Neutral Citation [2013] IEHC 177

THE HIGH COURT

COMPETITION

[2005 No. 532 J.R.]

BETWEEN

BUPA IRELAND LIMITED AND BUPA INSURANCE

APPLICANTS

AND

THE HEALTH INSURANCE AUTHORITY, THE MINISTER FOR HEALTH AND CHILDREN, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

RULING of Mr. Justice Cooke delivered the 30th day of April 2013

1. On the 7th March, 2013, the Court delivered its judgment on the preliminary issues which had been directed to be tried in relation to the liability of the respondents (in effect the second named respondent) for damages and the quantification of any such damages arising from the remittal of those issues by the Supreme Court on foot of its appeal judgment of the 16th July, 2008, which set aside the original High Court judgment of McKechnie J. of the 23rd November, 2006.

2. In its judgment of the 7th March, 2013, this Court found, essentially for the reasons summarised at para. 134 of that judgment, that the applicants' claim for damages could not be maintained.

3. The respondents now apply for an order for their costs against the applicants. The applicants not only resist that application but apply to be awarded their costs, or at least part of their costs, against the second named respondent. In the alternative they argue that any order for costs in favour of the respondents ought to be reduced to take account of particular issues upon which the applicants succeeded.

4. The costs in question are the costs incurred since the remittal of the issues to the High Court being principally those incurred by the parties on the various procedural applications, the delivery of pleadings on the issues and the hearing of this case before the Court for seven days in January/February, 2012. All costs previously incurred in the proceedings, both in the High Court and in the Supreme Court have been dealt with in the order of the Supreme Court of 17th December, 2008, which awarded all costs of the litigation in both the High Court and the Supreme Court up that point in favour of the applicants. In exercising its discretion on the award of costs in the application now before it, this Court is therefore concerned only with considerations relevant to the trial and outcome of the liability issue and not with any of the variety of the considerations relevant to the earlier course of the judicial review proceedings and the outcome of the case in the Supreme Court. Those considerations have effectively been met and satisfied by the determination of the Supreme Court.

5. There is no dispute as to the starting point and the basic rules for consideration of these issues. Order 99, r. 1(1) of the Rules of the Superior Courts provides the primary provision, namely, that "The costs of and incidental to every proceeding in the superior courts are to be in the discretion of those Courts respectively".

6. The second basic rule is that provided for jury and non jury cases in subrules (3) and (4) to the effect that costs are to follow the event. It is to be noted, however, that under subrule (3) the language used is that: "The costs of every action, question, and issue tried by a jury shall follow the event unless the Court, for special cause, to be mentioned in the order, shall otherwise direct". In non-jury matters, on the other hand, subrule (4) provides that: "The costs of every issue of fact or law raised upon a claim or counterclaim shall, unless otherwise ordered, follow the event". (Emphasis added.) This would seem to suggest that the issue of costs in non-jury proceedings is to be addressed with more particular regard to the distinct issues of law or fact within the proceedings, rather than by disposing of the costs of the action in their totality.

7. If it is clear as a basic rule that costs are to follow the event, it must also follow, obviously, that where any party who has not succeeded "on the event" seeks to resist the application of the primary rule, it is that party which bears the onus of demonstrating that the circumstances justify displacement of the primary rule. That is the position of the applicants before this Court.

8. In arguing that the primary rule should be displaced both to the extent that the applicants should recover an award for costs and, in the alternative, that the respondents should not recover their costs in their entirety, counsel for the applicants have relied upon a number of authorities:

Grimes v. Punchestown Developments Co. Limited [2002] 4 I.R. 515;

Fyffes plc v. DCC plc and Others [2006] IEHC 32;

Cork County Council v. Shackleton and Others [2011] 1 I.R. 443 and

John Ronan and Sons v. Cleanbuild Limited and Others [2011] IEHC 499.

9. The essential principles which emerge from this case law have not been disputed between the parties on this application and it turns more upon the application of the principles to the particular factors relied upon on each side in this litigation, than upon identifying the primacy of any one of the ingredient principles. It may nevertheless be useful for the Court to indicate the essential points which it distils from the case law thus relied upon.

