



THE COURT OF APPEAL

[2023] IECA 58
Appeal Number: 2020/133

Murray J.
Whelan J.
Faherty J.

BETWEEN/

INLAND FISHERIES IRELAND

RESPONDENT

- AND -

PEADAR Ó'BAOILL, JOHN GERARD BOYLE AND JOHN BOYLE

APPELLANTS

JUDGMENT of Ms. Justice Máire Whelan delivered on the 15th day of March 2023

Introduction

1. This judgment pertains to the issue of the proper allocation of costs of the within appeal, in respect of which judgment was delivered on the 18th day of November, 2022. At issue was the entitlement of the respondent to obtain injunctive relief restraining the appellants from asserting fishing rights over part of the Gweebarra River in north Donegal. The proceedings have had a long and involved history, including an extensive reserved judgment of Ms. Justice Laffoy delivered on the 19th December, 2012 after the conclusion of a six day hearing. The Supreme Court thereafter dismissed the appellants' application, *inter alia*, to adduce new evidence in support of their claims and assertions - reported at *Inland Fisheries Ireland v Ó'Baoill & Ors.* [2015] 4 IR 132. The appellants then withdrew their substantive appeal against the judgment and orders of Laffoy J.

2. In 2018 the respondent invoked the summary jurisdiction of the court in light, *inter alia*, of the decision in *Abbey International Finance Limited v Point Ireland Helicopters Limited* [2012] 2 IR 694 seeking a direction that its entitlement to certain reliefs sought at paras. 1, 3, 4 and 5 of the Writ be heard on affidavit only. The appellants strenuously resisted the said application seeking, *inter alia*, to adduce further new evidence said to have come to light more recently and at all events subsequent to the conclusion of the previous appeal before the Supreme Court.

3. The matter came on for hearing before Pilkington J. and in her judgment dated the 12th December, 2019 [2019] IEHC 943. Having made certain orders on consent pertaining to the map to be annexed to the orders as made she granted a declaration that the appellants did not have the right to fish the Gweebarra fishery in question shown on the relevant map without a permit issued by or with the authority of Inland Fisheries Ireland (the respondent). She further granted, *inter alia*, a perpetual injunction restraining the appellants and all persons acting in concert with them together with all persons having notice of the making of the said order from entering upon and/or fishing the Gweebarra Fishery without individual permits issued with the authority of Inland Fisheries Ireland. Further perpetual injunctions were granted which in substance recognised the entitlement of Inland Fisheries Ireland to control fishing of the said fishery to persons holding valid permits from Inland Fisheries Ireland. The appellants launched extensive appeals. The appellants appealed to this court. No ground of appeal by the appellants met with success before this court and the judgment of this court was delivered as aforesaid [2022] IECA 266.

High Court costs

4. With regard to the High Court costs an order for costs had been made against the appellants by the trial judge. This court in its judgment (para. 157) upheld the said order, finding that the trial judge was entitled to make the said orders as she did in circumstances

where a number of concessions had been made by the respondent in relation to the costs of the action.

Costs of this appeal

5. The court's provisional view was that Inland Fisheries Ireland was entitled to the costs of the appeal having due regard to the provisions of s. 169 of the Legal Services Regulation Act, 2015 and O. 99 of the Rules of the Superior Courts. That view was based on the essential premise that the respondent had been entirely successful in its opposition to the within appeal. The appellants, whilst accepting the general principle that costs follow the event, contend that they can identify good and substantial reasons why this court might depart from the said principle, including as follows: -

- (a) the special and unusual circumstances of the case;
- (b) the public interest;
- (c) the "test case" nature of the litigation; and
- (d) certain special factors said to engage the discretion of this court pursuant to s. 169(1) of the Legal Services Regulation Act, 2015 including in particular:
 - (i) conduct of the appellants before and during the proceedings;
 - (ii) reasonableness of the appellants in raising, pursuing and contesting issues in the proceedings;
 - (iii) the manner in which the appellants conducted all or any part of the case.

Thus the appellants assert that the court might deviate from the normal procedure having due regard to s. 169(1)(a), (b) and (c) of the Legal Services Regulation Act, 2015.

