Neutral Citation Number: [2014] IEHC 79

THE HIGH COURT

(DIVISIONAL COURT)

[2013 No. 4961 P]

MR. JUSTICE KELLY

MRS. JUSTICE FINLAY GEOGHEGAN

MR. JUSTICE HOGAN

BETWEEN/

JOAN COLLINS

PLAINTIFF

AND

THE MINISTER FOR FINANCE, IRELAND AND

THE ATTORNEY GENERAL

DEFENDANTS

JUDGMENT of the Court delivered on the 27th day of February, 2014

1. On 26th November 2013 this Court rejected the plaintiff's challenge to the vires of certain ministerial orders made pursuant to the Credit Institutions (Financial Support) Act 2008 ("the 2008 Act"): see *Collins v. Minister for Finance* [2013] IEHC 530. The Court further rejected the plaintiff's challenge to the constitutionality of the 2008 Act. While multiple issues were raised in the course of this litigation, two fundamental contentions fell for consideration.

2. First, it was said that the 2008 Act violated Article 15.2.1 of the Constitution by failing to articulate appropriate principles and policies in the body of that Act. Second, the plaintiff argued that the 2008 Act violated Article 11 of the Constitution in that it allowed for the appropriation of public moneys in circumstances where no upper limit to that appropriation had been stipulated by the Oireachtas in advance.

3. All of this was against the backdrop of the recapitalisation in 2010 of two credit institutions by the Minister for Finance by means of the issue by him of promissory notes in favour of Anglo Irish Bank and Educational Building Society. It was agreed that there was no separate vote in Dáil Éireann in respect of these notes. We observed at the commencement of the principal judgment that:

> "Apart from the intrinsic importance of the validity of this procedure, the plaintiff has also raised a series of constitutional questions in relation to the operation of the State's finances many of which have heretofore received little or no judicial consideration."

4. We rejected these claims for reasons which are set out in that judgment. IAs the plaintiff has failed in her claim that the ordinary rule as to costs contained in Ord. 99, r. 1(4) relevant. This provides that: "...the costs of every issue of fact or law raised upon a claim or counterclaim shall, unless otherwise ordered, follow the event." The order which is now sought against the plaintiff. That is the plaintiff on the other hand seeks her costs against the defendant.

5. Counsel for the defendants contended vigorously that although the issues raised were of importance, this did not necessarily mean that it was in the public interest that these issues should be litigated. He accepted that the consequences of an adverse finding would have been very serious for the State parties but, this he maintained, was not the critical issue. He argued that there was no good reason why this point should have been litigated.

6. A critical issue raised in these proceedings – namely, whether, the concept of appropriation contained in Article 11 and Article 17 of the Constitution required that sum so appropriation be defined by reference to a set limit – has never previously been judicially considered. Given the fundamental nature of this objection – which, if correct, would have affected budgetary allocation in a far-reaching manner – it was in the public interest that this point once raised should be determined.

7. Here the very novelty of the issue must be emphasised. Entirely different considerations would come into play if, for example the issue had been fully considered and determined in earlier proceedings. The fact that issues raised were by no means straightforward and required careful and elaborate judicial consideration is a further factor of some relevance in this context.

8. Furthermore, in any assessment of the public interest the fact that the Ministerial decisions (and the attendant legislation which underpins them) which were challenged in these proceedings are among the most far-reaching which any Government and individual Ministers have taken in the history of the State cannot be overlooked. Enormous sums of public money have been committed to the task of re-capitalisation of the banks and the burden of repayment associated with this will fall heavily on the citizenry for the foreseeable future.

9. It should also be recorded that a similar challenge to the constitutionality of the 2008 had been earlier brought in *Hall v. Minister for Finance* [2013] IEHC 39. In that case Kearns P. held that as the plaintiff in that case was not a member of Dáil Éireann he had no standing to challenge features of the appropriation process. The substantive issues were not determined on their merits in that case. It can scarcely have been a surprise that a challenge from a plaintiff who was in fact a member of the Dáil was later to ensue. Indeed, during the course of the original hearing in October 2013 counsel for the defendants urged us to determine the substantive issue and he indicated that his client desired that this important point be judicially determined.

