THE COURT OF APPEAL
CIVIL

Court of Appeal Record No. 2018/223
High Court Record No. 2015/269 R

UNAPPROVED
NO REDACTION NEEDED

Whelan J.
Ní Raifeartaigh J.
Murray J.

BETWEEN:

KENNY LEE

RESPONDENT

- AND -

THE REVENUE COMMISSIONERS

APPELLANT

JUDGMENT of Mr. Justice Murray delivered on the 16th of April 2021

1. At the conclusion of the judgment I delivered in this matter (and with which Whelan J. and Ní Raifeartaigh J agreed) ([2021] IECA 18) I expressed the provisional view that (a) the appellant ('Revenue') had been entirely successful in its appeal and (b) costs should follow that outcome. Both parties have delivered written submissions following that proposal. Mr. Lee, while not disputing that Revenue has been entirely successful, has urged that the Court exercise its discretion to make a limited order for costs in his favour or, alternatively, to make no order as to costs. Revenue disagrees, urging that the Court make an order for costs in its favour in line with the proposal suggested by the Court.

2. The issue presented by the appeal was, as I described it in the judgment, net. It depended upon whether the Appeal Commissioners enjoyed the jurisdiction to decide whether liabilities the subject of assessments to tax issued by the Revenue Commissioners had been compromised. To resolve that issue, it was necessary for the Court to address in some detail the precise definition of the Appeal Commissioner's function and powers when hearing appeals against assessment to income tax. In doing so, the Court was guided by authority in which the relationship between the jurisdiction of the Appeal Commissioners and established public law principles was explored. There was, however, no case in which the specific issue presented by the taxpayer here had been previously addressed.

3. The gravamen of Mr. Lee's argument is that the appeal presented issues of what he describes as *'public and systemic importance'*. He submits that the language of s. 169 of the Legal Services Regulation Act 2015 is sufficiently broad to allow the court to consider the making of a modified costs order in relation to such cases and contends that these proceedings fall within the category of litigation to which the general rule as provided for in s. 169 should not be applied.

4. Revenue, on the other hand, notes that tax cases frequently clarify the law so as to be relevant to taxpayers, their professional advisors and to Revenue. Revenue observes that jurisdictional issues can frequently arise in relation to the Circuit Court and other inferior tribunals suggesting that a general rule exempting the unsuccessful party from the obligation to pay costs in proceedings raising such issues, would require legislative intervention. It stresses that Mr. Lee did not bring these proceedings as a public interest challenge: his concern

was a very real financial one arising from his attempt to have the assessment to tax raised by Revenue '*reduced to zero'*.

5. The application falls to be viewed by reference to four features of the factual and legal context. First, the issue arising in this case was of systemic importance to the definition of the jurisdiction of the Appeal Commissioners. Second, it was not a straightforward issue – as evidenced by the fact that while both the Appeal Commissioner and the High Court judge adopted the view that the Commissioners *did* have jurisdiction to rule on whether there had been a settlement of the taxpayer's liability, both the Circuit Court Judge and this Court reached a different conclusion. There were, on any version of the case, good arguments either way. Third, while it follows that the taxpayer may have acted entirely reasonably in adopting the position that he did and litigating the issue of whether the Appeal Commissioners enjoyed that jurisdiction, it is clear that this is not enough of itself to displace the principle that a party that has failed in proceedings will normally bear the costs incurred by its opponent in defeating its claim (see most recently *The Lady Magda* [2021] IECA 51 at para. 6).

6. Fourth it is clear that the Court retains an exceptional jurisdiction to exempt a litigant from the consequence of this principle where proceedings were of general public importance. That jurisdiction continues following the enactment of the Legal Services Regulation Act 2015. The essential factors guiding it were, I think, well summarised recently by Simons J. in *Corcoran and anor. v. Commissioner of An Garda Siochana and anor*. [2021] IEHC 11 at para. 20. Having referred to the balancing exercise involved in reconciling the objective of ensuring that litigants are not deterred from pursuing litigation which serves a public interest with the aim of not encouraging unmeritorious litigation, Simons J. continued:

> *In carrying out this balancing exercise, it will be necessary for the court to consider factors such as (i) the general importance of the legal issues raised in the proceedings; (ii) whether the legal principles are novel, or, alternatively, are well established; (iii) the strength of the applicant's case: proceedings might touch upon issues of general importance but the grounds of challenge pursued might be weak; (iv) whether the subject-matter of the litigation is such that costs are likely to have a significant deterrent effect on the category of persons affected by the legal issues; and (v) whether the issues touch on sensitive personal rights.'*

