Neutral Citation Number [2007] IEHC 334

THE HIGH COURT

COMMERCIAL

[2007 No. 315 JR]
[2007 No. 55 COM]

BETWEEN

CORK COUNTY COUNCIL

APPLICANT

AND
JOHN SHACKELTON

RESPONDENT

AND
MURPHY CONSTRUCTION (CARRIGTWOHILL) LIMITED

NOTICE PARTY

Judgment of Mr. Justice Clarke delivered the 12th October, 2007.

1. Introduction

1.1 I have already given judgment in relation to the substantive issues between the parties in this case ("the substantive judgment"). See *Cork County Council v. Shackelton* (Unreported, High Court, Clarke J. 19th July, 2007). This judgment is directed to the question of costs. As appears from the substantive judgment I was satisfied, for the reasons which I set out, that Cork County Council ("Cork") was entitled to an order setting aside the award of the respondent arbitrator ("the arbitrator"). As is also clear from that judgment the arbitrator did not take any part in the proceedings.

1.2 Cork was opposed in its application by the notice party ("Murphy Construction") in whose favour, on the point in question, the arbitrator had ruled. In those circumstances Cork maintains that it has succeeded in the proceedings and that it is entitled to costs. Equally for what are contended to be unusual and special reasons, Murphy Construction maintains that it too is entitled to its costs notwithstanding the fact that it lost.

2. The Event

2.1 The starting point for the award of costs has to be to identify who the winner is. See *Veolia Water UK plc and Others v. Fingal County Council* [2006] IEHC 240. There can be no doubt but that, on the facts of this case, Cork was the winner. The proceedings involved a challenge to the award of the arbitrator in respect of the number of houses to be transferred to Cork on foot of the social and affordable housing provisions of the Planning and Development Act, 2000 as amended. Murphy Construction had proposed a particular basis to the arbitrator as to how that number was to be calculated. The arbitrator, by implication, accepted the arguments put forward on behalf of Murphy Construction and, in substance, on this point, ruled completely in favour of Murphy Construction. For the reasons set out in the substantive judgment I came, despite having very great sympathy for the difficulties with which the arbitrator was faced, to the view that the arbitrator was wrong in law and that it was an appropriate case in which the arbitrator's award should be quashed. It follows, therefore, that Cork won all of the issues in the case before me and that, if costs are to follow the event, same must be awarded in favour of Cork.

2.2 Before passing on to the reasons put forward on behalf of Murphy Construction as to why costs should not follow the event, I should touch on one question which was raised in the course of the argument before me in relation to costs. It is, of course, the case that Murphy Construction was a notice party rather than a respondent. It has sometime been questioned as to the extent to which costs orders both in favour of and against notice parties are appropriate. That notice parties may, in appropriate circumstances, be entitled to the costs of proceedings is clear. See for example the judgment of the Supreme Court in *Usk and District Residents Association v. EPA* 1 ILRM 363 and of this Court in *Eircom v. Director of Telecommunications Regulation* [2003] 1 ILRM 106. I am also satisfied that it is open to the court to order costs against a notice party, at least in some cases. Leaving aside the more general question as to when it may be appropriate to consider awarding costs against a notice party, I am satisfied that amongst the cases when that situation pertains is one where, in substance, the notice party is in the position of a defendant or respondent.

2.3 In some judicial review applications the decision making body whose decision is challenged takes the same position as that adopted by the arbitrator in these proceedings. For example where judicial review is sought against a decision of a court of local and limited jurisdiction, it is most unusual for the judge whose decision is sought to be reviewed to participate in the judicial review application. The reasons given for adopting such a position (apart from the undesirability of judges becoming involved personally in litigation) is that, in almost all cases, the decision under review will have been given on the urging of one party to the proceedings before the judge concerned. In those circumstances it is normally considered appropriate to allow the party who persuaded the judge to make the decision which is challenged, to justify that decision before this court on review. Similar considerations, doubtless, lead arbitrators not to participate in review applications unless, perhaps, the grounds of challenge contain personal allegations.

2.4 In such proceedings, therefore, the substance of the review hearing is that it is one between the applicant or plaintiff on the one hand and the notice party on the other. The true "defendant", or "respondent" is, in all but name, the notice party. If it were not for the resistance to the substantive application in this case put forward by Murphy Construction, then the proceedings would have gone largely by default subject to the court being satisfied that a case had been made out. Where, therefore, a notice party, such as Murphy Construction, takes on the role of being the sole or main defender of the proceedings, then it seems to me that, ordinarily, the position of that notice party in respect of costs should be the same as a defendant or respondent.

2.5 I am, therefore, satisfied that Cork are *prima facie* entitled to their costs against Murphy Construction notwithstanding that Murphy Construction was a notice party. However the real issue which was argued on behalf of Murphy Construction was as to whether there are special circumstances which would justify the court from departing from the normal position in this case.

3. Public Interest

3.1 In two recent judgments of this court Macken J. reviewed relevant authority in both this jurisdiction and the United Kingdom and set out the principles to be applied in departing from the ordinary rule to the effect that costs should follow the event in cases involving what have been termed "public interest challenges". See *Dubsky v. Ireland* (Unreported, High Court, Macken J, 13th December, 2005) and *Harrington v. An Bord Pleanála and Others* [2006] IEHC 223. The principles applicable to the courts discretion not to direct that costs follow the event in such cases suggest that, in general terms, the discretion concerned requires that the proceedings be ones which raise public law issues which are of general importance and also involve a situation where the person bringing the challenge has no personal private interest in the outcome of the case.

