2005 IEHC 194

**THE HIGH COURT**

**Record No. 2004 408JR**

**BETWEEN**

**EDWARD McCOPPIN**

**APPLICANT**

**AND**
**HIS HONOUR JUDGE ANTHONY KENNEDY**
**TERRY McHUGH T/A LONGFORD HIRE CENTRE**

**RESPONDENTS**

**AND**
**THE ATTORNEY GENERAL**

**NOTICE PARTY**

**Judgment delivered by Mrs. Justice Fidelma Macken on the 14th day of April, 2005**

1. The facts in this case are not heavily in dispute, nor are most of the relevant legal principles. It is the application of those principles to the facts in the case which is in issue.

2. On 21st April, 2004 certain civil proceedings between the applicant as plaintiff and the second named respondent as defendant were at hearing before the first named respondent at Longford Circuit Court. The case was one in which there was witness evidence and the first witness for the applicant was being examined by the plaintiff's counsel. In the course of that examination, the first named respondent instructed the witness to stop fiddling with a plastic bag on her lap, in response to which she informed him that the plastic bag contained the hoof of the horse (which had been injured in an accident and in respect of which the civil action was being taken).

3. Shortly thereafter, still in the course of the examination in chief, a mobile phone rang in the courtroom, and the first named respondent asked the garda in the court to remove from court the person whose phone had rung. It was explained to the first named respondent by counsel for the plaintiff (now applicant herein) that in fact it was phone of the plaintiff who was in court listening to the evidence of the witness. Nevertheless, according to the affidavit evidence filed, the plaintiff was then removed from the court, the said respondent indicating that this would remain the position until he was due to be called to give his own evidence.

4. After this interruption, the hearing continued with the examination of the same witness. Very shortly thereafter during the course of cross-examination of the witness, another mobile phone rang in the courtroom. This time it was the mobile phone of the plaintiff's counsel.

5. The first named respondent rose from the bench, and returned a short time later, at which time counsel for the plaintiff in the action apologized profusely for what had occurred stating that he was sorry for any disrespect to the Court and that there would be no recurrence of the problem as he had left his mobile phone outside the courtroom. The first named respondent then stated that the hearing was now "aborted" by reason of the plaintiff's contempt and by reason of the ringing of his counsel's phone, but that he could not, in that respondent's view, be excluded from the courtroom. He adjourned the case to the next sitting of a supplemental judge's list in June, that is to say, to be heard by a judge other than him so that "justice can be done", and awarded costs against the plaintiff in favour of the defendant on a "thrown away" basis.

6. By order of this Court (Quirke, J.), made on 24th May, 2004, leave was granted to the applicant to apply for judicial review seeking an order of *certiorari* to quash the order of the first respondent, for a declaration that the said respondent was obliged to comply with basic fairness of procedures and with natural and constitutional justice in respect of his purported findings reflected in the above order, and for an order seeking the costs of this application. At the same time, the learned judge directed that the Attorney General be joined as a notice party.

7. By his statement to ground the application for judicial review, the applicant bases his relief sought on the following legal grounds:

> (a) that the first named respondent acted contrary to natural and constitutional justice and in breach of fair procedures in finding the applicant in contempt of court, in his absence, and without giving him any or any adequate opportunity of being heard in his defence prior to such conviction or in submission prior to the imposition of the penalty of awarding costs thrown away against him;
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> (b) that the said respondent acted injudicially and in breach of basic fairness of procedures in finding the applicant guilty of contempt of court because his mobile phone had sounded during the course of the hearing;
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> (c) that the first named respondent acted injudicially and in breach of the principles of natural and constitutional justice in finding the applicant liable for the alleged contempt of court of the applicant's counsel without affording the applicant or his counsel any or any adequate opportunity of being heard prior to such conviction being imposed or in relation to the penalty contemplated by the said respondent;
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> (d) that the said respondent's finding that the applicant was guilty of contempt of court and liable for the contempt of his counsel, was contrary to fundamental reason and common sense and was not within the range of rational options open to the said respondent upon two mobile phones having sounded in his court room.
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> (e) The said respondent acted in such a fashion as would give rise to a reasonable belief on the part of an onlooker that justice was not being done or in the alternative, that justice was not being seen to be done.