10. The appeal in the case of *Grimes v. Punchestown Developments & Co. Limited* concerned an unsuccessful applicant for an

injunction to restrain a particular use of land by the respondent under the Local Government (Planning and Development) Act 1976. He had sought to appeal an order for costs awarded against him in the High Court upon the ground that it was only on the day before the hearing of the injunction application that the respondent had disclosed a prior use of the land for the same purpose. The Supreme Court upheld the High Court costs order on the basis that the High Court discretion had been correctly exercised by applying the normal rule. Denham J. (as she then was) pointed out:-

> "The normal rule is that costs followed the event. However, there were circumstances when a court on the facts of a case could determine that the normal rule did not apply. Indeed, a successful applicant may not succeed in obtaining an order for costs if the facts indicate features, which are unsatisfactory, as to the way in which they acted...."

11. In the particular circumstances and having regard to the factors analysed by the High Court judge, the Supreme Court held there was no reason to interfere with the exercise of the discretion. The case is, accordingly, authority for the proposition that if a successful party is to be deprived of an order of costs in accordance with the normal rule, it is at least necessary to demonstrate the presence of some features of the way in which the successful party has acted as being unsatisfactory. It is to be noted that in the Grimes case, one of the features sought to be relied upon was the "official watchdog" aspect of local authority control of unauthorised land use. In that regard, one of the factors invoked by the trial judge in discounting the implicit "public interest" element was the fact that applicant was not a resident in the relevant area and could not have suffered any injury or damage.

12. In the case of *Fyffes plc* the defendants had succeeded in the substantive action, but the plaintiff sought to urge the Court to exercise its discretion so as to exclude the costs relating to one particular issue ("the dealing issue") upon which the defendants had not succeeded. Laffoy J. having referred to the *Grimes* case and reviewed a number of other authorities from other common law jurisdictions, expressed the view that the Court's discretion in a case to which the subrule of (4) applies is "considerably tempered by the provision which stipulates that, as a general rule, costs should follow the event". She referred to the difference of language between subrules (3) and (4) already mentioned above, but noted that no argument had been advanced to her as to the significance of that distinction. She observed:-

> "Whether the general rule should be displaced is determined by reference to the facts of the particular case, not extraneous matters. I understand that to mean all facts in relation to the particular case, including the conduct of the parties leading to, and in the course of the prosecution of, the proceedings. As to whether the decision of the Supreme Court (in *Grimes*) is authority for the proposition that the court is entitled to have regard to the fact that a defendant, who was successful overall was not successful on substantive issues raised and prosecuted by him on his defence, in the context of an application by the unsuccessful plaintiff to be relieved of some of the costs which would be awarded against him under the general rule, in my view, it is. The decision of the Supreme Court does not, either expressly or by implication, preclude the court from considering any matter connected with the case. While not articulated in the *Grimes* case, it seems to me that the test must be whether the requirements of justice indicate that the general rule should be displaced."

13. In applying that approach to the particular facts and circumstances of the case before her, Laffoy J. concluded:-

> "In considering whether there should be a limited departure from the general rule that costs follow the event as advocated by the plaintiff, in my view, the starting point must be that, adopting the terminology used by counsel for the defendants, this is commercial litigation at a high level and it is commercial litigation between two major public companies in this jurisdiction. That being so, only exceptional circumstances would justify departure from the general rule."

14. She proceeded then to rule that the facts of the case in question were exceptional and that the approach adopted by the defendants on the "dealing issue" had "added considerably to the complexity and to the duration of the case". She took then that fact into account in exercising her discretion and disallowed the costs of making discovery in relation to the dealing issue and such costs as related to the hearing days taken up with that issue.

15. The *Fyffes* case is, accordingly, authority for the proposition that it can be appropriate in cases where subrule (4) applies to have regard to the role which specific issues have played within a piece of litigation, but that it requires exceptional circumstances to warrant departing from the primary rule in order to deprive the successful party of the order for costs which would normally follow. Nevertheless, in complex commercial litigation at a high level, this approach to the significance and consequences of individual issues within the litigation may well be appropriate.

