THE COURT OF APPEAL

Appeal No. 2014/1065

[Article 64 transfer]

Ryan P.
Finlay Geoghegan J.
Hogan J.

BETWEEN/

PETER WALSH

APPLICANT/

RESPONDENT

AND

PROPERTY REGISTRATION AUTHORITY

RESPONDENT/

APPELLANT

AND

COILLTE TEO.

NOTICE PARTY

JUDGMENT of Mr. Justice Gerard Hogan delivered the 17th day of February 2016

1. This is an appeal by the Property Registration Authority ("the Authority") against an order for costs made in judicial review proceedings in the High Court by Hedigan J. in an *ex tempore* ruling delivered on 10th February 2014. The Authority contends that as those proceedings concerned the exercise by it of its land registration functions under s. 49 of the Registration of Title Act 1964 ("the 1964 Act") it would be inappropriate, by reason of the quasi-judicial nature of those statutory functions, to have any costs order made against in circumstances where it had taken no active step in those proceedings. The Authority accordingly argued that it enjoyed an effective immunity from costs in uncontested cases of this kind and it invited the Court to allow this appeal on that particular and specific basis.

2. At the conclusion of the hearing of the appeal on 22nd April 2015 the Court indicated that it was dismissing this appeal and that it would give its reasons at a later date. The purpose of this judgment is to give the reasons for that decision.

3. It should be noted that the Authority originally had appealed to the Supreme Court against the making of this costs order. By order of the Chief Justice made on 28th October 2004 (made with the concurrence of the other members of the Supreme Court), this appeal was transferred to this Court pursuant to Article 64 of the Constitution.

4. The background to this appeal is quite straightforward. The notice party, Coillte Teo., applied to the Property Registration Authority ("the Authority") pursuant to s. 49 of the Registration of Title Act 1964 ("the 1964 Act") for registration of certain lands bearing Folio No. 33105 in the Register of Freeholders for Co. Mayo on the basis of adverse possession. The Authority ultimately acceded to that application and on 13th March 2013 it registered Coillte as the owner of the lands.

5. As it happens, Mr. Walsh has been the registered owner of these lands since 1986. On 23rd January 2013 the Authority wrote to him advising him of this application by Coillte and warned him that Coillte would be registered as owner of the lands unless good cause to the contrary was shown by him in writing within 21 days of receipt of the letter. On 30th January 2013 Mr. Walsh's solicitors, Gilvarry & Associates, wrote objecting to this course of action, stating their client was the "full registered owner of the lands which he purchased in 1984" and that he denied "any entitlement to Coillte over the lands." Gilvarry & Associates further requested a copy of Coillte's affidavit so that a fully and detailed response could be given by their client.

6. The Authority wrote to Gilvarry & Associates on 5th February 2013 enclosing a copy of Coillte's affidavit which had set out the grounds by which it sought registration by reason of its adverse possession of the lands. The Authority requested that if Mr. Walsh was to maintain his objection to Coillte's application that a replying affidavit "setting out fully the legal grounds of the objection" would be sent to the Authority within one month from receipt of this letter.

7. Gilvarry & Associates replied on 15th April 2013 to confirm that Mr. Walsh's affidavit would be supplied by the end of that week. They further requested confirmation that no decision would be made by the Authority in advance of receipt of this affidavit.

8. As it happens, however, and unbeknownst at the time to Mr. Walsh and his solicitor, the Authority had already proceeded to register Coillte as the registered owner on 13th March 2013. The Authority had apparently taken the view that, as no replying affidavit had been received by Mr. Walsh within the time it stipulated in the letter of 5th February 2013, it could – and should – proceed to register Coillte as the full owner.

