APPROVED **[2020] IEHC 673**

THE HIGH COURT
JUDICIAL REVIEW

2020 No. 547 J.R.

BETWEEN

RYANAIR DAC

APPLICANT

AND

AN TAOISEACH
IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AER LINGUS LTD

NOTICE PARTY

JUDGMENT of Mr. Justice Garrett Simons delivered on 31 December 2020

INTRODUCTION

1. The principal judgment in these proceedings had been delivered on 2 October 2020, *Ryanair DAC v. An Taoiseach* [2020] IEHC 461. This second judgment addresses the appropriate costs order to be made in the proceedings. In accordance with the protocol of 24 March 2020 on the delivery of judgments electronically, the parties have exchanged written legal submissions on the question of costs. Each party maintains that its costs should be paid by the other side.

NO REDACTION REQUIRED

2. The three core issues to be addressed in this costs judgment are as follows. First, whether the proceedings presented issues of general public importance such as to justify a departure from the normal rule that the successful party is entitled to its costs. Secondly, whether Ryanair can be said to have been "partially successful" in the proceedings notwithstanding that the application for judicial review was dismissed. Thirdly, whether it can be inferred that a change in the wording of the government's travel advice had been introduced in response to these proceedings.

3. These issues are addressed under separate headings below. Before turning to that task, however, it may assist the reader in a better understanding of the issues to pause here and identify the relevant aspects of the statutory costs regime.

LEGAL SERVICES REGULATION ACT 2015

4. The within proceedings were instituted subsequent to the commencement, in October 2019, of Part 11 of the Legal Services Regulation Act 2015 ("***the LSRA 2015***"). The allocation of costs thus falls to be determined by reference to that Act, and the amended version of Order 99 of the Rules of the Superior Courts.

5. Part 11 of the LSRA 2015 draws a distinction between a party who is "entirely successful" in proceedings, and a party who has only been "partially successful". The default position is that a party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings *unless* the court, in the exercise of its discretion, orders otherwise. The reasons for such an order must be stated. A non-exhaustive list of the factors to be taken into account by a court in exercising its discretion are enumerated under section 169(1).

6. No such default position applies in respect of a party who has only been "partially successful". As explained by Murray J. in *Higgins v. Irish Aviation Authority* [2020] IECA 277 (at paragraph 10), such a party may nevertheless be entitled to recover all of their costs in an appropriate case.

> "[…] it is particularly important to bear in mind that whether a party is 'entirely successful' is primarily relevant to where the burden lies within process of deciding how costs should be allocated. If a party is 'entirely successful' all of the costs follow unless the Court exercises its discretion to direct otherwise having regard to the factors enumerated in s.169(1). If 'partially successful' the costs of that part on which the party has succeeded may be awarded in its favour, bearing in mind those same factors. Indeed, having regard to the general discretion in s.168(1)(a) and O.99 R.2(1) a party who is 'partially successful' may still succeed in obtaining all of his costs, in an appropriate case."

7. Murray J. goes on in his judgment in *Higgins* to explain that in determining whether a party has been "entirely successful" for the purposes of section 169(1), the correct approach is to look beyond the overall result in the case and to consider whether the proceedings involve separate and distinct issues. If so, it is appropriate to determine which side succeeded on those issues.

8. The Court of Appeal has confirmed in *Chubb European Group SE v. Health Insurance Authority* [2020] IECA 183 that even where a party has not been "entirely successful", the court should still have regard to the matters set out in sub-section 169(1) when deciding whether to award costs. That sub-section reads as follows.

> 169.(1) A party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings, unless the court orders otherwise, having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties, including—
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> (a) conduct before and during the proceedings,

(b) whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings,

(c) the manner in which the parties conducted all or any part of their cases,

(d) whether a successful party exaggerated his or her claim,

(e) whether a party made a payment into court and the date of that payment,

(f) whether a party made an offer to settle the matter the subject of the proceedings, and if so, the date, terms and circumstances of that offer, and

(g) where the parties were invited by the court to settle the claim (whether by mediation or otherwise) and the court considers that one or more than one of the parties was or were unreasonable in refusing to engage in the settlement discussions or in mediation.

