I will address presently.

37. At para. 382, the trial judge concluded that the case was elongated because the appellant had made untrue allegations of rape and sexual assault against the respondent and that the additional time taken up by the allegations was entirely the fault of the appellant. He concluded that if the allegations of rape and sexual assault did not exist the case would have been considerably more straight forward and he went so far as to surmise that the case might not have troubled the court at all.

38. In the view of the trial judge, the untrue allegations of rape and sexual assault added at least 66% to the costs of the case. However, as is apparent, the trial judge stopped short of awarding 66% of the costs against the appellant, and instead limited his award to 60% of the costs of the proceedings to be agreed between the parties or to be determined by adjudication. It should be noted that the parties had agreed that costs should be measured on the Circuit Court scale, and the trial judge so ordered.

Notice of appeal

39. There are 11 grounds of appeal. They may be summarised as follows:

(1) The trial judge erred in concluding that the appellant had made allegations of rape and sexual assault against the respondent in circumstances where it was the respondent introduced these matters to these proceedings.

(2) The trial judge erred in concluding that the case was elongated and particularly bitter because of the untrue allegations of rape and sexual assault.

(3) The trial judge erred in concluding that the allegations of rape and sexual assault added to the costs of the case, and specifically that they added at least 66% to the costs of the proceedings.

(4) The trial judge erred in relying upon his incorrect factual assessment that the allegations of rape and sexual assault had added to the costs of the case as the basis for the exercise of his discretion in his order as to costs.

(5) There was no evidential basis for the conclusion that the allegations of rape and sexual assault added at least 66% to the costs of the case, and the parties were denied any opportunity to address this approach.

(6) The trial judge was overly influenced in the exercise of his discretion regarding costs by the nature of the allegations which he found were made by the appellant.

Respondent's notice

40. In his respondent's notice, the respondent pleads that the trial judge was correct to conclude that the appellant made untrue allegations of rape and sexual assault and that it was she who had introduced these matters into the factual matrix of this case. The respondent says that the trial judge was correct to conclude that these allegations prolonged the case, and correctly assessed that they had added at least 66% to the costs of the case. Moreover, the respondent says the trial judge was entitled to assess and estimate the extent to which these allegations added to the costs of the case.

Submissions

41. In her written submissions, the appellant reproduces from the judgment of the trial judge paras. 370 – 381 of the judgment of the High Court where the trial judge addressed the applicable principles in respect of costs in family law proceedings. The appellant, broadly speaking, accepted the correctness of the principles as set out by the trial judge. However, the appellant submits that:

(i) The trial judge did not give any or any adequately clear reasons for his decision on costs;

(ii) The trial judge did not have any or any sufficient regard to ss. 168 and 169 of the Legal Services Regulation Act 2015 (the "2015 Act") and,

(iii) The trial judge was overly influenced by his view of the character of the allegations made by the appellant against the respondent, and his conclusion that the respondent was entitled to have his reputation vindicated in these proceedings.

42. The appellant submits that the phrase "entirely successful" appearing in s.169 of the 2015 Act does not sit easily within family law proceedings having regard to the nature of the issues that require determination, such as the welfare of the children and "proper provision". Insofar as the trial judge placed decisive weight on his conclusions regarding the allegations of rape and sexual assault in arriving at his decision on costs, those allegations were not advanced at the trial by the appellant and so, it is submitted, the trial judge erred in relying on his conclusions regarding the allegations so far as costs are concerned.

43. The appellant submits that given the multi factorial issues in the proceedings, it is impossible to determine that one or other party was "entirely successful".

44. The appellant submits that it is implicit from the judgment that the trial judge was of the view that the respondent was "partially successful in the proceedings" for the purposes of s.168(2)(d) of the 2015 Act, which provides:

> "(2) without prejudice to subsection (1) the order [for costs] may include an order that a party shall pay: -
>
> (d) where a party is partially successful in the proceedings, costs relating to the successful element or elements of the proceedings, …"

The appellant submits that it is illogical and contrary to reason to find, by implication, that the respondent was partially successful in respect of a matter (i.e. the allegations) which was not advanced at trial by the appellant. The allegations, the appellant submits, were introduced

to the proceedings by the respondent, who persisted at the trial in seeking vindication in respect of them, notwithstanding the assurance given by the appellant on the first day of the trial, and notwithstanding that the district judge had rejected the allegations in declining to grant the appellant a barring order grounded on the same.

45. The appellant draws a comparison between a party (in non-family civil proceedings) who raised an issue relevant to the proceedings but at the trial either withdraws the issue formally or does not pursue the issue. The appellant submits that while the other party in such circumstances would be entitled to costs incurred in preparing to meet the issue at trial, it would be entirely unjust to factor such scenario into the costs of the trial. The appellant goes so far as to submit that it would have been more just for the trial judge to award costs against the respondent because it was his leading of evidence in relation to the allegations and the pursuit of his vindication (including the cross examination of the appellant) that lengthened and embittered the trial.

46. The appellant's legal advisors conducted a detailed analysis of the transcript for the purposes of estimating the time taken up in the court below in its consideration of the allegations, both in evidence and in submissions. In the estimation of the appellant's legal advisors, consideration of the allegations took up at most 15% of the time at trial, and accordingly the factual findings of the trial judge underpinning his decision on costs are not supported by sufficient credible evidence. Therefore, it is submitted, the decision of the trial judge to award 60% of the costs of the trial to take account of what the trial judge found to be the elongation of the trial by reason of the appellant's allegations, is one that falls well outside the margin of appreciation that may reasonably be afforded to the trial judge in accordance with the well-established jurisprudence on the standard of review by an appellate court.

