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THE COURT OF APPEAL

Record No. 616/2014
Neutral Citation Number [2024] IECA 211

Edwards J.

Faherty J.

Binchy J.

BETWEEN/

FRAMUS LIMITED,

AMANTISS ENTERPRISES LIMITED (IN VOLUNTARY LIQUIDATION) AND

WILBURY LIMITED (IN VOLUNTARY LIQUIDATION)

Appellants

V

CRH PLC, IRISH CEMENT LIMITED, ROADSTONE PROVINCES LIMITED,

ROADSTONE DUBLIN LIMITED, TRADBURN LIMITED, READYMIX PLC,

KILSARAN CONCRETE PRODUCTS LIMITED AND CPI LIMITED

Respondents

JUDGMENT delivered by Mr. Justice Edwards on the 2nd of August 2024.

1. The Court of Appeal gave judgment on the substantive issues in this appeal on the 10th of November 2023, and held:

   a. The respondents have established that the first named appellant is guilty of inordinate and inexcusable delay in the prosecution of its appeal.

b. The justice of the case lies in favour of dismissing the appeal of the first named appellant pursuant to the inherent jurisdiction of the Court on the grounds of inordinate and inexcusable delay in prosecuting the proceedings.

c. The respondents are entitled to the reliefs sought by them in their respective Notices of Motion insofar as those reliefs relate to the first named appellant.

d. The appeals of the second and third named appellants stand struck out with effect from the 9 July 2014 by Order of the Supreme Court.

2. In respect of costs, the Court of Appeal (Edwards J) expressed the following view, at [175]:

> "The respondents have succeeded in their applications against the first named appellant. It follows that the respondents, to the extent that they are/were independently legal represented, should be entitled to the costs of their motions to dismiss. If, however, a party wishes to seek some different costs order to that proposed they should so indicate to the Court of Appeal office within 21 days of the receipt of the delivery of this judgment, and a costs hearing will be scheduled, if necessary. If no indication is received within the 21 day period, the order of the Court, including the proposed costs order, will be drawn and perfected."

3. The Court of Appeal office was duly notified by KRW Law Solicitors, the solicitors on record for the first named appellants, of their client's wish to apply for a different costs order to that proposed, and that firm filed written submissions (a document entitled *"Submission on Costs to the Court of Appeal by Seamus Maye for and on behalf of the Appellants (listed below) following the COA's Judgment on November 10th, 2023"*). In those submissions, the first named appellants sought a different order on costs to that proposed in the judgment of Edwards J on the 10th of November 2023, namely that this Court should make no order as to the costs of this appeal or in the alternative, that this Court should award

costs against the respondents. The basis on which this request is made ~~ai~~ is a contention articulated in the submissions filed by KRW Law solicitors, namely *"that the Irish judiciary has deviated from its obligations under E.U. Law and the Bangalore Principles in its handling of the Framus case throughout the past 27 years"*, for reasons elaborated upon in the said submissions, including *"the expert assessment of the chairperson of the competition authority as to repeated private enforcement failures, the orchestrated menace upon liquidators, the judgment of the Supreme Court in July'15 in Goode Concrete upon the identical prior judicial responsibility issue, the significant public interest, the problems created by the ban on Third Party Funding and Contingency Fees and the Battle judgment"*.

4. Replying submissions were filed on behalf of 1st to 5th named respondents ("the CRH respondents") jointly; separate replying submissions were filed on behalf of the 6th named respondent ("Readymix"); and separate replying submissions were also filed on behalf of the 7th named respondent ("Kilsaran"). The 8th respondent adopted the submissions of the other respondents. Each of the respondents has contended that they were entirely successful in their applications to strike out the appellants' proceedings and that accordingly they are *prima facie* entitled to their costs in respect of the motions to dismiss, and of the appeal (to include the costs of this application). They have each contended that there is no basis on which this court could justifiably depart from the general rule stated in s. 169(1) of the Legal Services Regulation Act 2015 ("the Act of 2015") in the circumstances of this case, and they each ask this Court to make the required order, in effect an order that costs should follow the event.

5. The costs hearing was conducted on the 7th of May 2024. There was no appearance in Court on that date on behalf of the first named appellant. However, in circumstances where there were solicitors on record for the first named appellant, being KRW Law (albeit that there was nobody from that firm in attendance), and where written submissions had been filed by those solicitors, the Court indicated that in adjudicating on the matter it would take

into account those written submissions. Mr Maye, who was unable to attend the costs hearing in person, was facilitated in following the proceedings by video link, but had no right of audience in circumstances where the first named appellant is a limited liability company and was not legally represented in court by either a solicitor or counsel, notwithstanding that there were solicitors formally on record.

