Neutral Citation Number: [2012] IEHC 518

THE HIGH COURT

JUDICIAL REVIEW

IN THE MATTER OF SECTION 193 OF

THE NATIONAL ASSET MANAGEMENT AGENCY ACT 2009

[2012 No. 55 J.R.]

BETWEEN

TREASURY HOLDINGS, SPENCER DOCK DEVELOPMENT COMPANY LIMITED, SDDC (No. 1) LIMITED, SDDC (No. 2) LIMITED, SDDC (No. 3) LIMITED, SDDC (No. 4) LIMITED,

FAXGORE LIMITED, REAL ESTATE OPPORTUNITIES PLC., COOLRED LIMITED, TENDERBROOK LIMITED, WINTERTIDE LIMITED, TWYNHOLM LIMITED, RIGOL LIMITED,RUSHRID LIMITED, IREO IRISH REAL ESTATE OPPORTUNITIES

FUND PUBLIC LIMITED COMPANY, CARRYLANE LIMITED,

CALLSIDE DEVELOPMENTS LIMITED, RADTIP PROPERTIES LIMITED,

SENCODE LIMITED, LORNABAY LIMITED,

BALLYMUN SHOPPING CENTRE LIMITED, MONTEVETRO II LIMITED AND TREASURY HOLDINGS CHINA LIMITED

APPLICANTS

AND

THE NATIONAL ASSET MANAGEMENT AGENCY AND

NATIONAL ASSET LOAN MANAGEMENT LIMITED

RESPONDENTS

AND

KBC BANK IRELAND PLC,

IRISH BANK RESOLUTION CORPORATION LIMITED

LUKE CHARLTON AND DAVID HUGHES

NOTICE PARTIES

JUDGMENT ON COSTS of Ms. Justice Finlay Geoghegan delivered on the 7th day of December 2012

1. This judgment is delivered on the application by KBC Bank Ireland plc. ("KBC"), the first named notice party, for its costs in the proceedings against the applicants. The application for costs arises out of the judgment delivered by me herein on 31st July, 2012, [2012] IEHC 297, in which I dismissed the applicants' claim for orders of *certiorari* of decisions made by the first named respondent, the National Asset Management Agency ("NAMA") on 8th December, 2011, and 25th January, 2012.

2. The application by KBC for its costs against the applicants was heard on 30th October, 2012. In the intervening period since judgment was delivered on 31st July, 2012, orders were made on 9th October, 2012, for the winding up of the first to seventh named applicants and the appointment of Mr. Michael McAteer and Mr. Paul McCann as joint official Liquidators of those companies. The remaining applicants were not the subject of winding up orders or of any resolution to wind up on the date of the hearing of the application for costs.

3. The respondents had also sought its costs against the applicants. At the hearing, I was informed that agreement had been reached between the respondents and the joint official Liquidators of the first to seventh named applicants to compromise the respondents' claim for costs subject to the approval of the Court. By agreement of the parties, I was informed that by order of 12th November, 2012, the High Court (Cooke J.) pursuant to s. 231(1) of the Companies Act 1963, granted liberty to the joint official Liquidators to enter into the said agreement. Pursuant to the agreement, the joint official Liquidators consented to an order for the release to William Fry, as solicitors for the respondents, of the sum of €600,000 held by way of security for costs pursuant to the order of the High Court made on 26th April, 2012. The respondents consented to the release of the balance of the security identified in the said order of 26th April, 2012. It was also agreed that the respondents would not seek any order for costs against the eighth to 22nd named applicants.

4. These proceedings commenced on 25th January, 2012. On 26th January, 2012, on its own application, KBC was joined as a notice party. Similar orders, on their applications, were made in respect of Irish Bank Resolution Corporation Limited ("IBRC"), Mr. Luke Charleton and Mr. David Hughes, the receivers appointed by NAMA on 25th January, 2012. IBRC and Mr. Charleton and Mr. Hughes, apart from filing affidavits, did not subsequently participate in the proceedings. No application has been made in respect of their costs.

5. The interest of KBC in the proceedings was the following. Amongst the facilities of the Treasury Holdings Group taken into NAMA was a syndicated facility relating to the Spencer Dock Development. NAMA, as successor to Allied Irish Banks plc., and IBRC held 75%

of the syndicated loan and KBC the remaining 25%. IBRC was the agent and security trustee for the finance parties and secured beneficiaries under the syndicated loan agreement.

6. The decisions of NAMA challenged in the judicial review proceedings and in respect of which orders of *certiorari* were sought were:

> (a) a decision made on 8th December, 2011, "to arrange for demands for repayment to be issued in respect of facilities in default, and failing repayment, to proceed to appoint receivers (including statutory receivers) as appropriate to various properties that comprise security for such facilities", and
>
> (b) a decision taken on 25th January, 2012, to proceed with enforcement in respect of the Applicants' assets including the appointment of receivers.

7. The challenged decisions of NAMA related to multiple facilities including the syndicated facility in relation to the Spencer Dock Development. The relief sought, if granted, would have affected the enforcement of the syndicated facility and realisation of the relevant security, with consequences for KBC.

