AN CHÚIRT UACHTARACH

THE SUPREME COURT

Charleton J.
Woulfe J.
Hogan J.
Murray J.
Collins J.

S:AP:IE:2022: 0000142

[2024] IESC 53

BETWEEN/

DEIRDRE LITTLE

APPLICANT/APPELLANT

-AND-

THE CHIEF APPEALS OFFICER, SOCIAL WELFARE APPEALS OFFICE AND

MINISTER FOR SOCIAL PROTECTION (No2)

RESPONDENTS

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 19th day of November 2024

Introduction

1. I agree with the judgment which Murray J. is about to deliver. In this concurring judgment I simply wish to address one aspect of that judgment, namely, the troublesome question of what, exactly, is or are the foundational statutory basis or bases for those Rules of the Superior Courts which deal with the issue of costs. As Murray J. will explain, there are at least three separate legislative provisions dealing with the general question of costs which are still (potentially) extant on the statute books, namely, s. 53 of the Supreme Court of Judicature (Ireland) Act 1877 ("the 1877 Act"); s. 14(2) of the Courts (Supplemental Provisions) Act 1961 ("the 1961 Act") and ss. 168 and 169 of the Legal Services Regulation Act 2015 ("the 2015 Act").

2. One could also add that s. 94 of the Courts of Justice Act 1924 prescribed a general rule in respect of costs in civil actions tried by a jury. As it happens, this provision (which has never been expressly repealed) was applied by Barton J. in a costs matter arising from a jury action, *Gordon v. Irish Racehorse Trainers Association* [2020] IEHC 446. He held that this provision had not been impliedly repealed by the general words of s. 169 of the 2015 Act.

3. To illustrate the potential difficulty which this all of this causes, I propose to examine briefly the distinct question of whether one of these potentially foundational statutory provisions, namely, s. 53 of the 1877 Act, still forms part of that statutory foundation in respect of those rules of court dealing with the award of costs or whether it now or, indeed, ever, applied to the courts established under Article 64 of the Constitution of the Irish Free State in 1922 or Article 34 of the Constitution of Ireland.

Has s. 53 of the 1877 Act survived?

4. As Murray J. will explain, s. 53 of the 1877 Act was designed to provide a legal basis for rules of court dealing with costs following the procedural fusion of law and equity and

the creation of one Supreme Court of Judicature. As Palles C.B. observed in *Whitmore v. O'Reilly* [1906] 2 IR 357 at 393, the main object of s. 53 was to unite the practice of costs at both common law and equity. The common law courts had been required by statutes going as far back as the Statute of Gloucester 1278 to award costs where a party had succeeded, so that the common law judges had no discretion in the matter: see generally, Keane, "From Gloucester to judicature: tracing the roots of the Indemnity Rule on Costs" (2014) 51 *Irish Jurist* 149. The common law courts were therefore required by statute to apply the costs follow the event formula. But as Palles C.B. explained in *Whitmore, "*Costs in the Court of Chancery, on the other hand, were always in the discretion of the court": see [1906] 2 IR 357 at 394.

5. Section 53 of the 1877 Act largely reflected the thinking of equity by providing that the award of costs to the successful party was not to be automatic. But some elements of the pre-1877 common law statutory practice were nonetheless reflected in s. 53 in that it also provided that in the case of civil actions tried with a jury, costs should follow the event unless the trial judge should, for special cause, rule otherwise. It should be recalled, of course, that in 1877, the vast majority of common law civil actions were tried with a jury. That is, of course, no longer the case, as the right to trial by jury in contract cases was (effectively) removed by s. 94 of the Courts of Justice Act 1924 and in personal injuries actions the right to jury trial was later removed by s. 1 of the Courts Act 1988.

6. Article 64 of the Irish Free State Constitution Act 1922 contemplated the establishment of a new High Court and Supreme Court. This was duly accomplished by the enactment of the Courts of Justice Act 1924 ("the 1924 Act"). Section 22 of the 1924 Act had provided that:

> "The jurisdiction vested in and transferred to the High Court and the Supreme Court … respectively shall be exercised so far as regards pleading, practice and

procedure generally, including liability as to costs, in the manner provided by such rules of court as may be made pursuant to this Part of this Act, and where no provision is contained in any such rules of court and as long as there shall be no rule with reference thereto, it shall be exercised as nearly as possible in the same manner in which it might have been exercised by the respective courts from which such jurisdiction shall have been transferred, by this Act."