Submissions and arguments of the appellants

6. The appellants trace the history of the litigation, indeed reaching back prior to the institution of the proceedings before the High Court in 2009. In particular, it is asserted that

the respondent's predecessor, the Northern Regional Fisheries Board, had sought to prosecute anglers for fishing on the Gweebarra River in July of 2007. Further it is contended that the proceedings might more appropriately have been instituted before the Circuit Court and that NRFB had in effect taken steps "*to elevate the matter to the High Court, at great cost, expense and inconvenience to all parties (sic)*".

7. The appellants find fault with the conduct of the respondent and the respondent's predecessor, contending that it was "*appropriate and reasonable*" for them to:

"test the assertions of title made by the Plaintiff given that the dispute lay in the decision of the Northern Regional Fisheries Board to enter upon the fishery, terminate the long existing public user of the Gweebarra, privatise the fishery and impose commercial tourist day permits on persons such as the Defendants and then use its public powers to prosecute many anglers."

8. It is further contended that the court should have regard to the fact that the appellants "*had no personal commercial gain in the outcome of these proceedings*".

9. The appellants further assert that at the time of institution of the proceedings they had in good faith and with good reason "*... believed at the outset of the proceedings that there were public rights to fish in the Gweebarra given that such rights had been exercised for as long as local memory went...*"

10. The appellants further contend that from 2012 onward when historical research demonstrated that a several fishery had existed in the 19th century they had not pursued further their counterclaim but rather had set about endeavouring to establish what course the ownership of the fishery had taken. It is asserted that "*... this legitimate concern being based on entries in the official Rating Records which show the fishery de-rated and noting the fishery being in possession of the local community.*" In that regard it is further asserted

“there was evidence that the members of the local community had successfully defended an action for trespass”.

11. The appellants characterise a contended for public interest dimension to their pursuing this appeal in the following terms:

“In the context where the IFI were continuing with these proceedings with the objective of obtaining orders binding third parties and with the intention of cementing its position in relation to the multiple prosecutions in the District Court it was in the public interest that the Defendants challenge and test the title relating to the Fishery. Indeed the decision of the Plaintiff to call in aid the doctrine of ‘jus tertii’ as an estoppel of the Defendants testing the title to the fishery, runs counter to the very purpose for which District Court Prosecutions were adjourned from time to time and the very purpose for which it was first agreed that proceedings would be brought in the Circuit Court.”

12. The appellants assert that a letter of authority *“from the Minister in 2012”* which had authorised the respondent to manage the Gweebarra Fishery should not be available in relation to issues pertaining to the northern bank of the fishery, it is further asserted that efforts to settle should be taken into account and, in particular, a letter written on behalf of the appellants in or about the 18th November, 2016 and the proposals in relation to compromise therein contained. Overall, the appellants contend that there are good grounds for this court to award them their costs of the action or in the alternative to make no order as to costs.

Position of the respondent

13. The respondent succinctly points out that none of the submissions on costs are *“properly directed towards the issue before the Court, i.e. the costs of this appeal”*. Briefly put, the respondent points out that the submissions are deficient in offering a basis to deviate

from the order proposed by the court being, it is said, not directed towards the costs of the appeal in any coherent or discrete way but rather envisages that the court would revisit a whole range of issues in the proceedings and somehow determine that the appellants were right about issues in respect of which various courts, including the Supreme Court have determined that they were in fact wrong. It is further asserted that the appellants have over time raised various new issues, attempted to reopen issues already determined and have resisted the conclusion of the proceedings.

Analysis

14. Throughout the years of this litigation the appellants have pursued vastly differing propositions with regard to their asserted entitlements to fishing rights over the relevant portion of the Gweebarra River shown on the map annexed to this judgment and which was the subject of the order of the court by Pilkington J. in December, 2019. At various points in time it was asserted, *inter alia*, that there was a general public right to fish enjoyed over the portion of the fishery in question. At other times it was contended that they had procured permission from the lawful riparian owners to fish such as obviated the necessity to obtain a fishing permit from Inland Fisheries Ireland. Elsewhere it was asserted that they had rights in the nature of appurtenant rights given the apparent nexus between the homesteads of various relatives or ancestors and the respective appellants. Further it was asserted that the rights derived from a claim that the fishery had been “... *traditionally fished by members of the Rosses Anglers Association of which John Boyle of Dungloe is a member*” and it was further claimed that the said fishery had been “... *fished by all of them at various times throughout their lives*”. A further argument contended that they had certain easements including at the outset an understanding that there was a public right to fish which they enjoyed.

