THE HIGH COURT

JUDICIAL REVIEW

[2014 No. 781 JR]

BETWEEN

JASON GILLILAND

APPLICANT

AND

MOTOR INSURERS' BUREAU OF IRELAND, THE MINISTER FOR TRANSPORT TOURISM AND SPORT, THE MINISTER FOR FINANCE, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice MacGrath delivered on the 30th day of November, 2018.

1. This is an application for the costs of judicial review proceedings which are being withdrawn following the Supreme Court decision in *Law Society v. Motor Insurers' Bureau of Ireland* [2017] IESC 31. The applicant claims that there are exceptional circumstances in this case which justify the departure from the general rule that costs follow the event.

2. On 27th October, 2012, the applicant was involved in a road traffic accident and suffered injuries. The driver of the offending vehicle was insured with Setanta Insurance Company Limited ("*Setanta*"). On 11th March, 2014, Mr. Gilliland applied in normal course to the Personal Injuries Assessment Board for compensation in respect of the injuries suffered.

3. An assessment was made. It was accepted, or deemed to be accepted, and on 8th May, 2014, an order to pay in the amount of €36,290.00 was made against the Setanta policyholder. Before payment Setanta had become insolvent and went into liquidation in 30th April, 2014. Mr. Gilliland was not paid.

4. The Court has been informed that when Setanta went into liquidation on 30th April, 2014, approximately 1,750 claims by and against Setanta policyholders were outstanding. The order to pay in favour of Mr. Gilliland remained unsatisfied. His solicitor wrote to the Motor Insurers' Bureau of Ireland ("*MIBI*") calling upon it to satisfy the order to pay pursuant to their stated obligations under clause 4 of the Motor Insurers' Bureau of Ireland Agreements 1955 to 2009 ("*the MIBI Agreements*"). The MIBI declined to satisfy the order to pay. Subsequently, the applicant sought the assistance of the State to enforce the order to pay. The MIBI, on legal advice, declined to pay on the grounds that it was not liable. The applicant's solicitor was informed in October, 2014, by the Minister for Finance that the liquidator of Setanta would seek to satisfy each claimant and that thereafter recourse should be had to the Insurance Compensation Fund. Satisfaction by such fund, however, was limited to 65% of the award and costs.

5. The applicant was not content with the decision of the MIBI and the Minister and on 15th December, 2014, he applied for leave to issue proceedings by way of judicial review seeking, inter alia, a declaration that the decision of the respondents was unlawful. A statement of opposition was filed by the MIBI on 24th March, 2015 and by the second to fourth named respondents on 15th April, 2015. The applicant submits that there was a climate of uncertainty surrounding the potential liability of the MIBI and in early 2015 this was acknowledged by the State.

6. On 13th April, 2015, the Accountant of the Courts of Justice, having statutory responsibility to administer the Insurance Compensation Fund, instituted proceedings in the High Court seeking clarification of the potential liability of the MIBI for claims arising from the insolvency of Setanta (hereafter referred to as "*the Accountant's proceedings*"). The Law Society of Ireland was joined as a *legitimus contradictor*. The instant proceedings, on the consent of the parties, were then put on hold pending the outcome of the Accountant's proceedings. That case proceeded through all divisions of the Superior Courts – the High Court ([2015] IEHC 564), the Court of Appeal ([2016] IECA 60) and ultimately the Supreme Court ([2017] IESC 31) which on 25th May, 2017 rejected the claim, holding that the MIBI Agreements applied only to a limited class of cases and did not apply where an insurer was insolvent. The effect of this decision was that the MIBI did not have any liability to such claimants, including the applicant in this case.

7. In July, 2017, the Law Society of Ireland sought its costs as against the MIBI in the Accountant's proceedings but this was refused by the Supreme Court. No order as to costs was made.

8. In this case all matters were placed in issue including the question of whether the MIBI is amenable to the judicial review process. The applicant places significant emphasis on this in its submissions to this Court, and sets out in some detail, and by reference to a significant body of case law, why the MIBI should be amenable to judicial review.

9. In light of the decision of the Supreme Court, the applicant's proceedings effectively came to an end and the only remaining issue to be determined is liability for the costs of the application for judicial review. It has been agreed between the applicant and the second to fifth named respondents that no order as to costs should be made between the parties.

10. The applicant pursues his costs as against the first named respondent who opposes the application, but who does not seek costs against the applicant.

11. Order 99 of the Rules of the Superior Courts, as amended, in so far as it is relevant, provides that generally speaking, the costs of and incidental to every proceeding shall be in the discretion of the court. However, O. 99, r. 1(3), as amended, provides:-

> *"Subject to sub-rule (4A), 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."*

12. The applicant maintains that special circumstances arise in this case which should be taken into account by the Court in exercising its discretion to award costs, in full or in part, in favour of the applicant. The first named respondent maintains that there are no such circumstances and that the proceedings before the Court are now moot.

