THE COURT OF APPEAL

Neutral Citation Number: [2020] IECA 201

Record Number: 2019/434

Whelan J.
Costello J.
Noonan J.

IN THE MATTER OF CHAPTER III OF COUNCIL REGULATION (EC) 2201/2003
AND IN THE MATTER OF M.D. BORN IN MAY 2012
AND IN THE MATTER OF E.W. BORN IN AUGUST 2014
AND IN THE MATTER OF R.E. BORN IN SEPTEMBER 2017

BETWEEN/

C.E. AND N.E.

APPELLANTS

- AND –

HAMPSHIRE COUNTY COUNCIL

RESPONDENT

JUDGMENT of Ms. Justice Máire Whelan delivered on the 24th day of July 2020

Introduction

1. This judgment addresses the proper allocation of the costs incurred in this appeal in which judgment was delivered on 9 April 2020. The appellants failed to reverse the orders of the High Court refusing the order sought as hereafter considered.

2. The appellants are husband and wife. The first appellant is the mother of the three children named in the title of the proceedings. The second appellant is the father of the third-named child and was at all relevant times in *loco parentis* to the two older children. The respondent is a statutory body ("Hampshire") which at the relevant time was the holder of interim care orders within the jurisdiction of England and Wales in respect of the two older children. On 5 September 2017 the appellants travelled to Ireland with the three children, without the consent of Hampshire, intending on residing here indefinitely.

3. On 21 September 2017 Hampshire moved an application *ex parte* in the High Court and, as was subsequently held by Binchy J. on 12 April 2019 ([2019] IEHC 340), in so doing, failed "to provide Creedon J. with all the information that should have been provided to her in her consideration of the application…". Hampshire thereby secured from Creedon J. an order for the recognition and enforcement of a return order in respect of the children obtained by Hampshire at the High Court in Portsmouth on 8 September 2017. The appellants were oblivious to the court application. Hampshire elicited the assistance of the

Child and Family Agency ("CFA") to procure interim care orders in respect of the three children. CFA handed over the children to Hampshire on 21 September 2017 whose personnel promptly took the three children back to England. By the time the appellants were appraised of the facts, the three children were no longer in this jurisdiction.

4. In the instant case the appellants, C.E. and N.E., unsuccessfully appealed against the judgment of Binchy J. made on 30 July 2019 ([2019] IEHC 641) and consequent order of 20 August 2019 which refused to halt the adoption in England of the third child and also refused to order that the three children be brought to this jurisdiction where all issues concerning their future welfare could be determined or in the alternative that proceedings in being in England concerning them be transferred to this jurisdiction for determination pursuant to Article 15 of the Brussels II *bis* Regulation.

5. Notwithstanding being unsuccessful in this appeal, the appellants contend that they should be granted their costs or in the alternative no order as to costs be made against them. Hampshire contends that the interests of justice indicate that the general rule that "costs follow the event" is applicable and the court should exercise its discretion to make an order in its favour for all the costs relating and incidental to the appeal. Hampshire further asserted that "the issue of the solicitor showing cause as to why they should not meet all or some of the costs of this appeal should be referred to the Taxing Master for enquiry in accordance with O. 99, r. 7 RSC 1986".

Previous orders in relation to costs

6. There has been a protracted and complex litigation history between the parties. On the issue of costs alone the following determinations have been made. On 18 January 2018 Reynolds J. determined that the High Court had no jurisdiction to hear an application to extend time to appeal the order of Creedon J. of 21 September 2017. Reynolds J. ordered that there be no order as to costs.

7. The appellants appealed the determination of Reynolds J. which appeal led the Court of Appeal to make two references to the Court of Justice of the European Union ("CJEU") (*Hampshire County Council v. C.E.* [2018] IECA 154 and *Hampshire County Council v. C.E.* [2018] IECA 157). Following the composite judgment of the CJEU on 19 September 2018 (*Hampshire County Council v. C.E.* (*Joined Cases C-325/18 PPU and C-375/18 PPU*), EU:C:2018:739) addressing the issues raised in both references, this court allowed the appellants' appeal on 28 November 2018 (*Hampshire County Council v. C.E.* [2018] IECA 365). The issue of costs was listed for hearing on 12 December 2018 and a written decision of Peart J. was delivered two days later.

