

**APPROVED**

**[2023] IEHC 693**



THE HIGH COURT  
JUDICIAL REVIEW

2021 1099 JR

BETWEEN

BARRY SHEEHAN

APPLICANT

AND

CORK CITY COUNCIL

RESPONDENT

**JUDGMENT of Mr. Justice Garrett Simons delivered on 19 December 2023**

## **INTRODUCTION**

1. This judgment addresses the allocation of the legal costs of these judicial review proceedings. The proceedings had been listed for hearing on 14 November 2023. The Applicant ultimately withdrew the proceedings. The Applicant contends that this was done in circumstances where the Local Authority belatedly filed two affidavits, the content of which is said to have fundamentally altered the defence to the proceedings. The Applicant seeks to

NO REDACTION REQUIRED

characterise these events as a unilateral act on the part of the Local Authority which rendered the proceedings moot.

## **PROCEDURAL HISTORY**

2. These proceedings arise out of a dispute in relation to the regulation of on-street parking in the area within which the Applicant resides. The principal relief sought in the proceedings is an order of *certiorari* quashing a fixed charge penalty notice issued by the Local Authority in respect of the Applicant's motor vehicle. The notice relates to the parking of the vehicle on 24 September 2021. This relief had been sought on the grounds that the road upon which the vehicle had been parked is not a "*public road*" for the purposes of the Road Traffic Acts 1961 to 2018.
3. The stance adopted by the Local Authority in its opposition papers had been that the relevant road had acquired the status of a "*public road*" otherwise than by way of statutory declaration. This position changed shortly before the scheduled hearing date of 14 November 2023. More specifically, the Local Authority exhibited, for the first time, records which indicated that the relevant road had, on 19 June 1961, been declared to be a "*public road*" pursuant to Section 25 of the Local Government Act 1925 (as amended). The Applicant now accepts that he cannot succeed on this aspect of his case.
4. The Local Authority is critical of what it perceives as a failure by the Applicant to research the status of the relevant road prior to the institution of the judicial review proceedings.
5. A declaration had also been sought, in the judicial review proceedings, that the Cork City Council Parking Bye-Laws 2016 are *ultra vires*. This relief had

been sought on the grounds that the bye-laws had sought improperly to delegate a reserved function. This aspect of the proceedings was rendered moot upon the adoption of new bye-laws on 14 March 2022. The new bye-laws came into effect on 1 May 2022.

6. Both parties filed written submissions on the question of legal costs and supplemented these at a short oral hearing on 18 December 2023.

## **DISCUSSION**

7. The first issue to be addressed is as to the precise basis upon which costs are to be allocated. The Applicant seeks to characterise the proceedings as having been rendered moot as a result of the late introduction of evidence establishing that the relevant road had been declared a “*public road*”. Conversely, the Local Authority contends that the onus of proof was always on the Applicant and that, faced with incontrovertible evidence, the Applicant has withdrawn or discontinued his proceedings.
8. The latter characterisation is the more accurate. The Applicant had sought judicial review on an incorrect factual basis. The evidence now before the court establishes that the relevant road is undoubtedly a “*public road*”. Accordingly, the grounds of challenge in respect of this aspect of the case fall away. The application for judicial review is misconceived and cannot succeed.
9. The default position is that where a party discontinues proceedings, then it is generally liable to pay the other side’s costs. This reflects a principle similar to that underlying Section 169 of the Legal Services Regulation Act 2015, namely that a party who has been successful in proceedings is normally entitled to recover its costs against the losing side.

10. The distinctive feature of the present case is that the winning point, namely that the road had been declared to be a public road, was only disclosed belatedly. Had this clincher been made known earlier, the Applicant would not have pursued the proceedings as far as he did.
11. The Local Authority submits that it would have succeeded in its defence of the proceedings in any event, i.e. even without reliance upon the newly discovered declaration, saying that it had already adduced sufficient evidence to support a finding of dedication and acceptance as a public right of way. However, the fact of the matter is that the Local Authority sought to bolster its defence to the proceedings by reliance on the declaration. This represented an entirely new ground of opposition. The Local Authority cannot approbate and reprobate: having chosen to put forward a new ground of opposition, the Local Authority cannot seek to minimise its importance.
12. The court is entitled, in the exercise of its statutory discretion in respect of costs, to have regard to the manner in which the parties conducted all or any part of their cases. The parties to judicial review proceedings, whether an applicant or a respondent, are required under Order 84 of the Rules of the Superior Courts to plead their case with particularity. It is essential that the parties and the court know the precise parameters of the proceedings. Here, the Local Authority executed a *volte face* the week before the scheduled hearing date. The entire complexion of the case changed as the result of the introduction of the newly discovered evidence.
13. There is no obvious reason as to why the research exercise, which was ultimately carried out by the Local Authority in November 2023, could not have been performed prior to the filing of the opposition papers in July 2022.