9. As appears, there are two broad categories of considerations which a court may take into account in determining costs: (i) the particular nature and circumstances of the case, and (ii) the conduct of the proceedings by the parties. The criteria enumerated at subparagraphs (a) to (g) appear to be directed principally to the second of the two categories, that is, the conduct of the proceedings. The criteria provide examples of what might be described as litigation misconduct, such as, for example, the unreasonable pursuit of issues in the proceedings. The use of the introductory words "including" indicates that the criteria enumerated at subparagraphs (a) to (g) are not intended to be exhaustive; rather, they are illustrative.

10. There is no reference in the legislative provisions to public interest litigation. This is to be contrasted with other provisions governing costs, such as those applicable to certain categories of environmental litigation under section 50B of the Planning and Development Act 2000, and Part 2 of the Environment

(Miscellaneous) Provisions Act 2011. In each of these instances, the relevant costs rules are expressly stated not to affect the court's entitlement to award costs in favour of a party in a matter of exceptional public importance.

11. There is nothing in the statutory language of the LSRA 2015 which suggests that the discretion previously enjoyed by the courts under the pre- 2019 version of Order 99 of the Rules of the Superior Courts has been removed. Rather, it seems to me that the type of considerations identified in the case law discussed under the next heading below—such as, for example, whether the proceedings raise issues of general importance which transcend the facts of the case and which are novel—continue to inform the exercise of the costs jurisdiction. These considerations come within the rubric of the "particular nature and circumstances of the case" as *per* section 169(1) of the Legal Services Regulation Act 2015.

(I). PUBLIC INTEREST LITIGATION

12. Ryanair submits that the proceedings presented issues of general public importance such as to justify a departure from the normal rule that the successful party is entitled to its costs. In particular, it is submitted that the principal judgment addressed important issues in respect of the separation of powers as between the executive and legislative branches of government.

13. The parties were in broad agreement as to the principles governing an application for costs in circumstances where the moving party asserts that their proceedings had advanced a public interest. Both parties referenced the judgment of the Supreme Court in *Dunne v. Minister for the Environment (No. 2)* [2008] 2 I.R.

775 ("***Dunne***"), as follows. (It should be emphasised that *Dunne* had been decided prior to the enactment of the LSRA 2015).

> "26. The rule of law that costs normally follow the event, that the successful party to proceedings should not have to pay the costs of those proceedings which should be borne by the unsuccessful party, has an obvious equitable basis. As a counterpoint to that general rule of law, the court has a discretionary jurisdiction to vary or depart from that rule of law if, in the special circumstances of a case, the interests of justice require that it should do so. There is no predetermined category of cases which fall outside the full ambit of that jurisdiction. If there were to be a specific category of cases to which the general rule of law on costs did not apply that would be a matter for legislation since it is not for the courts to establish a cohesive code according to which costs would always be imposed on certain successful defendants for the benefit of certain unsuccessful plaintiffs.
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> 27. Where a court considers that it should exercise a discretion to depart from the normal rule as to costs, it is not completely at large but must do so on a reasoned basis, indicating the factors which, in the circumstances of the case, warrant such a departure. It would neither be possible nor desirable to attempt to list or define what all those factors are. It is invariably a combination of factors which is involved. An issue such as this is decided on a case by case basis and decided cases indicate the nature of the factors which may be relevant but it is the factors or combination of factors in the context of the individual case which determine the issue."

14. As appears from the foregoing, there is no *predetermined* category of cases which falls outside the general rule that costs follow the event. The judgment in *Dunne* also confirms (at paragraph 18) that factors such as (i) whether the proceedings were seeking a private personal advantage, and (ii) whether the legal issues raised were of special and general public importance, are potentially relevant to, but are not necessarily determinative of, the allocation of costs.