8. KBC filed affidavits and a notice of opposition. It participated fully in the leave hearing and in the substantive hearing. It also filed written legal submissions. It supported, throughout the proceedings, the submissions made on behalf of NAMA in relation to all the public law issues. KBC made one distinct submission in reliance upon its contractual position and decisions already taken by it in relation to enforcement which, it submitted should be taken into account by the Court in exercising its discretion in the event that it determined certain of the public law issues in favour of the applicants.

9. Counsel for KBC submitted that, notwithstanding that the applicants sought no relief against KBC, its commercial interests and rights were adversely affected by the ongoing challenge in these proceedings to the decisions taken by NAMA. He submitted that it was reasonable for KBC, on the facts of the case, to seek to be joined and to appear before the Court to protect its own interests. In reliance upon the judgment of Clarke J. in *Usk and District Residents Association Limited v. The Environmental Protection Agency and Greenstar Holdings Limited* [2007] IEHC 30, counsel submitted that KBC, as a notice party which was successful in resisting the applicants' claim herein, should be entitled to its costs against the applicants. He further submitted that, in accordance with that judgment and O. 99 of the Rules of the Superior Courts, the starting point should be that KBC is prima facie entitled to an order for its costs against the applicants and that there are no exceptional grounds departing from, what he submitted to be, the normal rule that "costs follow the event". He also drew attention to the fact that in the judgment on the costs of the leave application, delivered on 12th June, 2012, [2012] IEHC 237, I granted an order that Treasury was entitled to 50% of its costs of the leave application as costs in the cause against both NAMA and KBC.

10. Counsel for the eighth to 22nd named applicants submitted, firstly, that the principle that "costs follow the event" was not necessarily the starting point in respect of an application for costs by a notice party such as KBC against which no relief was sought and which was joined at its own request. He drew attention to the fact that the solicitors for the applicants had written twice to KBC subsequent to the order granting leave, expressing the view that the interests of KBC were adequately protected by the respondents and asking KBC to "step back" from the proceedings and avoid incurring unnecessary costs.

11. Counsel for the eighth to 22nd named applicants also distinctly submitted that applying the principles relating to costs in complex litigation set out by Clarke J. in *Veolia Water UK plc. and Ors. v. Fingal County Council (No. 2)* [2006] IEHC 240, [2007] 2 I.R. 81 there should be no order for costs. By reference to the six issues in the judicial review proceedings identified at para. 15 of the judgment delivered on 31st July, [2012] IEHC 297, counsel submitted that on the first four issues, the applicants had been successful. The fifth issue, on which NAMA had been successful, he submitted, was an issue peculiar to NAMA and could not have been articulated by KBC. The sixth issue, which did relate to KBC, was not ruled upon by the Court. He further submitted that, in considering the time spent on the relevant issues, the relevant applicants' estimate was that 65% of the time in the proceedings was spent on issues on which the applicants were successful. In all the circumstances, he submitted that there should be no order as to costs between KBC and the applicants.

12. Counsel instructed by the joint official Liquidators of the first to seventh named applicants supported the submissions made by counsel for the remaining applicants.

Conclusion

13. In my judgment, the starting point for consideration of an application for costs by a notice party, such as KBC, against which relief is not sought and which applied to join the proceedings for the purpose of protecting its own economic interests is not necessarily that it should be entitled to costs against an applicant who has failed in its claim against the respondent in judicial review.

14. In *Usk and District Residents Association v. The Environmental Protection Agency and Greenstar Recycling Holdings Limited* [2007] IEHC 30, at para. 3.4, Clarke J. stated:

> "It is clear, therefore, that the starting position has to be that, ordinarily, a party, such as the EPA and Greenstar in these proceedings, who successfully resists a plaintiff s or applicant's claim, will be entitled to all of the costs reasonably incurred. Therefore prima facie both the EPA and Greenstar should be entitled not only to the costs of successfully defending the substantive judicial review hearing but also to the costs of the leave hearing. The proceedings have been found to be unmeritorious. If they had not been brought, then the EPA and Greenstar would not have been subjected to any costs of defending them. The real issue which I have to determine is as to whether there is any proper basis for departing from that position."

15. The position of Greenstar in those proceedings was, however, different to that of KBC in the present proceedings. Usk sought to challenge, by way of judicial review, the grant by the EPA of a waste licence to Greenstar. In such proceedings, s. 43(5) of the Waste Management Act 1996, obliges an applicant to bring such a challenge on notice, *inter alia*, to the EPA and the holder of the licence. Hence, Greenstar was, in those proceedings, a necessary party to the proceedings. Whilst, in those proceedings, the EPA was named as the respondent and Greenstar a notice party, s. 43(5)(b)(ii)(I) and (II) of the Waste Management Act 1996, requires such judicial review proceedings to be brought on notice to both the EPA and the holder of the licence. The sub-sections do not distinguish between the statuses of the two parties.

16. Factually, in the present proceedings, the position of KBC is quite different and distinct to that of the respondents. The respondents were a necessary party as it was the decisions of the first named respondent which were challenged, and in the statutory scheme, it was considered that both respondents were necessary parties. It was not contended that KBC was a necessary party to the proceedings. No decision taken by it was challenged. It sought to be joined for the purpose of protecting its own

economic interest. That may have been a reasonable commercial decision for it to take. However, having regard to the claim made by the applicants, it was not a necessary party to the proceedings.