16. The costs issue considered by Clarke J. in *Cork County Council v. Shackleton* was one which arose in somewhat special circumstances following parallel proceedings of considerable complexity. The applicant had sought to set aside an arbitration award made by the respondent in favour of the notice party. The litigation arose in the context of detailed provisions of the Planning and Development Act 2000, under which a local authority could require, as a condition of the grant of a planning permission for a building development, that part of the land be made available for affordable housing. The notice party in the relevant proceedings was the company which had applied for the planning permission and been the beneficiary of the arbitration award determining the amount of houses to be transferred to the local authority under the planning permission. As is clear from the extensive judgment, the issues raised in the litigation were complex and considerable difficulties had been encountered by all concerned in interpreting and construing the legislation in question. The substantive issues were determined in favour of the applicant in circumstances where it was the notice party that had sought to uphold the arbitration award and provide the opposition to the applicant's contentions. As the successful party, the applicant sought to recover its costs, but the notice party also maintained an entitlement to recover costs because of the unusual and special circumstances of the litigation notwithstanding the fact that it had lost.

17. In addressing the question as to whether and on what basis the Court might depart from the primary rule that costs should follow the event in these circumstances, Clarke J. considered the case law relating to "public interest challenges" and then the arguments advanced as to whether the litigation was a "test case" which justified a departure from the primary rule. He pointed out that test cases can arise in very many different circumstances, but concluded:

> "Where the proceedings involve entirely private parties then there does not seem to me any proper basis for departing from the ordinary rule in relation to costs, notwithstanding the fact that the case might properly be described as a test case. There is no good reason for depriving a successful party of its ordinary entitlement to costs simply because the case in which it succeeded happens to be a test case."

18. He then pointed out, however, that different considerations may apply where one of the parties is a public authority and said:-

> "One can envisage circumstances where a court was faced with difficult questions of construction in relation to legislation

> of widespread and general application which was introduced by a particular ministry and in circumstances where that ministry is a necessary and proper party to the proceedings under consideration."

19. The particular case before him however, was one in an "intermediate position" in that the local authority as applicant was not responsible for the legislation out of which the complex issues arose. He concluded:-

> "I am satisfied that the Court retains discretion to consider whether there should be some departure from the normal rule in respect of costs. The circumstances concerned, in my view, stem from the fact that this litigation was necessitated by the introduction of legislation which is extremely difficult of construction and where one of the parties to the litigation is a public authority which is answerable to the very ministry who introduced that legislation in the first place."

20. In those circumstances he held that it would be going too far to award the notice party its costs given that it had sought to stand over the award in the proceedings and had failed. He held that the justice of the case was met by making no order as to costs.

21. In the case of *John Ronan and Sons v. Cleanbuild Limited*, Clarke J. returned to the issue which he had previously addressed in his judgment in *ACC Bank plc v. Johnston* (Unreported, Clarke J. High Court, 241h October, 2011) and in the other authorities he refers to at paragraph 3.1 of the judgment. He there outlines the approach to be taken when the Court is invited to depart from the overriding principle that costs should follow the event, particularly in complex cases involving several parties and multiple issues. He points out that the case law clearly establishes that the starting point is that the party who wins the event gets full costs, but that this overriding rule may require to be departed from where the successful party is shown to have "materially added to the costs of the proceedings by raising additional grounds or arguments which the Court found to be unmeritorious". He pointed out however, that:

> "It is important to emphasise that the exercise is not one of narrowly looking at the amount of time spent on each point, but rather taking a broad view as it can fairly be said that the costs of the proceedings as a whole were materially increased. In that light, the court should make an appropriate order to reflect the fact, not just that the winning party should not be awarded costs attributable specifically to an aspect of the case on which that winning party lost, but also to compensate the losing party of the fact that that party's costs had been increased by reason of the raising of the unmeritorious issues concerned."

