



THE COURT OF APPEAL

Record No.: 2022/275

Neutral Citation Number: [2024] IECA 146

Donnelly J.

Ní Raifeartaigh J.

Binchy J.

**IN THE MATTER OF REGULATION 1215/2012 AND ORDER 42A OF THE RULES
OF THE SUPERIOR COURTS AND S.I. NO. 9/2016**

BETWEEN/

MICHAEL SCULLY

APPELLANT

-and-

COUCAL Ltd.

RESPONDENT

RULING of the Court (Costs) dated this 17th day of June, 2024

1. In a judgment dated 30 April 2024, this Court (Donnelly J; Ní Raifeartaigh and Binchy JJ conc.) allowed the appeal of Mr Scully against the judgment and order of the High Court which had rejected Mr Scully's application to the Court to refuse to recognise a judgment which had been handed down in Poland. Mr Scully raised two points under the public policy ground provided for in Regulation (EU) 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial matters

(recast) (“Brussels I (Recast)” or “the Regulation”) as to why the judgment against him ought not to be recognised. The first was that the judgment was issued by a Court in Poland that was improperly constituted contrary to the principle of judicial independence (“the rule of law issue”) and the second point concerned the issue of whether the transfer of individual causes of action to the respondent company (“Coucal”) was the transfer of a bare cause of action and was impermissible in Irish law because of the prohibition on maintenance and champerty (“the assignment issue”). This Court upheld Mr. Scully’s appeal on the second ground and in light of that finding, the Court did not deal with the first ground.

2. The judgment was delivered electronically and at the end of the judgment, the Court gave an indication that “[a]s the appellant has been entirely successful in this appeal, it would appear the appellant is entitled to the costs of the appeal”. Coucal accepts that, in circumstances where the hearing before this Court took a day with a further one-hour hearing on the assignment issue only, Mr Scully is entitled to all his costs in relation to the appeal on a party-and-party basis, to be adjudicated in default of agreement. Coucal indicates that it accepts this position notwithstanding that a considerable amount of the Court of Appeal hearing was taken up with submissions on the rule of law issue. Coucal maintains that different considerations apply to the hearing in the High Court but Mr Scully maintains that as he has been entirely successful in the proceedings he is entitled to an award of costs under s. 169(1) of the Legal Services Regulation Act 2015 (“the 2015 Act”), Order 99 of the RSC and the principles set out in *Chubb European Group SE v Health Insurance Authority* [2020] IECA 183. Mr Scully submits that there is no reason why he should not be awarded his full costs. It was reasonable to raise both grounds.

3. Coucal submits that the High Court hearing took a day and a half and that if Mr Scully had confined his arguments to the single ground of the assignment issue it would have comfortably finished within a day. Coucal also submits that not only did the rule of law issue lengthen the hearing, but it necessitated the adducing of expert evidence which also increased costs. Coucal relied on *Veolia Water UK Plc & Ors v Fingal County Council* [2007] 2 IR 81 regarding apportionment of costs where additional issues were raised upon which it did not succeed. Ordinarily such costs should be disallowed. They also refer to s. 168 of the 2015 Act which provides that an order for costs may include an order to pay “a portion of another party’s costs” and/or “where a party is partially successful in the proceedings, costs relating to the successful element or elements of the proceedings.” They also raise the issue of s. 169(1)(b) of whether it was reasonable for Mr Scully “to raise, pursue or contest one or more issues in the proceedings”. Coucal submits that it was wrong for Mr Scully to advance the rule of law point and that each side should bear its own costs of the High Court, or in the alternative, that the costs order for the High Court ought to be restricted to an order for half his costs.

Decision on High Court Costs

4. Mr Scully succeeded in overturning the High Court decision based upon that ground of appeal directed towards the assignment issue. In the course of her judgment, Donnelly J. noted the considerable argument before the Court on the rule of law issue and the extensive exchange of affidavits before the High Court. Mr Scully had asked for a preliminary reference to the Court of Justice of the European Union. Donnelly J. said in respect of the rule of law ground: “In light of the specific request of the appellant for the preliminary reference, and in light of the finding that the Court cannot enforce this judgment on the ground of public policy, I consider that it is neither necessary nor

appropriate that this Court would engage with this second ground related to the issue of public policy. A reference to the CJEU ought not to be made where the case can be disposed of on other grounds. Similarly, it is not appropriate to give the Courts views on this particular ground in circumstances where that is not necessary.” It should also be noted that Donnelly J. at para 14 noted that the Polish Supreme Court had made a reference to the CJEU in which one of the questions concerned raised the precise issue raised in this appeal.

