THE COURT OF APPEAL

UNAPPROVED

Neutral Citation Number [2020] IECA 208
Court of Appeal Record No. 2019/496
High Court Record No. 2017/307JR

Costello J.
Haughton J.
Collins J.

BETWEEN/

JURIJ BONDARENKO

APPLICANT/RESPONDENT

- AND -

THE EMPLOYMENT APPEALS TRIBUNAL

RESPONDENT

- AND -

KEEGAN QUARRIES LIMITED

NOTICE PARTY/APPELLANT

JUDGMENT of Ms. Justice Costello delivered on the 29th day of July 2020

1. On 31 May 2019, the High Court (Binchy J.) refused an order of judicial review quashing a decision of the respondent ("EAT") dated 20 March 2017 ([2019] IEHC 578). On 8 October 2019, he ordered the notice party to pay the sum of €2,000 as a contribution to the costs of the applicant. The notice party appealed the order for costs and seeks the costs of the High Court and the appeal.

Background

2. In order to consider the decision of the trial judge on costs it is necessary to explain the complicated procedural background to the judicial review proceedings. In 2015, the applicant brought a series of claims to the Rights Commissioner against Keegan Precast Limited ("Precast") and a related company, Keegan Quarries Limited ("Quarries"), the notice party in these proceedings. They were identical claims arising out of the same cause of action. He sued both Precast and Quarries as he was unsure which of the two related companies was in fact his employer.

3. Precast and Quarries maintain that Precast was the employer of the applicant at the relevant time, though this was not clarified for some time. Precast instructed its solicitors to appear before the Rights Commissioner on its behalf to defend the claims. Quarries did not instruct its solicitors to act on its behalf as it was not the applicant's employer. Neither Precast nor its solicitors were able to attend before the Rights Commissioner due to prior commitments in the High Court. They sought an adjournment of the hearing, but that was refused. Thus, neither Precast nor Quarries were represented at the hearings before the Rights Commissioner. The solicitors for Precast sent a trainee solicitor to attend the hearing as a note taker on behalf of Precast.

4. The Rights Commissioner did not decide which of the two companies was the applicant's employer. The Rights Commissioner clearly ought to have made a determination as to the identity of the employer and issued a recommendation directed to that company. Instead, on 30 September 2015, the Rights Commissioner made identical sets of recommendations against both Precast and Quarries in favour of the applicant. That was not appropriate. The Rights Commissioner sent the recommendations against Precast to its solicitors and sent the recommendations against Quarries directly to Quarries, there being no representation in respect of Quarries. Thus, the solicitors for Precast, who were

also the solicitors for Quarries, were unaware of the fact that two mirror image recommendations had been made by the Rights Commissioner as, due to inadvertence, Quarries did not forward the recommendations against it to its solicitors.

5. Precast appealed the recommendation of the Rights Commissioner to the Labour Court. It described itself as the employer. The Labour Court proceeded on that basis. Quarries maintain that due to the confusion created by the Rights Commissioner, only the recommendations which had been sent to the solicitors on record for Precast were appealed to the Labour Court and by implication, that if the recommendations in relation to Quarries had likewise been furnished to the solicitors, they too would have been appealed to the Labour Court.

6. The Labour Court heard Precast's appeals on 11 April 2016. The applicant gave evidence. The Labour Court delivered its determinations on 3 May 2016. The Labour Court varied the Rights Commissioner's recommendation under the Unfair Dismissals Act 1997, setting aside the Rights Commissioner's award of reinstatement with full arrears of wages and substituting a fixed monetary award of €42,000. In addition, the Labour Court refused to award any compensation in respect of a claimed breach of the Terms of Employment (Information) Act 1994 in respect of which the Rights Commissioner had awarded the applicant €2,000. The orders made by the Labour Court were clearly premised on the applicant having been employed by Precast. Otherwise, the Labour Court would not have had jurisdiction to make such orders.

