UNAPPROVED
THE COURT OF APPEAL

Neutral Citation Number [2021] IECA 215
Appeal Number: 2018/229

Donnelly J
Faherty J.
Binchy J.

BETWEEN/

F.M.

APPLICANT/APPELLANT

- AND -

THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL

RESPONDENT

- AND –

Appeal Number: 2018/245

BETWEEN/

S.O.U.

APPLICANT/APPELLANT

-AND-

THE MINISTER FOR JUSTICE AND LAW REFORM

RESPONDENT

Ruling of Ms. Justice Faherty dated the 27th day of July 2021

1. This Court delivered its judgment ("the principal judgment") on 12 April 2021, dismissing the appellants' appeals from a judgment and Orders of Humphreys J. dated 17 April 2018. At para. 121 of the principal judgment the Court stated:

> "The appellants have not succeeded in these appeals. Accordingly, it follows that the Minister should be entitled to her costs. If, however, either party wishes to seek some different costs order to that proposed they should so indicate to the Court of Appeal Office within twenty one days of the receipt of the electronic delivery of this judgment, and a costs hearing will be scheduled. If no indication is received within the twenty-one-day period, the order of the Court, including the proposed costs order, will be drawn and perfected."

2. On 30 April 2021, the appellants delivered brief written submissions, accepting that they have lost their appeals but requesting the Court to consider setting aside the order for costs made in the Minister's favour in the High Court and making no order for costs in the High Court and on appeal. They advance their request on the basis that what was at issue in the appeals was a point of statutory interpretation of some importance. While they accept that there were High Court authorities against the argument they sought to advance both in the High Court and on appeal, they assert that there was no applicable appellate judgment on the point until this Court delivered the principal judgment.

3. The Minister delivered her submissions on costs on 10 May 2021. She refutes the appellants' contention that a point of statutory interpretation of importance was at issue and asserts that the same legal issues as raised in the appeals had been raised in several previous cases in the High Court and had already been clearly determined in favour of the Minister's position. She submits that there is no reason why the default rule regarding costs

should not apply and, on this basis, costs should follow the event. It is submitted that the taxpayer should not have to bear the burden of what the Minister contends was unnecessary and unsuccessful litigation.

4. Accordingly, the Minister's position is that the proposal set out at para. 121 of the principal judgment should apply, namely that the costs of the appeals should be granted against the appellants in each case, to include reserved costs to be adjudicated in default of agreement. It is also submitted that the High Court award of costs to the Minister should stand in each case.

Discussion

5. The rule in Order 99, r.1(4) of the Rules of the Superior Courts ("RSC") that *"[t]he costs of every issue of fact or law raised upon a claim or counterclaim shall, unless otherwise ordered, follow the event*" is now reflected in ss.168 and 169 of the Legal Services Regulation Act 2015 ("the 2015 Act"). A list of factors by reference to which the Court may depart from the normal rule is set out in s.169(1). Section 169(1) provides as follows:

> "169(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-
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> (a) conduct before and during the proceedings,
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> (b) whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings,
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> (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."

Section 169(2) provides that "[w]here the court orders that a party who is entirely successful in civil proceedings is not entitled to an award of costs against a party who is not successful in those proceedings, it shall give reasons for that order."

6. The new statutory regime, together with the relevant provisions of O.99 RSC as they stand since 3 December 2019, now provide the backdrop against which decisions in respect of costs are to be made. The new regime was considered in *Chubb European Group SE v. The Health Insurance Authority* [2020] IECA 183. Murray J. provided guidance in relation to the categories of cases in which a party may be deemed *"entirely successful"* in proceedings. There is no doubt but that the Minister meets that threshold in relation to the within appeals.

7. To my mind, none of the factors contemplated in s.169(1) is engaged in this case such that the Court should contemplate departing from the default procedure. Indeed, the appellants do not assert that there is anything in the Minister's conduct of the proceedings either in the High Court or before this Court to deprive her of a costs order.

8. Rather, as is clear from their brief submissions, the appellants look to what they characterise as the clarification given by this Court on a point of statutory interpretation of importance as a basis for the no costs order they seek in respect of the appeals, and in aid

of their submission that this Court should set aside of the High Court costs Orders against them.

9. I am not persuaded, however, by the appellants' argument. In circumstances where there were numerous decisions of the High Court against the position they sought to advance in the appeals with respect to how Regulation 4(5) of the European Communities (Eligibility for Protection) Regulations 2006 should be interpreted, and where no part of the appellants' argument in this regard (including their reliance on the *M.M.* jurisprudence of the CJEU -see Case C-277/11 2013 1 WLR 1259 and Case C-560/14 1 WLR- and the decision of the Supreme Court in *M.M. v. Minister for Justice* [2018] IESC 10) prevailed, and where none of their other grounds of appeal prevailed, the fact that the statutory interpretation point had not been specifically addressed at appellate level previously, of itself, is not enough for this Court to depart from the default procedure set out in the 2015 Act. The proceedings were not in any way exceptional such as might lead the Court to consider making no order as to costs in the appeal. In *Veolia Water UK Plc. v Fingal County Council (No. 2)* [2006] IEHC 240, [2007] 2 I.R. 81, the entitlement that costs should follow the event was described by Clarke J. (as he then was) 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. Accordingly, as the Minister was entirely successful in the appeals, as reflected in the principal judgment, and there being no reason why the Court should depart from the normal rule, whether under s.169 of the 2015 Act or the previous O.99 RSC, and where the appellants have not established that justice demands any contrary approach, the Court will

affirm the Orders of the High Court and award the Minister her costs of the appeals to be adjudicated in default of an agreement.

11. As this ruling is being delivered electronically, Donnelly J. and Binchy J. have indicated their agreement therewith.