8. By an amended statement to ground an application for judicial review, the applicant sought further, a declaration that the first named respondent had breached Article 6 of the European Convention on Human Rights and Fundamental freedoms, and further a declaration pursuant to s. 5 of the European Convention on Human Rights Act, 2003 that if the applicant is not entitled, in law, to an order for costs against the said respondent, save where *mala fides* is established, then such a rule of law gives rise to a breach of Article 13 of the said Convention in that it deprives the applicant of an effective remedy for a breach of Article 6 of the said Convention in respect of a fair trial.

9. In support of these additional grounds, the applicant pleaded:

(f) That Article 13 of the said Convention provided that everyone whose rights and freedoms as forth therein are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by a person acting in an official capacity.

(g) That a person charged with a criminal offence has the right to be informed promptly and in detail of the nature and cause of the accusation against him, to have adequate time and facilities for the preparation of his defence and to defend himself in person or by counsel.

(h) In the circumstances pleaded, the first named respondent had denied the applicant his right to a fair trial pursuant to the said Convention.

(i) If there was a rule of law whereby the applicant is not entitled to an order for costs against a judge in the absence of *mala fides* then such rule of law is contrary to the said Convention on Human Rights, for the reasons set out in the additional ground above.

10. By the notice of opposition filed on behalf of the notice party, he pleads that insofar as the decision of the first named respondent is concerned, the said respondent did not act improperly. In particular, the applicant is not entitled to costs against the notice party in the absence of any finding of bad faith or impropriety against the said respondent. Further, said notice party opposed the grant of the additional reliefs sought pursuant to the said Convention or pursuant to the said Act of 2003, in pleading:

(a) that the matters of which the applicant complains did not fall within Article 6 of the said Convention;

(b) that the applicant was not charged with a criminal offence for the purposes of the said Article;

(c) that if they were within the said article, there was no breach of the same;

(d) that there being no breach, the adequacy of any remedy does not arise;

(e) that the rule of law complained of in the amended statement of ground is not incompatible with the obligations arising under article 13 of the said Convention;

(f) the applicant had not established that no legal remedy other than a declaration of incompatibility is adequate and available.

11. While no notice of opposition was filed on behalf of the second named respondent, an affidavit was sworn on his behalf by his solicitor, Mr. Padraig Kelly on 15th July, 2004, in which he avers that that respondent had been joined as a notice party but had no role in the proceedings in that all of the reliefs sought in reality are against the first named respondent.

12. This affidavit was sworn in response to an affidavit of the applicant's solicitor, Mr. Kevin Kilrane, in which he had averred that the said respondent had indicated he would not oppose the relief sought by the applicant, and that he had sought from the second named respondent an agreement to waive the order for costs thrown away made in his favour, but that this had been refused, and he exhibited copies of correspondence passing.

13. In the course of that correspondence, it had been stated on behalf of the second named respondent that the etiquette applying in the court would have been apparent to all parties attending, because there are clear signs on the court door entrance stating that all mobile phones should be turned off, and further that the judge's tipstaff announces the request to turn off such phone every time the judge enters the court room which occurred frequently throughout the opening day of the sitting, so that everyone attending was or should be well aware of the prohibition against the use of such phones in court.

14. Mr. Kelly avers in his affidavit that his client was not in a position to waive the costs or to interfere in any way with the order, since this was a contempt order made by the first named respondent exclusively as against the applicant. He avers that the second named respondent was in no way responsible for the order which had been made. On the contrary, the making of the order had disadvantaged him. Mr. Kelly avers that any order for costs against the second named respondent would be an unjust order in that it would penalize that respondent in circumstances where he had no hand, act or part in the making of the original order.

**Legal Submissions**

15. Counsel for the applicant, Mr. McDonagh, S.C. indicated that none of the parties was objecting to the making of the order of *certiorari* sought. He argued that the first named respondent acted beyond jurisdiction in making the order and that the order made was also irrational in that it was made by way of a response which was wholly disproportionate to the events which had occurred, namely permitting a telephone to ring in the course of a hearing in court.

16. Moreover, counsel argued that the applicant should not have had any contempt finding or any order for costs made against him without his being in court, and without his counsel having an opportunity to take his instructions, to argue against any such result, and therefore to be heard in a real and appropriate way. In the present case it was submitted that since the order was made in his absence, and even without his knowledge that such a finding and order might be or was going to be made, his right to be heard in his defence was infringed, including his right to a fair trial pursuant to Article 6 of the European Convention on Human Rights and Fundamental Freedoms, and the Human Rights Act of 2003 by which that Convention was adopted into Irish law.

