

THE HIGH COURT

[2021] IEHC 314

[Record No. 2020/304/JR]

BETWEEN

WILLIAM KIELY

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Ms. Justice Miriam O'Regan delivered on the 6th day of May, 2021.

1. This judgment is for the purposes of determining the appropriate costs order to be made in respect of the within proceedings following delivery of judgment by me in the matter on 5 March 2021 when I found against the applicant who was seeking to prohibit the criminal trial pending against him before the Circuit Court.
2. Section 169(1) of the Legal Services Regulation Act 2015 (the 2015 Act) provides:

"A party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings, unless the court orders otherwise, having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties, including –

 - (a) conduct before and during the proceedings,
 - (b) whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings,
 - (c) the manner in which the parties conducted all or any part of their cases . . ."
3. In *Chubb European Group SE v. The Health Insurance Authority* [2020] IECA 183, Murray J. on behalf of the Court was satisfied that the general discretion of the court is preserved (referred to by Murray C.J. in the Supreme Court in *Dunne v. Minister for the Environment* [2007] IESC 60, at para. 28, when it was indicated that the court was not completely at large as to departing from the normal rule as to costs but must do so on a reasoned basis indicating the factors which warrant such a departure. The court was satisfied that invariably a combination of factors will be involved and the issue should be decided on a case by case basis). The Court was further satisfied that even where a party has been entirely successful the court should still have regard to the matters referred to in s.169(1)(a)-(g).
4. In *Higgins v. Irish Aviation Authority* [2020] IECA 277 Murray J. on behalf of the Court of Appeal was satisfied that for the purposes of s.169(1) of the 2015 Act, the correct approach is to look beyond the overall result in the case and to consider whether the proceedings involve separate and distinct issues.
5. In the instant matter only subs. (a) to (c) of s.169(1) of the 2015 Act are engaged. I am satisfied that there was a singular issue raised in the within proceedings namely whether or not the applicant was entitled to an order of prohibition of the pending criminal trial.

6. It was acknowledged by the applicant during the course of the hearing that not only would it be necessary to establish prosecutorial delay but some other factor would also be required in order to secure the order for prohibition sought.
7. Although there was a finding of prosecutorial delay in the within matter the delay was not as extensive as contended for by the applicant and I found that the further additional factor, relied on as necessary, was not sufficient to warrant an order of prohibition.
8. During the course of the hearing the respondent did act responsibly by not pursuing further an assertion that there was no prosecutorial delay, significantly however this effective concession was not made until after the applicant's submissions. The applicant had suggested a far more extensive period of prosecutorial delay than ultimately found by me.
9. The respondent argued that the issue of prohibition/prosecutorial delay raised by the applicant should more properly be dealt with by the Circuit Court criminal trial judge in the alternative to the argument that the applicant had not demonstrated that he came within the ambit of the relevant jurisprudence to secure an order for prohibition. However, ultimately this Court was satisfied that the basis for the application for prohibition was a matter properly before the High Court for determination.
10. By reason of the foregoing factors therefore I am satisfied that the denial of the existence of prosecutorial delay until after the completion of the applicant's submissions and given that the respondent was not successful in the argument to the effect that the issues raised would more properly be dealt with by the Circuit Court criminal trial judge, it is appropriate to depart from the general rule and to afford the respondent 75% of their costs of and incidental to the within proceedings. The stay on the criminal trial in the Circuit Court to continue until the time to lodge an appeal has passed, or, should an appeal be lodged, until the date of the first directions hearing before the Court of Appeal.