

APPROVED

[2021] IEHC 711



THE HIGH COURT
JUDICIAL REVIEW

2019 No. 727 JR

BETWEEN

SABINA MURPHY

APPLICANT

AND

CHIEF APPEALS OFFICER
(SOCIAL WELFARE APPEALS OFFICE)
MINISTER FOR EMPLOYMENT AFFAIRS AND SOCIAL PROTECTION

RESPONDENTS

CÓRAS IOMPAIR ÉIREANN

NOTICE PARTY

JUDGMENT of Mr. Justice Garrett Simons delivered on 22 November 2021

INTRODUCTION

1. This judgment addresses the allocation of the costs of the within judicial review proceedings. The principal judgment was delivered on 30 July 2021, and bears the neutral citation [2021] IEHC 455.
2. As appears from the principal judgment, the application for judicial review was dismissed on the merits. Much of the time at the hearing was, however, taken up with a procedural issue upon which the respondents were unsuccessful.

NO REDACTION NECESSARY

3. Following delivery of the principal judgment, the parties exchanged written legal submissions on costs. These were supplemented by oral submissions at a short hearing on 11 November 2021.
4. Two main issues arise for consideration in this judgment. First, it is necessary to consider whether the general rule, namely that the successful party is entitled to its costs, is displaced because much of the costs are attributable to a procedural issue upon which the respondents were unsuccessful. Secondly, it is necessary to consider the approach to be taken in respect of the costs of a notice party employer in judicial review proceedings in the context of social welfare legislation.

COSTS OF THE PARTIALLY SUCCESSFUL RESPONDENTS

5. The default position under the Legal Services Regulation Act 2015 is that a party who has been “*entirely successful*” in proceedings is entitled to its costs as against the unsuccessful party. This is subject to the court’s discretion to make a different form of costs order by reference to the criteria specified under section 169 of the Act.
6. As explained by the Court of Appeal in *Chubb European SE v. Health Service Executive* [2020] IECA 183, where a party has prevailed in the proceedings but has not been successful on an identifiable issue or issues which have materially increased the costs of the case, that party may obtain his costs but may suffer two deductions: one in respect of his own costs in presenting that issue, and the other requiring him to set-off the costs of his opponent in meeting that issue against such costs as are ordered in his favour.
7. In the present case, the respondents have prevailed in the proceedings in that the application for judicial review has been dismissed on its merits. The respondents were, however, unsuccessful in respect of a procedural issue. More specifically, the respondents had raised a preliminary objection that the judicial review proceedings were

premature and that the applicant should have awaited the outcome of the statutory appeals procedure before having recourse to the courts. This preliminary objection was rejected for the reasons set out in detail in the principal judgment.

8. This procedural issue took up much of the time at the hearing and much of the written legal submissions, and would have had a material impact on the level of costs. I have concluded, therefore, that the appropriate order as between the applicant and the respondents is that each should bear their own costs. The costs to which the respondents would otherwise have been entitled must be discounted in accordance with the principles in *Chubb European SE*. Had the respondents not raised this fruitless procedural objection, the judicial review proceedings could have been dealt with in less than one hour and would have been suitable for a Monday listing, with an attendant reduction in costs.

COSTS OF THE NOTICE PARTY

Discussion

9. The applicant's former employer, C oras Iompair  ireann, participated fully at the substantive hearing of the proceedings. (The precise nature of the relationship between the applicant and the notice party is the subject of the pending statutory appeal, and my use here of the term "*employer*" should not be understood as implying any view on that question. Rather the term "*employer*" is used colloquially in its broadest sense to indicate that the applicant had worked for the notice party).
10. The notice party seeks its costs as against the applicant. It is submitted that the remedies sought by the applicant in the judicial review proceedings were clearly of detriment to the notice party: had the applicant succeeded, the notice party would have been deprived of its opportunity to appeal the decision regarding the applicant's employment status. It is further submitted that the notice party was a necessary party, that it participated fully,

acted in good faith and had been successful in the proceedings; and on that basis should be awarded its costs.

