THE COURT OF APPEAL

Neutral Citation Number [2020] IECA 276

Appeal Record No.: 2019/207

Donnelly J.
Ní Raifeartaigh J.
Power J.

BETWEEN/

MICHAEL O'CALLAGHAN

APPELLANT

- AND–

IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Ms Justice Ní Raifeartaigh delivered on the 9th day of October, 2020

1. On the 6th day of July, 2020, I delivered a judgment in these proceedings in which the appellant's appeal was dismissed on all grounds. The court also upheld the respondents' cross appeal against the order of the High Court allowing an extension of time to pursue a claim under s.3 of the European Convention on Human Rights Act 2003. The issue of costs now arises and the parties have delivered written submissions in this regard.

2. The appellant urges the Court to depart from the normal rule that costs favour the winning party and to make an order for costs in his favour; in the alternative he requests the court to make no order as to costs, as did the trial judge. The appellant submits that his appeal falls within s.169(1)(b) of the Legal Services Regulation Act 2015 which permits the court to depart from the normal rule having regard to the particular nature and circumstances of the case, including: "*whether it was reasonable for a party to raise, pursue and contest one or more issues in the proceedings*." The appellant submits that the proceedings raised novel issues of law and that it was reasonable for him to pursue each of the grounds of appeal.

3. The appellant notes certain comments made by the court in its judgement including:

    - That there was undoubtedly some delay in the processing of his criminal appeal as a result of a backlog of cases in the appellate system.

    - That the period of time which elapsed between the appeal's first appearance in the list to fix dates and the hearing date was beyond what was hitherto normal for the

Court of Criminal Appeal according to the evidence of that court's registrar, Ms. Geraldine Manners.

- That there was at that particular time an insufficient number of judges to carry out the necessary appellate duties, which resulted in systemic delay.
- That the appearance of the appeal in the list to fix dates at periodic intervals did not equate with the case being kept under review in any meaningful sense and that the trial judge erred in that regard.
- That the circumstances in the Court of Criminal Appeal were not normal at the material time.
- That an application for priority *simpliciter* was likely to have been futile and that the trial judge erred in that regard.
- That the court was cautious about imposing blame on the appellant for not making a bail application pending his appeal, though on balance it did weigh against him.
- That there was a period of time during which the case failed to progress at a reasonable pace because of the systemic delay.
- That this was ultimately a borderline case.

4. The respondent opposes the appellant's application for costs and points out that s.169(1) of the Act of 2015 provides that a party who is entirely successful in civil proceedings is *entitled* to an award of costs against a party who is not successful, unless the court orders otherwise. There is therefore a *prima facie* entitlement that the successful party will be awarded the costs of the action (*Chubb v. HIA* [2020] IECA 183). The matters to which the court should have regard in determining whether to depart from this *prima facie* entitlement include whether it was reasonable for a party to raise, pursue or contest one or more issues, and the manner in which the parties conducted all or any part of their cases. The respondents submit that none of these factors dislodge their *prima facie* entitlement in this case. More particularly, they submit as follows.

5. The respondents submit that with regard to the appellant's claim that there existed a cause of action for damages under common law for a miscarriage of justice, and that his case fell within the parameters of such a claim, that the court had "*roundly rejected this claim*". They submit that the claim could only be described as novel in the sense that it was a claim which was unsupported by authority or capable of being formulated in legal terms and therefore had no chance of success. In any event, they say that the issue is not whether the claim is novel but whether the rule may be departed from on the basis that it was reasonable for party to raise or pursue such issues and they submit that this test was not satisfied in relation to that claim.

6. The respondents submit that in relation to the other two claims they in fact involved well established causes of action which had been the subject of jurisprudence of the Superior

Courts for a number of years. They submit that the claim under s.3 of the Act of 2003 was dismissed in circumstances where the appellant had not even attempted to lay facts before the court and therefore it was not reasonable for the appellant to pursue this aspect of his claim.

7. In relation to the claim for damages for a breach of the right to trial with reasonable expedition, they say that the case merely involved the application of the law to the facts of the case and that the existence of a cause of action was beyond doubt, as the court had itself noted at para.79 of the judgment. Insofar as the appellant relies upon the fact that the court described the case as borderline, the respondent points out that this was only in relation to the third limb of the appellant's proceedings and not the proceedings as a whole. The appellants point out that the court had ultimately decided that the appellant himself was responsible for at least some of the delay by failing to make a bail application before the Court of Criminal Appeal; and they point to the Court's comments on the appellant's failure to lay appropriate comparator evidence before the court and to take reasonable steps to secure such evidence as might be available. The respondents submit that in those circumstances, the fact that the Court described the case as "borderline" does not mean that it was reasonable for the party to have raised or pursued the issue in the proceedings. In any event, they say, reasonableness is only one of the factors to be considered under s. 169(1) of the Act of 2015.

