THE HIGH COURT

COMMERCIAL

[2023] IEHC 28

Record No. 2021/658 JR

BETWEEN

MICHELLE HAYES

APPLICANT

AND

ENVIRONMENTAL PROTECTION AGENCY

and

THE MINISTER FOR ENVIRONMENT, CLIMATE AND COMMUNICATIONS, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

IRISH CEMENT LIMITED

NOTICE PARTY

JUDGMENT OF Mr. Justice Twomey delivered on the 24th day of January, 2023

INTRODUCTION

1. The applicant in this case, Ms. Hayes, brought a challenge on environmental grounds to the grant of licence by a State agency (the EPA). She lost that challenge. In bringing the litigation, Ms. Hayes, who is a solicitor, was protected from a costs order being made against her if she lost. Accordingly, it is the taxpayer, rather than Ms. Hayes, which has to foot the bill for the EPA's legal costs, even though the EPA won the litigation.

2. Despite having cost the taxpayer significant sums of money by bringing this unsuccessful challenge, Ms. Hayes, now wants the EPA/the taxpayer to pay her legal costs. In essence therefore, Ms. Hayes wants the taxpayer *to pay her for bringing an unmeritorious case* and so to pay her for putting the taxpayer to the expense of having to successfully defend that case.

3. Ms. Hayes' application requires an analysis of the privileged position (from a costs' perspective) occupied by persons who take High Court cases challenging planning and other decisions on environmental grounds.

4. Theirs is a privileged position, because they have no '*skin in the game'*, in the sense that, unlike all other litigants, they are not at risk of having costs awarded against them, even if they lose the case. Furthermore, so long as these judicial review cases are required to be taken in the High Court (where costs for a hearing can be €50,000/€100,000 or more), rather than say the District Court (with costs of €500/€1,000), this is a very significant financial privilege. In real terms, it is a saving of hundreds of thousands of euro in many cases for this select group of litigants, *albeit* that there are clear policy reasons why this privilege is be granted in relation to environmental issues.

5. Nonetheless, it is important to bear in mind how much of a privilege this is, which very few other litigants have. These litigants are granted the privilege of being able to use scarce court resources, at huge cost, to pursue an environmental/planning challenge. It is also important to remember that somebody is paying for this privileged position, which is occupied

by litigants who take unsuccessful environmental judicial reviews (even those with little prospect of success). That person is the taxpayer. This is because instead of the losing litigant paying hundreds of thousands of euro for the legal costs of the State agency(s) which wins the case, the taxpayer foots this bill.

6. However, it is also important to bear in mind that the privilege of a litigant, who is protected from costs, is not an unrestricted privilege. This is because, as noted below, court resources are not just the concern of litigants, as there is a very strong public interest in those resources being carefully managed. The other reason it is not an unrestricted privilege is because it is the taxpayer who ends up suffering financially if such resources are used unnecessarily. For these reasons, it is this Courts' view that the benefit of being permitted to litigate with nothing to lose comes with a burden. This burden comes in the form of a greater onus on such litigants to be efficient with court time (in order to ensure that they are as efficient as other litigants, who are at risk of having costs awarded against him).

SUMMARY

7. In this case, Ms. Hayes failed in her challenge to the grant of a revised emissions licence to Irish Cement, which Irish Cement claims will lead to a saving of up to 50% of the factory's carbon dioxide emissions.

8. Ms. Hayes' own law firm acted for her in the proceedings, which she lost on all grounds – see *Foley v. Environmental Protection Agency & Ors; Hayes v. Environmental Protection Agency & Ors* [2022] IEHC 470 ("the Principal Judgment"). Expressions which are defined in that judgment are used in this judgment.

9. Although Ms. Hayes lost the case, the primary loser, from a financial perspective, is not Ms. Hayes. This is because it is not Ms. Hayes who will end up paying the likely hundreds of thousands of euro in legal costs of the successful parties, which were incurred as a result of

her decision to pursue this unmeritorious environmental claim. It is the taxpayer who has to pick up the tab for the very significant legal costs of the EPA for several days in the High Court as well as the legal costs of the Attorney General/Ireland, who she sued as well.

10. Ms. Hayes' case was heard at the same time as another applicant's case, that of Ms. Foley, and the combined cases took seven days in the High Court, thus using up an enormous amount of scarce court resources for a challenge to the grant of an emissions licence. The other applicant in this case, Ms. Foley, owns a stud farm at Islanmore Stud, Croom, County Limerick and her challenge to the grant of the revised emissions licence was also unsuccessful on all grounds.

