THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 81

Record Number: 2018/297

Peart J.
Edwards J.
Whelan J.

BETWEEN:

GARETH PHELAN, LISA MURPHY, BRODY MURPHY (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND, LISA MURPHY), KAMERON MURPHY A MINOR SUING BY HIS MOTHER AND NEXT FRIEND, LISA MURPHY), EMMIE-LEIGH MURPHY A MINOR SUING BY HIS MOTHER AND NEXT FRIEND, LISA MURPHY), KOBIE MURPHY A MINOR SUING BY HIS MOTHER AND NEXT FRIEND, LISA MURPHY), KYRA PHELAN A MINOR SUING BY HER MOTHER AND NEXT FRIEND, LISA MURPHY)

APPLICANTS/APPELLANTS

- AND -

SOUTH COUNTY DUBLIN COUNTY COUNCIL AND THE MINISTER FOR HOUSING, COMMUNITY AND LOCAL GOVERNMENT

RESPONDENTS

JUDGMENT OF MR. JUSTICE MICHAEL PEART DELIVERED ON THE 20TH DAY OF MARCH 2019

1. In these proceedings the applicants had sought certain reliefs by way of judicial review including an order to quash what they considered to be the decision of the first named respondent ("the Council") dated the 22nd December, 2016 to withdraw the applicants' emergency accommodation at the Abberley Court Hotel.

2. By the time the proceedings came on for hearing before Noonan J. on the 9th October 2017, the applicants had been provided with housing accommodation which, as noted by the trial judge, rendered the proceedings moot since the applicants could derive no benefit from any successful outcome. The appellants sought their costs in these circumstances. That application was resisted by the council on the basis that mootness had arisen by reason of an external event beyond its control, namely that a house became available in the ordinary course which could be allocated to the applicants, due to a change in government policy whereby extra resources were allocated to address the homeless crisis. The council argued that for a considerable period of time prior to the commencement of proceedings the council had been engaging with the applicants, and that post-commencement, it simply continued to do so in the normal course in accordance with its statutory obligations. It was simply the case that completely independently of these proceedings, and not in any way as a result of the proceedings, a suitable house became available to the council which it could allocate to the applicants. In other words, that the applicants would have been allocated this house in any event.

3. I should add that at all times the council denied that it made any decision dated the 22nd December, 2016 (or any other date) to withdraw the applicants' emergency accommodation at the Abberley Court Hotel, as is sought to be quashed in these proceedings. The council in its replying affidavits assert that the removal of the applicants from that hotel resulted from a decision of the hotel management as a result of allegations of misconduct on the part of the first named applicant, and that this was a decision in which the council played no role whatsoever. That is certainly a significant factual issue that would have to have been determined if the case had proceeded to a full hearing. If it was determined against the applicants it would have fatally undermined the application for an order of *certiorari*, the application for a mandatory injunction, as well as the various declaratory reliefs, not to mention the claim for damages.

4. However, having heard submissions from the parties on the question of costs, the trial judge decided that the appropriate order was to make no order as to costs. It is this order which gives rise the present appeal.

5. The applicants consider that the trial judge fell into error in determining that the proceedings became moot due to an event external to the proceedings and outside the control of the council. It is submitted that in error the trial judge placed the onus upon the appellants to establish that the mootness did not arise as a result of an external event outside the control of the council. In this regard it is submitted that the trial judge misapplied the principles in *Cunningham v. The President of the Circuit Court and the DPP* [2012] 3 I.R. 222, and that in all the circumstances the trial judge ought to have awarded the costs of the proceedings to the applicants, rather than make no order as to costs.

6. This Court has been provided with a transcript of what occurred firstly on the 4th July, 2017 when these proceedings first came before Noonan J. and next on the adjourned date the 9th October, 2017.

7. On the 4th July, 2017 the Court was handed a letter dated 28th June, 2017 from the council to the applicants which stated, *inter alia*: "South Dublin County Council does not have any social housing accommodation available to offer you at this time. Accordingly, you will be transferred from the commercial hotel/self-accommodate as vacancies become available in family specific temporary accommodation in Tallaght and other locations". This letter went on to state: "I can confirm that your household remains eligible for the "housing assistance payment" (HAP) scheme which will greatly assist in accessing the rental market. This means that you are eligible to be considered for one month's advance deposit and one month rent in advance with the differential rent payable". At the request of the trial judge counsel sought instructions as to the import of the letter, and according to the transcript, stated the following having taken such instructions:

> " … I asked at lunchtime, arising from the general initiatives that were taken in recent times what does that mean in practical terms. And I'm told that what that means, in terms of availability, that apartment living in Tallaght Cross would become available in two months. And that again, as a result of the more general initiatives that are taken recently, it also means that in a two-month period because the applicants are sixth in the list for a three-bedroom north of Naas Road and fourth in the list for a three-bedroom south of Naas Road, that a three-bedroom property may become available in

> approximately a two month period. And that is effectively what that sentence [i.e. contained in the said letter dated 28th June 2017 handed into court] is referring to, judge, on a practical basis …".

