AN CHÚIRT UACHTARACH

THE SUPREME COURT

Supreme Court Record No. 2023/74
[2024] IESC 32

Charleton J.
O'Malley J.
Woulfe J.
Murray J.

Between

FIONUALA SHERWIN

Applicant/Respondent

-and-

AN BORD PLEANÁLA

Respondent

-and-

CWTC MULTI FAMILY ICAV

Notice Party/Appellant

RULING of the Court as to Costs delivered electronically on the 18th day of July, 2024

1. This is the ruling of the Court in relation to costs arising from the substantive appeal judgment delivered by this Court on the 11th April, 2024. It should be noted that Baker J. retired as a judge later in April, 2024 and as a result this ruling is being dealt with by a panel of four.

2. The Court dismissed the appeal brought by the notice party/appellant (described in this ruling as "the notice party") against an order of the High Court dated the 8th May, 2023, following a judgment by Humphreys J. delivered on the 27th January, 2023, which quashed a decision of An Bord Pleanála ("the Board") to grant permission for certain development to be carried out by the notice party.

3. On the same date the Court directed that, if there was no agreement on the terms of the costs orders to be made, the parties should file written submissions setting out their respective positions. The applicant subsequently filed written submissions dated the 5th June, 2024, and the notice party filed written submissions dated the 7th June, 2024. The Court was notified that the Board had come to an agreement with the notice party in relation to discharging any liability for the costs of the applicant incurred in the Supreme Court appeal, and on the basis of that agreement the Board was not filing submissions.

4. In her submissions the applicant seeks an order for costs as against the notice party. She states that it was not clear as of that date what the notice party's position was, and whether it was seeking to apportion costs in some fashion, and if such position were to be taken by the notice party, she would request an opportunity to respond. However, she goes on to submit that the principles outlined in *Veolia v. Water UK Plc v. Fingal County Council (No. 2)* [2007] 2 I.R. 81*("Veolia")*, regarding splitting or partition of costs, do not arise in the present proceedings. She states that no extra time, cost or wasted legal issues were caused or raised by the applicant, such that costs ought to be partitioned in some fashion. She adds that she conceded to this Court at the hearing that s. 57(10)(b) was not singularly germane to these proceedings, which concerned protection of the protected structures on site under multiple different aspects of both the 2000 Act and the City Development Plan.

5. In their submissions the notice party seeks what they describe as a limited modification of the default provision that costs follow the event. The principal modification sought is

that the applicant should only be awarded 66% of her costs of the appeal, excluding costs incurred in opposing the application for leave to appeal. They rely essentially upon the principles set out in *Veolia*, that where a party has prevailed on the "event", but has not been successful on an identifiable issue which has materially increased the costs of the case, the successful party may suffer a deduction in the costs obtained in respect of his own costs in presenting that successful issue. The justification for this was stated to lie in discouraging parties from raising additional unmeritorious issues. The notice party states that the applicant was not successful on the first issue, as to the interpretation of s. 57(10)(b), that this first issue was the most significant issue in terms of time taken in oral submissions before the Supreme Court, and that this issue formed the most significant component of the Court's judgment. They submit that the raising of this issue, on which the otherwise successful party failed to prevail, very definitely affected the overall costs of the litigation to a material extent.

6. The notice party also submits that the applicant should not be entitled to her costs in respect of the application for leave to appeal to this Court, in circumstances where she opposed the application and the application involved the notice party incurring considerable costs.

7. The second modification sought by the notice party is that part of the High Court order for costs should be vacated, in relation to the application to that Court for leave to appeal to the Court of Appeal, and that no order for costs should be made in respect of same. Their argument appears to be that the decision of the High Court refusing leave to appeal to the Court of Appeal has in some way been proven implicitly to be in error, by reason of the application for leave to this Court subsequently proving successful.

8. In her submissions the applicant anticipates this point. She states that each of the two applications for leave are premised on different legal tests in respect of entry to the

respective appellate courts, and that it is not correct to say that entry to one court necessitated an error of the earlier court considering a different application for leave. She submits that the expense of the application to the High Court for leave to appeal was borne by the applicant, and the notice party having failed in that application is obliged to discharge the costs of same, as ordered by the High Court.

Decision

9. The Court is of the view that it would not be appropriate to apply *Veolia* so as to limit the applicant to an order for only 66% of her costs of the appeal, on the basis that she was unsuccessful on the first issue. The Court notes that *Veolia* made it clear that an order splitting costs in this way is very much the exception where the winner of an event has been identified, and should only be done where the raising of the unsuccessful issue could have affected the overall costs "in a material extent". In the present case, the applicant made very limited oral submissions on the first issue, in comparison with her submissions on the other two issues. In fact, her senior counsel made a submission, at the start of the second day's hearing, that the s. 57(10)(b) point did not arise in the appeal, because it was not a component part of the *ratio* of the trial judge wherein he made his decision to grant *certiorari.* Despite the applicant making very limited submissions on the first issue, the appeal took the full two days, and it seems to the Court that the appeal would have gone into a second day in any event, even without the first issue. The Court would not accept that the first issue forms the most significant component of the Court's judgment, given that it takes up around 13 pages of the judgment, whereas the second and third issues (which overlapped to some extent) take up around 33 pages of the judgment.

10. The Court is further of view that it would not be appropriate to exclude the costs incurred by the applicant in opposing the grant of leave to appeal to this Court. The Court notes the position set out in para. 15(d) of the revised Practice Direction SC19, that where leave

to appeal is granted, costs of the application for leave to appeal become costs in the appeal.

11. As regards the order for costs made by the High Court in respect of the unsuccessful application for leave to appeal to the Court of Appeal, this Court is of the view that there should be no order for costs in respect of that application. While the applicant is correct that the separate applications for leave to appeal are premised on different legal tests in respect of appeals to different appellate courts, we are of the view that the statutory interpretation point should have justified the High Court in granting leave, and therefore we will vary the High Court order in that regard.