

**THE HIGH COURT**

[2021] IEHC 675  
[2021 No. 1282 P.]

**BETWEEN**

**PATRICK COSTELLO**

**PLAINTIFF**

**AND**

**THE GOVERNMENT OF IRELAND, IRELAND AND THE ATTORNEY GENERAL**

**DEFENDANTS**

**JUDGMENT of Ms. Justice Butler delivered on the 26th day of October, 2021**

1. This is my ruling on the issue of costs in the above proceedings in which I delivered judgment on 16th September, 2021. That judgment found against the plaintiff on the key issue of the constitutionality of the proposed ratification of CETA by means of placing it before Dáil Éireann to secure its approval pursuant to Article 29.5.2 of the Constitution. In doing so, I accepted the main argument made by the defendants to the effect that as CETA is an international agreement operating only at the level of international law, it cannot be understood as effecting a transfer of either the State's legislative or judicial power. However, because of the importance of the issues raised and the likelihood of the matter proceeding on appeal, I also considered the balance of the arguments made by both sides and reached conclusions on those issues, albeit on occasion on an expressly *obiter* basis. Both parties now seek their costs as against the other.
2. The plaintiff advances a number of grounds for his application. Firstly, he contends that the standard rule that costs follow the event, now given legislative expression in s. 169(1) of the Legal Services Regulation Act, 2015, should not apply because of the court's findings that the plaintiff had *locus standi* to pursue the claim and, that as an elected public representative, he was especially well placed to do so.
3. Secondly, whilst recognising that there is no category of case automatically immune from the application of the general rule (per *Dunne v. Minister for the Environment* [2008] 2 IR 775), it is contended that the case was of an exceptional nature which merits an award of costs to the unsuccessful plaintiff. Reference was made to the fact that the case raised novel questions of constitutional law; that it operated as a test case in respect of future investment protection treaties; that it raised fundamental constitutional questions as regards the administration of justice; it raised significant questions of the constitutionality of adherence to international treaties; and, in general, that it raised issues of clear public interest in circumstances where the plaintiff had no personal interest in the outcome of the case. I note that the latter is effectively the category of case which the Supreme Court did not accept was automatically immune from the application of the general rule in *Dunne v. Minister for the Environment* (above). The plaintiff relies on the ruling of the Divisional High Court in *Collins v. Minister for Finance* [2014] IEHC 79 and of the High Court in *Kerins v. McGuinness* [2017] IEHC 217. The plaintiff argues, in particular, that the court should make an award of costs in his favour without any reduction.

4. Finally, the plaintiff points to the issues which were raised by the defendants on which the court preferred the plaintiff's position, to argue that although the plaintiff did not obtain the relief he sought, the defendants were not entirely successful.
5. The defendants, on the other hand, contend that having been successful in the proceedings, they are now entitled to an order for costs against the plaintiff. They indicate that they are happy that any order for costs made in their favour should be stayed in the event of an appeal. The defendants rely on the provisions of ss. 168 and 169 of the 2015 Act, the Recast Order 99 of the Rules of the Superior Courts introduced in 2019 in response to the 2015 Act and the analysis of the interplay between these various instruments by Murray J. in *Chubb European Group SE v. Health Insurance Authority* [2020] IECA 183. The defendants make the not unreasonable point that because the plaintiff made a very broad claim, it was necessary for them to respond to it in great detail. However, the defendants say they advanced a core argument in response to the entire claim on which they were successful. Consequently, it is argued that they should not be penalised because they did not succeed on all elements of the pleadings they raised to meet the detail of the plaintiff's broad claim which was fundamentally unsuccessful.
6. In relation to the potential public interest argument, the defendants say the onus is on the plaintiff to satisfy the court that the case is an exceptional one justifying a departure from the normal rule. Further, recent Supreme Court authority (*Minister for Communications, Energy and Natural Resources v. Wymes* [2021] IESC 63) has found that the mere fact that litigation raised a question of general public importance is not sufficient to justify a departure from the normal rule that costs follow the event. In looking at this particular judgment it should be borne in mind that establishing that an appeal raises a question of general public importance is one of two potential threshold requirements which must be satisfied for the Supreme Court to accept jurisdiction of an appeal under Article 34.5.3(i) of the Constitution. Consequently, if the Supreme Court were to treat the mere fact that a case raised an issue of general public importance as a basis for awarding costs to a losing party, it could have a potential impact on a very large number of appeals before that court. Finally, the defendants point out that it is only in very rare cases that unsuccessful parties have been awarded costs on the grounds of the public interest and importance of the litigation and, even when this has been done, the courts have tended to award partial rather than full costs. A number of cases are cited as examples of such orders.
7. I do not propose to rehearse all of the authorities which have been cited to the court in the written submissions of the parties, most of which are all by now well established. It seems to me that the basis on which I should approach the issue of costs is as follows:-
  - The Oireachtas has legislated to the effect that the general rule should be that a party who is entirely successful in litigation is entitled to an award of costs. This puts the former practice of the courts on a statutory footing.

