



THE SUPREME COURT

S:AP:IE:2019:000101

Clarke C.J.
O'Donnell J.
MacMenamin J.
O'Malley J.
Baker J.

In the Matter of the Freedom of Information Act 2014

Between/

The Minister for Communications, Energy and Natural Resources

Appellant/Respondent

And

The Information Commissioner

Respondent/Appellant

And

Gavin Sheridan

And

E-Nasc Éireann Teoranta (t/a “enet”)

Notice Parties

RULING of the Court on the Application of the First Notice Party, Gavin Sheridan, for

Costs against the Minister

1. The Information Commissioner and the Minister have agreed to bear their own costs of the appeal and not to seek an order for the costs against any other party, and accordingly no order for costs is required as between these parties.
2. The Commissioner makes no argument regarding the costs of the first notice party against the Minister.

3. Judgment was delivered by this Court on 25 September 2020 and the practical effect of the judgment was that the decision of the Commissioner given on 30 November 2015 was quashed, and the matter was remitted to the Commissioner for further consideration and in the light of the reasoning contained in the judgment of Baker J., with which the other members of the Court agreed.

4. In summary, the first notice party argues that the primary focus of the written submissions filed by the participating parties and the bulk of the time engaged in the oral argument was the role played by the presumption contained in s. 22(12)(b) of the Freedom of Information Act 2014, and how it was to be applied to records which are exempt under the Act and in the context of the public interest balancing test in section 36(3). The Minister made the argument and the Court of Appeal had agreed, that the presumption did not apply to exempt records. That decision was reversed on the appeal to this Court.

5. This Court also rejected the argument that the presumption in favour of release did not apply to both parts of section 36.

6. The Minister was successful in persuading the Court that the Commissioner erred in requiring that an FOI body demonstrate “exceptional circumstances” in order to justify a refusal to release, and that this posed too high a threshold.

7. The Minister cross-appealed under s. 35 of the Act and the cross-appeal was dismissed.

8. The first notice party argues that he was entitled to participate to defend a decision on the application which he had made to the Commissioner, and was quite properly included as a notice party. He argues that while he supported the submissions made by the Commissioner, his approach was distinct from that of either the Commissioner, the decision maker, or that of the Minister, the FOI body.

9. He argues that there was no overlap or commonality of interest such as to engage the analysis in *Doyle v. Private Residential Tenancies Board* [2016] IEHC 36.

10. The Minister on the other hand argues that he is entitled to costs against the first notice party or in the alternative, that there should be no order as to costs. The Minister argues that he has been successful in obtaining the reliefs sought and in his argument that the Commissioner erred in law and that Mr. Sheridan had joined the appeal on all issues, including those issues decided against the Commissioner. It is argued that in that sense Mr. Sheridan's opposition to the appeal has been unsuccessful, and that the decision of the Commissioner has been set aside. It is argued that the primary finding of this Court was that the Commissioner had wrongly interpreted section 36.

11. It is also argued that this Court found that the public interest engaged was not the general public interest in disclosure and transparency and that the Commissioner erred in the test that actually applied. In particular, the Court held that the size of the contract was not a proper basis for disclosure of itself.

12. The Minister argues that a notice party will usually be expected to bear his, her or its own costs. It is argued that the submissions of Mr. Sheridan echoed those of the Commissioner and that no separate legal opposition was advanced by Mr. Sheridan, either orally or in writing.

13. The first notice party was awarded costs in the High Court. This was reversed by the order of the Court of Appeal.

Decision

14. Because of the constitutional threshold for appeals to this Court, all cases admitted to the Court are of public importance and this does not form a suitable basis for assessing the entitlement to costs in the present case.

15. Section 24(7)(a) and 24(8) of the FOI Act deals with costs and provides that the court may if it considers that a point of law concerned was of exceptional public importance, order that some or all of the costs of a person other than the head be paid by the FOI body concerned.

No provision is made for the payment of costs against another party, nor for payment of costs to a notice party, and the section deals with the costs of appellants.

16. In making a decision as to costs, the Court must have regard to the terms of s. 169 of the Legal Services Regulation Act 2015, which sets out as a general principle that a party will be entitled to award of costs if “entirely successful” unless the Court considers that particular specified factors apply.

17. The arguments advanced by the notice party were not wholly successful, but it is in the interests of justice that he be awarded some of the costs of these proceedings.

18. This Court is of the view that the focus of Mr. Sheridan was primarily to support the argument of the Commissioner and to that extent, Mr. Sheridan cannot be said to have succeeded in the appeal. However, the points raised on this appeal regarding the correct approach benefited from the first notice party’s submissions, although it cannot be said that the propositions advanced on his behalf were entirely successful.

19. As noted above, the High Court awarded costs to Mr. Sheridan and this order was reversed on appeal, although the Minister points out that he did not seek costs against Mr. Sheridan in the Court of Appeal.

20. While this Court could adopt a formula of granting Mr. Sheridan a portion of the costs in each court, it considers that a more just approach to the application for costs, and one that would be likely to result in a more cost effective and speedy resolution of the measure of those costs, is to award Mr. Sheridan all of his costs in the High Court, and to make no order as to costs in this Court.

21. As no application for costs was made by Mr. Sheridan in the Court of Appeal this Court does not propose making any order in respect of those costs.

22. The net effect of this order is that Mr. Sheridan obtains full costs in one court only.