8. Shortly after that, the trial judge questioned counsel in relation to him saying that accommodation "may become available" in that two-month period, to which counsel responded: "It will become available, judge, within that two-month period". The trial judge went on to refer to the fact that there was a certain amount of information available "in the public arena in relation to this matter", which is a reference to the fact that in the recent past a government initiative had been announced to address expeditiously the housing crisis. It appears that this initiative made available additional resources to the council in order to address housing needs within its functional area. The trial judge went on to say that he was most anxious to avoid hearing if the applicants were going to be accommodated, and he stated that he presumed in that event that the proceedings would become moot. He adjourned the matter until the 5th September, 2017 for mention only. On that date the matter was adjourned further until the 9th October, 2017.

9. By 9th October, 2017 the applicants had been accommodated in a suitable three-bedroomed house, thereby rendering the proceedings moot and the question of costs arose for determination. The court was referred to the judgment of Clarke J. (as he then was) in *Cunningham v. The President of the Circuit Court and the DPP* [2012] 3 I.R. 222 which sets out certain principles as to how the question of costs should be dealt with where proceedings have become moot.

10. In the present case the applicants submitted that mootness arose because of "the unilateral act of the respondents". By that was meant that a suitable house was provided by the council thereby rendering it unnecessary to pursue the reliefs sought in the proceedings. Counsel for the applicant submitted that the proceedings had been brought in a *bona fide* manner and that is raised significant issues, so that, in his submission, the criteria set forth in Cunningham were satisfied. He referred to the fact that when the matter came before the court on 4th July, 2017 counsel for the council had informed him that circumstances had changed significantly in terms of the council's resources and that in those circumstances the local authority would be able to satisfy the applicants' needs within a short period, and that it was in those circumstances that his instructions were to adjourn the matter to a date in September to see if the applicants were rehoused within that period of time. In fact, they were rehoused in mid-September.

11. In response, the council submitted that in the first instance the removal of the applicants from their hotel accommodation on 22nd December, 2016 was not a decision of the council and that it had had no hand act or part in that decision. I have already referred to the fact that there was a conflict of evidence in relation to the allegation that it was the misconduct of the first named applicant that had led to the family's removal from that particular hotel.

12. In addition, the council referred to a history of engagement between the applicants and the council over an extensive period prior to the institution of these proceedings, and indeed thereafter, in relation to their housing need. Council described the involvement of the council with the applicants as being "a continuum", and that by having eventually become in a position to provide a house for the applicants in September 2017, that was simply a continuation of their existing efforts in that regard in discharge of their obligations under s. 10 of the Housing Act, 1998, and that it did not result from the commencement of the judicial review proceedings. Counsel made the point that at no stage had the council withdrawn or refused emergency accommodation to the applicants, and that, in fact, the opposite was the case.

13. In these circumstances, it was argued that while the proceedings were undoubtedly moot, this was not the result of any unilateral action taken by the council, and that in all respects, the council had always acted prior to the proceedings in accordance with their obligations under the legislation, and continued to do so following the commencement of proceedings.

14. The Court was also addressed by counsel for the Minister who was also served with the proceedings. Among the brief submissions made by counsel for the Minister was that, as provided by s. 17 of the Housing (Miscellaneous Provisions) Act 2009, the Minister has no power to allocate housing to a specific household. Indeed, the judge commented thereafter "you cannot order the local authority to give Mr Bloggs a house no matter how merited it may be".

15. It was submitted to the trial judge that mootness had arisen due to an external event outside the control of the council, namely as a result of a change in government policy over which it had no control, and therefore in accordance with the principles stated in *Cunningham* the default position in such circumstances is that there should be no order as to costs.

16. In reaching his conclusion that the appropriate order was that there should be no order as to costs, the trial judge made reference to the fact that the removal of the applicants from the hotel in question on 22nd December, 2016 "was not something that was within the control of the local authority" and "the management of the hotel took a particular view and that was not something that the local authority could do anything about". He then noted the evolution of events which led eventually to the accommodation of the applicants in the house that was allocated to them the following September. He stated: " … In any event [it] transpired ultimately that the proceedings were overtaken by the fact that the housing authority did, in fact, provide housing to the [applicants] which effectively has rendered the case now moot". The trial judge then referred to the judgment of Clarke J. (as he then was) in *Cunningham*, and to the fact that it was later followed by MacEochaidh J. in *C.A v. Minister for Justice and Equality & ors* [2015] IEHC 432. He referred to the following passage from para. 24 of *Cunningham*:

> " … a court, without being overly prescriptive as to the application of the rule, should, in the absence of significant countervailing factors, ordinarily lean in favour of making no order as to costs in cases which have become moot as a result of a factor or occurrence outside the control of the parties but should lean in favour of awarding costs against a party through whose unilateral action the proceedings have become moot".

