Neutral Citation Number: [2006] IEHC 223

**THE HIGH COURT**

**2004 1164JR**

**BETWEEN**

**MARTIN HARRINGTON**

**APPLICANT**

**AND**
**AN BÓRD PLEANÁLA,**
**IRELAND AND THE ATTORNEY GENERAL**

**RESPONDENTS**

**AND**
**SHELL E. AND P. IRELAND LIMITED, MAYO COUNTY COUNCIL AND OTHERS**

**NOTICE PARTIES**

**Judgment delivered by Macken J. on the 11th day of July 2006**

1. This judgment concerns only the question of costs in the matter. The case had two stages to it. The first was the hearing of the application for leave to issue judicial review proceedings. I delivered judgment on that application in July 2005. The second stage was the application for a certificate for leave to appeal to the Supreme Court arising from my decision pursuant to s.50 (4) of The Planning and Development Act 2000. I delivered judgment on that issue in March 2006. At the request of the parties, I adjourned the application for costs and this judgment relates to that issue only.

2. The principles applicable to the entitlement to costs are quite well established. The application of those principles to the question of costs may not have automatic or identical consequences to all stages of the matter before me. It is not necessarily appropriate, in my view, to consider the two stages of the proceedings in this matter together, in terms of costs. I will return to that issue later.

3. It is common case between the parties, that the right to costs is governed by Order 99 of the Rules of the Superior Courts, and that prima facie, a losing party in an application for judicial review can normally expect to be ordered to pay the taxed costs of a successful party. But while that is the normal rule, the overriding principle of law is that costs are always at the discretion of the court. The reason for this overriding principle is to permit a court, in appropriate cases, to depart from the norm by granting them to a losing party, or by making no order as to costs.

4. This judgment is concerned with applications:

> (i) by the unsuccessful Applicant for his costs of the proceedings in this court against the respondents and the notice parties; and
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> (ii) by the respondents and the notice parties for costs against the Applicant.

5. I have had the benefit of written submissions and of oral arguments made, which I have considered in full, including all counsels' exposure of the principles found in the jurisprudence on this issue. I had an opportunity to consider these same principles in the recent case of *Dubsky v Ireland* (unreported, the High Court, 13th December 2005).

6. The Applicant submits that the jurisprudence on the exercise of the discretion vested in the court to depart from the normal rule that costs follow the event is governed by the following principles, namely, (a) that the losing party was acting in the public interest in the matter, and (b) that the issues raised by the proceedings were of sufficient general public importance to warrant an order for costs being made in his favour, although having been unsuccessful in his claim. Counsel for the Applicant argues that the Applicant comes within these principles, firstly because the application was not brought by the Applicant merely as a private personal matter, and secondly, because he had raised serious legal issues of general importance concerning the scope of Section 50 of the Planning and Development Act 2000 which the judgment had clarified, as well as issues of European Law. He therefore submits that the application was a genuine and bona fide public interest challenge.

7. The Respondents and the Notice Parties claim that the judgment followed an established line of authority which, while not dealing with a factual basis identical to the Applicant's claim, nevertheless was sufficiently clear to permit the court to rely on that line of authority and to apply it without difficulty in the present case. Therefore it could not be said that the judgment in this case was one concerning a public law issue of significant general importance. Further, they argue that in the present case the Applicant does not fall within the ambit of the first requirement either, since his challenge was based essentially on his private personal interest in the matter. The jurisprudence they argue makes it clear that, that being so, the Applicant cannot succeed in his application for costs. In regard to both of these matters, the Respondents and the Notice Parties, as also did the Applicant, relied on jurisprudence both in this jurisdiction and in the United Kingdom.

**Conclusion:**

8. There is, as stated above, ample jurisprudence to which the court can refer in seeking guidance as to the appropriate principles to be applied, on an application of this nature for costs. The issue was considered in detail in the judgment of Laffoy, J. in Dunne v The Minister for the Environment Heritage and Local Government & Ors (unreported, The High Court, 18th March 2005), in which the learned Judge analysed the then existing jurisprudence, and traced the history of the adoption of the current principles and their application in case law, both by the English courts and, more particularly, by the courts in this jurisdiction:

> *"In reliance on a number of recent authorities, primarily, the judgment of this court (Quirke J.) delivered on 24th January, 2003 in McEvoy v. Meath County Council [2003] 1 IR 208 and the judgment of this court (Kelly J.) delivered on 31st March, 2004 in Sinnott v. Martin [2004] 1 IR 121, counsel for the plaintiff submitted that the exercise of this court's discretion to depart from the normal rule that costs follow the event is governed by two principles:*
>
> > *(1) that the plaintiff was acting in the public interest in a matter which involved no private personal advantage; and*
> >
> > *(2) that the issues raised by the proceedings are of sufficient general public importance to warrant an order for costs being made in his favour.*