9. Mr. Walsh was later dismayed to learn subsequently that the registration had proceeded without reference to him. Gilvarry & Associates then wrote to the Authority on 19th April 2013, objecting in forthright terms to what had happened:

> "As you will be aware, our client was objecting to the application and we had requested a full copy of the application form

> from you. We received a partial copy of the application being the affidavit of the applicant, but did not receive any supporting documentation to include maps, which it clearly referred to in the schedule of this affidavit.
>
> Our client is extremely distressed as this application now appears to have been completed without reference to him on 13th March 2013. Our client was neither informed over the pending completion nor of the actual completion of the application. Similarly, this office was never informed. While it is clear from your letter of 5th February 2013 that you gave one month for a reply to be submitted, you never stated that there was a prospect that the application could potentially proceed without reference to our client. Surely a final warning would have been appropriate whereby you warned our client that the application was going to go ahead and would be unsuccessful unless he responded within a further specified period of time. This was not done and this is grossly unfair.
>
> Our client lives forty miles away from this office in a remote rural area. We prepared the basis of his objection and was in the process of finalising his affidavit of objection and we had arranged to meet him in our sub office in Killala next week.
>
> Our client is extremely stressed at what has transpired and we are indeed shocked that the PRA would proceed with a contentious application in full knowledge that the registered owner denied absolutely Coillte's entitlement to the land. In this regard we refer you to a copy of our letter of 30th January 2013…
>
> Quite frankly, we are astonished that you would proceed to complete an application whereby you are aware that the registered owner was legally represented and you were aware he denied the applicant's entitlement to the lands. In fact, our client is in full and exclusive possession of these lands and has been since 1984. The fact that neither our client nor this offer was notified f completion of registration is also very disturbing."

10. On 25th April 2013 Gilvarry & Associates wrote another letter to the Authority warning that judicial review proceedings were imminent and that such proceedings would issue in the event that the registration of Coillte under s. 49 of the 1964 Act was not vacated. The letter writer stated expressly that the object of the correspondence was to ensure that the State body was not put to the expense of meeting Mr. Walsh's costs in judicial review proceedings and to demonstrate that an opportunity was "given to you to rectify the matter prior to us having to make application for judicial review."

11. Gilvarry & Associates also wrote another letter on 25th April 2013 addressing the merits of the matter. The letter writer contended that Mr. Walsh had specifically barred Coillte from entering his property; that Coillte employees had been warned off from entering the property and that Mr. Walsh had himself fenced off the property.

12. The Authority responded to Gilvarry & Associates on 29th April 2013 stating in effect that because the applicant had not shown good cause in opposition to Coillte's application within the time specified in the letter of February 5th, 2013, it had proceeded to deal with Coillte's application. The Authority also noted that no application for an extension of time had ever been made on behalf of Mr. Walsh.

13. On 17th June 2013 the High Court granted Mr. Walsh leave to commence judicial review proceedings quashing the making of the s. 49 order. The Authority duly entered an appearance in those proceedings, but it ultimately did not oppose the application for judicial review. On 19th November 2013 the High Court made an order by consent quashing the registration of Coillte as owner of the lands in question.

14. At that point Mr. Walsh applied for his costs as against the Authority. Having heard argument on the point, Hedigan J. held that the applicant was entitled to his costs of the judicial review proceedings as against the Authority. The question now before this Court is whether Hedigan J. was correct in making that order.

15. I should pause here to record that Coillte took no part in the judicial review proceedings or, for that matter, in this appeal. Accordingly, the sole issue before the Court is instead whether the Authority enjoys a form of quasi-immunity from costs in these circumstances by reason of the fact that it was itself acting in a quasi-judicial capacity.

16. The Authority relies in this context on the jurisprudence that holds that it is inappropriate to make an order for costs against a judge of the District Court or the Circuit Court in judicial review proceedings who takes no part in such proceedings. There is, of course, established authority that persons holding judicial office should not, save, perhaps, in exceptional cases, be liable in costs: see, *e.g., McIlwraith v. Fawsitt* [1990] 1 I.R. 343, *O'Connor v. Carroll* [1999] 2 I.R. 160 and *O'F v. O'Donnell* [2009] IEHC 142, [2012] 3 I.R. 483.

17. The fundamental basis for this rule so far as individual judges are concerned is, of course, to protect the independent exercise of the judicial power as envisaged by Article 34 and Article 35 of the Constitution. If judges could be made personally liable for costs, then, of course, as Ó Néill J. pointed out in *O'F. v. O'Donnell* ([2012] 3 I.R. 483, 511); "a judiciary could not function if it were exposed to that kind of risk." Personal immunity from costs – save, possibly, in quite exceptional cases where the impugned judicial order was made *mala fide* – is thus a necessary feature of judicial independence. This line of authority which protects individual judicial personages is, accordingly, not at issue in the course of this appeal.