7. A notable – and disquieting – feature of the hearing before the Labour Court was the fact that neither the applicant nor his representative referred to the mirror recommendations of the Rights Commissioner against Quarries, awarding the applicant reinstatement and €2,000 in respect of breach of the Terms of Employment (Information) Act 1994.

8. Following the determination by the Labour Court, the applicant sought to enforce the recommendations of the Rights Commissioner against Quarries (reinstatement and ancillary damages) and the award of the Labour Court against Precast (€42,000). On 31 May 2016, his solicitors wrote to the Employment Appeals Tribunal (EAT) enclosing a notice of claim for implementation in respect of the decision against Quarries, and on 1 June 2016 they wrote to the solicitors for Precast seeking the discharge of the €42,000 ordered by the Labour Court to be paid under the Unfair Dismissals Act, together with the sum of €1,450 under the Organisation of Working Time Act 1997 and the sum of €2,056 under the Payment of Wages Act 1991. The letter stated:-

> *"Please be advised that we are now proceeding to issue Motions once the time limit for payment elapses. In the event that it is necessary for us to issue the said Motions we will rely upon this letter for any cost relating to the applications to the Circuit Court and/or the District Court.*
>
> *Please also be advised if it is necessary to proceed further for implementation up to and including liquidation of the company we will rely upon this letter for any costs relating thereto.*
>
> *We will be obliged if you would confirm that you have authority to accept service of any proceedings failing which we will have no alternative but to serve them directly upon your Client."*

9. Quarries received notification from the EAT of a hearing fixed for 23 September 2016. Its solicitors wrote to the applicant's solicitors on 9 September 2016 concerned that confusion had arisen between the claims against Precast and Quarries. They requested confirmation that all applications referable to Quarries would be withdrawn and asked that

the applicant's solicitors simply summarise the overall position and "confirm that no further proceedings will be taken against [Quarries]". By letter dated 12 September 2016, the applicant's solicitors made it clear that they took the view that the EAT was obliged by statute to implement the recommendations of the Rights Commissioner against Quarries and that the applicant was not foregoing his claims against Quarries. On 22 September 2016, the solicitors for Precast and Quarries protested that the applicant was now seeking to be doubly compensated and that this could not be viewed as anything "other than an abuse of process". They said that the application to the EAT in the case of Quarries will be vigorously defended.

10. On 23 November, 2016 they wrote again in an effort to resolve the impasse:-

> *"[Precast] is anxious to discharge its obligations to [the applicant] pursuant to those determinations. The existence of the enforcement proceedings against [Quarries] before the EAT however, leaves our clients at risk of being forced to compensate the [applicant] twice arising out of one set of facts and circumstances and one employment. In the circumstances we cannot advise our client to satisfy the Labour Court's determinations until the situation has been clarified."*

11. Neither the applicant nor his solicitor chose to do anything to clarify the position. He continued to seek to enforce the recommendation against Quarries and to seek payment from Precast of the €42,000 awarded by the Labour Court. Finally, by letter dated 30 March 2017, solicitors for Precast and Quarries wrote to the applicant's solicitors:-

> *"It is clear from your correspondence that [the applicant] believes that he should collect awards from both [Quarries] and [Precast], that is that he ought to be allowed to collect "on the double"."*

The applicant continued to pursue both companies. He did not abandon his claim against Precast in favour of his claim against Quarries, or vice versa. In the circumstances, it is

impossible not to conclude that he was seeking to be unjustly enriched by recovering on the double.

12. The application for implementation of the recommendations of the Rights Commissioner against Quarries was heard by the EAT over three days, 23 September 2016, 24 November 2016 and 30 January 2017. On 20 March 2017, the EAT issued its decision. It determined that the Rights Commissioner had no statutory power to make a determination in relation to a claim where there had already been a determination, or to make two determinations in relation to one claim. It held that if there was a separate un-appealed decision of the Rights Commissioner against Quarries, any such determination was *ultra vires* the Rights Commissioner as it had already made a determination against Precast. In the circumstances, it held that the determination against Quarries was unenforceable and declined to make an implementation order as sought.

