THE COURT OF APPEAL
Civil

UNAPPROVED
Appeal Number: 2021/255

Edwards J.
Whelan J.
Collins J.

Neutral Citation Number [2023] IECA 7

IN THE MATTER OF THE JUDICIAL SEPARATION AND FAMILY LAW REFORM ACT 1989

AND

IN THE MATTER OF THE FAMILY LAW ACT 1995

BETWEEN/

DK

APPLICANT/RESPONDENT

- AND –

PIK

RESPONDENT/APPELLANT

JUDGMENT of Ms. Justice Máire Whelan delivered on the 24th day of January 2023

Introduction

1. The judgments of this court [2022] IECA 246 were delivered on the 28th October, 2022 wherein it was determined that the application of the wife for the relocation of the adolescent children of the marriage to a third jurisdiction required to be remitted to the High Court for a hearing and determination of the issue *de novo*. The court was satisfied in the first instance that the order for costs made in favour of the father by the High Court judge

must be set aside in light of the determinations of this court on foot of the appeal. Following delivery of the judgment the panel reflected further on the issue of the proper allocation of the costs of the appeal and indicated to the parties its preliminary view that in this instance no order as to costs ought to be made. The parties were afforded time to make written submissions in respect of costs and the appellant wife did so.

Submissions of the wife in respect of costs

2. The core factors relied upon by the wife in seeking an order for costs of the appeal against the husband included that the substantive decision of the High Court which had refused the wife's application for relocation of the minors to a third country had been set aside by this court and the matter is now remitted to the High Court for a rehearing in respect of that issue. Further, that the costs order granted in favour of the husband by the High Court had also been set aside. It was contended that "*the usual rule that costs should follow the event should apply in relation to the costs of this Honourable Court*." It was further asserted that *"as the High Court will now have to rule on the matter by way of rehearing, it is submitted that it is appropriate that there would be no Order in respect of the prior High Court hearing as, in essence, the hearing did not result in a determination of the matter in issue*."

3. Reliance was placed on the principle that the starting point is that costs should follow the *"event"* unless the court considers it appropriate to make a different order. It was asserted that in this appeal there was a "*clear event"* and that the wife is entitled to her costs in respect of the hearing of this appeal in all the circumstances and in light of the jurisprudence.

4. It was contended in particular that the jurisprudence including the judgment of Clarke J. (as he then was) in *Veolia Water U.K. Plc. v Fingal County Council (No. 2)* [2007] 2 IR 81 supported an approach whereby an order for costs would be granted in favour of the wife.

It was emphasised that "*the consideration of costs in the Veolia case was in the context of complex litigation with interlocutory applications arising which might of themselves be considered "events" in the context of the overall litigation. The within proceedings were not such as had a multiplicity of events, concerning only the single issue of relocation*."

5. Reliance was placed on the High Court decision of Simons J. in *Student A.B (a Minor) v The Board of Management of a Secondary School* [2019] IEHC 453, and the judgment of this court in *Chubb European Group SE v The Health Insurance Authority* [2020] IECA 183, where Murray J., citing Clarke J. in *Veolia* with approval, had observed concerning the different scenarios relevant to a determination of the appropriate allocation of costs:

> "*10. As analysed by Clarke J. the first is a case where an 'event' can be identified and in which all costs of the case follow that event. This is the default position even where the party who succeeds on the 'event' has not prevailed on every issue in the case or succeeded in every argument it has advanced (see Veolia at para. 2.5 and 2.8 and MD at para. 9). For these purposes, Clarke J. related success on the event to the securing of a 'substantive or procedural entitlement which could not be obtained without the hearing concerned' (Veolia at para. 2.8)."*

6. Reliance was also placed on the decision in *Godsil v Ireland* [2015] IESC 103, (citing Murray J. in *Chubb,* para. 10) for the proposition that "*as a matter of both fairness and of principle, where a party has had to institute legal proceedings in order to obtain relief, the starting point should be that he recovers all the legal costs in securing that benefit …*".