17. The trial judge, having referred to that passage, went on to state:

> "I suppose one might add a refinement to that in so far as in the present case obviously it has not become moot as a result of something entirely outside the control of the parties, in fact it was within the control of the local authority, but what they say is although it is within our control it is something that would have happened in any event and the proceedings were not the decisive factor in the ultimate outcome that has rendered the proceedings moot".

18. The trial Judge then explained his conclusion that there should be no order as to costs as follows:

> "There is no doubt, as [counsel for the applicants] urges, that the application was brought *bona fide* and concerns serious and very substantial issues, but he argues that costs should follow the event and the event in this case is the fact that his clients have been rehoused as a result of the interventions of the respondent local authority. I am not sure that that is correct. It seems to me that the event which is identified by [counsel for the applicants] is not an event that has come about as a result of a response to proceedings but rather merely as a result of the exercise by the local

> authority of their functions under the Housing Act, irrespective of the proceedings. Whether it came about sooner or later is something I cannot express a judgment [on] but it seems to me that *the onus would be on [the applicants] to establish, under the Cunningham dicta that I have just referred to, that it was clearly as a result of the proceedings that ultimately the proceedings themselves became moot because the event in question occurred, and I am not satisfied that [they have] discharged that onus*". [Emphasis provided]

19. The appellants submit that the trial judge erred by placing the onus on them to establish that it was the proceedings that produced the result that has rendered the proceedings moot. It is submitted that Cunningham in fact states the opposite, namely that the onus is upon the party relying upon an external event for the mootness to establish same. In that regard, Clarke J. in the Supreme Court (Denham C.J. and Hardiman J. concurring) stated at paras. 27-28 of his judgment:

> "27. If there were no change in underlying circumstances and if the statutory officer or body had simply changed his or her mind or adopted a new and different view, then such a characterisation might be appropriate. Where, however, there is an underlying change of circumstance, it is necessary to consider the extent to which it can properly be said that the proceedings have become moot by reason of the unilateral act of one party on the one hand or, in reality have become moot by reason of a change in underlying circumstances outside the control of either party, on the other hand. The result of any such analysis should play an important role in the court's consideration of the justice of where the costs of proceedings rendered moot should lie.
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> 28. It does, however, seem to me that, where the immediate proximate cause of proceedings becoming moot is the action of such a statutory officer or body but where it is sought to argue that the true underlying reason is an external factor outside the control of that officer or body, it is incumbent on the officer or body concerned to place before the court sufficient evidence to allow the court to assess whether, and if so to what extent, it can fairly be said that there was a sufficient underlying change in circumstances sufficient to justify, in whole or in part, it being appropriate to characterise the proceedings as having become moot by reason of a change in external circumstances….".

20. On the facts of the present case it was undoubtedly the fact that the applicants had been provided with a house by the council by the time the case came on for hearing that led to the proceedings being moot. Nevertheless, if the council seeks to argue that their ability to provide the applicants with a house was not simply the result of some decision made by it, but rather because additional resources were provided to it through some change in government policy or the introduction of some policy initiative by government, the principles in *Cunningham* require that the council, and not the appellants, bear the onus of putting sufficient evidence before the court to enable the court to assess whether and to what extent the proceedings became moot by reason of those external circumstances.

21. In *Cunningham*, Clarke J. went on to state at para. 29 of his judgment that:

> "The real problem with which this court is faced is that there is a virtual absence of evidence as to the true reasons why the second respondent came to the view that the criminal proceedings against the applicant were no longer sustainable", and at para. 30: " … where, as here, this court is required to assess whether, and if so to what extent, it can truly be said that there were changes in underlying circumstances which led to the discontinuance of the criminal trial then it is impossible for this court to carry out any reasonable analysis of the situation without information and evidence".

22. At para. 35 of *Cunningham*, Clarke J. went on to state:

> "… There may well, in many cases, be compelling reasons why a change of course is adopted by one or other party. Indeed, there may well be cases where it would be wrong not to adopt a changed position. However, that is not really the question. The problem with which the court is faced is that costs would have been incurred up to the point in time where proceedings become moot and some basis for dealing with those costs on a principled and rational basis needs to be adopted. In my view the proper basis to adopt is that already analysed in this judgment. A finding that proceedings have become moot by reason of the unilateral act of one party does not necessarily imply any blame on that party. Rather it is an acknowledgement that, by reason of that unilateral act, the merits of the case will not now come to be determined."