17. Further, counsel contended that when the first event was exacerbated by the unfortunate additional factor of the applicant's own counsel's mobile phone ringing in the course of cross-examination of a witness, the first named respondent should not have penalised the applicant for a wrongdoing or perceived contempt not of his making. In the circumstances, and having regard to the fact that this was also done without his having been heard, the applicant's right to be heard was thereby further infringed, with the same legal consequences as above contended for.

18. In view of the foregoing, the order actually made, according to counsel for the applicant, was one made unfairly, in disregard of the applicant's right to a hearing, was irrational in that it was wholly disproportionate to the circumstances in issue, and was *ultra vires* as being beyond what the first named respondent is entitled to do by way of appropriate remedy.

19. It was further submitted that what occurred before the first named respondent was outrageous, and that the said respondent could not possibly have thought that his Order was a legitimate exercise of his judicial function. Counsel argued that the conduct of the said respondent amounted to the wilful ignoring of fair procedures. The impugned order was not, according to the applicant, the

result of an understandable difference of opinion as to the law or as to the jurisdiction of the court in question.

20. Having regard to the foregoing, the order was made by the first named respondent acting injudicially. Counsel argued that, that being so, the applicant is entitled not only to have the order set aside, but also to have an order for the costs of this application as against the notice party on behalf of the first named respondent, and also, because of the circumstances of the case, against the second named respondent.

21. In support of his claim as to the costs of this application, counsel for the applicant invoked the decisions in the cases of *State (Prendergast) v. Rochford*, unreported, 1st July, 1952 and the case of *McIlwraith v. Fawsitt* [1990] 1 I.R. 343.

22. As to the position of the second named respondent, he said that after the events giving rise to the order, and after the order was made, the applicant's solicitor had asked that respondent not to rely on the order for costs made in his favour, but this had been refused. In the circumstances the said respondent was properly joined as a legitimus contradictor in the proceedings, and the applicant should be entitled, if successful, to have his costs also against him.

23. Counsel for the second named respondent, Mr. McNally, B.L., submitted that the position concerning costs in the impugned order was misunderstood by the applicant, in particular as to its legal status. Since the order made by the first named respondent was in respect of an alleged contempt of the applicant, it was not for his client to take any part in the dispute between those parties, and this had been clearly indicated, in the affidavit of the solicitor for the second named respondent. Further, the second named respondent had been in no way responsible for the order made by the first named respondent, had not sought costs and was now party to the proceedings, without having in anyway contributed to the position of the applicant, or to the making of the costs order.

24. In the circumstances, any application for costs against the second named respondent would be quite unjustified, and on the contrary, the second named respondent should have the costs of this application either against the applicant or against the Notice Party.

25. For the Notice Party, Mr. Devlin, B.L., submitted that while the actions of the first named respondent may have been described by counsel for the applicant as being harsh, it could not be said his decision was made through any impropriety, or in bad faith, and therefore the applicant had, in law, no entitlement to the costs of this application against the notice party on behalf of the first named respondent, as the solid jurisprudence of the courts makes it clear that no costs may be awarded against a judge except in very narrow circumstances, which did not apply here, and that the case law cited on behalf of the applicant supported this approach. In that regard, he invoked also the decision in the case of *O'Connor v. Carroll* [1999] 2 I.R. 160 in which the Supreme Court had again held that in the absence of impropriety or *mala fides* costs should not be awarded against a deciding judge who had not opposed the proceedings.

26. Further, counsel said he was struck by the use of the term "injudicially" by counsel for the applicant, who had indicated he would explain this, but had not done so. He submitted that there was no question of the first named respondent acting through *mala fides* or in any way which would give rise to an entitlement to costs.

**Conclusions**

27. In this case it was agreed between the parties, with the consent of the Court that, due to time constraints, the grounds invoked by the applicant in his amended Statement to Ground an Application for Judicial review, arising pursuant to Articles 6 and 13 of the European Convention on Human Rights and Fundamental Freedoms, and pursuant to Section 5 of the European Convention on Human Rights Act 2003, should be left over for detailed argument on a later occasion, and this judgment, although reciting the reliefs sought and the grounds therefor, as well as the response of the notice party, does not deal with this related but discrete issue, and I will make the necessary orders in that regard at the end of this judgment.