Position of husband

7. It was submitted on behalf of the husband "*… that in this instance no order as to costs ought to be made*."

Overview

8. The proper allocation of costs in the context of family law proceedings calls for an approach that accords due regard to the importance of the family and the rights of children under our constitutional order in cases such as the present where both aspects are engaged.

9. Conventionally, as was acknowledged by Clarke J. in *D v D* [2015] IESC 66, [2016] 2 IR 438 - Denham C.J. concurring - the starting point in family law proceedings is that both parties are to bear their own costs. In the instant case it is demonstrable that both parents are deeply attached to and invested in the children of the marriage and although their respective positions and views are diametrically opposed to one another as to where the best interests and the welfare of the said children may lie, the sincerity with which their respective views are held is not in question.

10. It is clear from the evidence that the costs incurred by both sides in this appeal were the inevitable if unfortunate consequence of a sequence of events that are outlined in the judgments of this court - reported at [2022] IECA 246. Those events that took place following the conclusion of the oral hearing in the High Court of the application for relocation brought by the mother in respect of the children were neither caused nor contributed to by any act or omission on the part of the father.

11. The question then arises as to whether the *Veolia* principles are engaged in the first instance. The starting point in the context of a family law application must be O. 99, r. 2(1) "*The costs of and incidental to every proceeding in the Superior Courts shall be in the discretion of those Courts respectively*." As Clarke J. made clear in *D v D (above)*, echoing the views of MacMenamin J. in his judgment in the said case reported at [2015] IESC 16, a different approach is required to be taken to the costs of matrimonial proceedings than that which is appropriate in many other forms of civil litigation. The decision is generally considered authority for the proposition that the starting point or default position ought to be

that the court should make no order as to costs in family law proceedings and that both parties be required to bear their own costs.

Veolia

12. As Clarke J. observed in *D v D (above*), the principles adumbrated in *Veolia Water* can be engaged in family law litigation. He noted at para. 2.4:

> "*…By virtue of those principles, a court should consider whether it needs to depart from what might be the default position to reflect the fact that the costs of the litigation have been increased because of unmeritorious actions taken by one or other party. The precise application of the Veolia principles in the context of family law will, however, likely be different to the application of those same principles in, for example, commercial litigation. In ordinary inter partes litigation the starting point is that the winner obtains an order for all reasonable costs against the loser. Costs, as it is put, follow the event. In such a context, the Veolia principles require the Court to consider whether unmeritorious action on the part of the winning party has had the effect of increasing the costs of the litigation as a whole to a material extent. If the Court so finds, then the Court should give serious consideration to adjusting its order as to costs to reflect that fact. An unsuccessful defendant may properly be obliged to pay the plaintiff's costs. However, if that unsuccessful defendant has been put to a great deal of additional and unnecessary expense because of the way in which the case was run by the successful plaintiff then that fact needs to be taken into account in fashioning an appropriate and just order as to costs*."

13. The within application for leave to relocate the adolescent children of the marriage to a third jurisdiction is a private issue concerning first and foremost the dynamics of this family. It is however primarily concerned with the welfare of children, the necessity to

ensure that significant decisions concerning their future are made with due regards not alone to the respective rights of the parents but also having due regard to the best interests of the children and by means of a process which ensures that the said minors have been afforded an opportunity to express their views in regard to the alternative options presenting and that the said views are taken into account and with due regard to the constitutional rights of all stakeholders.

14. In my view it is significant that the wife has failed to identify facts or omissions on the part of the husband in the course of the conduct of the within proceedings which materially added to the costs of the proceedings on any basis. Neither is it expressly contended that the husband raised arguments or grounds found by this court to be unmeritorious. There is no evidence before this court that the costs of this appeal as a whole were materially increased by virtue of any litigation approach or strategy adopted by or on behalf of the husband. As such, therefore, whilst it is of course appropriate to consider the *Veolia* principles having duly considered them in light of the circumstances, the evidence, the Transcripts and the submissions made on behalf of the wife in December 2022 in regard to costs I am satisfied that they are not engaged and do not play any material part ultimately in the exercise of determining the proper allocation of costs in respect of this appeal.

