

THE HIGH COURT

[2018 No. 944 JR]

BETWEEN

B (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND X)

APPLICANT

- AND -

THE BOARD OF MANAGEMENT OF ST Q'S COLLEGE

RESPONDENT

[2018 No. 940 JR]

BETWEEN

C (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND X)

APPLICANT

- AND -

THE BOARD OF MANAGEMENT OF ST Q'S COLLEGE

RESPONDENT

JUDGMENT of Mr Justice Max Barrett delivered on 26th May 2020

A. Introduction

1. The court previously granted injunctive relief in both of these matters, issuing a single reserved judgment (see [2018] IEHC 664). Its decision was appealed by the Board to the Court of Appeal (see [2019] IECA 229): that appeal was favourable to B who was awarded his costs by this Court and also his costs on appeal; C's case went a little differently: the appeal was dismissed with a limited qualification of this Court's judgment and he was granted 2/3 of the costs of defending his appeal. What is being sought by B in the within application is the costs of the leave application, the costs of the judicial review proceedings and the costs of this costs application. What is being sought by C in the within application is the costs of the leave application and this costs application. For the avoidance of doubt, the court uses 'B' to refer to the applicant in 2018 No. 944 JR and 'C' to refer to the applicant in 2018 No. 940 JR.

B. Some Aspects of the Boys' Cases

- i. Overview.*
 2. Counsel for B went into some detail about B's case. Counsel for C went into less detail. The underlying facts of both cases are in any event well-known to the court and treated with by it in its previous judgment, so either approach was fine. The salient points of fact that counsel wanted to mention about their respective client's cases are set out below.
- ii. Some Aspects of B's Case.*
 3. On appeal, it was found that B had not caused serious reputational damage to the College, that the video was not circulated, that the headmaster did not recommend the expulsion of B at the Board of Management hearing as he believed that there were mitigating factors, and that the actions of his parents were significant mitigating factors. Also relevant are the lengths to which B's parents went to ensure that the within proceedings did *not* issue. In this last regard, the court has been referred to an initial solicitor's letter of 22 October 2018 which sets out the facts as perceived by B and his parents and indicating an intention to invoke the appeals process (about which more detail is sought), with mention also being made of the prospect of going to court. Even

so, there was no rush to court. Thus, in a letter of 25 October, there is mention of making application to the court on 30 October, though again in the penultimate paragraph, re-admission of the applicant to school is sought. A letter issued from the solicitors for the Board of Management on 26 October 2018 and met with a response from the solicitors for B on 30 October 2018, asking for the school to respond in detail and indicating disappointment that the school, in his view, has disengaged from the process entirely. Notably, at this point, B was not only not in school, but he was not getting the special education assistance that he required, a point specifically adverted to in the letter. Even after this, the matter did not go to court; instead B wrote a letter on 2 November asking for the meeting scheduled for 7 November to be brought forward to 5 November. In passing, the court notes that the facilitator at this point recommended that B be allowed to return to school. A letter from the Board's solicitors on 2 November essentially indicated that the process was continuing, and that B would not be allowed to return to school. A final letter issued from B's solicitors on 8 November 2018. So, every effort was made by B and his solicitor to avoid coming to court. What is clear from this correspondence is that even though the first letter from B's solicitor said that judicial review would be sought, in fact it very quickly became 'Please return B to school pending the prosecution of an appeal under the appeals process'.

4. Following the decision to appeal the decision of this Court, there was a fundamental change of circumstances, *viz.* the s.29 appeal brought by B was successful. At that stage, B's position was that the within proceedings were now moot, so far as he was concerned. This court had made an order returning B to school, the s.29 appeal had been successful, and it was submitted to the Court of Appeal that there was no need to continue with the appeal. Despite this, the defendant proceeded with its appeal to the Court of Appeal. The reasonableness of the approach taken by B can be seen, for example, in an open letter from B's solicitor on 28 February 2019, in which it is clear that (consistent with the correspondence to that point), everything conceivable was being done to avoid court proceedings and the continuation of court proceedings. This letter was opened to the Court of Appeal and argument made that the case was moot; however, the appellants contended at that time that the proceedings were not moot. Liberty was given by the Court of Appeal to make application that the proceedings were moot; however, that application was not brought as B did not want to increase costs still further.
5. The point made by B in the within application is that he could not exit from the process at any stage. As his counsel put it in court, he had to 'come the whole journey', and that is why he came looking for his costs even in the judicial review proceedings after electing to divert into the s.29 process.

iii. Some Aspects of C's Case.

