

APPROVED

[2022] IEHC 352



**THE HIGH COURT
JUDICIAL REVIEW**

2016 No. 40 JR

BETWEEN

BRIAN MURPHY

APPLICANT

AND

THE REVENUE COMMISSIONERS
THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 15 June 2022

INTRODUCTION

1. The principal judgment in these proceedings was delivered on 5 May 2022 and bears the neutral citation [2022] IEHC 228. This supplemental judgment addresses the allocation of costs and the question of a stay pending a possible appeal to the Court of Appeal.
2. The applicant accepts that, in circumstances where the application for judicial review has been dismissed in its entirety, the respondents are entitled to the costs of the substantive hearing. The applicant, however, resists any requirement to pay the costs in respect of, first, an application for leave to cross-examine and, secondly, an application for discovery.

NO REDACTION REQUIRED

COSTS OF THE APPLICATION FOR LEAVE TO CROSS-EXAMINE

3. These proceedings had initially been listed for hearing in April 2021. Shortly before the scheduled hearing date, however, the applicant issued a motion seeking leave to cross-examine all seven deponents who had sworn affidavits on behalf of the respondents. This motion was then allocated the hearing slot which had previously been set aside for the hearing of the full action. I heard the motion but reserved the costs until the conclusion of the proceedings.
4. The respondents had opposed the application for leave to cross-examine principally on the basis that there was no conflict of fact which required to be resolved in order to allow the court to determine the legal issues arising in the proceedings. It was said that such factual disputes as had been identified did not relate to any legal issue pleaded in the statement of grounds.
5. The position of the respondents is usefully illustrated by reference to their approach to the evidence of Ms. Anna Lynch. As appears from the principal judgment, Ms. Lynch had been employed at all material times as a legal executive in the firm of solicitors acting on behalf of the Revenue Commissioners in seeking to recover the arrears of tax owed by the applicant. The applicant alleged, in his later affidavits, that Ms. Lynch had made certain representations to him in the course of a telephone conversation towards the end of August 2015. The respondents accepted, for the purpose of the application for leave to cross-examine, that there was a conflict between the affidavit evidence of the applicant and Ms. Lynch in this regard. The respondents maintained, however, that cross-examination was not necessary in that this factual dispute was not relevant to any legal issue arising on the case as pleaded.

6. The respondents' position was summarised as follows in their written legal submissions (at paragraph 10):

“In judicial review proceedings, and a fortiori in proceedings in legitimate expectation, the matters in issue which require to be resolved are defined by the Statement of Grounds, and Statement of Opposition. Of late, the Applicant has introduced into evidence conversations which are not pleaded in the Statement of Grounds and were not contained in the Applicant's first affidavit. Significantly, he seeks to rely on the alleged content of conversations said to have taken place between 1 July and 31 August between the Applicant and Ms. Anna Lynch. If those conversations are properly part of the Applicant's case, cross-examination of Mr. Murphy is required on them. If they are not however, then it is unnecessary to cross-examine Ms. Lynch in respect of them. The Respondent contends that they are not properly part of the Applicant's case.”

7. The submission that it is not sufficient for the purposes of an application for leave to cross-examine merely to demonstrate the existence of a factual dispute, but that it must also be demonstrated that the dispute is relevant to a legal issue in the proceedings, is undoubtedly correct. The position has been summarised by the Court of Appeal as follows in *Hegarty v. Commissioner of An Garda Síochána* [2021] IECA 328 (at paragraphs 34 to 36):

“Cross-examination in applications for judicial review is relatively rare. This is because judicial review is concerned with issues of pure law arising in the process under challenge, rather than the resolution of factual disputes between the parties. It is for that reason that cross-examination is unusual in such cases, rather than because special rules apply to judicial review. As in any adversarial litigation, it is for the claimant to allege facts which are said to give rise to an entitlement to the remedy sought.

To the extent that the public body concerned may dispute the facts alleged by an applicant for judicial review, if the court cannot adjudicate on the question of law raised without first resolving the dispute of fact, then cross-examination may not only be appropriate but essential. There must however be a genuine dispute of fact arising. It is not sufficient for the applicant to merely swear that he or she does not accept a

particular state of affairs without putting alternative facts before the court which the applicant says are the true facts.

Mere denial or non-acceptance of facts deposed to by a respondent cannot, without more, give rise to a right to cross-examine. Were that to be the position, there would be cross-examination in virtually every case. *Even if there is a genuine dispute on the facts in the sense of opposing versions of events being advanced by the parties, cross-examination will in general only be permitted where the resolution of that conflict is essential to the determination of the legal issues that arise.*”*

*Emphasis (italics) added.

8. For the reasons explained in the principal judgment, the oral statements supposedly made by Ms. Lynch did not form part of the case as pleaded. Accordingly, it was not necessary to resolve the conflict of fact on the affidavits for the purpose of determining the case as pleaded. As it happens, and for the reasons explained at paragraphs 50, 51 and 67 thereof, the principal judgment addresses the factual issue *de bene esse*. This does not detract from the point that the respondents had been correct in seeking to resist cross-examination on the basis that same was not necessary. Similar sentiments apply to the other deponents in respect of whom leave to cross-examine had been sought.
9. In the event, the only other deponent who was actually cross-examined was Mr. Aidan Duffy. No significant factual dispute arose in respect of Mr. Duffy’s evidence. Mr. Duffy candidly admitted that his preference had always been that any settlement agreement with the applicant should contain an express clause to the effect that such agreement was without prejudice to any enforcement action or prosecution action. However, for the reasons explained in the principal judgment, for the purpose of the doctrine of legitimate expectation, the nature and extent of a representation is assessed objectively, not by reference to the subjective views of the parties. The fact that the revenue officials may have

thought it preferable or even necessary to include an express clause in the settlement agreement to the effect that the agreement was to be without prejudice to criminal prosecution is not decisive.