8. On 14 December 2018, this court ordered that there be no order as to costs of the appeal, save that the appellants' costs in respect of the preliminary references made to the CJEU would be costs in the cause. At para. 13 of the written decision, Peart J. clarified that the "cause" was the appeal against the enforcement order which had been remitted to the High Court.

9. At para. 4 of the written decision, Peart J. explained, with reference to para. 42 of *Child and Family Agency v. O.A.* [2015] IESC 52, [2015] 2 I.R. 718 that the word "outcome" provided more clarity to the court than "event" in determining the issue of costs. Although the appellants were unsuccessful on the particular issue on which the appeal had been brought, namely whether the High Court had power to extend time to hear an appeal from an enforcement order, they had achieved their desired outcome, namely that their appeal against the order of enforcement be heard by the High Court. However, Peart J. noted, this outcome was based on an amended ground of appeal, flowing from an argument made in the opinion of Advocate General Kokott to the CJEU, which the appellants had failed to raise at first instance. Therefore, Peart J. noted at para. 8, it would be unfair for Hampshire County Council to pay the costs of the appeal. Equally, as the appellants had achieved their desired outcome, it would be unfair to burden them with Hampshire County Council's costs and so no order as to costs was made, save in respect of the costs of the preliminary references to the CJEU.

10. At para. 11 Peart J. highlighted the factors which required that a different approach be taken in the interest of justice in relation to the costs of the preliminary references:

> "In the events that happened this court also made the second reference in which three important questions were raised, including as to whether an injunction might be granted *in personam* against Hampshire County Council in order to protect the rights of the parents pending the determination of the other issues in these proceedings. That question arose in the light of the refusal by Hampshire County Council to provide an undertaking as sought, and against a background where the children in this case had been removed by Hampshire, with the cooperation of the CFA from this jurisdiction following the making of the order for enforcement by Creedon J. on 21 September 2017 but prior to the parents even having been served with that order, and in circumstances where there can have been no risk of flight by the parents with the children, the latter having already been taken into care by the Child and Family Agency with the parents' consent."

He also noted at para. 10 that the High Court had refused to make a reference in the terms of the first question referred to the CJEU by the Court of Appeal. As the two references had been heard together by the CJEU, the court considered it appropriate that the costs incurred in both should be costs in the cause.

11. The appellants then applied for and obtained an order setting aside the order made by Creedon J. on 21 September 2017 pursuant to the Brussels II *bis* Regulations for the recognition and enforcement of the foreign order in question. A written judgment was given by Binchy J. on 12 April 2019 (*Hampshire County Council v. C.E.* [2019] IEHC 340).

12. Following delivery of a written judgment on 30 July 2019 (*Hampshire County Council v. C.E.* [2019] IEHC 641) in which the appellants' application for consequential reliefs on foot of the decision of 12 April 2019 was refused, Binchy J. made an order for costs on 20 August 2019. The trial judge ordered that Hampshire pay:

(1) the appellants' costs of the appeal of the order of Creedon J. up to 12 April 2019 only;

(2) the appellants' costs in the referral proceedings (on appeal) to the CJEU up to 12 April 2019 only;

(3) the appellants' costs in the set aside application of the order of Creedon J. pursuant to the notice of motion filed on 7 December 2018; and,

(4) all reserved costs of the appellants to date, including applications for interlocutory injunctions restraining Hampshire from proceeding with the adoption of the children.

Position of the respondent

13. In the first instance Hampshire seeks an order for costs against the appellants. Comprehensive written submissions were filed engaging extensively with the jurisprudence of the superior courts in regard to costs, citing and quoting from key decisions such as *Dunne v. Minister for the Environment* [2007] IESC 60, [2008] 2 I.R. 775; *Veolia Water UK plc v. Fingal County Council (No. 2)* [2006] IEHC 240, [2007] 2 I.R. 81; *Roche v. Roche* [2010] IESC 10; and, *Child and Family Agency v. O.A.* It was further argued that-

> "There is a temptation to consider that 'no order' as to costs is the apposite order as the parents may well not have the ability to pay any award made on account of their limited means."

Hampshire argued that "[t]his temptation should be avoided and would plainly be the wrong approach for the following reasons: -

(1) This would not accord with the recognized principles and the law as mandated in the rules;
(2) The issue of enforcement is a separate matter and should not trespass on the primary decision as to whether a cost order should be made as a matter of principle;
(3) The parents have received inheritance;
(4) Any order made in favour of [Hampshire] would not be 'hollow' as there are previous orders made as against [it], which are currently in the process of being agreed/taxed and [Hampshire] would seek to offset any award granted in these proceedings as against orders previously made during the taxation process."

