[2022] IEHC 473

THE HIGH COURT

JUDICIAL REVIEW

[2021 No. 631 JR]

BETWEEN

CORK COUNTY COUNCIL

APPLICANT

AND

THE MINISTER FOR HOUSING, LOCAL GOVERNMENT AND HERITAGE

RESPONDENT

AND

CORK CITY COUNCIL

NOTICE PARTY

(II) (No. 3)

JUDGMENT of Humphreys J. delivered on Monday the 15th day of August, 2022

1. This is the fifth judgment in two related sets of proceedings between the parties. In *Cork County Council v. Minister for Housing, Local Government and Heritage (I) (No. 1)* [2021] IEHC 683, [2021] 11 JIC 0502 (Unreported, High Court, 5th November, 2021), I quashed a direction by the Minister under s. 31 of the Planning and Development Act 2000 to remove Variation No. 2 to the Cork County Development Plan.

2. In *Cork County Council v. Minister for Housing, Local Government and Heritage (I) (No. 2)* [2021] IEHC 708, [2021] 11 JIC 1810 (Unreported, High Court, 18th November, 2021), I granted a limited stay on that order.

3. In *Cork County Council v. Minister for Housing, Local Government and Heritage (II) (No. 1)* [2021] IEHC 617, [2021] 9 JIC 0701 (Unreported, High Court, 7th September, 2021), Hyland J. discharged a stay (granted at leave stage) on a requirement to the council made by the Minister under s. 9(7) of the 2000 Act to coordinate its Development Plan with Cork City Council.

4. In *Cork County Council v. Minister for Housing, Local Government and Heritage (II) (No. 2)* [2022] IEHC 281, [2022] 5 JIC 2701 (Unreported, High Court, 27th May, 2022), I dealt with the substantive stage of that challenge and quashed the requirement under s. 9(7) of the 2000 Act.

5. I am now dealing with the costs of that latter challenge.

Law in relation to costs

6. For whatever reason, ss. 168 and 169 of the Legal Services Regulation Act 2015 appear to have somewhat complicated the understanding of the crucial issue of the law in relation to the costs of civil proceedings. In an attempt to summarise the law as it currently stands, I would suggest that it can be broadly summarised under the following six headings:

(i). If a party is entirely successful in civil proceedings, that is if it wins on all issues (*Higgins v. Irish Aviation Authority* [2020] IECA 277, [2020] 10 JIC 0902 (Unreported, Court of Appeal, Murray J. (Noonan and Binchy JJ. concurring), 9th October, 2020)), then it obtains costs unless the court otherwise orders having regard to statutory factors (s. 169 of the 2015 Act).

(ii). If a moving party obtains the order sought or if a defending party successfully resists an order, but if the winning party does not win on all issues, the court should consider what order is appropriate by reference to the question conferred by s. 168 of the 2015 Act. One particularly relevant factor is sub-s. (2)(d) to the effect that the court can award the party costs "where a party is partially successful in the proceedings, costs relating to the successful element or elements of the proceedings".

(iii). In the application of that principle, the court can compare the proceedings as they actually ran and with how they would have run had the issues been confined to ones on which the winner prevailed: see *In Re Star Elm Frames Ltd.* [2016] IEHC 666, [2016] 10 JIC 0313 (Unreported, High Court, 3rd October, 2016), *In Re Star Elm Frames Ltd. v. Fitzpatrick* [2018] IECA 103, [2018] 4 JIC 1905 (Unreported, Court of Appeal, Peart J. (Irvine and Gilligan JJ. concurring), 19th April, 2018), *N.B. v. C.B.* [2020] IEHC 216, [2020] 5 JIC 0603 (Unreported, High Court, 6th May, 2020), *E. & F. v. G. & H.* [2021] IECA 108, [2021] 4 JIC 1301 (Unreported, Court of Appeal, Whelan J. (Edwards and Ní Raifeartaigh JJ. concurring), 13th April, 2021), *Flannery v. An Bord Pleanála (No. 3)* [2022] IEHC 327, [2022] 6 JIC 0802 (Unreported, High Court, 8th June, 2022).

(iv). If the issues on which the winning side was unsuccessful did not add significantly to the costs of the proceedings, that is if the costs of the proceedings without the losing sub-issue would not in fact have been significantly less than the costs of the proceedings as they actually ran, then the court can award the winning party full costs. In adopting such an approach the court can have regard to the undesirability of a micro-specific approach which would encourage additional costs in litigating the costs issue itself: see *Connelly v. An Bord Pleanála* [2018] IESC 36, [2018] 7 JIC 3002 (Unreported, Supreme Court, Clarke C.J. (O'Donnell, Dunne, O'Malley and Finlay Geoghegan JJ. concurring), 30th July, 2018), *Flannery v. An Bord Pleanála* at para. 34. In *Connelly*, in giving the vast bulk of costs to a party that won only one issue out of 10, Clarke C.J. said for the court at para. 2 that "The Court is anxious to minimise the risk of further disputes between the parties arising from the process which the Board follows hereafter. At the same time the Court is mindful of the fact that, by being overly prescriptive, the Court might make matters worse rather than better". At para. 8 he said: "an otherwise successful party should not be deprived of full costs unless it can be shown that it is clear that the raising of unmeritorious points added materially to the overall cost of the proceedings. In making that assessment it will rarely be appropriate to attempt either a very precise calculation

of the extent to which costs may have been increased or, indeed, an overly meticulous approach to identifying the precise issues or variations on issues, which were canvassed. To take that approach would be counterproductive in that it would turn every costs application into a major further hearing resulting in even more costs. In that context it is worth noting that the hearing this morning took over an hour." He went on to say at para. 9 that "Rather a broad brush approach should be adopted to identify whether, and if so to what general extent, it can be said that it is clear that significant areas of the case, adding materially to the cost, were run and lost." Clearly if there is no specific paperwork that would not have been required, if there was no wasted interlocutory hearing, and if the case would have run for the same number of days, it is much harder to say that the losing issues added in any significant way to the costs, and there is a much less compelling case for any discount.

