THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 183 JR]

BETWEEN

LIAM McCAFFREY

APPLICANT

AND

CENTRAL BANK OF IRELAND, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

[2016 No. 184 JR]

BETWEEN

KEVIN LUNNEY

APPLICANT

AND

CENTRAL BANK OF IRELAND, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Noonan delivered on the 1st day of November, 2017

1. I delivered judgment in these proceedings on the 3rd October, 2017 ("the principal judgment"). Consequent upon that judgment, the parties have made various applications in relation to the costs of these proceedings and that is the issue with which I now propose to deal.

2. Counsel for the applicants submitted that although his clients were unsuccessful in the litigation, it involved points of law of public importance not previously decided and while the applicants might be viewed as having an entitlement to apply for their costs in those circumstances, he was not making that application. Rather, counsel submitted that the appropriate order for the court to make in all of the circumstances was no order as to costs.

3. Counsel for the first respondent, the Bank, and counsel for the second and third respondents, the State, both applied for their costs on the basis that these should follow the event and this was not a case of such an exceptional nature as would warrant the court departing from the normal rule. In brief summary, the applicants contend that there were two important issues of law that involve a public interest element which have been clarified by the principal judgment.

4. The first is the issue concerning the power of the Inquiry Members (IMs) to make an order for costs against the applicants but not in their favour. I found against the applicants on this argument and the applicants say that this determination is of public importance in the context of future inquiries conducted under the ASP. To that extent it was said that this was a novel question not previously determined.

5. The second issue relied upon by the applicants was my determination in relation to the appropriate standard of proof to be applied at inquiries. I determined that this should be the civil standard and here again it was argued that this determination was novel and of importance.

6. The default position of course provided in O.99 r. 1 (4) is that costs follow the event unless otherwise ordered. Order 99 r. 1 (1) recognises that the costs shall be in the discretion of the court. However, that discretion is not absolute and can only be exercised within certain parameters. In *Dunne v. Minister for the Environment* [2008] 2 I.R. 755, Murray C.J. said (at 783):

> "The rule of law that costs normally follow the event, that the successful party to proceedings should not have to pay the costs of those proceedings which should be borne by the unsuccessful party, has an obvious equitable basis. As a counterpoint to that general rule of law, the court has a discretionary jurisdiction to vary or depart from that rule of law if, in the special circumstances of a case, the interests of justice require that it should do so…
>
> 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 a departure."

7. These observations were cited with approval in judgments of two divisional courts of the High Court in *Collins v. Minister for Finance and Ors* [2014] IEHC 79 and *Kerins v. McGuinness and Ors* [2017] IEHC 217.

8. In both *Collins* and *Kerins*, the divisional court analysed the circumstances in which the normal rule might be departed from, without seeking to enumerate them exhaustively. The court noted that costs have been awarded to unsuccessful parties where the issue was one of far reaching importance in an area of the law with general application and in some cases where the decision has clarified an otherwise obscure or unexplored area of the law. Whether or not the litigation has been brought for personal advantage is a factor that the court can also take into account.

9. It would appear clear however that there must be something exceptional about the circumstances of the case to warrant departure from the normal rule. Furthermore, the court is entitled in awarding costs to have regard to the conduct of the parties and the manner in which the case was litigated.

10. In that regard, it appears to me that there are a number of issues in the particular circumstances of this case that I should have

regard to in determining the question of costs. Although it may be correct to say that the two issues I have identified, those on costs and the standard of proof, were to an extent novel and could be viewed as of public importance, it is clear from the terms of the judgment that the conclusions I reached on these issues were essentially obiter as I had already determined that the applications failed in *limine* on time grounds. It seems to me therefore that it cannot be said that these issues have finally been determined.

11. However, aside from that consideration, there are a number of matters arising from the principal judgment which I believe are relevant to consider in the context of this costs application. The first is that, as noted in paras. 36 – 37, in addition to the two issues to which I have referred, the applicants for the first time introduced a third issue on the morning of the trial without notice to the respondents or leave of the court. I noted that this change of tack had not been satisfactorily explained. This new issue concerned whether the inquiry amounted to the administration of justice and was thus constitutionally impermissible and linked to that, whether the determination in *Purcell* on this point was one I was obliged to follow. Considerable argument and submission was devoted on all sides to this new issue which added significantly to the length of the trial.

12. At paras. 60 – 66 of the principle judgment, I pointed to the fact that in relation to the application for an extension of time, the applicants had introduced new facts and new grounds in support of that application for which leave had never been granted by the court, which again called for detailed argument, submission and consideration by the court. I noted that the applicants had purported to give contradictory and mutually exclusive explanations for the delay in bringing the application.

13. In the section of the judgment entitled "Is the Application Premature?" I considered whether the applicants were entitled to mount a challenge to the inquiry at all in circumstances where they were attempting to run the judicial review in tandem with participation in the inquiry to determine which approach might prove more advantageous. I concluded that this was an abuse of process and moreover an impermissible attempt to collaterally attack unchallenged decisions of the IMs.

14. On each of the three substantive issues, I reached conclusions based on the application of what appeared to me to be well settled jurisprudence so that whilst the actual determination might have an element of novelty, the legal principles applied to arrive at that determination did not.

15. In my opinion therefore, taking account of all of these matters, this case is not one in which I would be justified in departing from the normal rule and accordingly I am satisfied that the respondents are entitled to their costs.