NO REDACTION NEEDED

Unapproved

THE COURT OF APPEAL

Court of Appeal Record Number: 2023/7
Neutral Citation Number: [2024] IECA 272

Noonan J.
Binchy J.
Butler J.

BETWEEN/

MICHAEL HOEY

PLAINTIFF/
APPELLANT

- AND -

WATERWAYS IRELAND

DEFENDANT/
RESPONDENT

RULING ON COSTS of Mr. Justice Binchy delivered on the 18th day of November 2024

1. Judgment in the within appeal was delivered on 31st July last. The appeal was dismissed. At the conclusion of the judgment, I indicated a preliminary view that, since the respondent had been wholly successful within the meaning of that term as used in s. 169 of the Legal Services Regulation Act, 2015 (the "2015 Act"), it is entitled to an order against the appellant for payment of its costs in resisting the appeal. However, the appellant was afforded the opportunity to advance written submissions arguing for a different order, if he wished to do so. The appellant has availed of this opportunity and filed submissions on 11th September last, to which the respondent delivered replying submissions on 1st October.

2. In his submissions, the appellant submits that the Court should not make the costs order that was indicated in the substantive judgment because (he says) that in order to save time at the hearing, he "*had to forego*" items 3, 4, 9 and 10 as claimed in the endorsement of claim to the plenary summons, as well as items 11, 48 and 49. Although it is unclear, by this I understand the appellant to refer to the hearing in the High Court rather than the hearing of the within appeal. In case however the appellant is referring to the hearing of the within appeal, I should make it clear that the appellant was not required, expressly or impliedly, to forego any of his grounds of appeal, whether to save time or otherwise.

3. The plaintiff claimed the following reliefs in the paragraphs of the endorsement of claim to the plenary summons referred to above:-

> *"3. A declaration that the costs of taking this case are covered by the defendant under Section 21.8 and or 23 of the Water Supplies Act of 1942.*
>
> *4. A declaration that if necessary this case could be taken under Article 9.4 of the Aarhus Convention.*
>
> *9. A declaration that if necessary that a recommendation be made to the Attorney General that the scheme be applied.*
>
> *10. Further or in the alternative and without prejudice to the foregoing, a pre-emptive costs order.*
>
> *11. An Interim order for exemplary damages.*
>
> *48. An Order for my time and expenses under Section 23 of the Water Supplies Act.*
>
> *49. An Order if necessary for engaging professional advisers [sic] and specialists regarding the effects of the loss of water which would be covered by Section 21 and 23 of the Water Supplies Act."*

4. In paragraph 3 of his notice of appeal, the appellant seeks reliefs under each of the paragraphs of the plenary summons referred to above, as well as many other paragraphs of endorsement of claim. For the purpose of his costs submissions to this Court, he repeats his reliance on the paragraphs referred to above, but also includes reference to paragraph 8, by which he claimed a "*declaration that the defendant has caused pollution and that the Polluter pays principle applies*".

5. Insofar as the appellant is relying upon his claims for costs and expenses within the substantive proceedings, which he says he "*had to forego*", the fact is that his proceedings in the Court below, including his claims made relating to costs, were dismissed by the High Court, and his appeal from the High Court has also been dismissed in its entirety. Therefore, even if those claims in the plenary summons had any relevance to the costs of this appeal (and it is difficult to see that they do) his reliance on the same is misplaced.

6. Insofar as the appellant wishes to rely upon the same headings for the purposes of resisting an application for the costs incurred by the respondent in this appeal and/or obtaining an order in respect of his own costs, he has not advanced any submissions as to why any of the matters referred to in those paragraphs should result in a costs order in his favour, or could form a basis of upon which the Court should not make an order requiring him to discharge the costs incurred by the respondent in this appeal. The same applies to paragraph 8 of the endorsement of claim.