The High Court proceedings

13. On 24 April 2017, the applicant was granted leave to issue proceedings by way of judicial review to quash the decision of the EAT of 20 March 2017 on the grounds that it erred in law and the decision was *ultra vires*. The EAT did not defend the proceedings in accordance with its usual practice and Quarries acted as *legitimus contradictor*. The hearing lasted three days.

14. Quarries maintained that, at the Labour Court, the applicant accepted that Precast was his employer, but this was denied by the applicant; the High Court concluded that there was no evidence before the court either way, so it was not possible to adjudicate on the issue. Notwithstanding this conclusion at para. 62 of the judgment the trial judge stated:-

"Arguably it is no function of the Court to do so for the purposes of arriving at a conclusion as to whether or not the respondent erred in law or acted ultra vires, but it is not difficult to see the relevance of these matters. If the applicant acknowledged that he had one employer only i.e. Keegan Precast, and one income (from that company), the amount of which was agreed at the Labour Court hearing, then it is difficult to see how the applicant could be entitled to succeed with any claim concerning his employment rights as against the notice party, and it would follow that the Court could not exercise its discretion, in a judicial review application such as this, in favour of the applicant, even if it is apparent that the respondent has erred in law and acted ultra vires. The factual background against which the proceedings are brought is therefore of some considerable relevance to the determination of the question as to whether or not the applicant has engaged in an abuse of process by bringing and persisting with two claims against two different companies in connection with the breach of his employment rights and by seeking to enforce determinations made in his favour against both companies, as well as the related issue as to whether or not the Court should, if satisfied, that the respondent erred in law and acted ultra vires, exercise its discretion in favour of the applicant."

15. The trial judge held that he did not believe that "there can be any doubt at all" but that the EAT erred in law and acted *ultra vires*. But at para. 76 he said:-

"On the other hand, there can hardly be any doubt as to the reason why the respondent made the decision that it did. It heard evidence (which it was precluded by statute from hearing) and formed the conclusion that the applicant was attempting to recover twice in respect of the same wrongs on the part of his employer, whichever of the parties was his employer. Having heard that the applicant was

awarded the sum of €42,000 in respect of his claim for unfair dismissal by the Labour Court, the respondent clearly decided that he could not make a determination in the same terms as a Rights Commissioner, which would lead to double recovery on the part of the applicant."

16. The judgment continued that in the ordinary course of events, a conclusion that a respondent had erred in law and acted *ultra vires* would lead to an order of *certiorari* quashing a decision of the respondent but then held "this is not the ordinary course of events". At para. 80 the trial judge said:-

"It is well established that the remedy of judicial review is a discretionary remedy. ***It will not be used to perpetrate an abuse of process or to bring about an unjust result, such as unjust enrichment."*** (emphasis added)

The trial judge was under no doubt that the applicant was not contending that he had two separate jobs at the same rate of remuneration with each company. It was too late for the applicant to state on day three of the hearing that any recovery from Precast would be credited against the liability of Quarries. He held at paras. 85-87:-

"85. In response to this allegation during the course of this hearing, counsel for the applicant said that he was not attempting to do so. She submitted that, having obtained the maximum that he could do from the Rights Commissioner, i.e. a recommendation for reinstatement, the applicant was entitled to seek implementation of that remedy as against the notice party, but that if that is implemented (whether by actual reinstatement or by payment of compensation up to the maximum amount recoverable) the applicant would then, in effect, credit any payment received from Keegan Precast against whatever liability is determined as against the notice party. However, this was the first time such a proposition was advanced on behalf of the applicant. The letter of his solicitors of 9th September, 2016, referred to at para. 15

above makes it very clear that the applicant was, at that point in time, seeking to recover, in full, the amount awarded to him as against Keegan Precast from the Labour Court, in addition to the implementation of the recommendation of the Rights Commissioner as against the notice party. In short, ***I really do not believe that there can be any doubt but that the applicant, having gained a very significant litigation advantage, sought to exploit that advantage to the full.***