15. Notwithstanding the commencement of Part 11 of the LSRA 2015, I am satisfied that the pre-2019 case law continues to have relevance. The courts have a discretion, to be exercised on a case-by-case basis, to depart from the general

rule that a successful party is entitled to its costs. One of the factors to be considered, under section 169(1), is the "particular nature and circumstances of the case". The statutory language is broad enough to allow the court to consider whether the issues raised in the proceedings were of general public importance, and, if so, whether this justifies a modified costs order. In exercising its discretion in respect of costs, a court must seek to reconcile (i) the objective of ensuring that individuals are not deterred by the risk of exposure to legal costs from pursuing litigation of a type which—although ultimately unsuccessful—nevertheless serves a public interest, with (ii) the objective of ensuring that unmeritorious litigation is not inadvertently encouraged by an overly indulgent costs regime.

16. 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. In this last connection, see *Collins v. Minister for Finance* [2014] IEHC 79, [13], citing *Norris v. Attorney General* [1984] I.R. 36 (sexual orientation); *Roche v. Roche* [2006] IESC 10 (the constitutional status of human embryos); and *Fleming v. Ireland* [2013] IESC 19; [2013] 2 I.R. 417 (assisted suicide).

17. For the reasons which follow, I have decided that a departure from the general rule is <u>not</u> warranted in the circumstances of this case. First and foremost, regard

must be had to the fact that these proceedings have been taken by a well-resourced company in pursuit of its own commercial interests. Of course, the mere fact that an applicant has a personal or pecuniary interest in the outcome of judicial review proceedings does not necessarily preclude the making of a modified costs order in its favour. An applicant is always required to demonstrate a "sufficient interest" in judicial review proceedings (Order 84, rule 20(5)). To treat the existence of a personal interest as precluding a departure from the general rule that costs follow the event would create the following paradox. An applicant for judicial review would find themselves in a type of "Catch-22" situation whereby, first, it is necessary for them to establish a sufficient interest in the proceedings, but secondly, the existence of a personal interest would prevent them from availing of a relaxation of the general rule that costs follow the event. In most public interest cases there will be an inevitable overlap between the private and the public interests.

18. Nevertheless, the existence of a significant commercial interest in the outcome of the proceedings on the part of an applicant is a relevant consideration in allocating costs. At least part of the rationale for the making of modified costs orders is to ensure that the risk of having to pay the other side's costs does not deter parties from pursuing proceedings which are in the general public interest. The costs of judicial review proceedings before the High Court will run to tens of thousands of euro, and an adverse costs order could be financially ruinous for many individuals. This rationale is not engaged in circumstances, such as those of the present case, where an applicant has the financial resources and commercial incentive to pursue litigation undeterred by costs concerns.

19. Secondly, and in any event, the issues presented by the proceedings were not of such general public interest as to justify a departure from the default rule on costs. Whereas the principal judgment does address the question of the separation of powers, the case was ultimately resolved on the narrow ground that the content of the government's public statements on travel during the coronavirus pandemic was not mandatory in its terms. In a sense, the outcome of the case can be said to have been obvious and entirely predictable. Not every case which raises issues of constitutional law can be said to be of general public importance.

(II). APPLICANT PREVAILED ON SOME ISSUES

20. Ryanair draws attention to the fact that, notwithstanding that its application for judicial review was ultimately dismissed, it did prevail on some issues. In particular, it successfully resisted a preliminary objection raised by the respondents to the effect that the impugned travel advice was not amenable to judicial review, i.e. non-justiciable. It is submitted that a significant proportion of the case (and of the evidence which Ryanair advanced to refute same) was directed to this issue. Ryanair also prevailed on the question of whether the proceedings were moot.

