THE HIGH COURT

2018 No. 45 MCA

IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 22 (6) OF THE RESIDENTIAL INSTITUTIONS STATUTORY FUND ACT 2012

BETWEEN

W.

APPELLANT

AND

GERALDINE GLEESON

(APPEALS OFFICER)

RESPONDENT

RESIDENTIAL INSTITUTIONS STATUTORY FUND BOARD

NOTICE PARTY

JUDGMENT of Mr Justice Garrett Simons delivered on 30 July 2019.

INTRODUCTION

1. This judgment addresses the question of which party, if any, should be liable for the costs of the within proceedings. The proceedings were heard over two days in June 2019, and a written judgment was delivered on 28 June 2019 (*W. v. Gleeson* [2019] IEHC 472). I will refer to this earlier judgment as the "*principal judgment*".

2. The proceedings came before the High Court by way of a statutory appeal on a point of law pursuant to section 22 of the Residential Institutions Statutory Fund Act 2012. The dramatis personae are as follows. The appellant is a former resident of a scheduled residential institution, and a person who has previously benefited from grants pursuant to the statutory fund ("*the Appellant*"). The respondent to the appeal is a statutory appeals officer appointed by the Minister for Education and Skills ("*the Appeals Officer*"). The statutory board which is entrusted with the distribution of funds under the Act had successfully applied to be joined as a notice party to the appeal, and had participated fully at the hearing before the High Court ("*the Board*").

3. As appears from the principal judgment, the appeal has been dismissed in its entirety. Notwithstanding this, the unsuccessful Appellant now applies for an order directing that his costs be paid by the Appeals Officer and/or the Board. It is submitted that the appeal represented a "test case", and that the principal judgment has clarified the law. The Board has made a cross application to have its costs paid by the Appellant. The Appeals Officer submits that each party should bear its own costs, i.e. no order as to costs should be made.

4. In order to put the costs applications into context, it is necessary to say something about the underlying appeal. The matter had come before the High Court by way of a statutory appeal on a point of law from a decision of the Appeals Officer. The Appellant had sought to challenge the manner in which the Board is distributing funds pursuant to the Residential Institutions Statutory Fund Act 2012. More specifically, the Appellant had sought to challenge the introduction of a monetary limit on the aggregate value of benefits which any one individual could receive. (The Board had introduced a monetary limit of €15,000 when prescribing revised statutory criteria in May/June 2016).

5. In truth, the gravamen of the appeal was that the revised statutory criteria prescribed by the Board were *ultra vires*. Strictly speaking, such a claim should have been brought by separate judicial review proceedings naming the Board as *legitimus contradictor*. In the event, however, the Board successfully applied to be joined to the appeal as notice party, and all parties agreed at the hearing before me in June 2019 that it would be preferable that the substantive issue be determined rather than that this aspect of the case be dismissed on a narrow procedural ground. This issue was addressed as follows in the principal judgment.

> "27. Notwithstanding the fact that a challenge to the validity of the prescribed criteria cannot, strictly speaking, be pursued by way of statutory appeal, all of the parties urged the court to determine this issue as part of the appeal. It seems that the present case has been advanced as a form of 'test case', and there are a number of other statutory appeals outstanding, all of which raise a similar issue as to the validity of the introduction of the €15,000 monetary limit. Given that there is some urgency in having this issue resolved—one way or another—in circumstances where it is intended to complete the distribution of the fund by the autumn of this year (2019), it seems preferable that these issues be determined now notwithstanding the irregular form of the proceedings.
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> 28. With some hesitation, therefore, I have decided that it is appropriate to address all issues in this judgment. This is so notwithstanding that the proceedings are irregular. Any appellant in future proceedings should not assume, however, that another court would show such indulgence."

6. This procedural history is, nevertheless, relevant to the costs applications. I will return to this point at paragraph 25 below.

7. The other aspect of the proceedings which is relevant to the costs application is the nature of the statutory fund. The fund had been established by the Oireachtas in order to support the needs of former residents, such as the Appellant himself, who had suffered abuse (as defined) in scheduled residential institutions. Former residents were entitled to apply for approved services, which would be provided either (i) by the Board making a direct payment to an approved service provider, or (ii) by the payment of a grant to the former resident which could then be used to defray the cost of an approved service. The approved services included *inter alia* medical and dental services. The statutory fund is a finite fund of some 110 million euros. The affidavit evidence indicates that the fund is almost exhausted, and that it will be wound up shortly.

