

**THE HIGH COURT**

[2021] IEHC 816  
[2019/893 JR]

**The President, Irvine P.  
Simons J.  
O'Moore J.**

**BETWEEN**

**TOMÁS HENEGHAN**

**PLAINTIFF**

**AND**

**THE MINISTER FOR HOUSING, PLANNING & LOCAL GOVERNMENT,  
THE GOVERNMENT OF IRELAND,  
THE ATTORNEY GENERAL**

**&**

**IRELAND**

**DEFENDANTS**

**(COSTS RULING)**

**JUDGMENT of the Divisional Court delivered by Mr. Justice Brian O'Moore on the 20th day of December 2021**

1. On the 17th of November 2021 the judgment of this Court was delivered, dismissing Mr. Heneghan's claim in its entirety. On the 8th of December 2021, the Court heard arguments as to how the costs of the proceedings were to be decided.
2. Both sides submitted that they should be awarded their costs, though the position taken by Mr. Heneghan was somewhat more nuanced. We will set out the arguments made by each side, and then give our conclusions on the issue.
3. Counsel for the State submitted that costs should follow the event, and relied in particular on sections 168 and 169 of the Legal Services Regulation Act 2015. He also relied upon an exchange of correspondence which took place during the course of the proceedings. This correspondence, which was conducted on the basis that it was "Without Prejudice Save as to Costs", can be summarised as follows:-

On the 23rd of October 2020 the CSSO wrote to FLAC, Mr. Heneghan's solicitors, summarising the State's view of the evidence and pleadings, previewing the submissions to be made by the State, and concluding as follows:-

"The purpose of this letter is to invite the Applicant, having had sight of all relevant materials and an outline of the Respondent's position on the case being made, to discontinue the proceedings on the terms that there is no order as to costs."

FLAC replied on the 29th of October 2020. It rejected the offer contained in the CSSO letter, referring to certain of the materials in the proceedings and pointing out that the State's letter did not address the case made by Mr. Heneghan in respect of the Convention on Human Rights.

The CSSO wrote again on the 2nd of December 2020, after the legal submissions had been exchanged. The letter renewed the offer permitting Mr. Heneghan to walk away

from the proceedings, noting that 'the Seanad [was] currently engaging in Second Stage debate on two Seanad reform private members bills [...]'.

On the 8th of December 2020 FLAC again rejected the State's proposal, dismissing the significance of the private members' bills and stating that FLAC "would be happy to hear of any meaningful proposal you have that would actually address the substance of our client's claim".

FLAC was correct to say that the CSSO correspondence did not address the question of the Convention rights asserted by Mr. Heneghan. Having said that, the State's submissions (which post-dated FLAC's letter of the 29th of October) did deal with the Convention claim in some detail. Of more substance was FLAC's position that Mr. Heneghan could not be assured that his complaints would be addressed by the passage of private members' bills.

4. Counsel for Mr. Heneghan began her submission by seeking an order that the State pay all or some of Mr. Heneghan's costs. She clarified the position towards the end of her address by stating that Mr. Heneghan's preferred order was (naturally) that the State pay all his costs, but that as counsel (and in order to assist the Court) she felt that the appropriate level of contribution to Mr. Heneghan's costs was between one third and two thirds.
5. Counsel submitted that three of the principles to be found in the judgment in *Collins v. Minister for Finance* [2014] IEHC 79 were of assistance to Mr. Heneghan, and should be paid particular attention by the Court. These were:-
  - (i) The fact that, as is recorded at paragraph fourteen of *Collins*, costs have "been awarded to losing plaintiffs in constitutional cases of conspicuous novelty, often where the issue touched on aspects of the separation of powers between the various branches of government."
  - (ii) Costs have on occasion not followed the event where the decision "has clarified an otherwise obscure or unexplored area of the law"; paragraph sixteen of *Collins*.
  - (iii) These proceedings relate to issues of public importance and were not brought for the personal advantage of Mr. Heneghan, though it is accepted that this latter factor is not determinative of the issue.
6. With regard to (i), it is certainly the position that many of the issues raised by Mr. Heneghan were novel, but in the judgment of the Court this is because they were simply unsustainable. It is unnecessary here to repeat the Court's analysis of why Mr. Heneghan's claim failed. However, in the circumstances of this case the fact that certain of the arguments were conspicuously novel does not justify a departure from the ordinary rule that costs should be awarded to the successful party.
7. With regard to (ii), the Court does not find that any obscure or unexplored area of the law has been clarified or determined. The provisions of Article 18.4.1° were always clear,