17. Clarke J., on the facts of *Usk* as already stated, considered the starting point to be the *prima facie* entitlement of both the respondent and notice party to be entitled to the costs of successfully defending the substantial judicial review application, and when he came to consider the objection made to the entitlement of Greenstar as distinct from the EPA to its costs concluded, on the particular facts of the application, there was no basis for distinguishing between its position and that of the EPA. However, he added at para. 5.5. of his judgment:

> "I should, however, note that there may well be cases where it would be appropriate for notice parties (who are not as intimately connected with the issues as in this case) to consider whether it is necessary to participate, or at least participate fully, in judicial review proceedings. The mere fact that the party may have a sufficient interest so as to make it legitimate that they be placed on notice of the proceedings does not, of itself, necessarily carry with it an entitlement to that party to an unquestioned order for costs in the event of the proceedings being successfully defended. The extent to which such a notice party may be entitled to some or all of the costs of successfully supporting the defence of the application, will depend on all the circumstances of the case and, in particular, the extent of the interest of that party in the issues which are the subject of the judicial review application and the extent to which it may be regarded as reasonable for that party, in those circumstances, to independently oppose the application. Having regard to those principles it does not appear to me to be appropriate to diminish the entitlement of Greenstar to costs on the facts of this case."

18. In the above comments, Clarke J. appears to be referring to the position of a notice party who had been joined by the applicant. On the facts of this application, the applicants did not join KBC. It voluntarily came into Court and asked to be joined as a notice party. The approach envisaged by Clarke J. in the above paragraph, nevertheless, appears to me to properly apply to KBC on the facts of this application. Rather than commencing from any *prima facie* entitlement to costs, it appears to me that it must be a matter for the Court to consider, having regard to all the circumstances of the case, including, in particular, the extent of the interest of the notice party in the issues which are the subject matter of the judicial review application, and the extent to which it may be regarded as reasonable for the notice party, in all the circumstances of the case independently to oppose the application to determine whether an order for costs in its favour against an unsuccessful applicant should or should not be made.

19. On the facts of this application, of the principal issues in the proceedings, as identified by me at para. 15 of the judgment delivered on 31st July, 2012, [2012] IEHC 297, the first four issues were exclusively public law issues which concerned the obligations of NAMA, as a body corporate established by statute, and the rights of the applicants. NAMA was fully represented by solicitor and senior and junior counsel. KBC, a commercial bank, whilst obviously having an interest in the outcome of the proceedings, had no interest in those issues. Similarly, in relation to the fifth issue, which was a mixture of a public law and a private contract law issue concerning the standstill arrangements entered into between NAMA and the applicants in January, 2012 KBC did not have any interest in the issues concerned as distinct from having an interest in the outcome or resolution of the issues. It was never contended that it was a party at any stage to the arrangements between NAMA and the applicants which were at issue. KBC was concerned with the sixth issue identified. It was identified as an issue as KBC had put forward arguments which, depending upon the resolution of the earlier issues, it might have become necessary for the Court to consider and determine.

20. In all the circumstances of this application, I have determined that there should be no order for costs as between KBC and the applicants. I do so, firstly, by reason of the fact that KBC was not a necessary party to the proceedings; it sought to be joined and was permitted to be joined for the purpose of protecting its own commercial interests. It was not necessary for KBC to participate in the first five issues identified at para. 15 of the judgment of 31st July, 2012, [2012] IEHC 297, all of which were public law issues or a private law contractual issue which concerned NAMA and not any alleged arrangements with KBC. Insofar as KBC wished to address the Court on the sixth issue, whilst it was reasonable that KBC be permitted to do so, it does not appear to me to follow that they should be entitled to an order for costs against the applicants of defending the substantive proceedings, where the respondents were fully participating and represented and KBC decided that it wished to also participate in opposing the application in the protection of its own commercial interests.

21. Secondly, the applicants were successful on the first four issues which took up a significant portion of the time at the hearing. In application of the principles applicable to costs in complex litigation set out in *Veolia Water UK plc. and Ors. v. Fingal County Council (No. 2)* [2006] IEHC 240, [2007] 2 I.R. 81, there were significant issues opposed *inter alia* by KBC upon which the applicants were successful and which added to the overall time and cost of the proceedings. The only issue on which KBC had a distinct contribution took up relatively little time in the proceedings and was not determined.

22. Finally, I should add that I have considered the earlier decision I reached on 12th June, 2012, [2012] IEHC 237, in which, on the leave application, I awarded a portion of the applicants' costs of the leave application as costs in the cause against both NAMA and KBC. As appears from that decision, KBC had chosen to participate in the leave application and oppose leave being granted. In my judgment, different principles, as set out in that judgment applied, and it is not inconsistent with the decision reached in this judgment. The applicants are not now entitled recover against KBC by reason of that decision as the costs awarded were only costs in the cause and this decision makes no order as to costs of the substantive proceedings between KBC and the applicants.