10. We accordingly consider that it was in the public interest that the constitutionality of the far-reaching legislation which permitted

this to happen should be judicially determined. These considerations in themselves justify the Court exercising its discretion to refuse to make an order for costs in favour of the successful defendants. The real question is whether this Court should now go further and make an award of costs (whether in full or in part) in favour of the losing plaintiff.

11. The starting point for any consideration of this question is to be found in the judgment of Murray C.J. in *Dunne v. Minister for the Environment* [2007] IESC 60, [2008] 2 I.R. 755 where he observed ([2008] 2 I.R. 755, 783-784) that:

> "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. There is no predetermined category of cases which fall outside the full ambit of that jurisdiction. If there were to be a specific category of cases to which the general rule of law on costs did not apply that would be a matter for legislation since it is not for the Courts to establish a cohesive code according to which costs would always be imposed on certain successful defendants for the benefit of certain unsuccessful plaintiffs.
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> 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. It would neither be possible or desirable to attempt to list or define what all those factors are. It is invariably a combination of factors which is involved. An issue such as this is decided on a case by case basis and decided cases indicate the nature of the factors which may be relevant but it is the factors or combination of factors in the context of the individual case which determine the issue."

12. It is true that the pre-existing case law in respect of the award of costs to unsuccessful litigants in constitutional cases can be described as heterogeneous and as revealing a variety of distinct themes. Yet certain principles nonetheless emerge which may now be summarised.

13. First, costs (either full or partial) have been awarded against the State in cases where the constitutional issues raised were fundamental and touched on sensitive aspects of the human condition. Examples here might include *Norris v. Attorney General* [1984] I.R. 36 (homosexuality) *Roche v. Roche* [2006] IESC 10 (the constitutional status of human embryos) and *Fleming v. Ireland* (2014) (assisted suicide).

14. Second, costs have similarly been awarded to losing plaintiffs in constitutional cases of conspicuous novelty, often where the issue touched on aspects of the separation of powers between the various branches of government. Examples here include *Horgan v. An Taoiseach* [2003] 2 I.R. 468 (what constituted participation in war for the purposes of Article 28) and *Curtin v. Dáil Éireann* [2006] IESC 27 (aspects of the judicial impeachment power).

15. Third, costs have been awarded where the issue was one of far reaching importance in an area of the law with general application. Examples include *TF v. Ireland* [1995] (constitutionality of the Judicial Separation and Family Law Reform Act 1989), *O'Shiel v. Minister for Education* [1999] 2 I.R. 321(aspects of the State's duty under Article 42.4 to provide for free primary education), *Enright v. Ireland* [2003] 2 I.R. 321 (constitutionality of the Sexual Offenders Act 2001) *and MD (a minor) v. Ireland* [2012] IESC 10, [2012] 1 I.R. 697 (constitutionality of legislation making it an offences under under-age males only to have sexual intercourse with under-age females).

16. Fourth, in some cases the courts have stressed that the decision has clarified an otherwise obscure or unexplored area of the law. This point was emphasised by Murray C.J. in dealing with the costs question in *Curtin.* This was, after all, the first case in which the impeachment provisions of Article 35 had ever been commenced by the Houses of the Oireachtas in respect of a serving judge. As the Chief Justice observed:

> "Article 35.4 is silent as to the procedures to be followed by the Houses of the Oireachtas when considering a motion for the removal of a Judge. The adoption of procedures for that purpose was left to each House. No such procedures had been adopted by either House before the question of the appellant's removal had been raised. This was understandable given that since the foundation of the State no substantive question concerning the removal of the judge had been brought before the Oireachtas. This meant that to a significant extent all those concerned, the Government, both Houses of the Oireachtas and the appellant were required to address novel but crucial constitutional questions in an uncharted constitutional terrain. In the event it was the Courts which were asked to resolve them.
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> In these circumstances, before the Court addressed the discrete issues arising between the parties, it was necessary to interpret and define the meaning and ambit of Article 35 of the Constitution as a whole with a view to identifying the appropriate balance between the function of the Houses of the Oireachtas to call for the removal of a judge for stated misbehaviour and the separation of powers between the Judiciary and the other organs of State as guaranteed by Article 35 itself. For this purpose, the Court, as a constitutional court, had to consider questions that went, at least to some extent, beyond the specific issues raised, and determined, by way of constructive interpretation, how the final adjudication process must be addressed by the Houses of the Oireachtas when and if they come to a final decision. In addressing the broader issues the Court has provided certainty and obviated the risk of later litigation regarding them as well as providing a guide for the Oireachtas as to the procedures to be followed in the future.
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> In doing so the Court has clarified for the future the constitutional norms in a core area of constitutional governance as between the three organs of State, irrespective of the issues in this case. In this sense the case is exceptional and *sui generis*.
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> In all these circumstances the Court, in the exercise of its discretion, has decided that the appellant should be refused his application for full costs and be awarded half the costs of the proceedings in the High Court and half the costs of the appeal in this Court against the Attorney General."

17. Fifth, as Murray C.J. pointed out in *Dunne*, the fact that the litigation has not been brought for personal advantage and that the issues raised "are of special and general public importance are factors which may be taken into account." As *Dunne* itself shows, however, the mere fact that a litigant raises such issues in circumstances where no suit is brought for purely personal advantage does not in itself justify a departure from the general rule. In that case the plaintiff challenged the constitutionality of s. 8 of the

National Monuments (Amendment) Act 2004 on the ground that it provided insufficient protection for national monuments which might be impacted by motorway development. Even though the plaintiff did not challenge this legislation for personal advantage and the issues raised were of general public importance, costs were nonetheless awarded against the losing plaintiff.

18. Sixth, even in those cases where the court was minded to depart from the general rule and award the plaintiff costs, this did not necessarily mean that the plaintiff was held to be entitled to full costs. Thus, for example, in both *Horgan* and *Curtin* the respective plaintiffs were awarded 50% of their costs. In yet other cases – such as *Roche v. Roche* and *Fleming v. Ireland* - full costs were awarded to the losing party in this Court.

19. We consider that the present case is an exceptional one which warrants a departure from the general rule to the point whereby this Court would justified in making a partial order for costs in the plaintiff's favour. In this regard, we would note the following factors:

- the importance of this novel question of constitutional law;

- the weighty issues raised by this litigation;

- the importance to the State and its citizens that the constitutionality of the important and novel executive and legislative decisions with far-reaching consequences be judicially determined;

- the fact that the plaintiff is a public representative, did not act for personal advantage, brought the challenge following the decision in *Hall v Minister for Finance* and the State did not pursue the *locus standi* objection in order that the substantive issues raised be judicially determined;

- the decision clarified and provided certainty for the State in the operation of its financial procedures.

20. Counsel for the defendants urged us to have regard to the fact that the plaintiff has appealed our decision on the substantive issues to the Supreme Court and that this is something which we should take into account when considering our decision on costs. Beyond noting that the plaintiff has, of course, a constitutional right to appeal our decision to the Supreme Court in accordance with Article 34.4.3 of the Constitution, we consider that this is an entirely neutral factor, at least so far as the present case is concerned. There might well be cases – especially, perhaps, where the further continuation of litigation might be oppressive or where there was a clear interest in the finality of a particular judicial decision – where the question of whether a right of appeal was (or might be) exercised might be relevant to the exercise of discretion on costs. The issues raised in the present case are not, however, of that type.

Conclusion

21. In conclusion, therefore, taking into account all the factors we have just enumerated, we consider that this is an exceptional case which merits a departure from the normal rule regarding the disposal of costs. Yet while the case was exceptional, the plaintiff has still lost. We accordingly think that in line with cases such as *Horgan* and *Curtin* it would not be appropriate that the plaintiff should be awarded the full measure of costs, even if the exceptional nature of the litigation means that she should get a significant share of her costs.

22. In the particular circumstances of this case, we award the plaintiff 75% of her costs (including reserved costs), such costs to be taxed in default of agreement.