Each party bears their own costs

15. The approach of a court to an application for costs whether in respect of an interlocutory application or the substantive hearing in family law proceedings is informed by the key jurisprudence, including in particular the decision of McCracken J. in *M.K. v J.P.K. (No. 3) (Divorce: Currency)* [2006] 1 IR 283 where at p.291 he observed:

> *"These are family law proceedings in which the court must have regard to the interests of both parties. This is not a case in which damages have been awarded to the applicant for some wrongdoing or injury caused to her by the husband. In family*

law cases there is a pool of assets, comprising those of both the husband and the wife, which assets are to be used both to make future provision for the spouses and any dependant members of the family and to pay the costs of both parties. There is no question of either party having further assets which could be used to pay costs. In my view, therefore, the general rule does not necessarily apply in family law proceedings … In the circumstances of family law cases the court must look at the effect of the award of costs on both parties."

16. Taking that approach as the starting point, it is to be borne in mind that there are judicial separation proceedings in being before the High Court which will determine all issues with regard to the assets of the parties and the welfare of the children. This appeal arises from an interlocutory application brought by the wife within the said proceedings. The said proceedings have not been the subject of a determination yet and the court was informed that there are ancillary or allied proceedings concerning claims over the family home of the parties and other issues. It is evident that were this court to make an order as to costs against the respondent husband, in light of the evidence and transcripts, it would likely have a chilling impact on his capacity to pursue the within litigation and in particular to participate in the within proceedings which have been remitted to the High Court for determination. Thus, far from having a neutral impact, the making of the order for costs as sought risks having some adverse effect on the husband.

17. In *Roche v Roche* [2010] IESC 10 Murray C.J. observed:

"Litigation between spouses on issues related to the matrimonial relationship often give rise to particular circumstances in which the Courts consider it just and equitable to depart from the general rule of costs following the event."

18. Courts need to be particularly attuned to the risks of injustice or inequities in making orders for costs in the context of family law proceedings, particularly in relation to

interlocutory or interim applications, and a holistic view must be taken of the salient facts and circumstances and it is further important that the court have regard to the normative approach that has been ordained by the Supreme Court, namely that in general no order as to costs ought to be made.

19. Such an approach has been reinforced by the Supreme Court on a number of occasions including, for instance, *W.Y.Y.P. v P.C.* [2013] IESC 12. In that instance a key issue involved an application for ancillary relief arising in the context of divorce proceedings brought pursuant to the provisions of the Family Law (Divorce) Act, 1996, as amended. The Supreme Court determined that having due regard to the material facts in the case which included a finding of material non-disclosure, in all the circumstances the facts did not warrant an adverse costs order against the respondent. Denham CJ gave particular emphasis to the fact that the context of the motion pertained to certain family law matters *"... including custody of the children*". The approach of the Chief Justice offers insights into how the issue of costs might be dealt with in family law proceedings, particularly where she observed:

> *"39. The award of costs is an exercise of discretion of the trial judge, who has considered all the circumstances of the proceedings before her or him, and decided the issues. This Court is very reluctant to interfere with the exercise of such discretion.*
>
> *40. In this case, the learned High Court judge had regard to the general rule and the discretion afforded to him not to follow the general rule when the interests of justice required it, especially in the context of matrimonial proceedings. The High Court exercised its discretion within jurisdiction*."

20. A helpful adumbration of the principles to be applied in the context of an application for costs arising in family law proceedings is to be found in the judgment of Barrett J. in *B. v B.* [2022] IEHC 622 where he made the following observation at para. 7:

> "… *For my part I do not conceive of family court proceedings as presenting the same win/lose scenario that is the hallmark of other court proceedings. That is not what family law proceedings are about. They involve a most serious-minded effort by all involved to resolve sometimes very challenging matters in as best a manner as can humanly and lawfully be done, with children's interests being a paramount consideration when that is required by law. I doubt there are many litigants who leave the family courts feeling that they have 'won'. I suspect most people leave feeling a little dazed by all the emotions that have been at play. In most instances the best that can be achieved in (and by) the court is a state of affairs that is not quite as bad as the state of affairs that pertained when the parties entered the courtroom*."

