

**THE HIGH COURT
JUDICIAL REVIEW**

[2020 271 JR]

BETWEEN

GEMMA O'DOHERTY AND JOHN WATERS

APPLICANTS

AND

THE MINISTER FOR HEALTH, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

DÁIL ÉIREANN, SEANAD ÉIREANN AND AN CEANN COMHAIRLE

NOTICE PARTIES

JUDGMENT of Mr. Justice Meenan delivered on the 4th day of June, 2020

Introduction

1. On 13 May 2020, I delivered my judgment on the applicants' application seeking leave to challenge the constitutionality of certain legislation and regulations enacted to combat the spread of Covid-19 and to address the serious economic and social consequences that have arisen. The applicants also sought leave to challenge the manner and procedures followed by the notice parties (the Oireachtas) in enacting the said legislation. For the reasons stated in my judgment, I refused the application for leave.
2. The issue that I now have to determine is whether the respondents and the Oireachtas are entitled to their costs of successfully resisting the application.

Judicial review proceedings

3. The applicants moved their application *ex parte* before Sanfey J. on 15 April 2020. Pursuant to the provisions of O. 84, r. 24 (1) of the RSC, Sanfey J. directed, given the importance of the issues involved, that the application be made on notice. As part of the claim concerned the Legislature, the Oireachtas was put on notice.
4. The matter next came before Murphy J. on 21 April 2020. The purpose of the hearing was to set out a timetable to ensure as early a hearing as possible. Murphy J. suggested that the applicants might, themselves, wish to deliver their own legal submissions. 5 May 2020 was the date fixed for the hearing and the matter was adjourned for mention to 28 April 2020.
5. On 28 April 2020, the matter came before me. Both the respondents and the Oireachtas indicated that they would be filing affidavits and delivering submissions. It was indicated that these would be circulated by the end of that week. As the following Monday was a bank holiday, I suggested to the applicants, firstly, that they might put in their own legal submissions and, secondly, that they might require a few days to consider the affidavits and submissions from the respondents and the Oireachtas. This would entail a short adjournment of the hearing to 6 or 7 May 2020.
6. The applicants did not deliver any submissions and declined a short adjournment for the purposes of considering the affidavits and submissions of the respondents and the Oireachtas because of what they considered to be the "urgency" of the situation. The

applicants did file a further affidavit on 5 May 2020 but, other than dealing with the issue of legal standing, it was essentially a repeat of their original Statement of Grounds.

Submissions of the respondents and the Oireachtas

7. Both Mr. Patrick McCann SC, on behalf of the respondents, and Mr. Francis Kieran BL, on behalf of the Oireachtas, submitted that their respective clients were entitled to the costs of opposing the application under the rule that "*costs follow the event*". This rule is now provided for in s. 169 of the Legal Services Regulation Act, 2015 (the Act of 2015): -

"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-

- (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..."

8. Both counsel accepted that there are exceptions to this rule. The Court was referred to the following passage from the judgment of Murray C.J. in *Dunne v. Minister for the Environment* [2008] 2 I.R. 755: -

"Where a court considers that it should exercise a discretion to depart from the normal rule as to costs, it is not completely at large but must do so on a reasoned basis indicating the factors which, in the circumstances of the case, warrant such a departure. It would neither be possible nor desirable to attempt to list or define what all those factors are. It is invariably a combination of factors which is involved. An issue such as this is decided on a case by case basis and decided cases indicate the nature of the factors which may be relevant but it is the factors or combination of factors in the context of the individual case which determine the issue."

9. It was submitted that there were no factors in this case that made it exceptional, and Mr. McCann maintained that the applicants were not entitled to invoke the "*public interest*" as a reason for bringing these proceedings. For his part, Mr. Kieran relied, in particular, on the finding of the Court that the case which the applicants sought to make against the Oireachtas was unstateable.