11. The notice party relies in this regard, in particular, on the judgment in *Usk and District Residents Association Ltd v. Environmental Protection Agency* [2007] IEHC 30 (“*Usk*”).
12. The proceedings in *Usk* were judicial review proceedings which sought to challenge the validity of a waste licence that had been granted for the development and operation of a waste landfill facility. The respondent to the proceedings had been the competent authority which had made the decision to grant the licence, i.e. the Environmental Protection Agency. The licensee, i.e. the operator of the proposed facility, had been joined to the proceedings as a notice party.
13. The judicial review proceedings were ultimately dismissed. The High Court made a costs order in favour of both the respondent and the notice party as against the unsuccessful applicant. The court held that the proceedings were “*intimately concerned with the rights and entitlements of*” the notice party as licensee. As such, the notice party was entitled to defend its legitimate interests by putting forward arguments in support of the Environmental Protection Agency’s defence of the challenge to the waste licence.
14. Clarke J. (then sitting in the High Court) reiterated that the default position is that a successful party is entitled to an award of costs. See paragraph 5.2 of the judgment as follows:

“[...] the default position is that all costs should be awarded to the successful party. Where that successful party is a defendant, respondent, or, indeed, a notice party who opposes an application, then that position should be departed from only where the court is satisfied that there are good grounds for taking the view that the costs of the proceedings as a whole (including any appropriate interlocutory applications) have been clearly increased by reason of an unreasonable position adopted by that successful party in respect of some issue which has not already been the subject of a costs order reflecting the relevant unreasonableness.”

15. Clarke J. emphasised, however, that a notice party does not necessarily have an entitlement to costs in all cases. See paragraph 5.5 of the judgment as follows:

“I should, however, note that there may well be cases where it would be appropriate for notice parties (who are not as intimately connected with the issues as in this case) to consider whether it is necessary to participate, or at least participate fully, in judicial review proceedings. The mere fact that the party may have a sufficient interest so as to make it legitimate that they be placed on notice of the proceedings does not, of itself, necessarily carry with it an entitlement to that party to an unquestioned order for costs in the event of the proceedings being successfully defended. The extent to which such a notice party may be entitled to some or all of the costs of successfully supporting the defence of the application, will depend on all the circumstances of the case and, in particular, the extent of the interest of that party in the issues which are the subject of the judicial review application and the extent to which it may be regarded as reasonable for that party, in those circumstances, to independently oppose the application. Having regard to those principles it does not appear to me to be appropriate to diminish the entitlement of [the notice party licensee] to costs on the facts of this case.”

16. As appears, the entitlement to costs is limited by reference to the extent of the interest of the notice party in the proceedings, and by consideration of whether it is reasonable for the notice party to participate. It seems to me that such a limitation on the recoverability of costs is a necessary compromise, intended to ensure that the constitutional right of access to the courts is not rendered ineffective in proceedings involving notice parties. Were it otherwise, and were it to be the position that notice parties had a *prima facie* entitlement to costs, irrespective of the strength of their interest in the proceedings, then this would have a disproportionate deterrent effect on opposing parties. An individual might well be dissuaded from instituting proceedings for fear of incurring a financially-ruinous liability for the costs of more than one party. This would be especially so where the subject-matter of the litigation is such that a putative applicant is likely to be of more modest means than the notice party. This will often be the position in employment law disputes.

17. A principle which confines the right to recover costs to circumstances where it had been reasonable for a notice party to defend the proceedings independently of the respondent strikes an appropriate balance.
18. The judgment in *Usk* pre-dates the coming into force of the revised costs regime under the Legal Services Regulation Act 2015 on 7 October 2019. The principles identified in that judgment can, nevertheless, legitimately be extended to the revised costs regime. This is because the “old” and the “new” costs regime share the same underlying objective, namely that costs orders should be deployed to vindicate the constitutional right of access to the courts. In most cases, this is best achieved by awarding costs to the successful party. The interests of justice will usually require that a party who has successfully pursued, or has successfully defended, a claim should not be out of pocket. The authoritative statement of the rationale for this approach is to be found in *Godsil v. Ireland* [2015] IESC 103; [2015] 4 I.R. 535. McKechnie J., writing for the Supreme Court, stated as follows (at paragraph 20 of the reported judgment):

“A party who institutes proceedings in order to establish rights or assert entitlements, which are neither conceded nor compromised, is entitled to an expectation that he will, if successful, not have to suffer costs in so doing. At first, indeed at every level of principle, it would seem unjust if that were not so but, it is, with the ‘costs follow the event’ rule, designed for this purpose. A defendant’s position is in principle no different: if the advanced claim is one of merit to which he has no answer, then the point should be conceded: thus in that way he has significant control over the legal process, including over court participation or attendance. If, however, he should contest an unmeritorious point, the consequences are his to suffer. On the other hand, if he successfully defeats a claim and thereby has been justified in the stance adopted, it would likewise be unjust for him to have to suffer any financial burden by so doing. So, the rule applies to a defendant as it applies to a plaintiff.”

19. On occasion, however, it will be necessary to depart from the default position, i.e. that the successful party is entitled to their costs. The constitutional right of access to the courts will, in some instances, be better served by making a different form of costs order.