The Applicable Court Rules, Legislation and Jurisprudence

6. Order 99, rule 2(1) of the Rules of the Superior Courts provides:

"The costs of and incidental to every proceeding in the Superior Courts shall be in the discretion of those Courts respectively."

7. Order 99, rule 3(1) further provides that:

"The High Court, in considering the awarding of the costs of any action or step in any proceedings, and the Supreme Court and Court of Appeal in considering the awarding of costs of any appeal or step in any appeal, in respect of a claim or counterclaim, shall have regard to the matters set out in s.169(1) of the 2015 Act, where applicable."

8. The present statutory framework regulating the discretion to award costs is to be found in sections 168 and 169, respectively, of the Act of 2015.

9. Section 168 of the Act of 2015 provides in subss (1) and (2) thereof (subs (3) being not relevant for present purposes):

" (1) Subject to the provisions of this Part, a court may, on application by a party to civil proceedings, at any stage in, and from time to time during, those proceedings—

(a) order that a party to the proceedings pay the costs of or incidental to the proceedings of one or more other parties to the proceedings, or

(b) where proceedings before the court concern the estate of a deceased individual, or the property of a trust, order that the costs of or incidental to the

proceedings of one or more parties to the proceedings be paid out of the property of the estate or trust.

(2) Without prejudice to subsection (1), the order may include an order that a party shall pay—

(a) a portion of another party's costs,

(b) costs from or until a specified date, including a date before the proceedings were commenced,

(c) costs relating to one or more particular steps in the proceedings,

(d) where a party is partially successful in the proceedings, costs relating to the successful element or elements of the proceedings, and

(e) interest on costs from or until a specified date, including a date before the judgment."

10. Section 169(1) of the Act of 2015 provides that:

"(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—

(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."

11. The general principles now applicable to costs were summarised as follows by the Court of Appeal (Murray J) in *Chubb European Group v Health Insurance Authority* [2020] IECA 183, [19]:

"(a) The general discretion of the Court in connection with the ordering of costs is preserved (s.168(1)(a) and O.99, r.2(1)).

(b) In considering the awarding of costs of any action, the Court should 'have regard to' the provisions of s.169(1) (O.99, r.3(1)).

(c) In a case where the party seeking costs has been 'entirely successful in those proceedings', the party so succeeding 'is entitled' to an award of costs against the unsuccessful party unless the court orders otherwise (s.169(1)).

(d) In determining whether to 'order otherwise' the court should have regard to the 'nature and circumstances of the case' and 'the conduct of the proceedings by the parties' (s.169(1)).

(e) Further, the matters to which the court shall have regard in deciding whether to so order otherwise include the conduct of the parties before and during the proceedings, and whether it was reasonable for a party to raise, pursue or contest one or more issues (s. 169(1)(a) and (b)).

(f) The Court, in the exercise of its discretion may also make an order that where a party is 'partially successful' in the proceedings, it should recover costs relating to the successful element or elements of the proceedings (s.168(2)(d)).

(g) Even where a party has not been 'entirely successful' the court should still have regard to the matters referred to in s.169(1)(a)-(g) when deciding whether to award costs (O.99, r.3(1)).

(h) In the exercise of its discretion, the Court may order the payment of a portion of a party's costs, or costs from or until a specified date (s.168(2)(a))."

12. In *Higgins v Irish Aviation Authority* [2020] IECA 277, this Court (per Murray J.) identified (at paras 9 & 10) the appropriate sequence of examination to be conducted by the court:-

"9. Both parties referred in their submissions to ss. 168 and 169 of the Legal Services Regulation Act 2015. In this case, the application of these provisions when viewed in the light of O.99, r.3(1) RSC involves the Court in addressing four questions:

(a) Has either party to the proceedings been 'entirely successful' in the case as that phrase is used in s.169(1)?

(b) If so, is there any reason why, having regard to the matters specified in s.169(1)(a) – (g), all of the costs should not be ordered in favour of that party?

(c) If neither party has been 'entirely successful' have one or more parties been 'partially successful' within the meaning of s.168(2)?