8. The Board had sought to ensure an equitable distribution of the fund by introducing a monetary limit on the value of benefits which any one individual could receive. The logic of the Appellant's case, if successful, would have been that persons in the same position as him, i.e. persons who had made early applications to the fund, would have been preferred over those who came late. Put otherwise, this is not a case where a litigant can claim to be acting on behalf of an entire class. Rather, the Appellant was seeking to advance his own position at the expense of *other* former residents.

CASE LAW ON SO-CALLED PUBLIC INTEREST LITIGATION

9. The parties were in broad agreement as to the principles governing an application for costs in circumstances where the moving party asserts that their proceedings advance a public interest. Reference was made, in particular, to the judgment of the Supreme Court in *Dunne v. Minister for Environment (No. 2)* [2008] 2 I.R. 775.

> "26. The rule of law that costs normally follow the event, that the successful party to proceedings should not have to pay the costs of those proceedings which should be borne by the unsuccessful party, has an obvious equitable basis. As a counterpoint to that general rule of law, the court has a discretionary jurisdiction to vary or depart from that rule of law if, in the special circumstances of a case, the interests of justice require that it should do so. There is no predetermined category of cases which fall outside the full ambit of that jurisdiction. If there were to be a specific category of cases to which the general rule of law on costs did not apply that would be a matter for legislation since it is not for the courts to establish a cohesive code according to which costs would always be imposed on certain successful defendants for the benefit of certain unsuccessful plaintiffs.
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> 27. Where a court considers that it should exercise a discretion to depart from the normal rule as to costs, it is not completely at large but must do so on a reasoned basis, indicating the factors which, in the circumstances of the case, warrant such a departure. It would neither be possible nor desirable to attempt to list or define what all those factors are. It is invariably a combination of factors which is involved. An issue such as this is decided on a case by case basis and decided cases indicate the nature of the factors which may be relevant but it is the factors or combination of factors in the context of the individual case which determine the issue."

10. As appears from the foregoing, there is no *predetermined* category of cases which falls outside the general rule that costs follow the event.

11. Counsel on behalf of the Board also referenced the judgment of the High Court (Binchy J.) in *P.C. v. Minister for Social Protection (No. 2)* [2016] IEHC 343. Those proceedings involved a challenge to the constitutional validity of legislation which disqualified an individual undergoing a sentence of imprisonment from receiving the State contributory pension. (The substantive judgment in those proceedings was subsequently overturned on appeal to the Supreme Court in *P.C. v. Minister for Social Protection* [2017] IESC 63).

12. In deciding to award the unsuccessful applicant in those proceedings two-thirds of his costs, the High Court made the following observations as to the nature of "test cases".

> "12. It follows from this that whether or not a case qualifies as a test case or a public interest challenge is not determinative of the issue, but rather it is a factor that the Court may take into account in considering an application to depart from the general rule. The plaintiff has argued that this case qualifies as a test case and should be treated as such and relies upon the decision of Clarke J. in *Cork County Council v. Shackleton* referred to above. However, it has been submitted on behalf of the defendants that it is a pre-requisite for a case to qualify as a test case that there must be a issue requiring clarification, and it is not enough simply that the plaintiff is one of a category of persons who may have an interest in the outcome of proceedings. If this were correct however, it would mean that any person who first raises an issue would have great difficulty in succeeding with an argument that the case qualifies as a test case, notwithstanding that there are many others who will be affected by the outcome of the proceeding. In this case, the Court was informed that in the order of 40 people per annum are affected by s. 249(1) of the [Social Welfare (Consolidation) Act 2005]. It is certain therefore that had the plaintiff been successful there would be many others currently disqualified from entitlement to receive payment of the SPC, not to mention claims for refunds of payments denied to all persons affected by the provision in the past. Not only that, but during the course of the proceedings the defendants expressed concern that an outcome adverse to the defendants could well have a knock on effect for others disqualified from receiving other social welfare benefits during a term of imprisonment.
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> 13 It seems to me that the concept of a test case may include those cases where a challenge to the constitutionality of a statutory provision, if successful, would inevitably result in a large number of claims being made against the State or an emanation of the State, provided that the challenge itself is substantive in nature and not frivolous or vexatious. This was such a case."