7. As this description suggests, the '*public interest'* cases in which the court absolves the losing party from the cost consequences that usually follow the failure of their litigation may cover a wide terrain. In their purest form, they will involve significant issues of Constitutional or European law of general importance that have been pursued by the claimant to advance a public concern rather than to obtain a private and personal advantage. In some such cases the public interest in the underlying issue has been such as to justify the grant to the unsuccessful claimant of orders for the payment by the successful respondent of a proportion, or all, of their costs. The circumstances in which orders of this kind have been made are comprehensively examined in the decision of the Divisional Court in *Collins v. Minister for Finance* [2014] IEHC 79.

8. At one point the view was adopted that this exceptional jurisdiction was not available to a claimant whose case was brought in part to obtain a personal advantage (see the discussion at paras. 18-21 of *Harrington v. An Bord Pleanala* [2006] IEHC 223). However, since then costs orders have been made in favour of losing parties who brought litigation in order to

advance a personal interest (see *Curtin v. Clerk of Dail Eireann* [2006] IESC 27 : *Kerins v. McGuinness* [2017] IEHC 217), and the same jurisdiction has been invoked to justify making no order as to costs in such circumstances (see *HID v. The Refugee Applications Commissioner* [2013] IEHC 146). There is, in practical terms, a sliding scale guided by the importance and application of the issues, but also by the strength and difficulty of the claimant's case. A citizen pursuing a challenge on an issue of systemic constitutional importance in which they have no personal interest and which raises substantial issues will have to surmount a lesser burden in obtaining their costs than a similarly positioned litigant who proceeds to litigate an issue which affects their personal or proprietary interests. A litigant in the latter category may be exempted from costs in a case where a claimant in the former situation obtains some or all of them. Each may find themselves bearing costs if their claim turns out to be insubstantial or if it revolves around legal issues that are discrete (rather than general) in their application.

9. The decision of Clarke J. in *Cork County Council v. Shackleton* [2007] IEHC 334, [2011] 1 IR 485 introduced a further variable into this exercise, namely that in some cases to which the State or one of its agencies is a party and which have been necessitated by the complexity or difficulty of legislation it may be appropriate not to direct costs in favour of that State party and against the other litigant, even where that litigant is unsuccessful in its claim. There, the applicant sought to set aside the determination of a property arbitrator appointed to conduct an arbitration under s. 96 of the Planning and Development Act 2000. The arbitrator was thus concerned to determine the social and affordable housing obligations of the notice party to the proceedings arising out of a housing project of which it was the developer. The proceedings presented important and difficult issues of statutory construction arising from the relevant provisions of the 2000 Act and, specifically, the method of calculation to be brought to bear on the obligations imposed upon developers by those provisions. The property arbitrator did not

take part in the proceedings which were, therefore, in reality between the applicant council and the notice party developer (in whose favour the arbitrator had ruled). Clarke J. ([2007] IEHC 241, [2011] 1 IR 443) having determined the proceedings in favour of the former, the latter sought its costs. These were refused. However, Clarke J. also declined to make an order for costs in favour of the successful applicant.

10. His reasoning was based on four particular features of the case. First, the proceedings were a *'test case'* with many other local authorities, developers and property arbitrators grappling with the issue ultimately determined by the action. Second, the case arose from difficult issues of interpretation of legislation '*of widespread and general application'* which was, he said, '*opaque*'. Third, one of the parties to the action was a public body. Fourth, while the government Department responsible for that legislation was not a party to the proceedings, the applicant was funded by that Department. In deciding to make no order as to costs in these circumstances (and in strongly urging that the relevant Department should ensure that the applicant not be at any financial loss as a consequence of the proceedings), Clarke J. expressed the essential basis for his decision as follows (at para. 16):

> '*I am satisfied that the court retains discretion to consider whether there should be some departure from the normal rule in respect of costs. The circumstances concerned, in my view, stem from the fact that this litigation was necessitated by the introduction of legislation which is extremely difficult of construction and where one of the parties to the litigation is a public authority which is answerable to the very ministry who introduced that legislation in the first place*.'