8. In all the circumstances, the respondents therefore say that the normal rule that the costs shall follow the event should be applied by the Court.

9. In reply, the appellant makes three points. First, that the various limbs of the appellant's claim were closely interlinked and were not three separate and distinct parts. Secondly, with regard to the respondents' submission that the claim for damages breach a constitutional right to a trial with reasonable expedition was "well established" and did not involve any novel issue of law, they refer to the recent judgment of the European Court of Human Rights in *Keaney v. Ireland*, delivered on 30th April 2020 (a decision which was noted in my earlier judgment). In *Keaney*, the European Court noted that the development of this remedy in domestic Irish law was "*likely to remain legally and procedurally complex at least for a period of time*" (para. 122) and that "*considerable legal effort, time and even expense by potential applicants and the State will be required to establish how the right to expedition may apply in practice*." (para. 126). The appellant submits that the extent of the vacuum that existed with regard to the constitutional remedy is further evident from the considerable time and effort which the court was required to devote to its assessment. The appellant submits that the application for damages patently involved novel issues of law, namely the parameters of, and principles applicable to, that remedy.

10. Thirdly, the appellant submits that all reasonable efforts were made to discharge the evidential burden upon him and, specifically as regards the application for an extension of time to bring proceedings under s.3(2) of the Act of 2003, points out that the statutory provision does not impose any explicit obligation to bring forward affidavit evidence nor is

this suggested by any Practice Direction. He also points out that this remedy is available only if no other remedy in damages is available in any event and, given that the Supreme Court in *Nash* had recognised the existence of a constitutional remedy for breach of the right to an expeditious trial, and given the obvious overlap between that remedy and the remedy established by s.3(2), it was both reasonable and prudent for the appellant to focus his efforts on the constitutional remedy.

The court's decision

11. This appeal was heard in January 2020. Sections 168 and 169 of the Legal Services Regulation Act 2015 took effect from 7 October 2019, while the Rules of the Superior Courts (Costs) Order 2019 (SI 584/2019) introduced a recast Order 99 which took effect from 3 December 2019.

12. Section 168 of the Act of 2015 provides as follows:-

"168. (1) Subject to the provisions of this Part, a court may, on application by a party to civil proceedings, at any stage in, and from time to time during, those proceedings—

(a) order that a party to the proceedings pay the costs of or incidental to the proceedings of one or more other parties to the proceedings, or

[…]

(2) Without prejudice to subsection (1), the order may include an order that a party shall pay—

(a) a portion of another party's costs,
(b) costs from or until a specified date, including a date before the proceedings were commenced,
(c) costs relating to one or more particular steps in the proceedings,
(d) where a party is partially successful in the proceedings, costs relating to the successful element or elements of the proceedings, and
(e) interest on costs from or until a specified date, including a date before the judgment.

[…]

Section 169 provides:

169. (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.

[…]

13. In *Chubb European Group SE v. Health Insurance Authority* [2020] IECA 183, Murray J. said: -

"I have included in an Appendix to this judgment the relevant provisions of 0.99 as it stands since December 3 2019, as well as the relevant parts of s.168 and 169 of the Legal Services Regulation Act 2015. Reading these in conjunction with each other, it seems to me that the general principles now applicable to the costs of proceedings as a whole (as opposed to the costs of interlocutory applications) can be summarised as follows:

(a) The general discretion of the Court in connection with the ordering of costs is preserved (s.168(1)(a) and 0. 99, r.2(1)).
(b) In considering the awarding of costs of any action, the Court should 'have regard to' the provisions of s.169(1) (0. 9, r.3(1)).
(c) In a case where the party seeking costs has been 'entirely successful in those proceedings', the party so succeeding 'is entitled' to an award of costs against the unsuccessful party unless the court orders otherwise (s.169(1)).
(d) In determining whether to 'order otherwise' the court should have regard to the 'nature and circumstances of the case' and 'the conduct of the proceedings by the parties' (s.169(1)).
(e) Further, the matters to which the court shall have regard in deciding whether to so order otherwise include the conduct of the parties before and during the proceedings, and whether it was reasonable for a party to raise, pursue or contest one or more issues (s. 169(1)(a) and (b)).
(f) The Court, in the exercise of its discretion may also make an order that where a party is 'partially successful' in the proceedings, it should recover costs relating to the successful element or elements of the proceedings (s.168(2)(d)).
(g) Even where a party has not been 'entirely successful' the court should still have regard to the matters referred to in s.169(1)(a)-(g) when deciding whether to award costs (0. 99, r.3(1)).