13. For the reasons explained under the next heading, I am *not* satisfied that the proceedings before me constitute a "test case" in this sense.

(1). APPELLANT'S APPLICATION FOR COSTS

14. I propose to address first the Appellant's application to have his costs paid, before turning to address the cross-application for costs made on behalf of the Board.

15. The ordinary rule is that costs follow the event, i.e. an order for costs is usually made in favour of the successful party as against the unsuccessful party. Were this rule to be applied to the facts of the current case, then the Appeals Officer would undoubtedly be entitled to an order for costs in her favour as against the Appellant. This is because the appeal has been dismissed in its entirety. The Board would also have a strong argument for having its costs paid too.

16. Of course, a court retains *discretion* to make a different order in respect of costs. This is expressly provided for under Order 99, rule 1 of the Rules of the Superior Courts (as amended) as follows.

> "(1) The costs of and incidental to every proceeding in the Superior Courts shall be in the discretion of those Courts respectively.
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> […]
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> (4) Subject to sub-rule (4A), the costs of every issue of fact or law raised upon a claim or counterclaim shall, unless otherwise ordered, follow the event."
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> *Emphasis (italics) not in original.

17. As confirmed by the judgment of the Supreme Court in *Dunne v. Minister for Environment (No. 2)* [2008] 2 I.R. 775, [27], where a court departs from the normal rule as to costs, it is not completely at large but must do so on a reasoned basis, indicating the factors which, in the circumstances of the case, warrant such a departure. The judgment in *Dunne (No. 2)* also confirms at [18] that factors such as (i) whether the proceedings were seeking a private personal advantage, and (ii) whether the legal issues raised were of

special and general public importance are potentially relevant but are not necessarily determinative.

18. In exercising my discretion in respect of costs, I must seek to reconcile (i) the objective of ensuring that individuals are not deterred by the risk of exposure to legal costs from pursuing litigation of a type which—although ultimately unsuccessful—nevertheless serves a public interest, with (ii) the objective of ensuring that unmeritorious litigation is not inadvertently encouraged by an overly generous costs regime.

19. I must also respect the ruling of the Supreme Court in *Dunne (No. 2)* to the effect that—absent express legislative provision such as, for example, that applicable to environmental litigation under section 50B of the Planning and Development Act 2000—there is no predetermined category of cases which falls outside the full ambit of the discretionary costs jurisdiction.

20. Applying these principles, I have concluded that the Appellant is *not* entitled to an order for costs in his favour for the following reasons.

21. First and foremost, the principal ground of challenge advanced on behalf of the Appellant, i.e. that the monetary limit was *ultra vires*, was fundamentally misconceived. This argument simply could not be reconciled with the wording of sections 9 and 20 of the Residential Institutions Statutory Fund Act 2012. This matter was dealt with as follows in the principal judgment.

> "58. Counsel on behalf of the Appellant submits that the introduction of a monetary limit is inconsistent with the requirement under section 9(2)(a) to 'have regard to' the need to take account of the individual circumstances of former residents in determining criteria. Counsel further submits that, on its proper interpretation, the fund is an unlimited needs based fund, and that it is impermissible to impose a monetary limit on the value of the benefits which an individual applicant can obtain.
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> 59. These arguments simply cannot be reconciled with the express language of the legislation. Subsection 9(2)(c) provides that the Board, in determining criteria, shall have regard to the need to apply limits to monies that may be made available for an arrangement or grant. The reference to an 'arrangement' or 'grant' describes the making of an arrangement for the provision of an approved service, or the payment of a grant, pursuant to section 20. On its ordinary and natural meaning, therefore, section 9 confers upon the Board an express entitlement to prescribe a monetary limit. This in itself is sufficient to dispose of the Appellant's argument. Unless subsection 9(2)(c) is to be drained of all meaning, it provides a proper legal basis for the introduction of the monetary limit of €15,000."

