[2019] IEHC 676

THE HIGH COURT
JUDICIAL REVIEW

2017 No. 690 J.R.

BETWEEN

JOHN SHERLOCK
CAROLINE SHERLOCK

APPLICANTS

AND

CLARE COUNTY COUNCIL

RESPONDENTS

JUDGMENT of Mr Justice Garrett Simons delivered on 16 October 2019.

Introduction

1. This judgment addresses the question of the appropriate costs order to be made in respect of the within judicial review proceedings. The judgment arises against a background where the proceedings were, in effect, rendered moot by the making of an offer of alternative residential accommodation to the Applicants by the Respondent, Clare County Council. This offer was made very shortly before the hearing date.

2. The determination of the appropriate costs order turns largely on the application of the principles set out by the Supreme Court in *Cunningham v. President of the Circuit Court* [2012] IESC 39; [2012] 3 I.R. 222 and *Godsil v. Ireland* [2015] IESC 103, [2015] 4 I.R. 535.

Procedural History

3. The proceedings had been listed for hearing for six days commencing on Tuesday 8 October 2019. On the second day of the hearing, the parties indicated to the court that they had reached an agreement whereby the proceedings could be struck out. This agreement did not, however, extend to the issue of costs.

4. The Applicants submit that they are entitled to their costs in circumstances where they say that Clare County Council ("*the Local Authority*") has now offered to do the very thing which the Applicants had brought the proceedings to compel the Local Authority to do. More specifically, the Applicants submit that the principal relief sought in the proceedings had been an order of mandamus directing the Local Authority to assess their housing needs, and that an offer made last week to provide them with *alternative accommodation* means that the objective underlying this relief has now been achieved. In response, the Local Authority suggests that the offer of alternative accommodation came about in the ordinary discharge of its duties under the Housing Acts, and is not directly related to the judicial review proceedings.

5. The position is, therefore, that both sides are broadly in agreement that the judicial review proceedings are moot, in that the Applicants could not have achieved an outcome to the proceedings more favourable than the offer of alternative accommodation. However, the parties are in dispute as to whether the making of this offer can be properly characterised as an event of the proceedings for the purposes of the costs rules under Order 99 of the Rules of the Superior Courts.

Principles governing costs in Moot Proceedings

6. The principles governing the approach to be taken to costs in moot proceedings have been considered in detail by the Supreme Court in *Cunningham v. President of the Circuit Court* [2012] IESC 39; [2012] 3 I.R. 222 ("*Cunningham*"), and *Godsil v. Ireland* [2015] IESC 103, [2015] 4 I.R. 535 ("Godsil").

7. The judgment in *Cunningham* indicates that the court should consider the nature of the event which had caused the proceedings to become moot, and drew a distinction between (i) factors external to the parties, and (ii) unilateral action by one of the parties. See paragraphs [24] and [25] of the judgment as follows.

> "[…] a court, without being overly prescriptive as to the application of the rule, should, in the absence of significant countervailing factors, ordinarily lean in favour of making no order as to costs in cases which have become moot as a result of a factor or occurrence outside the control of the parties but should lean in favour of awarding costs against a party through whose unilateral action the proceedings have become moot. […]
>
> It must, of course, be acknowledged that some cases which have become moot may not fit neatly into the category of proceedings which have become moot due to entirely external events, on the one hand, or due to the unilateral action of one of the parties, on the other hand. In particular there will be cases where the immediate reason why proceedings have become moot is because a statutory officer or body has decided not to go ahead with a threatened course of action (such as the criminal prosecution in this case). However, the reason why it may have been necessary or appropriate for that statutory officer or body to adopt a changed position may, to a greater or lesser extent, be due to wholly external factors. […]"

8. The judgment in *Cunningham* recognises that a public authority may be under an obligation to keep its decision under review, and that the mere fact that a public authority adopts a changed position which renders judicial review proceedings moot does not necessarily mean that it is appropriate to characterise the proceedings as having become moot by reason of a *unilateral act* of one party. The change in position may have been as the result of external events. If a public authority wishes to assert that there has been an external event, then there is an onus on the public authority to put evidence to that effect before the court. See paragraph [28] of the judgment.

