THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 80

Record No. 2016/408

Irvine J.
Hogan J.
Stewart J.

BETWEEN/

BRENDAN KILTY

APPELLANT

- AND -

JUDGE CORMAC DUNNE

RESPONDENT

- AND -

CAMPION PROPERTY CONSULTANTS LIMITED

THIRD PARTY

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 22nd day of March 2018

1. In a ruling delivered on the 17th October 2017 this Court allowed an appeal brought by the applicant, Mr. Kilty, against a decision of the High Court to make no order as to costs following the remittal of the issue of those costs from the Supreme Court to that Court. All of this arises from long-running judicial review proceedings following which a decision of the respondent District Judge was quashed by the High Court as far back as 2011. The question which now arises is whether it would be appropriate to make an award of costs in this Court in favour of the applicant in respect of that successful appeal against the respondent judge personally or whether the quasi-immunity in respect of costs enjoyed by judges precludes the making of such an award in these circumstances. The resolution of this question presents yet a further issue to be determined in an ill-fated saga, the duration and complexity of which brings little credit to the legal system itself.

The background to the present appeal

2. The matter arises in the following way. Following High Court litigation between the applicant, Mr. Kilty, and the notice party, Campion Property Consultants Ltd. ("Campion Property"), Mr. Kilty subsequently sought to object in the District Court to the renewal of Campion Property's auctioneering licence. Those objections were rejected by Judge Dunne who granted the licence. Mr. Kilty then sought to have the order of Judge Dunne quashed in High Court proceedings by reason of what he contended was objective bias and what he maintained were the close connections between the judge and the legal team acting for Campion Property.

3. Mr. Kilty applied for and obtained leave from the High Court to apply for a judicial review of that decision. Before the judicial review application could proceed to a full hearing, Mr. Kilty's counsel brought a motion for directions in the High Court, which motion focused on the role envisaged for the District Judge in the forthcoming judicial review application. Questions raised included:

> "1. Is it appropriate to join a District Court judge to judicial review proceedings against him/her?
>
> 2. Should a judge be served, and should a judge be struck from the proceedings once leave is granted?
>
> 3. Should a judge be joined where the applicant is making an allegation of bias against the judge?"

4. The motion paper set out under each heading, and, by way of submission, quoted from, a number of legal authorities which considered the appropriateness of District Judges' active participation in judicial review proceedings in which their orders had been challenged. In the course of that submission Mr. Kilty's legal advisors acknowledged:

> "… The applicant *accepts that costs cannot be awarded against a District Judge when he does not take an active part in proceedings.* But this rather begs the question, where there is an allegation of bias, should the judge take an active part in proceedings." (emphasis added)

5. In the words of MacMenamin J., there "is no doubt that, by then, Mr. Kilty's advisors were alive to the fact that the general question of judicial immunity from costs orders was part of the consideration."

6. This motion for directions was heard by the High Court on the 14th October 2010. Hedigan J. declined to make any order to the effect that the District Judge should actively participate. The curial part of his order provided in relevant part that: *"The Court doth direct that this matter proceed without the participation of the respondent at this time, and the Court doth reserve the costs of this application."* (emphasis added)

7. One year later, on the 13th October 2011, the judicial review proceedings came on for hearing again before Hedigan J. and by then Mr. Kilty was represented by different counsel. Prior to the full hearing, his counsel sought and obtained a *subpoena duces tecum* directing the attendance of a District Court Clerk, and the production of the District Court file on the licence application. The file and other documents, including emails, were produced in court. It then emerged from email correspondence on file dated the 19th January 2010, that, as well as granting the renewal application, the District Judge had also placed what MacMenamin J. was later to describe in his judgment for the Supreme Court in the matter (*Kilty v. Dunne* [2015] IESC 88) as a "warning note" on the file. This note apparently purported to warn other District Court judges who might deal with any future renewals of Campion Property's auctioneering licence of Mr. Kilty's role in the application which Judge Dunne had heard. It also emerged that the District Judge had purported to

make an *Isaac Wunder* order both against Mr. Kevin Buggle (one of the two objectors), and Mr. Kilty himself, thereby restricting their right of access to the courts.

