Dominic Dunne, Plaintiff v. **The Minister for the Environment, Heritage and Local Government, Ireland, The Attorney General**, and **Dun Laoghaire-Rathdown County Council**, Defendants [2007] IESC 60, [S.C. No. 444 of 2004]

Supreme Court 6th December, 2007

Practice and procedure – Costs – Normal rule that costs follow event – Exception to normal rule – Discretion of courts in departing from normal rule – How discretion to be exercised – Public interest litigation – Whether issues of law raised in proceedings of such special and general importance as to warrant departure from normal rule – Rules of the Superior Courts 1986 (S.I. No. 15), O. 99 – Courts (Supplemental Provisions) Act 1961 (No. 39), s. 14(2).

The High Court (Laffoy J.) dismissed the plaintiff's claim in the substantive matter but made a costs award in his favour. The plaintiff appealed the substantive ruling and the defendants appealed the ruling in relation to costs to the Supreme Court. The appeal in relation to the substantive issues was dismissed by the Supreme Court on the 25th July, 2006: see *Dunne v. Minister for Environment* [2006] IESC 49, [2007] 1 I.R. 194 and the question of costs was adjourned for further submissions.

Held by the Supreme Court (Murray C.J., Denham, Hardiman, Geoghegan and Kearns JJ.), in allowing the appeal against the order for costs made in favour of the plaintiff in the High Court and in awarding the defendants the costs of the trial and the appeals, 1, that the basic law governing the question of costs in civil proceedings was found in s. 14(2) of the Courts (Supplemental Provisions) Act 1961 and O. 99 of the Rules of the Superior Courts 1986, which provided, *inter alia*, that the normal rule was that the costs of every proceeding followed the event but that the courts always retained discretion in relation thereto. There was no fixed rule or principle determining the ambit of that discretion and, in particular, no overriding principle which determined that it had to be exercised in favour of an unsuccessful plaintiff in specified circumstances or in a particular class of case.

Hewthorn & Co. v. Heathcott (1905) 39 I.L.T.R. 248 considered.

2. That the fact that a plaintiff was not seeking a private personal advantage and that the issues raised were of special and general public importance were factors which could be taken into account along with all other circumstances of the case in deciding whether there was sufficient reason to exercise a discretion to depart from the general rule that costs followed the event. However, the two principles, in themselves, were not the determining factors in any category of cases which could be described as public interest litigation.

Sinnott v. Martin [2004] IEHC 67; [2004] IEHC 136, [2004] 1 I.R. 121, *McEvoy v. Meath County Council* [2003] 1 I.R. 208, *Lancefort Ltd. v. An Bord Pleanála (No. 2)* [1999] 2 I.R. 270 and *R. v. Lord Chancellor, ex parte Child Poverty Action Group* [1999] 1 W.L.R. 347 considered.

3. That issues concerning subject matters such as the environment or national monuments had an importance in the public mind but a further factor for the court was

whether the legal issues raised, rather than the subject matter itself, were of special and general public importance. The issues of law raised in the proceedings were not of such special and general importance as to warrant a departure from the general rule that costs follow the event.

4. That, if there was to be a specific category of cases to which the general rule on costs was not to apply, such would have to be a matter for legislation since it was not for the courts to establish a cohesive code according to which costs would always be awarded.

Cases mentioned in this report:-

Curtin v. Dáil Éireann [2006] IESC 27, (Unreported, Supreme Court, 6th April, 2006).

Dunne v. Dun Laoghaire-Rathdown County Council [2003] 1 I.R. 567; [2003] 2 I.L.R.M. 147.

Hewthorn & Co. v. Heathcott (1905) 39 I.L.T.R. 248.

Lancefort Ltd. v. An Bord Pleanála (No. 2) [1999] 2 I.R. 270; [1998] 2 I.L.R.M. 401.

Little v. Dublin Tram Co. & Another [1929] I.R. 642; (1929) 65 I.L.T.R. 41.

McEvoy v. Meath County Council [2003] 1 I.R. 208; [2003] 1 I.L.R.M. 431.

Mulcreevy v. Minister for Environment [2004] IESC 5, [2004] 1 I.R. 72; [2004] 1 I.LR.M. 419.

R. v. Lord Chancellor, ex parte Child Poverty Action Group [1999] 1 W.L.R. 347; [1999] 2 All E.R. 755.

Sinnott v. Martin [2004] IEHC 67; [2004] IEHC 136, [2004] 1 I.R. 121.