(d) If one or more parties have been 'partially successful' and having regard to the factors outlined in s.169(1)(a)-(g) should some of the costs be ordered in favour of the party or parties that were 'partially successful' and if so, what should those costs be?

10. In answering these questions, 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)."

Application of the principles in this case

13. It is uncontroversial that the respondents have been 'entirely successful' in the present appeal proceedings, as that phrase is used in s. 169(1).

14. For reasons that I will elaborate upon later in this judgment, I do not consider that there is any reason why, having regard to the matters specified in s.169(1)(a)-(g), all of the costs of the appeal, either as agreed or as ascertained in default of agreement, should not be ordered in favour of the respondents, to the extent that they were separately represented (such costs to include all reserved costs, the costs of submissions, and a certificate for Senior Counsel for each separate legal team), against the first named appellant. In other words one set of such costs should be awarded to the 1st to 5th named respondents who were jointly represented, one set of such costs should be awarded to the 6th named respondent, one set of such costs should be awarded to the 7th named respondent, and one set of such costs should be awarded to the 8th named respondent, in each case against the first named appellant.

15. There should be no order as to costs in favour of the first named appellant.

Reasons for not departing from the default rule

16. I consider that no grounds had been demonstrated that would justify this court in departing from the default rule that where a party has been entirely successful they should receive their costs.

17. This Court expressly found at paragraph 168 of the judgement of the 10th of November 2023 that there was no evidence that the respondents were responsible for any of the delays that had occurred with regard to the progression of the appeals in this case. Moreover, there had been no acquiescence by them in the first named appellant's delays.

18. Further, at paragraph 166 of the of the judgement of the 10th of November 2023 there is an express rejection of the complaints of Mr Maye, articulated in his various affidavits filed in connection with these proceedings, of alleged inappropriate conduct on the part of the respondents.

19. Insofar as Mr Maye raises complaints of misconduct in the document filed on behalf of the first named appellants entitled *"Submission on Costs to the Court of Appeal by Seamus Maye for and on behalf of the Appellants (listed below) following the COA's Judgment on November 10th, 2023",* I am satisfied that these are nothing more than a reiteration of complaints/arguments previously made. I am satisfied that the reiteration of these complaints amounts to the first named appellant being argumentative with respect to findings in the judgment of the 10th of November 2023 , and in the light of the Court's previous findings it is not appropriate to engage with them beyond making some very brief remarks.

20. Insofar as the first named appellant asserts, through Mr Maye, that the respondents have been guilty of *"legal corruption"* and that there has been *"a failure of public/private enforcement of competition law"*, these are vague allegations and entirely unsupported by evidence.

21. Insofar as the first named appellant asserts, through Mr Maye, that Mr Maye's family was blacklisted and that threats were made by *"an agent of CRH plc",* who is named, in 1998; and that here were *"repeated liquidator menaces"* towards the liquidator of the second and third named appellant companies, those allegations are wholly unsubstantiated.

22. Insofar as the first named appellant asserts, through Mr Maye, objective bias on the part of Mr Justice Cooke arising from his shareholding in CRH and various other matters, these allegations against Mr Justice Cooke formed one of the grounds of appeal against the High Court's order. This court took account of those allegations in its judgment of the 10th of November 2023, in assessing the balance of justice, see paragraphs 162 and 163 thereof. I

expressly reject the assertion on behalf of the first named appellants that, what is characterised as, *"the CRH/Justice Cooke relationship"*, is critical to any costs order.

23. It is also argued in the document entitled *"Submission on Costs to the Court of Appeal by Seamus Maye for and on behalf of the Appellants (listed below) following the COA's Judgment on November 10th, 2023"* that, in considering whether to depart from the default rule provided for in s. 169 of the Act of 2015, this court should take account of certain unparticularised, unsubstantiated and irrelevant allegations against other unidentified judges, and of a suggestion that the Irish judiciary has deviated from its obligations under EU law and the Bangalore principles in its handling of the *Framus* litigation over the last 27 years. There is simply no evidence to support any such suggestions.

Conclusion

24. The respondents, having been entirely successful, are entitled to their costs against the first named appellant, to the extent that the said respondents were separately represented, such costs to include all reserved costs, the costs of submissions, and a certificate for Senior Counsel for each separate legal team, either as agreed or as ascertained in default of agreement.

25. The first named appellant's application for its costs is refused.

Faherty J: I agree.

Binchy J: I also agree.