APPROVED **[2024] IEHC 424**

THE HIGH COURT

Record No.: 2022/5253 P

Between:

ENOCH BURKE

Plaintiff

And

MEDIAHUIS IRELAND LIMITED, MEDIAHUIS IRELAND GROUP LIMITED, MEDIAHUIS SUNDAY NEWSPAPERS LIMITED, ALAN ENGLISH and ALI BRACKEN

Defendants

RULING of Mr Justice Rory Mulcahy delivered on 16 July 2024

Introduction

1. On 13 June 2024, I delivered a written judgment ("the judgment") in these proceedings, dismissing the plaintiff's claim that he had been defamed in an article published by the defendants in October 2022 ("**the Article**"). In that judgment, I indicated the provisional view that in circumstances where the defendants had been entirely successful in their defence of the claim, they were entitled to an award of costs in their favour, to be adjudicated in default of agreement. I afforded the plaintiff an opportunity to deliver written submissions should he wish to contend for a different form of order.

2. The plaintiff delivered written submissions on 22 June 2024 in which he argued that it would be "*an affront to justice*" to impose a costs order and contended that the court should

make no order as to costs. In responding submissions from the defendants, dated 1 July 2024, they argued that the appropriate order was that indicated in the judgment.

The plaintiff's arguments

3. The plaintiff's submissions reference section 169(1) of the Legal Services Regulation Act 2015, as amended ("**the 2015 Act**") which provides as follows:

> *(1) A party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings, unless the court orders otherwise, having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties, including—*
>
> *(a) conduct before and during the proceedings,*
>
> *(b) whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings,*
>
> *(c) the manner in which the parties conducted all or any part of their cases,*
>
> *(d) whether a successful party exaggerated his or her claim,*
>
> *(e) whether a party made a payment into court and the date of that payment,*
>
> *(f) whether a party made an offer to settle the matter the subject of the proceedings, and if so, the date, terms and circumstances of that offer, and*
>
> *(g) where the parties were invited by the court to settle the claim (whether by mediation or otherwise) and the court considers that one or more than one of the parties was or were unreasonable in refusing to engage in the settlement discussions or in mediation.*

4. In other words, where one party is entirely successful in proceedings, the default position is that it is entitled to its costs. The court may depart from that default position

having regard to the matters identified in s. 169(1). Where the court does depart from that default position, it must give reasons for so doing (see s. 169(2)).

5. The plaintiff argues that having regard to (1) the particular nature and circumstances of this case, and (2) the conduct of the proceedings by the defendants, the court should depart from the default rule and make no order as to costs. In addition, he makes arguments that no order as to costs should be made by reference to criticisms he has of the judgment.

6. The particular nature and circumstances of the case to which he refers include the following matters: the wide circulation of the Article which, he says, the court found to be "*without foundation*"; the fact that the defendants' witnesses had not accepted that the plaintiff had not been annoying other prisoners despite his unchallenged evidence in this regard; an earlier article published by the defendants, dated 11 September 2022, the headline of which was criticised in the judgment; the failure by the fifth defendant to check the story in the Article with the plaintiff or his family prior to publication, which the court found was a mistake on her part; the delay in publishing an apology and correction; and the court's conclusion that the defence of fair and reasonable publication would not have been open to the defendants.

7. He refers to the court's observation during the course of the hearing that it was striking that the newspaper's position was that it didn't matter whether the story was true or not, its position remaining unchanged once it found out that the allegations in the story were untrue.

8. He noted that the defendants gained financially from the story and that serious issues of fact and law were raised in the proceedings. He argues that the interests of justice require that the court make no order as to costs.

9. In respect of the conduct of the proceedings, he argues that the defendants' maintenance of the truth of the central allegation in the proceedings considerably prolonged the proceedings, which would have been considerably shorter had this central allegation been conceded at the outset. Failure to acknowledge that he had not been annoying other prisoners and that he had a good relationship with them are described as serious omissions in the apology and correction which, he says, were in no way adequate.