22. It is accordingly clear from the various sets of circumstances illustrated by these cases and the other authorities discussed in them, that there are broadly three approaches which the Court can adopt when it is considered appropriate to depart from the primary rule. At one end of the spectrum is the approach which awards the successful party its costs, but reduces the costs recoverable below the full amount that would otherwise be payable by the losing party. That approach may be appropriate where there is some feature of the litigation as conducted by the successful party which is, in the words of Denham J. above, "unsatisfactory" or where, as is described by Clarke J. in the *John Ronan* case, the successful party has materially added to the duration or complexity of the litigation by raising issues which are found to be unmeritorious. But it may also be appropriate where, without there being anything to criticise in the conduct of the case by the successful party, it is possible to identify one or more distinct issues or phases or steps taken in the litigation which have contributed materially to the overall costs and have gone against the successful party. The decision of Laffoy J. in the *Fyffes plc* case is an example of the recoverable costs being reduced in order to take into account the impact on the proceedings of a distinct and identifiable issue on which the successful party was defeated. Such an approach is adopted not to signal any reproach of the conduct of the successful but to strike a just balance between the parties by reflecting the burden they have respectively borne in the case.

23. The intermediate position is one in which no order for costs is made so that the relevant parties are left to bear their own costs. That was the solution reached by Clarke J. in the *Cork County Council* case to reflect, in effect, the fact that the notice party, although a private party, probably had little option but to stand over the arbitrator's award while the applicant was a public authority answerable to the Government department that had introduced the legislation out of which much of the difficulty arose.

24. At the other end of the spectrum, the most radical departure from the primary rule is that of an award of costs in favour of the losing party against the party which has succeeded. It is clear from the authorities that this approach should only be adopted in rare and exceptional circumstances and in cases which invariably involve considerations of public interest or features which go beyond the immediate interests of the parties to the litigation. An instance of this approach is to be found in, for example, *McEvoy v. Meath County Council* [2003] 1 I.R. 208, where the successful respondent was required to pay 50% of the applicant's costs of the proceedings in circumstances where the proceedings had raised public law issues of general importance and the applicants had no private interest in the outcome but had acted solely in furtherance of a valid public interest in the environment and thus by way of "public interest challenge". In *Dunne v. Minister for the Environment* [2008] 2 I.R. 775, on the other hand, the Supreme Court set aside an order in which Laffoy J. in the High Court had dismissed the substantive claim of the plaintiff, but made a costs award in his favour. The judgment of Murray C.J. makes it clear that there is no fixed category of "public interest challenge" cases which determine whether such a radical departure from the primary rule is appropriate. At paragraph 35 of the his judgment, Murray C.J. said:-

> "Accepting that the plaintiff brought the proceedings in the interests of promoting compliance with the law and without any private interest in the matter, I do not consider that the issues raised in the proceedings were of such special and general importance as to warrant a departure from the general rule. Undoubtedly, it could be said that issues concerning subject matters such as the environment or national monuments have an importance in the public mind, but a further factor for the court is whether the legal issues raised, rather than the subject matter itself, were of special and general public importance. In this case nothing exceptional was raised in the issues of law which were before the court so as to warrant a departure from the general rule."

25. What emerges, in the view of the Court, from this brief consultation of some of the recent leading cases in this area, is that the essential task of the Court when urged to depart from the primary rule and overriding principle which entitles the successful party to a full order for costs, is to frame a solution which does justice between the parties by taking account of a wide range of potentially relevant factors, both positive and negative, which are shown to have had a material bearing on the quantum of costs generated by the litigation. As the cases illustrate, these factors can include the nature, purpose and subject matter of the proceeding; the identities of the parties and their roles (public or private) and objectives in it; the significance and special character of the legal issues involved; the manner in which the parties have conducted the case and whether one or other is open to criticism for having contributed unjustifiably to the duration or complexity. In complex commercial cases, an important consideration will be the question as to whether a losing party has succeeded on distinct issues within the litigation which make it equitable to at least relieve it of liability for a corresponding portion of the full bill. Given the primacy of the overriding principle, the more radical the departure which is sought to be urged upon the Court, the more compelling and exceptional must be the factors relied upon.

