

## THE HIGH COURT

[Record No. 2013/6753 P]

BETWEEN

P. C.

PLAINTIFF

AND

THE MINISTER FOR SOCIAL PROTECTION, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

AND

THE IRISH HUMAN RIGHTS COMMISSION

NOTICE PARTY

**JUDGMENT of Mr. Justice Binchy delivered on the 14th day of June, 2016.****Ruling on Costs**

1. The plaintiff brought proceedings seeking declarations that s. 249(1) of the Social Welfare (Consolidation) Act, 2005 (the "act of 2005") is incompatible with various provisions of the Constitution and the European Convention on Human Rights.

2. At the heart of the proceedings was the question as to whether or not social insurance contributions made over a lifetime of work could give rise to a property right such as to entitle the plaintiff to an interest in the state pension contributory (the "SPC") which he could not be denied once he had met conditions as to entitlement thereof. The impugned section states that a person is disqualified from the benefit while undergoing imprisonment or detention in legal custody.

3. The plaintiff was unsuccessful in his challenge. Accordingly, the defendants now seek an order for costs against the plaintiff.

4. However, the plaintiff argues that he should be awarded his costs in the very particular circumstances of this case. Mr. Fitzsimons S.C. for the plaintiff argues that this case should be treated as a test case and relies upon the decision of Clarke J. in *Cork County Council v. Shackleton* [2007] IEHC 334 where he said:-

"Test cases can arise in very many different circumstances. Where there is doubt about the proper interpretation of the common law, the Constitution, or statute law involving the private relations between parties, and where the circumstances giving rise to those doubts apply in very many cases, then it is almost inevitable, as a matter of practice, that one or a small number of cases which happen to be first tried will clarify the legal issues arising."

Mr. Fitzsimons submits that these proceedings fall "fairly and squarely" within that broad definition of a test case.

5. In addition, Mr. Fitzsimons argues that this was an unusual case, involving as it did a prisoner serving a long sentence challenging the constitutionality of a long standing statutory provision. He argues that the plaintiff here was not asserting a new entitlement, but an entitlement to continue to receive a benefit for which he had contributed and to which he had an entitlement, and was in receipt of, before his imprisonment. He submits that there is a public interest element to the challenge and that the State itself expressed concerns about the possible implications of an adverse outcome, not just in relation to those who are denied entitlement to SPC by reason of the impugned section, but in relation to the possibility of more widespread implications concerning other provisions relating to disqualification from other social welfare benefits during a term of imprisonment.

6. Mr. Fitzsimons also relied upon the case of *Enright v. Ireland* [2003] 2 I.R. 321 where the plaintiff challenged the constitutionality of the retrospective application of the reporting requirements imposed upon sex offenders pursuant to the provisions of the Sex Offenders Act 2001. He informed the Court that in that case Finlay Geoghegan J. had awarded the plaintiff his costs, and submitted that the nature of the challenge in this context) was analogous to these proceedings.

7. Ms. Barrington S.C., for the defendants, argues that this case does not meet the criteria either for a test case or a public interest case. She submits that the fact that a plaintiff is one of a category of persons who may have an interest in the outcome of proceedings does not of itself qualify the case as a test case. If it were otherwise, she submits, almost any constitutional challenge would be a test case.

8. She further submits that for a case to qualify as a test case, there must be an issue requiring clarification and in this regard relies upon the decisions in *F. v. Ireland* [Supreme Court, 27th July, 1995] and *Curtin v. Dáil Éireann* [2006] 2 I.L.R.M 99. In the former case, which involved the constitutionality of certain provisions of the Judicial Separation and Family Law Reform Act 1989, the court noted that the outcome of the proceedings was of significance to litigants in at least 3,000 other cases in which orders had already been made under the Act. Accordingly, the Supreme Court awarded the costs of the appeal to the plaintiff.

9. In the latter case, the Supreme Court awarded the plaintiff half of his costs incurred in connection with his challenge to s. 3A of the Committees of the Houses of the Oireachtas (Compatibility, Privileges and Immunities of Witnesses) Act, 1997, because the Court was satisfied it had been required to consider questions which, to some extent, went beyond the specific issues raised and had provided a guide for the Oireachtas as to the procedures to be followed.

