THE COURT OF APPEAL

UNAPPROVED
NO REDACTION NEEDED
Appeal Number: 2022/148

Whelan J.
Noonan J.
Haughton J.

Neutral Citation Number [2023] IECA 131

IN THE MATTER OF THE COMPANIES ACT, 2014

AND IN THE MATTER OF SECTION 438 OF THE COMPANIES ACT, 2014
AND IN THE MATTER OF DAN MORRISSEY (IRL) LIMITED

ON THE APPLICATION OF PHILIP MORRISSEY

JUDGMENT delivered by Ms. Justice Máire Whelan on the 26th day of May 2023

1. This judgment is directed towards the issue of the proper allocation of costs in the above entitled appeal brought by Philip Morrissey against the order of the High Court made on the 20th May, 2022 which had determined a preliminary issue, to wit, that the appellant was not entitled to pursue a claim, *inter alia*, in his capacity as an officer or member or asserted creditor of the company Dan Morrissey (Irl) Limited (the company) for the purposes of securing an order of the High Court pursuant to s. 438 of the Companies Act, 2014 compelling receivers appointed over the company to grant to him an agricultural lease on terms nominated by him of agricultural lands situate at Powerstown, County Carlow in folios 6160F, 6161F, 20894F, 3349F, 7387F and 7388F, all County of Carlow, said to comprise in or about 110 acres or thereabouts for a term of 10 years at a rent nominated by him subject to the covenants and conditions specified by him in a draft Agricultural Lease exhibited. The application was brought by way of notice of motion dated the 29th March, 2022 grounded upon, *inter alia*, the pleadings in High Court proceedings 2019-294-COS his

grounding affidavit of the 29th March, 2022 and two subsequent affidavits sworn by him in the said proceedings. The High Court judgment [2022] IEHC 276 was delivered on the 13th May, 2022.

2. The appellant did not succeed in respect of any aspect of his claim before the High Court. His appeal against that decision has been wholly unsuccessful [2023] IECA 89. The respondents being wholly successful in this appeal contended that they are entitled to an order for costs pursuant to the statutory regime and in particular section 169 of the Legal Services Regulations Act, 2015 and Order 99 of the Rules of the Superior Courts (recast). Nevertheless, the appellant contends that in the circumstances of this case no order as to costs ought to be made as hereinafter outlined.

3. The appellant has significant direct personal and commercial interests in the litigation and in the process of the receivership. In addition to his shareholding and directorship of the company, and his assertion that in substance he was a creditor of the insolvent company - though apparently he had not obtained any judgment against it - he also informed this court that he had signed a personal guarantee for the benefit of AIB in respect of the indebtedness of the company and thereafter on the 17th December, 2015 had consented to judgment in favour of AIB on foot of the said guarantee, in the sum of €24,970,000.

4. In a written submission dated 10th May, 2023 Mr. Morrissey, who was self-represented, contends that there should be no order as to costs in respect of his unsuccessful appeal and further seeks an order setting aside the High Court order for costs.

Arguments of Mr. Morrissey

5. The appellant contends that in his view, since the appointment of the receivers, which apparently took place on the 18th June, 2014, whereas the company's agricultural lands were being leased out to farmers pending sale by the receivers the said lands were not being operated with due regard to *"... proper husbandry knowledge of agricultural land"*. He

further asserted as being a matter of relevance that the receivers had *"engaged an Auctioneer whose primary business was in commercial property"*. He asserts, repeating claims advanced in the course of his application before the High Court and in the course of the appeal that *"[n]o cultivation of lands was conducted for a period from October 2021 until 5th April 2022 following the issue of my motion and without notice to the Court."* No basis was identified for the implicit assertion that it was necessary for the receivers, who were appointed by the bank under a security instrument nine years ago, to furnish notice to the court in respect of the granting of agricultural lettings on an 11- month basis in the course of an out-of-court receivership.