11. Ms. Foley, like Ms. Hayes, benefited from being protected against a costs order, even if she lost the proceedings. When orders were being finalised, Ms. Foley agreed to a court order dismissing her application and providing for no order to be made regarding costs. For this reason, Ms. Foley did not require a costs' hearing. The effect of this order is that the taxpayer is likely to be paying hundreds of thousands of euro in legal costs as a result of Ms. Foley's unmeritorious challenge.

12. However, Ms. Hayes took a different approach from Ms. Foley to the costs issue. As already noted, she also occupied a privileged position, at the expense of the taxpayer, of not having to pay the EPA's (and the other winning parties') costs, even though she put them to the cost of defending an unmeritorious claim (and the added cost, as noted in the Principal Judgment, of having to deal with arguments which were not part of the pleaded case).

13. Nonetheless, Ms. Hayes sought a costs' hearing at which she sought to have the taxpayer pay even more. She wants the taxpayer to pay, not just the EPA's and the Attorney General's costs, but also Ms. Hayes' own legal costs for *losing* the case.

14. There is an added factor in this case. This is the fact that Ms. Hayes, as well as being the applicant, is a solicitor and her firm are the solicitors representing her. Accordingly, her

application for an order from this Court for her lawyers' costs to be paid for *losing* the case, is in effect an application for Ms. Hayes herself *to financially benefit from* losing the case. If she were to be successful, it is her firm which will benefit from the tens/hundreds of thousands of euro in legal costs she is seeking from the taxpayer for losing this case. For this reason, there is much more financially at stake for Ms. Hayes, in making this application for her legal costs, than the usual applicant. While this Court is thus highlighting the real-life effects of the order being sought by Ms. Hayes, it should be emphasised that Ms. Hayes is perfectly entitled to make this application, as an applicant and as a solicitor.

15. Ms. Hayes' application, as an applicant and the solicitor, also serves to highlight that if legal practitioners like Ms. Hayes were, as a general rule, to be paid hundreds of thousands of euro by the taxpayer for bringing unmeritorious environmental/planning cases in the High Court, whether on their own behalf, or on behalf of third-party applicants, the primary winners would be lawyers, all at the expense of the taxpayer. While lawyers might not be disappointed with such a scenario, one would imagine that the taxpayer, if it were represented, would not be overly pleased. However, as there are never any lawyers in court representing the interests of the taxpayer there is an onus on the courts to look out for the interests of the taxpayer. This is clear from the Supreme Court case of *Reardon v. Government of Ireland* [2009] 3 I.R. 745 at p. 765, where Murray C.J. noted that the interests of the taxpayer had to be *'borne in mind'* by the court in reaching its decision (in that case it was a decision to bring groundless litigation to an end):

> "**It must also be borne in mind that** all litigation, even groundless litigation, causes expense to the individuals or entities impleaded in it and that **this expense will often fall on the taxpayer**". (Emphasis added)

16. While this Court must only consider the merits of Ms. Hayes' application in making its decision, and not the wider implications, this Court would nonetheless observe that this case

highlights how sometimes mundane or technical decisions taken by the courts (such as ones regarding the award of legal costs) can have very significant real-life effects.

17. It is however important to emphasise that there is no suggestion that Ms. Hayes took this case for direct financial gain or that she was not motivated by a genuine desire to protect the environment or protect her neighbourhood from what she perceives as negative environmental consequences.

18. Nonetheless, for the reasons set out below, this Court not only rejects Ms. Hayes' application for her legal costs for bringing an unmeritorious claim, but it is of the view that, despite Ms. Hayes having costs protection, there are grounds for the respondents to be awarded their costs of the substantive hearing (in dealing with issues raised by Ms. Hayes which *were not part* of the pleaded case) and their costs of the costs hearing (in dealing with an unmeritorious application for costs by Ms. Hayes).

BACKGROUND

19. In light of the special costs' regime that applies to judicial reviews of environmental issues, Ms. Hayes was in the privileged position of not being at risk of having a costs order made *against her,* even though she brought an unmeritorious case (in the sense that it was rejected on all grounds by this Court). Her privileged costs' position was also confirmed by the fact that the EPA had written to her prior to the hearing to confirm that she would not be liable for costs (save in any of the circumstances set out in s. 50B(3) of the Planning and Development Act 2000 ("the 2000 Act")). The other parties also wrote to Ms. Hayes confirming this position. Thus, when it came to Ms. Hayes deciding how she was going to conduct the litigation, Ms. Hayes knew that even if she lost the judicial review, she was, subject to s. 50(B)(3), protected from having a costs order made against her.

