



THE SUPREME COURT

[Appeal No: 12/2021]

**Clarke C.J.
O'Donnell J.
MacMenamin J.
Dunne J.
Charleton J.
O'Malley J.
Baker J.**

Between/

Thomas Fox

Plaintiff/Appellant

and

**The Minister for Justice and Equality, Ireland
and the Attorney General**

Defendants/Respondents

**Ruling of the Court delivered by Mr. Justice Clarke, Chief Justice,
on 29th of September, 2021.**

1. On September 14, 2021, this Court delivered judgment on the substantive appeal in these proceedings. For the reasons set out in that judgment, (*Fox v. The Minister for Justice & Equality* [2021] IESC 61), the Court dismissed the appeal. The parties were then invited to submit, within seven days, any observations which they might have concerning the form of the order which the Court might make or in respect of costs.

2. No submissions were received in respect of the form of the order for it is clear that the only substantive order which the Court must make will be to dismiss the appeal. As will be set out shortly in more detail, submissions were received in respect of costs. Before turning to those submissions, it is relevant to note that the High Court (Faherty J.) considered that it was, in all the circumstances of the case, appropriate to award Mr. Fox 50% of the costs of the hearing before that court. As noted in the judgment of the Court of Appeal on the costs issue, the basis for the High Court so ordering was a consideration of “the particular nature of the proceedings and the issues raised”.

3. As noted in the substantive judgment, the plaintiff/appellant (“Mr. Fox”) appealed to the Court of Appeal which dismissed his appeal. That court varied the order of Faherty J. by making no order as to costs in respect of the High Court hearing. However, the Court of Appeal awarded the defendants/respondents (“the State”) their costs of the appeal.

4. In their submissions on the question of costs to this Court, the State suggested that the appropriate order in respect of costs in all courts should be that no order should be made in that regard. In that context it was accepted that it would be appropriate for this Court to vary the order as to costs of the appeal to the Court of

Appeal by directing that no order should be made as to costs in that court as opposed to the order for costs against Mr. Fox which had been made by the Court of Appeal.

5. Thus, in substance, the position of the State on this matter is that there should be no order as to costs in any court. It will shortly be necessary to turn to the submissions made on behalf of Mr. Fox but, again in substance, they are to the effect that he should, exceptionally, be awarded his costs in all courts notwithstanding that his proceedings have been unsuccessful. Thus the issue which this Court has to address is as to whether any order for costs should be made in favour of Mr. Fox and, if so, whether that order should be in respect of all of his costs in all courts or whether some more limited form of order should be made. In that context it is appropriate to turn first to the basis on which Mr. Fox suggests that costs should be awarded to him.

6. Two general bases were put forward on behalf of Mr. Fox in that regard. The first was a suggestion that these proceedings were of a type, involving matters of particular public interest, where the jurisprudence establishes that the courts have a discretion to depart from the normal rule of costs following the event. The second was a suggestion that, notwithstanding that the proceedings had failed, nonetheless certain events outside of the proceedings, but referred to in the judgment, could reasonably lead to the conclusion that the interests of Mr. Fox had been advanced by the existence of the proceedings.

7. On the first point, placing reliance on cases such as *Curtin v. Dáil Eireann* [2006] IESC 27, it is said that there is a consistent line of jurisprudence which suggests that, exceptionally, costs may be awarded in favour of an unsuccessful party if an important point of law has been determined in the proceedings or where the issues were ones of exceptional public importance. In that context it is suggested that

the issues which arose in these proceedings were of particular public importance concerning the precise application of Article 2 of the European Convention on Human Rights (“ECHR”) in Irish law, the interplay of the obligations arising on a state to investigate certain deaths under that Article and questions concerning the scope of the right to life under the Constitution.

8. In addition, reliance is placed on the suggestion that the legal issues with which this Court had to deal were novel. It is said, in particular, that the identification of the “critical date” for the domestic application of the ECHR in Irish law had never previously been determined. In addition, the question of the scope of the right to life under Article 40.2 of the Constitution in the context of a potential obligation on the State to investigate certain deaths was, it was said, novel.

9. Furthermore, it was said that there were arguable grounds in favour of the propositions put forward on behalf of Mr. Fox even though those arguments did not finally find favour with the Court. It was also said that the costs of important constitutional and human rights litigation such as this can prove a deterrent to persons bringing what might ultimately transpire to be successful proceedings.

10. Finally, so far as the first point is concerned, it was said that the proceeding involved matters of great and legitimate concern to the family of the late Mr. Ludlow in circumstances where the Court identified, and criticised, the established failings in the initial investigations carried out by An Garda Síochána.

11. On the second point it is argued, in the alternative, that the “event” was not the outcome of the proceedings but rather matters which occurred external to the litigation. The matters relied on were a commitment in the programme for the current government to appoint an independent, international judicial figure to consider the

original documents relating to a number of matters including the murder of Mr. Ludlow together with an agreement by the Garda Commissioner and a former senior English Chief Constable to conduct a cross-border review of the murder of Mr. Ludlow. It should be noted that a similar argument, although based on different events, was put forward on behalf of Mr. Fox in the Court of Appeal but was rejected.