It should be noted that no evidence has been adduced to support reason (3).

14. Hampshire drew particular attention to the following facts:

(i) the appellants "failed at all stages in the basic quest" to have the children returned to Ireland;

(ii) the appellants knew that "there was an obvious alternative remedy in England yet they chose to soldier [on] in Ireland in ignorance of the practical outcome that was inevitable";

(iii) this has put Hampshire to considerable expense and this appeal was "wholly unnecessary"; and,

(iv) suggestions made by Hampshire "as long ago as in the CJEU in June 2018", namely to seek relief in the English Court, have now been taken up by the appellants who have now instructed English lawyers and have applied to revoke R.'s placement order.

15. Hampshire laid weight on the outcome of matters advanced in the CJEU: -

(1) the CJEU observed that the Hague Convention 1980 and the Brussels II *bis* Regulation are "complementary" in nature at para. 48 of its judgment;

(2) the CJEU held at para. 53 that the holder of "parental responsibility" may apply under Chapter III of the Brussels II *bis* Regulation even if they have not applied under the Hague Convention 1980 i.e. they are not mutually exclusive;

(3) that in accordance with existing law of the CJEU "parental responsibility" within Article 2(7) of the Brussels II *bis* Regulation is given a broad interpretation (para. 57);

(4) that the acts of Hampshire in utilising the Brussels II *bis* Regulation as opposed to the 1980 Convention was within the scope of the regulation (para. 61) and that was therefore enforceable (para. 62);

(5) the wording of Article 33(5) of the Brussels II *bis* Regulation does not answer the question as to whether proceedings can be enforced before service of the order (para. 67);

(6) the CJEU observed that limitation periods fulfil a function of ensuring legal certainty (para. 77);

(7) the CJEU observed at para. 79 that: -

> "Admittedly, since that decision was served after its enforcement, the parents were deprived of their right to seek a stay of the return order. However, that infringement of their rights of defence has no effect on the period for bringing an appeal which commenced when that decision was served"; and,

(8) the CJEU held that the period laid down by Article 33(5) of the Brussels II *bis* Regulation cannot be extended by the Court seised (paras. 80 and 82).

16. Hampshire was also critical of the manner in which the parents conducted the litigation contending that they "brought this upon themselves": -

"At all times it was open to them to make applications in the English Court where they had previously retained, and instructed, lawyers, and could have had the benefit of legal funding and had unsuccessfully challenged the wardship order in the English Court of Appeal."

17. Hampshire asserted that: -

"It was, and arguably still is, open to them to challenge the basis of the orders made in England but instead they chose a complex tortuous legal route that will never have an effective outcome in that the children are legally habitually resident in England." (emphasis added)

Costs sought by Hampshire against appellants' solicitors

18. In written submissions Hampshire stated that it did: -

"...not by this application, or at this stage, seek a cost order to be made personally against the lawyers who have acted on behalf of the parents." (emphasis in original)

Instead the respondent asks this court to refer the issue to the Taxing Master for enquiry and report pursuant to the old O. 99, r. 7 RSC. A similar jurisdiction to refer matters to the Legal Costs Adjudicator is now contained in the recast O. 99, r. 9 RSC, which provides: –

"If in any case it shall appear to the Court that costs have been improperly or without any reasonable cause incurred, or that by reason of any undue delay in proceeding under any judgement or order, or of any misconduct or default of the legal practitioner, any costs properly incurred have nevertheless proved fruitless to the person incurring the same, the Court may –

…

(b) refer the matter to the Legal Costs Adjudicator for inquiry and report and nominate another legal practitioner to attend and take part in such inquiry."

Position of the appellants

19. The appellants rely on Kevin Costello, *The Law of Habeas Corpus in Ireland* (1st ed., Four Courts Press, 2006) in support of their contention that the issues engaged in the instant case operate so as to justify a dispensation from the ordinary rule that costs "follow the event". Costello identified four distinct categories of cases where the ordinary rule did not apply including: -

(i) where the applicant has raised a point of law of general public importance.

The authorities relied upon in support of that category include *Croke v. Smith (No. 2)* [1998] 1 I.R. 101, *Central Dublin Development Association v. The Attorney General* (1969) 109 ILTR 69, and *Dunne v. Minister for the Environment* [2007] IESC 60, [2008] 2 I.R. 775.