11. Clarke J. explained the principle in issue as follows (paras. 13 and 14):

> *"Where the proceedings involve entirely private parties then there does not seem to me to be any proper basis for departing from the ordinary rule in relation to costs, notwithstanding the fact that the case may properly be described as a test case. There is no good reason for depriving a successful private party of its ordinary entitlement to costs simply because the case in which it succeeded happens to be a test case.*
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> *However it seems to me that different considerations may apply, at least in some cases, where one of the parties is a public authority. To take a case at the other end of the spectrum from the purely private litigation which I have just considered, one can envisage circumstances where a court was faced with difficult questions of construction in relation to legislation of widespread and general application which was introduced by a particular ministry (sic) and in circumstances where that ministry is a necessary and proper party to the proceedings under consideration. An analogous situation might arise where Ireland was a necessary party. In those circumstances it seems to me that it is open to the Court to weigh in the balance in considering costs the fact (if it be so and to the extent that it is so) that the litigation may have been necessitated by the complexity or difficulty of legislation for which, of course, either the Minister concerned or Ireland, was in substance responsible."*

12. These passages were cited with approval by Murray CJ (Denham, Hardiman, Geoghegan and Fennelly JJ. concurring) in *O'Keefe v. Hickey and ors.* [2009] IESC 30. That was a case in which no order as to costs was made in proceedings in which the plaintiff failed to attach

liability to the Minister for Education and the State for sexual assaults carried out by the first named defendant for whose actions it was alleged they were legally responsible. Her action was an important test case governing a significant number of other pending cases.

13. Mr. Lee's case cannot be described as a '*test case'* in the sense used in any of these authorities. It has not been suggested that there are any other actions depending on its outcome. Nor did it present an issue of constitutional law or European law of general or widespread public importance. It was a case – like many others before and since – arising from the tax affairs of a private citizen, presenting a question of construction of the tax code on which there were two sustainable views. Mr. Lee determined to litigate that issue, and he failed. There is a strong presumption that he must bear the costs that follow from that choice.

14. However, it appears to me that there are some further relevant and important considerations. The proliferation of quasi-judicial bodies and tribunals exercising specialised and limited jurisdictions over discrete areas of legal activity is an inevitable (and ever expanding) feature of the administrative state. As it happens, the Appeal Commissioners are one of the oldest such tribunals. The vesting in those bodies of decision-making power over disputes between citizens and the State, or indeed as between citizens *inter se*, brings significant advantages. It enables persons to have their legal rights determined at a lower cost, with less formality, and with greater expedition than through the court system. It also allows those jurisdictions to be entrusted to persons having expertise in appropriate and relevant disciplines.

15. It is an unavoidable consequence of the creation of such tribunals that questions will present themselves as to the proper limitations on the powers and legal competence of those

bodies and of the relationship between their jurisdiction, and that of the Courts. No legislature will ever reliably predict all of those issues, and no statutory draftsman can be expected to devise a legislative expression of the competence of such bodies that will definitively resolve every issue of jurisdiction that may present itself.

16. Nonetheless for the citizen and his or her legal advisors, the consequences of inadequate legislative expression of the jurisdiction of statutory decision-making bodies of the kind in issue in this case can be very significant. If they proceed with litigation before the Courts they may find that they have made the wrong choice, facing legal costs in consequence. If (as happened in this case) they proceed before the relevant tribunal they may succeed in convincing it to exercise the jurisdiction in question and then face a liability in costs (as well as a significant delay in the determination of their claims) if they fail following appeals. If they do not proceed before the Courts when they ought to have done so and instead agitate their case before the relevant tribunal, they may find it declining jurisdiction with time limits applicable to Judicial Review proceedings having in the meantime expired (the fate that appears to have befallen the appellant in *Aspin v. v. Estill* [1987] STC 723). A failure to properly delineate the authority of a tribunal of this kind thus risks defeating several of the reasons for its establishment in the first place – the enabling of an efficient disposition of disputes the relevant tribunal was established to adjudicate upon, and the avoidance or reduction of legal costs.