> "It does, however, seem to me that, where the immediate or proximate cause of proceedings becoming moot is the action of such a statutory officer or body but where it is sought to argue that the true underlying reason is an external factor outside the control of that officer or body, it is incumbent on the officer or body concerned to place before the court sufficient evidence to allow the court to assess whether, and if so to what extent, it can fairly be said that there was a sufficient underlying change in circumstances sufficient to justify, in whole or in part, it being appropriate to characterise the proceedings as having become moot by reason of a

change in external circumstances. Against those general observations it is necessary to turn to the circumstances in which these proceedings became moot."

9. The principles in *Cunningham* were subsequently endorsed by the Supreme Court in *Godsil*. The gravamen of the complaint in Godsil had been that a statutory prohibition which precluded an undischarged bankrupt standing as a candidate for election to the European Parliament was invalid. Within two weeks of the proceedings having been instituted, the Government had introduced draft amending legislation, and same was soon passed by the Oireachtas and signed into law by the President. The effect of the amending legislation was to remove the statutory prohibition complained of. The period between the date of the institution of the proceedings and the enactment of the amending legislation was a mere six weeks.

10. The Supreme Court held that the enactment of the amending legislation could only be understood as being in direct response to the proceedings. The applicant was accordingly entitled to her costs. See paragraph [63] of the judgment as follows.

> "The actions of the respondents, despite their protestations that the same were driven by policy considerations, can only reasonably be understood, in the vastly truncated time period involved, as being in direct response to the proceedings as issued. It is difficult to recall any other comparable example where, by a combination of the executive and legislative branches of government, a constitutional challenge has been so responded to. Such can only be regarded as being an explicit acknowledgment and admission of the legal validity of the challenge as mounted. In effect, if the claim was unmeritorious, it could hardly be deserving of legislative amendment. Therefore, I am entirely satisfied that in this case, there exists an "event", by which the issue of costs should be determined."

11. I turn to consider the application of the principles in *Cunningham* and *Godsil* to the facts of the present case under the next heading below.

Discussion

12. The incidence of costs in this case will turn largely on whether the offer of alternative residential accommodation is to be regarded as (i) the result of external events outside the control of the parties, or (ii) a unilateral action on the part of the Local Authority in response to the judicial review proceedings.

13. In order to determine which pigeonhole the case falls into, it is necessary to consider very briefly the nature of the relief being sought in the case. The Applicants are a traveller family, made up of a father and mother (the first and second named applicants) and their children. The Applicants have, since December 2014, been residing in residential accommodation provided by the Local Authority in Carrowgar, Lahinch. The principal complaint made by the Applicants in the judicial review proceedings is that this accommodation is insufficient for their needs, and that the Local Authority is in breach of its obligation to carry out a housing needs assessment pursuant to section 20 of the

Housing (Miscellaneous Provisions) Act 2009. The Applicants also seek to call in aid the provisions of the Housing (Traveller Accommodation) Act 1998.

14. The Applicants' solicitors sent a letter to the Local Authority on 13 June 2017 calling upon the Local Authority *inter alia* to carry out an assessment of the housing needs of the Applicants. The letter concluded by stating that in default of the Local Authority complying with the requested requirements, the Applicants reserved the right to issue such proceedings as required to secure compliance without further notice. The letter also indicated that the costs associated with the issue of such proceedings would be sought from the Local Authority.

15. Counsel on behalf of the Applicants sought to characterise this letter of 13 June 2017 as a "mandamus letter". This characterisation overstates the legal effect of the letter. The letter is phrased in legalese, and lists off a series of statutory provisions without any attempt to explain the context of same. The letter signally fails to state what precisely it is that the Local Authority is being requested to do. It does not, for example, explain why it is that the Applicants required a *further* housing assessment in circumstances where they had been assessed in 2014, and had entered into a tenancy agreement with the Local Authority in December 2014. Indeed, the letter can properly be characterised as a *pro forma* letter, and there is nothing contained therein which makes express reference to the particular circumstances of the Applicants. The content of the letter is so general and vague that it could have been written in respect of any traveller family. I will return to discuss the consequences of these shortcomings for the costs application now made by the Applicants presently. (See paragraph 35 below).

