THE HIGH COURT

JUDICIAL REVIEW

[2022] IEHC 655

Record Number: [2020/643 JR]

BETWEEN

DENIS RIORDAN

APPLICANT

AND

THE IRISH FINANCIAL SERVICES APPEALS TRIBUNAL

RESPONDENT

COSTS RULING of Mr. Justice Heslin delivered on the 25th day of November, 2022

Introduction

1. This ruling is lengthier than it might well have been, had the Applicant been legally represented. However, given the need for parties to litigation to have a clear understanding of the reasons for decisions by this court, what follows seems necessary, in terms of detail.

2. This is a ruling in relation to the question of costs. It must be read in conjunction with the judgment delivered on 3 August 2022 (*Riordan v The Irish Financial Services Appeals Tribunal* [2022] IEHC 488) ("the judgment") in respect of proceedings brought by the Applicant who sought, *inter alia,* a:

> *"Declaration that the Irish Financial Services Appeals Tribunal acted ultra vires its powers by demanding the payment of an appeal fee of €5000 that was not applicable to an appeal brought under section 31 of the Anglo-Irish Bank Corporation Act 2009".*

Legislative construction

3. Paragraph 25 of the judgment stated:

> *"In truth, these proceedings exclusively concern the question of statutory interpretation and the applicant's case is determined by the proper interpretation of relevant legislative provisions."*

4. Paragraph 119 of the judgment states *inter alia*:

> "…*the question was purely one of legislative construction. The applicant asserted that the tribunal had no power to require, and that he had no obligation to pay, an appeal fee. This was a binary question. Either the applicant was right, or he was wrong. He was wrong."*

For the reasons set out in the judgment, the Applicant's claim was dismissed.

Preliminary view regarding costs

5. Paragraph 124 of the judgment states *inter alia:*

> "*With regard to the question of costs, my preliminary view is that they should 'follow the event'. In circumstances where the respondent has been entirely successful, whereas the applicant has been wholly unsuccessful, it seems to me that the justice of the situation is met by an order for costs in favour of the successful party and I have not identified any fact or circumstances which would justify a departure from what might be called the 'normal rule'. The foregoing is, as I say, my preliminary view. The parties should correspond with*

each other, forthwith, regarding the appropriate form of final order and, in default of agreement, short written submissions should be filed in the Central Office by the 19th September 2022".

Submissions

6. Written submissions, dated 15 September 2022, were furnished by the Respondent, well within the time specified for same. The Applicant did not furnish any written submissions within the period allowed by the court. Nor did he apply for any extension of time or indicate any intention to provide written submissions in the future. As of late October 2022, the Applicant indicated in correspondence to the Respondent's solicitors that he objected to an order for costs against him and he suggested that the question of costs should be dealt with by way of an oral hearing.

Oral hearing not required

7. I am satisfied that justice does not require an oral hearing on the issue of costs, which can be dealt with, fairly, on the basis of the positions adopted by the respective parties, who had the opportunity to provide such written submissions as they wished. Furthermore, an oral hearing would make unnecessary demands on limited court resources. As to the parties' positions, the Respondent submits that 'costs' should 'follow the event', whereas the Applicant objects to the court taking this approach.

The 'normal rule'

8. As the Supreme Court made clear in *Grimes v. Punchestown Developments Co. Ltd* [2002] 4 I.R. 515:

"*The **normal rule is that costs follow the event**. However, there are circumstances where a court on the facts of a case determines that the normal rule will not apply. Indeed, **a successful applicant may not succeed in obtaining an order for costs if the facts indicate features which are unsatisfactory as to the way in which they acted**, see for example Donegal County Council v. O'Donnell (unreported, High Court, O'Hanlon J., 25 June 1982). The burden is on the party making an application to show that the order for costs should not follow the general rule*." (Emphasis added).