10. The maintenance of the plea of qualified privilege until it was expressly abandoned on the last day of the hearing was said to have led to a wastage of court resources. He repeats his complaint about the reliance on the defence of fair and reasonable publication which he argues was "*unreasonable and unsustainable*" having regard to the recent decision of the Court of Appeal (O'Moore J) in *Bird v Iconic Newspapers Limited* [2024] IECA 62.

11. He also relies on the fact that on the third day of the hearing, counsel for the defendant flagged that he would be making a submission that recklessness is not a feature of the law of defamation, a proposition which was subsequently withdrawn. The plaintiff contrasts this "*extremely serious matter*" with his own conduct of the proceedings which he says was "*at all times with a view to dealing with the case efficiently and expeditiously*", noting that he had served a notice of discontinuance against two of the defendants in early course, and withdrew a number of claims in his General Indorsement of Claim, having accepted the defendants' position in respect of those claims.

12. Insofar as the plaintiff makes criticisms of the judgment, I address those below.

The defendants' response

13. The defendants contend that the plaintiff has not identified any basis for departing from the "*normal rule*" that costs follow the event.

14. As general propositions, they accept that the proceedings raised significant points of fact and law, but contend that no "*new or novel*" issues were raised to an extent which could justify a departure from the normal rule. Moreover, they dispute the plaintiff's assertion that they have not "*won the event in the overall sense of the phrase*". They reference the decision of the Court of Appeal (Donnelly J) in *Word Perfect Translation Services Limited v Minister for Public Expenditure and Reform* [2023] IECA 189 in which she observed (at para 50) that "*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.*"

15. They dispute that any of the matters upon which the plaintiff relies under the heading "*the particular nature and circumstances*" of the case warrant a departure from the normal

rule, contending that many of the issues raised by the plaintiff involve him seeking to re-argue his case.

16. As for the conduct of the proceedings, the defendants argue that the plaintiff's conduct in these proceedings, in particular in seeking to challenge the judgment, as well as in other unrelated proceedings, should disentitle him from relying on the defendants' conduct to argue that there should no order as to costs.

17. In any event, it points out that the apology demanded from the plaintiff – through his parents – required the newspaper to acknowledge that it had defamed the plaintiff, on which issue they have been vindicated. They contend that they withdrew the defence of qualified privilege following the decision in *Bird v Iconic* which was delivered a short time before the trial began. They object to the manner in which the plaintiff has criticised their counsel.

Assessment

18. Both parties correctly identify section 169(1) as the starting point for the court's consideration of the appropriate order as to costs. The first issue to consider, therefore, is whether the defendants have been "entirely successful" in the proceedings within the meaning of section 169(1). In the judgment, I expressed the provisional view that they had been entirely successful and I remain of that view. The proceedings were the plaintiff's claim for damages for defamation pursuant to the Defamation Act 2009, as amended. The defendants have succeeded in having the claim dismissed in its entirety. Although they did not win every argument, they have, self-evidently, been entirely successful in the proceedings – a defendant cannot achieve more when defending proceedings than having them dismissed on the merits – and therefore the starting point is that they are entitled to their costs absent reasons to depart from that default position.

19. None of the matters relied on by the plaintiff are sufficient to warrant departure from the normal rule.

20. It is correct, of course, that the article was untrue, but that could never be sufficient to justify a departure from the normal rule in defamation proceedings, where the claim is rejected on the basis that the statements at issue, even though untrue, were not defamatory,

at least not where the defendants have never pleaded or relied on the truth of the impugned statements. As stated in the judgment, it is unfortunate that the defendants caused an untrue or inaccurate article to be published but that doesn't entitle the plaintiff to a remedy, nor does it entitle the plaintiff to avoid the normal consequences in costs having failed to obtain a remedy. In respect of the earlier article, the plaintiff and his family elected to take no action in relation to that article, and I concluded in the judgment that it didn't evidence malice on the part of the defendants, despite the unwarranted headline. It is, therefore, of no relevance to the question of costs in these proceedings.

