APPROVED
NO REDACTION NEEDED

THE COURT OF APPEAL

CIVIL

Appeal Number: 2023/42

Binchy J. **Neutral Citation Number [2024] IECA 3**

Allen J.

Burns J.

BETWEEN

DENIS RIORDAN

APPELLANT

AND

THE IRISH FINANCIAL SERVICES APPEALS TRIBUNAL

RESPONDENT

JUDGMENT of Mr. Justice Allen delivered on the 12th day of January, 2024

1. The substance of this appeal was dealt with in a written judgment delivered on 6th October, 2023, with which Binchy and Burns JJ. agreed ([2023] IECA 236). For the reasons given in that judgment, the conclusion of the court was that the appeal must fail and the order of the High Court affirmed.

2. At para. 72 of that judgment I expressed the provisional view that, as the respondent had been entirely successful on the appeal, it appeared to be entitled to its costs of the appeal but went on to say that if Mr. Riordan wished to contend otherwise, he might, within fourteen days of the electronic delivery of the judgment, file and serve a short written submission – not exceeding 1,000 words – in which event the respondent would have fourteen days to file and serve a response, similarly so limited.

3. On 19th October, 2023 Mr. Riordan filed a written submission – running to precisely 1,000 words – in which he contended not only that the respondent should not have its costs of the appeal but that this court, in the exercise of its discretion, should set aside the High Court costs order against him and should award Mr. Riordan his costs – that is to say, as a litigant in person, his expenses and outlay; both in the High Court and on the appeal.

4. The substantive appeal was an appeal by Mr. Riordan against the judgment and order of the High Court dismissing his application by way of judicial review for a declaration that there was no fee payable in respect of an appeal which he had filed with the respondent pursuant to s. 31 of the Anglo Irish Bank Corporation Act, 2009 against a determination by the Assessor pursuant to the provisions of that Act.

5. In support of his appeal – as he had in support of his High Court application – Mr. Riordan advanced a number of arguments as to the construction of s. 31 of the Act of 2009 and of Part VIIA of the Central Bank Act, 1942, which was first inserted by the Central Bank and Financial Services Authority of Ireland Act, 2003, and later amended from time to time. As had the High Court, so this court found that the legislation was clear and that there was no merit to Mr. Riordan's arguments.

6. Mr. Riordan acts and at all times has acted *pro se*. His written submissions as to the proper allocation of the costs were rather tangled but I discerned three broad interwoven strands.

7. The first strand was a submission that the legislation was poorly drafted and ambiguous and that the State should be responsible for the costs of both sides.

8. The second strand – which was partly linked to the first – was that Mr. Riordan submitted that he should not – as he put it – be penalised for the negligence of the Oireachtas.

9. The third strand was, effectively, that the respondent in the first instance, and later this court, were wrong in construing the legislation as they did.

10. It was said that the respondent failed to ensure that the legislation under which it exercises its jurisdiction is effective; that the respondent failed to inform the Oireachtas that there were defects in the legislation; that the respondent failed to make rules to govern *"such other matters, or classes of matters, as may be prescribed by any other Act or law"*; that the respondent was *"**fully aware/cognizant** of the type of declaration that was legally necessary in order for an appeal to be declared 'to be an appealable decision for the purposes of this Part,' meaning Part VIIA"*; and that the respondent failed to exercise the discretion vested in it under Chapter 2 and Chapter 3 of Part VIIA in a manner favourable to the appellant.

11. Separately, it was submitted that the respondent did not show or attempt to show why it could not implement the clear will of the Oireachtas as expressed in s. 31(8) of the Anglo Irish Bank Corporation Act, 2009; that the respondent has usurped the power of the Oireachtas by illegally and unconstitutionally substituting the provisions of a different Act of the Oireachtas for s. 31(8) of the Act of 2009; and – in a contradictory mix of the first and third strands – that:-

"The appellant clarified the law and the Constitution in that the Court of Appeal has identified an unknown provision in the Constitution that empowers State institutions such as the Tribunal and judges to amend an Act/Acts of the Oireachtas in order to achieve a desired outcome contrary to the constitutional imperative to administer justice."

12. In response to Mr. Riordan's submissions on costs, the respondent filed its written submissions on 27th October, 2023.

