

THE HIGH COURT

[2022] IEHC 102
[Record No. 2021 2 R]

BETWEEN

DERMOT HANRAHAN

APPELLANT

AND

REVENUE COMMISSIONERS

RESPONDENT

JUDGMENT (No. 2) of Ms. Justice Stack delivered on the 24th day of February, 2022

Introduction

1. This judgment addresses the costs of these proceedings, an appeal by way of case stated from the Appeal Commissioners, arising out of my principal judgment delivered on 14 January, 2022.
2. There is no dispute between the parties that the matter is governed by ss. 168 and 169 of the Legal Services Regulation Act 2015 and Order 99 as amended with effect from 3 December, 2019.
3. The appellant's written submissions say that he has won the "event" and should be entitled to his costs, while Revenue submit that there should be no order as to costs.
4. As noted by the Court of Appeal on at least two occasions, it is not entirely clear whether s. 168 of the 2015 Act is intended to replicate the old rule that costs follow the event, or whether it has replaced the concept of the "event" with the principle that only a party who has been "entirely successful" should be entitled to all of the costs of the action. I return to this issue below.
5. As is apparent from the principal judgment, there were four issues in the case. Of these, the first issue in relation to the applicability of s. 955 (2) of the Taxes Consolidation Act 1997, as amended ("the TCA"), and the second issue as to whether the Transaction as set out in the Determination of the Appeal Commissioners was a "tax avoidance transaction" within the meaning of s.811 TCA, took up the vast majority of the three-day hearing. I agree with the submission of Revenue that they took up roughly equal time.
6. As is apparent from my principal judgment, Revenue were successful on the time limit point, whereas the appellant was successful on the substantive issue.
7. Some time was also used to address the issue of whether the Notice of Opinion of 23 December, 2009, was void as containing a misdescription of the Transaction and on whether, as contended for by the appellant, the issue of double taxation should have been dealt with in the Notice of Opinion. Again, I agree with Revenue that very little time was spent on the double taxation issue, in respect of which the appellant was entirely unsuccessful, or the issue as to the need to amend the misdescription in the Notice of Opinion, which was ultimately not necessary to resolve definitively.
8. Revenue submits that the appellant was not "entirely successful" within the meaning of s. 168 of the 2015 Act, but only "partially successful" as he succeeded only on the

substantive issue. It is also submitted that Revenue were themselves "*partially successful*" as they succeeded on the time limit issue. As a result, they say the appellant should only get 50% of his costs, representing the time spent on the issue on which he was successful whereas Revenue should get 50% of the costs, representing their success on the time limit issue.

9. The consequence, according to Revenue, is that there should be no order as to costs, as orders reflecting the partial success of each side would essentially cancel each other out.

Relevant legal principles

10. The submissions of the parties on costs has therefore highlighted the question of whether the concept of a party being "*entirely successful*" in s.169 is one and the same as identifying the winner of the "*event*" as understood prior to the introduction of the 2015 Act.
11. Under the old regime, it appears that the appellant would be seen to have won the "*event*" as both the time issue and the substantive issue were directed to his attempt at setting aside the Notice of Opinion. Whether this was done because the Notice of Opinion was out of time, or incorrect in law in its opinion that the transaction in question was a "*tax avoidance transaction*" was immaterial: in either situation, the appellant would have successfully avoided the Notice of Opinion and the "*tax consequences*" set out therein.
12. In *Veolia Water UK plc v. Fingal County Council (No. 2)* [2007] 2 I.R. 81 ("*Veolia*"), Clarke J. (as he then was), in considering how to identify what the "*event*" was and thereby identify the winning party, stated (at para. 12):

"[I]f the moving party [is] required to bring either the proceedings as a whole (where the costs of the litigation as a whole are under consideration) or a particular interlocutory application (where those costs are involved) in order to secure a substantive or procedural entitlement, which could not be obtained without the hearing concerned, then that party will be regarded as having succeeded even if not successful on every point."
13. As explained by Murray J. in *Chubb European Group SE v. The Health Insurance Authority* [2020] IECA 183 ("*Chubb*"), the decision in *Veolia* can be summarised as meaning that there may be cases in which the costs outcome differs very significantly depending upon whether the court decides that there is an "*event*". When a winning party on an event is identified that party will – irrespective of the number of issues in which it prevails – obtain all the costs of presenting the general legal and background issues that were applicable to all grounds. However, where it is deemed that it is not possible to determine the "*event*", an outcome which would be rare, the same costs of the same hearing are liable to be allocated quite differently with those general legal and background costs being distributed across the various issues to which they were applicable.
14. I think it is clear in this case that the "*event*" was whether the Notice of Opinion would be upheld or not. Therefore, if one applied the old rule of "*costs follow the event*", the

starting point for this costs application would be that the appellant would be entitled to all of his costs of the case stated, including all three days of the hearing.