28. In this case, the main bone of contention, as is clear from the submissions made, and it is the only real issue between the parties, apart from the legal issues raised pursuant to the above Convention and the Act of 2003, is whether the applicant is entitled to have the costs of this application against the notice party on behalf of the first named respondent in respect of the alleged impropriety or *mala fides* of that respondent, and/or as against the second named respondent. This in turn depends on the correct interpretation of the facts and of the order made in respect of those facts, and on the application of the jurisprudence on the issue of such costs to the facts in the present proceedings.

29. It is undoubtedly the case that in this age of mobile technology, when people carry mobile phones in ever increasing numbers, they will ring when least expected, even in the course of a court hearing and despite the fact that there may be notices on courtroom doors or announcements made. We have all, whether as judges or as ordinary citizens, had experiences of mobile phones ringing in the most unsuitable places. It is therefore quite understandable that when mobile phones ring, particularly in the course of the examination of a witness in a court case, any presiding judge will not be happy about it. When two phones ring, one a short time after the other, it is even more understandable that a presiding judge, who has already had to caution one person and required him to leave the courtroom temporarily, will be exasperated. And this is particularly so when every effort will have been made and should be made to ensure that a court hearing – an event dealing with legal issues which may be, indeed are likely to be, of serious concern to all parties – will not be interrupted, wrongly and without an exceptional reason by the carelessness of those owning and carrying mobile phones.

30. The real question which arises is whether, legally, such activities giving rise to an interruption or interference with the court hearing, and regardless of how exasperating it may be to the presiding judge, should lead to the orders made, including the order for costs "thrown away" against the applicant, and whether the judge in assessing the events leading to the order, or making such an order, has acted *mala fides* or through impropriety.

31. It is clear from the jurisprudence that an order for costs, which is always within the discretion of the court, may be made even against a judge acting wrongly, but only in limited circumstances. It is not the case that such an order can never be made. In the case of *O'Connor v. Carroll*, supra, one of the more recent judgments of the Supreme Court, the unanimous decision of that court was that, where, as here, a judge has not opposed the proceedings in question, an order for costs may not be made against him or her in the absence of *mala fides* or impropriety, adopting earlier jurisprudence of that court in support of the decision.

32. In an even more recent decision of the High Court, in which the latter case as well as the case of *McIlwraith v. Fawsitt*, supra., was also considered, Kelly J. specifically adopted and applied the established jurisprudence of the Supreme Court in the cases cited above.

33. It is the application of the principles found in this jurisprudence which really gives rise to the dispute here, as the applicant argues

that what occurred was clearly within the ambit of *mala fides* and/or impropriety, while the notice party argues that the events do not demonstrate either impropriety or *mala fides*.

34. I am satisfied that it was reasonable for the first named respondent to terminate the hearing when he did, even if that was not a choice which might be made by a different judge. It might even be considered to be a prudent approach on his part in view of the fact that the ringing of the mobile phones had so exasperated him. From what the solicitor for the applicant averred to in the affidavit to ground the application for leave to issue these proceedings, the adjournment to a different judge was indicated by the first named respondent as being intended to ensure that "justice was done". It seems to me clear from this that the said respondent took the view that the hearing should be before a judge other than himself, thus indicating that he fully appreciated that even if the case could continue before him, it would be preferable, so as to ensure that justice was not only done but was also seen to be done, that this should be before another judge who had not experienced the above events. To that extent I find that the order of the first named respondent adjourning the matter was a perfectly legitimate order which cannot be considered as having been made *mala fides* or through impropriety.

35. As to the question whether the said respondent was, consequent upon the events which occurred, legally correct to award costs against the applicant "thrown away", on the basis of a finding of contempt, I am not satisfied that he was. Before any such finding or any such order could be lawfully made, since the order for costs was in effect a form of sanction for the contempt, the applicant had a right to be heard, both on the alleged contempt and on the costs sanction, and had a right, if he wished, to instruct his counsel in that regard. That is so, whether what was being considered was the ringing of the mobile phone of the applicant or of his counsel. In either case, the costs awarded against the applicant was the sanction imposed in respect of the finding of contempt.