86. ***The applicant, on the other hand, was fully aware of the position at all times.*** *While the applicant disputes that, at the hearing of the appeal before the Labour Court, he accepted that Keegan Precast was his employer, and that he accepted the figures put forward by Keegan Precast at that hearing in relation to his remuneration, it is accepted by the applicant that no mention was made at all at this hearing of the other claim against the notice party, or the intention of the applicant to pursue the recommendation of the Rights Commissioner, before the respondent, in relation to that other claim.* ***It is difficult to avoid the conclusion that this was a deliberate strategy devised by the applicant and his solicitors who were representing him at the time. Whatever about the earlier errors and omissions on the part of the notice party and Keegan Precast that laid the foundations for these proceedings, this strategy became the driving force for the proceedings from that time onwards.***

87. It hardly needs to be said that, not only is there nothing at all wrong with a litigant adopting the strategy that is most likely to deliver the best result obtainable, one would expect a litigant to adopt a strategy designed to achieve that end. But a strategy that includes staying silent at a hearing before a forum (in this case, the

Labour Court) in relation to a parallel set of proceedings seeking the same relief, in circumstances in which the applicant and his advisors are surely aware that there has been an oversight of some kind, can hardly be commended. It is too late at the hearing of these proceedings for the applicant to volunteer that he never intended to claim both reliefs, but merely to seek the greater of the two options available to him. As I have said above, I fully understand why the claimant made two claims from the outset. ***However, once it became apparent that the two claims were now on a different path, the applicant at some point had an obligation to choose as between the two remedies. If he was uncertain about which remedy to pursue, it was open to him to communicate with the solicitors acting on behalf of the companies and to invite confirmation as to which of those companies accepted responsibility for the applicant's employment; if there was disagreement between the parties in this regard, that could then at least be explored, with a view to reaching agreement on the best way forward. But by staying silent on the issue, and by doing so very deliberately, the applicant exacerbated a problem that had its origins in the actions and inactions on the part of Keegan Precast and the notice party. He has stuck to a course that if seen through to a conclusion, will result in him obtaining two legally enforceable orders arising out of his unfair dismissal, and other breaches of employment legislation on the part of one or other of the companies, which orders, although against two different corporate entities, arise out of the same set of circumstances. Moreover, it is quite possible that the result of this would be that he would be entitled to receive far more than the maximum amount fixed by the legislature for compensation for unfair dismissal****."*(emphasis added)

17. At para. 90, the trial judge held that:-

"… I consider that I should not grant the order for certiorari sought by the applicant, nor any of the other reliefs sought by the applicant, ***as to do so would be to facilitate the applicant recovering damages twice from a single dismissal from employment****. If it seems unfair that this leaves the applicant with the lesser of two remedies, i.e. the compensation for unfair dismissal determined by the Labour Court in the sum of €42,000, as distinct from an order requiring his reinstatement, which may have a greater financial value, then the applicant needs to bear in mind that he could have chosen to apply to enforce the latter and more substantial remedy as against the notice party much earlier than he did, and well in advance of the hearing before the Labour Court. It is also fair to observe that the order of the Labour Court is one made following a full consideration of the merits of the case, and is more likely to represent a fairer outcome for both parties. And finally, on this point****, it would surely work a greater injustice to permit the applicant to recover twice in respect of his dismissal.****"* (emphasis added)

18. Finally, the trial judge noted that the EAT made no reference to the recommendation of the Rights Commissioner that Quarries should pay the applicant €2,000 in respect of a breach of the Terms of Information (Employment) Act 1994. The trial judge indicated that he would take the failure of the EAT to address this award of damages when dealing with the issue of costs of the judicial review proceedings.

