THE COURT OF APPEAL

Neutral Citation Number [2020] IECA 251
Record Number: 2019/462
High Court Record Number: 2017/955JR

Noonan J.
Faherty J.
Binchy J.

BETWEEN/

JOHN SHERLOCK AND CAROLINE SHERLOCK
AND CAROLINE SHERLOCK AS MOTHER AND NEXT FRIEND OF
EDWARD SHERLOCK (A MINOR), LISA SHERLOCK (A MINOR),
CHANTELLE SHERLOCK (A MINOR),
MICHAEL SHERLOCK (A MINOR), JOHN SHERLOCK (A MINOR),
JASON SHERLOCK (A MINOR), BRENDAN SHERLOCK (A MINOR),
NATHAN SHERLOCK (A MINOR)
AND MARY KATE SHERLOCK (A MINOR)

APPLICANTS/RESPONDENTS

-AND-

CLARE COUNTY COUNCIL

RESPONDENT/APPELLANT

JUDGMENT of Mr. Justice Noonan delivered on the 24th day of September, 2020

Relevant Facts

1. This appeal is concerned solely with costs. The respondents are members of the travelling community and this case concerns their housing needs. The first and second respondents are husband and wife and have nine children who are the remaining respondents. In 2014, the appellant provided housing accommodation for the respondents in a relatively small cottage in a rural setting near Lahinch in County Clare. The respondents claimed that this accommodation was unsuitable for their needs, particularly following the birth of their two youngest children, the last two respondents, who are twins born in 2017.

2. Although this accommodation was provided following an assessment of the respondents' housing needs by the appellant in 2014, there was a factual dispute between the parties as to whether this accommodation was intended to be temporary only pending something more suitable becoming available and whether it was, in fact, suitable to their needs. The respondents consulted their solicitors about the matter who wrote to the appellant on the 13th June, 2017. In that correspondence, described in these proceedings as the "mandamus letter", the respondents' solicitors called upon the appellant to take certain steps regarding their accommodation, in particular to carry out an assessment of their

needs and provide them with appropriate housing in accordance with their rights pursuant to Statute, the Constitution and the European Convention on Human Rights.

3. The mandamus letter was not responded to by the appellant and on the 1st September, 2017, the respondents sought leave from the High Court to apply for judicial review seeking a wide range of reliefs (24 in all), but the main claims of which were an order of mandamus directing the appellant to provide suitable accommodation for the respondents and to carry out an assessment of their needs in that regard. In the course of submissions before this court, counsel for the respondents conceded that his clients were not at any relevant time entitled to an order compelling the appellant to provide them with accommodation and the real focus of the case became the assessment of the respondents' needs. Counsel for the respondents submitted, and it was not seriously contested by the appellant, that this limitation was evident well in advance of the trial of the proceedings and in particular from the respondents' written submissions in the High Court.

4. Despite the evident urgency of the matter requiring the leave application to be dealt with in the long vacation, the proceedings did not come on for hearing until the 8th October, 2019. This appears in large measure to have been due to the fact that there were very significant factual disputes between the parties resulting in some 22 affidavits being sworn. Arising from these factual disputes, the respondents brought a motion seeking leave to cross-examine the appellant's deponents on their affidavits and the court directed that this motion be heard in tandem with the trial of the judicial review proceedings. Unusually for judicial review, six days were set aside for the trial and this was presumably on the basis that if cross-examination was permitted, the case would take significantly longer than a judicial review heard on affidavit only.

5. In September 2019, the month before the case was due to be heard, the appellant contacted the respondents directly, despite both parties having solicitors on record, with a view to inviting them to participate in a housing needs assessment. This was initially arranged to take place on the 12th September, 2019 but was rescheduled at the request of the respondents to Thursday the 3rd October, 2019 at the County Council offices in Ennis. Following this meeting, on the next day, Friday 4th October, 2019, the appellant wrote to the respondents, in a letter delivered by hand to them on that date, stating that the appellant anticipated that a five bedroom house in the north Clare area would shortly become available which may be suitable for accommodating the respondents. The appellant asked the respondents to complete a transfer application form.