22. Put shortly, these appeal admitted of an obvious answer.

23. The court must be entitled to have regard to the *strength* of an appellant's case in deciding whether or not to make a costs order in favour of an unsuccessful appellant. The logic of awarding costs to an unsuccessful litigant in so-called public interest litigation is that—notwithstanding that the litigant was ultimately unsuccessful in their argument—there had nevertheless been some public benefit to the proceedings in that an uncertainty in the law had been clarified. By contrast, on the facts of the present case, there was *no uncertainty* as to the meaning of the Residential Institutions Statutory Fund Act 2012 which required to be clarified.

24. Were the court to make even a partial costs order in favour of a litigant—such as the Appellant in the present case—who has pursued an argument which is fundamentally misconceived, it would run the risk of encouraging unmeritorious litigation.

25. Secondly, there are certain aspects of the conduct of the proceedings which also militate against making a costs order in favour of the Appellant. The gravamen of the Appellant's complaint had been that the introduction of the monetary limit of €15,000 was *ultra vires*. This complaint should have been pursued by way of judicial review proceedings as against the Board. Instead, the Appellant invoked the statutory appeal mechanism against the Appeals Officer and subsequently *objected* to the joinder of the Board as a notice party notwithstanding that it was the proper *legitimus contradictor*. This objection was dismissed by the High Court (Noonan J.) on 18 October 2018 and the Board was joined as a notice party to the appeal. The Appellant also pursued an unmeritorious argument to the effect that the Appeals Officer erred in law in regarding herself as bound by the statutory criteria specified by the Board pursuant to section 9 of the Act. See paragraphs [29] to [41] of the principal judgment.

26. The consequence of all of this was that it became necessary for the Appeals Officer to incur the costs of participating in a two-day hearing before the High Court. These costs could have been avoided had the correct procedural route been adopted, i.e. an application for judicial review against the Board.

27. Were the court to exercise its discretion to make a costs order in favour of the Appellant, this would, in effect, be to reward this behaviour.

28. Thirdly, I attach some *small* weight to the fact that the Appellant had a financial interest in the outcome of the proceedings. More specifically, the Appellant was seeking to obtain additional benefits from the fund, over and above the benefits in the order of €40,000 which he had previously received. The traditional exemplar of a public interest litigant is a person who is advancing a cause in respect of which neither they nor any other individual has a financial or proprietary interest. This might be the situation in respect of proceedings which, for instance, seek to protect a national monument or to vindicate some aspect of electoral law. Part of the rationale for exempting such a person from the normal rule that costs follow the event is that an area of law might not otherwise be clarified in the public interest for the lack of a litigant who is prepared to undertake the risk of an adverse costs order. A litigant who would have no financial or proprietary interest in the outcome of the proceedings is less likely to institute proceedings than a litigant who does.

29. The importance of this factor should not, however, be overstated. In some instances, a public interest will happily coincide with a private interest in the outcome of proceedings. It must also be borne in mind that an applicant in judicial review proceedings is required, under Order 84, rule 20(5) of the Rules of the Superior Courts (2011 version) to have a "sufficient interest" in the matter. It would create a type of Catch-22 situation if compliance with this *locus standi* requirement were automatically to shut out a litigant from protection against the risk of an adverse costs order.

30. Finally, for the sake of completeness, I do not accept that the characterisation of proceedings as a "test case" could ever be decisive of the approach to costs. On the facts of the present case, the within statutory appeal is one of seven appeals which raise issues as to the applicability of the monetary limit of €15,000. All of these appeals were subject to case-management by Noonan J. It was directed that two of the appeals be heard first, with the balance to await the outcome of same.

31. In the event, it was only necessary for one of those two appeals to be heard in full. The second "test case" had been chosen

because it had been thought that it presented an *additional* issue over and above the first test case in respect of which a ruling would be helpful. The additional issue (which concerned a time-limit) subsequently fell away.

32. The within proceedings thus represent a "test case" in the literal sense that the outcome of same is capable of being determinative of a small number of *other* cases. However, in order to justify an exemption from the general rule that costs follow the event, something more is required. The court is entitled to have regard to factors such as *inter alia* (i) the strength of the case; (ii) whether the relevant area of law is uncertain or in need of clarification; (iii) the conduct of the proceedings; and (iv) whether the litigant has a financial or proprietary interest in the outcome of the proceedings.