13. The respondent submitted, first, that Mr. Riordan had not addressed the provisional view expressed by the court that the costs should follow the event. While acknowledging – as Mr. Riordan had submitted – that O. 99 of the Rules of the Superior Courts provides that costs are in the discretion of the court, the respondent submitted that the starting point, in s. 169(1) of the Legal Services Regulation Act, 2015, is that a successful party is entitled to their costs. The respondent referenced the judgment of the Supreme Court in *Dunne v. Minister for the Environment* [2008] 2 I.R. 775 as to the ambit of the discretion of the court to depart from the rule of law that costs normally follow the event; and the judgment of the High Court in *Collins v. Minister for Finance* [2014] IEHC 79 as to the type of cases in which a departure from the rule may be warranted.

14. The respondent also referred to the decision of the High Court in *Word Perfect Translation Services Ltd. v. Minister for Public Expenditure and Reform (No. 2)* [2022] IEHC 219 as authority for the proposition that the court ought to ask, in every case, whether the parties have conducted the case in the most cost-effective way possible.

15. The respondent's written submissions characterised Mr. Riordan's reference to negligence on the part of the Oireachtas as baseless; and what he had to say about the judgment of this court as scandalous.

16. At the end of his written submission on costs Mr. Riordan's observed that he was restrained by the word count restriction imposed by the court from developing complete and detailed submissions and said that he would expand and offer additional reasons at the public hearing on the costs issue.

17. The object of permitting parties to file written submissions on costs is to allow them to make any argument they wish as to the allocation of costs and to allow the court to deal with any issue in a timely and cost effective manner. The object of the word count is precisely to restrain prolixity – on all sides – and to encourage focussed submissions. In the ordinary way, where written submissions are invited or permitted on the proper allocation of costs, there will be no necessity for an oral hearing. If, in the circumstances of any individual case, it is thought that the written submissions could usefully be developed or expanded upon, an oral hearing may be directed. However, there is no reason in principle why the written submissions should not identify all of the reasons relied on and it is not appropriate that the court should direct an oral hearing on the off chance that either party might in the meantime think of additional reasons. Moreover, an oral hearing will inevitably add to the costs of dealing with any argument as to the proper allocation of the costs of the litigation and/or the appeal.

18. In this case, Mr. Riordan insisted on an oral hearing and the panel reconvened to hear oral argument on 20th December, 2023.

19. Unsurprisingly, if not inevitably, Mr. Riordan's oral submission largely reflected his written submission. He modified his position by asking that the court should set aside the High Court order for costs and make no order as to the costs. He did not press for an order that the respondent should pay his expenses and outlay.

20. Mr. Riordan sought to revive the arguments which he had previously made and which the court had rejected as to the construction of s. 31 of the Act of 2009 and Part VIIA of the Act of 1942, as inserted and amended. He resurrected a passage from the written submission which he had made on the substance of the appeal, in which, he had cited a passage from the Law Reform Commission Consultation Paper on Statutory Drafting and Interpretation: Plain English and the Law (LRC – CP14 – 1999), in which the Law Reform Commission cited a passage from Lord Simon of Glaisdale's 1985 commentary on *The Renton Report – Ten Years On* 1985 Stat. Law. Rev. 133, and submitted that:-

> *"It is important to remember why our statutes should be framed in such a way as to be clearly comprehensible to those affected by them. It is an aspect of the Rule of Law. People who live under the Rule of Law are entitled to claim that the law should be intelligible. A society whose regulations are incomprehensible lives with the Rule of Lottery, not the Rule of Law."*

21. Mr. Riordan submitted that he *"could not have known"* that the determination by the Assessor appointed for the purposes of the Anglo Irish Bank Corporation Act, 2009 of his claim for compensation for the compulsory acquisition of his shares in Anglo Irish Bank, from which, by s. 31(1) of the Act of 2009 *"an appeal lies to"* the Irish Financial Services Appeals Tribunal was *"an appealable decision"* for the purposes of Part VIIA of the Central Bank Act, 1942, by which the Irish Financial Services Appeals Tribunal was established and regulated.

22. He also sought to revive an argument as to the construction of s. 57Z of the Act of 1942 which – to the extent that it went anywhere – went to the substance of the appeal.

23. Counsel for the respondent, in reply, reprised what had been said in the written submission as to costs. As to Mr. Riordan's submission that he could not have known that

the decision of the Assessor was an appealable decision for the purposes on Part VIIA of the Act of 1942, counsel pointed to a letter of 18th June, 2020 by which the registrar of the respondent rejected as mistaken and unfounded Mr. Riordan's assertion that the appeal fee of €5,000 did not apply to his appeal, and spelled out that his appeal was an appeal to which the s. 57L of the Act of 1942, other than sub-ss. (1) and (4) applied. It was submitted that Mr. Riordan plainly knew, because he had been told by the respondent, that his appeal pursuant to s. 31(1) of the Act of 2009 was an appealable decision for the purposes of Part VIIA of the Act of 1942.