47. The appellant relies upon the decision of this Court (Power J.) in *O'Connell v. BATU & Ors.* [2021] IECA 265 where at paras. 122 – 130 Power J. held that the decision of the trial judge in that case to allow the appellant just three days out of six of his costs and expenses was disproportionate, particularly where "*there was nothing to indicate that half of the trial time was spent or "wasted" on the matters that were not relevant to the ultimate outcome of the proceedings*." Power J. increased the percentage of costs awarded to the appellant in that case to 85% (15% being deducted because the appellant had not been entirely successful in the proceedings).

48. The appellant also relies upon the decision of this Court in *TAO & Ors. v. Minster for Justice & Ors.* [2021] IECA 293, in which case Collins J (in this Court) summarised the principles applicable to a review by this Court of costs orders made by the High Court. I return to *TAO* later in this judgment.

49. In his submissions to the court, counsel for the appellant argued that it was unnecessary for the trial judge to enter upon any consideration of the allegations of rape and sexual misconduct in circumstances where the appellant made it clear from the beginning of the trial that, while not withdrawing the allegations, she was not pursuing them for the purposes of these proceedings. Indeed, the trial judge, early on in the proceedings, made it clear that the court was not embarking either upon a criminal trial or upon a defamation suit, but, counsel submitted, the trial judge appeared to have overlooked that determination subsequently.

50. Insofar as it may be argued that the respondent was entitled to vindicate his good name, counsel for the appellant submitted that the respondent had already been vindicated by the decision of the District Judge and it was thus unnecessary for the trial judge to embark upon further consideration of these issues in the circumstances which were, in the submission of counsel, strictly *"inter partes"* and had no bearing upon the best interests of the children.

51. In answer to a question from the Court as to whether or not the trial judge had an obligation to consider these issues having regard to s.31 of the Guardianship of Infants Act 1964 (as inserted by s.63 of the Children and Family Relationships Act, 2015), counsel replied simply that the trial judge did not have to do so. He submitted that there was no suggestion at any time by any party that the allegations made by the appellant, insofar as they related to rape and sexual assault, had any implications for the welfare of the children. The appellant at no time made the case that the allegations impacted upon the capacity of the respondent to look after the children.

52. It will be recalled that s.31 of the Children and Family Relationships Act, 2015 sets out the factors that are to be taken into account by a court in considering the best interests of a child, and these include, at s.31(2)(h), the risk of harm to a child as a result of household violence, and the protection of the child's safety and psychological wellbeing, and the likely risk that a perpetrator of violence poses to the child (s.31(3)(d)). Section 31(7) defines "household violence" as including any behaviour by a parent or guardian or a household member causing or attempting to cause physical harm to a child or another child, parent or household member and includes sexual abuse or causing a child or a parent or other household member to fear for his or her safety or that of another household member.

53. Section 31(4) of the same Act provides that for the purposes of s.31, a parent's conduct may be considered to the extent that it is relevant to the child's welfare and interest only.

54. Insofar as allegations concerning the children are concerned, and specifically A, it is accepted by the appellant that the trial judge was required to consider the conduct alleged. However, it is submitted that the tenor of the decision of the trial judge, so far as costs are concerned, revolves around the elongation of the case by reason of the allegations of rape and sexual assault, and not so much the allegations concerning mistreatment of the children.

Submissions of respondent

55. The respondent submits that the trial judge was correct to conclude that it was the appellant brought the allegations into the proceedings. While it is correct that the respondent referred to the allegations in his affidavit grounding the special summons, and to a lesser extent, in his affidavit grounding the motion issued contemporaneously with the proceedings seeking, amongst other things, interim orders for custody and access to the children, the appellant, having received and read those pleadings, made application to the District Court for a protection order and a barring order in which she made allegations that the respondent had raped her, drugged her and was "coaching" the children. Furthermore, the appellant, in response to the respondent's motion swore her affidavit of 11th May 2018, where, at para. 20, she averred that the respondent had subjected her to "forced sexual intercourse" from September 2016 to March 2017. The appellant placed reliance on these allegations at the hearing of the application for a barring order on 23rd May 2018. Notwithstanding that the district judge rejected the application and was sceptical about the appellant's evidence, in her affidavit of 25th October 2018, being her substantive replying affidavit in these proceedings, the appellant repeated the allegations.

56. The respondent submits that if the appellant had wished to withdraw her allegations, having seen the affidavits of the respondent of 6th April 2018, she could have done so; instead she chose to "double down" on the allegations in order to persuade the District Court, in the first instance, that the respondent was a danger to the appellant and the children. Given the approach taken by the appellant, it is submitted that it was inevitable that the respondent would challenge the appellant to prove the truth of her allegations.

57. Moreover, it is submitted by the respondent that the position taken by the appellant at the outset of the trial – that she did not wish to rely on the serious allegations that she had made against the respondent – (although she was not prepared to withdraw the same either)

- was undermined by her evidence on the fourth day of the trial when she made further graphic allegations that the respondent had physically abused A.

58. For these reasons, the respondent submits that the only sensible analysis of the pleadings, evidence and progress of the trial is that it was the appellant who made awful and untrue allegations against the respondent, and it is for that reason that the allegations were in issue in the proceedings. Contrary to the assertions of the appellant in her grounds of appeal, the trial judge had credible evidence upon which to base his conclusion that it was the appellant, and not the respondent, who was responsible for introducing the allegations to the proceedings.

59. In answer to a question from the Court, counsel for the respondent confirmed that, in addition to ensuring that the allegations were rejected in the context of his application for custody and access, the respondent was concerned to secure a determination from the court below on the veracity of the allegations. It is submitted that the respondent was entitled to have his good name cleared in the course of the proceedings and it would be unjust for the respondent to be left in a situation where the allegations were not addressed in the interests of procedural efficiency.