33. It may also be appropriate to assess the importance of the proceedings by reference to the number of *other* individuals who might be affected by the outcome of same. On the facts of the present case, this number is very small. This is because the statutory fund is being wound down and no new applications have been accepted since August 2018. It seems, therefore, that the number of former residents, who would have been in a position to benefit had the monetary limit of €15,000 been invalidated by the High Court, would be very small. Proceedings which have such a limited effect can hardly be said to constitute public interest litigation.

34. For all these reasons, then, I refuse the application for a costs order in favour of the Appellant.

(2). CROSS-APPLICATION FOR COSTS AGAINST APPELLANT

35. I move next to consider the cross-application by the Board for a costs order against the Appellant. It will be recalled that the Board had applied to be joined to the appeal as a notice party in circumstances where it is not a mandatory party to an appeal on a point of law under the Residential Institutions Statutory Fund Act 2012.

36. A court hearing an application to allow a party to be joined to proceedings as a notice party will often impose a condition to the effect that the notice party must bear its own costs irrespective of the ultimate outcome of the proceedings. This is done in order to alleviate the concern that the joinder of additional parties will result in increased costs exposure for an applicant. I was informed, however, that no such condition was imposed at the time of the joinder of the Board to the appeal in October 2018. In principle, therefore, it is open to this court to make an order for costs in favour of the Board notwithstanding that it is technically a notice party only.

37. I have come to the conclusion that an order for costs should *not* be made against the Appellant in favour of the Board. The normal rule is, of course, that costs follow the event. Accordingly, the Board would, in principle, have been entitled to its costs. I am acutely conscious, however, of the fact that the Appellant is (i) a person of limited means; and (ii) a person who has suffered abuse (as defined) during his time as a resident in a scheduled residential institution. The making of a costs order against a person of limited means could be financially ruinous. The costs of a two-day hearing before the High Court are likely to run to tens of thousands of euro.

38. As against this, the inevitable consequence of the Appellant having pursued a statutory appeal to the High Court is that the statutory fund, which is intended for the benefit of *all* former residents, will have been depleted in order to cover the costs incurred by the Board in the defence of the proceedings.

39. On balance, however, I think that it would be disproportionate to make an order for costs as against the Appellant. The costs of the proceedings would be measured in tens of thousands of euro, whereas the fund had been in the order of 110 million euro. The marginal depletion of the fund must be weighed against the financially ruinous consequences which the making of a costs order would have for the Appellant.

40. Moreover, it seems to me that it would be unjust to make an order for costs in favour of a public authority, whose very objective is to support former residents, against a former resident who during their youth suffered abuse at the hands of a State sanctioned residential institution. An order for costs against such an individual would normally only be contemplated where the proceedings were frivolous or vexatious. Whereas the legal issues raised in the within proceedings were too insubstantial to reach the threshold for a costs order *in favour of* the Appellant, the issues were not frivolous or vexatious.

(3). APPEALS OFFICER'S POSITION

41. As noted earlier, the Appeals Officer has adopted the commendable position of not seeking an order for costs in her favour. Counsel on her behalf made helpful submissions on the correct application of the principles in *Dunne v. Minister for Environment (No. 2)* [2008] 2 I.R. 775 to the facts of the present case.

CONCLUSION AND ORDER

42. For the reasons set out herein, I have concluded that this is a case where some departure from the normal rule that costs follow the event is justified. An order which required the Appellant to pay the costs of the Board would be disproportionate having regard to the fact that the Appellant is (i) a person of limited means; and (ii) a person who has suffered abuse (as defined) during his time as a resident in a scheduled residential institution.

43. The Appellant is not, however, entitled to an order for costs in his favour. The relevant factors informing this conclusion are (i) the principal ground of challenge advanced on behalf of the Appellant, i.e. that the monetary limit was *ultra vires*, was fundamentally misconceived; (ii) there was *no uncertainty* as to the meaning of the Residential Institutions Statutory Fund Act 2012 which required to be clarified; (iii) the conduct of the proceedings; and (iv) the fact that the Appellant had a financial interest in the outcome of the proceedings.

44. Accordingly, I propose to make no order as to costs. Each party to the proceedings will have to bear their own costs.