2005 IEHC 350

THE HIGH COURT

[2001 No. 154 J.R.]

BETWEEN

BERNARD PHELAN, NEIL CONNAUGHTON, PAUL MURPHY, BRENDAN McEVOY AND SEAN CULLEN

APPLICANTS

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

DECISION of Mr. Justice Herbert delivered the 4th day of November, 2005

1. At the conclusion of my judgment, pronounced in this case on 7th October, 2003, the Respondents, having succeeded in total in their opposition to the application, through their counsel applied for the costs of the proceedings. The hearing of this Application for Judicial Review took nine days and, was correctly described by Counsel for both sides as involving detailed and complex issues. The judgment ran to twenty two pages. In the circumstances I decided, in the interests of justice, to adjourn dealing with the respondents' application for costs until the parties had a reasonable opportunity of considering the judgment. I therefore adjourned the issue of costs to a date to be fixed in the Central Office by agreement between the parties.

2. Order 99 rule 1(1) of the Rules of the Superior Courts, provides that, "the costs of and incidental to every proceeding in the Superior Courts shall be in the discretion of those Courts". Rule 4 of this same Order provides that, "the costs of every issue of fact or law raised upon a claim or counterclaim shall, unless otherwise ordered, follow the event".

3. In the case of *Shelly – Morris v. Bus Átha Cliath* [2003] 1 I.R. 232, it was held as follows by Denham J., with whom the other members of the Supreme Court concurred, at page 264 of the report:-

> "In the recent decision of *Grimes v. Punchestown Developments Company Limited* [2002] 4 I.R. 517, I stated:-
>
> > '9. The normal rule is that costs follow the event. However, there are circumstances where a Court on the facts of a case determines that the normal rule will 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, see, for example*, Donegal County Council v. O'Donnell*, (unreported, High Court, O'Hanlon J., June 25th, 1982). The burden is on the party making an application to show that the order for costs should not follow the general rule.
> >
> > 10. The Court exercises a discretion in making an Order as to costs. Of the words of O 99 r 1 'shall be in the discretion of' the publication of O'Floinn and Gannon, Practice and Procedure in the Superior Courts, states at page 888;
> >
> > 'The Court must exercise this discretion on the facts of each case and not apply a general rule: *Hewthorn and Company v. Heathcott* (1905) 39 I.L.T.R. 248…
>
> As to the words 'follow the event' O'Floinn and Gannon state at pp. 888 and 889:-
>
> > 'That is to say, are ordinarily awarded to the successful party. In circumstances where either plaintiff or defendant succeeds outright, difficulties seldom arise although, as indicated by this rule, the Court may award costs to an unsuccessful party in appropriate circumstances…'"

4. In the instant case the Respondents had succeeded totally in their opposition to the Applicants' application for judicial review. This was both on the issue of a failure on the part of the Applicants to act promptly as required by the provisions of Order 84 rule 21(1) of the Rules of the Superior Courts and, on the merits. The onus therefore clearly lay on the Applicants to show cause why costs in this matter should not follow the event. Counsel for the Respondents had sought an order for costs at the conclusion of the judgment. In these circumstances, the opportunity for reflection permitted by the Court was overwhelmingly to the advantage of the Applicants. It afforded them an opportunity of closely studying the text of the judgment and formulating an argument as to why the court should not apply the general rule that costs follow the event.

5. I find on the evidence that the Applicants and their legal advisers chose to adopt a "wait and see" attitude in the matter. Counsel for the Applicants submitted that they entertained a hope that despite the Respondents' application for costs, they might still be moved not to press the issue because the litigation had originated in an industrial relations dispute for which the Applicants' believed the decision of the Prisons Section of the Department of Justice, Equality and Law Reform and its expert advisers, Pearn Kandola, to hold the Stage I assessments on successive days, in different venues, using identical tests and material and, not all on the same day like particular subjects in the Leading Certificate Examination, was primarily responsible.

6. Apart from the issue of remoteness, this declared attitude on the part of the Applicants totally ignored the Primary Finding by the Court in its judgment of a failure on their part to act promptly in seeking Judicial Review. This was a failure which the court found the Applicants had failed to explain or to objectively excuse. This failure on the part of the Applicants to act promptly was something for which the Respondents could not in any way be responsible.

7. By a letter dated 20th July, 2004, and sent by telefax and by post, to the Applicants' Solicitors the Solicitors for the Respondents, wrote as follows:-

> "URGENT
>
> F.a.o.: Mr. Liam Guidera
>
> Re: Bernard Phelan and Ors -v- Min for Justice
>
> High Court Judicial Review 2001/154 J.R.

Dear Sirs,

I refer to the above matter and in particular our telephone conversation of 13th July last. As requested therein I would be grateful to hear from you as to when you and your counsel are available to attend Court to deal with the outstanding question of costs. My client's wish that the Application be made in the next day or so.

Please let me hear from you by return.

Yours faithfully,

David J. O'Hagan

Chief State Solicitor

20 July, 2004"

8. By a further letter dated 28th July, 2005, the Solicitor for the Respondents wrote to the Solicitors for the Applicants as follows:-

"Re: *Phelan & Ors -v- Minister for Justice*

High Court 154/2001 J.R.