12. In the submissions made on behalf of the State, attention is drawn to the fact that the long standing rule that costs follow the event has now been placed on a statutory basis in the form of s.169 of the Legal Services Regulation Act, 2015 (“the 2015 Act”) which provides as follows:-

“169. (1) A party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings, unless the court orders otherwise, having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties, including—

- (a) conduct before and during the proceedings,
- (b) whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings,
- (c) the manner in which the parties conducted all or any part of their cases,
- (d) whether a successful party exaggerated his or her claim,
- (e) whether a party made a payment into court and the date of that payment,
- (f) whether a party made an offer to settle the matter the subject of the proceedings, and if so, the date, terms and circumstances of that offer, and
- (g) where the parties were invited by the court to settle the claim (whether by mediation or otherwise) and the court considers that one or more than one of the parties was or were unreasonable in refusing to engage in the settlement discussions or in mediation.

13. In that context, attention was drawn to the judgment of Murray J., speaking for the Court of Appeal, in *Chubb European Group SE v. The Health Insurance Authority* [2020] IECA 183 (“*Chubb*”) where the following is stated:-

“19. ... Reading these in conjunction with each other, it seems to me that the general principles now applicable to the costs of proceedings as a whole (as opposed to the costs of interlocutory applications) can be summarised as follows:

- (a) The general discretion of the Court in connection with the ordering of costs is preserved (s.168(1)(a) and O.99, r.2(1)).
- (b) In considering the awarding of costs of any action, the Court should ‘*have regard to*’ the provisions of s.169(1) (O.9, r.3(1)).
- (c) In a case where the party seeking costs has been ‘*entirely successful in those proceedings*’, the party so succeeding ‘*is entitled*’ to an award of costs against the unsuccessful party unless the court orders otherwise (s.169(1)).
- (d) In determining whether to ‘*order otherwise*’ the court should have regard to the ‘*nature and circumstances of the case*’ and ‘*the conduct of the proceedings by the parties*’ (s.169(1)).
- (e) Further, the matters to which the court shall have regard in deciding whether to so order otherwise include the conduct of the parties before and during the proceedings, and whether it was reasonable for a party to raise, pursue or contest one or more issues (s. 169(1)(a) and (b)).
- (f) The Court, in the exercise of its discretion may also make an order that where a party is ‘*partially successful*’ in the proceedings, it should recover costs relating to the successful element or elements of the proceedings (s.168(2)(d)).
- (g) Even where a party has not been ‘*entirely successful*’ the court should still have regard to the matters referred to in s.169(1)(a)-(g) when deciding whether to award costs (O.99, r.3(1)).
- (h) In the exercise of its discretion, the Court may order the payment of a portion of a party’s costs, or costs from or until a specified date (s.168(2)(a)).”

14. In the State’s submissions, particular reliance was placed on the contention that procedures were not properly followed and that the case on behalf of Mr. Fox was, as the Court noted in the substantive judgment, repeatedly changed in nature and scope. It is said that this placed the State in the position of incurring extra costs. Finally, attention was drawn to a costs ruling made by this Court, in *Pervaiz v. The Minister for Justice and Equality* [2020] IESC 73, where it was pointed out that almost all cases which now come before this Court have been determined to involve matters of general public importance so that that factor, in and of itself, cannot be particularly significant in departing from the ordinary rule.

15. It is proposed to commence with the second point. It is true, as is pointed out on behalf for Mr. Fox, that there have been some developments, in the overall context of investigations into the murder of Mr. Ludlow, which have occurred since the hearing in the Court of Appeal. However, it must be recalled that the purpose of litigation is to establish legal rights and obligations. Clearly events outside the context of litigation can, on occasion, render proceedings, or part of them, moot. However, such a situation arises precisely because it is no longer necessary, in light of changed circumstances, to determine legal rights and obligations. That clearly is not the case here for the whole thrust of the debate before this Court was as to whether there were further legal obligations on the State to conduct investigations or inquiries.

16. In addition, s.169 of the 2015 Act speaks of “a party who is entirely successful in civil proceedings”. The statutory focus is, therefore, on the result of the case rather than matters external to the case itself. The Court does not rule out the possibility that developments outside of the case can, in very limited circumstances, play an appropriate role in the award of costs. However, the Court does not consider that the

matters relied on here would warrant a departure from the default position of costs following the event.

17. In those circumstances it is necessary to return to the first point. As was noted by Murray J. in *Chubb* (at point (d) of his list of findings set out in para. 19 of his judgment) a court, in determining whether to depart from the general rule, should have regard to the “*nature and circumstances of the case*” and “*the conduct of the proceedings by the parties*”. In so stating Murray J. was following the wording of the statute itself. The detailed matters set out in s.169 of the 2015 Act are matters to which a court should have regard in assessing whether to depart from the general rule.

18. It does not seem to the Court to be necessary in this case to consider whether the enactment of s.169 of the 2015 Act has brought about any significant change in the regime as to costs or has simply placed the existing regime on a statutory basis. That issue requires consideration on a case by case basis.