6. By way of justification for his issuing the motion on the 29th March, 2022, in circumstances where subsisting short-term lettings operated over part of the lands, he states:-

> *"I had believed that no use of the land was being made up to March 2022 hence my request on the 16th March 2022. I was unaware that the lands had been leased to Kevin Morrissey from 1st November 2020 to the 30th September 2021 and further extended by agreement for another 11 months."*

In that belief he was entirely mistaken as he acknowledges. He complains that the said lease was referred to in correspondence from McCann Fitzgerald, solicitors for the receivers dated the 25th April, 2022 but had not been produced in evidence. Kevin Morrissey (the lessee in occupation) is, apparently, a brother of the applicant. He further states *"If I had been aware of that lease, I would not have issued these proceedings."*

7. Essentially the appellant asserts that had the information which was subsequently provided by McCann Fitzgerald in their letter of the 25th April, 2022 been provided to him prior to the 29th March, 2022 he would not have issued the motion pursuant to s. 438 of the Companies Act, 2014 on the latter date. That assertion needs to be stress tested against the salient facts as hereinafter outlined and the appellant's own conduct.

Aarhus Convention

8. The appellant invokes the decision of the Supreme Court in *Heather Hill Management Company CLG and McGoldrick v An Bord Pleanála & Ors.* [2022] IESC 43. He contends, in reliance on the said judgment, that he was apparently unaware of the Aarhus Convention *"until I became aware of the Heather Hill decision by the Supreme Court."* He further asserts: -

> *"Neither the High Court nor this Court advised me of my rights to apply for a protective costs order when deciding the costs issue against me and I was unable to apply on an interlocutory basis."*

He further asserts:

> *"There was considerable emphasis by me on the need to protect the environment in the case I presented in the High Court and on appeal."*

He seeks that by virtue of the Aarhus Convention and his asserted rights thereunder this court should make no order as to costs and further should set aside the High Court order in respect of costs made against him.

Purely personal claim

9. As is clear from the notice of motion and the affidavits sworn in the application which were put before the High Court, the application sought to be pursued by the appellant was advanced purely for his personal benefit. In particular, he sought, based on novel, idiosyncratic and ultimately erroneous arguments and legal propositions that he had an entitlement, personal to him, to be granted a lease over 110 acres or so of the indebted company's lands. He invoked the jurisdiction of the High Court pursuant to s.438 of the Companies Act 2014 for the purposes of securing a coercive order that would compel the receivers to give effect to his demand. He did so in a context where the receivership had

been in train for many years and in the course of same judgment had been obtained by the bank against him as personal guarantor of the company's indebtedness for €24,900,000 approximately. He made clear to the court that he wished to resile from the said judgment in which consent orders had been made and that litigation was in train seeking to set aside the said consent order obtained against him and otherwise impugning the validity of the appointment of the receivers.

10. Whereas general comments were made with regard to his views concerning husbandry on the subject lands and alleged farm practices, a perusal of the affidavits and exhibits make clear that these assertions were advanced to buttress his application that he ought to be granted the lease in question in preference to the existing short-term agricultural tenancies.

11. It is clear from the papers that there was evidence before the High Court of a fraught relationship reaching back over many years between the receivers and Mr. Morrissey. In addition at least some tensions had emerged from time to time between Mr. Morrissey and tenants who had been put into occupation of parts of the company's land holding or their workmen.

The correspondence

12. Albeit that it is surprising that he was unaware that his own brother was a tenant in occupation of the subject lands on foot of a letting agreement, which said letting agreement subsisted at the date of the institution of these proceedings, the appellant acknowledges that with effect from the 25th April, 2022 he was actually aware of the existence of the subject lease the term of which had initially ran from the 1st November 2020 to the 30th September, 2021 and which had thereafter been extended for a further 11 months.

13. Mr. Morrissey's assertion that had he known of the said lease *"I would not have issued these proceedings"* must be considered in light of the fact that from and after the 25th April, 2022 he continued to actively pursue the said application before the High Court in the full

knowledge of the existence of the said lease and indeed filed his third affidavit on the 27th April, 2022. Whilst in the latter affidavit the appellant recalls that subsequent to the issuing of the motion he had taken issue with ploughing activities on the lands, he complains that details of the current lease over the lands had been *"withheld"* from him. He demanded proof on affidavit that named individuals were the employees of certain lessees. He further acknowledges that he had gone onto the lands "*to enquire of the machine drivers, who they were and for whom they are working…"* He also complained that potatoes had been sown twice in a three year period between 2015 and 2017, asserting that same was *"not permitted as it can damage the soil. It is recommended at least every four years preferably every seven years and I know that no potatoes were not (sic) sown over the last four years."*