24. Section 169(1) of the Legal Services Regulation Act, 2015 provides that:-

> *"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."

25. I will deal first with what I have identified as the third strand of Mr. Riordan's submission. This way and that, what Mr. Riordan seeks to do is to re-open the merits of the decision of the court on the substantive appeal. This is simply not permissible and for all that he is unrepresented, I doubt that Mr. Riordan is not perfectly well aware of this.

26. As to the allegation of negligence on the part of the Oireachtas, in view of the judgments of the High Court and of this court as to the meaning and clarity of the legislation, there is simply no substance to that.

27. In the same vein, as to what was said about the substantive judgment of this court, my experience is that recalcitrance is sometimes best dealt with by selective hearing. I am prepared to contemplate that Mr. Riordan – as he previously failed utterly to understand the legislation – has failed utterly to understand the judgment of the court, and to leave it at that.

28. As to what I have identified as the first strand to Mr. Riordan's submission – that the legislation governing his appeal to the Irish Financial Services Appeals Tribunal was poorly drafted or ambiguous – one of the instances identified in *Collins* in which a departure from the ordinary rule may be warranted is *"[Where] the decision has clarified an otherwise obscure or unexplored area of the law"*, and one of the factors that the court may take into account under s. 169(1)(b) is whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings.

29. In principle, there was substance to Mr. Riordan's submission that statute law should be intelligible and that a want of intelligibility may go to the question of costs.

30. For example, in *Lee v. Revenue Commissioners* [2021] IECA 114, this court (Murray J., Whelan and Ní Raifeartaigh JJ. concurring) considered the proper allocation of the costs

of proceedings which were necessary to determine the jurisdiction of the Appeal Commissioners. The taxpayer had been successful before the Appeal Commissioners and again before the High Court. However, the Revenue Commissioners had been successful in the Circuit Court and ultimately prevailed in this court. In *Lee*, the court was persuaded to depart from its provisional view that the costs of the proceedings should follow the event and to make no order as to costs. Among the factors identified to which the court had regard were that the proceedings presented an issue of law which was not straightforward and on which there were two legitimate views; that they raised an issue what went to the core of the powers and functions of an important quasi-judicial tribunal exercising an extensive jurisdiction of potential relevance to many citizens; that the relevant statute could have but did not, present a clear definition of the jurisdiction of the Appeal Commissioners; and that the taxpayer, who had to adopt a position in relation to the extent of the jurisdiction in such circumstances should not be penalised when the choice he had made had been a reasonable one.

31. In this case, however, none of those considerations apply. I observed in the judgment on the substantive issue that since its enactment, the Central Bank Act, 1942 has been extensively amended and extended and that but for the administrative consolidation prepared by the Law Reform Commission, it would be enormously difficult to follow. However, as I have previously said, the Act – specifically Part VIIA – is readily navigable with the benefit of the Revised Act and – as far as Mr. Riordan's appeals under s. 31 of the Anglo Irish Bank Corporation Act, 2009 is concerned – was perfectly clear. The detailed course which I plotted through the legislation was not required because of any doubt or difficulty in construing it but to expose the error of, and the inconsistencies in, Mr. Riordan's arguments.

32. While the respondent's submission referenced *Word Perfect (No. 2)* and the desirability that litigation be conducted in the most cost-effective way possible, it did not

identify any way in which Mr. Riordan's appeal might have been more efficiently or economically conducted, and I do not see that as a material factor.

33. Similarly, I do not consider the correspondence between Mr. Riordan and the respondent to be a material factor. If there had been an avoidable confusion in the legislation on which there were two legitimate views, I do not see that any such confusion could have been dispelled by the articulation by each of the parties of their opposing views, or by either party of the view which ultimately prevailed. However, for the reasons already given, there was no reason for any doubt or confusion and Mr. Riordan's argument was entirely contrived.

34. The provisional conclusion of the court in the substantive judgment was that the respondent, having been entirely successful on the appeal, was presumptively entitled to its costs. There is nothing in Mr. Riordan's written or oral submissions which has dissuaded me from that view.

35. In my view, the respondent is entitled to an order for its costs of the appeal; to include the costs of its written submissions as to the proper allocation of those costs and the costs of the oral hearing in relation to the costs.

36. As this judgment is being delivered electronically, Binchy and Burns JJ. have authorised me to say that they agree with it.