15. None of these assertions withstand any meaningful scrutiny.

Venue

16. Insofar as it is asserted that the within proceedings ought not to have been instituted in the High Court no valid basis has been demonstrated for that proposition. It is asserted that the fisheries are not rated. No evidence was put before the court on the issue.

17. Insofar as it is asserted that the within proceedings ought to have been instituted before the Circuit Court, it is well accepted that for an appreciable period of time there had been doubts or uncertainty as to whether the Circuit Court did enjoy jurisdiction in relation to any property which lacked a rateable valuation. That uncertainty was conclusively determined by the Supreme Court in *Permanent TSB v Langan* [2017] IESC 71. Doubts in parts stemmed from the construction of the Valuation Act, 2001 which had been commenced by virtue of S.I. 131 of 2002.

18. It is noteworthy that the uncertainty pertaining to the jurisdiction of the Circuit Court continued for an appreciable period of time during the currency of the within litigation and in particular up until 2017. The net effect of the Supreme Court decision was to clarify that the Circuit Court enjoyed jurisdiction to hear and determine proceedings in cases where the property either had a rateable valuation which did not exceed €253.95 or in all cases where the property had never been the subject of a rateable valuation at all in the first place. It is noteworthy that the appellants themselves never brought an application seeking to remit the proceedings subsequent to the delivery of the *Langan* judgment which is reported at [2018] 1 IR 375. In my view the assertion implicitly contending that the proceedings ought to have been instituted before the Circuit Court in the first instance is unmeritorious and the appellants do not offer any cogent or persuasive basis for their contentions that the proceedings (a) either ought to have been instituted in the Circuit Court or been the subject of a remittal to the Circuit Court or (b) that the appellants are entitled to have the costs of the within proceedings measured on the Circuit Court scale.

19. The clear impression one is left with regard to the varying bases on which the claims were being pursued by the appellants is that a methodology was adopted of raising and pursuing asserted rights to fish the Gweebarra Fishery without a permit from the respondent on one basis until such time as the respondent was in a position to disprove the assertions said to be the foundation of same. Then the appellants proceeded to adopt and pursue a fresh line of argument in support of their contention. The appellants' claims were based on ever shifting sands, were unmeritorious, and relied on supposition and conjecture. Each in turn was sequentially demonstrated to be entirely baseless and devoid of any merit.

20. I am satisfied that the appellants could not seriously have believed that a lawful entitlement to fish the river vested in them on any basis known to the law by virtue of the fact that certain tributaries of the said river Gweebarra had bounded homesteads of Peadar Ó Baoill and John Gerard Boyle. Neither could it have ever been a stateable basis for advancing the claims made that the appellant John Boyle had acquired legal entitlements by virtue of the fact that he was a member of Rosses Anglers Association and by virtue of the said membership had an entitlement to fish the said fishery without a licence in the manner asserted.

21. Even if, as is asserted, the appellants believed they had some legal basis for fishing on the river it was very evident from the date of the delivery of the judgment of Laffoy J. in the High Court in 2012 in respect of the southern boundary - that at least in regard to same - no such entitlements existed at all. Indeed, it is noteworthy, as is evident from the observations of the said judge in the course of her judgment that the appellants' contentions altered and changed throughout the six-day hearing before her as to the legal basis on which they founded their asserted entitlement to fish without a permit. It is noteworthy that in substance they abandoned their counterclaim and indeed Laffoy J. made an order striking it out. They ultimately resiled from their contention that a public right to fish existed over the relevant

fishery which enured to their benefit. Neither did they ultimately pursue an entitlement to any easement or right which would have vested in themselves in law conferring such entitlement. As Laffoy J. observed:

“... From the outset, it was nigh impossible to discern the nature of the right to fish which the defendants were contending they enjoy in relation to the segment of the Gweebarra River under consideration...”

It is very clear from the judgment that they had established no right to fish on any basis over any part of the southern fishery the subject of the said judgment.

22. Although subsequently documentation was found which altered the chain of devolution of title, it conferred no benefit whatsoever on the appellants and did not and could not have offered a legal basis on which they could justify in law fishing the fishery without the relevant permit as required by Inland Fisheries Ireland.

23. The additional and new evidence compiled from time to time makes for evidence pertaining to an interesting social history. It does not offer any stateable basis for the appellants' contention that they enjoyed any right at law to fish on the relevant fishery without a valid permit granted by Inland Fisheries Ireland.