6. The matter came on for hearing before Simons J. on Tuesday 8th October, 2019 when both parties were represented by senior and junior counsel and solicitors. When the matter resumed hearing on the next day, the 9th October, after discussion between the court and counsel, the court rose to allow the parties further time to consider their respective positions following the completion of the assessment of the respondents' needs by the appellant on the 4th October. When the court resumed, counsel for the respondents advised the trial judge that the respondents were now prepared to sign the

transfer application form. Counsel pointed to the fact that the effect of the assessment was that the proceedings had been rendered moot because even had they been successful, this is all that could have been achieved by the respondents. Counsel then applied for the respondents' costs on the basis that they followed the "event".

7. This application was resisted by counsel for the appellant on the basis that the proceedings had not in fact been rendered moot but rather, the respondents had elected not to proceed in the light of the "practical solution" that had evolved. Counsel for the appellant said that the correspondence between the parties spoke for itself and that since the respondents were withdrawing the case, the appellant would be entitled to seek its costs but in the circumstances was suggesting that the appropriate order should be no order as to costs. The court heard further submissions on the issue of costs and reserved its judgment, which was subsequently delivered on the 16th October, 2019.

Judgment of the High Court

8. In the introduction to his judgment, the trial judge noted that the within costs application arose against a background where the proceedings were, in effect, rendered moot by the making of an offer of alternative accommodation to the respondents by the appellant. He noted that the relevant principles to be applied were to be found in the judgments of the Supreme Court in *Cunningham v President of the Circuit Court* [2012] 3 IR 222 and *Godsil v Ireland* [2015] 4 IR 535. The trial judge summarised the issue. The respondents submitted that the principal relief sought in the proceedings had been an order of mandamus directing the appellant to assess their housing needs, the very thing which the appellant had now done. The appellant on the other hand, suggested that the offer of alternative accommodation came about in the ordinary discharge of its duties under the Housing Acts and was not directly related to the judicial review proceedings.

9. He considered the two cases referred to, noting that *Cunningham* was authority for the proposition that if a public authority wishes to assert that there has been an external event rendering the proceedings moot, then there is an onus on it to put evidence to that effect before the court. The trial judge discussed the issues arising, noting that the mandamus letter, which had not been replied to, called upon the appellant to carry out an assessment of the respondents' housing needs. He felt that characterising the correspondence as a "mandamus letter" overstated its legal effect.

10. The judge then referred to the correspondence immediately preceding the commencement of the trial. He noted that the letter of the 4th October, 2019 offering the respondents accommodation had been replied to on the 7th October by their solicitors asking if the offer was said to be in satisfaction of the judicial review proceedings. A response of the same date from the appellant's solicitors denied that this was the case and asserted that the offer was made in the normal course of matters as between the housing authority and the housing applicants/tenants. It indicated an intention to defend the proceedings.

11. In arriving at his decision, the trial judge held that the event which caused the proceedings to become moot was the making of the offer of alternative accommodation by letter of the 4th October, 2019. He said: -

> "26. The practical consequence of the letter offer of 4 October 2019 was, therefore, that the applicants were put in as good a position as they would have been had the proceedings been heard and determined in their favour. In these circumstances, both parties accepted that the proceedings were now moot."

12. In referring to the correspondence from the appellant suggesting that the offer had been made in the ordinary course of exchanges between the housing authority and its tenants, and was thus coincidental with the hearing of the judicial review proceedings, the judge said: -

> "29. Having regard to the chronology, it would be unrealistic to categorise the offer of alternative accommodation as an external event. Rather, the only reasonable inference to be drawn is that the Local Authority took a decision to address (belatedly) the complaints raised in the judicial review proceedings. In particular, the Local Authority offered in September 2019 to undertake a housing needs assessment, i.e. the very thing for which the applicants had been agitating in the judicial review proceedings. The timing of the approach, i.e. one month shy of the hearing date of 8th October, 2019, cannot have been coincidental.
>
> 30. If the Local Authority had wished to resist the inference that the offer was connected to the judicial review proceedings, then the Authority should have filed affidavit evidence explaining its position. This is the approach endorsed by the Supreme Court in *Cunningham v. President of the Circuit Court* [2012] IESC 39; [2012] 3 I.R. 222."

13. In those circumstances, the judge was of the view that the respondents were entitled to an order for costs in their favour. However, he went on to say that this finding did not automatically mean that the respondents were entitled to the costs of a full contested hearing. The judge said that since the offer of alternative accommodation was only made days before the hearing, he would not apply a discount to the costs. Having taken that view however, he went on to limit those costs in certain respects that have given rise to the cross-appeal herein.