Costs 'follow the event'

9. Two points arise from the foregoing. First, the 'event', for the purposes of this court's decision on costs, is the complete success of the Respondent. To 'follow' that event is for the court to award costs in favour of the successful party. Second, the facts in the present case do not indicate features which are unsatisfactory as to the way in which the Respondent acted. In *Godsil v. Ireland* [2015] 4 I.R. 535, Mr. Justice McKechnie put matters as follows, at para. 23 of the learned judge's decision:

"***The general rule is that costs follow the event** unless the court orders otherwise: O.99, r.1(3) and (4) of the Rules of the Superior Courts 1986. This applies to both the original action and to appeals to this court (Grimes v. Punchestown Developments Co. Ltd [2002] 4 I.R. 515 and S.P.U.C. v. Coogan (No. 2) [1990] 1 I.R. 273. Although acknowledged as being discretionary, **a court which is minded to disapply this rule can only do so on a reasoned basis, clearly explained, and one rationally connected to the facts of the case to include the conduct of the participants**: in effect, the discretion so vested is not at large but must be exercised judicially (Dunne v. Minister for the Environment [2007] IESC*

60, [2008] 2 I.R. 775 at pp. 783 and 784). The 'overarching test' in this regard, as described by Laffoy J. in Fyffes plc the DCC plc [2006] IEHC 32, [2009] 2 I.R. 417 at para. 16, p. 679, is justice related. It is only when justice demands should the general rule be departed from. On all occasions when such is asserted the onus is on the party who so claims."

Discretion

10. Having carefully considered all relevant factors, I am unable to identify any reason, rooted in the facts, to justify a departure from the 'normal rule'. Thus, it would be an entirely *inappropriate* exercise of discretion (i.e. it would not be exercising discretion *judicially*) to deny costs to the entirely successful Respondent, which is what the Applicant suggests. For the avoidance of doubt, there is no issue whatsoever with respect to the Respondent's conduct, still less one which could justify the exercise of discretion to refuse the Respondent an order for costs. The Applicant, who was given every reasonable opportunity to indicate in writing why the Respondent should not be awarded its costs, has certainly not discharged the onus resting on him (*per* the principles outlined in *Godsil*).

The 2015 Act

11. For the benefit of the Applicant, it is important to say that the will of the people of this State, as expressed in legislation enacted by the Oireachtas, makes clear that the 'starting point' for present purposes is that the Respondent has a *presumptive right* to an award of costs against him. I say this in light of Section s.169(1) of the Legal Services Regulation Act 2015 ("the 2015 Act") which provides the following:

> *"(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,*
>
> *(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.*
>
> *(2) Where 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."* (Emphasis added).

Order 99

12. The 2015 Act is referred to as follows in Order 99, r.2 of the Rules of the Superior Courts ("RSC"), which provides:

"2. Subject to the provisions of statute (including sections 168 and 169 of the 2015 Act) and except as otherwise provided by these Rules:

(1) The costs of and incidental to every proceeding in the Superior Courts shall be in the discretion of those Courts respectively.

(2) No party shall be entitled to recover any costs of or incidental to any proceeding from any other party to such proceeding except under an order or as provided by these Rules.

(3) The High Court, the Court of Appeal or the Supreme Court, upon determining any interlocutory application, shall make an award of costs save where it is not possible justly to adjudicate upon liability for costs on the basis of the interlocutory application.

(4) An award of costs shall include any sum payable by the party in favour of whom such an award is made by way of value added tax on such costs, where and only where such party establishes that such sum is not otherwise recoverable.

(5) An order may require the payment of an amount in respect of costs forthwith, notwithstanding that the proceedings have not been concluded."

13. Taking O. 99 and s.169 together, the position is that the Respondent, as the entirely successful party, is entitled to an award of costs, unless the nature or circumstances of this particular case, including the conduct of the parties, means that the interests of justice require otherwise. I have taken full account of the provisions of s.169 (a) to (g), inclusive, and all facts and circumstances, and can identify no valid reason to justify denying the Respondent their presumptive right to costs. I am satisfied that no circumstances exist to displace the presumption that the Respondent is entitled to their costs and there is no valid basis for this Court to exercise its discretion to depart from the normal rule.

