THE HIGH COURT

[2021] IEHC 157

RECORD NUMBER: 2021 2 JR

BETWEEN

THE IRISH COURSING CLUB

APPLICANT

AND

THE MINISTER FOR HEALTH AND THE MINISTER FOR HOUSING, LOCAL GOVERNMENT AND HERITAGE

RESPONDENTS

JUDGMENT of Ms. Justice Niamh Hyland delivered on 5 March 2021

1. Following my judgment of 25 January 2021 (*Irish Coursing Club v. Minister for Health & Ors* [2021] IEHC 47) refusing the applicant an interlocutory injunction in the terms sought, the parties have made submissions on the costs of the injunction application. The applicant asks me to treat the costs as costs in the cause. The respondents ask me to make a costs order in their favour.

2. The applicant justifies its position as follows:

   (a) It is not possible, at this stage, to disentangle the evidence presented by the parties at the interlocutory stage from that which will be introduced at the full hearing.

   (b) There were significant issues (including the merits of the parties' respective cases) canvassed at the interlocutory stage which will fall to be further considered at the full hearing.

   (c) The issue upon which the injunction application turned i.e. jurisdiction/separation of powers will be further considered at the full hearing because the applicant is seeking declaratory relief.

3. It relies upon the decisions of Clarke J. in *ACC Bank Plc v. Hanrahan* [2014] 1 I.R. 1 and Laffoy J. in *Haughey v. Synnott* [2012] IEHC 403.

4. The respondents argue that the principal basis for refusing the injunction was the decision of the Court that it had no jurisdiction to grant a relief of the mandatory nature sought by the applicant having regard to the principle of separation of powers. This is not an issue that will be revised at the hearing or altered by any determination on facts or law subsequently. In the alternative, where the balance of convenience favoured refusal of the relief, they argue that I can justly adjudicate upon the question of costs of the interlocutory application.

Legal Principles

5. The new version of O.99 RSC introduced in 2019 provides at O.99, r.2:

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

   …

(3) The High Court, the Court of Appeal or the Supreme Court, upon determining any interlocutory application, shall make an award of costs save where it is not possible justly to adjudicate upon liability for costs on the basis of the interlocutory application.

6. Therefore, I should only treat the costs as costs in the cause if I consider it is not possible justly to adjudicate upon liability for costs.

7. The basis of Clarke J.'s reservations about awarding costs following an application for summary judgment in *ACC v. Hanrahan* was that matters decided upon in that context, particularly those relevant to the strength of the case, might be revisited at the trial of the action and therefore it would generally be preferable to either reserve the costs or make them costs in the cause. I must consider if that is the case here, such that it would be unjust to adjudicate on costs at this point in time.

Application of principles

8. Although it is certainly the case that the issues that I considered in respect of whether the applicant had made out the necessary "strong cases" will be revisited at the trial of the action, I did not refuse the injunction on the basis that the applicant had failed to make out a strong case likely to succeed at trial. Thus, the concern raised by Clarke J. in *Hanrahan*, that a different result would be reached at trial with unfairness to the losing party, simply does not arise here.

9. However, the applicant makes an additional argument in this respect, arguing that the evidence identified in this respect will form part of its case in the substantive hearing and that therefore the cost of production of those affidavits ought to be made costs in the cause. That seems a reasonable approach to me since, if I award costs to the respondents in that respect, and they lose at trial, the applicant will not be able to recoup those costs. I will therefore order that the costs of the affidavits relied upon by both parties in the within proceedings are costs in the cause.

10. Next. the applicant argues that the fundamental matter upon which the injunction application turned, i.e. separation of powers, will remain at issue and that it may succeed in arguing that declaratory relief is appropriate in place of mandatory orders. The applicant stresses that it had to seek mandatory orders given that interim declarations cannot be obtained. That submission does not affect the answer to the core question that I must resolve i.e. whether the conclusions I came to on the separation of powers will potentially be revisited at the trial. The relief sought in the notice of motion was an:

> *"Interlocutory Injunction by way of an application for a judicial review requiring the First Respondent to permit the Applicant and its sporting activities to continue in operation in the like manner of greyhound racing, horse racing and horse sport (i.e. "behind closed doors") as so provided for at Article 10 of SI No 701/2020 pending the determination of the within application for a judicial review".*

11. I had to consider whether such relief would be granted. Many of the matters decided in the judgment will not be revisited since they were exclusively concerned with the interlocutory nature of the application. On the other hands, certain of the issues in relation to the separation of powers may be revisited, whether in the context of declaratory relief or in the context of permanent mandatory orders.

12. What will certainly not be revisited is the decisions I made in respect of the balance of convenience as this test will not be in any way relevant at the trial of the action. If I had decided the injunction on this basis alone, the applicant could not have argued that costs should be costs in the cause or reserved, since the approach taken in *ACC v. Hanrahan* would not have been relevant. The refusal on the ground of balance of convenience was made on a standalone basis and was not linked to my conclusions on separation of powers.

13. Taking all these matters in the round, and given that a court may resolve costs issues not on the basis of absolute precision but, as identified by Murray J. in *Chubb European Group SE v. The Health Insurance Authority* [2020] IECA 183 at para. 31, by adopting a "*broad brush approach*", it seems to me the justice of the situation is met by awarding the respondents 75% of their costs. I will make the remainder of the costs, including the costs of the affidavits referred to above, costs in the cause.