APPROVED NO REDACTION NEEDED

THE COURT OF APPEAL

Record Number: 2022/77
High Court Record Number: 2020/295JR

Whelan J. **Neutral Citation Number [2023] IECA 64**

Pilkington J.

Butler J.

BETWEEN/

DECLAN O'CALLAGHAN

APPLICANT/APPELLANT

-AND-

THE SOLICITORS DISCIPLINARY TRIBUNAL

RESPONDENT/RESPONDENT

-AND-

NIRVANNA PROPERTY HOLDINGS LIMITED

NOTICE PARTY

JUDGMENT of Ms. Justice Butler delivered on the 22nd day of March, 2023

1. In a judgment delivered on 17 January 2023 [2023] IECA 3 (Butler J., Whelan and Pilkington JJ concurring) the appellant's appeal was dismissed. At paragraph 47 of that judgment it was indicated that the Court's preliminary view was that as the appeal was

unsuccessful the appellant should pay the respondent's costs but that if either party wished to take issue with the making of an order in those terms, they had liberty to file written submissions as to the appropriate form of order. In the event the appellant filed submissions on costs 28 January 2023 to which the respondent replied on 8 February 2023.

2. This is the Court's ruling on costs.

3. To briefly recap, the appeal concerned the adjournment of a statutory disciplinary hearing before the respondent. The appellant, who challenged the adjournment, raised two main issues namely, whether the respondent could adjourn the hearing at the behest of or in ease of the notice party having previously held that the persons in attendance on behalf of the notice party could not represent it and whether, in any event, the respondent had jurisdiction to entertain the underlying complaint made by the notice party against the appellant. The appellant was unsuccessful on both issues.

4. The respondent, as might be expected, is seeking its costs. In a concise submission it relies on section 169 of the Legal Services Regulation Act 2015 and Order 99, rules 2 and 3 of the Rules of the Superior Courts (as amended by SI 584 of 2019) and the summary of the principles applicable to the costs regime governed by those provisions as set out in the judgement of this court (Murray J) in *Chubb European Group SE v Health Insurance Authority* [2020] IECA 183. As the respondent has been entirely successful in its defence of the appeal, it contends that the default position is that it is entitled to its costs and the appellant has not identified anything in the nature or circumstances of the case which would justify a departure from this rule.

5. The appellant identifies the same statutory and regulatory provisions as being relevant to the issue of costs on his appeal but argues that, having regard to section 169 (1)(a) and (b) the court should make no order for costs against him.

6. Section 169(1) of the 2015 act gives statutory expression to the well-established principle that "*costs follow the event*" subject always to the court's discretion. It provides that a party who has been '*entirely successful'* in civil proceedings is entitled to costs '*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*'. It then provides a non-exhaustive list of matters to which the court should have regard when exercising this discretion. These include at (a) the parties' '*conduct before and during the proceedings'* and at (b) whether '*it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings*'.
7. The appellant points to a number of instances in my judgement where either it is acknowledged that the appeal arose in unusual circumstances and raised substantive legal issues or it is pointed out that the appellant was not responsible for the notice party's failures which led to the adjournment of the hearing before the respondent. The appellant argues that the institution of judicial review proceedings was a *'justified and reasonable response'* to the circumstances in which the appellant found himself and that there were reasonable grounds for the appeal. Finally, the appellant points out that he has already borne the burden of his own costs of the hearing before the respondent (which did not proceed) and will have to bear both parties' costs in the High Court and his own costs in the appeal. This is in essence an *ad misericordiam* plea, albeit one particularly based on the lack of any fault by the appellant for the procedural events that led to the adjournment.
8. The onus lies on a party asking the court to depart from the normal rule as to costs, a rule that now is a statutory footing, to establish that such departure is justified. For the reasons which follow, I have no hesitation in finding that in the circumstances of this case the matters relied on by the appellant are not of sufficient weight or merit to justify a departure from the default position that the respondent is entitled to its costs.

9. In looking at the conduct of the parties under section 169(1)(a), the court is effectively being asked to reward the appellant for his lack of fault or blame for the procedural issues which led to the adjournment of the hearing before the respondent and, hence, to the judicial review. Accepting, as I did in my earlier judgement, that the appellant was not to blame for these matters, does that suffice to relieve him of the costs burden of having failed in his appeal? In my view it does not.