14. He was critical of the so-called mandamus letter in not making clear what precisely it was that the respondents were seeking. He held that the statement of grounds did not comply with the requirements of O. 84 of the RSC and the written legal submissions did not comply with Practice Direction HC 68. He said that the case should not have been called on for six days because there was no need for cross-examination, making it at most a two day case. There was no necessity to brief both senior and junior counsel, and having regard to these findings, the trial judge made an order awarding costs to the respondents but on the basis of a two day hearing with the costs being confined to a

single counsel. He disallowed any costs in respect of the statement of grounds, the legal submissions and the motion in respect of cross-examination.

Grounds of Appeal

15. The appellant asserts that the trial judge erred in holding that the making of the offer of accommodation rendered the proceedings moot, that there had been any agreement whereby the proceedings could be struck out or that the respondents have obtained any tangible benefit from having brought the proceedings. This is said to be underpinned by the fact that the correspondence from the appellant's solicitors made clear that the offer was not made in satisfaction of the proceedings and that, in fact, the court had been informed by counsel for the appellant that the proceedings were not moot but that a practical situation had evolved. There was no evidential basis for characterising the appellant's letter of the 4th October, 2019 as an offer to compromise the proceedings.

16. The appellant further asserts that the judge was wrong to determine that if the appellant had wished to resist the inference that the offer was connected with the proceedings, it should have put evidence on affidavit explaining its position. The trial judge failed to alert the appellant of his contemplation of drawing such an inference and failed to give the appellant an opportunity to respond. The trial judge's drawing of an inference that the appellant decided to address belatedly the issue in the proceedings was erroneous and failed to have regard to the appellant's position, which was that it intended to contest the proceedings. The judge failed to take adequate account of the appellant's affidavits in that regard.

17. In their cross-appeal, the respondents complain that the trial judge failed to properly apply the principles in *Cunningham* and *Godsil* in refusing to grant them their full costs without deduction. In particular, it is submitted that the trial judge gave the respondents no warning of his intention to limit the costs order in this way or to afford them any opportunity to address this issue before the order was made. This was particularly the case because this was a matter introduced by the trial judge of his own motion and not sought or argued for by the appellant. The deductions applied by the trial judge were wholly disproportionate.

Discussion

18. The relevant legal principles in relation to the allocation of costs in proceedings which have become moot were most recently considered by this Court in *P.T. v Wicklow County Council* [2019] IECA 346 where Murray J. said: -

> "18. The proper approach to allocating the costs of moot proceedings is not in controversy. The starting point is that costs follow the event. That is subject to the discretion of the court to order otherwise. Where proceedings have become moot, the court should thus enquire in the first instance as to whether there is an 'event'. This will arise where the action causing the mootness is undertaken in response to the proceedings (*Godsil v. Ireland and the Attorney General* [2015] 4 IR 535). Where there is no 'event' in this sense, and where the mootness is attributable to a factor outside the control of the parties, the court will ordinarily lean in favour of

making no order as to costs (*Cunningham v. President of the Circuit Court* [2012] 3 IR 222, 230). Where, however, the mootness results from the unilateral act of one of the parties, the court will ordinarily lean in favour of an order for costs against that party. The latter propositions are both subject to there being no significant countervailing factors (*id.*).

19. In circumstances in which the mootness arises because a statutory body makes a new decision in the exercise of its legal powers, the court will look at the circumstances giving rise to that new decision. If the new decision is caused by a change in the relevant circumstances occurring between the time of the first decision, and of the second, the court might not treat the new decision as a 'unilateral act' and may accordingly make no order as to costs (*Cunningham v. President of the Circuit Court* [2012] 3 IR 222 at 230-231). If, however, there has been no such change in circumstances so that the body has simply changed its mind, costs may be awarded against it (*id*.). If the respondent wishes to contend that there has been a change in circumstances – described by Clarke J. in *Cunningham* as an 'external circumstance' – it is a matter for it to place before the court sufficient evidence to allow the court to assess whether and if so to what extent it can fairly be said that there was a sufficient underlying change in circumstances sufficient to justify, in whole or in part, it being appropriate to characterise the proceedings as having become moot by reason of a change in external circumstances…"