60. The respondent's contention was that the allegations infected every aspect of the case, including the interlocutory hearings, correspondence and the section 47 process. The allegations, it is submitted, militated against any compromise so that every issue in the case had to be fought. The allegations were the backdrop to the entirety of the child welfare, custody and access issues. Accordingly, it is submitted that the approach of the appellant to measurement of the time spent upon the allegations by reference to the transcript in the High Court is far too narrow, and fails to take account of the impact the allegations had on the proceedings as a whole. The respondent further submits that it is manifest from the section 47 report that the allegations were brought to the attention of the authors of the report and

featured in their consideration of issues concerning the future care of the children. Accordingly, the trial judge was plainly correct to conclude that the allegations had to be determined in order for the court to reach conclusions concerning the welfare of the children.

61. The respondent agrees with the appellant that the statutory phrase "entirely successful" as appearing in s.169 of the 2015 Act does not sit easily within family law proceedings particularly where the matter is elevated beyond a simple *inter partes* dispute by issues concerning the welfare of children and by the imperative that the court is obliged to make "proper provision" and/or be satisfied that "proper provision" exists. However, the respondent submits that that does not inevitably lead to a conclusion that there should never be an award of costs in family law litigation. In this case, the appellant was responsible for introducing allegations of the most serious kind which the trial judge correctly concluded had to be dealt with, not least in the context of the consideration of the welfare of the children. It is submitted that the trial judge was entitled to conclude on the evidence that the case was made significantly more lengthy and more bitter than might otherwise have been the case, but for the allegations. The order made by the trial judge was one made within the margin of his discretion, having regard to the conclusions that he reached based upon credible evidence, and should not be disturbed by this Court on appeal.

Discussion and Conclusion

Standard of Review

62. Both parties drew the attention of the court to the judgment of this Court (Collins J.) in *TAO & Ors. v. Minister for Justice Equality and Law Reform & Ors.* [2021] IECA 293. In *TAO*, Collins J., following a review of the relevant authorities, identified (at para.30) the

following propositions applicable to a review by this Court of costs orders made by the High Court:

> "(*1) While costs orders are discretionary, this Court nonetheless has "full appellate jurisdiction in respect of such orders": Godsil v Ireland [2015] IESC 103, [2015] 4 IR 535, per McKechnie J (Dunne and Charleton JJ concurring) at para 65, citing In bonis Morelli; Vella v Morelli [1968] IR 11.*
>
> *(2) It follows that the Court "may substitute its own discretion in place of that of the trial judge": Mangan v Independent Newspapers [2003] 1 IR 442, per McCracken J (Geoghegan and Fennelly JJ concurring) at 447.*
>
> *(3) The jurisdiction "is not dependent on having to establish an error of law or otherwise on proving that in the exercise of such discretion the trial judge acted erroneously" (Godsil, at para 65)*
>
> *(4) At the same time, however, an appellate court "will, in general, be slow to interfere with the exercise of a trial judge's discretion in awarding costs": MD. v ND [2015] IESC 66, [2016] 2 I.R. 438, per McMenamin J (dissenting in the result), at para 46.*
>
> *(5) Furthermore, an appellate court "should not simply substitute its own assessment of what the appropriate order ought to have been but should afford an appropriate deference to the view of the trial judge who will have been much closer to the nuts and bolts of "the event" itself": Nash v DPP [2016] IESC 60; [2017] 3 I.R. 320, per Clarke J (as he then was) ((Denham CJ and O'Donnell, Dunne and Charleton JJ concurring), at para 67.*
>
> *(6) Absent some error of principle on the part of the trial judge, an appellate court should intervene only where it "feels that the exercise by the trial judge of an assessment in relation to costs has gone outside of the parameters of that margin of appreciation which the trial judge enjoys": Nash, at para 67. Where the costs order is*

"within the range of costs orders which were open to the trial judge within the margin of appreciation which must be afforded to a High Court judge", there will be no basis for appellate intervention: Nash, para 73."

P 63 To the above may be added the observation of Finlay- Geoghegan J., writing for this Court in *Sony Music Entertainment v UPC communications* [2017] IECA 96 where, at para.9, she stated (*inter alia*):

"While there is for the reasons stated more fully in [Collins] no a priori requirement that an appellant should establish an error in principle for this court to interfere, I nevertheless consider we should, in relation to costs orders, be very slow to interfere unless there are errors detectable in the approach of the High Court or, even without such errors, an appellant satisfies this court in a particular circumstances of the case that the interests of justice require that it should interfere in the High Court order for costs."

63. Arguably, the entitlement of the Court to intervene where it is satisfied that the interests of justice require it to do so affords the appellate court a somewhat broader discretion than intervening only where the court finds the trial judge to have gone outside the parameters of the margin of discretion enjoyed by the trial judge.

