

THE HIGH COURT

[2015 No. 5 CT]

IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 5(15) OF THE HEPATITIS C COMPENSATION TRIBUNAL ACTS 1997 –
2006IN THE MATTER OF A DECISION OF THE HEPATITIS COMPENSATION TRIBUNAL TO THE CLAIMANT, A.Q., ON 6TH OCTOBER
2015, REFERENCE 413/08

AND IN THE MATTER OF AN APPEAL OF THE CLAIMANT A.Q.

BETWEEN

A.Q.

APPELLANT

AND

THE MINISTER FOR HEALTH

RESPONDENT

JUDGMENT of Mr. Justice Bernard J. Barton delivered on the 13th day of October, 2016

Background

1. At the conclusion of the judgment in this case delivered on the 19th of July last, the Appellant and the Respondent both sought orders for their costs of the proceedings. Although the Court had dismissed her Appeal, the Appellant submitted that the special circumstances of the case were such as to warrant a departure by the Court from the ordinary rule that the costs of the proceedings should follow the event. The Respondent resisted that application and submitted that the circumstances of the case did not found a basis in law upon which the Court could or should make such an order; the Respondent had succeeded in defending the appeal, accordingly, the costs should follow that event. Judgment was reserved so that I could consider the matter and the submissions made on behalf of the parties.

2. It is not thought necessary to summarise here the submissions which have been made and considered; suffice it to say that the controversy between the parties centres on whether or not, having regard to well established legal principles, there were special circumstances and/or reasons which would justify the Court, in the exercise of its discretion, departing from the ordinary rule and making an order for some or all of the costs of the unsuccessful party, the Appellant.

The law

3. The general law governing the question of costs in civil proceedings is to be found in S.14 (2) of the Courts (Supplemental Provisions) Act, 1961, the Civil Liability and Courts Acts 1961 to 2013 and in O. 99 of the Rules of the Superior Courts 1986 as amended. The default position or "normal rule" as it was described by Denham J, (as she then was) in *Grimes v. Punchestown Developments Co Ltd* [2002] 4 IR 515, is that costs of every proceeding follow the event whether at first instance or on appeal; in complex cases the identification of the event which costs are to follow can be quite difficult and may result in orders for costs being made in favour of differing and opposing parties to the litigation. See *Veolia Water UK plc v. Fingal County Council (No2)* [2007] 2 IR 81.

4. Whether the litigation is comparatively straight forward or complex, when it comes to the making of an order for costs the Court is possessed of a discretion which is to be exercised in a reasoned fashion in accordance with certain well established criteria or principals about which, for present purposes, it is considered necessary to refer.

5. There is no hard and fixed rule or principle which determines the ambit of the Court's discretion and in particular there is no overriding principle which directs that it must be exercised in favour of an unsuccessful party in specific circumstances or in a certain class or category of case rather it is to be exercised in a reasoned fashion having due regard to the special circumstances of the particular case, if such exist, and where the interests of justice so require. See *Hewthorn & Co. v. Heathcott* [1905] 39 ILTR 248, *Grimes v. Punchestown Developments, supra*, *Fyffes plc v. DCC plc* [2009] 2 IR 417 and *Dunne v. Minister for the Environment, Heritage and Local Government* [2008] 2 I.R. 775 where the basis for and exercise of the jurisdiction was enunciated. Delivering the unanimous judgment of the Supreme Court in *Dunne*, Murray C.J. stated at para. 26, p. 783 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.

[27.] 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."

6. It is clear, therefore, that in the exercise of this jurisdiction the Court is required to give a reasoned decision which indicates or identifies factors or a combination of factors which in the particular circumstances of the case and in the interests of justice found a determination by the Court to depart from the 'ordinary rule'.

7. In *Dunne* it was accepted that the Plaintiff had brought the proceedings in the interests of promoting compliance with the law and without any private interest in the matter. While it could be said that cases concerning the environment or national monuments have

an importance in the public mind, a further factor which the Court was required to consider in the exercise of its discretion was whether or not the legal issues which arose, rather than the subject matter itself, were of special and general public importance. In the event the Court held that nothing exceptional was raised in the issues of law before it which would have warranted a departure from the general rule.

8. There is authority for the proposition that the discretion must be exercised in a reasoned way against a background of and by reference to principals appropriate to the specific case which were enunciated by Clarke J, in *Cork Council v. Shackleton & Ors.* [2007] IEHC 241. Firstly, there are the principals applicable to the so called 'public interest' cases which are considered to be those where the plaintiff is acting in the public interest in a manner which involves no private personal advantage and where the issues raised by the proceedings are of sufficient general public importance to warrant an order for costs being made in favour of the unsuccessful party. It is common case that this does not fall for consideration here.

9. Secondly, there are the principals applicable to so called 'test cases' identified by Clarke J. in *Shackleton*, and about which he observed at p. 489:-

"(13) Test cases can arise in very many different circumstances. Where there is doubt about the proper interpretation of the common law, the Constitution, or statute law involving the private relations between parties, and where the circumstances giving rise to those doubts apply in very many cases, then it is almost inevitable, as a matter of practice, that one or a small number of cases which happen to be first tried will clarify the legal issues arising. Where the proceedings involve entirely private parties then there does not seem to me to be any proper basis for departing from the ordinary rule in relation to costs, notwithstanding the fact that the case may properly be described as a test case. There is no good reason for depriving a successful private party of its ordinary entitlement to the costs simply because the case in which it succeeded happens to be a test case.