Waste of court time by Ms. Hayes

20. Nonetheless, this application by Ms. Hayes for *costs to be awarded to her* is curious, to say the least, since not only did Ms. Hayes lose on all grounds, but this Court was critical of the court time which was wasted by her in arguing issues which were not pleaded. While it is not clear why Ms. Hayes wasted court time arguing points which had not been pleaded, it is clear she did not have the *usual incentive* that a litigant has to be efficient with court time, i.e. the threat of a costs order against her. In this Court's Principal Judgment, this Court, in effect, concluded that Ms. Hayes had abused the privilege, of having costs protection, by wasting court time, *albeit* that it is not being suggested that this abuse of privilege was done intentionally by Ms. Hayes.

21. It is well established that one of the purposes of a costs order is to encourage litigants to take an '*efficient approach to litigation*' (*Permanent TSB & ors v. Skoczylas & ors* [2021] IESC 10 at para. 12). It is ironic therefore that, even though she was in the privileged position of not having costs *awarded against her* for losing the litigation (unlike other litigants), Ms. Hayes would seek *costs to be awarded to her*, even though she was found to have, not only, lost the case but *wasted* court time.

Waste of taxpayers' funds

22. Furthermore, as well as wasting court resources, Ms. Hayes' waste of court time involved a waste of taxpayers' funds (since she was suing State agencies and they had to spend legal costs in dealing with these unnecessary points, which they were not going to recover even if they won the case).

23. In addition of course, a private party, Irish Cement, had to incur legal costs dealing with points, which were not part of the case and for which Ms. Hayes would not be paying, even if she lost.

24. For this reason, it is also ironic that Ms. Hayes would seek to put the taxpayer to *further* expense (as well as Irish Cement) by having a costs' hearing (and having to prepare written legal submissions) regarding her claim that she should be *awarded costs* for losing the action.

Entitlement of a losing party to legal costs

25. While this Court has observed that it is curious, to say the least, that Ms. Hayes would seek her legal costs in these circumstances, it is important to point out that Ms. Hayes is legally entitled to make this application. The legal basis for Ms. Hayes' claim that she is entitled to costs is s. 50B(4) of the 2000 Act, which reads as follows:

> "(4) *Subsection (2)* does not affect the Court's entitlement to award costs in favour of a party in a matter of exceptional public importance and where in the special circumstances of the case it is in the interests of justice to do so."

26. Thus, this section provides for the *possibility* that a losing party may be awarded costs in a matter of exceptional public importance and where, in the special circumstances of the case, it is in the interests of justice. However, while providing for this possibility, it is clear that it is in the context of the pre-existing '*entitlement'* of courts to award costs, which is not altered by this additional possibility under s. 50B(4).

27. As regards the court's existing entitlement to award costs, it is clear from the Supreme Court's judgment in *Permanent TSB & ors v. Skoczylas & ors* [2021] IESC 10 at para. 12 that

> "Part of the function of the court's jurisdiction to award costs is to **encourage a responsible and efficient approach to litigation**". (Emphasis added)

28. It is important now to consider Ms. Hayes' application, in the context of the privileged position occupied by litigants who are protected from costs, with the foregoing principle in mind.

Added onus on party with benefit of protected costs agreement/order to be efficient

29. First, it seems to this Court that the fact that Ms. Hayes had the benefit of costs protection means that there was an added onus on her to be efficient with court time (in order to ensure that she is as efficient as other litigants, who have the threat of a costs order hanging over them).

30. This is because as noted by Murphy J. in *National Museum of Ireland v. The Minister for Social Protection* [2017] IEHC 198 at para. 4, a litigant who does not have the threat of being *'saddled with costs which will have to be met from their own resources'* is in a very different position from the usual litigant. It is a very different position, since that litigant does not have the *'potent incentive to reasonableness, both in the conduct of litigation and in the settlement of actions'*, which this threat of a costs order provides. To take account of the very different position of a party with costs protection, there is an added onus on her not to waste court time. Indeed, it seems to this Court that in light of the requirement imposed by the Supreme Court in *Skocylas*, that costs orders be used to *encourage efficient litigation*, this Court *must* impose an added onus on litigants with costs protection to be efficient in their litigation (in order to ensure that they are as efficient as other litigants).