The decision of the High Court on costs

19. There were two short hearings in respect of the costs of the judicial review proceedings on 8 October and 5 November 2019. The trial judge refused to award the costs to Quarries, the successful party. The trial judge ordered Quarries to pay €2,000 to

the applicant as a contribution to his costs. The trial judge explained his reasons for the order an *ex tempore* decision on 8 October 2019 in the following terms:-

> *"The normal rule is that costs follow the event and the event is that the applicant has failed to set aside the decision of the EAT but the applicant has failed to do so in very unusual circumstances where I found that the decision of the EAT was ultra vires and, in the ordinary course of events, the applicant would have succeeded with his application. But, for the reasons I have given in the decision, this was not the ordinary course of events. There was a background to this and the background was that in my view the applicant was, as I have said in the decision, pursuing a strategy which would have resulted in him obtaining compensation for the same event twice. I found that that was very unmeritorious and in the exercise of my discretion I felt that an action that would otherwise have succeeded should not succeed.*
>
> *But there was another part of the background that is also relevant to this application or these applications for costs and that is that … the employers themselves were the architects of the circumstances that gave rise to the problems in the first place. I don't think that the applicant set out to do anything wrong … [s]o, to that extent it seems to me that both parties share a culpability for how matters unfolded, both before the EAT and thereafter.*
>
> *I agree that the notice party had little choice but to defend these proceedings as legitimus contradictor for the EAT once they were issued but, having said that, I find it difficult to ignore the background against which the claims were made and adjudicated upon in the first instance. Overall, I think the fairest thing to do, and I think it does require a departure from the normal rule which is that costs follows the*

event, but I think the most appropriate way of departing from the normal rule is to make no order as to costs, except for one thing, and coming back to paragraph 91 in the judgment, and that is that there was a heading of claim that was not addressed by the EAT that should have been addressed by the EAT and that required a payment of €2,000 on the part of the notice party to the applicant and I think that it is appropriate that that sum of money should be paid as a contribution, a very small contribution by the notice party to the applicant's costs."

The relevant law

20. Section 169 of the Legal Services Regulation Act 2015 was commenced on 7 October 2019, the day before the High Court hearing on the costs of the judicial review proceedings. Neither party made any reference to it at that hearing. Order 99 of the Rules of the Superior Courts was not amended until after the decision of the trial judge and the trial judge made his decision by reference to the previous provisions of Order 99. At the appeal, the parties submitted that the Act of 2015 codified the existing law and did not argue that different principles ought to be applied by this court on appeal. Whether this is the case, is a matter for an appeal where the point is argued. This appeal has been decided on the basis of the law as it stood prior to the commencement of the Act of 2015.

21. Order 99, r.1(1) provided that the costs of every proceeding shall be in the discretion of the courts. Rule 1(4) provided that the costs of every issue of fact or law raised upon a claim or counterclaim shall, unless otherwise ordered, follow the event. The starting point is that costs follow the event. The importance of the rule of costs following the event was explained by the Supreme Court in *Godsil v. Ireland* [2015] 4 IR 535 by McKechnie J. in the following terms:-

"[19] Inter partes litigation for those unaided is, or can be, costly: certainly it carries with it that risk. It is therefore essential in furtherance of the

high constitutional right of effective access to the courts on the one hand and the high constitutional right to defend oneself, having been brought there, on the other hand, that our legal system makes provision for costs orders. This is also essential as a safeguarding tool so as to regulate litigation, and the conduct and process thereof, by ensuring that it is carried on fairly, reasonably and in proportion to the matters in issue. Whilst the importance of such orders is therefore clearly self-evident, nevertheless some observations in that regard, even at a general level, are still worth noting.

[20] 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.

...

[22] There is a second justification, again at the level of principle, for

this jurisdiction: it was mentioned in Farrell v. Bank of Ireland [2012] IESC 42, [2013] 2 I.L.R.M. 183, per Clarke J., at para. 4.12, p. 195. This justification is that, in the absence of such a mechanism, both the bringing and defending of proceedings could be used for abusive purposes. In effect, the financial weight of a litigant could determine the extent to which, if at all, a particular claim or defence could be pursued, and, certainly in some circumstances, could exercise an overly controlling influence on the process. Such of course would be inimicable to justice and could seriously disable the judicial role, as ultimately issues which should be determined may never even reach the point of adjudication. This would be highly undesirable. Accordingly, it is crucial to have such a means available so that the court, where appropriate, can dissuade, and if necessary even punish, exploitative conduct and unprincipled parties."