(14) However, it seems to me that different considerations may apply, at least in some cases, where one of the parties is a public authority. To take a case at the other end of the spectrum from the purely private litigation which I have just considered, one can envisage circumstances where a court is faced with difficult questions of construction in relation to legislation of widespread and general application which was introduced by a particular ministry and in circumstances where that ministry is a necessary and proper party to proceedings under consideration. An anomalous situation might arise where Ireland was a necessary party. In those circumstances it seems to me that it is open to the court to weigh in the balance in considering costs a fact (if it be so and to the extent that it is so) that the litigation may have been necessitated by the complexity or difficulty of legislation for which, of course, either the minister concerned or Ireland, was, in substance, responsible."

The Appellant submitted that this was a test case which satisfied the criteria, identified by Clarke J, where an order for the costs of the unsuccessful party could and, in the circumstances of this case, should be made.

10. The judgment in *Shakleton* was delivered in July 2007 and was not relied upon or considered by the Supreme Court in *Dunne*, an authority which is binding on this Court. In my judgment it follows that whilst the facts maybe such as to put a case into the category so called of a 'public interest' or 'test case' and that these are factors which may properly be taken into account, they are not determinative of the manner or way in which the Court should exercise its discretion.

11. Moreover, in my view it does not necessarily follow from the presence of such factors or the satisfaction of criteria relating to one category of case or another that an order for costs must be made in favour of an unsuccessful Plaintiff or Appellant any more than the absence thereof has the effect of excluding the Court from exercising its discretion to make such an order if, in all the circumstances of the case, the Court is satisfied that there are other factors or special or unusual circumstances which in the interests of justice warrant a departure from the ordinary rule.

Decision

12. The Department of Health and, through that Department, the State is responsible for the costs and awards made in respect of successful applications to the Tribunal. As already alluded to earlier, it was submitted on behalf of the Appellant that the circumstances of the case outlined in the substantive judgment support a conclusion, in the first instance, that the proceedings were properly to be considered a 'test case' within the meaning described by Clarke J, in *Shakleton*. That this was so, it was argued, arose from the very nature of the central issue which fell to be considered on the Appeal, involving as it did an interpretation of a statutory provision about which there was uncertainty, a factor which was evidenced by the absence of the issue at the initial hearing before the Tribunal.

13. Furthermore, having regard to the respective identities of the parties and the purposes for which the Respondent was established, there could be no suggestion that this was a test case which was confined to private individuals; the judgment of the Court was on an important issue central to the qualification threshold for claims brought under the Acts which not only clarified the law for the parties but also enured for the benefit both of future claimants and the Tribunal in the administration and determination of such claims.

14. Quite apart from the fact that the issue did not arise until a subsequent hearing, when introduced it arose at the behest of the Tribunal thus necessitating the retention and calling of experts on behalf of both parties to give evidence in respect of it and without which it is clear that the Court would not have been able to determine the matter.

15. I find that the decision of this Court delivered on the 21st December, 2015, by Humphreys J., in *BW and the Refugee Appeals Tribunal* [2015] IEHC 759, upon which the Appellant relied, is of limited assistance having regard to the circumstances of that case amongst which was the decision of the Court to grant the Applicant leave to appeal on certain questions of law.

16. It was submitted on behalf of the Respondent that this is not a 'test case' which could benefit other applications pending before the Tribunal; there was no evidence that there were any such claimants or applications, accordingly, an essential qualifying ingredient to constitute the proceedings as a test case of the type where an order for the costs of an unsuccessful party could be made was absent. I cannot accept that submission.

17. The Court is aware of circumstances which pertain to other victims of Hepatitis C, as they pertained to this Applicant, who have tested positive by CHLIA prior to the relevant statutory provision becoming operative. Accordingly, it would be incorrect and, in my view, improper to conclude that the Applicant was the only claimant or potential claimant in the position in which she finds herself. Furthermore, it is not disputed that most of the cases now coming before the Tribunal are difficult, problematic and regularly involve the satisfaction of threshold requirements of which the case in point is but one.

18. The Respondent submitted that having found on a literal interpretation that the provision in question was clear and unambiguous it followed that the requirement that the interpretation of the provision should be one involving difficulty or opacity could not be satisfied and was, accordingly, fatal to the Appellant's application.

19. The Applicant submitted that the matter was far from clear and that this was evidenced by the behaviour of the Tribunal in relation to compliance with the section since coming into effect in 2012; specifically the Tribunal had dealt with applications without ever raising the issue until well into the proceedings before it in this case and that when the question was put in issue the uncertainty and complexity surrounding it was such as to necessitate the retention of specific and particular expert testimony to in order to properly dispose of it.

Conclusion

20. Having regard to the circumstances and facts of the case already recited in the substantive judgment, the matters and circumstances addressed in argument on the respective applications and having due regard to the law as exemplified in the judgment of the Supreme Court in *Dunne*, I accept the submissions of the Appellant and find for the reasons given that the particular factors which have been identified and referred to herein are such that, in the interests of justice, the Court is warranted in the exercise of its discretion to depart from the ordinary rule and should accede to the Appellant's application for an order for her costs but limited to the costs of and incidental to the proceedings on Appeal. The Court will so Order.