3.2 *Harrington* was concerned with the interaction of the existing jurisprudence in respect of the costs of public interest challenges to the requirement now contained in s. 50 of the Planning and Development Act, 2000 that a person must show a "substantial interest" in the matter under challenge in order to have standing to mount judicial review proceedings in the environmental field. For the reasons analysed by Macken J. in *Harrington* it does not necessarily follow that, merely because a person has a sufficient interest in the matter to meet the standing test mandated by s. 50, that person has the type of direct private interest in the proceedings that would debar them from being entitled to seek their costs on the basis of having maintained a public interests challenge.

3.3 However it does not seem to me that even on the broader criteria for determining interest applied by Macken J. in *Harrington*, Murphy Construction could possibly come within the jurisprudence entitling it to rely on the public interest challenge exception to the general rule in relation to costs. There was, without doubt, a public law issue involved in these proceedings and it was also one of broad application. However it is equally clear that the interest which Murphy Construction sought to protect was its own direct commercial interest in minimising the number of houses which it would transfer to Cork on foot of its social and affordable housing obligations. It could not, therefore, be said that this case comes within the principles identified and explained in *Dubsky and Harrington*.

3.4 However in truth, as I understand it, the principal focus of the argument put forward on behalf of Murphy Construction was to assert that the court should exercise discretion on a slightly different basis to which I now turn.

4. Test Cases

4.1 In substance it is argued on behalf of Murphy Construction that this case was a test case involving an issue which was of general application to many parties and which was necessitated by virtue of the undoubted difficulties encountered by all concerned with interpreting and construing the relevant legislation. Against that background it is appropriate to consider the principles by reference to which a court might exercise discretion to depart from the normal rule in relation to costs in such a case. Before doing so I should just add one comment. While it is often said that the court retains a discretion to depart from the ordinary rule in relation to costs, it seems to me that that discretion, like all other judicial discretions, needs to be exercised against a background of appropriate principles. To state that the court retains a discretion is not to give the court *carte blanche*. It may well be that it is neither possible nor appropriate to list all of the circumstances in which the discretion concerned might be exercised or all of the factors which might properly be taken into account. Experience has shown that new and different cases may lead to a refinement or expansion in the principles applicable. However, it does seem to me that all discretion needs to be exercised in a reasoned way against the background of having identified appropriate principles by reference to which the court should exercise the discretion concerned. I, therefore, propose to consider whether there are principles by reference to which a departure from the ordinary rule in respect of costs may be considered, in at least some cases that might properly be described as a "test case". The principles which I identify are those which seem to me to be relevant to this case. There may, of course, be others which might arise in very different circumstances but it is not appropriate within the narrow confines of this case to attempt to set out a more exhaustive set of criteria by reference to which any such discretion might be exercised.

4.2 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. Where the proceedings involve entirely private parties then there does not seem to me to be any proper basis for departing from the ordinary rule in relation to costs, notwithstanding the fact that the case may properly be described as a test case. There is no good reason for depriving a successful private party of its ordinary entitlement to costs simply because the case in which it succeeded happens to be a test case.

4.3 However it seems to me that different considerations may apply, at least in some cases, where one of the parties is a public authority. To take a case at the other end of the spectrum from the purely private litigation which I have just considered, one can envisage circumstances where a court was faced with difficult questions of construction in relation to legislation of widespread and general application which was introduced by a particular ministry and in circumstances where that ministry is a necessary and proper party to the proceedings under consideration. An analogous situation might arise where Ireland was a necessary party. In those circumstances it seems to me that it is open to the court to weigh in the balance in considering costs the fact (if it be so and to the extent that it is so) that the litigation may have been necessitated by the complexity or difficulty of legislation for which, of course, either the Minister concerned or Ireland was, in substance, responsible.

4.4 I appreciate that this case is, to some extent, is in an intermediate position. Cork is not, of course, responsible for the legislation. It has had the same difficulties as everyone else in attempting to grapple with the legislation which, to put it at its kindest, might be described as opaque. However it also needs to be noted that the ministry responsible for the introduction of that opaque legislation is also the ministry responsible, in significant part, for providing funding to Cork along with all other local authorities. In those circumstances it seems to me that this case is much nearer, in substance, to a case directly involving the party responsible for the legislation in the first place than to a purely private dispute.

4.5 In those circumstances I am satisfied that the court retains discretion to consider whether there should be some departure from the normal rule in respect of costs. The circumstances concerned, in my view, stem from the fact that this litigation was necessitated by the introduction of legislation which is extremely difficult of construction and where one of the parties to the litigation is a public authority which is answerable to the very ministry who introduced that legislation in the first place.

4.6 In all the circumstances it seems to me that it would be going too far to award Murphy Construction its costs. It did, after all, adopt a position before the arbitrator and sought to stand over that position before this court in circumstances where it has failed. However it seems to me that the justice of the case would be met by making no order as to costs for the reasons which I have analysed. In expressing that view I should also indicate, in strong terms, that it is my view that Cork should not be at any financial loss by virtue of failing to recover the costs to which it might, ordinarily, be said to be entitled. While I do not have any jurisdiction to require the Minister to pay the costs concerned, it is my view that the Minister should take whatever steps are appropriate within his remit to ensure that Cork are not placed at any financial disadvantage by reason of not having recovered its costs. The reason why these proceedings were necessitated was because legislation which I have found to be ill worked out was introduced, which in turn necessitated local authorities and parties such as Cork and Murphy Construction to grapple with the complexities imposed on them by it. The very fact that these proceedings ran in tandem with proceedings raising very similar issues involving Dun Laoghaire/Rathdown County Council makes clear the widespread and far-ranging consequences of the legislation and also emphasises the difficulties which all parties have had in having to deal with it. It can truly be said that the principal reason why this litigation was necessary was because of the nature of the legislation introduced. In those circumstances it seems to me that the Minister who was responsible for the legislation should ensure that Cork are at no loss by having played a very necessary role in the clarification of the legislation concerned.