16. It does not appear that the Local Authority made any substantive response to this letter. The Applicants instituted judicial review proceedings on 1 September 2017. The position adopted by the Local Authority in opposition to the judicial review proceedings was that a proper assessment had been carried out at the time the Applicants were provided with a tenancy of the dwelling house at Carrowgar, Lahinch, and that no further assessment was required at this stage. This argument was put forward by way of affidavit evidence. There was, at no stage, a formal written explanation as to why the Local Authority declined to carry out the requested assessment.

17. It is stated in the statement of opposition, and verified on affidavit, that the accommodation consists of a single-story dwelling house, with five bedrooms, a living room, dining room, kitchen, bathroom and lobby area. The dwelling is said to measure approximately 69 metres squared. The Local Authority also indicated that it was amenable to constructing an *extension* to the dwelling house in order to facilitate the dynamic nature of the Applicants' accommodation needs. (The household had increased with the birth of twin children in January 2017).

18. The judicial review proceedings wended their way through the court system, and accumulated some twenty-two affidavits *en route*. The case was ultimately listed for hearing this legal term, some two years after the proceedings had first been instituted on 1 September 2017.

19. The case opened before me on the afternoon of Tuesday, 8 October 2019. During the course of his opening, leading counsel on behalf of the Applicants, Mr James O'Reilly, SC, very properly brought to my attention a recent exchange of correspondence between the parties. This correspondence had taken place in September and early October of this year.

20. The background to this correspondence was as follows. It seems that, notwithstanding that the Applicants were represented by a firm of solicitors, officials from the Local Authority had contacted the Applicants directly in September 2019. The first and second Applicants, Mr and Mrs Sherlock, were invited to attend for a meeting with the Local Authority for the purposes of a housing needs assessment. Following a false start, it seems that this meeting ultimately took place on 3 October 2019.

21. The upshot of these exchanges was that the Local Authority then made an offer of alternative accommodation to the Applicants. (This offer was brought to the attention of the Applicants' solicitors by way of email, but it seems to have been missed initially).

22. The key passages of this letter read as follows.

> "At your assessment you indicated your dissatisfaction with the property at Carhugar based on its location and size. Your expressed a preference for housing is a detached 5/6 bed property in Ennistymon/Lahinch area. Clare County Council does not have such a property in our housing stock in this or any other area.
>
> To date, Clare County Council has not had a suitable alternative property available to accommodate a family of 2 adults and 9 children and, accordingly, it has been the Council's intention to progress an extension of the property in which you are currently accommodated at Moy, Carhugar, Lahinch. It will be necessary to provide temporary accommodation to you family to facilitate the construction of an extension to this property at Carhugar, Moy, Lahinch.
>
> The up to date situation is that Clare County Council anticipates that a five bedroom property located in the North Clare area will become available for allocation in the coming weeks. The property has recently come back into our housing stock and is currently undergoing extensive refurbishment, which is expected to complete within the next couple of weeks. Clare County Council Housing Department considers that this property may be suitable accommodation for you and your family.
>
> […]
>
> In order to consider your family for this property, we request that you formally complete a transfer application in circumstances where, despite your request to be transferred out of the property in which you are currently residing, a formal transfer application has not been completed."

23. The Applicants' solicitors wrote to the Local Authority's solicitors on 7 October 2019. The letter expressly asked the Local Authority to confirm whether the letter offering

alternative accommodation was said to be “in satisfaction of” the judicial review proceedings.