The research exercise consisted of an online search of newspaper archives. This search threw up two newspaper articles which identified a date upon which the road is reported as having been declared to be a “*public road*” (17 April 1961). This date was then used to trace the minutes of the relevant meetings of the elected members. These are stored at the City and County Archives. The minutes of 19 June 1961 record that the relevant road was declared to be a “*public road*” pursuant to Section 2 of the Local Government Act 1953 (which amended Section 25 of the Local Government Act 1925).

14. Had the Local Authority pleaded, as part of its opposition papers, that the road had formally been taken in charge, then these proceedings would, presumably, have been withdrawn. Instead, the Applicant was led to believe that his claim was being defended on the less robust basis that there had been acts of dedication and acceptance as a public right of way. As a result of the Local Authority’s failure to disclose that the road had been declared to be a “*public road*”, the Applicant pursued the proceedings further than he would otherwise have done. This will have resulted in his incurring additional costs unnecessarily. It also resulted in a hearing date having to be vacated at the eleventh hour, which is contrary to the efficient allocation of scarce judicial resources.
15. The costs order should reflect the disruptive effect of the Local Authority’s late change in position. The appropriate order is that each side should bear its own costs. The Local Authority is to be denied the legal costs which it would otherwise have been entitled to recover from the Applicant. This is sufficient to redress the balance. It would be going too far to allow the Applicant to recover his legal costs against the Local Authority. It would not be an

appropriate exercise of the statutory discretion under the Legal Services Regulation Act 2015 to reward an *unsuccessful* applicant with a costs order in his favour. To do so would run the risk of encouraging unmeritorious proceedings. Had the Local Authority identified that the relevant road had been declared a “*public road*” at the time it filed its opposition papers, it would have been entitled to recover its legal costs as against the Applicant. The Applicant is only being spared this costs liability because of the tardiness of the Local Authority in seeking out this evidence.

16. In summary, the costs order strikes an appropriate balance between encouraging parties to plead their cases with particularity whilst avoiding the risk of encouraging unmeritorious proceedings. The costs order also reflects the public law nature of the proceedings. It is important that public authorities make all reasonable efforts to ensure that all relevant material is placed before the court in judicial review proceedings. The declaration of a public road is a solemn legal event and is formally recorded as part of the minutes of the meetings of the elected members. There was an obligation on the Local Authority to make reasonable efforts to seek out the relevant records.
17. It is correct to say, as counsel for the Local Authority does, that the Applicant could have sought out the records himself in the publicly accessible archives. The fact that a member of the public, such as the Applicant, might have been able to locate the record independently is appropriately reflected by the court refusing to make a costs order in his favour. Had the record been one which was only readily accessible to the Local Authority, then consideration would have had to be given to the making of a partial costs order in the Applicant’s favour.

18. Turning next to the position in relation to the challenge to the validity of the Cork City Council Parking Bye-Laws 2016, this aspect of the case is moot in the strict sense. The proceedings were, in effect, overtaken by events. The making of the new bye-laws had the result that the impugned bye-laws were superseded. There is no practical benefit, therefore, in pursuing a challenge to same.
19. The default position in circumstances where proceedings are rendered moot is that each party should bear its own costs. As explained by Murray J., writing for the Court of Appeal, in *Hughes v. Revenue Commissioners* [2021] IECA 5 (at paragraphs 31 to 34), different considerations apply where the event, which renders the proceedings moot, is undertaken in response to the proceedings. There is no evidence to suggest that this is the position in the present case. Rather, the procedure for making new bye-laws had commenced well before the proceedings were instituted. Accordingly, the default position applies and each party should bear its own costs in respect of this aspect of the proceedings.

### **CONCLUSION AND FORM OF ORDER**

20. For the reasons explained, the interests of justice dictate that each party should bear its own costs of the proceedings. Accordingly, the court, in the exercise of its discretion under Part 11 of the Legal Services Regulation Act 2015, makes no order as to costs.
21. The proceedings will be struck out with no further order.

#### *Appearances*

Niall Handy SC and Kevin Bell for the applicant instructed by Cahill & Cahill  
Pearse Sreenan SC and Eoin Sreenan for the respondent instructed by the Law Agent

Approved  
Gemma S. Mans