Neutral Citation [2013] IEHC 142

THE HIGH COURT

[2011 No. 322 MCA]

IN THE MATTER OF THE FIRE SERVICES ACTS 1981 AND 2003 AND IN THE MATTER OF AN APPLICATION BY DUBLIN CITY COUNCIL PURSUANT TO SECTION 23 OF THE FIRE SERVICES ACT 1981

BETWEEN

DUBLIN CITY COUNCIL

APPLICANT

AND

THOMAS McFEELY, LAURENCE O'MAHONY AND COALPORT BUILDING COMPANY LTD

RESPONDENTS

AND

SINEAD POWER AND GRAHAM USHER

NOTICE PARTIES

RULING of Kearns P. on issue of costs, dated 11th April, 2013

This matter returns to the High Court for consideration of applications for costs arising from proceedings brought by the applicant under s. 23 of the Fire Services Act, 1981 in respect of the apartment complex developed and constructed by the respondents at Priory Hall, Donaghmede, in the City of Dublin. In circumstances where there was overwhelming evidence of serious defects (admitted to exist by the first respondent) which were the source of serious risk of fire, the applicants obtained an order on 14th October, 2011 for the discontinuance of occupation of Priory Hall, an order which had the effect of requiring the immediate removal from their homes of a large number of families and individuals residing at Priory Hall. The proceedings involved numerous days of court hearings to determine if the respondents would carry out repairs and works in compliance with an undertaking to that effect given to the court and a programme of works agreed with the applicants. That process came to an end on the 4th November when this Court determined that the respondents were in breach of their undertakings and court orders and had not implemented the agreed programme of works. The applicants seek their costs, both of the proceedings up to that date but also in respect of the hearing on 17th November, 2011 which resulted in an order imposing a fine on the first respondent and a 3 month sentence of imprisonment for contempt of court. The orders of 17th November were subsequently set aside on appeal by the Supreme Court.

There is also before the Court an application brought by the solicitors for the first and third named respondents for their costs in respect of hearing days before this Court on 4th November, 2011 and on 17th November, 2011.

While extensive submissions have been filed on behalf of Dublin City Council in opposition to the respondents' application and in support of its own application for costs; I do not believe it would serve any useful purpose, in the aftermath of the Supreme Court adjudication, to engage in any extensive revisitation of the facts. I will thus confine myself to saying that the outline and analysis of the facts contained in the 49 page submission filed on behalf of the applicants accords with the recollection of this Court. Having regard to both the admissions by Mr. McFeely of serious defects in Priory Hall and also to the multiple adverse findings made by this Court against him and the third named respondent, I am satisfied that Dublin City Council are indeed entitled to the costs of the proceedings, including all days of hearing up to and including the 4th November, 2011, given that the hearing on that day was yet another hearing mandated by the requirement to monitor progress with the remedial works.

By letter dated 7th March, 2013, the solicitors for the first and third named respondents have written to the Law Agent of Dublin City Council saying they had –

> "No instructions to oppose your application for costs of the proceedings to date. We were permitted by the Official Assignee to pursue an application for costs of the applications made to the learned President on the 4th November, 2011 and the 17th November, 2011 and for the costs of the relevant appeals to the Supreme Court."

The order of the Supreme Court dated 6th November, 2012 directed that Mr. McFeely should recover from the applicant the costs of his appeal from the judgment and order of this Court dated 17th November, 2011, such costs not to include the costs of the applications made to the Supreme Court on 17th November, 2011 and 16th March, 2012. The order further recites that the Official Assignee consented, and it was so ordered pursuant to s. 3 of the Legal Practitioners (Ireland) Act 1876, that the said order for costs be charged in favour of John B. O'Connor & Co., solicitors for the applicant. The court made no order as to the costs of the motion in the High Court.

No written submissions of any sort have been filed by or on behalf of the first and third named respondents, either in response to the submissions filed on behalf of the applicants, or in support of the respondents own application for the costs of the hearings in this Court on 4th November, 2011 and 17th November, 2011.

I have already addressed the matter of costs arising on the 4th November, 2011. Insofar as the costs of the hearing on the 17th November, 2011 are concerned, this Court gave its decision and made orders before 1.00 p.m. on that date. A request for a stay on behalf of Mr. McFeely was refused, but the Court indicated that Mr. McFeely could remain in the precincts of the Round Hall of the Four Courts until 4.00p.m. on that day so as to make such arrangements as he might deem appropriate. Shortly before 4.00pm, and without further reversion to this Court, an application for a stay on the operation of the High Court order was made to the Supreme Court. It seems to have been based solely upon an affidavit in which it was contended that Mr. McFeely had been wrongly sentenced for contempt in circumstances where he was ordered off the site and thus denied the opportunity of completing the works. Having been so informed and, critically, there being no appearance by or on behalf of Dublin City Council to oppose the application, a stay

was placed upon the operation of the order of this Court.

At no stage was any request made to this Court for a note of the ruling delivered before 1.00 p.m. on the 17th November, notwithstanding that such a note could readily have been provided by the Court itself had the same been sought. Such a note was clearly required in circumstances where, to the knowledge of the respondents' solicitors, the applicants (for whatever reason) did not propose to appear in the Supreme Court for the making of the particular application. Apart from the existence and availability of the Court's record of its ruling, the Court later learned that a stenographer's note of the ruling and the reasons for same was also available from Gwen Malone Stenographers who, at the request of the respondents' solicitors, had attended the court hearings on the 4th and 17th November, 2011.

This Court only became aware of these facts when a transcript prepared by Gwen Malone of the hearing on 17th November, 2011 (together with a transcript of the hearing of 4th November) was unexpectedly delivered to chambers on 21st November, 2011. On making inquiry, Ms. Malone advised that the transcript had been commissioned at the request of the first respondent's legal advisers and could certainly have been made available to the Supreme Court for the purposes of the application brought to it on the 17th November had it been sought.

The failure of the respondent's solicitors to seek and obtain any form of note from the trial court giving the reasons for its order was, in the view of the Court, reprehensible. The Court feels compelled to express in the strongest terms its dismay and anger that, in a matter of such importance to the proper administration of justice, and regardless of the ultimate outcome of the appeal, such a failure should have occurred. There was no justification for it and the apology belatedly offered (during the costs hearing) by the respondent's solicitors for that failure was, in the view of the Court, casual, self-serving and disingenuous.

Matters were not helped by the applicant's failure to attend before the Supreme Court on the afternoon of the 17th November notwithstanding it had been put on notice that an application would be made.

In all the circumstances, I propose making no order for costs in favour of either party in respect of the hearing on the 17th November, 2011.