APPROVED

THE COURT OF APPEAL

Neutral Citation Number [2020] IECA 252
Record Number: 2018/253
High Court Record Number: 2016/955JR

Noonan J.

Faherty J.

Binchy J.

BETWEEN/

DAVID MONGANS AND MARGARET LISA MONGANS

AND MARGARET LISA MONGANS AS MOTHER AND NEXT FRIEND OF DAVID MONGANS (A MINOR), MICHAEL JAMES MONGANS (A MINOR) AND MARTIN MONGANS (A MINOR)

APPLICANTS/RESPONDENTS

-AND-

CLARE COUNTY COUNCIL

RESPONDENT/APPELLANT

JUDGMENT of Mr. Justice Noonan delivered on the 24th day of September, 2020

Relevant facts

1. The issue in this case concerns the costs of these judicial review proceedings awarded by the High Court. That Court awarded the respondents 50% of the costs of the entire proceedings. The appellant contends that no costs should have been awarded against it.

2. The respondents are a family and members of the travelling community residing in County Clare. It would appear that in or about August of 2009, they were accommodated by the appellant at Bay 4, St. Enda's Park, Ennis. Their home appears to have been subjected to an arson attack in or about December of 2012 and they were rehoused thereafter by the appellant in a dwelling house at 1 Knockanean, Ennis. Unfortunately, a second arson attack appears to have taken place on this premises on the 31st May, 2015 resulting in the respondents being made homeless. There is no suggestion that any of the respondents were in any way involved in these malicious fires. On the 19th December, 2016, the respondents were granted leave by the High Court to seek judicial review claiming, *inter alia*, an order of mandamus compelling the appellant to provide them with appropriate accommodation and to carry out an assessment of their needs in that regard.

3. There is a factual dispute between the parties as to what arrangements were offered or put in place in respect of emergency accommodation following the respondents being rendered homeless but that is not immediately relevant to the issues that arise herein. Shortly before the appellant delivered its statement of opposition, it wrote to the respondents on the 7th March, 2017 offering them accommodation in the same house that they had been resident in at 1 Knockanean which had, since the fire, been refurbished by the appellant at a cost of some €90,000. In the letter of offer, the appellant explained that its insurers, Irish Public Bodies, had indicated that while they would provide insurance cover for the premises, there would be an exclusion in respect of any fire that was malicious in origin. Accordingly, as a term of the new tenancy, the appellant sought an indemnity from the respondents in respect of any such malicious fire. The appellant delivered its statement of opposition on the 14th March, 2017 placing reliance, *inter alia*, on this offer.

4. The appellant's offer was refused by the respondents who claimed it was unfairly discriminatory against them as members of the travelling community. Arising out of that, the respondents brought a motion on the 14th June, 2017 seeking to amend their statement of grounds to include a new plea that they had been unfairly discriminated against by the appellant by virtue of their ethnicity. In that regard, the respondents placed reliance on a statement made by An Taoiseach in Dáil Éireann on the 1st March, 2017 referred to as "The Statement for Recognition of the Traveller Community as an Ethnic Group".

5. The respondents' motion to amend was heard and determined by the High Court (Eagar J.) in a written judgment on the 27th October, 2017 whereby leave to amend was refused. In his judgment, Eagar J. stated that he was satisfied that the statement by An Taoiseach had no legal effect. No appeal was taken. The judicial review application came on for hearing before the High Court (McDermott J.) on the 15th May, 2018. On that date, arising from discussion between the parties, the respondents agreed to accept a further offer of accommodation in another dwelling house, the house at 1 Knockanean being by then no longer available. The respondents' affidavits had accepted that the house at 1 Knockanean was suitable for their needs. The offer of the new house was, however, subject to precisely the same limitation in respect of insurance cover as had previously been put forward. This time, the offer was accepted by the respondents, effectively disposing of the issue in the proceedings. What remained therefore was the question of costs.

Judgment of the High Court

6. The trial judge, having been apprised of the relevant factual background, delivered an *ex tempore* judgment. He noted that there was no event that had occurred which the costs must follow. He referred to the open offer made in March 2017. He referred to the

motion to amend the statement of grounds following the making of that offer and the judgment of Eagar J. to which I have referred. He discussed the relevant Supreme Court authorities which appear to have included the judgment of Clarke J. (as he then was) in *Cunningham v President of the Circuit Court* [2012] 3 IR 222 and he also made reference in particular to an earlier judgment of the High Court (Herbert J.) in *Garibov v Minister for Justice, Equality and Law Reform* [2006] IEHC 371. In that case, Herbert J. considered that in deciding on the issue of costs, the question the court should ask itself was "Was it reasonable to commence the proceedings, and was it reasonable to continue the proceedings?".