7. While s. 22 was a general rule as to costs, s. 94 of the 1924 Act also provided for a special rule for costs in the case of civil actions tried by jury. Section 94 accordingly provided that costs should follow the event in civil actions tried by a jury unless the trial judge should otherwise rule for special cause which was to be mentioned in the court's order. Although this language was very similar to and covered the same ground as the corresponding provisions dealing with costs in civil actions tried by jury which were contained in s. 53 of the 1877 Act, neither s. 94 – or, for that matter, any other provision of the 1924 Act – purported to repeal s. 53 of the 1877 Act as such.

8. The late 1920 and early 1930s saw two major decisions of this Court dealing with costs and, specifically, the question of whether s. 53 of the 1877 Act still had application to these newly established courts. In the first of these judgments which was delivered in July 1929, *Little v. Dublin United Tramways Ltd.* [1929] IR 642, Kennedy C.J. stated that the provisions of the 1877 Act dealing with the jurisdiction of the courts created by that Act "were repealed by implication or at least rendered obsolete", although he held that it was otherwise in the case of the substantive rules contained in the 1877 Act: see [1929] IR 642 at 651. He then examined the terms of s. 53 of the 1877 Act to see into which category (i.e., obsolete or retained) the costs rule fell. The Chief Justice concluded that the effect of s. 22 of the 1924 Act and Ord. 28, r. 3 of the RSC 1926 was "to keep in force and operation the other provisions of s. 53, so far as they are not inconsistent with

the Act of 1924 and those rules": see [1929] IR 642 at 653. This seemed to imply that s. 53 of the 1877 Act might be superseded – or even impliedly repealed – by either provisions of the 1924 Act itself or by rules of court made under s. 22 of the 1924 Act.

9. *Little* was a civil jury action and the judgments delivered by the other members of the Court, FitzGibbon and Murnaghan JJ., both proceeded on the basis that the cost rules in respect of the civil jury actions were contained in *both* s. 53 of the 1877 Act *and* s. 94 of the 1924 Act. While nothing probably turned on this, it is hard to see how, quite apart from any other consideration, s. 53 remained operative in cases involving costs in civil jury matters given the express words of the later s. 94 of the 1924 Act. Ordinary principles of statutory construction would suggest that where a later item of legislation covers the same ground as an earlier item of legislation, it is the later statutory provision which should prevail: see *McLaughlin v. Minister for the Public Service* [1985] IR 631 at 635, per Henchy J.

10. I would in passing enter one caveat to this. Section 94 of the 1924 Act stated that the costs rule was "subject to all existing enactments limiting, regulating, or affecting the costs payable in any action by reference to the amount recovered therein…" On the assumption that s. 53 of the 1877 Act was an "existing enactment" for the purposes of this section, it might then be argued that s. 94 gave way to s. 53 of the 1877 Act given that this latter provision had originally provided "that in all actions for libel where the jury shall give damages under forty shillings the plaintiff shall not be entitled to more costs than damages." This proviso was, however, repealed by the First Schedule of the Court of Justice Act 1936, so that – whatever else may be said about s. 53 of the 1877 Act – it ceased thereafter to be an enactment which affected the costs payable by reference to the amount recovered within the meaning of s. 94 of the 1924 Act. In those circumstances, it might be said that s. 94 of the 1924 Act may in consequence have

superseded s. 53 of 1877 Act, at least so far as costs in civil actions tried with a jury were concerned.

11. At all events, a somewhat different note to *Little v. Dublin United Tramways* was struck by this Court a year later in July 1930 in *Quinn and White v. Stokes and Quirke* [1931] IR 558. Here the question was whether s. 53 of the 1877 Act could apply in respect of the costs issues arising in a non-jury action in the Circuit Court. Delivering the judgment of the Court, Kennedy C.J. rejected the argument that s. 53 of the 1877 Act could have any application to the Circuit Court, saying ([1931] IR at 564) that it owes "nothing of the jurisdiction so conferred on it to the former Supreme Court of Judicature in Ireland". Kennedy C.J. went on to say that the power to award costs in the Circuit Court was contingent on the making of Rules for the Circuit Court in the manner contemplated by the 1924 Act, which Rules, as of that point, had not yet been promulgated.