17. A consideration of my substantive judgment in this case shows that the jurisdiction of the Appeal Commissioners was not clearly defined. In fact, there is no single provision on the statute book that even purports to define it : section 933(2)(a) simply (and unhelpfully) provides for an appeal against an assessment. Instead, to ascertain the limits of the Commissioners jurisdiction it was necessary to look to their overall function, the grounds of appeal they can

entertain, the orders they may make, the ancillary powers they enjoy to that end, and the nature of a liability arising on foot of a statutory charge to tax as compared to that of a liability arising under an agreement. The case law shows that even Revenue itself - better placed than any litigant to understand the correct allocation of jurisdiction between the Appeal Commissioners and the Courts - can be mistaken in its understanding of that division of function. In *Stanley v Revenue Commissioners* [2017] IECA 278, [2019] 2 IR 218 Revenue contended unsuccessfully that the Appeal Commissioners had jurisdiction over the question of whether an assessment had been issued within time and/or of whether that time should be extended and that the Courts should not entertain a claim to that effect. In *CAB v. Hunt* [2003] IESC 20, [2003] 2 IR 168 Revenue unsuccessfully contended that the Courts had an inherent jurisdiction to determine a person's liability to tax notwithstanding the existence of machinery for assessment and appeal provided under the relevant legislation. In both of these cases the appellate courts reached conclusions that were diametrically opposed to those reached (at the urging of Revenue itself) by Judges of the High Court.

18. Mr. Lee convinced the Commissioner himself and a Judge of the High Court that the Appeal Commissioners had jurisdiction to consider his argument. Now, in standing over both decisions he finds that Revenue seeks its costs against him of proceedings in both the High Court and before this Court. These are likely to be very substantial. Revenue does so in the course of seeking to recover a debt due to the Minister whose department is responsible for the definition of the Commissioners' jurisdiction in the first place (see s. 960D Taxes Consolidation Act 1997). It also does so in a context where Revenue stands to ultimately benefit from the exercise initiated by the taxpayer : Revenue is a party to every appeal before the Appeal Commissioners, and the description, explanation and delineation of the jurisdiction

of the Commissioners necessitated by the challenge and set forth in the Court's judgment is to Revenue's ultimate advantage.

19. While *Shackleton* was concerned with test cases so called, it expresses a common-sense reality that goes beyond litigation of that kind. There will be cases involving a State party which arise because and only because of an avoidable lack of clarity in the drafting of legislation. In some cases, that lack of clarity gives rise to litigation which is of systemic importance within a particular sector and on which there are substantial arguments on each side the resolution of which is important to other citizens not merely in cases of exactly the same kind, but in the general operation and administration of the legislation in question. In some such circumstances the Court may exercise its discretion in respect of costs so that the State, which is at the same time in a position to avoid that uncertainty in the drafting of its legislation *and* the single greatest beneficiary of the litigation, should not through one of its agencies recover the costs of that case from the party who has been compelled to pursue it.

20. This is such a case having regard to the cumulative effect of the following:

(i) The proceedings presented an issue of law which was not straightforward and on which there were two legitimate views;

(ii) While the issue in the appeal was neither of fundamental constitutional importance nor dispositive of other proceedings, it was an issue that went to the core of the powers and functions of important quasi-judicial tribunal exercising an extensive jurisdiction of potential relevance to many citizens;

(iii) The question was one of statutory construction arising in a context in which the relevant statute could have, but did not, present a clear definition of the jurisdiction of the Appeal Commissioners;

(iv) Having regard to the relationship between Revenue, the Minister for Finance and the process of collection of tax it is not unreasonable that Revenue bear its own costs of proceedings that could have been avoided (or could have been rendered simpler and easier to predict) through a clear statutory definition of the Appeal Commissioner's jurisdiction;

(v) Revenue will ultimately benefit from the consideration in the Court's judgment of the nature and extent of the Appeal Commissioner's jurisdiction;

(vi) The underlying issue was not simply a question of a dispute as to the meaning or effect of a charging provision. Such disputes arise all the time and are an unavoidable consequence of the inherent complexity of many aspects of taxation, and the necessary limitations of the drafting process. Taxpayers who find themselves litigating the meaning of the provisions of taxation statutes – even those that with hindsight might have been drafted with greater clarity – have no expectation that they will be treated any differently from other litigants when it comes to the costs of those proceedings. However, this case went beyond a mere ambiguity in a charging provision. Clarity as to the jurisdiction of bodies such as the Appeal Commissioners is critical to ensuring that those seeking access to justice can be certain at least as to where they should go to obtain it. The absence of such clarity leads to unnecessary confusion and cost. The scope of the Commissioner's

jurisdiction could and ought to have been clearly identified and defined in a single and accessible statutory provision. Litigants such as the appellant who have to adopt a position as to the extent of that jurisdiction in these circumstances should not be penalised when they do so and when the choice they make is a reasonable one.

21. Accordingly, it is my view that in these circumstances no order should be made as to the costs of these proceedings. Whelan J. and Ní Raifeartaigh J. agree with that order and the reasons I have given for it.