19. The first point to be considered in the present case is whether it was, in fact, moot. Counsel for the appellant submitted in the High Court that the proceedings had not in fact become moot, saying (on Day 2 transcript p. 26): -

> "Obviously we are gratified that the proceedings are not going ahead and a practical solution has evolved, but I am resisting the application for costs. Costs follow the event but you may well scratch your head, as I did, and say what is the event that's before the court? The proceedings haven't been rendered moot. Coincidentally, at an administrative level, a situation has evolved very recently and the correspondence speaks for itself, I am not going to go over it, but in that situation, it's not that the proceedings have been rendered moot, and it's not that there is any implied wrong on the part of the County Council that would justify an order for costs. So that, in my respectful submission, it could be, in a situation like this, where a party says: 'I am withdrawing the case', that I could look for my costs. I would sensibly say the appropriate order is no order for costs; I am not looking for my costs, but that could be the upshot of where we are at at this stage."

20. A number of points emerge from that submission. The first is the one to which I have alluded, namely that the proceedings were, according to the appellant, not moot. Secondly, the appellant was suggesting that the situation that had evolved resulting in the offer of accommodation to the respondents was coincidental. Thirdly, insofar as the factual issues were concerned, the appellant was relying upon the correspondence which

spoke for itself. However, the basis upon which the appellant contended that the proceedings were not moot was not elaborated upon. This was said in response to a submission by counsel for the respondents in which counsel had said "what has happened is all that could have happened if they were successful in their claim."

21. It seems to have been clear from the outset that the gravamen of this case was that the respondents were seeking to compel the appellant to carry out an assessment of their housing needs. All of the other reliefs claimed were in effect ancillary to this fundamental relief. Although initially a claim was advanced for an order directing the appellant to provide accommodation to the respondent, it was at an early stage conceded that no such order could be obtained and no such duty rested upon the appellant.

22. The respondents' needs had originally been assessed in 2014. In 2017, their case was that the accommodation was no longer suitable for their needs. There was a significant factual dispute concerning the state of the premises and whether it was intended to be temporary or permanent accommodation when it was allocated originally to the respondents. In addition, they had recently had two additional children. The so-called mandamus letter went unanswered and the proceedings commenced. Nothing of significance appears to have occurred in the two years between the commencement of the proceedings and the hearing in the High Court until the month before the hearing when contact was made, directly, with the respondents by the appellant.

23. It is said that the reason for this was the coincidental availability of a suitable house. The court was not told when or in what circumstances the appellant first became aware of the availability of this house. The assessment of the respondents' housing needs took place on the 3rd October, 2019. The result of that assessment became available almost immediately on the next day, the 4th October, 2019, almost literally the eve of the trial, when a letter confirming the offer was delivered by hand to the respondents. The court was asked by the appellant to accept that all of this happened "coincidentally". The trial judge came to the conclusion that the only reasonable inference to be drawn from this chronology was that the appellant took a belated decision to address the complaints raised in the proceedings.

24. The appellant complains of this on two levels, first that the judge was wrong to arrive at that inference on the facts as presented and secondly, that if he was going to arrive at such inference, he ought to have afforded the appellant an opportunity to explain its position on affidavit. Indeed, in its notice of appeal, one of the reliefs sought by the appellant is an order remitting the matter to the High Court with liberty to it to file an affidavit explaining the altered circumstances whereby alternative accommodation became available.

25. That appears to me to be a surprising proposition. It must have been obvious to the appellant that the events that I have described, and particularly the timeline associated with those events, were likely to immediately give rise to an assumption that there was a connection between these events and the proceedings. It would seem to any reasonable onlooker to be stretching credibility beyond breaking point to suggest that it was mere

coincidence that the appellant, having done nothing in response to the proceedings for two years, arranged the very assessment sought by the respondents to take place three working days before the trial and to convey the results of that assessment, with clear and evident urgency, to the respondents the very next day by hand. In response to a question from this court during the hearing of the appeal, counsel for the appellant confirmed that it was not the normal practice for the appellant to communicate with its housing tenants by hand delivered correspondence. The Supreme Court had little difficulty in despatching the argument that a similarly unusual state of affairs had come about in *Godsil* by virtue of mere coincidence.