The Applicable Principles

64. With those principles regarding the role of the appellate court in mind, I turn now to address the law more generally in relation to costs. At the hearing of this appeal, the appellant placed some reliance upon the decision of Murray J. in *Higgins v. Irish Aviation Authority* [2020] IECA 277. In that case, Murray J., (at para.9) considered that the costs provisions of

the Act of 2015, viewed in the light of O.99, r.3(1) of the RSC, requires the court to address the following four questions:

> "*(a) Has either party to the proceedings been 'entirely successful' in the case as that phrase is used in s.169(1)?*
>
> *(b) If so, is there any reason why, having regard to the matters specified in s.169(1)(a) – (g), all of the costs should not be ordered in favour of that party?*
>
> *(c) If neither party has been 'entirely successful' have one or more parties been 'partially successful' within the meaning of s.168(2)?*
>
> *(d) If one or more parties have been 'partially successful' and having regard to the factors outlined in s.169(1)(a) – (g) should some of the costs be ordered in favour of the party or parties that were 'partially successful' and if so, what should those costs be?*"

65. While the trial judge conducted a detailed analysis of the general principles applicable to the issue of costs, he did not refer to *Higgins.* This is most likely because *Higgins* was not cited to the trial judge, that judgment having been handed down just weeks before these proceedings were heard in the court below. The trial judge concluded his review of the authorities on the general principles applicable to the issue of costs at para. 368 stating that:

> *"In short the position is that: -*
>
> *1. In the normal course, costs should follow the event;*
>
> *2. The starting position is that the party who wins the event should get their full costs;*
>
> *3. Departure from the foregoing should be considered by a court where the winning party added materially to the costs of the proceedings by raising additional grounds or arguments that the court considered to be "unmeritorious" by way of a view to be taken which is not narrowly measuring time, but looking at the proceedings in their entirety being materially increased."*

66. At paras. 352 – 369 of his judgment, the trial judge conducts an analysis of the general principles applicable to the issue of costs, and at paras. 370 – 381 he considered those principles in the context of family law proceedings. Neither party takes any issue with the analysis of the trial judge of these principles. On the contrary, there appears to be broad agreement between the parties that the analysis of the trial judge is, at the level of generality, correct. Indeed the written submissions of the appellant reproduce, almost in their entirety, paras. 370 – 381 of the judgment of the trial judge and the submissions go on to state that the appellant accepts, broadly speaking, the correctness of the applicable legal principles. Both the appellant and the respondent are agreed that the phrase "entirely successful" as used in s.169(1) of the Act of 2015 does not sit easily within family law proceedings, particularly where the proceedings involve issues concerning the welfare of the children (which cannot be said to be simply *inter partes* issues) and the statutory imperative that the court is obliged to make "such provision as the court considers proper" for the parties and the children of the marriage. These views are reflected in the judgment of the High Court at para. 370 where the trial judge stated as follows:

> *"370. Traditionally courts have approached costs in family law proceedings differently to the approach adopted in most other areas of law. There has been a view that costs ought not to be awarded ordinarily in family law proceedings and that view has prevailed for good reason. Apart from the relationship dynamic at play courts are frequently dealing with a struggle to see proper provision made where resources are limited. Courts need to be and have been mindful of the reality that any award of costs against a party may impact on and alter what the court has just earlier determined constitutes proper provision. So there is a balance to be struck in this regard, as an added dimension, when considering awarding costs against a party to family law proceedings. That is not to say that proper provision and costs are not separate and*

distinct considerations but rather that the decision on both do involve some overlap as far as the factors to be considered as concerned."

67. I agree with these observations of the trial judge, and indeed the submissions of each of the parties in this regard. This is not, of course, to say that that family law proceedings are in any way exempt from the costs provisions of the 2015 Act, which it goes without saying are of universal application to all categories of legal proceedings. Rather, as the trial judge suggested, the assessment of who has been "entirely successful" in matters such as proper provision and child custody and access will not generally be as clear as it is in other forms of litigation, although the making of detailed open offers by the parties may go a long way to assisting a court in forming a view as to the degrees of success enjoyed by the parties, and in appropriate cases, in formulating a costs order having due regard to the provisions of the 2015 Act.

68. It is, in my view, implicit from the judgment under appeal that the trial judge did not consider that either of the parties had been entirely successful, withing the meaning of s.169 of the 2015 Act, and neither of the parties has suggested otherwise . The appellant submits that it is implicit that the trial judge must have concluded that the respondent was partially successful, within the meaning of s.168(2)(d) of the Act of 2015. It will be recalled that the trial judge found that *"a central issue, if not the central issue throughout the hearing of this case over the 7 day period was the credibility of the allegations of rape and sexual assault made by the* [appellant]….". Somewhat surprisingly, given the submissions of the appellant that it was the respondent who introduced these matters and persisted with them at trial, there is no express appeal from this significant finding . Putting aside for one moment the argument of the appellant that it is illogical and contrary to reason to find, by implication, that the respondent had been partially successful in respect of a matter which was not advanced at trial by the appellant, the conclusion of the trial judge that these allegations were

untrue would certainly have justified a further conclusion that the respondent had been at least partially successful in the proceedings.

69. However, it is clear from the judgment that the trial judge did not consider the issue in these terms, and that the reason that the trial judge imposed the costs order he did upon the appellant was because he found that the making of allegations of rape and sexual assault amounted to gross misconduct on the part of the appellant (see para. 300 of the judgment). While the trial judge considered whether or not the misconduct should be factored into his orders for proper provision, he elected not to do so for the reasons explained in para. 302 of his judgment, and instead, at para. 302(e) stated that: *"The court must and will consider the behaviour of both parties when considering the issue of costs."*

70. When, later on in his judgment, he came to consider the issue of costs, the trial judge did so in a measured way, observing (as we have already seen) that there is a need to balance any costs order that might be made against orders already made for proper provision. I agree. In very many cases, the resources of the parties may not even stretch to what is required to make proper provision, and in such cases the court may not get as far as even considering the issue of costs.

71. However, that is not the situation in this case. At para. 371, the trial judge stated:

"*In this case the court is keenly aware of the need for this exercise* [being the need to strike a balance between orders for costs and proper provision] *and has measured its decision on costs in light of the lump sum award, the financial resources of the parties and all of the circumstances*."

