

THE HIGH COURT

[2021] IEHC 309

[Record No. 2019/383 MCA]

BETWEEN

ALDONA STULPINAITE

APPELLANT

AND

THE RESIDENTIAL TENANCIES BOARD

RESPONDENT

AND

MICHAEL WHELAN

NOTICE PARTY

RULING ON COSTS delivered electronically by Mr. Justice Barr on the 23rd day of April, 2021

1. This judgment deals with the issue of costs arising out of the substantive judgment in this matter delivered by the court on 12th March, 2021, reported at 2021 IEHC 178.
2. The substantive application concerned an appeal on a point of law pursuant to s.123 of the Residential Tenancies Act 2004 (as amended) brought by the appellant against a decision of the Residential Tenancies Tribunal, which had found that the termination notice served by the notice party on the appellant, was valid. The appellant was unsuccessful in her appeal against the decision of the Tribunal and the resulting Determination Order made by the respondent.
3. Notwithstanding that she was unsuccessful in her appeal, the appellant has submitted that she is entitled to the following orders: An order giving her three months within which to vacate the property, so as to enable her to put her affairs in order and find alternative accommodation; secondly, she seeks an order for payments of her costs on the basis that the matters raised in the appeal were of sufficient public importance as to constitute "public interest litigation", such that she should be awarded her costs notwithstanding that she was unsuccessful on the hearing of the appeal. In this regard the appellant relied on the decision in *Collins v. Minister for Finance* [2014] IEHC 79. The appellant did not specify whether she wanted her costs paid by the respondent or the notice party.
4. In response, it was submitted on behalf of the respondent that as the court had dismissed the appeal and had not varied the Determination Order, it had no jurisdiction to effectively vary the order at this stage by permitting the appellant to have three months within which to vacate the property.
5. It was further submitted that there was no rational or legal basis on which the appellant should be awarded her costs. She had brought an appeal against the decision of the Tribunal and had been entirely unsuccessful on all of the grounds put forward by her at the hearing of the appeal. It was denied that the appeal raised any issues of general public importance. It was submitted that the appeal merely raised grounds that were individual to the circumstances of the appellant and related to the hearing which had

taken place before the Tribunal. The issues raised had no wider importance to the public generally; they solely concerned matters between the parties to the appeal.

6. It was submitted that there was no basis on which the court should depart from the general rule that was provided for in s.169 of the Legal Services Regulation Act 2015 and in O.99 of the Rules of the Superior Courts, that where a party has been entirely successful, costs should follow the event and they should be awarded their costs of the proceedings. It was submitted that as the respondent had been entirely successful on the hearing of the appeal, there was no basis on which the court should depart from the general rule applicable in such circumstances.
7. On behalf of the notice party, who is the landlord, it was submitted that as the court had not set aside or varied the Determination Order, it had no jurisdiction to extend the time provided for therein for the applicant to vacate the property. However, without prejudice to that assertion, it was pointed out that the notice party had given a written undertaking that he would allow the appellant a period of 28 days from perfection of the court order to vacate the property.
8. It was submitted that having regard to the date on which the substantive judgment was delivered, being 12th March, 2021 and the date on which the perfected order would likely be made, together with the further period of 28 days thereafter, the appellant would in effect have had in excess of two months from the date of delivery of the judgment to the date on which she would actually have to vacate the property. It was submitted that that was reasonable, in particular having regard to the fact that the appellant had, by means of bringing a number of unsuccessful challenges to the notice of termination, obtained a very considerable extension of her occupancy of the property, because the notice of termination had been due to expire in November 2019.
9. It was submitted that given the challenges brought by the appellant and another tenant to the validity of the notice of termination and the bringing of the appeal against the decision of the Tribunal, the notice party had suffered considerable financial loss and damage. In particular, as there were only currently two units out of the total of thirty units, occupied, the notice party had been at the loss of a considerable amount of rent in the intervening period. Furthermore, his ability to successfully market and sell the property had been adversely impacted by the presence of the tenants in the properties and the legal proceedings herein.
10. Insofar as it had been suggested by the appellant in correspondence that the notice party should not be given his costs due to the fact that he was merely named in the title to the proceedings as a notice party; it was submitted that that misconstrued his role and interest in the proceedings. He was not a mere spectator or uninterested party in the proceedings. He was the landlord of the property, who had served the challenged notice of termination of the tenancy. He had obtained a decision in his favour, both from the adjudicator and from the Tribunal. In these submissions it was submitted that he had a very real interest in the outcome of the appeal that was brought against the Tribunal decision. In this regard, counsel referred to the decisions in *O'Connor v. Nenagh Urban*

District Council & Dunnes Stores (Notice Party) [2002] IESC 42 and USK and District Residents Association v. Environmental Protection Agency & Ors. [2007] IEHC 30.

11. It was submitted that where the notice party had been obliged to participate in the appeal so as to protect his interests and where he had been entirely successful in that appeal, none of the factors set out in s.169 of the 2015 Act applied to deprive him of an entitlement of his costs. It was submitted that it was appropriate that the landlord should be awarded his costs against the appellant.