21. It is not the case that the defendants maintained "*the truth of the central allegation*" in the Article throughout the proceedings. At no point did the defendants plead the truth of any of the relevant seven paragraphs of the Article. It is true that the witnesses called on behalf of the defendants' witnesses did not accept, when questioned by the plaintiff, that he had not been annoying other prisoners, which seemed to be inconsistent with their pleaded case, but the case was not defended on the basis that that was so. In any event, in circumstances where I ultimately concluded that such an allegation was not defamatory even if untrue, the position taken by the defendants' witnesses does not justify a departure from the default rule. Had I determined that the Article was defamatory, there might have been consequences in damages, and accordingly costs, but that does not arise.

22. The plaintiff emphasises the court's reference during the hearing to the "*striking*" fact that the position adopted by the defendants was unaffected by learning that the Article was not true. This was not, as the plaintiff appears to infer, a suggestion that the defendants published the article reckless as to whether it was true or not, as a full reading of the judgment shows (see para 124 of the judgment). Rather, it was a reference to the position adopted in their earliest correspondence, before the errors in the Article were confirmed, that the Article could not be regarded as defamatory. They were ultimately vindicated in that view. And, of course, the defendants did subsequently publish a correction and apology.

23. Nor do the defendants' failure to check accuracy of story with the plaintiff's family, or their delay in issuing an apology and correction, mean that the plaintiff should not bear the costs of pursuing a claim thereafter which has entirely failed.

24. Of greater potential relevance to the question of costs was the defendants' reliance on the defences of qualified privilege and fair and reasonable publication. The abandonment of

the defence of qualified privilege was made very late in day; it had not been flagged at all prior to the last day of the hearing. Although the decision in *Bird v Iconic Newspapers Ltd* was published after the defendants delivered their amended defence, the defendants maintained the plea in their written submissions delivered several weeks later and did not indicate that it was not being pursued at the outset of the hearing. However, the matters raised relevant to the question of qualified privilege overlap, to a very significant extent, with those relevant to the defence of fair and reasonable publication. The inclusion of the plea in relation to qualified privilege did not add to the costs of proceedings in which the defence of fair and reasonable publication was also being advanced. The question remains whether the raising of both those defences, unsuccessfully, by the defendants, is a basis for depriving them of a costs order to which they are otherwise entitled, or some portion of those costs.

25. In *Fox v Minister for Justice and Equality* [2021] IESC , the Supreme Court observed as follows (at para. 25):

> "*In that context it should be noted that s.169 of the 2015 Act does invite the Court to consider the conduct of the proceedings by the parties. The Court would consider that such a phrase gives statutory recognition to, amongst other things, the principles which have been identified in* Veolia Water UK plc v. Fingal County Council (No 1) *[2006] IEHC 137, [2007] 1 IR 690, [2007] 2 IR 81, and subsequent case law. However, the position of a party who has ultimately succeeded is, in the Court's view, different in that regard to a party which has failed. The successful party is prima facie entitled to their costs and the jurisprudence which has developed since* Veolia Water *has established that the default position, where costs follow the event, should only be departed from where it is "clear" that the conduct of the proceedings by the successful party has materially increased the costs of the unsuccessful party. A party who has lost is prima facie obliged to pay costs and must establish a basis, within the statutory framework of s.169 of the 2015 Act, and the jurisprudence of the courts, to justify a departure from the general rule.*"

26. Is it clear that the conduct of the proceedings by the defendants materially increased the plaintiff's costs? In my view, no. The lion's share of the hearing was taken up with the evidence of the four witnesses who gave evidence. No doubt some evidence was led on both

sides relevant to the statutory defences, and there was some cross-examination relevant to the issues raised by those defences. However, having reviewed the transcripts for the purpose of this ruling, it is not possible to identify any discrete portion of the hearing relevant only to those issues, at least none which could clearly be said to have materially affected the length and therefore the costs of the proceedings.