8. During the hearing before him, the High Court judge amended the statement of grounds on one point to permit a claim to the effect that the *Isaac Wunder* order was *ultra vires*. No other amendment to the statement of grounds was sought or granted. The statement of grounds did not contain any claim that costs should be awarded personally against the District Judge. In the course of an *ex tempore* ruling Hedigan J. held that there were grounds for finding objective bias on the basis of non-disclosure of the professional relationship between the parties. The judge accordingly granted a declaration that the respondent had breached the applicant's right to fair procedures, and quashed the other orders, which he held to be *ultra vires*. He made no finding of subjective bias on the part of the District Judge.

9. So far as the issue of costs was concerned, Hedigan J. observed that Campion Property had been effectively "caught in the crossfire"; that it had not had any knowledge of the "warning note", and had not had any "hand, act or part in the so-called *Isaac Wunder* order that was made". Hedigan J. then said:

> "The order for costs, therefore, will be an order in favour of the applicant [Mr. Kilty] against the respondent [the District Judge], and an order in favour of the third party [Campion Property] also against the respondent in this matter."

10. This conclusion was reflected in the order of the High Court dated 30th March 2012. As MacMenamin J. observed, Hedigan J. had not been reminded that he had previously made an order to the effect that the District Judge should not (or, at least, need not) participate in the substantive judicial review proceedings. The District Judge then appealed against this costs order and the Supreme Court allowed that appeal on the ground of fair procedures, since he had not been on notice that such an order might be sought against him.

11. As MacMenamin J. observed:

> "Taking these principles together, it is clear that, on this occasion, the High Court judge erred in making the costs order. A party potentially affected by a final court order is entitled to be given adequate notice of the possibility of such an order being made. Such an order should not be made, at least in the absence of notice to a party that such application might be made. This is not, of course, to say that by failing to attend a court proceeding, a party, who is on notice, can prevent an adverse order being made. What is necessary in such a context is that a court be satisfied a party is on notice of the application, and the potential orders which might foreseeably be made.
>
> It would be inappropriate for this Court to embark on the form of enquiry which is urged by counsel on behalf of Mr. Kilty. The Supreme Court is not a Court of First Instance. Furthermore, no application was made at any stage to amend the statement of grounds, to seek costs against the District Judge (see *AP v. DPP* [2011] IESC 2). As this Court emphasised in *AP,* it is the duty of an applicant in judicial review to set out, clearly, each of the reliefs claimed against a respondent, or a party who might be affected. It is not open to this Court, at this stage, to make an order amending the statement of grounds. There is no cross-appeal, or notice to vary, filed by the respondent.
>
> The question of judicial immunity arose in *McIlwraith v. Fawsitt* [1990] 1 I.R. 343; and *O'Connor v. Carroll* [1999] 2 I.R. 160. I express no further view thereon. Any further issue, and the extent of any immunity arising, are matters which fall to be determined by the High Court, in the first instance, utilising well established procedures for fact finding. By remitting the matter, neither party will be debarred from a right of appeal on a matter, potentially, of some gravity.

Proposed Order
The present order for costs made against the respondent District Judge, having been made in the absence of jurisdiction, cannot stand. I would, therefore, allow the appeal, and remit the question of the costs award to the High Court."

12. The actual order made by the Supreme Court on 22nd February 2016 provided for no order as to costs in respect of the appeal itself. Critically, however, so far as the High Court costs were concerned the order provided:

> "IT WAS ORDERED AND ADJUDGED that this appeal be allowed and that the said Order of the High Court as to costs be set aside.
>
> AND IT WAS ORDERED that the question of the costs award[ed] in the High Court be remitted to that Court for determination…"

13. When the matter came back to the High Court Hedigan J. made no order for costs. While the nature of the ruling was a matter of debate between the parties at the hearing of the substantive appeal last October, in truth the transcript of the digital audio recording leaves absolutely no room for doubt but that Hedigan J. considered that he was bound by the Supreme Court order to make no order as to High Court costs. Two extracts from the transcript must suffice for this purpose:

> "COUNSEL FOR APPLICANT: For hearing
>
> JUDGE: Hearing for what?
>
> COUNSEL FOR APPLICANT: Exactly, Judge. There is an issue – an outstanding issue as to who should pay the costs of the High Court proceedings.
>
> JUDGE: Yes, that's all I'll say is to come back here. Well see, the answer is obvious, the Supreme Court made no order as to costs, I can do nothing else but that.
>
> COUNSEL FOR APPLICANT: Well that isn't in fact… Judge, there will be significant substantial submissions on that.
>
> JUDGE: I can't see how I could possibly make any other order, that's effectively what the Supreme Court have directed me to do, and that's what I will do.. I can't make any other order. There is nothing to debate on this…"

The second extract is in similar terms:

> "JUDGE: The matter is closed. The only order I have to make is an order for no order as to costs, and that is what I am doing. I am not reopening a case that is years out of date. I am very sorry to hear that anybody was so unwise as to try to reopen this matter again at this stage.
>
> COUNSEL FOR APPLICANT: May it please the Court.
>
> JUDGE: I can't think of anything less wise in the circumstances. It was a most unfortunate case for everyone involved. But I am making – doing the only thing I can possibly do in this case and that is to vary the order that was made in the High Court by me, incorrectly made by me in the circumstances and to change it to one of no order as to costs. I can do no more than that, I am sorry."

14. It is plain from this transcript that Hedigan J. considered that he was bound by the terms of the Supreme Court order to make no order as to High Court costs. In a ruling delivered on 17th October 2017 I held that Hedigan J. was in error in arriving at that conclusion, saying:

> "The order of the Supreme Court made it plain that the question of the High Court costs was a matter for the High Court to determine afresh in the light of the judgment of MacMenamin J. which had allowed the respondent judge's appeal against the original costs order on fair procedures grounds. It must be recalled that that judgment expressly stated (at para. 27) that "the extent of any immunity arising, are matters which fall to be determined by the High Court, in the first instance, utilising well established procedures for fact finding" and, further, that "by remitting the matter, neither party will be debarred from a right of appeal on a matter, potentially, of some gravity."
>
> The judgment and order thus plainly envisaged and contemplated that once the matter went back to the High Court the respondent judge would, on this occasion, be on notice that an application for costs might be made against him personally. The judgment also appears to contemplate that the question of a potential judicial immunity – on topic on which it is unnecessary to express any view – could also be explored should this prove necessary."

15. While the effect of the order of this Court is that the issue of the High Court costs in the original proceedings was remitted to the High Court for consideration, this Court is now required to consider the question of the costs of the successful appeal brought by the applicant in this Court. There is, I think, no question but that in the ordinary way had it not been for the status of the respondent as a judge of the District Court, costs would have followed the event in the ordinary way in the manner contemplated by Ord. 99, r. 1 so that the Court of Appeal costs would have been awarded against the losing party, i.e., the District Court judge. This, accordingly, now requires the Court to consider the applicability of the quasi-immunity from costs long enjoyed by judicial personages.

16. The Court requested that the Attorney General participate in the costs hearing as an *amicus curiae* and the Court has had the benefit of very helpful written and oral submissions from counsel on behalf of the Attorney.

The quasi-immunity from costs enjoyed by judges

17. At common law, judges enjoyed complete immunity from liability in tort in respect of any act done or thing said while exercising their judicial functions: see, *e.g., Sirros v. Moore [1975] Q.B. 118; Beatty v. Rent Tribunal* [2006] 2 I.R. 191. The rationale for judicial immunity was explained thus by Morris P. in *Desmond v. Riordan* [2000] 1 I.R. 505, 507:

> "It is, in my view, well settled that the immunity from suit enjoyed by the judiciary exists not for the benefit of the judge but for the benefit of the community as a whole. This immunity is perceived to be necessary and desirable so that a judge may perform his functions the better, freed of concern that in the course of performing his duties he may defame a third party and be required to be answerable to that party in damages."

