THE HIGH COURT

[RECORD NO. 2018/349JR]

BETWEEN

JOHN STOKES, TAMMY STOKES, JOHN STOKES JR (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND TAMMY STOKES), MICHAEL STOKES (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND TAMMY STOKES) THOMAS STOKES (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND TAMMY STOKES)

APPLICANTS

AND

THE SOUTH DUBLIN COUNTY COUNCIL AND THE MINISTER FOR HOUSING, PLANNING AND LOCAL GOVERNMENT

RESPONDENTS

AND

IRELAND AND THE ATTORNEY GENERAL AND THE IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

NOTICE PARTIES

JUDGMENT of Mr. Justice Robert Eagar delivered on the 8th day of March 2019

1. This is a judgement on foot of an *ex parte* application for leave to apply by way of an application for judicial review which have become moot. The only issue now before the court is costs.

2. On the 20th day of April, 2018, on foot of an application by the applicants made *ex parte* for leave to apply by way of an application for judicial review for a number of motions but in particular: -

> (i) an order of certiorari quashing the decision of the first named respondent of the 12th February 2018 to refuse to process the applicants' caravan loan;
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> (ii) an order directing the first named respondent to process the applicants' caravan loan;
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> (iii) a declaration by way of an application for judicial review that the refusal of the first named respondent of the 12th February 2018 was:-
>
> > (a) an obligation of the first named respondents' statutory discretion pursuant to s. 25 of the Housing (Traveller Accommodation) Act 1998 and was for that reason *ultra vires*, unlawful, void, and of no effect;
> >
> > (b) an unlawful fettering of statutory discretion pursuant to s. 25 of the Housing (Traveller Accommodation) Act 1998;
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> > (c) an unlawful resigning from the legitimate expectation created by the first named respondents' previous representations to the applicants, upon which the applicants had relied;
> >
> > (d) based on and error of law and was for that reason *ultra vires*;
> >
> > (e) unreasonable by law by reason of being arbitrarily determined by the fact that the applicants reside within the functional area of the first named respondent, a housing authority which is not processing caravan loans under s. 25 of the Housing (Traveller Accommodation) Act 1998 or otherwise.

3. A number of other declarations were sought by the statement grounding the application for judicial review, but for the purposes of this decision it is not necessary to set them out in full.

4. The matter came before Noonan J. on the 30th April 2018 and he ordered that the applicants do have to leave by way of application for judicial review for the reliefs set forth and that the said applicants serve an originating notice of motion before 1:00 p.m. on the 1st May 2018 returnable for the 8th May 2018 in the judicial review list together with copies of the aforesaid statement and verifying affidavit and this order and the solicitors on behalf of the respondents and notice parties. On the 22nd October 2018 it was indicated to the court that the only issue before the court is the matter of costs.

Applicable Cost Principles

5. The legal principles in regard to costs when legal proceedings have become moot have been well established throughout the years and for those reasons I will not analyse them in great detail. The principles have been neatly summarised by Keane J. in *Lufeyo & Anor v Minister for Justice* [2018] IEHC 491 at paragraph 7 where he stated:

> i. "Under O. 99, r. 1(4) of the Rules of the Superior Courts, the general rule on the costs of proceedings is that they follow the event, although there is a discretion to order otherwise; *Grimes v Punchestown Developments Co. Ltd* [2002] 4 IR 515 (at 522).
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> ii. Even where the substantive point has become moot, the first inquiry which a court must make on a follow on costs application is to decide whether or not there exists an "event" to which the general rule can be applied; *Godsil v Ireland* [2015] 4 IR 535 at 555-6. Such an event may exist where, for example, the actions that rendered the proceedings moot were carried out in direct response to the issue of the proceedings; *ibid* (at 557).
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> iii. Where there is no 'event', the basic rule, though not one that should be applied over-prescriptively, is that, in the absence of significant countervailing factors, the court should lean ordinarily in favour of making no order as to costs where a case has become moot due to 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; *Cunningham v. President of the Circuit Court* [2012] IESC 39 , [2012] 3 I.R. 222 (at 230).

iv. There are hybrid cases that do not fit neatly into either category; *Cunningham* (at 23). The most obvious instance of such a case is where a statutory officer or body, whose conduct is under challenge, has changed position, to a greater or lesser extent, due to wholly external factors. Statutory authorities have an obligation to exercise their powers in a proper manner. Where circumstances change, it is not only reasonable but necessary for them to take that into account, which may result in a change of position, rendering proceedings moot. When that happens, it may be inappropriate to characterise the proceedings as having become moot by the unilateral action of that authority, whereas it may be appropriate to do so if there has simply been a change of mind or the adoption of a new and different view. Where the immediate or proximate cause of mootness is an act or omission of a statutory body or officer, which that body or officer claims was precipitated by an external factor or factors, that body or officer bears the evidential burden in that regard; *Cunningham* (at 230-2)

v. The court cannot and should not form a view on the merits of the proceedings - i.e. whether the substantive application for judicial review would have succeeded or failed; *Cunningham* (at 233).

