



THE COURT OF APPEAL

Appeal Record Number: 2020/89

Neutral Citation Number [2022] IECA 280

**Donnelly J.
Noonan J.
Binchy J.**

COSTS RULING IN THE MATTER OF

JACKSON WAY PROPERTIES LIMITED and JAMES PATRICK KENNEDY

APPELLANTS

- AND -

THE INFORMATION COMMISSIONER

RESPONDENT

-AND-

DUN LAOGHAIRE/RATHDOWN COUNTY COUNCIL

NOTICE PARTY

Costs Ruling of Mr. Justice Binchy delivered on the 8th day of December 2022

1. On 30th September 2022, I delivered a judgment (the "Judgment"), with which the other members of the Court agreed, in an appeal brought by the appellants from a decision of the High Court whereby that court had dismissed an appeal of the appellants from a decision of the respondent made on 23rd January 2019, whereby the respondent had upheld a decision of the notice party to refuse a request for information made by the appellants. That request had been refused on the grounds provided for in ss. 15(1)(c) of

the Freedom of Information Act 2014 (the "Act of 2014"), which provides that a freedom of information request made under the Act of 2014 may be refused where: *"in the opinion of the head [of the relevant body to whom the FOI request is made] granting the request would, by reason of the number or nature of the records concerned or the nature of the information concerned, require the retrieval and examination of such number of records or an examination of such kind of the records concerned as to cause a substantial and unreasonable interference with or disruption of work (including disruption of work in a particular functional area) of the FOI body concerned"*.

2. The appeal to the High Court centred around, *inter alia*, what constitutes the "work" of an FOI body for the purposes of s.15(1)(c) and whether or not "substantial" and "unreasonable" interference with or disruption of work of an FOI body are different concepts requiring separate consideration by the head of the FOI body. Relatedly, the appellant raised questions as to whether what is "unreasonable" within the meaning of the subsection must have regard to the resources of the FOI body concerned, and the evidential burden on an FOI body when invoking the subsection to justify a refusal of an FOI request. Before this Court, the appellant contended that the trial judge had erred in her determinations on each of these issues, and in my judgment of 30th September last, I held against the appellant on all grounds of appeal.

3. Following upon delivery of the Judgment, the Court invited the parties to make submissions on the issue of costs.

4. In their submissions, the appellants refer to s.169(1) of the Legal Services Regulation Act 2015, which it will be recalled provides:

"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..."

5. The appellants submit that the court should depart from the normal rule that the entirely successful party should recover its costs in this instance because:

- (a) The wording of s.15(1)(c) of the Act of 2014 is unclear;
- (b) The clarification provided by the Judgment will be of assistance to the Information Commissioner, public bodies and FOI requestors.

6. The appellant also relies on s.24(8) of the Act which states:

"Where an appeal to the Supreme Court is taken from a decision of the High Court under this section, that Court may order that some or all of the costs of a person (other than a head) in relation to an appeal to that court shall be paid by the FOI body concerned, if it considers that a point of law of exceptional public importance was involved in the appeal and, but for this subsection, the court would not so order".

7. The appellant further relies upon the decision of Murray J., then sitting in this Court, in *Lee v. The Revenue Commissioners* [2021] IECA 114 in which he stated that the court "retains an exceptional jurisdiction to exempt a litigant from the consequences of this principle [that the entirely successful party should recover its costs] as provided for in s.169(1) of the Act of 2015] where proceedings were of general public importance".
8. On the basis of the foregoing, the appellant submits that it should be awarded some or all of its costs, or alternatively that there should be no order as to costs.
9. The respondent on the other hand submits that it is clear from the Judgment that there is no lack of clarity in s.15(1)(c) and that it is the appellants by their arguments who sought to engender a lack of clarity. Furthermore, the respondent submits, that if there was any uncertainty, it was clarified by the judgment of the High Court, and yet the appellants still choose to appeal.
10. The respondents also submit that the fact that a judgment of the court may bring greater clarity to a particular provision in a statute is not of itself a reason to depart from the ordinary rules as to costs. They also submit that this case turned largely on its facts, and its wider application is limited.
11. The respondent also rejects an argument advanced by the appellants that requiring the appellants to pay the costs of the appeal will deter other litigants.
12. The respondent further argues that by their appeal, the appellants clearly sought a private advantage, and while they accept that that does not automatically bar the appellants from invoking any "exceptional" costs jurisdiction, it is nonetheless a relevant factor.
13. Finally, the respondent argues that s.24(8) of the Act of 2014 is not engaged. No application was made in the High Court to hold the "FOI body concerned" , in this case Dun Laoghaire/Rathdown County Council, responsible for any of the costs of the other parties to the proceedings. Furthermore, no effort has been made by the appellants to identify any point of exceptional public importance as required by section 24(8).
14. The respondent submits that the Judgment ruled emphatically against the appellants, and that he is entitled to an order for payment of all of his costs by the appellants.

Decision

15. The appellants place reliance upon the decision of Murray J. in this Court in *Lee v. The Revenue Commissioners* [2021] IECA 114. That case concerned the jurisdiction of the Appeal Commissioners to decide whether liabilities the subject of assessments to tax issued by the Revenue Commissioners had been compromised. Mr. Lee had been successful on this issue before the Appeal Commissioners themselves, was then unsuccessful on an appeal brought by the Revenue Commissioners to the Circuit Court, was again successful in his appeal to the High Court, and finally was unsuccessful on appeal to this Court. At paras. 5 and 6 of his judgment on costs, Murray J. stated:

*"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 the claim (see most recently *The Lady Magda* [2021] IECA 51, 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..."

16. Later in his judgment, Murray J. observed that 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. He concluded that *Lee* was such a case, because the proceedings presented an issue of law which was not straightforward, it was an issue that went to the core of the powers and functions of an important quasi-judicial tribunal and it involved the construction of an ambiguous statutory provision. This ambiguity could have been avoided in the drafting of the legislation – for which the State itself was responsible – and at the same time the greatest beneficiary of the litigation would be the State itself.
17. No issues of this kind were present in this appeal. As is apparent from the Judgment, I did not consider there to be any ambiguity in the provisions of the Act of 2014 under consideration. The proceedings involved the straightforward interpretation of ss. 15(1)(c) of the Act. As such, it is difficult to see how any benefit accrues either to the respondent or to other FOI bodies arising out of the Judgment. There was no issue of "exceptional public importance" for the purposes of s.24(8) of the Act of 2014.
18. While the matters raised by the appellants have been clarified by the Judgment, it does not follow that those matters were in need of clarification, or that the smooth operation of the Act of 2014 required such clarification, simply because the appellants raised those issues.

Moreover, as the respondent has submitted, if that were the case the decision of the High Court provided the necessary clarification.

19. For all of the foregoing reasons, I am of the view that there is no reason to depart from the general rule provided for by s.169(1) of The Legal Services Regulation Act, 2015 and it follows that, as the respondent has been entirely successful in this appeal, he is entitled to recover his costs incurred in the appeal from the appellants, and I so order.
20. Donnelly J. and Noonan J. are in agreement with this order, and the reasons for it.