Dear Sir,

I refer you to the above matter and to my letter of 20th July, 2004, to which there appears to have been no response.

It is our intention to seek to make the costs application at the start of next term, in October.

Please let me know what dates in October are suitable to your Counsel so that a date can be agreed between the parties and listed.

Yours faithfully

David J. O'Hagan

Chief State Solicitor"

9. Despite the absence of any letter taking issue with what was stated in the first paragraph of the above letter dated 28th July, 2005, Counsel for the Applicants informed the Court at the hearing of this application for costs that his instructing Solicitor, - who was present in court, - instructed him that he had on 20th July, 2004, - I assume in response to the telefax transmission of the above letter of even date, - spoken to a Mr. Moloney in the office of the Chief State Solicitor, with regard to agreeing a date for the re-entry of the costs application.

10. In my judgment, in default of agreement between them as to a suitable date, either party could have returned unilaterally to the Court and applied to have the matter re-entered before the Court for the purpose of fixing a date for the hearing of the issue as to costs. The Applicants were firmly on notice that the Respondents had already applied to the Court at the conclusion of the judgment for the costs of the proceedings. In my judgment the fact that the Respondents were somewhat dilatory in pressing the solicitors for the Applicants to agree a date for the hearing of the issue of costs did not amount to and could not reasonable be seen by the Applicants as a representation that the Respondents had decided not to seek costs. Though the judgment of the Court took effect from the date on which it was pronounced, no Order of the Court had been passed or perfected in the matter pursuant to the provisions of Order 115 of the Rules of the Superior Courts. In my judgment, the Applicants knowingly and consciously took advantage of the adjournment which had been granted by the Court, almost exclusively for their benefit for the reasons I have already addressed, to delay matters in the hope of avoiding an order for costs being made against them in the proceedings without having to consider, devise or advance an argument on the merits while at the same time preserving without any risk their right of appeal to the Supreme Court pursuant to the provisions of Order 58 rule 2 of the Rules of the Superior Courts. The Applicants never at any time voluntarily agreed, as was the clear intention of the Court, that they should agree a date for the re-entry of the issue as to costs. In the context of the judgment pronounced by the Court the onus was clearly on the Applicants to show cause why the costs which had been sought by the Respondents should not follow the event.

11. I find that no evidence was put before the Court that the Applicants had been prejudiced by the somewhat less than enthusiastic manner in which the Respondents pressed for an agreed date upon which to re-enter the application for costs. At any time it was open to the Applicants to come back to the Court and seek a date in default of agreement with the Respondents for the re-entry of the issue as to costs. I cannot accept the submission on behalf of the Applicants that the Respondents are somehow estopped by the passage of time since the pronouncement of the judgment in this case from now pressing ahead with their application to the Court for costs or, that the length of the adjournment has been such that it would be an abuse of the process of the Court to permit the Respondents to progress their application for costs at this juncture. I am quite satisfied on the evidence that the Respondents said nothing and did nothing which would render it unjust that they should now be permitted to press ahead with their application that the costs of the proceedings should be awarded against the Applicants.

12. In considering the issue of whether the costs should or should not follow the event, the Court can only have regard to the issues addressed and to the material considered by it in arriving at its judgment. Every Plaintiff and every Applicant who embarks on litigation places himself or herself in peril of costs should the litigation prove fruitless. I find in the instant case that there is no evidence that either the Respondents or the Applicants adopted a wholly unreasonable view of what they believed to be their rights. I do not consider that the Respondents acted in any way unfairly or oppressively towards the Applicants. This was a *lis inter partes* concerned solely with the obligations and rights of the parties *inter sè* and no unique issue of law affecting the interests of a large body of the general public fell to be decided by the Court in the course of the litigation. In my judgment an Applicant would have to establish some very exceptional circumstance in order to persuade a Court to deprive a completely successful party of his or her costs of the litigation. I find that no such circumstances have been established by the Applicants in this case.

13. The Court found by its judgment that the Applicants were not justified in deferring a decision to seek leave to apply for judicial review until after they had first undergone the second Stage of the Assessment and seen how they had faired. Having so found, the

Court may not revisit this issue and consider whether it was or was not a reasonable approach for the Applicants to have adopted in the circumstances so as to afford them some sort of moral excuse as to why the costs of their unsuccessful application for Judicial Review, should not follow the event.

14. I find that however possibly naive or unduly trusting the Prison Service of the Department of Justice, Equality and Law Reform may have been in holding the

15. Stage I Assessments on successive days, at different venues, using identical tests and materials, this does not constitute behaviour which I could in reason or in justice, even adopting a singularly harsh and critical standard, categorise as so reprehensible as to constitute misconduct sufficient to deprive the Respondents of their costs of successfully opposing the Applicants' application for Judicial Review.

16. In the circumstances, the Court finds no reason why costs should not follow the event in this case. The Respondents are therefore entitled to the costs of the proceedings.