20. The second category identified by Costello was: –

(ii) where the public body, although ultimately successful, has in the course of the challenged transaction, been guilty of a degree of illegality or maladministration.

The appellants place reliance on this subcategory, the authorities for which include *Hanafin v. Minister for the Environment* [1996] 2 I.R. 321 and *McEvoy v. Meath County Council* [2003] 1 I.R. 208, 228.

21. The third category identified by Costello was: -

(iii) where the authorities by lack of transparency, or otherwise, can be regarded as responsible for precipitating the litigation.

The decisions of *An Taisce v. Dublin Corporation* (Unreported, High Court, O'Keefe P., 31 January 1973) and *O'Connor v. Nenagh UDC* (Unreported, Supreme Court, 16 May 2002) are cited as authorities in support of that category.

22. The fourth category provides: -

(iv) where the application involved a doubtful point of law which the complainant is considered justified in raising.

The decision of *The State (Carney) v. Governor of Portlaoighise Prison* [1957] I.R. 25, in which the High Court ordered that the respondent pay the complainant's costs of a conditional order as the sentence on which he was detained was doubtful at the time the application was initiated, is cited as authority for the proposition.

The event

23. The appellants contend that the "event" in question is whether and what effective remedy by way of constitutional reliefs ought to have been granted to the appellants in the context of the unlawful and unconstitutional removal of the three children from this jurisdiction. Further, that regard should be had to the fact that the primary relief sought by the appellants was a substantive order which would restore the *status quo ante* prior to the unlawful and unconstitutional act of the respondent. The appellants contend that the determination by this court that they are not entitled to the consequential reliefs sought does not dictate that the costs incurred in seeking to vindicate their rights in response to the unlawful and unconstitutional action of the respondent should not be awarded to them.

24. The appellants contend for the exceptionality of the proceedings as a basis for an order that they be entitled to their costs, citing *The State (Quinn) v. Ryan* [1965] I.R. 70 where Ó Dálaigh C.J. stated at p. 122: -

> "It was not the intention of the Constitution in guaranteeing the fundamental rights of the citizen that these rights should be set at nought or circumvented. The intention was that rights of substance were being assured to the individual and that the Courts were the custodians of these rights. As a necessary corollary it follows

that no one can with impunity set these rights at nought or circumvent them, and that the Courts' powers in this regard are as ample as the defence of the Constitution requires."

General observations

25. Cases involving children, their welfare and their removal from the care of their families are always complex, necessitating a balancing exercise between the competing interests of the respective parties with the first and paramount consideration at all times being the best interests and welfare of the children in question. The statutory obligations of Hampshire, in whose administrative area the family resided, are extensive and it was understandable that it was concerned to discover in early September 2017 that the family was no longer resident within the jurisdiction of England and Wales. The removal of the two older children breached a court order.

Principles on awards of costs where violation of constitutional rights asserted

26. In their arguments and submissions the appellants lay emphasis on the violation of their constitutional rights which arose from the conduct of Hampshire and cite the judgment of Hogan J. in this court on 7 June 2018 ([2018] IECA 157). They placed reliance on the case of *Collins v. Minister for Finance* [2014] IEHC 79 where a Divisional Court of the High Court considered the principles operative when an unsuccessful litigant in constitutional proceedings seeks their costs. The Divisional Court had earlier rejected the plaintiff's challenge to the constitutionality of the Credit Institutions (Financial Support) Act 2008. Although the plaintiff had failed in her claim such that the ordinary rule as to costs was relevant, the Divisional Court partly allowed the plaintiff's application for costs.

27. In *Collins* a critical issue raised in the proceedings had never previously been judicially considered. Given the fundamental nature of the claim, it was in the public interest that the point once raised should be determined. The very novelty of the issue had to be emphasised. Entirely different considerations would have come into play had the issue been fully considered and determined in earlier proceedings. The fact that the issues raised were by no means straightforward and required careful and elaborate judicial consideration was a further factor of some relevance in this context.

28. The court considered that it was in the public interest that the constitutionality of the 2008 Act be judicially determined. These considerations justified the court exercising its discretion to refuse to make an order for costs in favour of the successful defendants. The real question thereafter was whether the court should go further and make an award of costs (whether in full or in part) in favour of the losing plaintiff.