notwithstanding the 1979 amendment. Equally, the system for election of the vocational senators was not an obscure one. Finally, while Counsel for Mr. Heneghan relied on the passage in the judgment which described as “weighty issues” arguments made by the State in respect of the Convention on Human Rights, the proper context of that reference must be kept in mind. The “weighty issues” raised by the State (and described at paragraphs 157 to 162 of the judgment) were not subject to any detailed rebuttal by Mr. Heneghan’s legal team. It is difficult to see why there should be any departure from the normal costs regime simply because substantial arguments are raised by the winning side, which are not then subject to any meaningful engagement by the loser.

8. With regard to (iii), the Court accepts that (in bringing these proceedings) Mr. Heneghan was not motivated by desire for any personal gain. It is, of course, the case that if he had succeeded in his claim Mr. Heneghan would have potentially moved toward obtaining a vote in the direct election of members of the Seanad. However, that form of benefit is one which is entirely consistent with treating these proceedings as having been brought forward by a citizen galvanised by a public spirit and by an embedded interest in having a Seanad which is (in his view) more representative and effective.
9. Having referred to what she felt were the relevant principles to be found in *Collins*, Counsel for Mr. Heneghan concluded that their application did not entitle him to any particular order as to costs. Counsel conceded, importantly, that it was within the discretion of the Court to make no order as to costs as well as a costs order of some sort in favour of Mr. Heneghan.
10. The Court has decided, given the particular nature and circumstances of this case, that the correct order is that each side will bear their own costs. In doing so, the Court takes into account the following factors:-
  - (i) The State’s electoral law is fundamental to the continued operation of the State as a constitutional democracy. It is therefore of the highest importance that electoral laws be consistent with the provisions of the Constitution.
  - (ii) It is undesirable that bona fide challenges to the constitutionality of electoral law, even challenges of the sort mounted by Mr. Heneghan, be deterred solely because of the likelihood of an adverse costs order.
  - (iii) Any award of costs against Mr. Heneghan would have a chilling effect on future claims seeking to impugn electoral legislation.
  - (iv) Mr. Heneghan has brought this case for public spirited reasons, and without any intention or expectation of personal gain other than the possibility of participating directly in the election of members of the Seanad.
11. These factors all support a deviation from the normal rule that costs follow the event. As against that, the State took a very sensible approach in inviting Mr. Heneghan to withdraw his case at an advanced stage in the proceedings, at a time when both he and

his lawyers were fully apprised of the evidence and (more importantly) the arguments. Not every litigant is given the opportunity to walk away from an action after having seen the strength of the case that they are facing. It would be wrong to award Mr. Heneghan some or all of his costs after he had been given this option and declined it, thereby causing the State to incur the expense of the hearing; this cost is unlikely to have been modest. In addition, the case mounted by Mr. Heneghan was a weak one, relying on evidence that was both irrelevant and inadmissible. Mr. Heneghan had the opportunity to take stock and assess the strength of his case after receipt of the State's submissions. In those circumstances, awarding Mr. Heneghan some or all of his costs would not strike a fair balance between the parties.

12. For these reasons, the Court has decided to make no order as to costs in these proceedings.
13. After the hearing on the 8th of December 2021, and after the Court had come to a decision on the costs question, news came of the sudden death of leading counsel for the State in these proceedings, Frank Callanan SC. If this ruling were being delivered in open court, it would be inevitable that something would have been said about Frank Callanan's stellar career and the loss which his tragic death has caused to the practice of law in Ireland. The fact that this decision is being given electronically does not mean that these decencies should be lost. The Court expresses its sympathy to Frank's wife Bridget and to the rest of his family at this very sad time.