13. The special circumstances relied upon by the applicant which he maintains entitles the Court to exercise its discretion to make an

award of costs in his favour, include the following:-

a. This application was one of considerable public importance, given the number of other claimants directly affected. Thus the outcome of these proceedings would have assisted in the determination of a liability issue in respect of approximately 1,750 claimants. The issue was of such public importance that the Law Society, representing solicitors throughout the State, was joined as *legitimus contradictor* and participated fully in the Accountant's proceedings.

b. These proceedings raised issues which went beyond the immediate interests of the applicant himself.

c. These proceedings were the first in time, initiated before the Accountant's proceedings, and therefore amounted to a test case at the time they were commenced.

d. On this application, clarification was sought in respect of the previously unexplored area of the law on the interpretation of the MIBI Agreements.

e. Had the application had been successful, it would have resulted in a large number of claims against the MIBI on foot of its alleged liability under the MIBI Agreements.

f. This application was substantial and meritorious (as opposed to being frivolous or vexatious) and was brought by a faultless victim who had the benefit of an order to pay and who himself was of very limited financial means.

g. The lack of clarity surrounding the interpretation of the MIBI Agreements was highlighted by the fact that both the High Court and the Court of Appeal found a liability on the part of the MIBI, whereas the Supreme Court, by a majority, overturned the decision of the Court of Appeal.

h. The applicant was left with no option but to issue these proceedings in circumstances where he was prevented from issuing personal injuries proceedings. This arises from the fact that he had an order to pay, rather than an authorisation issued pursuant to the provisions of the Personal Injuries Assessment Board Act 2003. Furthermore, the applicant had no privity of contract to enable him to issue plenary proceedings to enforce the provisions of the MIBI Agreements. The institution of these proceedings, against what has been described as the backdrop of political protestations and unrest, was a significant contributory factor in the decision of the Accountant of the Courts of Justice to seek clarity on the issue, thereby giving rise to the commencement of the Accountant's proceedings.

14. The first named respondent makes the following points:-

i. Following the collapse of Setanta, in addition to obtaining its own legal advice, the MIBI contacted the Minister for Transport, Tourism and Sport who was the counterparty to the MIBI Agreements, to ascertain his view as to whether the contract imposed an obligation on the MIBI in relation to the Setanta cases. The Minister made clear his view that the MIBI Agreements did not impose such obligations.

ii. The applicant was not forced to stay these proceedings but they were adjourned from time to time on consent.

iii. The decision of the Supreme Court in the Accountant's proceedings addressed some of the same points of law raised in the instant proceedings, rendering these proceedings moot. The application for costs is being pursued in circumstances where the proceedings have not been determined and are being withdrawn because they are moot. In this regard, it is argued that if the proceedings were determined in accordance with the Supreme Court decision, they would be dismissed.

iv. This application for costs runs contrary to the manner in which costs have been dealt with to date, in particular, the refusal by the Supreme Court of an application by the Law Society for its costs. In the 771 personal injury actions in which plaintiffs incorrectly joined the MIBI as co-defendant, the MIBI agreed to bear its own costs in each set of those proceedings.

v. The caselaw relied upon by the applicant as authority for the special circumstances, were all cases that were heard and determined, whereas these proceedings are being withdrawn. Further in the events which have transpired, the applicant has now been paid in full.

vi. There is no "*event*" within the meaning of the Rules of the Superior Courts and in the absence of such, the default order is no order as to costs.

vii. This is not a test case. A review of the statement of grounds makes clear that the focus of the application was on the applicant's own personal position, rather than that of others. At no point have these proceedings been described as a test case, nor were the respondents requested to treat them as such.

viii. The Accountant's proceedings were not instituted as a result of these proceedings. This is a speculative proposition by the applicant unsupported by the evidence. The background to the Accountant's proceedings is outlined in the High Court judgment of Hedigan J. on 13th April, 2015. Those proceedings followed an exchange of correspondence between the various interested parties, being the Law Society, the Minister of Transport, Tourism and Sport and the MIBI.

ix. The applicant was not left with "*no other option but to issue these proceedings*". He had been informed that he would be compensated in the liquidation and by the Insurance Compensation Fund, albeit with certain limitations. It was open to him to pursue the policyholder for the balance, something which he chose not to do.

x. The MIBI is not seeking its costs as against the applicant, a stance which it has adopted with all other litigants involved in the Setanta dispute. It is noted that is acknowledged in the applicant's submissions that he commenced proceedings at considerable financial risk to himself.