Conclusion
26. The applicants in the present case have urged the Court to draw some analogy between the circumstances of the *Cork County Council* case and the positions of the parties now before it. It seems to the Court that such a submission might have some force if one was considering the outcome of this litigation in its entirety. Many of the issues which occupied McKechnie J. and then the Supreme Court in the substantive proceedings arose out of the obvious difficulties of construction and disputed interpretation of the legislation and the statutory instruments. The second named respondent is the Minister with responsibility for that legislation and had sought to stand over it as validating the 2003 Scheme.

27. That, however, is not the issue which is now before this Court in relation to the particular costs upon which it must rule. As pointed out above, the costs with which this application is concerned are confined to the costs of the trial of the preliminary issues arising upon the remittal by the Supreme Court of the questions of liability for and quantification of damages. Taken in isolation these issues could not be characterised as public interest issues or those of a test case. The claim has been pursued by the applicants in order to recover compensation for the commercial loss they claimed to have sustained. The claim has been defended by the respondents upon the basis that the *ultra vires* adoption of the 2003 Scheme did not, as a matter of Irish or European Union law, give rise to an entitlement to damages on the part of the applicants. That is the defence upon which the respondents have succeeded.

28. In the judgment of the Court, therefore, this is not an instance in which the Court could not merely depart from the primary rule, but effectively reverse it by awarding the costs in favour of the party which has failed. In the judgment of the Court, it is only possible to adopt such an approach in exceptional cases which present some of the features mentioned in paragraph 24 above in order to do justice to the unsuccessful party. The issues before this Court on the remittal did not involve any novel proposition brought before the Court by the unsuccessful party in a manner which could be said to serve a wider public interest. Nor can it be said that there has been anything in the conduct of the respondents in the nature of "unsatisfactory features" of the kind referred to by Denham J. in the *Grimes* case. As will appear from the judgment of this Court on the 7th March, 2013, and particularly from the summary contained at paragraph 134, the principal aspect of the issues which went against the respondent was that of the reliance placed upon *res judicata*. The Court is satisfied, however, that no criticism could be directed at the second named respondent for having raised or argued that ground, nor could it be said to have been in any sense wasteful, vexatious or "unsatisfactory" as an aspect of the conduct of the proceedings on the part of the respondents. From the point of view of this Court, the issues thereby raised were difficult and the answer to them by no means obvious because of the complex nature of the issues which formed the basis of the judgment of McKechnie J. and the fact that the Supreme Court refrained from expressing any view on many of the relevant findings contained in the original High Court judgment. For these reasons, the Court is satisfied that it would be going too far to award costs to the applicants.

29. The position remains, however, that the matter before the Court can be characterised as "commercial litigation at a high level" in which it is possible to identify the manner in which the main issues were determined for and against the respective sides. While the exercise is obviously not a precise science, it is clearly in the interest of doing justice between the parties to take these considerations into account when it is possible to do so with some degree of confidence. As will be apparent both from the preliminary issues defined by this Court (see paragraph 20 of the judgment of the 7th March, 2013), and from the manner in which the various arguments raised have been addressed in that judgment, a major area of dispute between the parties has been directed at the effect to be attributed to the judgment of the Supreme Court upon the findings of McKechnie J. on substantive issues as to the nature, extent and gravity of the impact of the 2003 Scheme for the purposes of assessing the alleged infringement of the wrongs relied upon by BUPA. It was strongly contended and forcibly argued on behalf of the respondents that the applicants ought not to be entitled to reopen such issues and require them to be retried by the High Court. That aspect of the case was, as already indicated, determined against the respondents.

30. Having regard to the importance of that aspect of the case and the role it played both in the time taken at the hearing and the influence it had on the analysis of the issues generally, the Court is satisfied that the balance of justice between the parties in respect of this final stage in the litigation (at least in this Court), is best reflected in an award of costs in favour of the respondents limited to 75% of the costs recoverable on taxation.