THE COURT OF APPEAL

Record Number: 270/2022
Neutral Citation Number [2024] IECA 61

Whelan J.
Faherty J.
Haughton J.

BETWEEN/

THE CRIMINAL ASSETS BUREAU

APPLICANT/
RESPONDENT

- AND -

STEFAN SAUNDERS AND TAMMY SAUNDERS

RESPONDENTS/
APPELLANTS

Ruling of Ms. Justice Faherty on costs dated the 20th day of March 2024

1. In a judgment ("the principal judgment") delivered on 15 February 2024, the Court dismissed the appellants' appeal against the Order of the High Court (Owens J.) in which Owens J. made an Order pursuant to s.3(1) of the Proceeds of Crime Act 1996 (as amended) prohibiting the appellants and any person with notice of the making of the Order from disposing or otherwise dealing with or diminishing the value of property located at Hazelbury Park, Dublin 15. The property in question is a house in the joint ownership of the appellants and is their family home.

2. At para. 117 of the principal judgment the Court opined that as the appellants have not succeeded in their appeal, it would seem to follow that the respondent (hereinafter "the

Bureau") should be awarded its costs but that if any party wished to seek some different costs order to that proposed they should so indicate to the Court of Appeal Office within 14 days of the receipt of the electronic delivery of the principal judgment. It was further stated that if no indication was received within the 14-day period, then the order of the Court, including the proposed costs order, would be drawn and perfected.

3. On 27 February 2024, the appellants filed brief submissions on costs. The Bureau filed its submissions on 29 February 2024.

The parties' submissions

4. In their submissions, the appellants note the indicative view of the Court regarding the issue of costs. They submit however that no order for costs should be made in this case and rely on the fact that they have the benefit of the CAB *ad hoc* legal aid scheme. Although the appellants acknowledge that the fact that they are legally aided is not a bar to an order for costs being made against them, they submit that the fact that they are legally aided is a factor to be considered. No authority is cited in support of this proposition.

5. The appellants further submit that the appeal is a public law case which, while civil in nature, involves an order under s. 3 of the Proceeds of Crime Act, 1996 against their house. On this basis, they submit that the Court might exercise its discretion not to award costs against them. Again, no authority is cited by the appellants in respect of the proposition which underlies their seeking a no costs order.

6. On the other hand, the Bureau seeks an order for the costs of the appeal on the basis that it has been entirely successful on all material aspects of same and notes that this is the presumptive position enshrined in s. 169(1) of the Legal Services Regulation Act, 2015 ("the 2015 Act"). It submits that there is no special provision in the Rules of the Superior Courts ("RSC"), legislation or in the jurisprudence setting out a different standard regarding costs

for those who are in receipt of civil legal aid. The Bureau draws attention to s. 36(1) of the Civil Legal Aid Act, 1995 ("the 1995 Act") which provides:

> *"Costs awarded by a court or tribunal to a person not in receipt of legal aid (referred to subsequently in this section as "the successful litigant") against a person who is so in receipt (referred to subsequently in this section as "the unsuccessful litigant") shall not, save in accordance with subsection (2), be paid out of the Fund."*

7. The Bureau also notes that s. 36(2) the 1995 Act sets out an entitlement, subject to conditions, on the part of the legal aid board to make an *ex gratia* payment towards a successful litigant's costs in certain defined circumstances:

> "(2) *Where a successful litigant submits a bill of costs to the Board, the Board may make an ex gratia payment towards such costs of such amount as it considers appropriate, if it is satisfied of the following matters, namely that—*
>
> *(a) the proceedings were instituted by the unsuccessful litigant,*
>
> *(b) the successful litigant has taken all reasonable steps to recover his or her costs from the unsuccessful litigant in person,*
>
> *(c) the successful litigant will suffer severe financial hardship unless an ex gratia payment is made,*
>
> *(d) the ex gratia payment will not exceed the amount that would be allowed if the costs were taxed on a party and party basis, and*
>
> *(e) the case has been finally determined."*

These circumstances are not met here.