15. The applicant relies on *Collins v. Minister for Finance* [2014] IEHC 79, where the High Court (Divisonal Court of Kelly, Finlay Geoghegan and Hogan JJ.) identified certain cases in which a departure from the general rules may be warranted, including where the issue is one of far reaching importance in an area of law, where the decision has clarified some otherwise obscure or unexplored area of law, where the litigation was not brought for personal advantage and where the issues raised were of special and general public importance.

16. Counsel for the applicant refers to *Curtin v. Dáil Éireann* [2006] IESC 27, Murray C.J. emphasised that it would neither be desirable nor possible to lay down one definitive rule according to which exceptions are made to the general rule regarding costs. He observed that the discretionary function of the court to be exercised in the context of each case militates against such a definitive rule of exception. It is submitted that the issue in this case had far reaching importance in an area of law of general application. This is evident from the fact that the Accountant of the Courts of Justice instituted proceedings seeking clarification of the law. Those proceedings overtook the instant proceedings and because of this, the applicant did not get the opportunity to clarify the issue. It is submitted that the same principle must apply where the applicant's ability to prosecute his proceedings was curtailed by the Accountant's proceedings.

17. The applicant contends that even if the proceedings might not be categorised as public interest litigation within the meaning in *Dunne v. Minister for the Environment* [2008] 2 I.R. 775, because of the applicant's private interest in the outcome of proceedings, they nevertheless issues of special and general importance, and therefore constitute a public interest challenge. It is submitted that the legal issues in this case were novel, and thus, distinguishable from *O'Brien v. Clerk of Dáil Éireann* [2017] IEHC 377, where Ní Raifeartaigh J. concluded that there was insufficient degree of novelty in the legal issues raised to warrant the exercise of jurisdiction to depart from the normal rule.

18. The respondent relies on the decision of Clarke J. in *Telefonica O2 Ireland Ltd v. Commission for Communications Regulation* [2011] IEHC 380, in which the court considered the principles governing the award of costs where proceedings become moot. Clarke J. observed that mootness can arise for a number of different reasons. At para. 6.1, he stated as follows:-

> *"It is impossible to be overly prescriptive as to the proper approach which the court should adopt for the range of factors that may be relevant are wide. However, it seems to me that a factor which is at least of some significance is an analysis of how it came about that proceedings had become moot. Sometimes (as was the case in Eircom), external factors over which the parties have no control render proceedings moot. In many such cases there may at least be an argument for the court making no order as to costs. It clearly would, at least in the vast majority of cases, be an unacceptable use of scarce court resources for a hearing to have to go ahead to decide a moot issue simply for the purposes of deciding who should pay the costs. Indeed, given that all that will be at issue are the costs up to the time when the proceedings become moot, it would seem particularly foolish for parties to have to incur much more costs solely for the purposes of deciding who should bear the costs up to the point when the case became moot."*

19. Observing that mootness may arise as a result of external factors, Clarke J. stated that in many such cases the equity of both parties' position will be much the same. Analysis led him to believe that, in the absence of other significant countervailing factors, a court should favour making no order as to costs when proceedings become moot because of factors entirely outside the control of the parties. The position might be otherwise if the mootness has arisen from the actions of some, but perhaps not all, of the parties to the proceedings.

20. Applying the reasoning of Clarke J. to the facts of this case, and in particular to the submission by the applicant regarding the issue of whether the MIBI is amenable to judicial review, the first respondent submits that if this Court had to embark on a determination as to whether the applicant's case was amenable to judicial review, it would involve the running of part of the case, would involve additional expense and would be a waste of valuable court time. Further the determination of such issue would be of little assistance to the Court in deciding on costs, given the decision of the Supreme Court in the Accountant's proceedings. The first respondent also relies on observations of the same judge in the Supreme Court in *Cunningham v. President of the Circuit Court* [2012] 3 I.R. 222. At paras. 24 and 25, Clarke J. stated:-

> *"…[A] court, without being overly prescriptive as to the application of the rule, should, in the absence of significant countervailing factors, ordinarily lean in favour of making no order as to costs in cases which have become moot as a result of a factor or occurrence outside the control of the parties but should lean in favour of awarding costs against a party through whose unilateral action the proceedings have become moot.*
>
> *[…]*
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> *It must, of course, be acknowledged that some cases which have become moot may not fit neatly into the category of proceedings which have become moot due to entirely external events, on the one hand, or due to the unilateral action of one of the parties, on the other hand. In particular there will be cases where the immediate reason why proceedings have become moot is because a statutory officer or body has decided not to go ahead with a threatened course of action (such as the criminal prosecution in this case). However, the reason why it may have been necessary or appropriate for that statutory officer or body to adopt a changed position may, to a greater or lesser extent, be due to wholly external factors."*

The first respondent argues that the proceedings are moot through no fault of either party and as a result no orders as to costs should be made in the interests of equity and justice.