10. As regards whether or not a case constitutes a public interest challenge, Ms. Barrington S.C. relied upon the decision of the Supreme Court in *Dunne v. Minister for the Environment, Heritage and Local Government* [2008] 2 I.R. 775. That case involved a challenge to the constitutionality of s. 8 of the National Monuments Amendment Act 2004 through which challenge the plaintiff hoped to prevent the construction of a motorway proceeding. The plaintiff had no private interest in the case and argued that on that

account, and because the issues raised were of sufficient general public importance, he was entitled to an order for his costs notwithstanding that he was unsuccessful in his challenge. In the Supreme Court, Murray C.J. stated:-

*"As previously indicated, these elements are relevant factors which may be taken into account in the circumstances of a case as a whole. Because these elements are found to be present it does not necessarily follow that an award of costs must invariably be made in favour of an unsuccessful plaintiff or applicant. Equally, the absence of these elements does not, for that reason alone, exclude a court exercising its discretion to award an unsuccessful applicant his or her costs if, in all the circumstances of the case, the court is satisfied that there are other special circumstances that justify a departure from the normal rule."*

## **Decision**

11. The general rule is of course that costs follow the event, and the Court is obliged to indicate reasons for departing from the general rule. In order to depart from the general rule, there must be special or unusual circumstances. These circumstances may include cases which fall within a recognised category of test cases or public interest challenges, or where an order may cause hardship or where improper conduct by a party merits a departure from the general rule. It is clear however, that whether or not to depart from the general rule is a matter to be determined at the discretion of the Court, to be decided on a case by case basis and the courts have declined to lay down definitive rules governing exceptions to the general rule. In *Dunne*, Murray C.J. cited the following passage from *Curtin*:-

*"The general rule is that costs follow the event subject to the court having a discretion, for a special reason, to make a different order. It is a discretion to be exercised in the circumstances and context of each case and is one which is so exercised from time to time."*

*Counsel for all parties referred to previous decisions of this court and the High Court, in which a discretion was exercised to make an order concerning costs which did not follow the general rule. It would neither be possible nor desirable to lay down one definitive rule according to which exceptions are to be made to the general rule. For the discretionary function of the court to be exercised in the context of each case militates against such a definitive rule of exception and it is also the reason why previous decisions of such a question are always of limited value."*

Murray C.J. echoed this sentiment in *Dunne* when he said:-

*"The rule of law that costs normally follow the event, that the successful party to proceedings should not have to pay the costs of those proceedings which should be borne by the unsuccessful party, has an obvious equitable basis. As a counterpoint to that general rule of law, the court has a discretionary jurisdiction to vary or depart from that rule of law if, in the special circumstances of a case, the interests of justice require that it should do so. There is no predetermined category of cases which fall outside the full ambit of that jurisdiction. If there were to be a specific category of cases to which the general rule of law on costs did not apply that would be a matter for legislation since it is not for the courts to establish a cohesive code according to which costs would always be imposed on certain successful defendants for the benefit of certain unsuccessful plaintiffs."*

*Where a court considers that it should exercise a discretion to depart from the normal rule as to costs, it is not completely at large but must do so on a reasoned basis, indicating the factors which, in the circumstances of the case, warrant such a departure. It would neither be possible nor desirable to attempt to list or define what all those factors are. It is invariably a combination of factors which is involved. An issue such as this is decided on a case by case basis and decided cases indicate the nature of the factors which may be relevant but it is the factors or combination of factors in the context of the individual case which determine the issue."*

