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Neutral Citation Number [2022] IECA 41

THE COURT OF APPEAL

Edwards J.

Donnelly J.

Noonan J.

Record No: 2019/183

COLUM BROWNE

Plaintiff/Appellant

V

MINISTER FOR AGRICULTURE, FISHERIES AND FOOD,

IRELAND AND THE ATTORNEY GENERAL

Defendants/Respondents

RULING of Mr Justice Edwards delivered (electronically) on the 24th day of February, 2022.

1. On the 10th of July 2020, in my judgment with which Donnelly and Noonan J.J. agreed, this Court dismissed the plaintiff/appellant's appeal against the dismissal of his claims against the defendants/respondents by the High Court (Ní Raifeartaigh J.) seeking various declarations and damages from the defendants/respondents for alleged tort and

alleged breach of his right to earn a livelihood and to own property pursuant to Article 40.3.1[0] of the Constitution of Ireland and Article 1 of the First Protocol of the European Convention on Human Rights.

2. The High Court's judgment had ruled upon several preliminary issues that had been set down for determination prior to the hearing of the substantive case. The ruling on those issues was adverse to the plaintiff, resulting in the dismissal of his claim with costs to the defendants. He then appealed against the entirety of the High Court's judgment and Order to this Court.

3. The background to the case and the reasons for the Court's decision are set out in my judgment of the 10th of July 2020.

4. The defendants/respondents were wholly successful in the appeal proceedings, in circumstances where the plaintiff/appellant's appeal was dismissed unconditionally and in its entirety. That being the position, I stated the following with respect to costs at the end of my judgment of the 10th of July 2020.

> *"With regard to costs, my provisional view is that as they follow the event, the defendants are entitled to the costs of this appeal. If the plaintiff wishes to contend for an alternative order, he will have 14 days to deliver a written submission not exceeding 2,000 words and the defendants will have 14 days to reply. In default, an order in the proposed terms will be made."*

Submissions on behalf of the Plaintiff/Appellant

5. The plaintiff/appellant has filed written submissions contending for an alternative order to that proposed. He contends that, notwithstanding that he was unsuccessful in his appeal, the Court should award him his costs against the defendants/respondents (and it follows, should make no order for costs in favour of the defendants/respondents).

6. The plaintiff/appellant seeks this order on two grounds. First, he maintains that the appeal involved a test case, and secondly, he contends that he has suffered great hardship by the matters complained of in the proceedings and that an order for costs would exacerbate that hardship.

7. In elaboration on his first ground of appeal, the appellant says that the appeal raised two issues which had been undecided until considered by this Court. The first issue was the question of whether or not the failure to seek judicial review (within the judicial review time frame allowed by national law) absolutely precluded a claim for damages for negligence (brought within the time frame allowed for bringing a claim in tort in national law) even though the negligence complained of was a breach of European law; the second issue was the question of whether or not the first issue, as now decided by this Court, was sufficiently *acte clair* to not require a reference to the Court of Justice of the European Union.

8. In elaboration on the second ground of appeal, i.e., the asserted hardship, the appellant says that the Court found that if the plaintiff/appellant had challenged the acts of the Minister in 2006 as being contrary to European law he would have succeeded in having the correct criteria applied to the measurement of the length of his boat, the MV Áine Ide, and he could have continued to fish using his boat in the over 65 foot class as he had done since 1994. He had borrowed at that time to purchase the MV Áine Ide and her fishing licences and quota, all of which he has now lost together with his livelihood. It is said that his finances have been consumed in lengthy and costly litigation and that he now relies on such casual work crewing the boats of others as he can obtain, in order to make ends meet.

9. We were referred to a number of cases by the plaintiff/appellant in support of his claim that where there are special or unusual circumstances a discretion exists to depart from the general rule that costs should follow the event where a party has been wholly successful, including *Dunne v Minister for the Environment* [2008] 2 IR 775; *Veolia Water UK plc v*

Fingal County Council (No. 2) [2007] 2 IR 81 and *Grimes v Punchestown Developments Co. Ltd* [2002] 4IR 515. On the specific issue of the contention that this was a test case, we were referred to the observations of Clark J. in *Cork County Council v Shackleton* [2007] IEHC 334, where he said:

> *"Test cases can arise in many different circumstances. Where there is doubt about the proper interpretation of the common law, the Constitution, or statute law involving the private relations between parties, and where the circumstances giving rise to those doubts apply in very many cases, then it is almost inevitable, as a matter of practice, that one or a small number of cases which happen to be tried first will clarify the legal issues arising."*

10. The plaintiff/appellant maintains that his case was one of the small number of cases referred to by Clarke J.

Submissions on behalf of the Defendants/Respondents

11. The defendants/respondents point to this Court's two core findings, as set out in my aforementioned judgment of the 10th of July 2020.

