Neutral Citation Number: [2010] IEHC 291

THE HIGH COURT

2006 1375 P

BETWEEN

PAULA SMYTH AND VINCENT SMYTH

PLAINTIFFS

AND

RAILWAY PROCUREMENT AGENCY AND VEOLIA TRANSPORT DUBLIN LIGHT RAIL LIMITED

DEFENDANTS

AND

THE ATTORNEY GENERAL

NOTICE PARTY

Judgment of Miss Justice Laffoy delivered on the 17th day of June, 2010.

1. This judgment is concerned with an application by the Attorney General for his costs of his participation in these proceedings against the plaintiffs. When the application was heard on 10th June, 2010, the Court was informed that there was to be no order for costs as between the plaintiffs and the defendants and counsel for the defendants signified consent to that.

2. The position adopted by the plaintiffs to the application of the Attorney General was that there should be no order as to costs because it would be fair and just if that position was adopted. An alternative argument was made on behalf of the plaintiffs that, if there is to be an award of costs, it should be limited to a small number of the sixteen days during which the action was at trial.

3. I have outlined the case as pleaded in paragraph 2 of my judgment delivered on 5th March, 2010. The salient elements of the case in the context of the Attorney General's application are as follows:

> (a) The plaintiffs' claim was a private law claim grounded in the tort of nuisance and, in essence, the relief the plaintiffs were seeking was injunctive relief directing the defendants to abate an alleged noise nuisance from the passing of Luas trams at the rear of their dwelling house by the erection of an appropriate acoustic barrier.
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> (b) The defendants' defence was that the Luas railway system had been constructed and was being operated in accordance with what I have referred to as the Line B Order in the judgment of 5th March, 2010, which was made pursuant to the Transport (Dublin Light Rail) Act 1996 and also in compliance with the Transport (Railway Infrastructure) Act 2001. Specifically, the defendants pleaded that the operation of the Luas within the parameters permitted by the Line B Order, including the parameters in relation to noise, could not, as a matter of law or fact, give rise to the nuisance alleged by the plaintiffs. The "permitted parameters" were identified as those set out in the Environmental Impact Statement which accompanied the application for the Line B Order.
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> (c) The plaintiffs' reply to the defendants' reliance on statutory authority raised issues of constitutional law, in that they pleaded –
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> > (i) to the extent that the defendants were seeking to establish or rely on "an alleged immunity at common law", such immunity at common law did not survive the enactment of and/or is inconsistent with the Constitution having regard to the plaintiffs' constitutional rights under Articles 40.3 and 43; and
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> > (ii) to the extent that "the common law immunity" being relied on by the defendants has survived and is not inconsistent with the provisions of the Constitution, the defendants were not entitled to rely on the common law immunity in circumstances where no compensation had been paid to the plaintiffs and where there was no statutory provision for payment of compensation in respect of noise nuisance being caused to the plaintiffs in the enjoyment of their family home and in respect of the permanent diminution in the capital value of their property.
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> The plaintiffs sought various declaratory reliefs grounded on the alleged breach of their constitutional rights asserted.
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> (d) The defendants in their rejoinder denied that "the immunity from suit" on which they relied was inconsistent with the Constitution.
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> (e) On the direction of the Court, the plaintiffs' solicitors, by letter of 3rd April, 2008, gave notice to the Attorney General under Order 60, rule 2 of the Rules of the Superior Courts 1986 of the constitutional question which had arisen on the pleadings. As I have outlined in the judgment, by letter dated 10th July, 2008, the plaintiffs' solicitors suggested that the constitutional question be left over until the Court had determined –
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> > (i) in favour of the plaintiffs that the defendants had committed and were continuing to commit a nuisance to the plaintiffs in operating the Luas, but
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> > (ii) that the defendants had made out a defence of statutory authority on the facts.

4. The suggestion made in the letter of 10th July, 2008 was raised by counsel for the plaintiffs during the opening of the plaintiffs' case on the Day 1 of the hearing, because the plaintiffs' solicitors had not obtained a response to it. It was submitted that the constitutional question was an issue for the legal submissions stage of the proceedings and that the presence of the Attorney General's legal team was not necessary for the entirety of the hearing of the case. It was made clear that the issue was being raised because of concerns in relation to costs.

5. The submissions made by counsel for all of the parties on the issue raised by counsel for the plaintiffs are to be found in the transcript (Day 1, at pp. 75 – 87). Counsel for the defendants submitted that it was appropriate that all of the parties should remain for the duration of the case for the reasons she outlined. Counsel for the Attorney General submitted that the constitutional question was inseparable from the facts of the case because an issue might arise as to whether such immunity as was being contended for, having regard to the relevant statutory provision, constituted a proportionate vindication of the rights of the plaintiffs under Articles 40 and 43 of the Constitution or not. The position of counsel for the Attorney General was that such an argument could not be conducted in the abstract. The Court raised its recent experience in the case of *Fitzpatrick v. K* [2009] 2 I.R. 7, where the Attorney General's legal team was present for the opening of the case and was supplied with the overnight transcript throughout the hearing of the evidence and was free to return to court at any time, but did not return until the closing submissions. Following an application by counsel for the Attorney General to stay in the proceedings throughout the hearing of the evidence the Court ruled as follows:

> "… I think for the time being at any rate the Attorney should stay. I will accede to that application. We can review the matter as we go along. This case does seem to me to be different from the other cases. The factual component of this case could go to the constitutional issue if proportionality comes into play."