9. McEvoy v. Meath County Council involved a challenge by

10. way of judicial review to the making and adoption of a development plan for County Meath, the first applicant being an elected member of Kildare County Council and the second applicant being the chairman of An Taisce (the National Trust for Ireland). The challenge was unsuccessful. In considering the applicants' application for an order for costs against the respondent, Quirke J. considered a number of authorities, one of which was a decision of the English High Court in *R. v. Lord Chancellor, ex parte Child Poverty Action Group* [1999] 1 W.L.R. 347 which concerned the jurisdiction of the English High Court to make a pre-emptive costs order. Quirke J., having noted that Dyson J. acknowledged that there was a distinction to be made between ordinary private law litigation, on the one hand, and what he called "public interest challenges" on the other hand, quoted the following passage from the judgment of Dyson J. at p. 353 in which he explained his understanding of the concept of a public interest challenge:

> *"The essential characteristics of a public law challenge are that it raises public law issues which are of general importance, where the applicant has no private interest in the outcome of the case. It is obvious that many, indeed most judicial review challenges, do not fall into the category of public interest challenges so defined. This is because, even if they do raise issues of general importance, they are cases in which the applicant is seeking to protect some private interest of his or her own."*

11. Quirke J. found that in the proceedings before him neither of the applicants was seeking to protect some private interest of his own. They had acted solely by way of furtherance of a valid public interest in the environment and, in particular, in the interest of those communities affected by the planning considerations applicable to the greater Dublin area. He was also satisfied that the proceedings raised public law issues of general importance. On that basis he was satisfied that the applicants had brought "a *bona fida* public interest challenge". Quirke J. went on to analyse the course of the proceedings in terms of how issues of fact and law were dealt with. He found that the proceedings were unnecessarily prolonged because of the vast amount of documentation that had to be analysed. While he did not expressly blame the respondent for this, it is to be inferred that it was his view that it was the manner in which the respondent contested the issues which gave rise to that outcome. He also found that the majority of issues of fact were determined in favour of the applicants. He made an order requiring the respondent to pay the full costs of and associated with the daily transcript and he awarded the applicants 50% of their costs of and incidental to the proceedings.

12. In *Sinnott v. Martin*, Kelly J. stated that, in his view, the views expressed by Dyson J. in the passage which I have quoted earlier, and approved of by Quirke J., were correct. However, he found that in the proceedings before him, with one exception, the parties before him were seeking to protect their own private interests by participating in the proceedings and that in the circumstances which had prevailed the exceptional party could not be regarded as in a different category for cost purposes. Moreover, he felt that the case did not raise public law issues of such importance as would entitle him, as a matter of discretion, to award costs against the Minister for the Environment.

13. I am satisfied that counsel for the plaintiff has correctly identified the principles established in the recent jurisprudence of this court in accordance with which the court should exercise its discretion in considering an application for costs by an unsuccessful plaintiff or applicant in public law litigation, at any rate, against a protagonist which is a public body."

14. In *Dunne v. Minister for the Environment, supra*., Laffoy, J. in applying the foregoing jurisprudence, accepted that the plaintiff came within the category of persons who truly had no personal private interest in the outcome of the proceedings, as outlined by Dyson, J. in the above extract from the judgment in *R. v Lord Chancellor, ex parte Child Poverty Action Group., supra*. She also recognised that the outcome of the proceedings turned almost entirely on questions of law, all of which were determined in favour of the defendants. But nevertheless, she considered that special circumstances existed which warranted a departure from the general rule because the issues raised were truly ones of general public importance, which were difficult issues of law and it was in the public interest that they be clarified. In those special circumstances she awarded costs to the plaintiff.

15. It seems to me that there were serious and complex issues of law to be considered, both of Irish law and of Community law, of general importance and therefore that the second leg of the test is clearly met. Whether they qualify as "public law issues" simpliciter, or exclusively, is not a matter which was debated extensively before me, although they were certainly issues of general importance. I am satisfied that, although it was possible to find considerable assistance in the existing jurisprudence, as to the scope of Section 50 in an application such as the one in the present case, nevertheless that issue, as well as the several other issues raised by the Applicant and responded to were legally complex and of important general interest.

16. The real issue therefore, so far as the above jurisprudence is concerned, is as to whether the Applicant comes within the category of persons "*who are raising public law issues which are of general importance, where the Applicant has no personal private interest in the outcome of the case*" (emphasis added), which arises from the judgment of Dyson, J. in the above English proceedings, and is therefore excluded from having his costs. This is certainly not the case here. While I am perfectly satisfied that the Applicant has raised serious legal issues of general importance he has done so in the context of his own admitted private personal interest in the outcome of the matter.

17. By its very nature, however, an application such as this must, in all cases, under existing law, be brought by a person who has a "substantial interest" in the outcome of the subject matter of the proceedings. It is necessary only to view the conditions attaching to the application for leave and the jurisprudence on the same to see how important it is that this pre-condition be met. It is of course the case that certain persons could bring such proceedings without a private personal interest in the outcome, for example those who are designated within the Act of 2000 itself, or persons in analogous situations, without considering who they might be.