23. Clarke J. went on to conclude:

> "38. For the reasons analysed earlier in this judgment it seems to me that it is appropriate to characterise this case as one which has become moot by reason of the unilateral act of the second respondent. If it was desired by the second respondent that this court should treat these as having become moot by reason of external factors, then it was incumbent on the second respondent to place sufficient evidence before the court to enable the court to determine the extent and materiality of such factors and whether they arose, or were reasonably discoverable, before or after the costs in this case were incurred. The second respondent failed to put forward such evidence."

24. The situation in the present case is very similar. While counsel for the applicants explained in his submissions to the High Court that counsel for the council had indicated that circumstances had changed as far as resources were concerned, to the extent that in a short period the applicants' housing needs would be met, and the case was adjourned for that purpose, the court was left without any evidential basis for reaching a proper conclusion that those changed circumstances were the result of changes over which the council had no control. The council were simply in the position of asserting that what had occurred in relation to providing the applicants with a house would have happened in any event without the existence of the proceedings. No evidence was adduced. It was urged by counsel in submissions, as it has been in this Court, that it was a change of government policy in order to address a worsening housing crisis whereby the government introduced an initiative enabling the council to provide housing to these applicants sooner than would otherwise have been the case. It was submitted in this Court that it would have been public knowledge at the time, and something of which the trial judge would have been aware from the media reports, and that in such circumstances evidence as such was not required.

25. The Supreme Court's judgment in *Cunningham* is binding upon this Court, and sets forth in a clear fashion the legal principles which should guide a Court in determining the issue of costs when proceedings have become moot. One such principle is that where a unilateral act by one party is the proximate cause of the proceedings becoming moot, the general rule is that such party will pay the costs of the other party, and that if that general rule is to be departed from, the basis for doing so must be established evidentially by the party seeking that departure.

26. It follows in my view that by stating that the applicants had failed to establish that the proceedings had become moot as a result

of the unilateral action of the council in providing them with a house, the trial judge fell into error by placing that onus upon the applicants. If the council, whose action was the *proximate* cause of the mootness wished the court to depart from the general rule, the onus was upon it, and not the applicants, in that regard.

27. In most cases where the first instance court has made an order which is of a discretionary nature such as a costs order, an appellate court will be slow to interfere, and will do so only where there has been a clear error of principle. Otherwise a reasonable margin of appreciation will be permitted to the first instance judge as to the manner in which he/she exercises what is a broad discretion in relation to costs. Where there has been an identified error of principle this Court, in a case such as this, is in a position to exercise its own discretion in relation to the appropriate costs order. It is not necessary to remit the question to the High Court for its reconsideration in the light of this Court's judgment.

28. There is no doubt in my mind that the proximate cause of the proceedings becoming moot was the provision of suitable accommodation by the council. To so find is not a finding of blameworthiness. But it is necessary to conclude as to the proximate cause before moving to the next stage of considering whether there is a proper evidential basis for departing from the general rule stated in *Cunningham*. In my view, no evidential basis has been provided for a departure from the general rule. The council, though counsel's submissions, has asserted that it was a change in government policy at the relevant time that enabled it to provide a house more quickly to these applicants than would otherwise have been the case. While I do not doubt for one moment the sincerity of that assertion, indeed its truth, it does not comprise an evidential basis for the court being satisfied that, in the words of Clarke J. in *Cunningham*, "there are any sufficient weighty countervailing factors such as might lead the court to depart from what should be the general rule that costs of an issue which has become moot by the unilateral action of one party should be awarded against that party".

29. I should add also that it is clear from *Cunningham* that there can be no question of the High Court or this Court embarking on an examination of the merits of the case when determining the issue of costs when proceedings are moot. I acknowledge that the council in its statement of opposition and affidavits have taken serious issue with the allegation made by the applicants that their removal from their hotel accommodation on the 22nd December, 2016 was on foot of a decision made by the council, and contend that it was a decision taken by the hotel management as a result of what the management considered to be misconduct on the part of the first named applicant. There is no doubt that the resolution of that factual question against the first named applicant would seriously undermine the applicants' case, quite apart from the difficult legal issues involved. It is unnecessary, however, to place any reliance on any potential weaknesses in the applicants' case had it gone to a full hearing, or to speculate as to the outcome. I express no views in that regard, and the Court must not do so for the purpose of its consideration of how properly to exercise the Court's discretion as to costs.

30. In my view the correct order in relation to costs in the present case is that the applicants' costs in the High Court should be paid by the council given the absence of any evidential basis for a departure from the general rule to which I have referred. I would therefore allow the appeal, and make such an order.