vi. The quite different test for determining the issue of liability for the costs of moot proceedings posited in *S.G.* and *N.G. v The Minister for Justice* [2006] IEHC 371, (Unreported, High Court (Herbert J), 16th November, 2006) - i.e. whether in the circumstances it was reasonable for the applicants to have commenced their application for leave to seek judicial review - must now be viewed as one limited in its application to the facts of that case; *Matta v Minister for Justice* [2016] IESC 45 (Unreported, Supreme Court (MacMenamin J; Dunne and O'Malley JJ concurring), 26th July, 2016) (at para. 22)."

Background

6. The application for leave was grounded on the affidavit of Tammy Stokes, the Second Named Applicant. She lives with her husband, the First Named Applicant and her children, the Third, Fourth and Fifth Applicants on the Oldcastle Park Green halting site whereby they were allocated a bay in or around 2014/2015. She explained that they did not have the means to acquire a caravan to place on their bay but were able to borrow a caravan which they used at their bay until the summer of 2017 when they had to return it. After the return of the borrowed caravan, she explained borrowing a small 'portacabin' which she described as not suitable for residential use. The portacabin was not sub-divided in to rooms, did not have heating, plumbing, insulation or electricity.

7. In or about August or September 2017, the applicants started liaising with Stephen Brown, a member of Clondalkin Traveller Development Group and subsequently organised a meeting with Sonia Lavelle, an employee of South Dublin County Council (hereinafter the Council) in the Traveller Accommodation Unit and Gerald Fitzgibbon, an Administrative Officer with the Council. At this time, the applicant became aware of a Caravan Loan Scheme being offered by the Council.

Chronology of Correspondence

8. The applicants subsequently applied to the Council for a loan in order to purchase a caravan. The application was assessed and a letter was sent to the first and second named applicants confirming that the application was approved *in principle*. The Council allocated €10,750, repayable by the applicants over a period of five years. The first named applicant wrote to the Council on the 1st of December 2017 requesting that the term of repayment be made over a seven year period in order to reduce the monthly repayment of the loan. This request was subsequently approved by letter dated 6th December 2017 from the Council to the first and second named applicants and requested that they sign a Household Budget Form and an agreement form at the Council's Customer Care desk. The following day the Council received the requested forms signed only by the first named applicant, John Stokes. The first and second named applicant completed a Standard Financial Statement which is required for all Local Authority borrowers on the 21st December 2017. A credit check was requested on the 2nd January 2018.

9. In early January 2018, the Council had been advised by their Head of Finance that it would not be able to deduct the repayments for loans advanced for caravans through the Household Budget Scheme due to applicable Social Protection legislation.

10. Mr. Browne of the Clondalkin Traveller Development Group wrote to the Council on behalf of the applicants enquiring about the delay. A response was received on the same day. On the 7th February 2018, Mr. Browne made enquiries with the Finance Department of the Council regarding the status of the applicants caravan loan application. Mr Browne advised that members of the Finance Department had no knowledge of the scheme. On the 12th February 2018, the second named applicant spoke to Sonia Lavelle in the Traveller Accommodation Unit of the Council. The second named applicant was told that the scheme had been put on hold. The same day, Mr Browne wrote to Sonia Lavelle asking that the loan be honoured regardless of the implications with finance. Later the same day, Gerald Fitzgibbon, wrote to Mr. Browne stating that the Council was not in a position to process caravan loans on the advice of the Council's Head of Finance due to the Council not having the necessary mechanisms to administer the caravan loans or recoup the monies involved. It was submitted by Counsel for the Council that efforts were being made by the Finance Department of the Council to put in place necessary administrative structures to allow loans to be paid out. However, from an early stage, the Council was not clear in their correspondence to the applicants about the status of the Scheme.

11. On the 19th April 2018, solicitor for the applicants wrote to the Council outlining the factual legal issues that arose. The solicitor gave the Council seven days to reply to the correspondence or they would be advising the applicants of the legal remedies open to them. On the 30th April 2018, leave was granted to apply for judicial review. On 4th May 2018, the County Solicitor-Law Agent for the Council wrote to the applicants' solicitor advising that there had been a breakdown in communication between the parties and that the caravan loan will be made available within four weeks of the 8th May 2018 provided all the necessary documentation and agreements have been completed by the applicants.

Decision of the Court

12. It is clear that the response of the Council to the issue of judicial review proceedings was an event that ultimately rendered the legal proceedings moot.

13. In those circumstances the Court is of the view that the applicants are entitled to the costs of the *ex parte* application for judicial review.