18. The question which does arise, therefore, is a different one, namely, whether the Authority can invoke a similar immunity on the facts of this case. While the Authority consented to the making of an order of *certiorari* quashing the registration and did not contest these judicial review proceedings, it did so presumably on the basis that it could not stand over the fairness of the procedures it had actually adopted in this case. In truth, therefore, the decision came to be quashed because of a failure on the part of the Authority to abide by basic fairness of procedures in respect of a matter fundamentally concerning the applicant's land ownership. In so consenting to the making of the order of *certiorari,* the Authority has effectively acknowledged that it should have given Mr. Walsh a more extended opportunity of making a submission or, at the very least, explicitly warning him of the consequences of failing to submit the appropriate affidavit within the one month period stipulated in correspondence.

19. It is accordingly clear the Authority did not, in fact, exercise any power of adjudication in the present case as between the rival claims of both Mr. Walsh and Coillte. In these circumstances the argument that the Authority should therefore enjoy some sort of quasi-immunity from costs because it *might* in *other* circumstances have been exercising quasi-judicial powers of adjudication in respect of disputes concerning land ownership simply evaporates. No principled basis for such an immunity can be advanced in a case of this kind. Indeed, it would be manifestly unfair if an entirely innocent private citizen such as Mr. Walsh who was simply protecting what he contends are his own legitimate rights of ownership in the lands should be disadvantaged in terms of costs in a case of this kind. This is especially so given that the Authority were expressly warned by Gilvarry & Associates that the applicant would be seeking his costs if the Authority did not vacate the registration order prior to the commencement of these proceedings.

20. In these circumstances, it is unnecessary for this Court to examine what the position might have been had it concluded that the Authority was indeed exercising quasi-judicial or adjudicatory functions in the present case. It is true there is recent authority to the effect that statutory bodies discharging adjudicatory functions may enjoy a de facto immunity from costs where the deciding body in question takes no active part in the proceedings in which the validity of its decision has been challenged: see, e.g., the decision of Dunne J. in *Casey v. Private Security Appeals Board* [2009] IEHC 547 and the subsequent decision of my own (delivered as a judge of the High Court). in *Hussein v. Labour Court (No.2)* [2012] IEHC 599 which followed that decision, albeit with reservations.

21. It must nevertheless be said that the case for an institutional immunity in respect of the exercise of *quasi-judicial* powers is less clear-cut and obvious than in the case of a *personal* immunity from costs for persons discharging *judicial* powers. As I observed in *Hussein (No.2),* if there were indeed such an institutional immunity on the part of administrative bodies exercising adjudicatory powers of this kind, it would represent a major change from long-established practice and tradition in relation to the award of costs against a range of statutory bodies. As such a change would have far-reaching effects and consequences, it might be thought that the case for such an immunity would be require to be convincingly established.

22. Having regard to the circumstances of the present appeal it is, however, unnecessary to consider this wider issue any further. The Authority did not in fact purport to exercise any powers of adjudication in the present case and the registration order which it had made in favour of Coillte was set aside by reason of the (tacitly admitted) breach of fair procedures on the part of the Authority. But orders of this kind made by administrative bodies such as the Authority are routinely quashed on this and similar grounds and it has never been suggested heretofore that the administrative body in question should enjoy some form of quasi-immunity from an order for costs where it had never exercised a power of adjudication in the first place.

Conclusions

23. It was for these reasons, therefore, that the Court concluded that Hedigan J. was correct when he concluded that, at least so far as these proceedings were concerned, the Authority was exercising purely routine administrative functions which did not involve any adjudication upon the respective rights of the parties. In these circumstances the question of any quasi-immunity from costs in respect of the discharge of any quasi-judicial or adjudicatory functions simply did not arise.

24. It follows, therefore, that I consider Hedigan J. was entirely correct to award the applicant his costs as against the Authority. It was for these reasons, therefore, that the Authority's appeal against the making of the costs order was dismissed.