Conclusions

12. In relation to the application on behalf of the appellant that the order should provide that she be given a period of three months within which to vacate the property, the court is of the view that it is not appropriate to make that order.
13. While the court does not necessarily accept the argument put forward on behalf of the respondent and the notice party that it does not have jurisdiction to make such an order having regard to the fact that the court did not cancel or vary the Determination Order that had been made by the respondent; the court is satisfied that it is not necessary to decide that issue. The court is satisfied that as the substantive judgment was delivered on 12th March, 2021 and in light of the undertaking given by the notice party that he will allow a period of 28 days from perfection of the court order for the applicant to vacate the premises, that combined period effectively means that the applicant has had a reasonable period of time to seek alternative accommodation, given that she was aware of the decision of this Court from delivery of the judgment on 12th March, 2021.
14. Turning to the issue of costs, the court does not accept the argument put forward on behalf of the appellant that, notwithstanding that she was unsuccessful in her appeal, she is entitled to an order for payment of her costs by either the respondent or the notice party, due to the fact that the issues raised in her appeal were of public importance. In *McEvoy v. Meath County Council* [2003] IEHC 31 Quirke J referred to the decision of Dyson J in *R v. Lord Chancellor, Ex Parte Child Poverty Action Group* [1998] 2 All ER 755, where the essential characteristics of a public law challenge were described in the following way: -

"The essential characteristics of a public law challenge are that it raises public law issues which are of general importance, where the applicant has no private interest in the outcome of the case. It is obvious that many, indeed most judicial review challenges, do not fall into the category of public interest challenges so defined. This is because, even if they do raise issues of general importance, they are cases in which the applicant is seeking to protect some private interest of his or her own."

15. While that case relates to the bringing of judicial review proceedings, it seems to me that the dicta cited therein, are applicable to an appeal on a point of law.
16. The court has also had regard to the principles set out by the divisional court of the High Court in *Collins v. Minister for Finance* [2014] IEHC 79. However, the examples given

therein relate primarily to issues of statutory or constitutional interpretation that were novel and were of exceptional public importance. The issues that were raised in the present appeal, cannot be seen as being in the same category. Accordingly, the court holds that the present appeal cannot be seen as coming within the general exception known as public interest litigation, wherein an unsuccessful party might be awarded his or her costs against the successful party. A further difficulty with that proposition is that in the examples given in the *Collins* case the order for costs was generally against the State, or an emanation of the State. It is difficult to see how the same principle could be applied where the paying party would be a private entity, or a private citizen. However, it is not necessary to decide that issue on this application.

17. The court accepts the argument put forward by the notice party that his interests were involved in the appeal to such an extent that it was reasonable for him to be a party to the appeal and to participate in the hearing of the appeal. The court is satisfied that in the circumstances of this case, the notice party comes within the class of cases described in *O'Connor v. Nenagh Urban District Council* and in *USK and District Residents Association Limited v. Environmental Protection Agency*; such that he is not prevented from seeking an order for payment of his costs merely by virtue of the fact that he was a notice party to the appeal rather than the respondent to the appeal.
18. Thus, the essential question which the court must determine is whether the respondent and the notice party are entitled to orders for payment of their costs by the appellant, on the basis that they were successful at the hearing of the appeal. The court must look at the totality of the circumstances of the case in deciding the issue of costs. While it is certainly the case that the respondent and the notice party were successful in the appeal, that is not the end of the matter.
19. The court must have regard to the following factors: Firstly, the appellant is a single woman, who has lived in the apartment for fifteen years. She does not drive, but works in Inchicore, Dublin, as a child minder. Her gross income is in the order of €21,800. She is on the Social Housing List, but is low priority. She receives the Housing Assistance Payment (HAP). Her current rent is low, compared to what she will have to pay in a new apartment as a result of the substantive judgment herein.
20. Secondly, the appellant was awarded €7,500 by the Tribunal due to a breach by the landlord of his obligation to keep the property in adequate condition. That aspect of the Tribunal decision was not appealed. Thirdly, the notice party owns two very substantial properties in Ballsbridge, Dublin 4. In 2020 he obtained an offer of €5.5m for these properties. The prospective purchaser later pulled out of the sale. Thus, on any reasonable analysis, there is an enormous chasm between the economic position of the appellant and the notice party.
21. Fourthly, the court must ask, what is the reality if it were to award the costs of the respondent and the notice party against the appellant? Given her circumstances, it would probably mean that she would end up being subjected to an instalment order in the District Court, which would oblige her to pay off the debt in instalments over a very

prolonged period of time. Indeed, it is possible that given the level of her income and the probable level of the instalment order, she could be left paying back the debt for the entirety of her natural life. The court cannot see how that would be fair.

22. The appellant challenged the validity of the termination notice before the adjudicator and the Tribunal, where she was represented by CAVA, which is a voluntary assistance organisation run by chartered accountants. She was represented by counsel instructed by FLAC at the appeal hearing. In essence, she was fighting to protect her home. She was unsuccessful in that regard. However, I do not see that it would be just that this woman should be saddled with debt for the rest of her life, or a significant portion thereof, so as to pay costs to a statutory agency and to a wealthy landlord.
23. On a consideration of all the circumstances in this case, the court is satisfied that the justice of the case will be met by the following order:
 - (a) Dismiss the appeal.
 - (b) Each party is to bear their own costs of the appeal.
 - (c) The parties are to file a copy of their written submissions in the Central Office of the High Court within four weeks, in compliance with Practice Direction HC 101.