21. One of the factors to be taken into account in allocating costs is whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings. In principle, therefore, it may be necessary to modify a costs order to reflect that the losing party was "partially successful" on some issues. Indeed, as observed by the Court of Appeal in *Higgins v. Irish Aviation Authority*

[2020] IECA 277 (at paragraph 10), a party who is only "partially successful" may, in an appropriate case, obtain *all* of its costs.

22. The rationale for making a modified costs order is that one side should not have to bear costs which have been incurred unnecessarily by the other side. The raising of multiple issues has the potential to prolong the hearing of proceedings and to add to the volume of documentation, e.g. in terms of pleadings, affidavits or discovery. Whereas a party who has successfully defended proceedings taken against it is entitled, in principle, to recover the reasonable costs so incurred, an adjustment may be necessary to reflect the manner in which it conducted that litigation.

23. No such adjustment is, however, required in the circumstances of the present case. It is correct to say that the respondents did pursue a number of preliminary objections which were not accepted ultimately by the court. The respondents thus cannot be said to have been "entirely successful" in the proceedings. Crucially, however, the raising of these preliminary issues did not, in truth, add materially to the length of the proceedings nor to the volume of documents. This is because, as explained in the principal judgment, these preliminary issues were so enmeshed with the substantive merits of the case that it would be artificial to attempt to separate them out. The approach adopted in the principal judgment was to address the substantive merits of the case first, before returning to the preliminary objections towards the latter part of the judgment. This reflected the fact that the amount of time attributed to the preliminary issues over the course of the three days' hearing was not significant.

(III). COSTS AND MOOTNESS

24. As explained at paragraph 161 of the principal judgment, the proceedings were determined on the basis of the content of the government's travel advice as it stood at the conclusion of the exchange of the affidavits in these proceedings, i.e. as of the first week of September 2020. Under that version of the travel advice, the offending word "required" had been replaced by the word "advise", with the result that the crucial sentence was to the effect that the Irish Authorities merely advised travellers to restrict their movements.

25. The position now adopted by Ryanair for the purposes of costs is that it can be inferred that the change in the wording of the government's travel advice had been introduced in response to these proceedings. Specifically, it is submitted that "but for" the institution of these proceedings, the wording of the travel advice would have remained in mandatory and directive terms, i.e. "require" rather than "advise". This change is described as "case altering".

26. Ryanair cites *Cunningham v. President of the Circuit Court* [2012] IESC 39; [2012] 3 I.R. 222 in support of the proposition that costs should be awarded to an applicant where proceedings have become moot as a result of a unilateral act on the part of the respondent public authority.

27. The judgment in *Cunningham* recognises that a public authority may be under an obligation to keep its decisions under review, and that the mere fact that a public authority adopts a changed position which renders judicial review proceedings moot does not necessarily mean that it is appropriate to characterise the proceedings as having become moot by reason of a *unilateral act* of one party. There is an onus, however, on the public authority to put evidence before

the court if it seeks to argue that the proceedings became moot by reason of an external factor outside the control of the public authority

28. With respect, Ryanair's attempted characterisation of the change in wording of the travel advice as "case altering" ignores the actual course of the proceedings. At no stage during the hearing in September 2020 did Ryanair concede that the revised wording of the travel advice was lawful, still less did Ryanair submit that the proceedings had become moot as a result of the change in language. Rather, it was the respondents who had objected that the proceedings were moot.

29. Counsel for Ryanair had successfully maintained the position in September 2020 that the proceedings were not moot, citing in particular the judgments of the Supreme Court in *Lofinmakin v. Minister for Justice* [2013] 4 I.R. 274 and *N.V.H v. Minister for Justice and Equality* [2017] IESC 35; [2018] 1 I.R. 246. Particular reliance was also placed on the judgment of the New Zealand High Court in *Borrowdale v. Director-General for Health* [2020] NZHC 2090. On the facts of that case, there had been a gap of some nine days between restrictive measures being announced by the government to combat coronavirus, and the putting in place of a legislative basis for those measures. During this interregnum, members of the government, including the prime minister, had represented that the measures were legally enforceable. The judgment expressly rejected a plea that the subsequent introduction of a legislative basis for the measures rendered the proceedings moot.