18. While noting with great care and respect the cases cited in the judgment of Laffoy, J. in *Dunne v the Minister for the Environment, supra*., I am not entirely satisfied that the wide discretion vested in the courts to grant costs is or ought to be as strictly limited as it is submitted must follow from that jurisprudence. To preclude a person who is required by statute to establish a "substantial interest" in the very subject matter of an application for judicial review, from claiming and in an appropriate case being awarded costs, does not, in my view, seem justified on any principle of law. The judgment of Laffoy, J. was not concerned with the question of judicial review applications made pursuant to the provisions of the Act of 2000, or the statutory requirements imposed by that Act on applicants in respect of decisions of a planning authority or of An Bórd Pleanála. The judgment of Dyson, J. in the case of *R v Lord Chancellor, ex parte Child Poverty Agency, supra*, arose in a highly unusual application, being one which I think has no equivalent in this jurisdiction. It was an application, at interlocutory stage, in which the applicant sought an order, in advance of the hearing, declaring that it should not be liable for any costs consequent upon a full hearing, regardless of the outcome of the proceedings. In that context is found the dictum of Dyson, J. as to public law proceedings and the issue of costs. It would not appear that he was dealing with an application in any way analogous to that found in the statutory scheme, found in the Act of 2000, governing applications for judicial review

19. For these reasons I am not persuaded that it is correct, under the legislative framework operating in this jurisdiction, at least in so far as concerns planning matters, that the full rigours of the Dyson, J. extract must or can always apply. Indeed if such a rigorous

rule as to costs did apply, it would or could, I believe, lead to an injustice in the matter of costs. In the context of applications for judicial review pursuant to the Act of 2000 it would mean, as a logical consequence, that no person other than perhaps designated bodies, or analogous persons, could ever fall within the category of persons who have "no personal private interest in the outcome of the case" since they are obliged to have the required statutory interest. It was of course recognised by Dyson, J. that his judgment would, so far as "public law proceedings" are concerned, have that precise effect. I am satisfied therefore that a person bringing these type of proceedings, under the planning code, who while in law must have the statutory substantial interest in the outcome of the matter, but who, at the same raises complex legal issues of general, even perhaps seminal, importance, is not to be precluded from being granted his costs in an appropriate case, and I propose therefore to deal with the application for costs in the application for judicial review on that basis.

20. This application concerned a novel development for the bringing and processing of gas through a pipeline from the seabed off the West Coast of Ireland and through land in Co. Mayo, up to a processing point, at which point it would be first processed. It involved not only the question of the Applicant's interest, as a near neighbour to the development, but also issues as to the possible application of a European Community Directive, the status of the court in dealing with this type of application, vis a vis Article 234 of the Treaty, as well as the status of an applicant for judicial review under the Act of 2000, and the conditions which must be met pursuant to that statutory regime. Some at least of these issues were clarified in the course of the judgment.

21. Notwithstanding therefore the contention on the part of the Respondents and of the Notice Parties that the Applicant did not fall within the principles established by the jurisprudence. I am satisfied that the Applicant ought to have his costs in respect of the leave application as against the Respondents and the Notice Parties. I do not think it is possible or correct to make any distinction between the Respondents and Notice Parties in the matter of costs.

22. Separate considerations arise entirely in respect of the subsequent application for a certificate for leave to appeal to The Supreme Court against the decision. Again, the standard rule is that costs would follow the event. In that regard, I accept the arguments put forward on behalf of the Respondents and the Notice Parties concerning the absence of any grounds upon which such certificate leave could have been granted. In that regard, the law requires, not simply that there should be issues of general public importance, but rather a much higher test, found in the provisions of Section 50 (4)(f) of the Act of 2000, namely that the Applicant must establish that a question of exceptional public importance arising out of the decision, which it is in the public interest should be certified, exists. An applicant who has not succeeded in an application for leave to issue judicial review proceedings, as here, is not otherwise entitled to appeal that decision save by means of the saving clause in Section 50, permitting the court to grant such a certificate for leave to appeal, but that leave is circumscribed in a significant way as referred to above. An applicant carries the burden of establishing that the statutory criteria are met. I held in my judgment on the application for a Certificate, that the Applicant had not met the required criteria. No

23. issues arose in the context of that application which persuades me that any exception to the general rule as to costs arises. In such circumstances, I do not accept the argument put forward on behalf of the Applicant that he nevertheless should have his costs in respect of that application also. Neither am I persuaded that the issues arising on an application for the substantive leave application, and the application for leave to appeal, so far costs are concerned, are conterminous as to their importance, impact or legal effect. Since I found that the Applicant had no grounds whatsoever for seeking a certificate for leave to appeal not having made out any case arising from the decision, it follows that there were no issues of exceptional public importance which it was in the interest of the public ought to be the subject of a certificate for leave to appeal.

24. Having regard to the foregoing, I am satisfied that the normal order as to costs should apply in respect of that application, namely that the Applicant will pay the costs of the other parties, both Respondents and Notice Parties, and I make no distinction between one party and another in that regard.

25. Accordingly there will be an order for costs in favour of the Applicant against the Respondents and the Notice Parties in respect of the hearing on the application for leave to apply for judicial review. There will also be an order for costs in favour of the Respondents and the Notice Parties against the Applicant in respect of the application for a certificate for leave to appeal against the decision I delivered on the application for leave to issue judicial review. As to the costs arising on the separate hearing on costs, I make no order in that regard.