72. It is clear from the judgment that the trial judge went to considerable trouble to do so. Having conducted a detailed analysis of the income, expenditure, assets and liabilities of the parties, he made a series of orders dealing with the various assets of the parties. He also

made orders requiring the parties to share equally all educational and medical care costs of the children. None of these orders have been appealed.

73. The figures taken into account by the trial judge included significant sums then due by each of the parties in respect of their costs of the proceedings, although these figures were very likely to be considerably less than the total costs incurred by the parties, and the trial judge could not have known the value of 60% of the respondent's costs. (Nor, I might add, does this Court). Nonetheless, following upon his detailed analysis of the financial position of the parties, the trial judge was clearly satisfied that the costs order that he made against the appellant would not impact in any degree upon the ability of the appellant to comply with the orders he made as to proper provision.

74. At paras. 372-38, the trial judge then continued to consider a number of authorities in which the reasonableness of the conduct of a party (specifically in the family law context) was considered. He referred to and quoted from the judgment of MacMenamin J. (in the Supreme Court) in *MD v. ND* [2015] IESC 66, [2016] 2 IR 438, including para. 43 thereof wherein MacMenamin J. stated:

> *"43. A trial judge is in a particularly strong position to determine whether a particular party has engaged in conduct which goes beyond the reasonable parameters in the conduct of litigation. In such circumstances, if there is unreasonable conduct, for example, by setting sights too high, or by non cooperation in disclosure, or by non compliance with court orders, a court will be entitled to address this in costs applications. These observations apply, a fortiori, in the last category, that is, misconduct by one party involving obstruction or failing to comply with court orders.*

75. At para. 375, the trial judge referred to and quoted from his own judgment in *B.R. v. P.T.* [2020] IEHC 205, to which he had appended a decision upon the issue of costs in those proceedings. At p.39 he stated:

"It is true that there is still a tendency to consider family law proceedings to be separate and apart from all other types of litigation insofar as costs are concerned. Of course, that must be the situation in the initial stages of family law proceedings where the parties are endeavouring, with the assistance of the court, to untangle themselves from a failed relationship. But there comes a point in time when the situation changes; it changes when the litigation becomes unreasonably protracted and bitter and in particular when that has arisen by reason of the conduct of one of the parties…"

76. In *B.R. v. P.T.*, the trial judge concluded that the unreasonable conduct of the appellant was such that it would have been contrary to the interests of justice and the public interest not to make an award of costs in favour of the respondent. The trial judge (in these proceedings) then continued with some further consideration of this issue i.e. the consequences of unreasonable conduct in family law litigation and at paras. 379-380 he held:

"379. *.....there is a necessity for issues to be properly presented and managed by the parties-and that wrong and false allegations of a serious nature be avoided-to effect savings in respect of time and costs. If this is not done the court must consider the making of a costs order against the litigant who has caused the litigation to become protracted and high conflict, if one is to blame more than the other.*

380. The policy considerations are just one consideration. Doing justice in the case will frequently require the awarding of costs to a party to litigation and this applies equally in family law cases."

77. I agree with these observations, and I do not understand either of the parties to demur from them. Long before the Act of 2015, it was always within the discretion of a trial judge to reflect the conduct of a party when making a costs order. So, for example, in *Dunne the Minister for the Environment* [2007] IESC 60, [2008] 2 IR 775, Murray C.J. held:

"The rule of law that costs normally follow the event, that the successful party to proceedings should not have to pay the costs of those proceedings which should be borne by the unsuccessful party has an obvious equitable basis. As a counterpoint to that general rule of law the court has a discretionary jurisdiction to vary or depart from that rule of law if, in the special circumstances of the case, the interests of justice require that it should be so. There is no predetermined category of cases which fall outside the full ambit of that jurisdiction…… Where the court considers that it should exercise a discretion to depart 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."

78. The statement of Murray C.J. in *Dunne* now finds statutory expression in s.169 of the Act of 2015. While in practical terms this section preserves the old rule that "costs follow the event" it also empowers the court not to award costs to a successful party having regard to conduct, including a range of factors specified in section 169(1)(a)-(g). These factors include conduct before and during the proceedings, whether it was reasonable for the party to raise, pursue or contest one or more issues in the proceedings and the manner in which the parties conduct is already part of their cases.

79. Of course we are not concerned here with a situation where a trial judge has declined to award costs to a successful litigant as a reflection of that litigant's conduct. Rather we are dealing with a decision to award costs against a party who the court has found engaged in gross misconduct. However, it can scarcely be doubted that if the court has - as it does -a jurisdiction not to award costs to a successful party by reason of conduct, or on grounds of misconduct, it must also have a jurisdiction to award costs against a party found to have engaged in gross misconduct.

80. Following upon his analysis of the legal principles, the trial judge, at para.382, arrived at his conclusion that this case was elongated because of the untrue allegations of rape and sexual assault advanced by the appellant against the respondent.

81. Significantly, while the appellant made complaint that it was only at the closing of the case the respondent described, for the first time, the conduct of the appellant in making the allegations as being gross and obvious, the appellant has not appealed from the finding of the trial judge that, in making the allegations, the appellant engaged in gross misconduct. Rather, the appellant's response to the findings of the trial judge is to say, firstly, that it was not she who brought these issues into these proceedings – on the contrary, she says, it was the respondent - and she (the appellant) made it clear that she did not wish to pursue these matters. And, secondly, the appellant takes issue with the conclusion of the trial judge that these matters engaged as much as 66% of the time at hearing in the court below.