10. One of the factors to be taken into account in the allocation of costs is the reasonableness of the conduct of the parties: see section 169 of the Legal Services Regulation Act 2015. In the present case, it was entirely reasonable for the respondents to resist the application for leave to cross-examine. This is so notwithstanding that, for pragmatic reasons, the ultimate outcome of the application had been that both sides had agreed, at the suggestion of the court, that they would make available their witnesses for cross-examination. This was done with a view to progressing the proceedings to full hearing.
11. I had deliberately reserved the costs of the application for leave to cross-examine, deferring the allocation of those costs until after the conclusion of the proceedings. I did this to ensure that, prior to allocating those costs, I had a fuller understanding of the issues in the proceedings and a better appreciation of the pleading objection raised by the respondents. I am now satisfied that the cross-examination was unnecessary, and the respondents were accordingly justified in opposing the application for leave to cross-examine. The respondents are entitled to recover the costs so incurred.

COSTS OF THE APPLICATION FOR THE DISCOVERY OF DOCUMENTS

12. The applicant had sought discovery of a number of categories of documents. The application for discovery was ultimately determined by the Court of Appeal: *Murphy v. Revenue Commissioners* [2020] IECA 36 and discovery was ordered in respect of a single, modified category. The Court of Appeal subsequently

made an order on 13 March 2020 directing that the costs of the appeal be costs in the cause, i.e. the costs of the discovery application would be allocated to whichever party succeeded in the judicial review proceedings. The Court of Appeal did not address the costs of the discovery motion before the High Court, which costs had been reserved by the motion judge to the trial judge.

13. No cogent reason has been advanced by the applicant as to why the costs incurred before the High Court should be treated differently than those of the appeal to the Court of Appeal. In each instance, the applicant had sought far more extensive discovery than either court was prepared to allow. Thus, the applicant cannot be said to have been “*entirely successful*” in his applications. The approach of the Court of Appeal, which is that the costs should be awarded to whichever side was ultimately successful in the judicial review proceedings, should equally apply to the costs before the High Court.

STAY ON PROSECUTION PENDING APPEAL

14. The objective of the proceedings is to preclude the Director of Public Prosecutions pursuing two pending criminal prosecutions against the applicant. A stay on the criminal prosecutions had been imposed as part of the order granting leave to apply for judicial review on 25 January 2016.
15. The substantive application for judicial review has now been dismissed for the reasons set out in the principal judgment. Notwithstanding that the proceedings have been dismissed, the applicant seeks a further stay on the criminal prosecutions in the event of an appeal. The stay is sought up and until the first return date before the Court of Appeal. At that stage, the applicant will be in a position to apply directly to the Court of Appeal for a further stay.

16. The principles governing a stay pending an appeal are well established. Both sides rely on the judgment of the Supreme Court in *C.C. v. Minister for Justice* [2016] IESC 48; [2016] 2 I.R. 680. These principles have recently been reaffirmed in *Krikke v. Barranafaddock Sustainability Electricity Ltd* [2020] IESC 42.
17. The considerations of most immediate relevance in the present case are as follows. The main factor militating against the grant of a stay is the weakness of the applicant's case. As detailed in the principal judgment, the applicant seeks to restrain the two criminal prosecutions on the basis of a written agreement to which the Director of Public Prosecutions is not even a party. The applicant has failed to establish any link between the alleged actions of the Revenue Commissioners and that of the independent office of the Director of Public Prosecutions. It seems very unlikely, therefore, that any appeal would be successful.
18. The main factor in favour of granting a stay is the gravity of the consequences for the applicant of allowing any criminal prosecution to proceed in the interim. If the applicant is correct in his contention, and if his case is ultimately upheld by the Court of Appeal, then it will have been found that he is entitled to an order restraining the criminal prosecutions. If, in the absence of a stay, the applicant has been exposed in the interim to the stress and anxiety of a criminal prosecution, and penalties, including possible imprisonment, have been imposed, then he will have suffered a grave injustice.
19. It seems to me that the latter factor must prevail notwithstanding the weakness of any potential appeal. The interests of justice are best served by affording the applicant a period of time within which to file an appeal, if he so desires, and to

renew his application for a stay before the Court of Appeal. I propose, therefore, to continue the stay on the two criminal prosecutions until the first return date before the Court of Appeal.

CONCLUSION AND FORM OF ORDER

20. For the reasons set out in the principal judgment, the application for judicial review is dismissed in its entirety. An order for costs will be made in favour of the respondents as against the applicant. The costs are to include all reserved costs; the costs of the discovery application before the High Court; the costs of the application for leave to cross-examine in April 2021; the costs of the substantive hearing; and the costs of all the various sets of written legal submissions prepared on behalf of the respondents. The costs also include the costs of the appeal before the Court of Appeal in circumstances where that court directed that those costs be costs in the cause. All costs are subject to adjudication under Part 10 of the Legal Services Regulation Act 2015 in default of agreement between the parties. There will be a stay on the execution (but not the adjudication) of the costs order pending the determination of any appeal.
21. The stay on the two sets of criminal proceedings will be continued for a period of 28 days from the date of the perfection of the order, and, thereafter, in the event of an appeal, up and until the first return date before the Court of Appeal.
- Both sides have liberty to apply.

Appearances

Paul McGarry, SC and David Dodd for the applicant instructed by McMahon O'Brien Tynan

Paul O'Higgins, SC and Alison Keirse for the respondents instructed by the Revenue Solicitor

Approved
Samuel S.M.S.