18. This common law immunity has been supplanted by constitutional considerations because without such immunity no person could discharge judicial office with the independence and detachment required by both Article 34.6.1 and Article 35.2 of the Constitution. If judges could be routinely sued in respect of the performance of their functions, none but the foolhardy would apply for judicial office.

19. The most common manifestation of judicial immunity is in the area of costs in judicial review proceedings where a judicial decision has been successfully challenged. The case-law is clear in that an order for costs cannot be made against a judge personally in the absence of an express finding of mala fides or impropriety on his part.

20. In *R. (King) v. Justices of Londonderry* (1912) 46 I.L.T.R. 105 Palles C.B. stated the principle in the following terms :

> "According to the principles that the Courts have been acting upon for years, as a rule magistrates ought not to be obliged to pay costs unless they were acting in some way that was not bona fide, or unless they took it upon themselves to put forward and support a case that was wrong in point of law".

21. This statement of principle was cited with approval by Maguire C.J. in *State (Prendergast) v. Rochford,* Supreme Court, July 1, 1952, by Finlay C.J. in *McIlwraith v. Fawsitt* [1990] 1 I.R. 343 and by Denham C.J. in *Miley v. Employment Appeals Tribunal* [2016] IESC 20. In *McIIwraith* Finlay C.J. stated ([1990] 1 I.R. 343, 345-346):

> "the principle enunciated by the former Chief Justice Maguire [in *Prendergast*] is the appropriate principle, that under no circumstances should the High Court upon application for judicial review with regard to either a decision of a District Justice or of a Circuit Court judge award costs to a successful applicant in a case where there is no question of impropriety or mala fides on the part of the judge concerned and where he has not sought to defend an order which apparently is invalid."

22. The reasons underlying such a principle were outlined by O'Neill J. in *O'F. v. Judge O'Donnell* [2012] 3 I.R. 483, 494-495 in the following terms:

> "On this question there was no dispute between the parties. Counsel for the applicants acknowledged that the judgments of the Supreme Court in the cases of *McIlwraith v. His Honour Judge Fawsitt* [1990] 1 I.R. 343 and *O'Connor v. Carroll* [1999] 2 I.R. 160 and the judgments of Kelly J. in *Curtis v. Kenny* [2001] 2 I.R. 96 *and McKechnie J. in Stephens v. Connellan* [2002] 4 I.R. 321 and of Macken J. in *McCoppin v. Kennedy* [2005] IEHC 194; [2005] 4 I.R. 66, all make it clear that where there is no allegation of mala fides or impropriety and where the judge does not defend the impugned order, there cannot be an order for costs against him or her. Without such a rule, judges could be sued and orders for costs made against them where they had merely fallen into error without any impropriety or mala fides on their part. Bearing in

> mind the range of error that may be the subject-matter of judicial review, in my opinion, without a full indemnity from the State, which for the reasons discussed below cannot exist, it would not be possible because of the risk to personal fortune, to retain judges let alone independent judges in the District or Circuit Courts."

23. This issue was also touched on by me when delivering the judgment of this Court in *Walsh v. Property Registration Authority* [2016] IECA 34 where I identified the rationale for the rule in the following terms:

> " … There is, of course, established authority that persons holding judicial office should not, save, perhaps, in exceptional cases, be liable in costs: see, e.g., *McIlwraith v. Fawsitt* [1990] 1 I.R. 343, *O'Connor v. Carroll* [1999] 2 I.R. 160 and *O'F v. O'Donnell* [2009] IEHC 142, [2012] 3 I.R. 483.
>
> The fundamental basis for this rule so far as individual judges are concerned is, of course, to protect the independent exercise of the judicial power as envisaged by Article 34 and Article 35 of the Constitution. If judges could be made personally liable for costs, then, of course, as Ó Néill J. pointed out in *O'F. v. O'Donnell* ([2012] 3 I.R. 483, 511); "a judiciary could not function if it were exposed to that kind of risk." Personal immunity from costs – save, possibly, in quite exceptional cases where the impugned judicial order was made *mala fide* – is thus a necessary feature of judicial independence. This line of authority which protects individual judicial personages is, accordingly, not at issue in the course of this appeal."