- By expressly including the phrase “*entirely successful*”, the Oireachtas allows a court to look at discrete aspects of a case on which the successful party may not have succeeded or on which the unsuccessful party succeeded in order to determine whether the costs awarded should include the costs of those issues or, conversely, whether the unsuccessful party should be awarded costs in respect of the issues on which they succeeded.
  - Furthermore, the court retains a discretion as regards the award of costs in each case which must be exercised in light of the particular nature and circumstances of the case and the conduct of the parties. Factors potentially relevant to an assessment of the conduct of the parties are set out in s. 169(1) of the 2015 Act.
  - The court must provide reasons for any departure from the normal rule (see s. 169(2)).
  - There is no category of case which is automatically immune from the application of the normal rule that costs should follow the event.
  - The onus is on the party asking the court to depart from the normal rule to establish that such a departure is justified.
  - However, there is a body of jurisprudence indicating that cases which raise novel or fundamental constitutional issues capable of having far-reaching application and effect or cases which are capable of being regarded as test cases governing the disposition of multiple other cases may justify a departure from the normal rule. Inevitably, the defendant or respondent in such cases is likely to be the State or a public authority as the courts regard such entities as having a broader interest in the proper interpretation and application of the law governing their activities. A private litigant who has succeeded in litigation is less likely to be regarded as having an interest in the determination of issues for the purposes of clarifying the law such as would justify the courts requiring that litigant to bear the costs of the litigation.
  - A departure from the normal rule as to costs can take many different forms. It can range from the court limiting the order for costs to be made against the unsuccessful party or making no order for costs against the unsuccessful party or awarding the unsuccessful party partial costs or, finally, awarding the unsuccessful party full costs.
8. Before explaining the decision I propose to make, which is to award the plaintiff a proportion of his costs, I want to address some of the arguments made on the plaintiff’s behalf which I do not accept.
9. Firstly, the plaintiff points to s. 169(1)(b) of the Legal Services Regulation Act, 2015 which includes as a factor for the court to consider in relation to the conduct of the parties “*whether it was reasonable for a party to raise, pursue or contest one or more issues in*

*the proceedings*". He then refers to comments made in the judgment at paras. 5 and 165 to the effect that the plaintiff had locus standi to bring the proceedings, was sincere in doing so and was making a case which, if CETA were to be ratified, it might then be too late for any other plaintiff to pursue. It is then submitted that these findings alone merit an award of costs in favour of the plaintiff. I do not agree. *Locus standi* is a basic threshold requirement for most litigation, including constitutional litigation, in Ireland. Having *locus standi* in a constitutional action and, indeed, being given a broad latitude to raise arguments because of the transformative effect ratification would have in terms of the possibility of a challenge being brought thereafter, should not be confused with or equated with having an untrammelled right to run that litigation without bearing the usual risk as to costs. If the plaintiff did not have *locus standi*, he could not bring the litigation at all. Having it permits him to litigate but does not of itself entitle him to the costs of doing so.