22. The court has a discretion when it comes to costs, but it is not at large. The discretion must be exercised on a reasoned basis and exercised judicially. See *Dunne v. Minister for the Environment* [2007] IESC 60, and *Cork County Council v. Shackleton* [2007] IEHC 334 where Clarke J. in the High Court at para. 4.1 said:-

"... To state that the court retains a discretion is not to give the court carte blanche. It may well be that it is neither possible nor appropriate to list all of the circumstances in which the discretion concerned might be exercised or all of the factors which might properly be taken into account. Experience has shown that new and different cases may lead to a refinement or expansion of the principles applicable. However, it does seem to me that all discretion needs to be exercised in a reasoned way against the background of having identified appropriate principles by reference to which the court should exercise the discretion concerned."

23. Some of the factors which the courts have and now are required to consider are set out in s.169(1) of the Legal Services Regulation Act, 2015 which 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, 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."*

24. Complex cases which raise multiple issues may have more than one "event". In *Veolia Water U.K. plc v. Fingal Country Council (No. 2)* [2007] 2 I.R. 81 Clarke J. stated that where the winning party had not succeeded on all issues which were argued before the court, that the court should consider whether it is reasonable to assume that the costs of the parties in pursuing the set of issues before the court were increased by virtue of the successful party having raised additional issues upon which it was not successful. He

cautioned that this approach might not be appropriate in more straightforward litigation stating:-

> *"[t]he fact that such an additional issue was raised should only affect costs where the raising of the issue could, reasonably, be said to have effected the overall cost of the litigation to a material extent."*

25. In *ACC Bank plc v. Johnston* [2011] IEHC 500, Clarke J. reiterated that the first and overriding principle was that costs follow the event. The second principle was that the starting position should be that the party who wins the event should get full costs and *"the third principle was that the court should consider departing from awarding full costs to the party who wins the event where it is clear that that party, although generally victorious, materially added to the costs of the proceedings by raising additional grounds or arguments which the court found to be unmeritorious"*.

26. In *M.D. v. N.D.* [2016] 2 I.R. 438, at pp. 445-446, Clarke J., in the Supreme Court, emphasised that it must be clear that the costs of the proceedings were materially increased by pursuing the unmeritorious points. In other words, a party should not be penalised for pursuing arguable points simply because they ultimately fail to find favour with the court; they must additionally be shown to have added materially to the costs of the proceedings and it is only to that extent that the successful litigant should be deprived of those costs or ordered to pay them, as seems just to the trial judge.

Discussion

27. The trial judge noted that the normal rule was that costs follow the event, but he felt that it was an appropriate case in which to depart from that rule. He did so on the basis of attributing equal weight to the initial failure by Precast and Quarries to clarify the identity of the applicant's employer, with the deliberate strategy of the applicant to exploit the situation after the identity of the employer had been clarified, unjustly seeking to recover

on the double from both companies, when he accepted that he had only one employment with one company. The High Court did not reach its decision in reliance on the principles in *Veolia Water*, despite the fact that counsel for the applicant urged that the trial judge should apply those principles in circumstances where the EAT had erred in law and acted *ultra vires*, and Quarries had been unsuccessful in its arguments to the contrary. In addition, having refused to award the costs to Quarries, or to apportion the costs at the request of the applicant, he sought to enforce the award of €2,000 – which was not addressed by the EAT in its impugned decision, and which was not before the court – by way of a contribution to the costs of the applicant to be paid by Quarries.

28. In my judgment, the trial judge erred in the exercise of his discretion in equating the conduct of Precast and Quarries prior to the hearing by the Labour Court on the one hand, with the exploitative and unprincipled conduct of the applicant thereafter. No court could, or should, condone that conduct in any way. I find no equivalence in the confusion generated by Precast and Quarries in relation to the employment status of the applicant and the abuse of process, so found by the trial judge, of the applicant in seeking to secure a double recovery in exploiting the situation which arose. It is quite clear, in light of the letters of 23 November 2016 and 30 March 2017, that the applicant did not need to institute the judicial review proceedings in order to vindicate his rights, and that he deliberately sought to recover more than was his due. Thus, they were both unnecessary and part of a deliberate "unmeritorious" strategy, as the trial judge found. This was also recognised by the trial judge at para. 90 of his judgment, but he failed to give this finding adequate weight when he made his decision on the costs of the proceedings.

