



**THE COURT OF APPEAL
CIVIL**

UNAPPROVED

No Redaction Needed

[2020] IECA 310

[2018 No. 37]

**The President.
Edwards J.
McCarthy J.**

BETWEEN

THOMAS FOX

APPLICANT

AND

**THE MINISTER FOR JUSTICE AND LAW REFORM,
THE ATTORNEY GENERAL AND IRELAND**

RESPONDENTS

RULING of the Court on Costs delivered on the 16th day of November 2020 by

Birmingham P

1. This Court delivered judgments on 22nd May 2020, dismissing the applicant's appeal.
2. Submissions in relation to costs were received from the successful respondents on 14th August 2020. In recent days, submissions have been received by the Court of Appeal Office from the unsuccessful applicant. Those submissions are dated 19th June 2020, but no submissions from June 2020 have been found.
3. In the High Court, where the applicant was also unsuccessful, it was argued on behalf of the successful respondents that it was a case where there should be no order for costs.

However, having regard to the particular nature of the proceedings and the issues raised, the High Court judge awarded the unsuccessful applicant 50% of his costs.

4. The plaintiff appealed and the defendant cross-appealed the award of costs in favour of the plaintiff. The respondents now argue that they have fully succeeded before this Court and that there should be an order for costs of the appeal in their favour. So far as the High Court is concerned, the respondents ask that the order in favour of the applicant as to 50% of costs should be varied, to the extent that there should be no order for costs in the High Court.

5. The unsuccessful applicant takes a very different view and says that he should have the costs of the appeal awarded in his favour. He does so on the basis of a contention that it is a case where costs should follow the event and, in the alternative, that this is an exceptional case which involved novel and important points of law which would justify a departure from the normal rules.

6. At first blush, the contention that costs should follow the event from the unsuccessful applicant might seem very surprising. However, the applicant says that what is needed is to determine what is the ‘event’. The applicant argues that the event should be identified as the publication of the Programme for Government on 15th June 2020, which happened, of course, after the matter was heard in this Court and after judgment was delivered. The Programme for Government, as quoted in the submissions on costs, includes a commitment to ensuring access by an independent, international judicial figure to all original documents relating to the Dublin and Monaghan bombings, as well as the Dublin bombings of 1972 and 1971; the bombing of Kay’s Tavern; and the murder of Seamus Ludlow – in accordance with the all-party Dáil motions on these matters. In putting forward this contention, the applicant relies on the case of *Godsil v. Ireland* [2015] 4 IR 535, a case about the entitlement of an undischarged bankrupt to contest elections. The respondents point out that the timeframe in *Godsil* was very different. In that case, as appears from the judgment of McKechnie J., the warning letter

before action issued on 14th March 2014; the proceedings issued on 20th March 2014; the matter was listed on 31st March 2014 for hearing on 24th July 2014. A Bill was presented to the Oireachtas on 7th April 2014 and signed into law as the Electoral (Amendment) Act 2014 on 16th April 2014. The case was then struck out on 30th April 2014. For my part, I do not believe that the *Godsil* decision provides any assistance to the applicant. Neither do I believe that the reference to the Programme for Government offers any assistance. It is said that the Programme for Government commitment can only be explained, or can be explained substantially by reason of these proceedings. I do not believe that assertion stands scrutiny. These proceedings related to one particular incident; the murder of Seamus Ludlow. The Programme for Government deals with several different historical events which, to a greater or lesser extent, have been the subject of public disquiet and political controversy for many years. Far from the commitment in the Programme for Government providing a justification for the present proceedings, in my view, it shows that this was an issue that should always have been pursued in the political arena rather than in the courts.

7. In my view, the respondents' contention that they have wholly succeeded on this appeal is entirely correct and it seems to me that must result in an order for costs in favour of the successful respondents in this Court. That is so whether one has regard to s. 169 of the Legal Services Regulation Act 2015, or to O. 99 of the Rules of the Superior Courts or a combination of both. It also seems to me that a necessary consequence of having brought an unsuccessful appeal to this Court is that the applicant loses the benefit of the order for part-costs that he had received in the High Court.

8. Therefore, on the cross-appeal, I would set aside the order for 50% costs in favour of the applicant which had been made in the High Court, and instead, provide that there should be no order for costs in the High Court. As the events of the COVID-19 pandemic required this judgment to be delivered electronically, the views of my colleagues are set out below.

Edwards J:

I agree.

McCarthy J:

I also agree.