Equitable basis

14. In *Dunne v. Minister for the Environment* [2008] 2 IR 775, the Supreme Court stated the following:

*"**The rule of law that costs normally follow the event, that the successful party to proceedings should not have to pay the costs of those proceedings which should be borne by the unsuccessful party has an obvious equitable basis**. As a counterpoint to that general rule of law the Court has a discretionary jurisdiction to vary or depart from that rule of law if, in the special circumstances of a case, the interests of justice require that it should do so. There is no predetermined category of cases which fall outside the full ambit of that jurisdiction…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. Accordingly, any departure from the general rule is one which must be decided by a Court in the circumstances of each case."* (Emphasis added).

15. What is equitable, or fair, in the present case is that the entirely unsuccessful party pay the costs of the entirely successful party. At para.18 in *Dunne*, the Supreme Court opined that the fact that a plaintiff is not seeking a private personal advantage and that the issues raised are of

special and general public importance, are factors which may be taken into account, along with all other circumstances of the case, in deciding whether there is sufficient reason to exercise a discretion to depart from the general rule that costs follow the event. The present case is utterly different. The Applicant asserted that he was not required to pay an appeal fee. An analysis of the literal meaning of the relevant legislation wholly undermined that assertion.

Departure from the 'normal rule'

16. The divisional court's decision in *Collins v. Minister for Finance* [2014] IEHC 79 (Kelly, Finlay Geoghegan, Hogan JJ.) outlined the type of cases in respect of which a departure from the 'normal rule' may be warranted (examples of a departure being where an unsuccessful party, depending on the circumstances, may avoid an award of costs against them, or may be awarded some or all of their costs). Paragraphs 13 – 18 of *Collins* seems to me to be particularly relevant. This court proposes to ask itself whether the Applicant's case falls within any of the categories identified in those paragraphs (and, for ease of reference, I propose to highlight the categories which emerge). This exercise is done, not because the court regards it as essential (given that the Applicant has not put forward *any* reason as to why the normal rule should not apply) but out of an abundance of caution and so that the Applicant, who represented himself at the hearing, might better understand the analysis undertaken by this court on the costs issue, and the decision made. The following is a *verbatim* extract from the decision in *Collins*:

> "*12. It is true that the pre-existing case law in respect of the award of costs to unsuccessful litigants in constitutional cases can be described as heterogeneous and as revealing a variety of distinct themes. Yet certain principles nonetheless emerge which may now be summarised.*
>
> *13. First, costs (either full or partial) have been awarded against the State in cases where the* ***constitutional issues raised were fundamental and touched on sensitive aspects of the human condition.*** *Examples here might include Norris v. Attorney General [1984] I.R. 36 (homosexuality) Roche v. Roche [2006] IESC 10 (the constitutional status of human embryos) and Fleming v. Ireland (2014) (assisted suicide).*
>
> *14. Second, costs have similarly been awarded to losing plaintiffs in* ***constitutional cases of conspicuous novelty, often where the issue touched on aspects of the separation of powers*** *between the various branches of government. Examples here include Horgan v. An Taoiseach [2003] 2 I.R. 468 (what constituted participation in war for the purposes of Article 28) and Curtin v. Dáil Éireann [2006] IESC 27 (aspects of the judicial impeachment power).*
>
> *15. Third, costs have been awarded* ***where the issue was one of far reaching importance in an area of the law with general application****. Examples include TF v. Ireland [1995] (constitutionality of the Judicial Separation and Family Law Reform Act 1989), O'Shiel v. Minister for Education [1999] 2 I.R. 321(aspects of the State's duty under Article 42.4 to provide for free primary education), Enright v. Ireland [2003] 2 I.R. 321 (constitutionality of the Sexual Offenders Act 2001) and MD (a minor) v. Ireland [2012]*

IESC 10, [2012] 1 I.R. 697 (constitutionality of legislation making it an offences under under-age males only to have sexual intercourse with under-age females).