82. Relatedly, the appellant also takes issue with the determination of the trial judge that the allegations had to be determined in the context of the assessment of the welfare of the children, even though the appellant made it clear that she did not wish to rely upon them. In her written submissions, the appellant argues that if this is correct, it would follow that even if the appellant had not averred to the allegations in her affidavit, the trial judge would still have been required to address the same. The appellant submits that this cannot be correct.

Who bears responsibility for the allegations?

83. It is necessary first to consider the argument that it was respondent and not the appellant who introduced the allegations into the litigation. In my judgment, there is an air of unreality to this argument. Both the appellant and her parents had made the allegations directly to the respondent, before he issued the proceedings. While the appellant sought to

characterise the respondent raising the allegations in the proceedings as "getting his retaliation in first", this is in my view both an unfair and inaccurate characterisation. It was perfectly reasonable for the respondent to anticipate that the appellant would raise these allegations in response to an application for custody and access, and this was borne out by subsequent events. At the point of issue of the proceedings, the appellant had not made the allegations in any formal setting, and it would have been relatively straightforward for her to step back from them. Instead, as counsel for the respondent put it, she "doubled down" on them , both in these proceedings and in advancing in the District Court applications for a protection order and a barring order. For all of these reasons, I consider the trial judge was correct to hold that the allegations were in these proceedings because the appellant "made them and repeated them to her parents-and repeated them during the dispute and on affidavit." (at para.315).

84. Having thus found, the trial judge further concluded that, notwithstanding that the appellant informed the Court she did not wish to rely upon them, the Court had to address the credibility of the allegations in the context of child welfare issues (see paras. 262, 292 and 315 of the judgment). This conclusion has not been appealed by the appellant, although in her submissions she argued that since she did not pursue the allegations at the trial, the trial judge erred in relying on his conclusions regarding the allegations so far as costs are concerned. In these circumstances, the appellant submits, the allegations are "*inter partes*", and have no bearing upon the welfare of the children.

85. Putting it at its mildest, I find this submission surprising. It hardly needs to be said that the allegations made by the appellant, that, amongst other things, she was raped and sexually assaulted by the respondent are allegations of the most serious kind. Moreover, she also made allegations, which were pursued at trial, that the respondent had physically mistreated the children, and A especially. The latter allegations were rejected by the trial judge at para.

299 of the judgment. Even if there were no statutory obligation to have regard to the alleged conduct when considering what is in the best interests of the children, in the context of applications for custody and access, it would to my mind be inconceivable that a court would not, in considering such applications, firstly, form a view as to the veracity of the allegations and, secondly, if satisfied that they were true, assess the risk posed by the respondent to the children in the light of the conduct so found. Having regard to the seriousness of the allegations, it could not seriously be suggested that the court could safely conclude that the respondent would pose no risk to the children simply because the conduct alleged was "*inter partes*".

86. But of course there is just such a statutory obligation, being that created by s.3 of the Act of 1964 (as inserted by s.45 of the Children and Family Relationships Act 2015), pursuant to which the Court has a clear statutory obligation in considering matters of guardianship, custody or upbringing of, or access to, a child to have regard to the best interest of the child as the paramount consideration. In considering the best interests of the child, the court is required under s.31 of the Act of 1964 to have regard to all the factors or circumstances that it regards as relevant to the child and his or her family, including those factors specified in s.31(2). I have summarised these factors at paragraph 52 above. In my view, it cannot be gainsaid that in considering the respective applications of the parties under section 11 of the Act of 1964, the court is bound by section 31 to consider the allegations made by the appellant in order to assess whether or not any of the children have suffered or are at risk of suffering harm as a result of household violence and also to assess the protection of the safety and psychological well-being of the children. In addition, if the court had found the allegations to be true, it would have had an express statutory obligation under section31(3)(d) of the Act of 1964 to consider, *inter Alia,* the capacity of the respondent to care properly for the children and the risk, or likely risk, that he posed to the children.

Accordingly, the submission of the appellant that the trial judge erred in assessing the credibility of the allegations must be rejected.

87. Having concluded that he was obliged to consider the credibility of the allegations, the trial judge then proceeded to hold that the allegations of rape and sexual assault were untrue. It is somewhat unclear if this conclusion is actually appealed. The only ground of appeal that addresses the truth of the allegations is ground no. 1 which states: "*The learned trial judge erred in fact and in law in determining that the respondent made untrue allegations of rape and sexual assault in the context of the applicant introducing these matters*." This appears to suggest not that the allegations are either true or untrue, but that the trial judge erred in addressing the truth of the allegations in circumstances where it was the respondent introduced the allegations to the proceedings, and not the appellant. If that is what this ground of appeal means, then it has already been rejected above.

88. If, on the other hand, the appellant also means or it is intended to mean that the trial judge was incorrect in holding that the allegations were untrue, no such argument was advanced in either of the written or oral submissions of the appellant and for this reason also I would reject this ground of appeal.

Did the allegation elongate the trial (by 66% or otherwise)?

89. This brings me to the second central ground of appeal which is whether or not the trial judge erred in holding that a consideration of the allegations elongated the proceedings, and in particular elongated them to the extent of adding at least 66% to the costs of the proceedings. It was not seriously contended by the appellant that the issues did not add at all to the costs of the proceedings and so the central question for the purposes of this ground of appeal is whether or not the conclusion of the trial judge in this regard, and his decision,

based upon that conclusion, to award the respondent 60% of the costs of the proceedings *"has gone outside of the parameters of that margin of appreciation which the trial judge enjoys"* (per Collins J. in *TAO,* citing *Nash v DPP*- see para.62 above).