12. One could also add that the language of s. 53 of the 1873 Act referred expressly to costs arising from proceedings in the (former) High Court of Justice and (former) Court of Appeal. In those circumstances it is, perhaps, not always easy to see why s. 53 of the 1877 Act might be thought to apply to costs arising from proceedings in the entirely new High Court and Supreme Court created by Article 64 of the Constitution of the Irish Free State. After all, as was stated in *Quinn and White* (and later approved in *Bell),* the new courts which were created in 1924 (and established again in 1961) "are not the old Courts of the British regime amended, extended, divided, or otherwise re-dressed, but new Courts established by the Oireachtas under the authority of the Constitution…" [1931] IR 558 at 564, per Kennedy C.J.

13. At all events, this conclusion did not mean, however, that no costs at all could be awarded in the Circuit Court. Section 22 of the 1924 Act had also provided that where there were no rules of court, the pre-existing practice was to be followed "as nearly as possible."

Kennedy C.J. held that this meant that the Court could award costs by reference to the pre-existing 1924 County Court practice.

14. Finally, for completeness, it should be again recalled that a portion of s. 53 dealing with costs where the jury award was less than 40 shillings was repealed by the Courts of Justice Act 1936. This suggests that the Oireachtas considered that s. 53 of the 1877 Act had survived the enactment of the 1924 Act and that its costs provisions still had some vitality.

15. This was the state of the law when the 1961 Act was enacted. Section 14(2) of the 1961 Act reproduced pretty well verbatim s. 22 of the 1924 Act, which provision was itself repealed by s. 3 and First Schedule of that Act. In *The People (Attorney General) v. Bell* [1969] IR 24 at 49 Walsh J. commented – following the decision in *Quinn and White*– that the words "including liability as to costs" (which is to be found in both s. 22 of the 1924 Act and s. 14(2) of the 1961 Act) "appearing in s. 14(2) of the Act of 1961 Act is sufficient to give the High Court a statutory basis for its jurisdiction to impose liability as to costs where rules to this effect have been made for the High Court…" Rejecting the argument to the contrary which had been adopted by Kenny J. in the High Court, Walsh J. added (at 49) that:

> "The rules relating to costs which are contained in Order 99 of the Rules of 1962 owe nothing for their authority to the provisions of ss. 53 and 65 of the Act of 1877 or to any other section of that Act or of any statute in force prior to the Act of 1924."

16. It is notable that in 1986 the Superior Court Rules Committee invoked s. 14 of the 1961 Act as the principal legislative basis for the Rules of the Superior Courts 1986 (S.I. No. 15 of 1986), which Rules included Ord. 99 dealing with costs. A similar approach was taken by the Rules of the Superior Courts (Costs) 2019 (S.I. No, 584 of 2019) which

inserted a new version of Ord. 99 following the enactment of ss. 168 and 169 of the 2015 Act. It perhaps bears remarking that in no instance has s. 53 of the 1877 Act ever been expressly invoked by the Superior Court Rules Committee as a legislative basis for the making of rules of court in respect of costs.

Conclusions

17. While this Court has stressed that there is a presumption against implied repeal (*Director of Public Prosecutions v. Grey* [1986] IR 317), there is nonetheless a strong argument that, for the reasons I have just mentioned, s. 53 of the 1877 Act never applied to the courts created by Article 64 of the Irish Free State Constitution or to the courts subsequently created by Article 34 of the Constitution. This, in any event, is what this Court decided in both *Quinn and White* and *Bell*. If it is said that these decisions should not now be followed, it would, of course, be necessary to show that these decisions are clearly wrong: see *Mogul of Ireland Ltd. v. Tipperary (NR) County Council* [1975] IR 260 and *Director of Public Prosecutions (O'Grady) v. Hodgins* [2024] IESC 36. It is true that there are important recent decisions of this Court in which s. 53 of the 1877 Act was expressly relied on by the Court: see *Moorview Developments Ltd. v. First Active* [2018] IESC 33, [2019] 1 IR 417 and *WL Constructions Ltd. v. Chawke* [2019] IESC 74. Yet in none of those cases was this jurisdictional issue explored or considered.

18. While it is unnecessary to express a concluded view on this question of the current status of s. 53 of the 1877 Act, the potential for confusion between these various overlapping statutory provisions is obvious. It cannot be satisfactory that such confusion should continue to exist as to the precise statutory foundation or foundations in respect of rules of court dealing with costs and perhaps one consequence of this litigation is that the matter will be looked at afresh by the Oireachtas so that clarity can be brought to this important question.