14. It is very evident that the various assertions and allegations being advanced by the appellant were not directed towards any general environmental or public law consideration nor did they identify any legal basis to demonstrate violation or breach of environmental law but the focus was rather towards impugning the methodology of tenants who had been put into occupation of various parts of the company's agricultural lands by the receivers in a context where to succeed in obtaining the order he sought pursuant to s.438 of the Companies Act, 2014 from the court compelling the receivers to grant him the lease of the lands he would also require ancillary orders terminating the existing agricultural lettings. Thus, these assertions were made wholly and exclusively in pursuance of a personal, commercial objective, namely for the purposes of procuring an order from the High court compelling the receivers against their will to grant him a ten year agricultural lease on terms of his choice, a claim which the High Court - and this court on appeal - found he was not entitled on the facts of this case to pursue.

15. The evidence of the conduct of the proceedings from and after the 25th April, 2022 up to the conclusion of the appeal in this court demonstrates that when in possession of the

knowledge that his own brother was a tenant of the lands Mr Morrissey did not withdraw the application which tends to cast some doubt on his assertion that had he known of the lease prior to the 29th March 2022 he would not have issued the application pursuant to s438 in the first instance.

Letter of the 1st April, 2022

16. McCann Fitzgerald in their letter of the 1st April, 2022 raised a series of issues, in particular enquiring as to the legal basis upon which the appellant contended that the High Court had jurisdiction to grant the orders sought in his motion.

> *"We note that while you have asked the Receivers to agree to grant you a lease, neither the Motion nor your affidavit assert that you have any contractual or other legal right to be granted an agricultural lease over the relevant land. We do not believe that the High Court has any jurisdiction to compel receivers to accede to a request to grant a person a lease over agricultural land."*

17. The stance adopted by McCann Fitzgerald in that regard has been upheld as correct both by the High Court and in this court. On the issue of costs the said letter stated: -

> *"We fully reserve our clients' position in relation to the Motion, including the right to seek an order dismissing the Motion… on the basis the Court does not have jurisdiction to grant the order sought. We will rely on this letter for the purpose of applying to fix you with the costs of such application."*

18. Thus, it is clear that the likelihood of a preliminary issue as to jurisdiction being raised was specifically communicated to the appellant in a timely fashion and further it was made very clear that in the event that he unsuccessfully pursued his claim an order for costs would be sought against him. In my view this offered fair warning and clear notice to the appellant of what ought to have been self-evident, namely that were he to pursue the novel s.438 claim unsuccessfully an order for costs would be sought against him.

Aarhus Convention

19. The Aarhus Convention is concerned with the protection of the environment. The EU (EIA) Directive 2011/92/EU implements its terms at least in part. It is directed towards and concerns the evaluation and assessment of the effects of certain public and private projects on the environment. It is to be borne in mind that, as was observed by Hogan J. in *Kimpton Vale Limited v An Bord Pleanála* [2013] IEHC 442, the Environment (Miscellaneous Provisions) Act, 2011 did not make the Aarhus Convention part of the domestic law of the State but rather approximated the national statutory provisions to the requirements of Art. 9(3) and (4) of the Aarhus Convention by providing for a modified costs rule. Indeed, some commentators, including Browne and Simons in their text *Planning Law* (3rd ed., Round Hall, 2021) at para. 11-694, suggest that the national costs provisions to be found in the 2011 Act arguably go further than what is provided for in the Aarhus Convention which merely requires the costs not be prohibitively expensive.

20. It is to be recalled that in the instant case at no time in the course of the hearing in the High Court or in this court in the course of the appeal did the appellant ever contend that the litigation was concerned with protection of the environment or any public law issue or that the outcome of the litigation would have an impact on development affecting the environment having due regard to the tenor and terms of the Aarhus Convention "UNECE Convention on Access to Information, Public Participation and Decision-making and Access to Justice in Environmental Matters" which was ratified by the State in 2012.

21. Throughout the conduct of the litigation the basis upon which the proceedings were brought and the arguments advanced on affidavit and in written and oral submissions were directed towards the alleged entitlement of Mr. Morrissey to be granted a lease for his private and personal use subject to the terms he nominated. The lease was intended to be

granted to him personally for his private use. It is clear that the overriding objective of the application brought by him pursuant to s. 438 of the Companies Act, 2014 was to secure a valuable lease interest over the property.