15. The question is whether ss. 168 and 169 of the 2015 Act alter that situation. In *Chubb, Murray J.* summarised the applicable principles, which are now well known. The first principle identified was that the general discretion of the court in connection with ordering costs is preserved. This is clear from s.168 (1)(a) of the 2015 Act and O.99, r.2 (1) of the Rules of the Superior Courts.
16. In addition, where a party has been "*entirely successful*" in the proceedings, he or she is "entitled" to an award of costs against the unsuccessful party, unless the court orders otherwise and where the court orders otherwise, it must give a reason for doing so.
17. Where, as Revenue contend in this case, a party has only been "*partially successful*" the court may exercise its discretion so as to make an order that the partially successful party will recover costs relating to the successful element or elements of the proceedings. But even where a party has not been "*entirely successful*", the court should still have regard to the matters set out in s. 169(1) when deciding whether to award costs.
18. It is not the case, therefore, that a party who has only been "*partially successful*" cannot recover all of the costs of the action and this was made absolutely clear in *Higgins v. Irish Aviation Authority* [2020] IECA 277 ("*Higgins*") at para. 10.
19. Revenue contends in this case that the appellant has only been "*partially successful*" and that therefore he should only get the costs of that portion of the proceedings in respect of which he was successful. However, I think it is clear from ss. 168 and 169, and from the judgments in *Chubb* and *Higgins*, that this is not in any sense a strict rule, as the court retains its general discretion. The power to award a party who has only been partially successful in proceedings only those costs relating to the successful element or elements of the proceedings, is found in s.168 (2), which is expressly said to be without prejudice to the more general discretion in s.168 (1).
20. There is, therefore, no rule that where one does not succeed in every aspect of the case, one can only get the costs relating to those elements of the case in which one was successful.

Application of relevant legal principles to this case

21. The starting point under the new regime is still to identify the winner. As explained by Simons J. in *Náisiúnta Leictreach Conraitheoir Eireann Cuideachta Faoi Theorainn Rathaíochta v. The Labour Court* [2020] IEHC 342 ("*Naisiúnta Leictreach*"), subsequently approved in *Higgins*, it is possible to decide the winner and loser of a case by reference to three different levels of analysis. At paras. 42 to 44, Simons J. identified these as follows:
 - (i) by reference to the relief obtained;
 - (ii) by reference to separate and distinct issues; and

- (iii) by reference to the specific arguments relied upon.
22. The third approach, whereby a scorecard is kept as to success or failure on each individual argument was rejected by Simons J. and by the Court of Appeal in *Higgins* at para. 13. Such an approach would result in cumbersome hearings, resulting perhaps in significant costs being incurred merely arguing about costs, and would do the legal system little credit.
23. However, the second approach suggested by Simons J. found favour in *Náisiúnta Leictreach* itself and *Higgins*. At para. 16, the Court of Appeal in *Higgins* held that the correct approach in applying s. 169 (1) is “to look beyond the overall result in the case and to consider whether the proceedings involve separate and distinct issues.”
24. Applying the approach in those judgments to this case, it appears:
- (i) it is not appropriate to award costs to the appellant solely on the basis that he undoubtedly won the “event”;
 - (ii) it is not appropriate to look at individual arguments on any of the four issues to see which side was successful, and it should be noted that both sides won and lost individual arguments on the two main issues;
 - (iii) the appellant has only been “*partially successful*” because, while he succeeded on the question of whether the Transaction was a “*tax avoidance transaction*”, he did not succeed in demonstrating that the Notice of Opinion was out of time by reason of s. 955 (2) TCA.
25. Consequently, the appellant is not “*entitled*” to his costs, but the court still has a full discretion as to how costs should be awarded.
26. Before coming to a conclusion as to how this Court should exercise its discretion, it should be noted that in *Náisiúnta Leictreach*, Simons J. ultimately awarded the full costs to the party who had been successful in the sense of winning the overall “event”. This was because the arguments in which he was unsuccessful did not add materially to the length or costs of the proceedings, and moreover it had been reasonable to raise them. In *Higgins*, the issue turned on the making of a *Calderbank* offer determining the approach of the court to the costs of the appeal, but that is not an issue which arises in this case. In *Chubb*, the appellant had won, but on a very narrow ground which had not taken up much of the hearing and had failed in parallel judicial review proceedings which it had brought along with the statutory application in which it had prevailed. (Indeed, in *Higgins*, it was noted that *Chubb* might be “*well outside the norm*” in private law litigation: see para. 15.)
27. As a preliminary point, I would note that, under the pre-2015 Act regime as to costs, the appellant undoubtedly won the “event”, and would *prima facie* be entitled to all of his costs. Although the issues in the case were legally complex, they were argued by both sides in a concise fashion over three days. It is true that, as pointed out in *Chubb*, even

the old rule that costs follow the event permitted the "event" to be identified distributively, as demonstrated by *Kennedy v. Healy* [1897] 2 I.R. 258, where a plaintiff succeeded on one cause of action (monies had and received) but failed on another (trespass), brought in the same civil action.