21. It is argued that the applicant's reliance on *Collins* is misconceived and that each of the cases relied on by the applicant concerned proceedings which had been heard and determined, whereas in the instant case, the proceedings are moot, and have not been determined.

22. It is further submitted that the applicant's proceedings were primarily brought on the basis of self-interest, seeking to be paid in full on foot of the order to pay. While a side effect of the proceedings may have been that a decision would have implications for others, the proceedings were not in the nature of a test case. At no point did the applicant suggest that his proceedings were in the nature of a test case, until his submissions in this case.

23. It is also contended that it is factually incorrect to suggest that the applicant was forced to stay the proceedings. They were adjourned from time to time with the consent of all parties. It is submitted that if the proceedings were to proceed, they would fail in light of the decision in the Accountant's proceedings and further that the proceedings did not involve an obscure or unexplored area of law where the focus was on the principles of contractual interpretation in the context of commercial contracts.

24. Reliance is placed on *M.K.I.A. (Palestine) v. The International Protection Appeals Tribunal* [2018] IEHC 134 where at para. 6, Humphreys J. observed:-

> *"So it seems then the law applicable in relation to costs of a moot action can be summarised as follows:*

(i). The first inquiry that a court is required to make is to decide whether or not there existed an 'event' to which the general rule that costs follow the event can be applied (see Godsil).

(ii). An act that could only be regarded as an explicit acknowledgment and admission of the legal validity of the plaintiff's challenge is such an event, as in Godsil.

(iii). Thus the event must normally in some way be caused by the applicant's proceedings; per MacMenamin J. in Matta.

(iv). If the proceedings are moot due to a factor outside the control of either party, the view should be taken that there is no event in the Godsil sense and therefore the default order is no order as to costs, as discussed in Cunningham.

(v). If the proceedings are moot due to a factor which is within the control of one party but that has no causal nexus with the proceedings or which relates, as it is put in Cunningham, to an underlying change in circumstances, then again there seems to be no event in the Godsil sense, so the court should lean in favour of no order (see per MacMenamin J. in Matta at para. 20).

(vi). Finally, if the proceedings are moot due to a factor within the control of one party that does have a causal nexus with the proceedings then there is an event in the Godsil sense and the default order should be costs in favour of the other party (see Cunningham and Godsil in particular)."

Decision

25. I have considered the well reasoned and well argued submissions of both parties. These proceedings are at an end. They are being withdrawn. The central issue in the case has become moot. It may be that there is an outstanding issue of whether the MIBI is amenable to judicial review, but that has not been proceeded with and for very good reason because, in truth, it would make little difference to the outcome of the proceedings, bearing in mind the decision of the Supreme Court in the Accountant's proceedings.

26. No determination has been made on the substantive issues in these proceedings to the extent that one could conclude that there is an "*event*" which dictates that costs should be awarded in a particular direction. If there is an event within the proceedings, it is the withdrawal of the proceedings by the applicant in consequence of the outcome of the Accountant's proceedings. On the application of *dicta* of Clarke J. in *Telefonica*, it is clear that these proceedings have been rendered moot in the light of that external event. The mootness in this case is the result of a factor or factors which were outside the control of the parties.

27. I am not satisfied on the submissions or the limited information and evidence placed before the Court that these proceedings were in fact influential in the bringing of, or were the progenitor of, the Accountant's proceedings. Any such link is tenuous to the extent that one could not say that these proceedings effectively prompted the Accountant's proceedings.

28. In my view, to the extent that there is an event, this is a clear example of a true external factor rendering the proceedings moot and to which neither party has contributed. I do not believe, therefore, that the applicant has established special circumstances, within the meaning of O. 99 of the Rules of the Superior Courts that costs should be awarded in his favour.

29. In arriving at this conclusion, I have also considered a number of other factors which have been urged upon me by the parties, including that the first named respondent does not seek costs against the applicant and the applicant does not seek costs against the second to fifth named respondents. Such decisions and courses of action, in my view, are not necessarily determinative as each application for costs must be considered on its own merits in the light of the applicable principles. I also fully appreciate that the applicant may not have the resources that may be available to the respondent, but it does not appear to me that this fact, on its own and without more, is something on which I should lay particular emphasis in determining where the costs should lie in this case.

30. I am satisfied that there are no special circumstances within the meaning of O. 99 of the Rules of the Superior Courts, for the making of an order for costs in favour of the applicant. I therefore direct that there should be no order as to costs.