The observations emphasise that there are rarely "winners" in family law proceedings – particularly where issues of custody and access to children are involved. The insights underpinning the observations of Barrett J. engaging values of justice, equity and compassion offer a useful roadmap to the exercise of discretion in the context of an application for costs in family law proceedings, which I adopt.

21. As Clarke J. made clear in *D. v D.* aforementioned - echoing the observations of MacMenamin J. in the same case - the *Veolia* principles can indeed be considered in an application for costs at the conclusion of a family law application or proceedings and indeed can be applied where the circumstances warrant in accordance with the jurisprudence, particularly where there is clear evidence of misconduct, of the litigation being pursued inappropriately or unmeritorious steps or actions having been taken by one party to the proceedings. In the absence of the criteria identified in *Veolia* different considerations are engaged as the above referenced jurisprudence exemplify.

Conclusions

22. Applying the above-referenced principles to the issue of costs in the instant case I conclude as follows:

(1) The applicant wife's essential contention that "*as the High Court will now have to rule on a matter by way of rehearing, it is submitted that it is appropriate that there would be no Order in respect of the prior High Court hearing as, in essence, that hearing did not result in a determination of the matter in issue*." (emphasis added)

The order for costs made in the High Court is to be set aside. The justice of this case warrants that the issue of the costs of the said High Court application be determined by the High Court within the judicial separation proceedings either at the conclusion of any application for leave to relocate the children or at the conclusion of the substantive proceedings in accordance with the settled jurisprudence referenced above.

(2) Having duly considered the principles in *Veolia* I am satisfied that they are not engaged in the instant case and no adequate evidence has been put before this court to warrant a determination that the court is to approach the exercise of its discretion in respect of costs on the basis that the *Veolia* principles apply.

(3) The litigation and particularly the application the subject this appeal is concerned with the welfare and best interests of the children of the family; a matter which, in addition to being of existential importance both to the parties to this litigation themselves and also to their children, is of general public interest to have properly determined.

(4) Both parties might be said to have caused or contributed to the events which led to the appeal being necessitated in the first place particularly by their failure

to engage with the trial judge in a timely and effective manner prior to the said meetings taking place to identify and clarify sufficiently the precise purpose and parameters of the proposed meetings with the children. Those omissions contributed significantly to the series of events which ultimately necessitated the setting aside of the orders of the High Court and the remittal of the within interlocutory application for a rehearing.

(5) Of concern to this court too is the wholly unrealistic estimation of time identified by the appellant for the appeal hearing and the approach adopted by the appellant in presenting her appeal which caused the hearing to go into a second day.

(6) That said, the issues arising in this interlocutory application have engaged this court in extensive considerations directed towards the welfare of the children in question.

(7) It is in the interests of justice, fairness and equity that no order as to costs be made in the absence of any evidence that would warrant the making of same and further, although the wife succeeded in having the issue remitted, this application for relocation of the children cannot readily be located within a binary "win lose" parameter. In all the circumstances, in light of the jurisprudence it is appropriate having due regard to the dicta of the Supreme Court outlined in authorities including, *inter alia*, those outlined above, when applied to the facts that there be no order as to costs of this appeal.

23. Although the wife succeeded in having the issue remitted, this application for relocation of the children cannot readily be located within a binary "win lose" parameter . It is in the interests of justice, fairness and equity and in light of the jurisprudence including, *inter alia*, as outlined above, when applied to the facts that no order as to costs be made in

the absence of any evidence that would warrant the making of same. This Court makes no order as to the costs of this appeal.

24. Collins and Edwards JJ. agree with the within judgment.