Neutral Citation Number: [2005] IEHC 79

THE HIGH COURT

[Record No 2004/18593P]

BETWEEN

DOMINIC DUNNE

PLAINTIFF

AND
THE MINISTER FOR THE ENVIRONMENT, HERITAGE, AND LOCAL GOVERNMENT, IRELAND
THE ATTORNEY GENERAL AND
DUN LAOGHAIRE RATHDOWN COUNTY COUNCIL

DEFENDANTS

Judgment of Miss Justice Laffoy delivered on the 18th day of March, 2005

1. On 7th September, 2004 I delivered a judgment on the substantive issues in this case – whether s. 8 of the National Monuments (Amendment) Act, 2004 (the Act of 2004) was invalid having regard to the provisions of the Constitution and certain provisions of European Law. I found against the plaintiff on all the issues raised. An appeal to the Supreme Court by the plaintiff against that decision is currently pending.

2. This judgment is concerned with the following applications:

> (a) an application by the unsuccessful plaintiff for his costs of the proceedings in this court against all of the defendants; and
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> (b) an application by the defendants for their costs against the plaintiff, which it was contended should be acceded to on the basis that the ordinary rule that costs follow the event should be applied.

3. I have had the benefit of written submissions on behalf of the plaintiff and oral submissions on behalf of all of the parties.

4. In reliance on a number of recent authorities, primarily, the judgment of this court (Quirke J.) delivered on 24th January, 2003 in *McEvoy v. Meath County Council* [2003] 1 I.R. 208 and the judgment of this court (Kelly J.) delivered on 31st March, 2004 in *Sinnott v. Martin* [2004] 1 I.R. 121, counsel for the plaintiff submitted that the exercise of this court's discretion to depart from the normal rule that costs follow the event is governed by two principles:

> (1) that the plaintiff was acting in the public interest in a matter which involved no private personal advantage; and
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> (2) that the issues raised by the proceedings are of sufficient general public importance to warrant an order for costs being made in his favour.

5. *McEvoy v. Meath County Council* involved a challenge by way of judicial review to the making and adopting of a development plan for County Meath, the first applicant being an elected member of Kildare County Council and the second applicant being the chairman of An Taisce (the National Trust for Ireland). The challenge was unsuccessful. In considering the applicants' application for an order for costs against the respondent, Quirke J. considered a number of authorities, one of which was a decision of the English High Court in *R. v. Lord Chancellor, ex parte Child Poverty Action Group* [1999] 1 W.L.R. 347 which concerned the jurisdiction of the English High Court to make a pre-emptive costs order. Quirke J., having noted that Dyson J. acknowledged that there was a distinction to be made between ordinary private law litigation, on the one hand, and what he called "public interest challenges" on the other hand, quoted the following passage from the judgment of Dyson J. at p. 353 in which he explained his understanding of the concept of a public interest challenge:

> "The essential characteristics of a public law challenge are that it raises public law issues which are of general importance, where the applicant has no private interest in the outcome of the case. It is obvious that many, indeed most judicial review challenges, do not fall into the category of public interest challenges so defined. This is because, even if they do raise issues of general importance, they are cases in which the applicant is seeking to protect some private interest of his or her own."

6. Quirke J. found that in the proceedings before him neither of the applicants was seeking to protect some private interest of his own. They had acted solely by way of furtherance of a valid public interest in the environment and, in particular, in the interest of those communities affected by the planning considerations applicable to the greater Dublin area. He was also satisfied that the proceedings raised public law issues of general importance. On that basis he was satisfied that the applicants had brought "a *bona fida* public interest challenge". Quirke J. went on to analyse the course of the proceedings in terms of how issues of fact and law were dealt with. He found that the proceedings were unnecessarily prolonged because of the vast amount of documentation that had to be analysed. While he did not expressly blame the respondent for this, it is to be inferred that it was his view that it was the manner in which the respondent contested the issues which gave rise to that outcome. He also found that the majority of issues of fact were determined in favour of the applicants. He made an order requiring the respondent to pay the full costs of and associated with the daily transcript and he awarded the applicants 50% of their costs of and incidental to the proceedings.