22. Enforcement of the Aarhus Convention is vested in the Aarhus Convention Compliance Committee which comprises a body of academics and legal practitioners with expertise in the field. As was observed by Lord Carnwath in *Walton v Scottish Ministers* [2012] UKSC 44 at para. 100 decisions of the said Committee *"... deserve respect on issues relating to standards of public participation".*

23. Mr. Morrissey identifies no reason for the lateness of his application other than asserting that the courts were obliged to inform him of the possibility of making an application for a relevant PCO order. He has not identified any issue of general public importance in connection with the non-granting to him of the lease. The lands are intended to be sold presently by the receivers and have been the subject of short-term agricultural lettings. Manifestly, Mr. Morrissey disagrees with the lettings and the usage the agricultural tenants – including, apparently, his own brother - have put the lands to, but at its height, it is clear that that opinions may vary as to which is the better way to operate and maintain an agricultural holding or managing and operating it on a temporary short-term basis pending its sale in the due process of completion of the receivership. Mr. Morrissey disagrees with the methodology being used by the current tenant farmers. The issue was a subsidiary point at most – made to buttress his own private claim to secure a 10-year lease of the lands. There was absolutely no public interest asserted in pursuance of the claim. It is significant that the appellant had a fundamental and significant private interest in the outcome of the litigation. The substance of the appellant's claim was to acquire a valuable long leasehold interest on a significant farm holding and thereby to impede the due completion of the receivership at least for the term of the lease.

S.169

24. The burden rests with the appellant to demonstrate that the general rule which is that costs shall follow the event unless the court for special cause otherwise directs, is applicable. There is no doubt but that Mr. Morrissey is the unsuccessful party. As was observed by Clarke J. (as he then was) in *Veolia Water UK Plc. v. Fingal County Council (No. 2)* [2007] 2 IR 81 at 85 the overriding starting position ought to remain that costs should follow the event. Litigants who are required to bring a case to court in order to secure their rights are, *prima facie*, entitled to the reasonable costs incurred in maintaining and pursuing the proceedings. Likewise, litigants who successfully defend proceedings are *prima facie* entitled to costs incurred in defending a claim where same has ultimately been determined by a court of competent jurisdiction to be unmeritorious in whole or in part.

25. Even if the appellant had made out an argument in a timely fashion for a PCO the jurisprudence in this jurisdiction strongly indicates that the application would have been and ought to be refused. Kelly J. (as he then was) in *Friends of the Curragh Environment Limited v An Bord Pleanála (No. 1)* [2006] IEHC 243, [2009] 4 IR 451, having considered the judgment of Laffoy J. in *Village Residents Association v An Bord Pleanála (No. 2)* [2000] 4 IR 321, attached weight to English jurisprudence including the decision in *R. (On the application of Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ. 192, [2005] 1 WLR 2600 where the concept of a PCO and the conditions for making same were analysed. Lord Phillips MR at paragraph 74 of the judgment had identified the following principles governing the approach of a court to the making of a protective costs order and the factors which the court ought to be satisfied of prior to acceding to such an application.

(i) The issues raised are of general public importance.

(ii) The public interest requires that those issues should be resolved.

(iii) The applicant has no private interest in the outcome of the case.

(iv) Having regard to the financial resources of the applicant and the respondents and the amount of costs that are likely to be involved it is fair and just to make the order.

(v) If the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in so doing.

26. Kelly J. had also further concurred with the observations of Lord Phillips in *Corner House* where the latter had, *inter alia*, observed: -

"2. If those acting for the applicant are doing so pro bono this will be likely to enhance the merits of application for a PCO.

3. It is for the court, in its discretion, to decide whether it is fair and just to make the order in the light of the considerations set out above."

Conclusions

27. I am satisfied that the proper allocation of costs pursuant to s.169 does not require to be adjusted by reference to any belatedly asserted public interest in the proceedings. These proceedings were pursued for the exclusive private benefit of one individual in pursuance of his own commercial interests. Provisions such as s. 50B of the Planning and Development Act, 2000, as amended were not engaged at all, were never asserted, invoked or alluded to.