36. Moreover, a finding of contempt, without any hearing and the costs order on a "thrown away" basis without any hearing were *ultra vires* the first named respondent's powers. They were also disproportionate as a remedy for the events which had occurred, even if I accept that the first named respondent was entitled to be exasperated at the interruptions. For the purposes of this judgment, it is not necessary for me to consider whether in any particular circumstances a finding of contempt could have been made against the applicant in respect of the ringing of his counsel's mobile phone. In the circumstances which are described, the response was also irrational in the legal sense, in that it was beyond what a reasonable judge would determine to be an appropriate response to the events.

37. I therefore consider that on both grounds, namely a failure to afford the applicant his right to be heard and represented, and on the ground or irrationality as that term is understood and applied legally, the order was *ultra vires* and ought to be quashed insofar as it awarded costs against the applicant in favour of the first named respondent on a thrown away basis.

38. As to the question of costs claimed by the applicant in respect of this application, I find against the applicant in that regard, and I now deal with the legal arguments made pursuant to the above jurisprudence. As mentioned above, costs have always been awarded at the discretion of the Court, and although frequently – or indeed in most cases – costs will "follow the event", this is not invariably the case, as is clear from the above jurisprudence including McIlwraith, supra, and *O'Connor v Carroll*, supra. However, in the particular circumstances of an order made by a judge acting *mala fides* or through impropriety or bias or ill will, there will or may be an award of costs in favour of an applicant, depending always on the circumstances of the case..

39. Here the plea is made that the second named respondent acted both unjudicially and improperly. The first of these is explained in the pleadings and affidavits as being constituted by the finding of contempt for the ringing of the mobile phones, and by finding the applicant liable for contempt without being afforded an opportunity of being heard before the imposition of the costs sanction. The allegation of having acted "improperly" is explained or particularised as having occurred by reason of the first named respondent declining to exercise the judicial function entrusted to him because a mobile phone rang in his courtroom room.

40. Neither of these pleas constitute either *mala fides* or impropriety, as these are understood in the jurisprudence, and no facts adduced in the affidavits filed bring the pleas further. The first set relate to matters in respect of which the first named respondent was quite simply wrong in law, by inter alia depriving the applicant of his right to be heard. The second is explained by a submission that the first named respondent dealt with the incident in a manner which was not proper, which I understand as not legally proper. But the allegation that a judge has acted "improperly" requires more than a complaint of the nature found here, encompassing as it does something in the nature of a deliberate decision not to apply the law, or deliberately to ignore a ruling of a higher court, for example. I am satisfied that the above case law of this court and of the Supreme Court makes it clear that costs are not to be awarded in the face of events of the type giving rise to the within proceedings and the impugned order, even though it may be said that the costs element of the decision as well as of the order made was highly unusual and was not legally permissible. The applicant has not made out a case that he is entitled to the costs on grounds that the first named respondent acted either improperly of through mala fides.

41. In the foregoing circumstances, I will quash the order of the first named respondent made on 21st April, 2004 in the proceedings entitled "Edward McCoppin Plaintiff and Gerry McHugh trading as Longford Hire Centre Defendant and bearing Record Number 270/2002" in so far as the costs element of that order is concerned.

42. As to costs of the applicant in these proceedings, in view of my findings, I refuse the applicant an order for costs against the first named respondent or against the Notice Party on his behalf. As against the second named respondent, I am not satisfied that he should be found in any way liable to the applicant for his costs. His involvement in these proceedings did not cause or contribute in any way to any of the applicant's costs. As to the costs of the second named respondent, while he is listed as being a notice party to the proceedings, it was not, in my view, necessary for him to have taken an active part in the proceedings, and therefore, as he has chosen to do so, I am of the view that the appropriate approach is to make no order for his costs, either against the applicant or the notice party. Nor will I make any order as to costs in favour of notice party against any other party.

43. In so far as concerns the pleas in the amended statement to ground an application for judicial review, and the legal argument in respect of the same, it seems to me that these pleas raise discrete legal grounds which may, in certain circumstances, have a significant effect on the existing jurisprudence of this court and of the Supreme Court, which require to be argued and considered in detail. I will direct that those issues, which I have set forth adequately above and which are found set out in the said amended statement and amended notice of opposition, should be remitted to an appropriate Judicial Review List, and I will direct that written submissions be filed and delivered on behalf of the Applicant and the Notice Party on those issues alone, and that the same to be determined by a judge at a future date.