10. I might also comment that I do not read s. 169(1)(b) in the way urged on the court. The fact that it is reasonable for an unsuccessful party to raise particular issues in litigation cannot, in my view, become a generalised basis for either excusing that party the burden of paying the costs thereby incurred much less awarding the unsuccessful party the costs of those issues. For the most part, I think that s. 169(1)(b) is directed at looking at whether it was reasonable for a party – and, in particular, the successful party – to pursue issues that were ultimately unnecessary or unsuccessful and then to seek to have the other party pay the costs of litigating those issues. This has frequently given rise to the vexed issue of determining "the event" which costs should normally follow, particularly where the party who has been successful in overall terms has added to the length and the costs of the litigation by raising or contesting issues in a manner which was not reasonable in the particular context. It should, of course, be borne in mind that that matters listed at s. 169(1) are merely factors to be considered by the court in exercising its discretion as to costs. They are not criteria, compliance with which will automatically result in a costs order either way.
11. Further on this theme, the plaintiff points to a number of issues raised by the defendants on which the court favoured the position taken by the plaintiffs. The defendants argue that these were very much subsidiary to its main argument which was in fact accepted by the court. The defendants also argue that in circumstances where the plaintiff's litigation is very broad and wide-ranging, as was the case here, the defendants must of necessity address each of the issues and could not assume that the court would necessarily find in their favour on the core issue which ultimately made many of the other issues moot. I think this is a fair observation on the part of the defendants. I think it is clear from the structure of the judgment that I accepted the central argument made by the defendants but proceeded to consider each strand of the arguments made by the plaintiff (and the defendants' response thereto) both because of the importance of the issues raised and because, in the event of an appeal, it would assist the appellate court to have had all of the potentially relevant issues addressed at first instance. I do not think that the defendants can suffer a costs detriment because of this. It would have been open to the court to simply conclude the judgment having accepted the defendants' central argument

and, not having done so in the interests of both parties, I do not think the defendants can be penalised as to costs.

12. There is one exception to this which is the arguments raised by the defendant as to the plaintiff's *locus standi* which were not arguments raised in response to the case as pleaded by the plaintiff. As it happens, I decided one of those issues in the plaintiff's favour and the other in the favour of the defendants. However, the *locus standi* issues did not take up much of the hearing time compared to the other issues in the case. If I recall correctly, for the most part the plaintiff did not address the *locus standi* arguments orally but relied on their own written submissions in response to the case they understood the defendants to be making on the basis of their written submissions. Whilst an extended and unsuccessful argument on *locus standi* might have a bearing on the costs order to be made in another case, I do not think it does in this case.
13. Secondly, the plaintiff points to the High Court judgment in *Collins v. Minister for Finance* [2014] IEHC 79 in which the court identified a number of principles which courts had applied in previous cases departing from the ordinary rule in relation to costs. It is important to bear in mind that, in light of the Supreme Court judgment in *Dunne v. Minister for the Environment* [2008] 2 IR 775, these are not categories of cases, as the plaintiff has sought to characterise them, much less categories of case to which particular costs consequences will inevitably follow. Rather, they are indicative of how previous courts have exercised the discretion available to the court in unsuccessful constitutional litigation.
14. The plaintiff argues that the case falls into a number of these "categories" including arguing that it is a test case by analogy with *P.C. v. Minister for Social Protection (No. 2)* [2016] IEHC 343. Again, I do not agree. In *P.C.*, the proceedings raised issues as to the legal nature of the plaintiff's interest (if any) in social insurance contributions made on his behalf during his working life, the plaintiff having been refused a state contributory pension on the grounds that he was a prisoner. Binchy J. held that the case qualified as a test case because, if it had succeeded, it "*would inevitably result in a large number of claims being made against the State or an emanation of the State*". In the particular case, he acknowledged that had the plaintiff been successful, it would have impacted on the claims of many others currently disqualified from entitlement, not to mention claims for refunds of payment denied to persons affected by the provision in the past.
15. In my view, a test case classically covers the situation where the outcome of litigation brought by a particular plaintiff on the basis of his or her particular circumstances, has the potential to affect a multiplicity of others in a similar if not an identical position. The legality of or the interpretation and application of the eligibility criteria for social welfare payments would be typical of the type of case that qualifies as a test case – depending of course on the particular circumstances. In this case, the plaintiff points to two things, firstly, the fact that there is another set of High Court proceedings in being challenging the ratification of CETA and, secondly, the fact that there may be other investor protection treaties in the future. I do not think that either of those facts are sufficient to

