THE COURT OF APPEAL

UNAPPROVED

Record Number: 2024/08
High Court Record Number: 2018/620JR
Neutral Citation: [2024] IECA 253

Whelan J.

Noonan J.

Pilkington J.

BETWEEN/

DAVID COOPER

APPLICANT/APPELLANT

-AND-

AN BORD PLEANÁLA

DEFENDANT/RESPONDENT

-AND-

DUN LAOGHAIRE RATHDOWN COUNTY COUNCIL
AND DUNDRUM RETAIL LIMITED PARTNERSHIP

NOTICE PARTIES/RESPONDENTS

JUDGMENT of Mr. Justice Noonan delivered *ex tempore* on the 24th day of October, 2024

1. This appeal is brought by the appellant, Mr. Cooper, against the order and judgment of the High Court (O'Donnell J.) delivered on 8th November, 2023 rejecting an appeal by Mr. Cooper against a costs adjudication in this matter.

2. Although the background is set out in detail in the judgment of the High Court, I should refer to it briefly for ease of reference. Mr. Cooper, who lives in Dundrum, objected to a planning application made by the second notice party in respect of Dundrum Town Centre. The application was granted by the local authority, the first notice party, and Mr. Cooper sought to appeal that to the respondent, An Bord Pleanála. Section 127(1) of the Planning and Development Act, 2000 (as amended) ("the PDA") provides, *inter alia*, that in the case of an appeal under s. 37 by a person who made submissions or observations on the application to the planning authority, as Mr. Cooper did, the appeal must be accompanied by the acknowledgment by the planning authority of receipt of the submissions or observations.

3. The planning application was granted on 12th June, 2018 and Mr. Cooper attended at An Bord Pleanála's office on 6th July, 2018 in order to lodge appeal papers. He says he was told by a board official at that time who reviewed his papers that the appeal was in order. However, it was subsequently examined by the Board on 8th July, 2018 when it was determined that it was invalid because he had failed to comply with the requirement under s. 127 to which I have referred. The Board informed Mr. Cooper accordingly on 12th July, 2018.

4. On 23rd July, 2018, Mr. Cooper commenced the within judicial review proceedings seeking to quash the Board's decision not to accept his appeal. His judicial review application was dismissed by the High Court and an order for costs made against Mr. Cooper in favour of the respondent and notice parties. Mr. Cooper sought to appeal the judgment of the High Court to this Court but without obtaining the leave of the High Court to bring such an appeal which is required under s. 50A(7) of the PDA. Consequently, his appeal was

struck out at the first directions hearing by the directions judge with an order for costs against Mr. Cooper.

5. Both sets of costs went to adjudication before the Legal Costs Adjudicator, Mr. Barry Magee, and he made a determination on 27th January, 2023 measuring the costs of the notice party, being the only participating party, in the sum of €20,979.30 in respect of the High Court and €5,557 in respect of the Court of Appeal. In addition, VAT is payable on the professional fee element of these costs. Mr. Cooper sought a review of this determination by the adjudicator pursuant to s. 160(1) of the Legal Services Regulation Act, 2015 ("the LSRA") and in a further determination on 9th March, 2023, the adjudicator declined to vary his determination.

6. It is against the latter determination that Mr. Cooper appealed to the High Court. The jurisdiction of the High Court to review a determination of the Legal Costs Adjudicator is contained in s. 161(5) of the LSRA which provides:

> *"161 (5) The High Court shall allow a review under subsection (4)(b) only where it is satisfied that the Legal Costs Adjudicator has, in his or her determination, erred as to the amount of the allowance or disallowance so that the determination is unjust."*

7. As the High Court pointed out in its judgment, this is an almost exact analogue of s. 27(3) of the Courts and Court Officers Act, 1995 which conferred jurisdiction on the High Court to review a decision of a Taxing Master in identical terms. Prior to that, the High Court had a wide-ranging remit under the RSC and in particular Order 99, rule 28 which allowed it to *"make such order as may seem just"*. The jurisdiction provided for in the 1995 Act and now the LSRA is a much narrower jurisdiction as explained in the judgment of Kearns J. (as he then was) in *Superquinn Limited v Bray UDC (No. 2)* [2001] 1 I.R. 459. A

party challenging a taxation, or adjudication as it now is, carries the onus of demonstrating that the adjudicator has first erred as to the amount of the allowance or disallowance and second, if error is shown, that it has led to injustice.

8. Again, as noted in the High Court judgment, Mr. Cooper in his appeal did not point to any asserted error in the allowances or disallowances made by the adjudicator nor did he submit any evidence from a Legal Costs Accountant or otherwise from which such a conclusion could be arrived at. On the contrary, in his affidavit grounding the motion before the High Court, Mr. Cooper in fact makes no complaint nor adduces any evidence in relation to the process before the adjudicator. In fact, he expressly confirmed in the High Court, as noted by the trial judge, and again in this Court, that he was not taking any issue with the approach of the adjudicator to the determination in respect of costs. Mr. Cooper's contention was that, in the light of the judgment of the Supreme Court in *Heather Hill Management Company CLG and McGoldrick v An Bord Pleanála* [2022] IESC 43, a different costs order should have been made by the High Court, and the Court of Appeal, in dealing with Mr. Cooper's judicial review application.

9. It is immediately evident that this is an unstatable proposition. In his notice of appeal to this Court, Mr. Cooper makes no reference to the judgment of the High Court, but merely refers to the judgment in *Heather Hill* above. The orders he seeks from this Court include *"to reinstate my right to appeal against An Bord Pleanala's decision"* and to set aside previous orders of the High Court and the Court of Appeal, which appears to be a reference to the substantive judicial review and/or associated costs orders, but not the costs adjudication.

10. It is thus clear that Mr. Cooper's purported appeal is in fact substantially unrelated to the adjudication process but rather an attempt to collaterally attack and appeal final

judgments of the High Court and Court of Appeal. While his appeal to the High Court was evidently confined to the costs orders made in the underlying judicial review proceedings, he now appears to be seeking to challenge the substantive determination dismissing his claim. That is, of course, entirely impermissible.

11. Accordingly, this appeal, and indeed the entire proceedings, are an abuse of process in that they seek to re-litigate issues conclusively determined by the High Court and the Court of Appeal and are in fact entirely unrelated to any *bona fide* appeal available to the appellant under the LSRA.

12. In those circumstances, I have no hesitation in dismissing this appeal. As the second respondent has been entirely successful in this appeal, my provisional view is that it is entitled to its costs. Should the appellant wish to contend for an alternative costs order, he will have liberty to deliver a submission not exceeding 1,000 words within 14 days of the date of this judgment and the second respondent will have a similar period to reply likewise.

13. As this judgment is delivered electronically, Whelan and Pilkington JJ. have authorised me to record their agreement with it.