7. Applying those dicta, McDermott J. held that it was reasonable for the respondents to have commenced the proceedings and to have continued them up until March 2017 when the offer was made. He said: -

> "It was reasonable to maintain the case up to that point. Thereafter, the same conclusion doesn't apply."

8. He then made his determination in the following terms: -

> "I propose therefore, in the circumstances and bearing in mind the vicissitudes of litigation, as well as the justice of the case, and the background to this case and the rather peculiar feature of the unique proposition made in relation to the applicants in the case, to award the applicants 50% of the costs of the proceedings, and I don't propose to make any order in relation to the application to amend made to address the receiver (*sic*)."

Grounds of Appeal

9. The appellant states that it was an error of law and fact on the part of the High Court to determine that it was reasonable for the respondents to commence the proceedings in the absence of any determination concerning the issues arising in the proceedings. The appellant further contends that the trial judge, having determined that it was not reasonable to continue the proceedings beyond March 2017, should only have awarded costs, if at all, up to that date which were confined to the *ex parte* leave application. The appellant complains further that having successfully resisted the respondents' motion to amend, it should have been awarded the costs of that motion as costs should follow the event. The Notice of Appeal states that the order sought from this court is an order striking out the proceedings with no order as to costs and an order awarding the appellant the costs of the amendment motion. In their cross-appeal, the respondents argue that they are entitled to greater than 50% of their costs on the basis that the circumstances merit such an order. They claim a similar proportion of their costs in respect of the amendment motion on the basis that the appellant secured a benefit from that motion being the determination of the High Court that the statement of An Taoiseach had no legal effect.

Discussion

10. In submissions before this court, counsel for the appellant contended that the continuation of the proceedings by the respondents beyond March 2017 had resulted in no additional benefit being secured by them since they had accepted an offer of accommodation on precisely the same terms as the offer rejected in March 2017. The respondents on the other hand contended that they did in fact secure an advantage by the continuation of the proceedings, being the allocation of housing to them in a non-traveller designated private estate. This was said to be an important advantage for the respondents

in circumstances where the children of the family suffer from certain disabilities which, in the traveller community, expose them to unpleasant taunts and verbal abuse.

11. Complaint was made by the appellant that this issue was not raised previously but counsel for the respondents contended that it had in fact been raised in argument before the High Court. Whether this matter was raised in argument or not, it is clear that it never formed any part of the respondents' case, either as originally pleaded or as sought, unsuccessfully, to be amended. When the original offer of accommodation at their former refurbished residence was made in March 2017, it was rejected on the clear basis, stated in correspondence by the respondents' solicitors, that the insurance proviso was unacceptable and discriminatory. At no time was any suggestion made that the offer was rejected for the reasons advanced, at the earliest, before the High Court, at the hearing of the matter on the 15th May, 2018. Indeed, it was conceded on affidavit by the respondents that their former home was indeed suitable for their needs. I therefore reject the proposition that any tangible benefit was achieved by the respondents' continuing the proceedings after March 2017 and insofar as there is any relevance to whether or not it was "reasonable" to continue the case after that date, I agree with the views of the learned trial judge that it was not.

12. In *Cunningham*, Clarke J. (as he then was), speaking for the court concerning costs in moot proceedings said (at para. 24 – 26): -

> "A court, without being overly prescriptive as to the application of the rule, should, in the absence of significant countervailing factors, ordinarily lean in favour of making no order as to costs in cases which have become moot as a result of a factor or occurrence outside the control of the parties but should lean in favour of awarding costs against a party through whose unilateral action the proceedings have become moot. …

It must, of course, be acknowledged that some cases which have become moot may not fit neatly into the category of proceedings which have become moot due to entirely external events, on the one hand, or due to the unilateral action of one of the parties, on the other hand. In particular there will be cases where the immediate reason why proceedings have become moot is because a statutory officer or body has decided not to go ahead with a threatened course of action (such as the criminal prosecution in this case). However, the reason why it may have been necessary or appropriate for that statutory officer or body to adopt a changed position may, to a greater or lesser extent, be due to wholly external factors.

In that context it is, of course, important to note that statutory officers and bodies have an obligation to exercise their powers in a proper manner. If circumstances change then it is, of course, not only reasonable but necessary for such officers and bodies to reflect the new circumstances by adopting a position (even if different) which takes into account the circumstances as they have come to be. The mere fact, therefore, that a statutory officer or body adopts a changed position which renders judicial review proceedings moot does not, of itself, necessarily mean that it is appropriate to characterise the proceedings as having become moot by reason of a unilateral act of one party."

