AN CHÚIRT UACHTARACH
THE SUPREME COURT

O'Donnell C.J.
Woulfe J.
Hogan J.
Collins J.
Donnelly J.

S:AP:IE:2023:000032

[2024] IESC 18

BETWEEN/

MD (A MINOR SUING BY HIS FATHER AND NEXT FRIEND MD)

APPLICANT

AND

BOARD OF MANAGEMENT OF A SECONDARY SCHOOL (NO.2)

RESPONDENT

RULING of the Court as to costs delivered electronically on the 13th day of May 2024

Introduction

1. The Court has already delivered its judgment in a direct appeal from a decision of the High Court on 10th April 2024: see *MD v. Board of Management of a Secondary School* [2024] IESC 11. In the wake of the separate judgments delivered by O'Donnell C.J., Hogan and Collins JJ. the Court invited the parties to make submissions in writing as to costs. We indicated that we would rule on the matter without the necessity for an oral hearing, save if

such was considered to be necessary by the Court. Having deliberated on the matter, the Court does not think that an oral hearing is warranted and this, accordingly, is the ruling of the Court as to costs.

2. While the full background to the appeal is set out in the various judgments of the Court, by way of summary it can be said that MD was a secondary school student in his Junior Certificate year at a particular secondary school. The School wished to expel MD in the wake of serious allegations which had been made against him qua pupil.

3. In the wake of these allegations the Board of Management met on 17th January 2023 and made a preliminary decision to expel the student from the school. By virtue of s. 24(4) of the Education (Welfare) Act 2000 ("the 2000 Act") a period of 20 school days must elapse before the Board can make a final decision to exclude a student. Taking account of the mid-term break the 20-day period was due to expire on 2nd March 2023. By letter dated 26th January 2023 MD's solicitors wrote to the Principal of the school calling upon him to permit the student to remain in the school pending the outcome of a statutory appeal of the expulsion decision to the Secretary General of the Department of Education and Skills pursuant to s. 29(1) of the 1998 Act.

4. The letter of 26th January 2023 threatened legal proceedings to compel the school to maintain the enrolment of MD pending the outcome of the s.29 appeal. The Chairman of the Board of Management replied by letter dated 30th January 2023 saying that there was no provision in the Department of Education's procedures "whereby a student could remain in a school pending a final determination of a Board of Management meeting that the student in question should be permanently excluded."

5. MD then sought to challenge the "decision" of the school not to allow the student to remain in the school pending the outcome of the s. 29 appeal. On 14th February 2023 Meenan J. granted the student leave to apply for judicial review in respect of these reliefs. He also

made an order staying the decision of the Board of Management to exclude the student from the school pending the determination of the s. 29 appeal by the appeal committee. Section 29 does not itself provide for any stay procedure pending the outcome of the appeal against any expulsion decision.

6. On 3rd March 2023, the school applied to the High Court (Bolger J.) to have the interim injunctive orders which had been granted by Meenan J. set aside. This application was refused by Bolger J. in a judgment delivered on 8th March 2023. The Board of Management met on the day after Bolger J. delivered judgment and determined that the student should be permanently excluded from the school. The student duly invoked the s. 29 appeal procedure. That appeal was finally rejected by the Appeal Committee on the 8th June 2023.

7. This Court granted leave pursuant to Article 34.5.4º of the Constitution on 25th May 2023 for a direct appeal from the decision of Bolger J. in the High Court: see [2023] IESCDET 68. While it was accepted that the underlying issue had been rendered moot by reason of the decision of the Appeal Committee, this Court nonetheless considered that leave should be granted in view of the importance of the underlying issues and the fact that they had a systemic importance both for the education sector but also in respect of the practice governing the grant of interlocutory injunctions.

8. It is fair to say that the School succeeded on all issues in its appeal to this Court. We stressed that the ordinary practice governing the grant of interlocutory relief applied to all such applications before the High Court and irrespective of whether, for example, they were characterised as an application for a stay in Ord. 84 matters. In addition, all members of the Court considered that the balance of convenience issues had not been properly weighed or considered.

9. Turning now to the question of costs, it is clear that the School has been entirely successful in defending these proceedings within the meaning of s. 169 of the Legal Service

Regulation Act 2015. To that extent, the normal rule is that such a successful litigant is entitled to the costs of the proceedings when duly adjudicated. The question which then arises is whether there are any exceptional circumstances which justify a departure from this ordinary rule. The Court is not, however, persuaded that there are indeed any such circumstances.

10. Three reasons have been advanced in this context by the applicant, MD. First, it is noted that the appeal concerned an issue of public importance and that the appeal had a systemic importance for the manner in which interlocutory relief may be granted in Ord. 84 judicial review proceedings. It is certainly correct to state that the issue is one of systemic importance. But the same can be said almost by definition of every case in respect of which leave has been granted by this Court. If this *in itself* were accepted as a ground for resisting an application for costs, it would mean that in practice this Court would never be in a position to make an award of costs against a losing party.

11. Here it is of considerable significance that the successful appellant was a private party. Different considerations may arise where – as not infrequently happens - the State (or some other public entity) has appealed to this Court on the grounds that the issue concerned has raised an issue of public importance, the resolution of which is in the public interest. These particular considerations do not apply where, as here, the School is a private entity.

12. Second, the point is made that the case was moot, and the Court nevertheless granted leave. That is true, but as this Court noted in *Odum v. Minister for Justice* [2023] IESC 3, the Court's practice in this regard has necessarily changed following the enactment of the 33rd Amendment of the Constitution Act 2013. By the time many cases come on appeal to this Court the issues has been rendered moot by the passage of time. Again, if this particular ground were *in itself* to be accepted as a ground for resisting an application for costs in the context *of an appeal to this Court*, this would mean that in many cases the Court would

find itself unable to make an order for costs in favour of the successful appellant. Very different considerations would have applied had, for example, the case been rendered moot before the High Court could pronounce on the merits.

13. Finally, the Court notes that the order for costs would fall to be made against the applicant who is a minor. This Court would normally be slow to make such an order. The alternative, however, is that the School would be left to bear its own costs – which may well be considerable – and it would have no right of recourse in respect of these costs. All of this would mean that the costs would have to be borne by the School itself and, by extension, the parents and the children attending the School. Furthermore, the applicant and his next friend (his father) must have been aware of the risks of an adverse costs order being made against him in the event that his application for an injunction was unsuccessful, as in the event it has been. In these circumstances the Court considers that there is little alternative to awarding costs against the applicant, MD, his status as a minor notwithstanding.

14. The Court will accordingly direct that the School should be entitled to recover the costs of the interlocutory hearing before Bolger J. in March 2023 and the appeal to this Court when adjudicated and ascertained in default of agreement between the parties.