In fact, the participation of the Attorney General's legal team was not reviewed.

6. The case, which had been estimated to last four days, ran for sixteen days and was broken up by the long vacation. I have reviewed the transcript, admittedly in a cursory fashion. I think I am correct in stating that counsel for the Attorney General did not cross-examine any of the witnesses called by the plaintiffs or the defendants save to put twenty four questions to Mr. Searson, the plaintiffs' acoustics expert, on Day 4 (Transcript, Day 4, pp. 21 – 29). The cross-examination centred on the methodology employed by Mr. Searson in conducting tests at the plaintiffs' premises and, in particular, the duration of the tram passes by reference to which he assessed the LAeq. No evidence was led on behalf of the Attorney General, although during the submissions on Day 1, counsel for the Attorney General had signposted the possibility that it might be considered fit that the Attorney General's legal team would participate in the evidence and contended that, in those circumstances, the Attorney General would have *locus standi* to do so (Transcript, Day 1, p. 83).

7. The plaintiffs' evidence was heard over part of Day 1, Day 2, Day 3 and part of Day 4. The evidence of both plaintiffs was completed shortly after lunch on Day 2. Part of Day 4 and Day 5 to Day 14 inclusive were taken up by the evidence of the defendants. Written legal submissions were exchanged by the parties during the course of the hearing. Day 15 and Day 16 were taken up with legal submissions.

8. The circumstances in which the Court can depart from the rule of law that costs normally follow the event are set out in the judgment of the Supreme Court in *Dunne v. Minister for the Environment* [2008] 2 I.R. 775. Murray C. J. stated (at para. 27):

> "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 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 the combination of factors in the context of the individual case which determine the issue."

The rule that costs follow the event means that the unsuccessful party is liable for the costs of the successful party. The outcome of the *Dunne* case was that an order for costs was made against the unsuccessful plaintiff in favour of the successful defendants by the Supreme Court.

9. In this case, in broad terms, the Attorney General was successful on the constitutional question. There is no factor or combination of factors in this case, in my view, on the basis of which the Court could properly exercise its discretion not to award the Attorney General the costs of his participation to deal with the constitutional question. In this case, the plaintiffs were pursuing their private law rights. Contrary to the submission made on their behalf, they raised the constitutional question. While, pursuant to Order 60, rule 2, they were directed by the Court to give notice to the Attorney General, the fact that the constitutional question was raised in answer to the defendants' plea that they were acting in compliance with the statute law which governed the operation of the Luas necessitated notice being given to the Attorney General in accordance with the Rules. While the decision may have brought some clarity to the law on the defence of statutory authority, I do not see that as a "special reason", to use the terminology used by the Supreme Court in *Curtin v. Dáil Éireann* [2006] IESC 27, which was referred to by Murray C.J. in the Dunne case (at para. 28), to depart from the normal rule.

10. As regards the alternative argument advanced on behalf of the plaintiffs, that an award of costs should be limited, counsel for the plaintiffs referred, in particular, to Order 60, rule 4 which, in relation to a notice served under Order 60, provides:

> "The Attorney General shall thereupon be entitled to appear in the action or matter and become a party thereto as regards the question which arises".

Counsel for the plaintiffs pointed to the fact that the participation of the Attorney General relates only to "the question which arises".

11. As I recorded at paragraph 31.7 of the judgment of 5th March, 2010, counsel for the Attorney General expressed a view on one aspect only of the evidence in their submissions - that no evidence had been adduced that the operation of the Luas had effected a permanent diminution in the market value of the plaintiffs' house. It is quite clear, albeit with the benefit of hindsight, that the attendance of the Attorney General's legal team throughout the evidence did not contribute to any degree to the legal submissions made on behalf of the Attorney General, which were of considerable assistance to the Court in arriving at its decision. Indeed, at para. 31.20 of the judgment there is a comment on the largely theoretical basis on which the constitutional issues were raised and refuted.

12. I have come to the conclusion, albeit also on the basis of hindsight, that the approach adopted in *Fitzpatrick v. K* should have been adopted in this case, because it would have adequately met the entitlement of the Attorney General to be a party as regards

the constitutional question raised. In the circumstances, I do not think it would be fair or just to award the costs of attendance throughout the evidence to the Attorney General against the plaintiffs. While it has to be acknowledged that there is no scientific basis for this approach, I propose awarding the Attorney General costs of five of the sixteen days of the hearing against the plaintiffs.