29. Counsel for Quarries submitted that, in addition to the normal rule that costs follow the event, there was a public policy reason why Quarries should be awarded its costs. The applicant had engaged in an abuse of process and it was important that the court should

discourage litigation of this kind. I accept her submission. *Godsil* makes clear that, not only is a successful defendant entitled normally to recover the cost of defending the proceedings from the losing plaintiff, but also that the courts can and ought, in appropriate cases, to use orders for costs to "dissuade, and if necessary even punish, exploitative conduct and unprincipled parties". In my judgment, the High Court should not have condoned the actions of the applicant in instituting and prosecuting the judicial review proceedings and the failure to award Quarries, the successful party, its costs against the applicant effectively failed to condemn this behaviour.

30. Furthermore, the trial judge expressly exercised his discretion to refuse to grant an order of *certiorari* in respect of a decision which he said was clearly *ultra vires* on the basis that to do so would be, in effect, to assist an abuse of process. In those circumstances, it seems to me that the rule that costs follow the event is, if anything, reinforced. It would seem inconsistent, at the very least, to hold that the conduct of the applicant for judicial review was so egregious that it justified the withholding of an order of *certiorari* in respect of an order which was made *ultra vires*, but would not justify an order for costs in favour of the notice party who was forced to defend the abusive proceedings. The trial judge held that Quarries had little option but to defend the judicial review proceedings. Had it failed to do so, the applicant would have been facilitated in his attempt to recover twice for the one wrong. In my judgment, where a judge, in the exercise of his discretion declines to order *certiorari* of an *ultra vires* decision of an inferior tribunal, it would require exceptional countervailing factors to depart from the rule that the costs should follow the event in the proceedings.

31. The trial judge decided not to award the relief sought solely on the basis of the unmeritorious nature of the litigation, however, the decision on costs did not flow from this reasoning or finding. The reason for refusing the relief ought to have been given

proportionate weight in the decision on costs, but it was not. On the other hand, the decision to refuse the relief sought was not based upon any wrongdoing on the part of Quarries or Precast. I agree with counsel for Quarries that, in the circumstances, the trial judge gave undue weight to irrelevant matters and failed to give due weight to the central issue in the case.

32. Counsel for the applicant argued that he succeeded in his claim that the decision of the EAT was *ultra vires* and, accordingly, it was appropriate for the court to engage in a *Veolia Water* type assessment and to apportion costs even though the court declined to grant an order of *certiorari.* She applied for an award of part of the costs in favour of her client on this basis. She submitted that Quarries had prolonged what could have been a one-day judicial review hearing into a three-day judicial review hearing, arguing unmeritorious points which were rejected by the trial judge.

33. I am not persuaded by the submissions of counsel for the applicant. I do not think a *Veolia Water* type assessment can arise at all, save, perhaps, in very exceptional circumstances, where proceedings have been dismissed – correctly in my view – on the basis that they effectively amount to an abuse of process and an attempt at unjust enrichment.

34. In any event, it is clear that the trial judge was requested to make an award of costs on the basis of a *Veolia Water* type apportionment of costs and he declined to do so. His decision on the costs was based on the conduct of the parties, not on the fact that Quarries lost on the substantive issue whether the EAT erred in law or acted *ultra vires*. He did not criticise the notice party for arguing points which he rejected in emphatic fashion. On the contrary, he said that *"the notice party had little choice but to defend these proceedings as legitimus contradictor for the EAT once they were issued"*. The trial judge did not conduct a *Veolia Water* type analysis of the hearing before him.