24. This letter was responded to on the same date as follows.

> “This request that your client complete an application for a transfer arose in the context of the Housing Authority’s normal interactions with your clients arising out of the housing needs assessment which took place on Thursday last. As we have previously pointed out to you, it is a matter for the Housing Authority to communicate in relation to such matters directly with housing applicants/tenants.
>
> This request of the Housing Authority to your clients is not made in satisfaction of the above entitled proceedings. It is made in the normal course of matters as between the Housing Authority and housing applicants/tenants. We intend to defend the proceedings as pleaded.
>
> The fact that a suitable property has now become available to your client, which would appear to meet your client’s needs and which will be available imminently for allocation, is a fact that will be brought to the attention of the Court in the context of the judicial review proceedings with a view to providing the Court with the most up to date position in relation to the housing situation both in terms of what is available to your client and what has been and will be available by our clients for allocation. You will recall that this housing assessment had been scheduled with your clients 12th September 2019 but they did not attend at that time”

Decision

25. The event which caused the judicial review proceedings to become moot was the making of the offer of alternative accommodation by letter dated 4 October 2019. The gravamen of the complaint made by the Applicants in the judicial review proceedings had been that the Local Authority had failed to carry out a fresh assessment of their housing needs. This assessment, it is said, should have had regard to changes such as the increase of the household following the birth of the twins in January 2017; and the fact that the dwelling house has fallen into disrepair and is now damp and subject to rodent infestation. Had the judicial review proceedings been heard and determined by the court, and had the Applicants succeeded, the principal relief to which they would have been entitled would have been an order of mandamus directing the Local Authority to carry out such an assessment. Leading counsel for the Applicants, very properly, accepted that this court would not have jurisdiction to direct that any particular accommodation be provided to the Applicants as to do so would represent a breach of the separation of powers.

26. The practical consequence of the letter of offer of 4 October 2019 was, therefore, that the Applicants were put in as good a position as they would have been had the proceedings been heard and determined in their favour. In these circumstances, both parties accepted that the proceedings were now moot.

27. The key issue to be determined for the purposes of the costs application is whether the making of an offer of alternative accommodation represents an external event, based on new circumstances. The Local Authority, in its correspondence, has sought to portray the events of September and October 2019 as occurring in the ordinary course of exchanges between a housing authority and its tenants. The implication being that any link with the imminent hearing date for the judicial review proceedings had been coincidental.

28. Whereas the letter from the Local Authority is careful to say that the offer of alternative accommodation was not in "satisfaction of" the judicial review proceedings, the letter goes on to state that it is intended to bring this offer to the attention of the court in the context of the judicial review proceedings.

29. Having regard to the chronology, it would be unrealistic to categorise the offer of alternative accommodation as an external event. Rather, the only reasonable inference to be drawn is that the Local Authority took a decision to address (belatedly) the complaints raised in the judicial review proceedings. In particular, the Local Authority offered in September 2019 to undertake a housing needs assessment, i.e. the very thing for which the Applicants had been agitating in the judicial review proceedings. The timing of the approach, i.e. one month shy of the hearing date of 8 October 2019, cannot have been coincidental.

30. If the Local Authority had wished to resist the inference that the offer was connected to the judicial review proceedings, then the Authority should have filed affidavit evidence explaining its position. This is the approach endorsed by the Supreme Court in *Cunningham v. President of the Circuit Court* [2012] IESC 39; [2012] 3 I.R. 222 at [28] (cited at paragraph 8 above).

31. In the absence of an explanation by the Local Authority, I am driven to the conclusion that the event giving rise to the proceedings becoming moot was a unilateral action on the part of the Authority, namely the carrying out of a housing needs assessment and the offer of alternative accommodation. Therefore, applying the principles in *Cunningham* and *Godsil*, the Applicants are, in principle, entitled to an order for costs in their favour insofar as they have succeeded in obtaining a tangible benefit from having brought the proceedings.