28. However, in this case, there was nothing akin to a claim and counterclaim or, as occurred in *Kennedy v. Healy*, two separate causes of action tried together, and the two principal issues were directed entirely to the same ultimate purpose, ie, a consideration of whether the Appeal Commissioners had erred in law in upholding the Notice of Opinion.
29. However, even though he has won the "event", the appellant has not been "entirely successful" within the meaning of s. 169(1) of the 2015 Act, because he did not succeed in showing that the time limit in s.955(2) TCA applied to him. While he was successful on a number of the individual arguments made by both sides in relation to the applicability of s.955(2), he ultimately failed because s. 811(5A) was enacted some years after he challenged the Notice of Opinion by appeal to the Appeal Commissioners, and that plainly disapplied s. 955(2), at least insofar as the tax consequences identified in the Notice of Opinion were concerned. On the facts of this case, that meant the appellant could not invoke s. 955 (2), which would otherwise have applied to him in relation to the 2005 tax year.
30. Revenue relied strongly at the hearing of the costs application on the fact that I found no ambiguity in subs. (5A), as inserted by s. 130 of the 2012 Act. However, it must be borne in mind that the 2012 Act which was enacted on 31 March, 2012, over two years after the appeal was made to the Appeal Commissioners, and applied to assessments or amended assessments made on or after 28 February, 2012. In circumstances where the section operated, not only to alter the appellant's liability to tax but also, at least in part, to change the outcome of an extant appeal to the Appeal Commissioners, I think it was reasonable of the appellant to have challenged, to the extent to which he could do so in these proceedings, the retrospective operation of the section.
31. In addition, I would reiterate that the case was argued concisely over three days. As argued by Revenue, the substantive issues as to whether the Transaction was or was not a "tax avoidance transaction" within the meaning of s. 811 took approximately 50% of the time. Accordingly, the raising of the additional issues as to time, as well as being reasonable in itself, did not materially add to the time spent on the case as it would always have required written submissions and the preparation of booklets, and would always have gone well into a second day's hearing.
32. Finally, I note that one of the arguments in *Higgins* was that if an award of costs on the issues on which the appellant there was unsuccessful were set against the award of costs in his favour, his award in that case would be set at nought and he might be left with a significant legal bill. In exercising any discretion, whether as to costs or otherwise, achieving a result which is just overall must surely rank highly in the approach to be taken by the court. In this case, if Revenue's approach were adopted, the appellant would have achieved a significant success but would have had to fund that entirely from his own

resources, even though Revenue had failed on the central substantive point in the appeal. That would hardly be a just outcome.

33. In saying that, I would add that I do not accept the submission of Revenue that the appellant and the other appellants whose appeals it has been agreed would be determined by the outcome of this appeal, stand to gain significantly from their success. That does not, in my view, stand up to scrutiny. They have only gained in that Revenue had intended to deprive them of substantial sums of money on what has been found to be a legally erroneous basis. In any event, were it the case that wealthy appellants could not recover their costs from Revenue, that might dissuade even litigants with significant means from asserting their rights. I do not believe this is the correct approach.
34. I would also add that I agree with the submission of the appellant that Revenue is incorrect in arguing that on a case stated, in order to be regarded as "*entirely successful*", an appellant would have to succeed on all questions in the case stated. This would elevate form over substance in circumstances where it may not, for example, be necessary to decide all the questions in a case stated.
35. Similarly, I do not agree with the appellant's submission that the considerations which persuaded the Court of Appeal in *Kenny Lee v. Revenue Commissioners* [2021] IECA 114 to make no order for costs, even though Revenue had been successful, are present in this case. It was made clear at para. 20 that this was done on the basis that clarity had been brought to the jurisdiction of the Appeal Commissioners, in circumstances where the relevant statutory provisions were less than clear, and the unsuccessful party had had to adopt a position on the extent of that jurisdiction and had acted reasonably in doing so. However, the Court of Appeal also stated quite explicitly that taxpayers generally should not expect different treatment on costs from any other litigant when they litigate the meaning of a taxation provision. In my view, the appellant is not in a special category as occurred in *Kenny Lee*.

Conclusion

36. For those reasons, I would exercise my discretion in favour of granting the appellant all of the costs of the case stated (including, for the avoidance of doubt, the hearing of the costs application itself), to be adjudicated in default of agreement. There will be a stay on that order as Revenue intend to appeal the principal judgment.