10. There is no doubt that difficult behaviour can push a situation towards litigation that might not otherwise materialise and that litigation can be conducted in a manner that is unhelpful or disruptive thereby increasing its length and cost. In both of these instances the party responsible may face the prospect of being made liable for some or all of the costs arising from that behaviour or, having been successful in the proceedings, of not recovering costs to which they would otherwise be entitled.

11. Whilst behaving badly may certainly have detrimental costs consequences, I do not think that simply not behaving badly has the converse implications. Although the appellant was not to blame for the issues which arose, the court has also found that the respondent's treatment of those issues was appropriate and fair. Depriving the respondent of costs to which it is *prima facie* entitled based on what might be regarded as neutral behaviour by the appellant prior to the institution of proceedings would be quite a radical step. Thus, the lack of bad behaviour on the appellant's part does not provide a basis for departing from the normal costs rule.

12. Note I have deliberately used the word '*behaviour*' rather than the word used in the section, namely "*conduct*", as I do not want to suggest that the court can or should take account of the fact that the proceedings before the respondent arose as a result of allegations of professional misconduct against the appellant. Those allegations are as yet unproven, and the appellant is fully entitled to defend those allegations before the respondent. The issue

is not conduct or misconduct in that sense but a sense more directly relevant to the litigation, even if occurring prior to the institution of proceedings.

13. Relying on section 169(1)(b), the appellant points to the Court's acceptance that the case raised substantive legal issues and argues that it was reasonable for him to issue proceedings and to have taken this appeal. Given that sub-paragraph refers to the party raising or contesting one or more issues in the case, it seems likely that this provision is primarily directed at circumstances where the successful party does not succeed in all of the grounds they advanced or where the outcome of a preliminary issue (e.g. such as the dispute about *locus standi* or time limits) is decided in favour of the party who ultimately loses the case. As the costs of proceedings normally means the costs of the entire proceedings, the court may consider whether it would be appropriate to vary such an order to reflect the fact that it was unreasonable for party to have incurred additional costs in the unsuccessful or unnecessary pursuit of issues which were not ultimately determinative of the case.

14. Obviously, the argument the appellant makes here is different to this and is instead based on the proposition that as the proceedings as a whole were reasonable, he should not be penalised in costs for having taken them. I would be reluctant in principle to allow the mere fact that it was reasonable to institute proceedings to justify a departure from the normal costs rule. Most litigation meets the basic standard of being reasonably taken or defended. There is a significant difference between the reasonableness or unreasonableness of instituting or defending proceedings and the ultimate success or failure of those proceedings. To allow the reasonableness of the proceedings to become a test by reference to which a successful party could be deprived of their costs, would be contrary to the intention of the Oireachtas in giving statutory effect to the "costs follow the event" rule and making that the default position in all cases.

15. I note the appellant's submission that he is already bearing his costs of the hearing before the respondent, the costs of both parties in the High Court and his own costs on the appeal. Undoubtedly this represents a significant burden to him, not least because litigation costs are so high. It is, I think, important to understand that the application the appellant makes is not a neutral one. The Court cannot comment on the costs that may have been incurred by the appellant before the respondent as that is a matter over which it has absolutely no jurisdiction. However, the appellant chose to institute judicial review proceedings in the High Court and then chose to appeal the outcome of those proceedings to this Court. In doing so he caused the respondent to incur significant costs in defending the proceedings. If the appellant is to be relieved of the burden of paying the respondent's costs, that burden does not disappear – it must be met by the respondent and by extension by those legally responsible for funding the respondent, namely other solicitors. Therefore, any order made in ease of the appellant in light of the significant costs incurred by him in unsuccessfully pursuing these matters operates to the detriment of the respondent. Nothing that has been advanced in the appellant's submissions justifies the Court in requiring the respondent to shoulder that detriment.
16. For all these reasons I do not accept the arguments made by the appellant as to why no order for costs should be made against him. Thus, the court will make an order for the respondent's costs in the appeal.
17. Whelan and Pilkington JJ. agree with same.