

THE COURT OF APPEAL

Neutral Citation Number [2020] IECA 274
Appeal Number: 2019/247

Kennedy J.
Faherty J.
Ní Raifeartaigh J.

BETWEEN/

**THE MINISTER FOR COMMUNICATIONS, ENERGY AND NATURAL
RESOURCES AND MICHAEL O’CONNELL**

PETITIONERS/RESPONDENTS

- AND -

MICHAEL WYMES

RESPONDENT/APPELLANT

Ruling of Ms Justice Faherty dated the 6th day of October 2020

1. Judgment in this matter was delivered by the Court on 7 July 2020 (“the principal judgment”). The appeal was dismissed on all grounds. At para. 123 of the principal judgment, I indicated a provisional view that costs should be awarded to the successful party in the appeal and that the Court would so order fourteen days from the date of judgment unless either party applied within that time to request that the Court should otherwise order. If applying, the appellant was to first notify the office in writing of his intention to object to the indicative costs proposal within the fourteen-day period and should file short written submissions within one week of his so notifying the Court. The respondents then had a further week to file their submissions.
2. The appellant duly filed submissions, as did the respondents.

3. The appellant submits that there should be no costs award in favour of the respondents pursuant to the judgment delivered on 7 July 2020. He submits that this should be so having regard to the unique and extraordinary circumstances, individual and in the round, described in his written submission furnished in advance of the appeal hearing. In particular, in advocating no order as to costs, the appellant relies on the following factors as set out in his appeal submissions dated 30 September 2019:

- The respondents' failure to consent to a late filing of an appeal from the judgment of the High Court (Meenan J.) delivered on 20 March 2018 and Order made on 23 March 2018 adjudicating the appellant a bankrupt. It is submitted that the refusal to consent to a late appeal was against a backdrop where the appellant had made numerous requests to the Examiner's office seeking an attested copy of the Adjudication Order made on 23rd March 2018.
- The respondents' participation in the bankruptcy proceedings as a surrogate/front for others.
- A "clutter of prevarication, obfuscation and incorrect averments" as to whether any or any enforceable Adjudication Order was made against Mr. Wood.
- The appellant's status as a lay litigant, his health problems and his wish to have the bankruptcy record expunged.
- Alleged actions and/or omissions on the part of Mr. Wood which resulted in the appellant having to be self-represented in the bankruptcy proceedings.
- The alleged participation by Mr. Wood and others in "a grotesque fraud" to defeat the appellant's rights as a secured creditor in respect of certain lands in Cork.
- Alleged actions by the respondents, Mr. Wood and others in concert to the appellant's detriment and towards securing Mr. Wood's lands "at a collusive, grossest of undervalues".

- Alleged accommodation between Mr. Wood and the respondents to the detriment of the appellant.
- Alleged actions on the part of named individuals such that proceedings in which the appellant was involved, and which might have been compromised, were thwarted.

4. By way of alternative to a no costs order, the appellant asks for a stay on any costs awarded in favour of the respondents in the event that he receives leave to appeal the decision of this Court to the Supreme Court. In this regard, the appellant attached to his costs submissions a draft Application for Leave to Appeal to the Supreme Court.

5. The respondents submit that costs should get their costs in the normal way with respect to the dismissal of the appellant's application to show cause pursuant to, *inter alia*, s. 16 of the Bankruptcy Act 1988. They submit that there are no unique or extraordinary circumstances such that might warrant no order as to costs. They contend that the most extraordinary aspect of the matter has been the appellant's willingness to relitigate matters which have already been determined against him. It is further submitted that no unique circumstances were found to preclude the costs order made against the appellant in 1997. There has been no payment on foot of that 1997 costs order, which has resulted in the respondents being put to very significant additional cost as the petitioning creditor in trying to recover the costs of the *Bula Ltd. (In Receivership) v. Tara Mines Ltd.* proceedings. The appellant has contested every step of his bankruptcy and has not succeeded. This has caused additional cost to the creditors in the bankruptcy including the respondents as the petitioning creditors.

6. It is further submitted that there is no basis, nor any necessity, for a stay to be put on the costs order pending the determination of the appellant's application for leave to appeal to the Supreme Court. This is in circumstances where the appellant has been adjudicated a

bankrupt. The respondents seek their costs as the costs of the petitioning creditor out of the bankruptcy estate in the normal way and in the manner of the High Court costs order made in 1997. Accordingly, any costs order will come out of the bankruptcy estate on distribution.

Discussion

7. The new regime relating to costs is set out in the Legal Services Regulation Act, 2015 (“the 2015 Act”) and in particular sections 168 and 169 thereof. Those provisions, together with the relevant provisions of O. 99 of the Rules of the Superior Courts as they stand since 3 December 2019 govern the law relating to costs. The new regime applying post 3 December 2019 was considered by Murray J. in *Chubb European Group SE v The Health Insurance Authority* [2020] IECA 183. At para. 19, Murray J. set out the principles to be applied by the Court in determining costs issues post December 2019.

“(a) The general discretion of the Court in connection with the ordering of costs is preserved (s.168(1)(a) and O.99, r.2(1)).

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

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

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

(e) Further, the matters to which the court shall have regard in deciding whether to so order otherwise include the conduct of the parties before and during the proceedings, and whether it was reasonable for a party to raise, pursue or contest one or more issues (s. 169(1)(a) and (b)).

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

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

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

8. Section 169(1) provides that where the party seeking costs has been “entirely successful” in the proceedings, such party “is entitled to an award of costs unless the court orders otherwise.” In determining whether to order otherwise, the court should have regard to the “nature and circumstances of the case” and “the conduct of the proceedings by the parties”. This includes conduct both before and during the proceedings and whether it was reasonable for a party to raise, pursue and contest one or more issues.

9. The principle that costs should follow the event was confirmed by In *Veolia Water UK Plc. v Fingal County Council (No. 2)* [2006] IEHC 240, [2007] 2 I.R. 81, Clarke J. (as he then was) described the entitlement to costs in the following terms:

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

10. While the appellant cites a list of factors which he says should persuade the Court to make no order as to costs, in reality the arguments advanced are an attempt to re-litigate

matters aired in the High Court and before this Court which, insofar as material to the Court's decision, have been conclusively determined against the appellant.

11. The respondents have been entirely successful in the appeal. All issues considered by the Court to be material have been determined against the appellant. Therefore, as they were entirely successful, the respondents are entitled to their costs. Having regard to s.169(a) and (b) of the 2015 Act, I perceive no basis upon which the Court should decide otherwise.

12. Nor do I find merit in the appellant's submission that this Court should stay any costs award in favour of the respondents. The onus clearly rests on the party seeking such a stay to satisfy the Court that it is in the interests of justice to do so. I accept that stays are frequently granted pending appeal. However, I am not persuaded that it would be in the interests of justice to put a stay on costs, having regard to the protracted history of this case. Furthermore, any costs order will ultimately come out of the appellant's bankruptcy estate on distribution. As such they are not recoverable in the immediate future. Accordingly, in the event that the appellant succeeds in his leave application the Supreme Court, which no doubt will be determined prior to any distribution from the bankruptcy estate, that Court will be able to deal with any application in respect of costs which the appellant may advance.

13. For all of the foregoing reasons, the respondents are entitled to their costs with no stay thereon.

14. Kennedy J. and Ní Raifeartaigh J. have indicated their agreement to the proposed costs order.