(h) In the exercise of its discretion, the Court may order the payment of a portion of a party's costs, or costs from or until a specified date (s.168(2)(a)).”

14. In the present case, the respondents were the “entirely successful” parties within the meaning of s.169(1) of the Act of 2015. Accordingly, they are entitled to their costs unless the Court is persuaded otherwise by reason of the matters set out in that subsection.

15. The Court is of the view that, as regards the first limb of the appellant’s claim, concerning a ‘miscarriage of justice’ cause of action, there could be no reason to disapply the presumptive rule in favour of the respondents. I am not persuaded by the argument of the appellant that the two aspects to his case (the “delay” aspect and the “miscarriage of justice aspect) were inextricably intermingled. They were separate and distinct claims even though they were based upon the same facts, and there would have been no difficulty in choosing to appeal in respect of one of those claims only.

16. There is also the issue of the cross-appeal. The respondents were successful on the cross-appeal also, which concerned the extension of time in respect of the claim pursuant to s.3 of the European Convention on Human Rights Act, 2003. This aspect took up only a small amount of time in the hearing which was reflected in the judgment.

17. The position regarding the claim for “delay” is slightly different. While the appellant was ultimately unsuccessful, it is fair to say that whilst the general cause of action for breach of constitutional rights has consistently formed part of Irish law, its parameters in respect of a breach of the specific right to trial with reasonable expedition and the damages that may accrue on foot thereof have not, to date, been fully prescribed. It will be recalled that in *Nash* the Supreme Court declined to delineate the parameters of the cause of action with any great precision, and indeed pointed out potential areas where the domestic cause of action might diverge from the European law in the area. The European Court of Human Rights recently observed in *Keaney* that the area was “*likely to remain legally and procedurally complex at least for a period of time*” (para. 122). I would not disagree with that observation. In those circumstances, it was in my view “reasonable” for the appellant to raise, pursue or contest the appeal on that particular claim on the facts of his case, which involved a systemic backlog in the appellate system prior to the establishment of this Court, and indeed he successfully convinced the Court of the correctness of some of his arguments even though he was ultimately unsuccessful in the appeal on this limb of his case also.

18. As an entirely successful party in this appeal, the respondent is entitled to an award of costs against the appellant **unless** the court considers otherwise having regard to the particular nature and circumstances of the case and to whether it was reasonable for the appellant to raise, pursue or contest one or more issues in these proceedings. In having regard to the particular nature and circumstances of the present case, I consider that it was reasonable for the appellant to pursue the ‘delay’ claim particularly in the context of the parameters of this claim for damages undergoing precise prescription by the courts.

Moreover, the finding that this was a 'borderline' case is also relevant, and this leads me to conclude that, in so far as the costs of the "delay" issue are concerned, an award of full costs being made against the appellant would not be fair in all the prevailing circumstances. It follows that on this issue, the respondent is not entitled to an award of full costs against the appellant.

19. The next issue is how to calculate the appropriate costs order. Taking 100% as the total costs that might be awarded to an entirely successful party, in my view, the costs attributable to each of the three issues may, approximately, be characterised as follows:

    a) Miscarriage of justice: 45%

    b) The ECHR cross-appeal: 10%

    c) Delay and right to a fair trial: 45%

20. Having been entirely successful in the appeal and there being no reason to depart from the general rule insofar as issues (a) and (b) are concerned, the respondents are entitled to their full costs in respect of those issues. As to the final issue of delay and right to a fair trial, I have concluded, for the reasons set out above, that a departure from the general rule is warranted. Consequently, a fair and equitable deduction of the respondents' entitlement to costs would be 50% of the remaining 45%.

21. Therefore, I make an order for costs in favour of the respondents but conclude that it should be reduced by 22.5%. The respondents are, therefore, entitled to an order for 77.5% of their costs.

22. As this judgment is being delivered electronically, it is appropriate to record the agreement of the other members of the Court.

Donnelly J.: I have read this judgment and agree with it.

Power J.: I have read this judgment and agree with it.