28. It is important to recall the ambit of the ratio in *Heather Hill*. Essentially the court clearly determined that any challenge to a decision made pursuant to a statutory provision which gives effect to the listed Directives falls within the costs protection provided for in s. 50B. This is not such a case. The receivers in the discharge of their powers, functions and obligations were of the view that they did not wish to grant - indeed were entirely opposed

to the proposal that the court should make an order effectively compelling them to the grant to the appellant a lease on the terms sought. That was a professional decision made in the course of the receivership by expert receivers who had at their disposal professional expertise and advice in addition to their own expertise. Their decision not to acquiesce in the demand of the appellant to grant him a lease could not on any stretch be characterised as a decision taken pursuant to any relevant statutory provision that would bring Mr Morrissey within the ambit of the *Heather Hill* decision and accordingly in my view section 50B did not apply.

29. That said, the appellant has not offered any credible basis whereby the general principle governing costs might be varied in this instance having due regard to s. 168(2) of the Legal Services Regulations Act, 2015 and in particular s. 168(2) which in effect, as has been held by Murray J. in *Heather Hill* offers a statutory basis for Veolia orders in certain instances.

30. In the instant case we were dealing with a preliminary issue. The issue is one of commercial and personal importance to the appellant. There was no public interest aspect evident or asserted. The proceedings were pursued for purely personal and commercial benefit and advantage of Mr. Morrissey. There is no public law dimension discernible in same. Had he succeeded he would have achieved a personal, private windfall, namely an entitlement by virtue of being an officer, member and/or asserted creditor of a company to compel receivers to grant him a valuable lease for a duration of 10 years over the incumbered property on terms (including duration and rent) of his choosing.

31. Whilst it is understandable that the appellant seeks to cloak himself in the protections afforded by Aarhus, including s. 50B of the Planning and Development Act, 2000, as amended, contrary to the appellant's assertions, his application when duly considered in the context of the grounding affidavits and exhibits cannot fairly be characterised as a *bona fide*

action to protect the environment. It was an action brought for his own personal and private advantage. The claim was entirely novel and pursued without any regard to any identified relevant precedent or principle. The claim was agitated based on a misunderstanding of key provisions of the Supreme Court of Judicature (Ireland) Act, 1877, the powers and functions of receivers as the law currently stands and a misunderstanding of jurisprudence from another jurisdiction. The application was not brought *"as a member of the public"*, it was brought on an assertion that the appellant's *locus standi* derived from s. 438 of the Companies Act, 2014.

32. In the instant case the appellant is demonstrably quite unable to bring himself within the cohort of persons concerned and who would be in a position to invoke the provisions of the Aarhus Convention. At no point until after the conclusion of the Court of Appeal hearing and where judgment was handed down were any such rights invoked or asserted. The complexion of the litigation is purely private in nature. It cannot on any basis be termed as an environmental case. It does not engage any directly effective provision of EU law giving rise to an entitlement to assert rights imposed on States or derived from the Aarhus Convention.

33. The courts have no function in advising proofs or informing parties on a selective basis as to possible rights or entitlements. There is no basis for the appellant's contention that either the High Court or this court ought to have advised him of his asserted *"rights to apply for a protective costs order"*. It is a matter for litigants to make their own litigation choices and decisions.

Costs to follow event

34. Accordingly, I am satisfied that the respondents were *"entirely successful"* in the within proceedings, both in the High Court and in this court, same being constituted civil proceedings. Having due regard to s. 169(1) of the Legal Services Regulation Act, 2015, as

amended, the respondents are entitled to an award of costs against Mr. Morrissey who has not succeeded in any respect in these proceedings in either court.

35. None of the arguments and contentions advanced by the appellant identify any valid legal basis whether pursuant to statute or the Rules of the Superior Court, authority or precedent that would warrant or justify deviating from the general rule as to costs in circumstances where the respondents have prevailed in both courts in resisting the application and orders sought. Accordingly, no basis exists for interfering with the determination of the High Court that the respondents are entitled to their costs and likewise, for all the reasons stated above, they are also entitled to their costs of the appeal in this court. In respect of both, same to be ascertained in default of agreement.

36. Noonan and Haughton JJ. concur in this judgment as to costs.