7. The appellant also claims that all of his costs are "*covered*" by s. 23 of the Water Supplies Act, 1942 (the "1942 Act") (as inserted by s. 112(c) of the Water Services Act, 2007). This section provides that a Sanitary Authority may recover expenses under that Act that it has incurred for the purposes of increasing, extending or providing a supply of water under the Local Government (Sanitary Services) Acts, 1878-2001. The appellant is obviously not a Sanitary Authority and this statutory provision is clearly of no relevance to

the issue of costs in these proceedings. In the interest of completeness, I should add that the 1942 Act has since been repealed, pursuant to the Water Environment (Abstractions and Associated Impoundments) Act, 2022, with effect from 28th August 2024, but was in force at the time that the proceedings were heard.

8. In his submissions, the appellant, at paras. 1, 2, 3, 4, 6 and 7 again raises issues canvassed by him in the substantive proceedings, none of which have any bearing at all upon the issue of costs. There is no need to rehearse those issues here.

9. At paragraph 5 of his submissions, the appellant refers to an opinion of Advocate General Kokott of 15th January 2009 in the case *The European Commission vs. Ireland* (C-427/07), and he quotes the following extract from the opinion:-

> *"6. Article 3(8) [of the Aarhus Convention] is to be noted in so far as it makes reference to costs in judicial proceedings:*
>
> > *'Each Party shall ensure that persons exercising their rights in conformity with the provisions of this Convention shall not be penalised, persecuted or harassed in any way for their involvement. This provision shall not affect the powers of national courts to award reasonable costs in judicial proceedings.'"*

10. Having quoted that extract, which he also quoted in his notice of appeal, presumably in the context appealing from the award of costs made against him in the court below, the appellant fails to make any submission on foot thereof. That said, it is apparent that the appellant, in a general way, relies upon the costs protection provisions of the Aarhus Convention (the "Convention") in seeking to avoid an order for costs against him.

11. The default position so far as costs are concerned is that set out in s. 169(1) of the 2015 Act which provides:-

> *"**169.** (1) A party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings, unless the court*

orders otherwise, having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties including– [the range of factors set out at sub paras. (a) – (g)]."

12. However, in order to have any prospect of avoiding an order for costs under s. 169(1) of the 2015 Act, it is not enough for the appellant merely to assert or call in aid the Convention. The appellant must go further; he must advance arguments to demonstrate that these proceedings fall within the scope of the Convention or the Environment (Miscellaneous Provisions) Act, 2011 (the "2011 Act") which implemented certain provisions of the Convention, including certain provisions as to costs.

13. It may be that the appellant considers that just because one element of his proceedings was concerned with the statutory obligation of the respondent to maintain water levels in the canals with which the proceedings were concerned, that that element of the proceedings entitles him to a protective costs order under the Convention or the 2011 Act, but if that is so it was necessary for him to argue the point, not least in circumstances where much of the proceedings were concerned with issues of economic concern to the appellant only (i.e. his claims relating to Barge 43M and for damages sustained by reason of the collapse of the business of Canalways Ireland Ltd.). By failing to make any submissions in support of his claims (such as they are), the appellant has failed to advance any basis upon which this Court could possibly be persuaded that the provisions of the Convention or the 2011 Act have been engaged by the proceedings, such as to disapply s. 169 of the 2015 Act.

14. Finally, the appellant's request that a recommendation for admission to the Attorney General's scheme be made is also misplaced, as that scheme has no application to proceedings of this kind.

15. Accordingly, in circumstances where the respondent has been entirely successful in defending this appeal, and the appellant has failed to identify any basis upon which the

respondent should not be awarded its costs pursuant to s. 169 of the 2015 Act, I am satisfied that the respondent is entitled to an order for its costs incurred in connection with this appeal, and I so order.

16. The appellant has asked that in the event that the Court makes an order for costs against him, a stay should be put on that order pending the outcome of any appeal to the Supreme Court. The respondent however resists this application on the basis that the proceedings have been ongoing since 2012, with appeals brought by the appellant against both interlocutory and substantive judgments and orders of the High Court. Accordingly, the respondent has submitted that no stay of any kind should be placed on the substantive order of this Court dismissing the appeal and affirming the judgment and order of the High Court, or in relation to costs.

17. In my view, the appellant has failed to advance any basis upon which a stay should be ordered, and I refuse the application.

18. As this ruling is being delivered electronically, Noonan and Butler JJ. have authorised me to indicate their agreement with it.