



THE COURT OF APPEAL

High Court Record No.: 2017/217 MCA
Court of Appeal Record No.: 2018/281
Neutral Citation No.: [2022] IECA 67

**UNAPPROVED
NO REDACTION NEEDED**

**Murray J.
Haughton J.
Pilkington J.**

BETWEEN

C

APPELLANT

- AND -

JOHN CASEY

RESPONDENT

Costs Judgment

Judgment of the Court delivered electronically on the 21st day of March, 2022

1. The Court delivered its judgments herein on 2 February 2022 (Pilkington J., concurring judgment of Murray J., and Haughton J. concurring) whereby it allowed the appeal from

the Order of Barrett J. dated 31 May 2018, perfected on 7 June 2018 and substituted therefore an order granting leave to the appellant pursuant to s.73 of the Mental Health Act, 2001 (as amended) to issue the intended proceedings in the form of the draft Civil Bill submitted to the Court.

2. This is the judgment of the court in relation to the costs incurred in the High Court and in respect of the appeal. In the judgment of Pilkington J. it was proposed, subject to any submissions that the parties might wish to make, that the costs of the application in the High Court, and the appeal, be reserved to the judge determining the intended proceedings.
3. Both parties written submissions on the costs have been considered, and the court does not consider that any oral submissions are required.
4. The appellant, who did not have legal representation, is of course not entitled to seek any legal/professional costs, and is limited to seeking the expenses which he has properly incurred in both courts . In *Dawson v Irish Brokers Association* [2002] 2 ILRM 210 it was held that lay litigants are not entitled to recover costs on the same basis as a solicitor for preparatory work undertaken by them prior to trial.
5. As he was successful in his appeal, the appellant seeks his expenses in both courts.
6. In addition the appellant seeks expenses related to an earlier application (18 January, 2016) seeking, retrospectively, leave to issue/continue Circuit Court proceedings commenced by the appellant in 2014. This is the application that was initially acceded to by Barrett J., but in respect of which he later revoked his order, on 24 April 2017, for lack of jurisdiction to grant leave retrospectively – see para.13 of the judgment of Pilkington J.
7. This court has no jurisdiction to make any order in respect of the costs/expenses of the earlier application before Barrett J. as it was not the subject of any appeal. This court

can only make costs orders in respect of the Notice of Motion issued herein on 17 July 2017 and the resulting hearings before Barrett J. (13 February 2018) and on appeal before this court.

8. The respondent asks that the costs/expenses of both High Court and this court be reserved because, it is submitted, it is an initial mandatory leave application, and the proceedings will ultimately be decided on their merits by the trial judge, and the respondent may succeed in defending them.
9. It is the case that s.73 of the 2001 Act mandates an application to the High Court for leave to issue civil proceedings arising out of acts purporting to have been done in pursuance of the Act. Accordingly in general, if leave is granted by the High Court, the costs of the leave application would be reserved to the trial judge hearing the proceedings for which leave to issue has been granted. This is because the leave determination is limited in nature – the court is only required to refuse leave if satisfied that the intended proceedings are frivolous or vexatious, or that “*there are no reasonable grounds for contending that the person against whom the proceedings are brought acted in bad faith or without reasonable care*” (s.73 (1)(b)). Granting leave does not mean that the plaintiff will succeed. The proceedings might ultimately succeed, or they might fail, and it would not be appropriate to anticipate the outcome by awarding leave costs in advance of that determination.
10. Accordingly it is appropriate that this court should set aside the order of the High Court granting costs to the respondent, and should substitute therefore an order that the plaintiff/appellant’s expenses and the defendant/respondent’s costs be reserved to the judge determining the intended proceedings.
11. With regard to the costs/expenses of the appeal, different considerations apply. In the court’s view the ‘normal rule’ that costs follow the event applies. The event was that the

respondent lost the appeal. On one view it was not unreasonable for the respondent to oppose the appeal, but, having opposed, he was unsuccessful. This followed from this court's examination of the affidavit evidence presented, including the Custody Record, hospital records, and subsequent exchange of emails between the parties. In the result the respondent should not have contested the appeal, and should have allowed leave to be granted. The consequence was a second hearing that should not have been necessary.

12. Accordingly the court orders that the appellant be paid his expenses of the appeal by the respondent.
13. It is appropriate that there should be a stay on payment of those expenses pending the determination of the intended proceedings because of the possibility that if the respondent successfully defends he may obtain a costs order against which the expenses now awarded to the appellant could be set off.
14. In summary the court makes the following costs/expenses orders:
 - (i) an order reserving the costs/expenses of the leave application in the High Court heard by Barrett J. on 13 February, 2018 to the trial judge determining the proceedings in respect of which leave to issue has been granted by this court;
 - (ii) an order that the expenses properly incurred by the appellant in this appeal be paid by the respondent, with a stay on payment and execution until the final determination of the proceedings in respect of which leave to issue has been granted by this court.