27. As for his complaints about counsel for the defendants, this is hugely overstated. A legal proposition was briefly flagged by counsel and immediately challenged by the plaintiff. I indicated that, as it related to a legal submission and the evidence was still being heard, I would deal with the dispute after the evidence finished. At the outset of his legal submissions, counsel very properly accepted that he had misspoken and apologised. By contrast, the plaintiff's response to this innocent error was to disrupt the hearing of his own case, and make demands of the court despite repeatedly being told to move on, to the point where it was necessary for the proceedings to be briefly paused. He continues, inappropriately, to agitate the issue in submissions. This could not conceivably be a basis to deprive the defendants of a costs order to which they are otherwise entitled.

28. In all the circumstances, the plaintiff has not identified anything which would justify a departure from the default position that the defendants, having been entirely successful in their defence of the proceedings, are entitled to an award of costs.

Errors in judgment

29. I address separately the criticisms the plaintiff makes of the judgment, since those complaints are not relevant to the question of costs. It is very clear that a complaint about a judgment, or an attempt to re-argue issues already determined, could never be a basis for a court departing from the default position in relation to costs. As noted by the Court of Appeal (Noonan J) in *Mongans and Ors v Clare County Council* [2020] IECA 317, in response to a similar contention:

> "*This proposition, amounting as it does to an impermissible challenge to the judgment of this court, is advanced in support of the contention that there should be no order as to the costs of the appeal and cross-appeal or an adjusted costs order granting some*

percentage benefit to the respondents. It seems to me that such a submission is to be deprecated for the reasons I have identified."

30. For completeness, however, I will briefly address the issues the plaintiff raises. First, the plaintiff complains that the conclusion in the judgment that the words in the Article were not capable of bearing a defamatory meaning was inconsistent with the statement earlier in the judgment that it was only in a clear case that a court could reach such a conclusion. The plaintiff overlooks the fact that the comments earlier in the judgment were part of a discussion about the role of the court *in a preliminary hearing* pursuant to section 14 of the Defamation Act 2009, not its role following a hearing of all the evidence in a case.

31. He complains, moreover, that the judgment failed to address his argument that the use of the words that the plaintiff was "*just being himself*" meant that it was the plaintiff's normal pattern of life to severely annoy others by the expression of his religious beliefs. He takes particular umbrage at the court's conclusion on this issue in circumstances where, as he correctly notes, I had indicated during the hearing that the words "*just being himself*" did closely relate to his plea regarding his "*normal pattern of life*".

32. The plaintiff is mistaken, however, in his view that this was not addressed in the judgment. At paragraph 144 of the judgment, I expressly concluded that words in the Article did suggest that he has a tendency to share his religious views. The words "*just being himself and being outspoken on his religious views and beliefs*" are the only words used in the Article which carry such a meaning. As explained in the judgment, it is difficult to see how that could be regarded as being capable of being defamatory. More importantly, as set out at paragraph 150 to 152 of the judgment, I concluded that when read in context, the suggestion that the plaintiff had a tendency to express his religious views, or that it was his normal pattern of life to do so, did not carry the meaning that it was his normal pattern of life to severely annoy others by the expression of those views.

33. The plaintiff also expresses himself "*gravely concerned*" with the conclusion in the judgment that the alleged defamatory statement is not inconsistent with the plaintiff's actual reputation, describing himself as a "*well-regarded and conscientious teacher with an excellent record of service in the teaching profession and further afield*". The plaintiff may disagree with the court's conclusion as to his actual reputation at the time that the Article

was published, but his disagreement on that issue could never be a basis for departing from the usual rule.

34. In the circumstances, I will make an order that the plaintiff pay the defendants' costs, including reserved costs and the costs of the written submissions on this issue, to be adjudicated in default of agreement.