29. From a review of the case law in respect of awarding costs to unsuccessful litigants in constitutional cases, the court distilled six principles:

    (i) costs (either full or partial) had been awarded against the State in cases where the constitutional issues raised were fundamental and touched on sensitive aspects of the human condition;

(ii) costs had 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;

(iii) costs had been awarded where the issue was one of far reaching importance in an area of the law with general application;

(iv) in some cases the courts had stressed that the decision had clarified an otherwise obscure or unexplored area of the law;

(v) the fact that litigation had not been brought for personal advantage and that the issues raised were of special and general public importance are factors which may be taken into account; and,

(vi) even in those cases where the court was minded to depart from the general rule and award the unsuccessful plaintiff costs, this did not necessarily mean that the plaintiff was held to be entitled to full costs.

The Divisional Court taking into account all these factors concluded that it was an exceptional case which merited a departure from the normal rule regarding the disposal of costs. The court considered that it would not be appropriate that the plaintiff be awarded the full measure of costs so in the particular circumstances, the court awarded the plaintiff 75% of her costs (including reserved costs).

30. In the instant case the issue of concern to the appellants was of existential importance to them and though offering perhaps poor prospects for success, this appeal presented the last chance to recover their son who had been improperly removed from this jurisdiction on 21 September 2017 by Hampshire in breach of the parents' constitutional rights and placed for adoption with a third party which adoption was recently finalised.

31. Additionally there were significant and novel aspects to the case. Two references were warranted to the CJEU. At para. 49 of his judgment of 30 July 2019, Binchy J stated that:-

> "…neither the Regulation nor the decision of the CJEU give any guidance as to the consequences of a successful appeal in circumstances where the order has already been executed".

The Law

32. The recast O. 99 (effective 3 December 2019 pursuant to S.I. No. 584/2019) provides: -

"II. Right to Costs

2. Subject to the provisions of statute (including sections 168 and 169 of the 2015 Act) and except as otherwise provided by these Rules:

(1) The costs of and incidental to every proceeding in the Superior Courts shall be in the discretion of those Courts respectively.

(2) No party shall be entitled to recover any costs of or incidental to any proceeding from any other party to such proceeding except under an order or as provided by these Rules."

33. Order 99, r. 3(1) provides: -

> "The High Court, in considering the awarding of the costs of any action or step in any proceedings, and the Supreme Court and Court of Appeal in considering the awarding of the costs of any appeal or step in any appeal, in respect of a claim or counterclaim, shall have regard to the matters set out in section 169(1) of the 2015 Act, where applicable."

34. Section 169 of the Legal Services Regulation Act 2015 provides: -

> "(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—
>
> (a) conduct before and during the proceedings,
> (b) whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings,
> (c) the manner in which the parties conducted all or any part of their cases,
> (d) whether a successful party exaggerated his or her claim,
> (e) whether a party made a payment into court and the date of that payment,
> (f) whether a party made an offer to settle the matter the subject of the proceedings, and if so, the date, terms and circumstances of that offer, and
> (g) where the parties were invited by the court to settle the claim (whether by mediation or otherwise) and the court considers that one or more than one of the parties was or were unreasonable in refusing to engage in the settlement discussions or in mediation.
>
> (2) Where the court orders that a party who is entirely successful in civil proceedings is not entitled to an award of costs against a party who is not successful in those proceedings, it shall give reasons for that order."

Hampshire's costs

35. The appellants were unsuccessful in this appeal. Having due regard to the recast O. 99 and ss. 168, 169(1)(a) 169(1)(c) and 169(2) of the 2015 Act, I am satisfied that Hampshire is not entitled to an award of costs for the following reasons:

> (a) The manner in which Hampshire conducted the original litigation is the backdrop from which inexorably flowed all subsequent litigation steps. This litigation was precipitated wholly and exclusively by reason of the wrongful conduct of Hampshire in causing orders, themselves improperly obtained *ex parte* in the High Court on 21 September 2017, to be executed improperly, exiguously and in breach of fair procedures and in breach of the constitutional rights of the appellants. The orders

resulted in the summary removal of three children from this jurisdiction in circumstances which deprived the appellants of their entitlement to raise comprehensive defences including, in the case of the youngest child, defences that went to jurisdiction.

(b) The removal of the children on 21 September 2017 breached constitutionally protected rights of the parents. As a direct result of the conduct of Hampshire, however well-intentioned it may have been, the appellants never saw their son again. He was placed for adoption and that process is now completed.