(v). On the other hand, if the issues on which the ultimate winner was unsuccessful *did* add significantly to the costs of the proceedings (for example, if identified paperwork was unnecessary, if an identified interlocutory hearing should not have been required, or if X number of days of substantive hearing time would have been saved), the court can consider either a discount (either on a percentage basis or a time basis) or (especially in complex commercial litigation) a cross-order and set-off allowing for costs in favour of the losing side on the issues that it won (*Veolia Water UK Plc. V. Fingal County Council (No. 1)* [2006] IEHC 137, [2007] 1 I.R. 690, [2007] 2 I.R. 81. While the requirement of complexity is not expressly referenced in s. 168 (see *Chubb European Group SE v. Health Insurance Authority* [2020] IECA 183, [2020] 7 JIC 0801 (Unreported, Court of Appeal, Murray J. (Whelan and Power JJ. concurring), 8th July, 2020)), s. 168 generally does not set out fixed criteria for the exercise of the discretion thereby conferred.

(vi). There are special costs rules for situations such as moot proceedings, environmental litigation, public interest litigation or abuse of process.

Application of law to facts

7. Going through the six points referred to above it seems to me that the situation here is as follows:

(i). The applicant was not "entirely successful" because it did not prevail on all issues. Therefore, s. 169 of the 2015 Act does not apply.

(ii). Where the winner is partly successful, the court then considers the matter under the discretion conferred by s. 168. That *does* apply here.

(iii). In exercising that discretion, the court should have regard to whether the losing issues added significantly to the length of the proceedings. Significance in that sense is best judged by comparison between the proceedings as they actually ran with how

they would have looked without the superfluous issues. Here, most if not all of the paperwork would have been required anyway, and indeed the State did not particularly look for any discount on the paperwork. Rather their focus was on reducing the two days of hearing to a single day. It seems to me that the hearing was conducted economically and that there is no way that a complex matter such as this could conceivably have concluded in one day on any view, even if the applicant had strictly confined itself to the points on which it won. So the State's idea of one day's costs only is a complete non-starter. I agree of course that some relatively modest costs were incurred unnecessarily by virtue of the sub-issues on which the applicant lost, but I do not think those additional costs reach the threshold of being significant for the purposes of justifying a cost discount where the case would in my view have run into a second day anyway.

(iv). To cheese-pare a winner's costs by knocking off a few per cent just for the sake of making a point might bring short-term gratification but in the long run would create an incentive for every part-winner's costs to be litigated in depth – the very thing the Supreme Court warned against in *Connelly*. The key point (as so often) is balance and incentives. The court has to balance the abstract desirability that winners would confine themselves to winning points against both the practical difficulty that a party can't know which are the winning points in advance and the much more significant problem of creating a perverse incentive for the parties to square up for another round of fisticuffs over costs. The tie-breaker is the very simple comparison process referred to above. Would the case have taken significantly longer without the losing points? If the answer is yes then by all means one can consider a discount, subject to any other relevant factors such as the Aarhus Convention. But if the answer is no, the case would (as here) have run for 2 days or X number of days in any event, and there is no particular pleading, affidavit or interlocutory hearing that unnecessarily absorbed costs, then it is generally both inappropriate and counter-productive to incentivise losers into making pointless and academic applications for costs to be shaved back. Resources are finite and courts have to be part of the solution rather than part of the problem. Such unnecessary costs arguments injure other litigants indirectly by draining the court's mental and physical resources. The comparison process provides a simple and objective test as to whether any such discount should be sought or allowed.

(v). Having regard to the foregoing, since the additional effort of dealing with the winner's losing points was not so material as to give rise to a significant increase in costs, then the question of a discount or a *Veolia* costs order does not arise.

(vi). Special costs rules do not apply. The only one that could have been relevant was that in relation to environmental litigation, but the issues under the SEA directive did not have to be decided.

Order

8. In finalising the order, I note that the costs of the stay have already been disposed of by order of Hyland J. and awarded to the Minister, on his application, against the council. I should also note the fact that the parties sensibly agreed that, insofar as the costs decision was capable of ready application to the issue of the costs of litigating the costs issue, it could be so applied without the necessity for a further hearing.

9. For the reasons set out above it seems to me the appropriate order is as follows:

(i). that the council be awarded the costs of the proceedings against the Minister including reserved costs and the costs of written legal submissions, and allowing for the costs of two counsel for the leave application;

(ii). that the applicant will also have the costs of the costs issue as against the Minister, including any reserved costs and the costs of written legal submissions; and

(iii). for the avoidance of doubt, that the Minister can set off against such costs the costs already awarded in relation to the stay.