One obvious example is where the successful party had prolonged the proceedings unnecessarily by unreasonably pursuing or contesting certain issues. It is in the interests of justice to ensure that scarce judicial resources are not dissipated unnecessarily, and a court might legitimately mark its disapproval by withholding costs on this basis. The prospect of costs being withheld (or even awarded to the other side) for unreasonable litigation conduct encourages discipline in legal proceedings.

20. The principles identified in *Usk* are entirely consistent with the approach to costs now embodied in the Legal Services Regulation Act 2015. The first consideration identified in *Usk*, namely the importance of the outcome of the proceedings to the notice party; reflects the general principle that a party who has been put to the expense of pursuing or defending a claim should normally be entitled to recover the measured costs of so doing from the losing side. This assumes, of course, that their rights or entitlements are actually at issue in the proceedings. Hence the need to assess the extent of the interest of the notice party in the proceedings.
21. The second consideration identified in *Usk*, namely that the default position should be departed from only where the court is satisfied that the costs of the proceedings have been clearly increased because of an unreasonable position adopted by the successful party in respect of some issue; chimes with the statutory criteria under section 169(1) of the Legal Services Regulation Act 2015, which focus on the conduct of the proceedings by the parties.

Decision

22. I turn next to apply these principles to the circumstances of the notice party in the present case. There is no doubt but that the notice party was a proper party to the judicial review proceedings and should have been named in the title of the proceedings from the outset. The outcome of the judicial review proceedings directly affected the notice party in that,

if successful, the application would have resulted in the invalidation of the statutory appeal made against the earlier finding that the applicant was in insurable employment with the notice party.

23. It does not, however, automatically follow that the notice party should be entitled to its costs now that the application for judicial review has been dismissed. The proceedings were being fully defended by the respondents, and the notice party could safely have left the defence of the proceedings to the respondents. The grounds of judicial review were directed primarily to the conduct of the respondents in their processing of the statutory appeal. The participation of the notice party did not add to the defence of the *substance* of the proceedings.
24. It is correct to say that the notice party's approach to the *procedural issue* of the timing of the proceedings was more correct than that of the respondents. More specifically, the notice party correctly submitted that time had begun to run against the applicant for the purpose of the three month time-limit under Order 84, rule 21 of the Rules of the Superior Courts. The notice party did not, however, ultimately prevail on the procedural point in that it had unsuccessfully opposed the grant of an extension of time.
25. In the circumstances, I have concluded that the notice party's participation in the proceedings was not such as to justify an award of costs in its favour. Its participation largely duplicated that of the respondents. Moreover, to allow a notice party employer to recover its costs as against an unsuccessful employee in the context of judicial review proceedings under the social welfare legislation would have a disproportionate deterrent effect. An employee contemplating judicial review proceedings might well be deterred from pursuing same lest they be liable for two sets of costs. The potential benefit to an employer of being entitled to recover its costs is disproportionate to the disbenefit to the employee. The employer's position is adequately safeguarded because the judicial

review proceedings will be defended by the respondents. It is unnecessary, in such circumstances, that the employer should be indemnified by a costs order in its favour.

APPLICANT'S CROSS-APPLICATION FOR COSTS

26. For completeness, it should be recorded that there is no reasonable basis for the applicant seeking an order for costs in her favour. The applicant has been unsuccessful on the merits of the judicial review proceedings; and her challenge to the validity of the statutory appeal, the subject-matter of the proceedings, has been found to be contrived.
27. It is not correct to suggest, as the applicant did in submission, that the conduct of the respondents left her with no choice but to institute judicial review proceedings. The applicant had been provided with a detailed reasoned explanation by the respondents as to why her objection to the validity of the statutory appeal was not being upheld. The applicant would have been wise to accept that explanation, and to have engaged with the statutory appeal on its merits. Instead, the applicant instituted these judicial review proceedings, with the attendant risk in terms of legal costs.
28. The fact that the applicant managed to resist the preliminary procedural objections raised on behalf of the respondents and the notice party has allowed her to avoid costs orders against her. It certainly does not justify the making of a costs order in her favour.

CONCLUSION AND FORM OF ORDER

29. For the reasons set out in detail herein, I have decided, in the exercise of my discretion under section 169 of the Legal Services Regulation Act 2015, not to make an order for costs in favour of either the respondents or the notice party. In the result, each party will bear its own costs.

Appearances

The applicant represented herself

Alex White, SC and Martin Fitzgerald for the respondents instructed by the Chief State Solicitor

Peter Ward, SC and Cathy Maguire for the notice party instructed by Colm Costello Solicitor

Approved
Gareth S. Mans