THE HIGH COURT

[2022] IEHC 649

[2020/66 COS]

IN THE MATTER OF THE COMPANIES ACT, 2014

BETWEEN

CORPORATE ENFORCEMENT AUTHORITY

APPLICANT

AND

CUMANN PEILE NA H–EIREANN

"FOOTBALL ASSOCIATION OF IRELAND"

RESPONDENT

AND

JOHN DELANEY

NOTICE PARTY

***EX TEMPORE* JUDGMENT of Ms. Justice Reynolds delivered on the 24th of November 2022**

Preamble

1. At the outset, and for the purposes of clarity, since I delivered judgment last month the Office of the Director of Corporate Enforcement ("ODCE") has been dissolved. It has been succeeded by the Corporate Enforcement Authority ("CEA") which is now the independent statutory agency authorised to investigate and prosecute breaches of company law.

2. In the circumstances, the CEA has been substituted as the applicant in the title of the proceedings.

Costs

3. This judgment concerns cost orders to be made in circumstances where the original application pursuant to s. 795(4) of the Companies Act 2014 has concluded, culminating in judgment delivered on the 21st of October, 2022 [2020/66/COS].

4. In circumstances where I determined that the notice party had failed to discharge the requisite burden of proof required to maintain his assertions of privilege, the applicant now seeks its costs.

5. The notice party concedes that costs in respect of the final hearing determining the issue of privilege are costs which follow the event. However, it is contended that the proceedings as they unfolded entailed not a single event but a series of discrete and consecutive events, which the notice party contends were akin to modules and should be treated separately in determining the issue of costs.

Relevant principles

6. Section 169(1) of the Legal Services Regulation Act ("the Act") sets out the principles governing the award of costs in civil proceedings: -

> "(1) A party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings, unless the court orders otherwise, having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties, including—
>
> (a) conduct before and during the proceedings,

(b) whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings,

(c) the manner in which the parties conducted all or any part of their cases,

(d) whether a successful party exaggerated his or her claim,

(e) whether a party made a payment into court and the date of that payment,

(f) whether a party made an offer to settle the matter the subject of the proceedings, and if so, the date, terms and circumstances of that offer, and

(g) where the parties were invited by the court to settle the claim (whether by mediation or otherwise) and the court considers that one or more than one of the parties was or were unreasonable in refusing to engage in the settlement discussions or in mediation".

7. The default position therefore under s. 169 of the Act is that a party who has been "entirely successful" in proceedings is normally entitled to recover their legal costs against the losing parties. The court does, of course, retain discretion in this regard.

8. At the outset, it must be noted that the within proceedings differ from most *inter partes* litigation insofar as they involve a statutory body bringing an application that it is required to pursuant to statute. The material at issue was seized from the respondent pursuant to a search warrant.

9. Thereafter, the ODCE was obliged pursuant to its statutory obligations to bring an application under s. 795(4) of the Companies Act 2014 seeking a determination as to whether legal professional privilege attached to the material.

10. A full chronology is set out in my previous judgments and I don't propose to rehearse same.

11. Suffice to say the notice party was under no obligation to engage with the proceedings. However, he sought to be joined as a notice party and engaged legal representation to represent his interests.

12. In summary, the applicant's position is that it is entitled to its costs having succeeded entirely in the proceedings.

13. The notice party contends that he is entitled to the costs of those parts of the statutory process where the applicant was obliged to apply to the court in any event, and where the applicant was unsuccessful. It is submitted that these costs may be the subject of a set off insofar as the final portion of the application was concerned.

Conduct of the parties

14. In considering the conduct of the proceedings by the parties, it is clear that the only relevant matters to be considered in the context of this application are: -

> "(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, and
>
> (c) the manner in which the parties conducted all or any part of their cases . ."

15. Notwithstanding the length of the proceedings, the volume of affidavit evidence, and the time afforded to the notice party to assess and consider the documents, the notice party failed to discharge the burden of proof in respect of any of the impugned documents for privilege.

16. In *Chubb v. The Health Insurance Authority* [2020] IECA 183, the Court of Appeal refers to the provisions of s. 169 (1) (a) and (b) of the Act and the obligation on a court to have regard to the conduct of parties when considering whether to award costs to a party that has been entirely successful in its proceedings.

17. Murray J. at para. 19(e) refers to the mandatory nature of the obligation to have regard to the conduct of the parties when considering to award costs to a party that has been entirely successful in its proceedings.

18. In accordance with the Act, a court is obliged to ask, in every application for costs, have the parties conducted the case in the most cost-effective way possible. In doing so, the court can adjudicate on whether the winning party is entitled to its costs or whether the winning party or parties conducted proceedings in a manner that justifies a lesser award. In terms of the within application, its notable that there were a large number of dates on which the case was listed, and submissions were made, and the costs were reserved.

19. It is well established that the court can deal with interlocutory applications separate from the overall costs (*Veolia Water UK plc. v. Fingal County Council (No. 2) [2007] 2 IR 81).*

20. The applications of relevance in the context of these proceedings included: -

(a) The ex parte application and joinder of the notice party on the return date.

(b) The appointment of independent counsel to assist the court pursuant to the Act together with a further application to appoint a second counsel.

(c) The application to determine whether the material was subject to the crime/fraud exception.

21. Firstly, as already noted above, the applicant was required pursuant to its statutory obligations to bring the application pursuant to s.795(4). Thereafter, the notice party sought to be joined to the proceedings and engaged legal representation throughout the process. Notwithstanding the lengthy process which ensued thereafter, the notice party failed to establish privilege in relation to a single document.

22. Secondly, the applications to appoint counsel were precipated by the length of time the process of review by the notice party took and were entirely warranted. Whilst the first

application was consented to by the notice party, the second one was resisted thereby prolonging matters and resulting in the incurrence of unnecessary costs.

23. Finally, the application to determine whether the material was subject to the crime/fraud exception was unsuccessful in circumstances where there was insufficient information before the court to allow for an informed determination to be made. In the ordinary course, the notice party would have a good argument for its costs where the application was unsuccessful. However, having regard to the overall manner in which the proceedings were conducted on his instructions (which is set out in considerable detail in my earlier judgments), I am satisfied that it is appropriate in the circumstances to simply make no order.

24. In conclusion, I am satisfied that in meeting the justice of the case, the applicant is entitled to its costs (to include all reserve costs and the costs incurred in relation to the engagement of independent counsel) with the exception of costs of the crime/fraud application, in respect of which I will make no order.

Order

25. The appropriate form of order to be made therefore is as follows: -

(a) An order pursuant to s.169 of the Legal Services Regulation Act 2015 and O. 99 of the Rules of the Superior Courts directing that the applicant is to recover, as against the notice party, the costs of the proceedings from the 20th of February 2020 onwards, to include all reserved costs, save and except for the costs incurred in relation to the interlocutory application to determine whether the material was subject to the crime/fraud exception in respect of which there is no order, such costs to include all costs associated with the appointment of both independent counsel appointed by the court.

(b) Further, costs to be adjudicated upon in default of agreement between the parties, pursuant to the provisions of Part 10 of the Legal Services Regulation Act 2015, with liberty to apply, if necessary, should any clarification be required as to the extent of the costs covered by the order.