5. This Court considers that it cannot be said in those circumstances that the defendant was “unsuccessful” in raising the rule of law issue before this Court. Coucal have submitted that it was wrong of Mr Scully to advance the rule of law proceedings and that the High Court so found and that that aspect of the High Court decision remains undisturbed. We do not agree that it can be said that a party was “wrong” to raise a ground merely because a court has found against them. More specifically, we do not accept that it can be said that a party’s conduct of litigation was unreasonable by the mere fact alone that they raised a point which the court held against them but that the appellate court did not find it necessary, for specific reason, to address in its decision.
6. We do not find it necessary in this case to make a final decision on whether Mr Scully can be said to have been “entirely successful” in his appeal because, applying *Chubb*, the general discretion of the Court in connection with the ordering of costs is preserved (s. 168(1)(a) and Order 99, r 2(1) RSC) but that in considering any awarding of costs, the Court should have regard to the provisions of s. 169(1) as set out in O 99, r 3(1). As *Chubb* sets out, even where a party has not been “entirely successful” the court should still have regard to the matters referred to in s. 169(1)(a)-(g) when deciding whether to award costs.

7. We also note that although Mr. Scully was the moving party in this application before the High Court, the motion was brought in circumstances where Coucal had taken steps to progress the enforcement of its judgment by obtaining a relevant order from the Polish Court of Appeal. If he were to be successful, Coucal would not be entitled to enforce their judgment in this jurisdiction. Mr Scully cannot be said to have acted “unreasonably” or “wrongly” in raising the rule of law issue before the High Court in circumstances where this Court, for the reasons set out, felt it was not necessary to give a final determination on that issue. Although that point may have added some time and witness expense to the proceedings in the High Court the raising of the rule of law issue was reasonable in the circumstances. Furthermore, as the Court of Appeal (Donnelly J; Faherty and Ní Raifeartaigh JJ conc.) said in *Word Perfect Translation Services Ltd v Minister for Public Expenditure and Reform* [2023] IECA 189: “...the focus of the trial judge on costs ought to be the big picture rather than a nitpicking of every single item or minute spent by each party in the course of the litigation”. The big picture here is that Mr Scully made two discrete public policy arguments as to why the judgment against him in Poland ought not to be enforced in this jurisdiction. He was successful on one point and the Court did not consider it necessary to deal with the other point for the specific reasons outlined. In all these circumstances, we are satisfied that Mr Scully is entitled to his full costs in the High Court.

Stay

8. Coucal sought, and Mr Scully does not object to, a stay pending an application for leave to appeal to the Supreme Court. This Court will make the Order set out below in that regard.

A Moorview Costs Order?

9. In the course of its submissions on costs, Mr Scully submitted that the proceedings involved highly unusual circumstances whereby he successfully brought a motion for non-recognition of a judgment obtained against him on the basis of assignments of causes of action that savoured of champerty. He submitted that, in the interests of justice, it may be necessary and appropriate for the Court to exercise its jurisdiction to make a *Moorview* costs order (see *Moorview Development Ltd. v First Active plc* [2011] 3 IR 615) against the individual assignors, notwithstanding that Coucal was the respondent to the proceedings brought by Mr Scully in the High Court. Mr Scully submitted that, given the procedural complexity, especially in light of the 63 separate assignors and in light of Coucal's intention to seek leave to appeal to the Supreme Court, the most efficient use of court and party resources would be a) for this Court to proceed to make the costs order against Coucal in favour of Mr Scully, staying pending the Supreme Court's determination or case management as appropriate and b) Mr Scully to defer an application to join the individual assignors to the proceedings (in accordance with the jurisdiction described in *Moorview*) until the stay is vacated. It is said that this would enable the finality of the costs award to be clear before he brings a complex and burdensome *Moorview* application. It would also facilitate engagement with Coucal on costs such that the *Moorview* application may not be necessary.

10. This Court has before it an application for a costs order and an application for a stay. In his submissions, Mr Scully asks the Court to proceed to make the costs order and "the Appellant to defer any application to join the individual assignors to the proceedings (in accordance with the *Moorview* jurisdiction) until the above noted stay is vacated". As there is no specific application in respect of a *Moorview* application, this Court will proceed to make the order on costs. We agree however that the most expeditious and fair way to proceed is to make the costs order as suggested without

prejudice to any application that Mr Scully may make. Any matters that may arise in any *Moorview* application, including the appropriate venue for such an application, will be for the Court to decide in that application.

Conclusion

11. The Court makes the following orders:

- a) That a costs order in favour of the appellant against the respondent be made in respect of the costs of the appellant's appeal to this Court, costs to be adjudicated upon in default of agreement.
- b) That a costs order in favour of the appellant against the respondent be made in respect of the appellant's costs of his motion before the High Court, costs to be adjudicated upon in default of agreement.
- c) That the costs order be stayed for a period of 21 days from the date of perfection of the Order of the Court of Appeal and if an application for leave to appeal is lodged in the Supreme Court within the said 21 days, the said stay shall continue until a) a determination is made refusing leave to appeal or b) a determination is made granting leave to appeal until the said appeal is finalised or until such further or other Order of the Supreme Court is made in respect of the said stay.