6. C did not succeed in the s.29 appeal. Judicial review proceedings then issued and that case then settled, with the previous s.29 decision being quashed on consent. There was a second appeals hearing and C failed in that hearing as well. What if any step may come next in terms of challenging that more recent decision is unknown to the court. Also, in the Court of Appeal there was what counsel for C referred to as a "*slight tweaking*" of this

Court's judgment, but the Court of Appeal left the Order issued by this Court wholly undisturbed; this would suggest that the Court of Appeal was satisfied that the High Court proceedings were entirely justified, and that there was no necessity to 'punish' the applicant.

C. Some Legal Principles Applicable

7. The court has been referred to the decisions of the Supreme Court in *Godsil v. Ireland* [2015] 4 IR 535 and *Cunningham v. President of the Circuit Court* [2012] 3 IR 222. It considers such points as were made in respect of these two cases but ultimately, as will be seen later below, it respectfully adopts a simpler, yet still correct, way of approaching matters that was urged upon it by counsel for the Board. The arguments concerning the just-mentioned cases were advanced by counsel for C; however, the court has proceeded in this regard on the basis that these arguments were also respectfully adopted by counsel for B. The judgment of McKechnie J. in *Godsil* suggests the following matters to be of relevance:
 1. *Litigation Conduct.*
 8. In both cases, correspondence issued before the proceedings came to court, in which permission was sought to remain in school pending the appeal, and the response to both was prompt, if negative responses. So, there were two opportunities given to resolve matters. Hence, in this regard there was nothing untoward on the part of either applicant. Different considerations would arise if no warning letters were written, but in each case they were written, and that they are relevant to the issue of costs now presenting shows just how important litigation conduct is, coming ultimately to be, to use a colloquialism, a matter of 'pounds, shillings and pence'.
 2. *Mootness.*
 9. In relation to mootness, the general principles are set out in *Cunningham v. President of the Circuit Court* [2012] 3 IR 222, as referred to in *Godsil*. The general rule in *Cunningham* is that if one party brings about mootness by way of unilateral decision, that party is 'punished' in relation to costs; however, it cannot be said that either side in the within proceedings took any such unilateral action. The other scenario is that if some other event has concerned which is outside the control of all sides, no order as to costs would be made. However, McKechnie J. acknowledges that there will be cases which do not fit comfortably into this division, and this is one such case.
 3. *Whether or Not There Was an Event.*
 10. There is discussion in *Godsil* about what constitutes an event, McKechnie J., at p. 554, quoting from the judgment of Bingham MR in *Roache v. News Group Newspapers Ltd.* [1998] EMLR 161, where Bingham MR, at p. 166, equated the event with "who is really the winner and who is really the loser or, as it is sometimes put, to identify the event which costs are to follow". McKechnie J., at p. 554, identifies that several Irish cases had, to that time, adopted a like approach. In the within proceedings, it seems to the court, both children won their respective cases – yes, there was the tweaking of this Court's judgment in C's case but this Court's order was left undisturbed, and the court cannot see

that it is wrong to describe both boys (they are probably adults now) as having essentially won in the High Court and the Court of Appeal. The event in both cases, it seems to the court, is very clearly the injunction, which injunction, in both cases, was sought in the pleadings. In passing, the court notes that it is often the case in injunction proceedings that the person who succeeds, because of the passage of time, will be the ultimate 'winner' in the case. Here, there is a perhaps slightly unusual feature to the within case in that not only did this Court give an injunction but, following a hard-fought appeal before the Court of Appeal, this Court's order was deemed to be justified. Indeed, Birmingham P., in the Court of Appeal made the quite striking observation, at para.17, that there was a strong arguable case that the decision to expel the boys in their Leaving Cert year was "irrational", an observation that one suspects will have a considerable bearing in Board of Management and court decisions in this area in the years to come.

D. Conclusion

11. As indicated in court on the day of the costs hearing, the court considers that C should be granted the costs of the leave application and the costs application. It was B's application that the court wanted to think over. The court likewise considers that B should be granted the costs of the leave application; counsel for the Board indicated that he wished to see how the court was going to rule before making further argument as to the costs of the costs application, so that point will have to be left open for now – hopefully, the parties can resolve it between themselves; if not, then it will have to, and the parties are welcome to, come to this Court for brief argument on the point.
12. In proceeding as just indicated, the court does so, with respect, not on the basis of the eminent decisions in *Godsil* or *Cunningham*, but on the simpler basis, urged upon it by counsel for the Board, that having obtained leave, it was on the back of that leave application that B and C made their successful injunction applications. This simpler approach has merit because the injunctive relief could not have been sought separate from any underlying proceedings, so the costs just have to flow in favour of the applicants insofar as the leave applications (which grounded the injunction applications) are concerned.