12. It follows from this that whether or not a case qualifies as a test case or a public interest challenge is not determinative of the issue, but rather it is a factor that the Court may take into account in considering an application to depart from the general rule. The plaintiff has argued that this case qualifies as a test case and should be treated as such and relies upon the decision of Clarke J. in *Cork County Council v. Shackleton* referred to above. However, it has been submitted on behalf of the defendants that it is a pre-requisite for a case to qualify as a test case that there must be an issue requiring clarification, and it is not enough simply that the plaintiff is one of a category of persons who may have an interest in the outcome of proceedings. If this were correct however, it would mean that any person who first raises an issue would have great difficulty in succeeding with an argument that the case qualifies as a test case, notwithstanding that there are many others who will be affected by the outcome of the proceeding. In this case, the Court was informed that in the order of 40 people per annum are affected by s. 249(1) of the act of 2005. It is certain therefore that had the plaintiff been successful there would be many others currently disqualified from entitlement to receive payment of the SPC, not to mention claims for refunds of payments denied to all persons affected by the provision in the past. Not only that, but during the course of the proceedings the defendants expressed concern that an outcome adverse to the defendants could well have a knock on effect for others disqualified from receiving other social welfare benefits during a term of imprisonment.

13. It seems to me that the concept of a test case may include those cases where a challenge to the constitutionality of a statutory provision, if successful, would inevitably result in a large number of claims being made against the State or an emanation of the State, provided that the challenge itself is substantive in nature and not frivolous or vexatious. This was such a case.

14. Moreover, while the plaintiff brought these proceedings exclusively in his private interest, I consider that the issues raised in the case are of significant general public importance. It was perhaps somewhat surprising that there had never been a determination in this jurisdiction as to the legal character of entitlements created by social insurance contributions, and it was inevitable that at some stage proceedings would be brought seeking clarification as to what, if any, proprietary interest results from such contributions. That question has been clarified in my substantive judgment to the benefit of the defendants.

15. As I made clear in the substantive judgment, a determination adverse to the State would have had very significant long term implications for the State, affecting the flexibility available to the State in the manner in which it chooses to distribute funds collected for the welfare of the most vulnerable in society. This is especially so at a time when this country, along with almost all other countries in the developed world, faces acute challenges in the medium to longer term in funding the pension needs of its citizens. It is an issue of considerable significance to the defendants and I am persuaded by the dictum of Murray C.J. in *Dunne* that the absence of one of the criteria that would normally define a public interest challenge (in this case the absent criteria being that the plaintiff should not have private interest in the case) does not exclude the court exercising its discretion to make an award of costs in favour of the plaintiff, having regard to the special circumstances described above.

16. There are two other factors which I consider are relevant to this application. The first is that the plaintiff had contributed all his working life to the social insurance fund, and was in receipt of the SPC prior to his imprisonment. Notwithstanding a lifetime of contributions, he finds himself treated in precisely the same way as a person who is in receipt of a non-contributory pension and who

may never have paid social insurance contributions. Secondly, notwithstanding that the disqualification from entitlement to receive the SPC while imprisoned dates back to legislation first enacted in 1908, and that it has been repeated in successive Acts of the Oireachtas, the plaintiff had no way of knowing the purpose behind the impugned provision which he forcefully argued was penal and discriminatory; that did not become evident until the issue was argued and determined in these proceedings.

17. In the special circumstances described above, I am of the view that the interests of justice require that an award of costs in favour of the plaintiff is appropriate and I intend to award the plaintiff a proportion of his costs. In my view the appropriate proportion is two thirds. I say this for two reasons. First, in principle it seems to me to be appropriate that where a party has been unsuccessful in litigation and is asking the Court to depart from the general rule in relation to costs, an award of costs in favour of that party should in some measure reflect the fact that that party has been unsuccessful. Notwithstanding that the party has been found to fall within one of the exceptions to the general rule, some reduction in the costs awarded is in my view appropriate to reflect the outcome of the proceedings, the measure of which will depend upon the circumstances of the case.

18. Secondly, the plaintiff's case to a significant degree depended on his succeeding with the proposition that he had a constitutional or Convention right to payment of the SPC, anterior to any limitations which may be imposed by statute. However, the arguments made by the plaintiff were far more wide ranging and in my view more Court time than was necessary was taken up in dealing with such arguments, particularly somewhat remote arguments relying on Convention rights. On the basis of the decision of Clarke J. in *Veolia Water UK Plc. v. Fingal County Council* [2006] IEHC 240 I consider that some measure of reduction is also appropriate under this heading.