8. The Bureau's position is that the net effect of both the statutory civil legal aid scheme, and the CAB *ad hoc* scheme, is that legal aid only covers the costs of the legally aided person's own legal costs. Therefore, if the person with the benefit of legal aid is unsuccessful in the litigation, they are responsible for the costs of same should an order for costs be made

against them. The Bureau contends that there is *"simply no basis for departure from the general rule in this case"*.

Discussion and Decision

9. It is difficult to disagree with the Bureau's submissions, particularly in circumstances where the appellants do not cite any authorities in support of their submissions, and in light of the position under the 1995 Act. I note especially s. 33(2) of that Act which makes clear that the fact that a party is legally aided is effectively irrelevant in considering costs. Section 33(2) provides:

> *"A court or tribunal shall make an order for costs in a matter in which any of the parties is in receipt of legal aid in like manner and to like effect as the court or tribunal would otherwise make if no party was in receipt of legal aid and all parties had respectively obtained the services of a solicitor or barrister or both, as appropriate, at their own expense."*

As Gearty J. notes in *B.E. v. R.E.* [2023] IEHC 413, there are exceptions to the definite statement that costs usually follow the event and the 1995 Act confirming that legal aid should not affect this position in the cases of criminal prosecutions and family law proceedings (Gearty J. citing *D. V. D.* [2015] IESC 66 in the latter regard). However, neither of these exceptions apply here. Accordingly, the issue of costs falls to be considered in the context of the costs regime provided for by the 2015 Act and the relevant provisions of Order 99 RSC as they stand since 3 December 2019.

10. The first observation I would make is that there is nothing in the 2015 Act that is supportive of what the appellants advocate for. Moreover, I note that the appellants in their submissions do not advert to the provisions of the 2015 Act, in particular sections 168 and 169 thereof, or indeed the relevant provisions of Order 99 RSC.

11. The costs regime which applies since 3 December 2019 was comprehensively addressed in *Chubb European Group SE v. Health Insurance Authority* [2020] IECA 183. At para. 19 of his judgment, Murray J. (writing for the Court) sets out the principles to be applied in determining costs issues post December 2019. Section 169(1) of the 2015 Act provides that where the party seeking costs has been *"entirely successful*" in the proceedings such party *"is entitled to an award of costs unless the court orders otherwise".* In determining whether to depart from this default position, the court is required to have regard to the *"nature and circumstances of the case"* and *"the conduct of the proceedings by the parties"*. This includes conduct both before and during the proceedings and whether it was reasonable for a party to raise, pursue or contest one or more issues. The court's overriding general discretion is preserved by s. 168(1)(a) of the 2015 Act and Order 99, r.2(1) RSC.

12. It is clear that the Bureau has been entirely successful in this appeal. All issues considered by this Court to be material have been determined against the appellants. Therefore, whether one adopts the criterion of costs following the event, or of being entirely successful, under either rubric the Bureau should be entitled to its costs unless the appellants can demonstrate that there are special reasons why the Court should depart from the normal rule. In my view, the appellants have not provided any basis upon which the Court could consider departing from the normal rule. First, they have not pointed to any conduct on the part of the Bureau which would merit a departure from the normal rule. Secondly, in as much as they rely on the fact that they are legally aided, for the reasons already stated, that cannot suffice, in my view, to displace the normal rule that costs follow the event. It seems to me that if the legislature intended to create a discretion, or some sort of particular carve out for persons such as the appellants on the basis of their being legally aided, then the 2015 Act is where one would expect to see this explicitly set out. There is however no such provision made in the 2015 Act.

13. In my view, therefore, the appellants have not established any basis upon which the Court should depart from the normal rule and, accordingly, the Bureau is entitled to the costs of the appeal.

14. As this ruling is being delivered electronically, Whelan J. and Haughton J. have indicated their agreement therewith.