35. In those circumstances, counsel for the applicant, in effect, invites the Court of Appeal to conduct the analysis by reference to the points which were unsuccessful. I do not accept that this is appropriate, or indeed possible, on the basis of the matters before the court. The court does not have sufficient information to conduct a *Veolia Water* type assessment. Counsel for Quarries argued that a considerable part of the hearing was concerned with the factual background in order to establish the fact that the applicant was following a deliberate strategy of seeking a double recovery. I can readily accept that this was so, and also that a considerable amount of time was devoted to dealing with the legal arguments put forward in opposition to the claim for *certiorari.* But, as far as how much time was taken on various issues and how this should be disentangled, only the trial judge could a determine in this case. A party who seeks an apportionment of costs must be able to satisfy the court that the raising of the impugned issue(s) *"could, reasonably, be said to have effected the overall cost of the litigation to a material extent."* This court cannot so determine and, therefore, cannot make an order for apportioned costs, even if the court otherwise was of the view that it would be just to do so (which it is not).

36. The trial judge directed Quarries to pay €2,000 as a contribution towards the costs of the applicant on the grounds that the EAT failed to address the heading of claim in respect of a breach of the terms of Employment (Information) Act 1994 and *"that required a payment"* by Quarries. In my view, he erred in principle in so doing. First, for the reasons set out above, he ought to have awarded no costs to the applicant and secondly, Quarries ought not to have any costs awarded against it, but ought to have been awarded all of its costs in the proceedings against the applicant. Thirdly, in so ordering, the trial judge referred to a matter which was not and could not have been before the court in the judicial review proceedings. He was giving effect to a duplicate award of damages referable to the applicant's employment. The matter had been dealt with by the Labour Court in the appeal

by Precast, and the Labour Court had expressly declined to make any award under this heading against the party that the Labour Court accepted was the applicant's employer. As the trial judge himself observed (at para. 90 of his judgment) that order was made following a full consideration of the merits and was "more likely to represent a fairer outcome for both parties" than a recommendation of the Rights Commissioner made after hearing only one side. Yet the order made by the High Court effectively enforces the recommendation. In the circumstances, it is difficult to understand how this particular claim could, as a matter of justice, be enforced by the means adopted by the trial judge against Quarries. It was, in the words of counsel for Quarries "an inexplicably punitive step" and one which, in my opinion, cannot be allowed to stand.

Conclusion

37. This court should be be slow to interfere with the exercise of a High Court judge's discretion in relation to costs and significant weight is to be given to the views of the trial judge, see *Godsil v Ireland*, at paras. 65 & 66, as well as *M.D. v N.D.*, at para. 46 (per MacMenamin J).

38. Even so, I am satisfied that in this case this court can, and should, intervene. The entire proceedings constituted an abuse of process. It is not appropriate that the applicant should have received any award of costs, and it is not just that Quarries should be put to the expense of defending the proceedings in those circumstances and yet be denied an order for its costs when the relief sought is refused on the basis that to grant it would facilitate unjust enrichment at its expense. In my judgment, the trial judge failed to give appropriate weight to the abuse of process in this case when he made his order on costs.

39. It is not appropriate to make a *Veolia Water* type assessment in this case as the proceedings ought never to have been brought, even if this court were in a position so to do.

40. The trial judge erred in the exercise of his discretion when he, in effect, ordered Quarries to contribute to the costs of the applicant to make up for the fact that the EAT failed to direct the implementation of the recommendation of the Rights Commissioner, that Quarries pay €2,000 to the applicant in respect of breaches of the provisions of the Act of 1994.

41. I would allow the appeal, vacate the decision of the trial judge on costs and award Quarries the cost of the High Court against the applicant.

42. As this judgment is being delivered electronically, Haughton and Collins JJ. have indicated their agreement with the reasoning and conclusions reached in respect of this appeal. The provisional view of the court on the matter of costs is that the costs of the appeal should follow the event. If either party contends that a different order as to costs should be made, the party may make written submission of no more than 1500 words to the court within 28 days of the delivery on the judgment, which application shall be on notice to the other party who shall have 21 days thereafter to reply by written submissions of no more than 1500 words.