90. The appellant submits that, at worst, the allegations added no more than 15% to the time taken up by the trial of the proceedings, and in any event there is no evidential basis for the conclusion of the trial judge that the allegations added at least 66% to the costs of the case.

91. The respondent did not seriously contest the 15% computation, but submits that it is a very narrow prism though which to evaluate the impact of the allegations upon the proceedings as a whole. In the submission of the respondent, the allegations impacted upon the proceedings from the very outset and inevitably protracted the proceedings at every stage. The respondent submits that every element of the proceedings, including interlocutory hearings, correspondence and the s.47 process was overshadowed and influenced by the allegations. The allegations, the respondent says, militated against any compromise, so that every issue in the case then had to be fought. They formed the backdrop to the entirety of the child welfare/custody/access issues, none of which could be compromised because of the premise adopted by the appellant that the children were not safe to be with their father. The open offer of the appellant not to pursue the allegations at the trial (but at the same time not to withdraw them) came only on the first day of the trial, by which time the litigation had lasted approximately two and a half years and included numerous interlocutory motions and hearings. (By my calculations there were at least eight interlocutory motions, in which costs were reserved in at least two, but possibly also a third, that being the order of MacGrath J. of 31st July 2018, which has not yet been perfected and was not available to the Court).

92. The respondent further submits that the decision of the trial judge as regards costs was one tempered by justice and is not unprecedented. It is submitted that it is not unusual for

the courts to make orders of this kind without an empirical analysis of the time spent upon a particular issue. However, in this regard the appellant relies upon *O'Connell v BATU*, discussed briefly at para. 47 above, in which case Power J. found that a reduction of an award of costs in the High Court by 50% was disproportionate and increased the costs awarded to the successful party to 85%. On the other hand the appellant very fairly also drew to the attention of the Court the decision of O'Donovan J. in *C O'R v M.O'R* (unreported, High Court, 19th September 2000) in which case O'Donovan J. reduced an award of costs to the applicant to reflect the fact that the hearing before him had been prolonged unnecessarily by issues raised by the applicant. The hearing had lasted nine days, and he awarded the applicant just six days costs to reflect the extra time taken up on those issues. The judgment does not suggest any actual analysis or breakdown of the time spent at hearing on the issues which the trial judge in that case considered to be irrelevant.

93. While I acknowledge that there is merit in the submissions of the appellant that the time spent at the trial in considering the allegations made by the appellant is unlikely to have been as much as 66% (or, for that matter 60%) of the time at hearing, there is also considerable merit in the submissions of the respondent that the matter needs to be considered from a broader perspective than just the time which the transcript reveals this matter consumed at the hearing. There can be little doubt but that allegations of this kind ramp up the tensions between the parties and militate against agreement or other progress in the proceedings. Inevitably, this leads to the unnecessary protraction of the proceedings, and in a way which it would be difficult to measure empirically, not least when considered from the broad perspective urged by the respondent.

94. In *TAO* the appellants in that case had been awarded one eighth of their costs of the proceedings in the High Court, on the basis, *inter alia*, that the trial judge considered that they had been only partially successful and the trial judge was critical of their conduct in the

proceedings. Collins J., speaking for this Court, dismissed the appeal, holding as follows at paras. 51 – 52:

> *"51. The Appellants have not demonstrated any error of law or principle on the part of the judge. That does not, of course, exhaust this Court's inquiry. The Court is entitled to intervene even in the absence of such an error (Godsil). But it should do so only where the judge's assessment "has gone outside of the parameters of that margin of appreciation which the trial judge enjoys"(Nash). The fact that it was open to the trial judge to have made a different costs order is not, in itself, a sufficient basis for intervention. Neither is it sufficient that this Court might have made a different order if it had been in the position of the trial judge: this Court "should not simply substitute its own assessment of what the appropriate order ought to have been"(Nash).*
>
> *52. Affording an appropriate deference to the view of the judge – who was "much closer to the nuts and bolts of 'the event' itself" (Nash) – I do not consider it can properly be said that her assessment was outside the reasonable range of assessment or that the order made by her fell outside the range of orders which it was reasonably open to her to make. That being so, for this Court to interfere with the judge's order would involve the illegitimate substitution of its assessment for that of the judge."*

95. The reference to the "nuts and bolts of "the event" itself" finds an echo in the judgment of Clarke C.J. in *University College Cork v Electricity Supply Board* [2021] IESC 47, where he said, at para.3.4 ;

> " …. *It is important, therefore, to give significant weight to any assessment of the relevant factors by the trial judge who will, after all, be intimately familiar with the twists and turns of the proceedings and the effect that any argument or evidence may or may not have had on the ultimate outcome*."

96. So, too, it is in this case. The trial judge, having presided over a seven day trial (plus a further day for submissions), as well as two substantial interlocutory applications, was far better positioned than this Court to form a view of the impact the allegations had upon the proceedings as a whole, and in particular the extent to which the proceedings were "elongated" by reasons of the allegations.

97. In a further comment having a resonance in these proceedings, Clarke C.J. in *University College Cork v Electricity Supply Board* said , at para. 3.3. :

> "*Allowing an excessively granular approach to the detail of costs is likely to lead to less rather than greater justice, for it will only add to the overall costs burden on parties generally. Permitting such arguments to be made can only increase the already substantial burden on parties to significant litigation*."

