

THE HIGH COURT

[2023] IEHC 474

[Record No. 2019/250JR]

BETWEEN

LIAM Ó DUBHGAIN TRADING AS WD DUGGAN

APPLICANT

AND

MINISTER FOR CULTURE, HERITAGE AND THE GAELTACHT

RESPONDENT

JUDGMENT of Ms Justice O'Regan delivered on the 28 July 2023.

1. This judgment is supplementary to the principal judgment in these proceedings delivered on 11 July 2023 and deals with costs to be awarded, the nature of the order to be made and the possibility of a stay pending an appeal.

2. In accordance with the principal judgment both parties delivered submissions in respect of the issue of costs. In addition, the respondent made submissions in respect of the relevant order to be made and a possible stay pending an appeal.

Costs

3. The applicant is claiming full costs on the basis that the applicant was successful in the proceedings in respect of the issue concerning reasons given, the taking into account of irrelevant matters and the nature of the order to be afforded.

The applicant acknowledges that the applicant had raised issues which were not

pleaded. In this regard although discovery was made, and the applicant had within the body of the statement of grounds reserved its right to amend the proceedings, no such amendment was sought either prior to or during the course of the hearing.

The respondent argues that under O.99 of the Rules of the Superior Courts costs will be awarded at the discretion of the court and argues that the costs of every issue of fact or law raised upon a claim or counterclaim shall unless otherwise ordered follow the event. The respondent quotes from s.169(1) of the Legal Services Regulation Act 2015 ('the 2015 Act') and relevant case law from the Court of Appeal from the interpretation of that section namely *Higgins v Irish Aviation Authority* [2020] IECA 277. The respondent notes that the pleaded case against the respondent in respect of a manifest error was effectively abandoned at the hearing.

4. In my view the issue of manifest error did not take up any of the court's time at the hearing but clearly did involve the respondent with the expenditure of time and resources in dealing with the claim in advance of the hearing and the applicant did not argue that the issue of manifest error had in fact been withdrawn by the applicant prior to the hearing.

Furthermore, I am not satisfied, as argued by the applicant in costs submissions, that the issues raised which did not come within the context of the pleaded case did not elongate the case and in my view such issues did in fact take up a considerable portion of the two day hearing notwithstanding that the applicant was requested from the outset by the court to confine itself to pleaded matters. In addition, considerable reference was also made to the applicant's expert report and associated affidavits which, as expressed in the principal judgment, did not involve an appropriate issue to be dealt with by the court. The respondent's oral submissions did not take up time arguing the issues not pleaded other than to identify same.

5. Given the foregoing I am satisfied that the pleaded case excluding the manifest error point could conveniently have been concluded before the court on one day rather than taking two days.

6. For the reasons above it appears to me that the appropriate costs order is an order providing for the plaintiff's costs to be adjudicated upon in default of agreement in respect of a one-day hearing excluding any costs associated with the expert report and associated affidavits.

Nature of the order to be made

7. Reference to the nature of the order to be made is contained at para. 1.3 of the respondent's submissions as to costs which is to the effect that as the nature of the order to be made has not been specified and the respondent was seeking an opportunity to make a submission on the form of *certiorari* order or related order.

8. It appears to me that the nature of the order to be made is not sufficiently complex as to require a further hearing from the parties on this topic in particular in circumstances where during the hearing before the court, the respondent confined its submissions to the argument that the applicant was not entitled to the relief claimed. At para. 29(1) of the statement grounding the judicial review application and at para. 1 of the notice of motion of 26 April 2019 served on the respondent the applicant is seeking an order setting aside and/or permanently suspending the decision of the respondent set out in the respondent's letter of 15 April 2019 to award the contract the subject matter of these proceedings to the affected party. It appears to me that the appropriate order to be made is an order of *certiorari* in respect of the decision set out in the respondent's letter of 15 April 2019 to award the relevant contract to the affected party.

Stay pending appeal

9. The respondent in submissions references two judgments of Clarke J (as he then was) namely *Okunade v Minister for Justice* [2012] 3 IR 152 and *CC v Minister for Justice & Equality* [2016] 2 IR 680 detailing the appropriate considerations to be taken into account in determining whether or not to grant a stay pending an appeal. The task for the court is to determine whether the appellant would have arguable grounds to appeal and identify where the greatest risk of injustice would lie.

10. The respondent argues that there is a significant risk of injustice to the respondent and the affected party if the order comes into effect before any appeal has been determined as an appeal could be rendered entirely moot. It is said that the risk of injustice to the affected party is that it would no longer be awarded the contract. On the other hand, it is argued that no prejudice would be occasioned to the applicant.

11. It should be borne in mind that the request for tender issued on 27 February 2019 and the latest date for receipt of submissions was 29 March 2019. The process concerned the provision of a fast ferry passenger service for the period 1 May 2019 to 30 April 2021. Accordingly, the period the subject matter of the tender process, has expired in excess of two years ago. Given the temporal limit on the contract to be granted under the tender process the respondent has not identified any specific prejudice to the respondent or indeed the affected person should an order be made now by this Court without the benefit of a stay.

12. Insofar as arguable grounds of appeal are concerned the respondent's submissions identified such arguable grounds at para. 2.6 the submissions on costs. Such summary is to the effect:

- (a) In each of the five criteria identified by the court the court did not consider all the relevant information.

The nature of the relevant information which was not considered under any one of the five criteria has not been identified.

(b) It is argued that the selection criteria included one criterion that did not form part of the pleaded case namely “customer service” and in addition it is argued that no reasons were required where equal marks had been given.

(c) The respondent does not agree with the court’s factual findings on the interpretation of reasons and the Court did not apply the applicable principles. No further detail is included.

(d) The court has not applied the applicable principles to guide the appropriate remedy as set out in *Gaswise*.

The nature of the lapse by the court has not been identified.

13. By reason of the foregoing it is not possible to determine the arguability of the respondent’s appeal save in relation to the argument relevant to “customer service” at para. (b) above. It appears to me that the respondent has arguable grounds in this regard. Assuming that the respondent is correct on these grounds of appeal, ten points were identified in the principal judgment as potentially lost to the applicant, of these a total of sixty such points potentially lost to the applicant in circumstances where the differential in points between the parties under the assessment made by the respondent and communicated to the applicant under cover letter of 15 April 2019 was limited to twenty points. Accordingly therefore, accepting the arguability of these points and assuming that the respondent will be successful on appeal on the points, nevertheless by reason of the remaining criteria there is the potential of fifty points lost to the applicant and in the circumstances the respondent’s success on appeal in respect of the customer service argument does not make a material difference to the ultimate outcome.

14. The application for a stay pending an appeal of the order is therefore refused, however it does appear to me that a stay on the adjudication and payment of costs should be made pending appeal. Such a stay will therefore be made for an initial period of 28 days from the perfection of this order. Should the respondent lodge an appeal within that time the stay will continue pending the determination of the appeal. If no such appeal is lodged the stay will lapse after the period of 28 days from the perfection of this order.