19. However, so far as the type of issues which are at play in these proceedings are concerned, the Court does not consider that any material change in the overall position has been brought about by the enactment of the 2015 Act. The Court is, under s.169, entitled to take into account “the nature and circumstances of the case”. The Court does not see that this requirement alters in any way the jurisprudence which has built up concerning the circumstances in which it may be appropriate to depart from the general rule in important public interest cases. It is, therefore, necessary to consider whether this case falls into that category.

20. In that regard the Court takes into account the fact that the proceedings did raise novel and important issues in circumstances where there had been no clear jurisprudence in the past. The case itself involved a situation where there had been a

significant failure on the part of a State agency, in the shape of An Garda Síochána, even though those failures did not, at this remove, give rise to any continuing legal obligations. While in one very narrow sense it might be said that the proceedings were brought in the interests of the family of Mr. Ludlow at a personal level, nonetheless the overall circumstances are of particular public importance and warranted careful scrutiny.

21. In those circumstances the Court considers that Faherty J., in the High Court, was correct to consider these proceedings as being ones which came within the general parameters of the jurisprudence which entitles a court to depart from the general rule. Faherty J. assessed the situation as one in which the justice of the case would be met by an award to Mr. Fox of 50% of his costs in the High Court. A trial judge is in a particularly good position to reach such an assessment and an appellate court should only depart from the views of the trial judge if either there is an error in principle by, for example, wrongly considering that a case properly came within the public interest exception to the general rule or if the particular order determined on by the trial judge is outside the range of orders which it was reasonably open for the court to make. The Court has already set out its view that there was no error in principle. The Court does not consider that the assessment of 50% was outside of the range which was reasonably open to the trial judge. In those circumstances the Court would propose to restore the award of 50% of costs in favour of Mr. Fox so far as the High Court is concerned and, in so doing, to allow that aspect of the appeal and thus vary the order of the Court of Appeal in that regard.

22. There remains then the costs of the appeals both to the Court of Appeal and to this Court. In many circumstances it might be appropriate to allow the assessment

reached at first instance to follow through to subsequent appellate stages. Obviously if a case meets the criteria for departing from the general rule, then it potentially does so at each level of instance provided that the relevant appellate court considers that, in all the circumstances, it was appropriate for an appeal to be pursued in light of the result at first instance.

23. However, the Court also considers that there is merit in the submission made on behalf of the State that the appellate process in these proceedings was made unduly complicated, and thus made more expensive, by virtue of the very significant changes made to the case as presented, not least to this Court. It is, of course, the case, as this Court pointed out in a costs ruling in *University College Cork v. Electricity Supply Board* [2021] IESC 47 (“*UCC*”), that it is inevitable that complex proceedings involving issues not previously clarified will be likely to involve parties placing reliance on a range of issues not all of which may prove to be determinative of the ultimate outcome. Some latitude needs to be allowed in that regard in cases involving novel issues for it is not reasonable to expect absolute focus where new ground is being traversed.

24. However, the Court considers that there are two significant distinguishing features between the manner in which these proceedings were conducted and the manner in which *UCC* was conducted. Most importantly, the Court considers that the alteration in the case as ultimately made at the oral hearing before this Court, as compared with the case which was made at various earlier stages in the proceedings, was at the extreme end of the spectrum. In that regard the circumstances are quite different from those which pertained in *UCC*.

25. Second, it must be recalled that the issue in *UCC* concerned the question of whether a plaintiff who was ultimately successful ought be deprived of some costs by reason of having raised issues on which that party was unsuccessful. In that context it should be noted that s.169 of the 2015 Act does invite the Court to consider the conduct of the proceedings by the parties. The Court would consider that such a phrase gives statutory recognition to, amongst other things, the principles which have been identified in *Veolia Water UK plc v. Fingal County Council (No 1)* [2006] IEHC 137, [2007] 1 IR 690, [2007] 2 IR 81, and subsequent case law. However, the position of a party who has ultimately succeeded is, in the Court's view, different in that regard to a party which has failed. The successful party is *prima facie* entitled to their costs and the jurisprudence which has developed since *Veolia Water* has established that the default position, where costs follow the event, should only be departed from where it is "clear" that the conduct of the proceedings by the successful party has materially increased the costs of the unsuccessful party. A party who has lost is *prima facie* obliged to pay costs and must establish a basis, within the statutory framework of s.169 of the 2015 Act, and the jurisprudence of the courts, to justify a departure from the general rule.

26. The Court is satisfied that it is appropriate to reflect in costs the exceptional manner in which the case made in these proceedings altered during the course of the appellate process and in particular before this Court. In those circumstances the Court will award Mr. Fox 50% of the costs in the Court of Appeal but will make no order as to costs in respect of this Court. In that context the Court will vary the order for costs made by the Court of Appeal in respect of the costs of the appeal to that court.

27. In summary, Mr. Fox can recover his costs, to be adjudicated in default of agreement, to the extent of 50% of his costs in the High Court and in the Court of Appeal. There will be no order as to the costs of the appeal to this Court.