98. Previously, in *Connelly v An Bord Pleanála* [2018] IESC 36, in the context of arguments advanced on the basis of the principles that he had enunciated in *Veolia Water U.K. Plc v Fingal County Council* (no.2)[2007] 2.I.R. 81, Clarke C.J. had stated, at paras. 8 and 9 as follows:

> "8. *.....it will rarely be appropriate to attempt either a very precise calculation of the extent to which costs may have been increased or, indeed, an overly meticulous approach to identifying the precise issues are variations on issues, which were canvassed. To take that approach would be counter-productive and it would turn every costs application into a major further hearing resulting in even more costs. In that context it is worth noting that the hearing this morning took over an hour.*
>
> *9. Rather a broad brush approach should be adopted to identify whether, and if so to what general extent, it can be said that it is clear that significant areas of the case, adding materially to the cost, were run and lost*."

99. This is not to suggest that the court should not, in appropriate cases, make reasonable attempts to measure the time taken up by discrete issues in the course of proceedings, with a view to fashioning the fairest and most appropriate costs orders. Courts can and do undertake such exercises from time to time, and I do not understand Clarke C.J. to say that such an approach is not permissible, but rather that the exercise is not an exact one and, where undertaking such an exercise, the court should be careful to ensure that the time spent upon it should be proportional to the task at hand.

100. While the trial judge did not attempt a forensic analysis of the time taken up by the allegations at the trial, or, for that matter, their impact upon the proceedings up to commencement of the trial, nonetheless he gave an adequate explanation for his decision. In so doing, the trial judge avoided "an excessively granular" approach of the kind alluded to by Clarke C.J. and instead took a broad brush approach. He said that if the allegations had not been made, the case would have been considerably more straightforward, and he went so far as to say that if the allegations had not been made, the case might not have troubled the Court at all. Obviously this last remark is entirely speculative, but it paints a very clear picture of the impact the allegations had on the proceedings in the eyes of the trial judge, who was "*intimately familiar with the twists and turns of the proceedings*"

101. The appellant has not demonstrated any error of law on the part of the trial judge, and I am satisfied that his decision to award the respondent 60% of the costs of the proceedings was one made within "*the parameters of that margin of appreciation which the trial judge enjoys*", and that the interests of justice do not require any intervention by this Court.

Was the appellant denied the opportunity to address the issue?

102. The appellant also contends that she was not afforded the opportunity to address the approach taken by the trial judge in his assessment that the allegations had increased by 66% the costs of the proceedings. It is apparent from the transcript of the last day of the trial that

the trial judge made it plain to the parties that costs would be a significant feature of the judgment, because he did not think that this is a case in which the issue of costs could readily be separated from his other conclusions. He made it clear that he was considering this issue in the light of the written submissions of the parties and their respective positions regarding the conduct of the other party. He therefore invited the parties to make whatever oral submissions they may wish to make over and above their written submissions which he had already received and considered. The written submissions of the parties in the High Court were not made available to this Court,

103. Counsel for the respondent submitted that the conduct of the appellant had been obvious and gross and invited the court to so conclude and reflect that conclusion in the orders that the court would make us to proper provision. Alternatively, counsel submitted that the court could reflect its conclusions its order as to costs, and in that event, counsel submitted that, in the circumstances of this case, the court should not attempt to identify how long the various issues in the case had each engaged the court, because the allegations had infected every part of the proceedings and it would be very difficult to separate out the issues from each other and estimate the time each engaged the court.

104. Unfortunately, counsel for the appellant did not take the opportunity when making his oral submissions to address the court on the issue of costs, and most likely this is because he had already made his submissions on costs in his written submissions to the court. However, this Court has no way of knowing just what was submitted, in their written submissions, on behalf of either party, not having been provided with copies of the submissions to the court below. Nonetheless counsel for the appellant did have an opportunity to make submissions to the court as to how, in his submission, the court might best address the issue of costs. While he could not have known the exact approach the court would ultimately take, he did have the opportunity to make the point to the court that relatively little time at hearing was

taken up dealing specifically with the allegations made by the appellant, even if he could not have been expected to have undertaken an analysis of the transcript such as was done for the purposes of this appeal. Indeed, it might be said that the submissions made on behalf of the respondent that the court should not endeavour to estimate the time spent on different issues invited just such a submission on behalf of the appellant in reply. In any case, in my view it cannot be said that there was any procedural deficiency in the manner in which the court arrived at its conclusion on costs, and so this ground of appeal must also be rejected.

Conclusions – a Summary

105. The trial judge was correct to conclude that the allegations made by the appellant were in the proceedings because she made them. He was also correct to conclude that he had to adjudicate upon their veracity in order to address issues concerning the welfare of the children. He was entitled to conclude that the proceedings were elongated unnecessarily as a result of the allegations, and, having found that the appellant made the allegations that she did knowing them to be untrue, for ulterior purposes, that she had engaged in conduct that was gross and obvious. Having arrived at those conclusions, the trial judge was entitled to reflect them in a costs order, both because of his conclusion that the conduct of the appellant in making the allegation was gross and obvious and because the respondent was partially successful in an element of the proceedings, as provided for in s.1682(d) of the 2015 Act. The conclusion of the trial judge that the allegations had increased the costs of the proceedings by 66% related to the entirety of the proceedings and not just the time spent at trial. It was a conclusion within "*the parameters of that margin of appreciation which the trial judge enjoys"* and is not one with which this court should interfere. For all of these reasons and for the other reasons earlier set out in the main body of this judgment, I would dismiss this appeal.

106. Since the respondent has been successful in resisting this appeal, my preliminary view is that he is entitled to an order requiring the appellant to pay him the costs incurred by him in doing so. If the appellant wishes to contend for a different order, then she may, within 14 days from the date of delivery of this decision, deliver written submissions not exceeding 1,000 words within 14 days of the date of this judgment and the respondent will likewise have 14 days to respond.

107. Since this judgment is being delivered electronically, I am authorised by Whelan J. and Faherty J. to confirm their agreement with it.