7. In *Sinnott v. Martin*, Kelly J. stated that, in his view, the views expressed by Dyson J. in the passage which I have quoted earlier, and approved of by Quirke J., were correct. However, he found that in the proceedings before him, with one exception, the parties before him were seeking to protect their own private interests by participating in the proceedings and that in the circumstances which had prevailed the exceptional party could not be regarded as in a different category for cost purposes. Moreover, he felt that the case did not raise public law issues of such importance as would entitle him, as a matter of discretion, to award costs against the Minister for the Environment.

8. I am satisfied that counsel for the plaintiff have correctly identified the principles established in the recent jurisprudence of this court in accordance with which the court should exercise its discretion in considering an application for costs by an unsuccessful plaintiff or applicant in public law litigation, at any rate, against a protagonist which is a public body. I now propose applying those principles to the instant case.

9. In my view, it cannot be gainsaid that these proceedings have the essential characteristics of a public law challenge as outlined by Dyson J. The plaintiff is within that rare category of litigants who truly have no private interest in the outcome of the proceedings. He

brought these proceedings and the earlier proceedings in which he was involved, *Dunne v. Dun Laoghaire Rathdown County Council* [2003] 1 I.R. 567 (Dunne No. 1), as a private citizen who is concerned about the impact of the construction of the South Eastern Route Motorway on the archaeological site at Carrickmines Castle. The proceedings undoubtedly raised public law issues which are of general importance in that the issue at the core of the proceedings is the power of the Oireachtas to make laws facilitating road development which will or may impact on a national monument.

10. In my judgment on the substantive issues, I have to some extent outlined the course of the proceedings. The proceedings were initiated on 18th August, 2004. By consent of the parties the plenary hearing commenced on 26th August, 2004 and was heard over four days. No oral evidence was heard. I think it appropriate to record that all of the parties and their respective legal teams conducted the proceedings in a manner which ensured that the issues were dealt with in a timely and cost efficient manner.

11. The outcome of the proceedings turned almost entirely on questions of law, all of which were determined in favour of the defendants. Notwithstanding that, it seems to me that there are special circumstances in this case which warrant a departure from the general rule contained in order 99, rule 1(4) of the Rules of the Superior Courts, 1986 that the costs of every issue or fact or law raised upon a claim or counterclaim shall follow the event.

12. In my judgment on the substantive issues, I have outlined the background to the proceedings from the Environmental Impact Statement of September, 1997 to the coming into force of the Act of 2004 on 18th July, 2004. Of particular significance on the issue of costs, in my view, is the fact that the plaintiff was successful in obtaining an interlocutory injunction in Dunne No. 1, which effectively halted road works at Carrickmines Castle without a valid consent under s. 14 of the National Monuments Act, 1930, as amended. This led to the making on 3rd July, 2003 of the joint consent and the ministerial order which were subsequently successfully challenged in *Mulcreevy v. Minister for Environment, Heritage and Local Government and Dun Laoghaire County Council* [2004] 1 I.L.R.M. 419. That successful challenge, in turn, provoked the enactment of a special provision in s. 8 of the Act of 2004 in relation to the South Eastern Route, which I have concluded was driven by a policy designed to ensure the completion of the motorway without any input in relation to national monument protection implications from any party external to the first and fourth defendants and their respective advisors. Against that background, I consider that the issues raised in these proceedings, adopting the words of Dyson J. in the *CPAG* case at p. 358, were "truly ones of general public importance". They were difficult issues of law. It was in the public interest that they be clarified.

13. I can see no principled, or even rational, basis on which I would award the plaintiff portion only of the costs of the proceedings. Unlike the situation which arose in the *McEvoy* case, the plaintiff was not successful on any issue. However, as a matter of principle I do not consider that the courts discretion as to costs in this type of public law litigation is in any way dependent on one or more of the issues of fact or law raised being decided in favour of the plaintiff or applicant. Accordingly, there will be an order for costs in favour of the plaintiff against all the defendants.