32. I pause here to observe that it does not follow as a necessary corollary of a finding that a party is entitled, in principle, to an order for costs of proceedings which have become moot that the order must extend to the costs of a full contested hearing. There is a public interest in encouraging public authorities to take a reasonable approach to litigation and to compromise cases where it is appropriate to do so. There would, however, be little incentive for a public authority to compromise cases if it is to be liable for the full costs regardless. Such an approach to costs would create a risk that a public authority might decide—at least in borderline cases—that it may as well defend the case in full on the off chance that it might succeed. This might result in more cases going to full hearing than would otherwise be the position, and this would put unnecessary strain on scarce judicial resources and on litigants who might not be as well-funded as a public authority.

33. A court exercising its discretion in respect of costs should give some weight to these public interest considerations. In particular, regard should be had to the *timing* of the offer to compromise the proceedings. The current rules governing the quantification of costs ("taxation of costs") allocate the bulk of the costs to the trial of action, with relatively modest fees for pre-trial work and drafting. If a public authority makes an offer to compromise proceedings well in advance of the trial date, then the costs order should reflect this. See, by analogy, in *J. C. Savage Supermarkets Ltd. v. An Bord Pleanála* [2011] IEHC 488 ("*J. C. Savage*") where the costs payable to the other side were limited to one-third in circumstances where an applicant for judicial review had withdrawn its case six weeks prior to the trial date.

34. In the present case, the offer of alternative accommodation was only made days before the trial date. Had the offer been made earlier, I would have considered applying a discount of the type applied in *J. C. Savage*. Regrettably, the offer of alternative accommodation only crystallised on the eve of the trial and no discount can be allowed on this basis.

35. The Applicants are, therefore, in principle entitled to a costs order in their favour. There are, however, certain aspects of the manner in which the case was presented which should be reflected in the detail of the costs order. First, the approach taken on behalf of the Applicants both in the pre-litigation correspondence and their subsequent pleadings tended to obscure rather than identify the real issues in controversy. In particular, the so-called "mandamus letter" of 13 June 2017 left a lot to be desired. Had the terms of that letter—and the subsequent statement of grounds—been clearer, then it might have been more obvious to the Local Authority what precisely the Applicants were seeking out of the proceedings. In particular, had it been made known to the Local Authority that the claim was confined to one by way of procedural relief, namely the carrying out of a proper housing needs assessment (as opposed to a direction that a particular house be provided), it is possible that the proceedings might have been compromised at an earlier stage.

36. Secondly, the statement of grounds did not comply with the requirements of Order 84 of the Rules of the Superior Courts. The statement of grounds reads more like a statement of claim in plenary proceedings, and does not comply with the requirements of Order 84, rule 20 as follows.

> "(3) It shall not be sufficient for an applicant to give as any of his grounds for the purposes of paragraphs (ii) or (iii) of sub-rule (2)(a) an assertion in general terms of the ground concerned, but the applicant should state precisely each such ground, giving particulars where appropriate, and identify in respect of each ground the facts or matters relied upon as supporting that ground."

37. Thirdly, the written legal submissions filed did not comply with the Practice Direction HC68 (Written Submissions). The nature of the case being advanced was not at all clear from the written legal submissions, and it was necessary for this court to direct the preparation of an issues paper in an attempt to identify the real issues in controversy.

38. Fourthly, the case should not have been called on for six days. It was at the very most a two-day case, once the legal issues were properly identified. There was no need for cross-examination. Nor did the case necessitate the briefing of both senior and junior counsel. Whereas it is ultimately a matter for a litigant, with his or her solicitor's advice, to decide whether to brief counsel at all, and, if so, how many, a litigant cannot assume that they will receive a full indemnity for the costs of same from the other side. The legal issues were net, and could have been dealt with by a single counsel.

39. These factors are reflected in the proposed order below.

Proposed Order

40. For the reasons set out above, I have concluded that the Applicants are entitled to a (limited) costs order as against the Local Authority. More specifically, the Applicants are to recover the costs of the proceedings measured on the basis that the full hearing would have taken two days only. The costs for counsel are to be confined to a single counsel. No costs are recoverable in respect of the costs associated with (i) the statement of grounds; (ii) the written legal submissions; and (iii) the motions in respect of cross-examination.