31. To put the matter another way, the latitude, if any, which a court might grant a litigant, whose own money is at stake, should not be granted to a litigant who has the privilege of costs protection. This is because a litigant who has nothing to lose (and in particular, no fear of having to pay hundreds of thousands of euro in costs if she is not reasonable in the conduct of litigation) has little or no incentive to be efficient with the court's time as regards arguing points that are not even part of the case.

32. Applying the foregoing principles to this case, the fact that Ms. Hayes wasted so much court time dealing with matters that were not pleaded *is sufficient reason alone* for this Court to exercise its discretion under s. 50B(4) *against* awarding her costs, in a case where she lost

her application on all grounds. For this reason alone, this Court rejects Ms. Hayes' application for costs.

33. For the sake of completeness, this Court would add that, even if the inefficient manner in which the litigation was conducted by Ms. Hayes was not the reason for this Court refusing this application, this application would be refused for other reasons. This is because as is clear from *Bupa Ireland Ltd. & anor v. Health Insurance Authority* [2013] IEHC 177 at para. 24, awarding costs to a losing *party 'should only be adopted in rare and exceptional circumstances'.* This case was very far removed from a rare or exceptional case, as it was typical of the type of judicial review, run on a daily basis in the courts, regarding the alleged failure of an administrative body to give reasons for a decision. The fact that it related to a significant cement plant or claims regarding carcinogenic pollutants (which claims were dismissed) does not alter that fact. In addition, there was no *'legal issues… of special and general public importance'* as required by *Dunne v. Minister for the Environment* [2008] 2 I.R. 775 at para. 35, in order for this Court to exercise its discretion to award a losing party her costs.

34. Accordingly, this Court refuses Ms. Hayes' application for her costs.

35. Although not determinative of this application, this Court would observe that if Ms. Hayes were to be granted an order for her costs for losing this case this would lead to a number of consequences.

Costs' order, if granted to Ms. Hayes, would impact on the finances of the EPA

36. First, an order for the EPA to pay the costs of an applicant, who had brought an unmeritorious environmental challenge, highlights a further irony in this case.

This is the fact that that a litigant who took an unmeritorious case so as to *protect the environment* is nonetheless seeking an order for its costs for *losing* that case, from the EPA, which is the body with responsibility for protecting the environment. Accordingly, the effect

of such an order would be to reduce the finances of the EPA, and so arguably undermine the ability of the EPA to *protect* the environment.

Lawyers would be paid by the taxpayer for bringing unmeritorious claims

37. Secondly, if Ms. Hayes were to be granted the order, it would mean that legal practitioners like herself are paid by the taxpayer, for bringing environmental litigation which is unmeritorious. In this regard, Ms. Hayes' application for her costs is premised on the fact that it is irrelevant, to her claim for costs, that her claim was without any merit. However, if the taxpayer were to pay Ms. Hayes her costs, as the solicitor, for taking unmeritorious environmental/planning challenges, it would be a financially very significant order. This is because these environmental/planning judicial review cases are taken in the High Court, where costs are often €100,000 or more, rather than say the District Court, where costs are often 1% of High Court costs (*circa* €500-€1,000). It could be argued therefore that the granting of a costs order in Ms. Hayes' favour might incentivise the taking of unmeritorious environmental/planning challenges, when this is the very opposite of what costs orders are intended to achieve, i.e. *'responsible and efficient litigation'* (*per* the Supreme Court in *Skocylas*).

Should costs be *awarded against* Ms. Hayes even though she is protected from costs?

38. A completely separate issue to whether Ms. Hayes should have costs awarded to her, as the losing litigant, is whether she might have had costs awarded against her, despite the fact that she had the benefit of costs protection. In this regard, it seems to this Court that a strong case could have been made by the respondents to have costs awarded against Ms. Hayes under s. 50B(3) of the 2000 Act. This section states:

> "(3) The Court may award costs against a party in proceedings to which this section applies if the Court considers it appropriate to do so—

(a) because the Court considers that a claim or counterclaim by the party is frivolous or vexatious,

(b) because of the manner in which the party has conducted the proceedings, or

(c) where the party is in contempt of the Court."