16. Fourth, in some cases the courts have stressed that the decision has ***clarified an otherwise obscure or unexplored area of the law****. This point was emphasised by Murray C.J. in dealing with the costs question in Curtin. This was, after all, the first case in which the impeachment provisions of Article 35 had ever been commenced by the Houses of the Oireachtas in respect of a serving judge…*

…

17. Fifth, as Murray C.J. pointed out in Dunne, the fact that ***the litigation has not been brought for personal advantage and that the issues raised "are of special and general public importance*** *are factors which may be taken into account." As Dunne itself shows, however, the mere fact that a litigant raises such issues in circumstances where no suit is brought for purely personal advantage does not in itself justify a departure from the general rule. In that case the plaintiff challenged the constitutionality of s. 8 of the National Monuments (Amendment) Act 2004 on the ground that it provided insufficient protection for national monuments which might be impacted by motorway development. Even though the plaintiff did not challenge this legislation for personal advantage and the issues raised were of general public importance, costs were nonetheless awarded against the losing plaintiff.*

18. Sixth, even in those cases ***where the court was minded to depart from the general rule and award the plaintiff costs, this did not necessarily mean that the plaintiff was held to be entitled to full costs.*** *Thus, for example, in both Horgan and Curtin the respective plaintiffs were awarded 50% of their costs. In yet other cases – such as Roche v. Roche and Fleming v. Ireland - full costs were awarded to the losing party in this Court.*

19. We consider that the present case is an exceptional one which warrants a departure from the general rule to the point whereby this Court would justified in making a partial order for costs in the plaintiff's favour. In this regard, we would note the following factors:

- *the importance of this novel question of constitutional law;*
- *the weighty issues raised by this litigation;*
- *the importance to the State and its citizens that the constitutionality of the important and novel executive and legislative decisions with far-reaching consequences be judicially determined;*
- *the fact that the plaintiff is a public representative, did not act for personal advantage, brought the challenge following the decision in Hall v Minister for Finance and the State did not pursue the locus standi objection in order that the substantive issues raised be judicially determined;*
- *the decision clarified and provided certainty for the State in the operation of its financial procedures."* (Emphasis added).

17. I am entirely satisfied that the applicant's case does not fall into any of the categories described in *Collins*. These proceedings did not concern constitutional rights, nor fundamental issues

touching on sensitive aspects of the human condition. By means of these proceedings, the Applicant wished to gain a benefit/avoid a liability, personally. There was nothing novel or far reaching at issue. There was not, in any sense, an important question at issue (e.g. the existence or not of a contended–for right). Rather, the case concerned straightforward legislative interpretation using well established legal principles. This was not a case which concerned any issue 'crying out for' clarification. This case was not concerned with weighty issues. Rather, the legislation was there to be read and, on a plain reading of it, the Applicant is required to pay the appeal fee which he objected to. Nothing has been clarified which was obscure before these proceedings were commenced. No 'public service' was done by the bringing of this case and these were not proceedings which were 'public interest' in nature, in any sense. Nor did this case 'break' any 'new ground', in terms of legal principle. On the contrary, the literal rule of construction of relevant legislation required the court to dismiss the Applicant's claim which, it must be said, he ran with both courtesy, as well as conviction.

Conclusion

18. The Applicant had every right to access this court to have his claim determined. However, his was a case which, despite the sincerity and skill with which he made it, had to be dismissed. A decision to bring legal proceedings is one which comes with consequences, should those proceedings be unsuccessful. This is what has occurred in the present case. As the *entirely successful* party, the Respondent enjoy a presumptive right (under. s. 169(1) of the 2015 Act) to an award of costs against the Applicant in this case. Although O.99, r.2(1) of the RSC provides that costs are in the *discretion* of the court, this court is not at all 'at large' in the exercise of that discretion, which must be exercised fairly and within the 'guardrails' of (i) applicable legislation and (ii) established legal principles (and, for the benefit of the Applicant, I have referred to both (i) and (ii) in this ruling). There is no valid basis which would justify a refusal of an order for costs in favour of the wholly successful Respondent. In short, the justice of the situation is met by *not* departing from the 'normal rule' that 'costs' should 'follow the event'. Thus, the Respondent is entitled to an award of costs to include all reserved costs and any costs of discovery to be adjudicated in default of agreement and is invited to submit a draft final order reflecting this court's decision.