30. Having adopted the position that it did for the purposes of the hearing in September 2020, it is not permissible for Ryanair to commit a *volte face*, and now to invite the court to allocate costs on the basis that the proceedings were a moot. The rationale underlying the costs rules governing moots is that,

notwithstanding that it will have been unnecessary for the court to embark upon a consideration of the underlying merits of the proceedings, the court nevertheless has jurisdiction to award costs. An applicant who has achieved the desired outcome by virtue of having merely instituted proceedings, without having to prosecute those proceedings to finality, will generally be entitled to their costs unless the respondent can demonstrate that the change in position was as the result of external factors. This rationale has no application to circumstances, such as those of the present case, where the applicant pursued the proceedings to a full hearing. This had the effect that both sides incurred the costs of a three-day hearing before the High Court.

31. Different considerations would have applied had Ryanair responded to the change in wording by signalling that it intended to discontinue the proceedings. It would then have been necessary to determine whether the change in wording was, indeed, triggered by the institution of the proceedings. It should be said, however, that on the limited evidence before the court, it is not at all obvious that there was a causal connection between the two. The affidavit evidence filed indicates that the content of the government's travel advice was subject to continuous review in response to the ever evolving health crisis. It is idle to speculate further, given that Ryanair did not seek to discontinue the proceedings.

CONCLUSION AND FORM OF ORDER

32. The default position under Part 11 of the Legal Services Regulation Act 2015 is that a party who has been "entirely successful" in proceedings is entitled to recover its reasonable costs as against the unsuccessful party. The court can

depart from the default position for stated reasons. The court enjoys a less trammelled discretion where a party is only "partially successful".

33. In the present case, the respondents successfully saw off the judicial review proceedings, and Ryanair's application was dismissed in its entirety. Whereas certain issues were decided against the respondents, the pursuit of those issues did not add materially to the length of the proceedings nor to the volume of documents. This is because, as explained in the principal judgment, these issues were so enmeshed with the substantive merits that it would have been artificial to attempt to separate them out. Accordingly, even though the respondents were not "entirely successful", they did succeed on those issues which account for almost all of the legal costs incurred. Therefore, I propose in the exercise of my discretion under Part 11 of the LSRA 2015 to make an order for costs in favour of the respondents as against Ryanair.

34. For the reasons detailed earlier, I have concluded that the allocation of costs does not require to be adjusted by reference to the alleged public interest in the proceedings nor to their alleged mootness. These proceedings are taken by a well-resourced company, for whom costs are not a deterrent, in pursuit of its own commercial interests, and were brought on for full hearing notwithstanding the change in the wording of the government's travel advice.

35. The costs order will allow for the recovery of the costs of a solicitor and two counsel for a three-day hearing. It will include the costs of the written legal submissions, and the costs of the "paper based" costs application. The costs are to be measured by the Office of the Chief Legal Costs Adjudicator in default of agreement between the parties.

36. The notice party, Aer Lingus, is to bear its own costs. Aer Lingus had participated in the proceedings on a limited basis only, and supported the application for judicial review. In circumstances where Ryanair expressly agreed to its joinder in the proceedings, there are no grounds for directing that Aer Lingus make a contribution towards Ryanair's liability to pay the respondents' costs.

Appearances

Martin Hayden SC and Eoin O'Shea for Ryanair instructed by Arthur Cox Solicitors
Frank Callanan SC, Eoin McCullough SC, Suzanne Kingston and David Fennelly for the Respondents instructed by the Chief State Solicitor
Francis Kieran for Aer Lingus instructed by Mason Hayes and Curran LLP