24. The reasons for, and benefits of, immunity from costs orders are accordingly clear. The prospect of potentially ruinous costs orders being made against judges in subsequent judicial review proceedings would clearly undermine their capacity to perform their judicial functions in a truly independent manner and would be bound to inhibit their judgment, thus making it all the more difficult – even impossible - for them to fulfil the judicial declaration subscribed to by every judge under Article 34.6.1 of the Constitution to exercise those functions "without fear or favour, affection or ill-will towards any man".

25. None of the parties to this appeal have sought to deny the general applicability of the principles in *McIlwraith.* The real question so far as this particular costs application was concerned was whether these principles apply in the circumstances of the present appeal.

Whether the *McIlwraith* principles apply to the costs issue arising on this appeal

26. So far at least as this particular appeal to this Court is concerned, there is no question of impropriety or *mala fides* on the part of the respondent judge. Following the Supreme Court order, a question of interpretation of that order subsequently arose in the High Court. Hedigan J. ruled in favour of the respondent judge on that issue and this Court has held that he was in error.

27. The question which now arises is whether the quasi-immunity from costs articulated in *McIlwraith* continues to apply in such a situation. Counsel for Mr. Kilty, Mr. Phelan S.C., contends that it does not. He submits that the quasi-immunity applies only where the respondent judge takes no part in the substantive judicial review proceedings, but that by participating in the various costs appeals he has so taken part in these proceedings.

28. It is clear, however, that the test articulated in *McIlwraith* as to when judges will lose the quasi-immunity is two-fold in nature. First, there must have been either *mala fides* or impropriety on the part of the judge concerned. Second, he must not have sought to defend the validity of an order which has been successfully challenged in the judicial review proceedings. It is unnecessary for the present purposes to express any view as to whether these requirements are singular or cumulative as I consider that the respondent judge can meet both tests.

29. As I have already indicated, there is no question of any *mala fides* on the part of the respondent judge so far as this appeal is concerned. As Denham C.J. explained in *Miley*, the concept of impropriety is slightly different and it suggests "a different aspect of conduct, such as wholly unfit proceedings." As the decision in Miley itself illustrates, mere routine error – such as that disclosed here in respect of the interpretation of the Supreme Court order of 22nd February 2016 – does not amount to impropriety in the *McIlwraith* sense of that term. The first limb of the test is accordingly satisfied.

30. The second limb of the test requires the Court to consider whether the respondent judge has sought to defend the validity of an order which was subsequently quashed. In my view, however, it cannot be said that the judge by participating in these costs applications has sought thereby to defend the validity of the District Court order which he made and which has since been quashed. After all, the judge was obliged to seek to appeal the original adverse costs order made by the High Court since – as the Supreme Court subsequently found – he had not been heard on that question. It was then perfectly reasonable for him to have advanced a particular understanding of the effect of that order before the High Court and, more latterly, before this Court, even if that understanding transpired to be erroneous. But none of this means that the judge has thereby sought to defend the validity of the order made by him in the District Court.

31. In these circumstances, it has to be said that the judge satisfies the two *McIlwraith* criteria and he can thus successfully invoke the quasi-immunity from costs.

Conclusions

32. In summary, therefore, I would conclude as follows:

33. First, were it not for the question of the judicial quasi-immunity, this Court would have naturally awarded the costs of the appeal to Mr. Kilty as a matter of ordinary justice.

34. Second, however, the respondent judge can avail of the judicial quasi-immunity in respect of costs articulated by Finlay C.J. in *McIlwraith* in that (i) there was no *mala fide* or impropriety on the part of the judge in the conduct of this appeal and (ii) by participating in the subsequent costs issue, he did not thereby seek to defend the validity of the order which he had made in the District Court and which was subsequently quashed by the High Court in October 2011.

35. It follows that this Court will make no order as to costs against the respondent judge so far as the costs of the appeal to this Court are concerned. I should stress again that the wider issue of costs in the original High Court proceedings will now fall to be determined by the High Court having regard to the Supreme Court order of 22nd February 2016 and the subsequent ruling of this Court on 17th October 2017 and nothing in this judgment should be viewed as expressing any views on the merits of that wider costs issue.