treat this case as a test case. Where something is the subject of intense public debate, there is often more than one set of legal proceedings brought to challenge it but that does not make the first case heard a test case in the sense discussed by Binchy J. in *P.C.* In addition, it is not certain that there will be other investor protection treaties in the future or, if there are, that the terms of those treaties will be similar as regards the issues of concern to the plaintiff or that the position as a matter of EU law will not have changed such as to ensure that this case can be regarded as a test case for all potential challenges to international investor protection treaties that have not yet been entered into.

16. That said, I do accept the plaintiff's characterisation of the proceedings as ones which raised novel questions of constitutional law in respect of the State's adherence to international treaties with binding tribunal mechanisms and as proceedings which are, of themselves, of clear public interest. I also accept, although with some hesitation, that the plaintiff had no personal interest in the outcome of the proceedings in the sense of his having any financial, property or beneficial interest at stake. However, in the case of a politician litigating issues in respect of which political decisions may also have to be taken, high profile litigation certainly associates that politician with those issues in the mind of the public and, regardless of the outcome, does potentially confer a political advantage and a consequent benefit to the individual concerned.
17. Looking at the *Collins* principles, the case is not one in which the constitutional issues touch on sensitive aspects of the human conditions nor is the outcome, although significant in terms of the separation of powers, one of far-reaching importance in an area of the law of general application such as divorce, education, social welfare or the criminal law (being the types of examples used in *Collins*). Of course, *Collins* is not a checklist of criteria which must be satisfied in order for a court to exercise its discretion in making a costs order in favour of an unsuccessful plaintiff but rather an analysis of the principles which have been applied in cases of this nature. In an overall context, I am satisfied that the issues in this case were of significant constitutional weight and importance, that the legal issues raised were complex and there was a clear public interest in having them determined before the proposal to ratify CETA comes back before Dáil Éireann. For those reasons, I am prepared to depart from the normal rule that costs should follow the event and to make an order for costs in favour of the plaintiff.
18. Finally, as is pointed out in *Collins*, given the discretionary nature of the power being exercised by the court, even where it decides to make an order for costs in favour of an unsuccessful plaintiff, it does not follow that that order will in all cases cover the entire of the plaintiff's costs. A number of cases have been cited to me by both sides in which unsuccessful litigants were awarded varying proportions of their costs, most usually 50% but sometimes as low as one-third or as high as 75%. There does not appear to be any clear authority identifying principles by reference to which a court might decide the appropriate proportion of costs to award to an unsuccessful plaintiff in these circumstances. The plaintiff's submission suggests that any deduction from full costs is usually referable to some specific factor in the proceedings but I am not entirely convinced that this is always the case.

19. I think it important to note that the main clause in s. 169(1) suggests that the court's discretion to make an award which departs from the ordinary rule should be based on two factors. The first is the particular nature and circumstances of the case and the second is the conduct of the proceedings by the parties having regard, in particular, to the factors set out from sub-para. (a) to (g). I do not think that any of the factors listed at (a) to (g) are of particular relevance in this case. The parties themselves do not take issue with the conduct of the other either in the circumstances giving rise to the proceedings or the conduct of the proceedings themselves. Therefore, I think the question falls to be resolved primarily by reference to the particular nature and circumstances of the case. As noted above, I am satisfied that the nature and circumstances of the case are sufficient to justify departure from the normal rule and making an award of costs in favour of the unsuccessful plaintiff. However, in light of the fact that the defendants would normally expect to receive an order for costs having succeeded in the defence of the proceedings and the fact that, apart from raising questions as to *locus standi*, there is nothing in the defendants' conduct of the proceedings which could be said to have added to the cost or otherwise warranted a penalty being imposed on them, I propose to award the plaintiff 50% of his costs including reserved costs.