Submissions of the applicants

10. The applicants resisted orders for costs on a number of grounds: -

- (i) The applicants maintained that they ought to have been allowed to proceed on an *ex parte* basis and that by putting both the respondents and the Oireachtas on notice, they were presented with a legal hurdle which they ought not to have been;
- (ii) The applicants were of the view that it was unnecessary for the Oireachtas to be separately represented;

- (iii) In particular, the applicants emphasised the “*public interest*” aspect of their application. This was clear from the nature of the broad ranging restrictions which the impugned legislation imposed on persons;
- (iv) The applicants maintained that they were entitled to a “*Protective Costs Order*”; and
- (v) The applicants relied on an English Court of Appeal decision, *R (on the application of Mount Cook Land Ltd) v. Westminster City Council* [2003] EWCA Civ 1346, which concerned the jurisdiction and/or discretion of a court in granting costs on an application for leave.

Consideration of submissions

11. When the application was first made before Sanfey J. on 15 April 2020, the Court directed, in accordance with O. 84, r. 24 (1) of the RSC, that the application be made on notice. The applicants took exception to this. In the course of my judgment, I considered the issue as to whether the fact that the application was no longer *ex parte* but on notice raised the threshold for leave to be granted. I expressed the view that the applicants did not face a higher threshold but that they did have to deal with the submissions made by the respondents and the Oireachtas, which they otherwise would not have had to do. I find it hard to understand the basis for the applicants’ complaints. It seems reasonable to me that parties against whom serious issues are being raised are given an early opportunity to put their side of the case to the Court. This is what is provided for in O. 84, r. 24 (1) of the RSC.
12. The applicants also protested at the involvement of the Oireachtas, disputing the need for separate representation. Enshrined in the Constitution is the separation of powers, in this case: the Executive and the Legislature. The applicants were making a case against both. The separation of powers requires that both the Executive and the Legislature be separately represented.
13. I have considered the decision in the case of *R (on the application of Mount Cook Land Ltd) v. Westminster City Council*, which the applicants rely on as authority for the proposition that costs should not be given against an unsuccessful party at the leave stage. This judgment of the English Court of Appeal is based on legislation that does not apply in this jurisdiction. I am satisfied that I should deal with the matter of costs under s. 169 of the Act of 2015, already referred to.
14. A “*Protective Costs Order*” as sought by the applicants has no application.

Public interest

15. The applicants’ principal contention is that, as they brought these proceedings “*in the public interest*”, they ought not to be penalised by having to pay costs for failing to obtain leave to proceed. In my view, this contention does not stand up to much scrutiny.
16. Legal submissions were delivered by both the respondents and the Oireachtas. These submissions made clear the legal principles that were being relied upon to resist the

application. These legal principles are not complex and would be readily understandable to the applicants as lay litigants. In support of these submissions, affidavits were filed by the respondents and the Oireachtas. These affidavits clearly set out the factual background to the enactment of the legislation and regulations and the procedures followed by the Oireachtas.

17. As mentioned earlier, despite suggestions from the Court, both on 21 April 2020 and 28 April 2020, the applicants declined to put in their own submissions. They also rejected the suggestion of a short adjournment to give them an opportunity to consider and, possibly, respond to the case being made against them. The applicants did file a further affidavit which, although it did deal with the issue of legal standing, essentially repeated the matters that were set out in their original "*statement required to ground application for judicial review*".
18. The applicants did not engage with the case being made by the respondents and the Oireachtas in any meaningful way. Rather, they proceeded with their application on the basis that as they were of the opinion they had an arguable case, this, of itself, was sufficient for the Court to grant them leave.
19. There is no doubt but that issues raised by the widespread restrictions imposed by the legislation and regulations in question are important matters of public interest. However, the manner in which the applicants conducted their proceedings, their failure to consider or answer the case being made against them and to only have regard to their own opinions meant that these proceedings were very far from being in the public interest.

Conclusion

20. By reason of the foregoing, I am satisfied that no grounds have been established for me to depart from the general rule that "*costs follow the event*". I will, therefore, grant the respondents and the Oireachtas (the notice parties) their costs. I will limit the costs to those associated with, and arising from, the hearings on 5 and 6 May 2020, to include the costs of legal submissions and affidavits, such costs to be adjudicated in default of agreement.
21. I will make an order dismissing the applicants' application herein.