12. The first was that the High Court was correct in its primary finding, in the trial of preliminary issues, that, "*notwithstanding how the proceedings have in fact been framed, the claim is in reality one which seeks to challenge decisions of a public law character, that accordingly judicial review time limits apply and the Plaintiff did not initiate his proceedings within those time limits. Moreover* [the High Court] *was correct that… the Plaintiff had not demonstrated any basis that could justify an extension of the time*."

13. The second was that *"the position in EU law is acte clair, namely that Ireland is entitled as a matter of procedural autonomy to apply domestic judicial review time limits… where in reality it is sought to challenge decisions having a public law character, even if the claim has been framed in part as one for Francovich damages for an alleged breach of EU*

law and… there is nothing to suggest a failure to comply with the principles of effectiveness or equivalence."

14. We were referred to the general rule that costs follow the event unless the court otherwise orders, as reflected in O. 99, r. 1(3) and (4) of the Rules of the Superior Courts 1986 and s.169**(**1) of the Legal Service Regulation Act 2015. It was submitted that the matters advanced by the plaintiff/appellant provide no basis to depart from that general rule.

15. In paragraphs 2.2 to 2.5 inclusive of their written submissions the defendants/respondents referred to several cases as supporting the following propositions:

> "2.2 In *Dunne v Minister for the Environment* [2008] 2 IR 775 at 783 and 784, Murray CJ. stated:
>
> > *'26. The rule of law that costs normally follow the event, ----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.'*
>
> The Court in *Curtin* v *Dáil Éireann* [2006] IESC 27 referred to disapplication of the general rule that costs follow the event in terms of *'the Court having a discretion for special reason to make a different Order.'* Laffoy J in *Fyffes plc v DCC plc* [2009] 2 IR 417 referred to it as *'exceptional circumstances'.*
>
> 2.3 … whilst Murray CJ in *Dunne* [2008] 2 IR 775 states [at para 27] '*there is no predetermined category of cases which fall outside the full ambit of the jurisdiction' [the general rule]* he did state was that '*decided cases indicate the nature of the factors which may be relevant*.'

2.4 Clarke J. in *Cork County Council v Shackleton* [2007] IEHC 334 stated, "*that all discretion needs to be exercised in a reasoned way against the background of having identified appropriate principles by reference to which the court should exercise the discretion concerned."*

2.5 In *Kerins v McGuinnes*s [2017] IEHC 217 the Divisional Court reiterated what was stated in *Collins v Minister for Finance & Ors* [2014] IEHC 79, i.e., that the starting point for any consideration of the question was *Dunne*, [and] then reprised the six-point summary of the relevant principles gleaned from cases where costs had been awarded to unsuccessful litigants set out by the Divisional Court in *Collins*. Such costs (either full or partial) have been awarded to a losing plaintiff:

1 'where the constitutional issues raised were fundamental and touched on sensitive aspects of the human condition;
2 in constitutional cases of conspicuous novelty, often where the issue touched on the aspect of the separation of powers between the various branches of government;
3 where the issue was one of far reaching importance in an area of the law with general application;
4 where the decision has clarified some otherwise obscure or unexplored area of the law;
5 where the litigation has not been brought for personal advantage and the issues raised were of special and general public importance;

> 6 however, 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.' "

16. The defendants/respondents maintain that the plaintiff/appellant has not met the requirement of showing the existence of special or exceptional circumstances such as would require a departure from the general rule in the interests of justice.

17. As to the specific contention that the issues that were raised and determined by this Court were such as to render it a test case, it did not involve fundamental constitutional issues, or issues of conspicuous constitutional novelty. It did not involve an issue of far reaching importance in an area of the law with general application. The Court's judgment did not clarify some otherwise obscure or unexplored area of the law. Moreover, the litigation was brought for the plaintiff/applicant's personal advantage and the issues raised were not of special and general public importance.