39. It is certainly arguable that, because of the '*manner in which [Ms. Hayes] conducted the proceedings'* (to quote s. 50B(3)(b)), the respondents are entitled to an order for costs against Ms. Hayes. This is because of the considerable amount of costs incurred in the waste of their time (as well as the Court's time) in dealing with matters which were not pleaded.

40. Since the Supreme Court has recognised that a function of a costs' orders is to encourage an '*efficient approach to litigation'*, the respondents could have sought such an order against Ms. Hayes under s. 50B(3). This is particularly so since, as previously noted, a party pursuing an environmental/planning judicial review, with the benefit of costs protection, has a particular onus to ensure that the litigation is conducted efficiently.

41. Such an order could have been sought because costs protection is not a *carte blanche* to use court time inefficiently. It is particularly not a *carte blanche* to use taxpayers' funds inefficiently. In addition, as the taxpayer is not represented in court, there is an onus on the court to look out for its interests by making costs orders against parties who abuse the privilege of costs protection.

42. A further reason why costs might have been awarded against Ms. Hayes, is because, as noted by MacMenamin J. in the Supreme Court case of *Tracey t/a Engineering Design & Management v. Burton & ors.* [2016] IESC 16 at para. 45,

"Court time is not solely the concern of litigants, or their legal representatives. There is a strong public interest aspect to these issues."

Accordingly, there is an obligation upon the courts, in the public interest, to ensure that court time is used efficiently, and one way in which this is achieved is by the use of costs orders.

43. In addition, in light of the well-publicised pressure on court resources, the courts are under added pressure at this time to find ways of ensuring that court time is used efficiently, particularly in cases concerning litigants who have costs protection. Those litigants will not have the threat of a costs orders to incentivise them to be mindful of the effect of their inefficient use of court time on other litigants waiting for their cases to be heard. However, this is a matter the courts have to keep in mind at all times.

44. In conclusion in this regard, it seems to this Court that Ms. Hayes did not discharge the particular onus on her, as a person with costs protection, of litigating efficiently. It is clear from *Skocylas* that costs orders should be used to encourage efficiency. For this reason, this Court would have been likely to award costs against Ms. Hayes (if the respondents had sought such an order).

Costs of the costs' hearing

45. The final irony in this case is that even though this Court, in the Principal Judgment, criticised the waste of court resources and of taxpayers' funds, during the substantive hearing, Ms. Hayes required further court resources and taxpayer's funds to be used to have a costs' hearing (which necessitated written legal submissions by all parties).

46. The respondents have been successful once again, since Ms. Hayes' has lost on all grounds in her application for the legal costs she incurred in the substantive hearing.

47. However, this begs the question, what about the costs incurred in the costs' hearing and the preparation of legal submissions? Who is liable for these additional costs (incurred by the winning State agencies/the taxpayer and Irish Cement)? It is certainly arguable that the costs of the costs' hearing should be awarded against Ms. Hayes, pursuant to s. 50B(3), in the circumstances of this case.

48. In this regard, the foregoing comments from the Supreme Court, that costs' orders are to be used to encourage efficient litigation, apply equally to a costs' hearing, as they do to a substantive hearing. Similarly, the earlier point about there being a particular onus, on parties with protective costs orders, to be efficient in their litigation, is also relevant to the costs' hearing.

49. Ms. Foley, whose case was heard with Ms. Hayes', because of the similarity of their challenges to the award of the licence, did not require further court resources to be utilised to seek costs in her favour for losing the litigation, unlike Ms. Hayes.

50. In considering whether Ms. Hayes might be subject to a costs order (in respect of the costs hearing), even though she is protected from costs, s. 50B(3) of the 2000 Act provides that in environmental cases such as this, costs can nonetheless be awarded against an applicant if the claim is '*frivolous or vexatious'*. While the EPA stated at the costs' hearing that it felt that the points being taken by Ms. Hayes were frivolous, it did not seek an order against Ms. Hayes for the costs of the costs' hearing. However, if such an application had been made against Ms. Hayes, it is likely that this Court would have granted that order, in light of the waste of court time in the substantive hearing, which was compounded by the utilisation of further court time in Ms. Hayes seeking a costs' hearing. This Court would have done so because of the clear obligation on courts, arising from *Skocylas,* to use costs orders to encourage efficient litigation, in the public interest i.e. for the benefit of the many other litigants waiting to having their cases heard and to seek to reduce the waste of taxpayers' funds involved in this application.