(c) Statutory bodies, such as Hampshire, charged with the protection of the interests and welfare of children, enjoy ready and extensive access to the courts and in turn the courts, of necessity, repose a high degree of trust and confidence in the representations they make in the context of child welfare applications. Such matters, even on an *ex parte* basis, are always progressed inquisitorially and in high confidence that a local authority or statutory body such as Hampshire has discharged its obligation of candour and has not practised any deception or misrepresentation in the course of securing an order from the court.

(d) Hitherto, the relevant Irish social services had no concern regarding the welfare of the children in the care of the appellants.

(e) In the application to the High Court on 21 September 2017 Hampshire refrained from disclosing to the court the materially different circumstances and facts that obtained regarding the minor R.E. in respect of whom no valid order was in place within the jurisdiction of the courts of England and Wales at the time the parents travelled with him to this jurisdiction.

(f) Further, contrary to the standards which behove a public authority charged with protecting the welfare of children, Hampshire failed to ensure that the orders in question were served on the parents prior to their execution in respect of all three children.

(g) The judgment of Binchy J. delivered on 12 April 2019, against which Hampshire did not appeal, made serious and significant findings of impropriety against Hampshire which weigh heavily in the balance and predisposes against the grant of any order for costs in its favour as against the appellants. Those findings include:

(i) By the time Hampshire was moving the application before the English Court, on 7 September 2017, it had had contact with the CFA and was aware of the appellants' presence in this jurisdiction. The exact address and location of the appellants was thus readily ascertainable.

(ii) Hampshire failed to comply with relevant English rules of court which require a minimum notice period to parents of fourteen days in wardship proceedings. The appellants received no notice.

(iii) With assistance from CFA, Hampshire could readily have served the appellants with court documents relevant to the application brought in Portsmouth. They chose not to do so.

(iv) Hampshire, with the aid of a care order secured in questionable circumstances from the District Court prior to the institution of the return litigation in the High Court in September 2017, caused the children to be removed from the care of the appellants.

(v) The urgency on 21 September 2017 was not driven by concerns for the safety of the children but was driven by other factors.

(vi) Relevant material was not disclosed to the High Court on 21 September 2017.

(vii) Creedon J. was not told that at the time the appellants took their son R. to Ireland on 5 September 2017 there was no order in existence prohibiting them from doing so.

(viii) The order granted by the High Court on 21 September 2017 for the recognition of the English return order was made in circumstances where the appellants did not have an opportunity to be heard, as required by Article 23(d) of the Brussels II *bis* Regulation.

(ix) Creedon J. was led to understand that she could not grant a stay on the enforcement order she was requested to make.

36. The behaviour of Hampshire gave rise to serious concerns on the part of this court and brought forth the following rebuke from Hogan J. in [2018] IECA 154 at para. 45: -

> "…It is equally at odds with the concept of a democratic state based upon the rule of law guaranteed by Article 5 of the Constitution of which this court has so frequently spoken in recent times, given that the right of access to the courts is not only a constitutionally guaranteed right… but… it is a cornerstone of a democratic state based on the rule of law."

37. The attitude of Hampshire from time to time gave cause for serious concern including, as was observed by Hogan J. at paras. 13 and 14 of [2018] IECA 154, Hampshire's intimations to the court that it did not wish to engage with the litigation and that it did not intend to comply with any orders as might be made by the Court of Appeal.

38. In the course of the hearing of this appeal counsel on behalf of Hampshire indicated to the court that, were the appellants to return to the jurisdiction of the courts in England and Wales where the three minors were resident, they risked criminal proceedings being brought against them arising from alleged breaches of orders of the courts of England and Wales. This is at odds with submissions now made asserting that the appellants ought to have litigated all issues in England. In all the circumstances these factors weigh in the balance and predispose towards refusing the application for costs sought by Hampshire. For the reasons stated I refuse Hampshire their application for costs.

Referral to Taxing Master

39. There is no evidence before the court that the firm of solicitors retained by the parents engaged in any conduct which would warrant the order sought being made against them. At all material times the firm clearly endeavoured as best they could to vindicate the constitutional rights of the appellants, to restore the relationship between the parents and the children and in particular to forestall the irrevocable loss of the appellants' youngest child which has ensued from the adoption. The delays that may have occurred were largely outside the control of the appellants' firm of solicitors and were an inevitable consequence of the approach adopted by Hampshire. Various applications taken, including the application to the English Court of Appeal in October 2017 for permission to appeal (which was not necessarily brought by the said solicitors); the application for a reference to the CJEU; the securing of an opinion from Advocate General Kokott in August 2018 and a judgment from the CJEU in September 2018; and, the setting aside in April 2019 of the orders obtained irregularly and improperly by Hampshire in September 2017, sprang entirely from the defalcations on the part of Hampshire to conduct the application for return without due regard to the rights of the parents to be heard and the principles of basic fairness of procedures.