26. It seems to me clear therefore, that the appellant had to have anticipated that the court would infer what it did in fact infer and that if it wished to disabuse the court of that inference, it should have put sworn evidence explaining its position before the court. That is the clear import of the passage in *P.T.* to which I have referred above which demonstrates that if a decision is taken by a public body such as the appellant which renders the proceedings moot, it is a matter for that body to put evidence before the court sufficient to satisfy the court that there has been a change in underlying circumstances giving rise to the decision that has rendered the case moot, as distinct from a change of heart in response to the claim.

27. There was accordingly no onus on the trial judge to, in some sense, advise the appellant's proofs by flagging in advance that he was likely to draw an inference which was one that was perfectly obvious to draw. In my view, the trial judge was therefore correct in coming to the conclusion that the case was in fact moot and that such mootness had arisen as a result of the unilateral act of the appellant. To this I would add that while the appellant has laid great reliance on the fact that it could not have made the offer that it did until a suitable house became available, that fact cannot be relied upon in relation to the carrying out of a housing needs assessment, which was the principal objective of the proceedings.

28. In cases involving public bodies taking decisions which are within their statutory remit, it is not uncommon for disputes to arise of the kind that have occurred in this case. Clearly where an order of mandamus is being sought to compel a public body to carry out its statutory obligations, there is always the potential for an argument that a decision is not taken in response to proceedings but in the normal course of the public body's administrative functions. It can thus be difficult to identify whether the action concerned is a unilateral act in response to proceedings, or one that might in the normal course of events have occurred anyway. If the surrounding circumstances are indicative of a significant acceleration of the action concerned beyond what might be expected in the normal course, there may be an onus on the public body to account for that fact if the court is not to infer that the acceleration is a response to the proceedings.

29. I am therefore satisfied that the trial judge was quite correct in inferring that the appellant decided to address the complaint in the proceedings by undertaking, in September 2019, a housing needs assessment of the applicants, which the trial judge

noted at para.29 of his judgment was the very thing for which the applicants had been agitating in the proceedings. While it may not have been possible for the appellant to offer the house that it did to the respondents until it knew it was available, the housing needs assessment could have been done at any time, and was clearly a unilateral act on the part of the appellant which rendered the proceedings moot. I would therefore dismiss the appeal.

Cross-Appeal

30. As noted above, one of the issues to be determined at the hearing before the trial judge was the respondents' motion to cross-examine the appellant's deponents on their affidavits. I have pointed to the factual conflicts that are said to have arisen on the affidavits as between the parties. Whether the resolution of those conflicts, assuming them to have existed, was necessary in order to determine the issues in the proceedings, had they been contested, was a matter that remained to be determined on the respondents' motion. However, when the matter concluded, the point had not been reached at which this motion fell to be considered by the court.

31. Despite that, the trial judge appears to have concluded in dealing with the costs issue that there was no need for cross-examination and consequently the case was in reality a two day rather than a six day case. That finding underpinned the trial judge's determination that the costs should be limited on the basis of a two day hearing, but I do not think it was open to him to reach that determination without the motion even being opened to him. The respondents are also correct in submitting that if the trial judge was minded to make any determination on the issue of costs on the basis of considerations not advanced by the appellant, fair procedures required that this be indicated to the respondents so that they could have an opportunity of addressing the court on the point before it was decided against them. Regrettably, it seems that none of the matters relied upon by the trial judge to limit the costs order in favour of the respondents were ones that the respondents had any opportunity of addressing and inevitably, in my view it must follow that those limitations cannot stand.

32. Accordingly, I would allow the cross-appeal and substitute for the order of the trial judge, an order awarding costs *simpliciter* to the respondents to include any reserved costs. In default of those costs being agreed, both parties remain free to advance such arguments as they wish to make in the course of adjudication of those costs.

33. My provisional view with regard to the costs of this appeal is that as the respondents have been wholly successful on both the appeal and the cross-appeal, they should be entitled to those costs. If however, the appellant wishes to contend for an alternative form of order, it will have 28 days to lodge a written submission not exceeding 2,000 words and the respondents will have a similar period to respond.

34. As this judgment is being delivered electronically, Faherty and Binchy JJ. have read and considered same in advance and are in agreement with it.