24. There was never any realistic prospect that the documentation assembled in terms of transcripts of hearings and the observations, remarks and statements of a variety of witnesses before the hearing at Glenties Courthouse in 1911 and elsewhere could be sufficient to dislodge the legal effect of the documentary title demonstrated to exist and pertaining to the property. There is no basis for contending that the deed of 1908 is suggestive of a trust. The assertion is pure speculation, unsupported by any probative evidence.

25. The appellants' contention that a proposal advanced in November 2016 seeking a Fishery Inquiry pursuant to the provisions of the Fisheries (Consolidation) Act 1959 amounted to an effort to settle the within proceedings is wholly unconvincing. The appellants

had no basis in law for pursuing their claims. A Fishery Inquiry was wholly unwarranted and disproportionate and was made at a time when the appellants ought to have considered withdrawing their claims.

26. Further, I am satisfied that the respondent advanced quite correctly and reasonably the *jus tertii* principle in opposition to the repeated creative arguments being advanced on behalf of the appellants based on further new and additional documentation which did not amount at any stage to probative evidence. This was a valid litigation decision taken by Inland Fisheries Ireland at an advanced stage and after extensive hearing had taken place and a clear judgment been delivered by Laffoy J. as long ago as 2012. That step was taken in a measured and reasonable manner as befits a statutory body and was only advanced at a point where the defendants had unequivocally abandoned all claims to enjoy a vested title over the said rights and furthermore all claims to hold or enjoy an easement or profit á prendre in respect of same.

27. I am satisfied that the conduct of the respondent throughout both before and during the proceedings was proportionate, reasonable and fair and did not take the appellants short in any way. Finality is necessary in litigation. The *jus tertii* doctrine point raised was unanswerable and it ought to have been relatively evident to the appellants that such was so. In that regard it is noteworthy that the appellants had adequate opportunity to consider the *jus tertii* point and to evaluate their prudence of continuing. Their decision to pursue the within appeal was ill judged and no valid basis was identified for doing so.

28. I am satisfied that it was wholly unreasonable for the appellants to raise, pursue or assert their claims and contentions in the manner in which they did even after they had in substance abandoned their asserted entitlement to hold or enjoy interests as of right either under public law or private law in respect of the said fisheries both on the northern boundary as well as the southern boundary. As had been observed by Laffoy J. the counterclaim

advanced in the High Court before her was ultimately “... *wholly inconsistent with the case advanced...*” at the trial. She had dismissed the counterclaim in relation to the southern side of the fishery and that is evident from the terms of her order of the 7th February, 2013. Further, the order dismissing the entire counterclaim was made on consent on the 13th March, 2020 by Pilkington J. in the High Court. Thus years of litigation had been expended with varying documents emerging from time to time, occasionally of little greater value than their anecdotal interest, which in turn were each sequentially posited by the appellants to constitute a legal basis which was said to entitled them to fish the Gweebarra Fishery without a permit. None of those assertions were maintainable.

Conclusions

29. The orders made in the High Court in respect of costs stand. The appellants have offered no legitimate basis for why this court might deviate from the essential rule enshrined in s. 169(1) of the Legal Services Regulation Act, 2015 that costs should follow the event. Inland Fisheries Ireland has been entirely successful in opposing the within appeal and is entitled to its costs as against the appellants jointly and severally as appellants who were not successful in the within proceedings. No basis has been identified for contemplating or entertaining any alternative order. The conduct both before and during the proceedings on the part of Inland Fisheries Ireland is not in any way blameworthy. Further, I am satisfied it was not reasonable for the appellants to raise, pursue and contest all of the issues being agitated in the counterclaim in circumstances where those issues have had to be dismissed and struck out by the courts. Further, the manner in which the appellants conducted the litigation serially raising and pursuing discrete issues based on various, said to be recently discovered documents is unsatisfactory, added to the burden of costs, escalated delay and created a significant impediment in the expeditious conclusion of the litigation. Accordingly, the respondent Inland Fisheries Ireland is entitled to an order for costs as

against the appellants in respect of this appeal, to include the costs of the submissions in respect of the issue of Costs, for which the appellants are to be jointly and severally liable, said costs to be ascertained in the ordinary way in default of agreement.

30. Murray and Faherty JJ. concur with the above judgment.