40. No sound basis has been articulated by Hampshire for a referral to the Taxing Master of an enquiry as to whether a costs order might be made against the solicitors on record for the appellants. The rights at issue were fundamental and at no stage could any aspect of the application be characterised as in aid of a "frivolous and vexatious action". Indeed, articulating or characterising the application as such might imply that Hampshire lacks insight into the gravity and overall impropriety of their own conduct on 21 September 2017 which in the first instance was the dominant and direct precipitant for all of the ensuing litigation.

41. Historically the jurisdiction to make an order pursuant to the previous O. 99, r. 7 RSC stemmed from the exercise by the High Court of its inherent jurisdiction over solicitors. Though rarely applied it came to be invoked where it was established on the balance of probabilities that a solicitor, as an officer of the court having carriage of litigation, had been guilty of improper conduct. This required proof that the solicitor was in breach of his duty to the court as its officer or at the minimum guilty of gross negligence in respect of the discharge of that duty. To meet the threshold the jurisprudence indicates that the court was to be satisfied that the costs had been incurred quite unnecessarily by solicitors "without any reasonable cause". Behaviour such as continuing to prosecute wholly unmeritorious litigation in the full knowledge of the true facts and circumstances amounted to such conduct and entitled the court to make a so-called wasted costs order under the old O. 99, r. 7 against the solicitor in question.

42. In the instant case I am satisfied that no case is made out for such an order by Hampshire such as would warrant the making of a wasted costs order against the solicitors retained on behalf of the parents who were the unsuccessful appellants in these proceedings. The said solicitors acted with probity at all times. I would refuse the application of Hampshire in that regard.

The appellants' costs

43. It is contended that the proceedings were novel and of great public importance. They place reliance in particular on the judgment of Hogan J. in [2018] IECA 154 including, inter alia where he states at para. 46: -

> "…It is the clear duty of the courts to direct that this practice on the part of UK Local Authorities acting in conjunction with the CFA in this fashion must stop immediately. If it does not, then I fear that it may lead to some altogether unpleasant consequences for those acting in this fashion in any future case, for the prospect of contempt proceedings against social workers in such cases were this practice to reoccur must be a very real one."

44. It is clear that all the measures and steps taken by the appellants were directed towards recovering custody of their three children for the purposes, *inter alia*, of ensuring that due process would take place, that a proper and fair hearing would be embarked upon and that all the defences and legal points available to the appellants would be taken into consideration before any orders might be made and/or enforced pursuant to the Brussels II *bis* Regulation.

45. That prospect was ultimately forlorn and was very significantly thwarted by the strategic measures taken by Hampshire in the course of the litigation including misleading Creedon J. in the High Court for the purposes of improperly procuring an immediately enforceable order for the return of the minors to the jurisdiction of the courts of England and Wales in September 2017.

Doubtful point of law raised

46. The following issue did require a determination in the context of the within proceedings: -

> "What are the consequences of a successful appeal pursuant to Article 33 of the Brussels II *bis* Regulation in circumstances where the enforcement order had already been executed?"

47. However the determination of the High Court on the point was clear and unimpeachable. Whilst the prospects of the appellants succeeding in obtaining the orders sought were not high, they could not be said to be unstateable. It was at least understandable that in the vindication of their constitutional rights which had been demonstrably violated they would seek by way of an effective remedy an order which, in their minds, carried the best prospect of being reunited with their children and of halting the adoption proceedings in respect of their son.

Conclusion on the appellants' costs

48. Ultimately, I am not satisfied that the appellants met the exacting threshold to warrant an order for costs being made in their favour against Hampshire notwithstanding that Hampshire was entirely successful in resisting the claim both in the High Court and in this court. The litigation was brought primarily for personal advantage and was predominantly directed towards securing an outcome that would restore the relationship between the appellants and their children. That the issues raised were of special and general public

importance was a secondary consideration. I would refuse the appellants' application for costs.

49. Noonan J. and Costello J. concur with this judgment.