13. These dicta were considered and applied by this court recently in *P.T. v Wicklow County Council* [2019] IECA 346 in which Murray J., speaking for the court, observed (at para. 19): -

"In circumstances in which the mootness arises because a statutory body makes a new decision in the exercise of its legal powers, the court will look at the circumstances giving rise to that new decision. If the new decision is caused by a

change in the relevant circumstances occurring between the time of the first decision, and of the second, the court might not treat the new decision as a 'unilateral act' and may accordingly make no order as to costs (*Cunningham v. President of the Circuit Court* [2012] 3 IR 222 at 230-231). If, however, there has been no such change in circumstances so that the body has simply changed its mind, costs may be awarded against it (*id.*). If the respondent wishes to contend that there has been a change in circumstances – described by Clarke J. in *Cunningham* as an 'external circumstance' – it is a matter for it to place before the court sufficient evidence to allow the Court to assess whether and if so to what extent it can fairly be said that there was a sufficient underlying change in circumstances sufficient to justify, in whole or in part, it being appropriate to characterise the proceedings as having become moot by reason of a change in external circumstances. …"

14. These proceedings became moot in May 2018 by the repetition, in effect, of the same offer that had been made to the respondents in March 2017. Had the March 2017 offer been accepted by the respondents, the proceedings would then have been moot and the question the court would have had to consider was whether the making of the offer arose as a result of a change in circumstances or "an external circumstance" as characterised by Clarke J. It seems to me that there would have been a significant argument to be made that the refurbishment of the house at 1 Knockanean was clearly a change in circumstance which led to the house being reoffered for occupation to the respondents. Clearly that offer could not have been made until the refurbishment was completed. In my view therefore, as of March 2017, there was an argument to be made by the appellant that had the proceedings ended then, no order as to costs should have been made.

15. The same considerations arose again in May 2018 but with considerably greater force in circumstances where there was, on any reasonable assessment of the case, no objective justification for the respondents continuing on with the proceedings after the March 2017 offer. Indeed, it now appears that they did so in the misguided belief that they had been discriminated against by the Local Authority in making the offer subject to the insurance proviso, which prompted the failed amendment application and which proviso was subsequently accepted by them.

16. The respondents in argument urged on this court that it was reasonable for them to continue the proceedings until they did on the basis of *Garibov* as applied by the trial judge, who also applied the same authority in *Mansouri v Minster for Justice, Equality and Law Reform* [2013] IEHC 527. However, that submission has to be viewed in the light of the subsequent judgment of the Supreme Court in *Matta v Minister for Justice, Equality and Law Reform* [2016] IESC 45 where McMenamin J., speaking for the Court, said (at para. 22): -

> "I would, however, add that the judgment delivered by Harding Clark J., in this case, was of some precedential value. It clarified the law. It laid down a more general principle of application regarding the correct approach to be taken by the High Court in dealing with moot applications. Harding Clark J., at p.216, correctly distinguished the circumstances of the case before her, from a decision of Herbert J. in *Garibov v. The Minister for Justice, Equality & Law Reform* [2006] I.E.H.C. 371 (Unreported, High Court, Herbert J., 16th November, 2006), which should now be regarded as decided on its own facts. That judgment must now also be taken as having been superseded by the judgments of this Court in *Cunningham* and *Godsil*, and I would not apply it."

17. It is in my view clear therefore that whether it was reasonable to commence or continue the proceedings is no longer to be regarded as the correct test to be applied with regard to the allocation of costs in proceedings which have become moot.

Conclusion

18. It was not in dispute before this court that the costs order made by the trial judge being 50% of the entire costs of the proceedings greatly exceeded any costs incurred by the respondents up to the making of the offer in March 2017. In argument, the appellant proposed two alternatives, either that there be no order as to costs, or alternatively that the respondents have their costs up until March 2017, which would be confined to the costs of the *ex parte* application, and thereafter the appellant would have its costs resulting in a significant balance in favour of the appellant. While I accept that there is an argument for making such order, the order sought by the appellant in its Notice of Appeal is that there should be no order as to the costs of the proceedings, with the exception of the motion to amend.

19. In those circumstances therefore, I propose that there should be no order as to costs of the proceedings in the High Court, with the exception of the motion to amend. With regard to that motion, it is by any objective measure clear that the respondents failed and the appellant was entirely successful. I do not consider that it can reasonably be said that the appellant derived any benefit from the finding of the High Court that the statement of An Taoiseach had no legal effect. It would be very surprising indeed if the High Court were to have considered otherwise but this was merely an incidental finding to the court's primary determination which was that the respondents were not entitled to amend their grounds. I consider therefore that costs should follow the event in respect of that motion and the appellant is entitled to those costs.

20. With regard to the costs of this appeal, my provisional view is that as the appellant has been entirely successful on both the appeal and cross-appeal, it should be awarded its costs of the appeal. If, however the respondents wish to contend for an alternative form of order, they will have liberty to deliver written submissions not exceeding 2,000 words within 14 days and the appellant will have a similar period to respond.

21. As this judgment is being delivered electronically, Faherty and Binchy JJ. have indicated their agreement with it.