18. The defendants/respondents maintain that the Court in its judgment herein followed established law: *O'Donnell v Dun Laoghaire Corporation* [1991] ILRM 301, *Kildare Meats & Kildare Chilling Co. v Minister for Agriculture* [2004] 1 IR 92**,** *Shell E & P Ireland Ltd v McGrath* [2013] 1 IR 247 and *Express Bus v NTA* [2018] IECA 236. The Court held that Judicial Review time limits applied and that the plaintiff/appellant failed to institute proceedings within those time limits. It further held that there was no basis demonstrated for an extension of time and that it was *acte clair* that Ireland is entitled as a matter of procedural autonomy to apply Judicial Review time limits where in reality it was sought to challenge decisions of a public law character even if framed as a claim for *Francovich* damages. Moreover, there was nothing to suggest a failure to comply with the principles of equivalence and effectiveness.

19. On the hardship question, the defendants/respondents have properly drawn to our attention the case of *MN v SM (Costs)* [2005] 4 IR 461 (recently considered by this court in *Higgins v Irish Aviation Authority* [2020] IECA 277) where Geoghegan J. said:

> "*"In most instances, of course, the normal rule ------- will apply. But in cases where that may be perceived to cause a hardship, the court must exercise its discretion and the manner in which it exercises that discretion will differ from case to case.*"

20. It is accepted by the defendants/respondents that no order as to costs was made in *MN v SM (Costs)* on the grounds of the hardship it would cause. However, they maintain that the circumstances in *MN v SM (Costs)* can be clearly distinguished from those in the present case. In that case there was, on appeal, a substantial reduction in the quantum of damages that had been awarded by the court below for the plaintiff's personal injury. The case had proceeded in both courts as an assessment only. The error, corrected by the appeal court, was something the plaintiff could not be said to have caused or contributed to. In the present case, however, it is said that the plaintiff/appellant bears significant personal responsibility for the situation he is now in. He took no steps to initiate legal action until 2012 in circumstances where he was in effect challenging public law decisions from 2003/2005/2006. Indeed, he was dilatory even in terms of the plenary summons procedure he (wrongly) adopted, with his statement of claim only being delivered in 2015. In contrast, the defendants/respondents identified the underlying issues at an early stage as preliminary objections pleaded as part of their defence, and they sought a trial of the preliminary issues therein flagged and were successful in sustaining their preliminary objections. The appeal herein was brought in an effort to overturn the High Court's upholding of the defendants/respondents' preliminary objections, and the dismissal of the plaintiff/appellant's claims as being wrongly constituted, and outside of the applicable time limits.

21. The defendants/respondents therefore say that the plaintiff/appellant has not demonstrated any basis to justify the extension of time. It is thus, they further say, in the interest of justice that costs follow the event.

Decision

22. Having given careful consideration to the submissions of both parties, I am satisfied that as the defendants/respondents were entirely successful in this appeal and as no cogent reasons have been advanced which would justify a departure from the general rule stated in s.169(1) of the Legal Services Regulation Act 2015, they are entitled to their costs against the plaintiff/appellant. I reject the reasons advanced as justifying such a departure because I am not persuaded that the issues that were raised were of general importance, or that they resulted in a significant clarification of the law. Rather, as the defendants/respondents correctly maintain all the court had to do to resolve the issues raised was to apply established law. Moreover, there was no constitutional dimension to the case, and in so far as issues of European law that were raised, the relevant legislation was *acte clair* and did not require a reference either to interpret it or to determine the scope of its application. Further, as has been pointed out, there was nothing to suggest a failure to comply with the principles of equivalence and effectiveness. Accordingly, I do not consider that this case is properly to be characterised as having been a test case.

23. On the question of hardship, I agree with the defendants/respondents that the circumstances of this case are wholly different and readily distinguishable from *MN v SM (Costs).* While we accept that it may be onerous for the plaintiff/applicant to have to satisfy a costs order against him, and to have to be responsible for his own costs, this was misconceived litigation that was initiated by him. I do not think it is an appropriate case in which to exercise our discretion in his favour.

Ruling

24. I would refuse the plaintiff/applicant's application to be awarded his costs. In the circumstances I would confirm the Court's provisional ruling on costs. I consider that the defendants/respondents are entitled to the full costs of the appeal against the plaintiff/appellant, to include the costs of this costs application, all such costs to be adjudicated in default of agreement.

As this ruling is delivered electronically, Donnelly and Noonan JJ. have indicated their agreement with it.