Appeal from the High Court

The facts have been summarised in the headnote and are more fully set out in the judgment of Murray C.J., *infra*.

The plaintiff issued a plenary summons on the 18th August, 2004. The High Court (Laffoy J.) delivered judgment on the 7th September, 2004, wherein she dismissed the plaintiff's claim but awarded him his costs.

The plaintiff appealed against the substantive ruling of the High Court and the defendants appealed the ruling in relation to costs. The appeal was heard by the Supreme Court (Murray C.J., Denham, Hardiman, Geoghegan and Kearns JJ.) on the 7th April, 2005 and the court dismissed the appeal on the substantive issues: see [2006] IESC 49, [2007] 1 I.R. 194. The appeal in relation to the issue of costs was adjourned to and was heard on the 16th November, 2006.

Gerard Hogan S.C. (with him *James Bridgeman*) for the plaintiff.

James Connolly S.C. (with him *Garrett Simons*) for the first, second and third defendants.

Conleth Bradley S.C. for the fourth defendant.

Cur. adv. vult.

Murray C.J. 6th December, 2007

[1] In its substantive judgment on the merits in this case the court unanimously upheld the judgment of the High Court Judge and dismissed the appeal: see *Dunne v. Minster for Environment* [2006] IESC 49, [2007] 1 I.R. 194.

[2] The appeal was concerned with questions as to whether s. 8 of the National Monuments (Amendment) Act 2004 offended Articles 5, 10, 15 and 40 of the Constitution and whether it breached the law of the European Communities and, in particular, the provisions of Council Directive 85/337/EEC of the 27th June, 1985, as amended by Council Directive 97/11/EC of the 3rd March, 1997.

[3] Although the plaintiff lost his case in the High Court, the High Court Judge awarded him costs against the defendants, notwithstanding the normal rule that the losing party should pay the costs of the proceedings.

[4] The defendants have appealed against the High Court order awarding costs of the High Court proceedings to the plaintiff. When judgment was delivered on the substance of the appeal the issue concerning the costs of the High Court and the costs of the appeal to this court was adjourned for submissions to a later date.

[5] The plaintiff seeks to uphold the order awarding him costs and, as regards the appeal to this court, asks the court to exercise its discretion by awarding him his costs of the appeal or, in the alternative, making no order as to costs.

The High Court costs

[6] The plaintiff primarily relied on the terms of the judgment of the High Court (Laffoy J.) delivered on the 18th March, 2005, on the question of costs.

[7] In her separate written decision on the question of costs, the High Court (Laffoy J.) referred to the submission made by the parties and, in

particular, considered two decisions of the High Court, namely *McEvoy v. Meath County Council* [2003] 1 I.R. 208 and *Sinnott v. Martin* [2004] IEHC 67; [2004] IEHC 136, [2004] 1 I.R. 121, relied upon by the plaintiff. Having considered those authorities, both of which she noted cited a decision of the English High Court in *R. v. Lord Chancellor, ex parte Child Poverty Action Group* [1991] 1 W.L.R. 347, the High Court Judge concluded stating:-

> "I am satisfied that counsel for the plaintiff has correctly identified the principles established in the recent jurisprudence of this court in accordance with which the court should exercise its discretion in considering an application for costs by an unsuccessful plaintiff or applicant in public law litigation, at any rate, against a protagonist which is a public body. I now propose applying those principles to the instant case."

[8] The two principles identified by the High Court were:-

"(1) that the plaintiff was acting in the public interest in a matter which involved no private personal advantage; and

(2) that the issues raised by the proceedings are of sufficient general public importance to warrant an order for costs being made in his favour."

[9] These were described as the principles which governed the court's discretion to depart from the normal rule that costs follow the event. The fact that the defendant was a public body was also considered relevant.

[10] In reaching its conclusion the High Court also stated that:-

> "However, as a matter of principle I do not consider that the court's discretion as to costs in this type of public law litigation is in any way dependant on one or more of the issues of fact or law raised being decided in favour of the plaintiff or the applicant. Accordingly, there will be an order for costs in favour of the plaintiff against all the defendants."

[11] Counsel for the defendants submitted that the High Court was incorrect in applying these two principles as determinative factors and, in effect, was establishing a category of cases in which the normal rule of costs following the event would not apply. It was submitted that, in any event, the High Court did not exercise its discretion correctly in placing excessive reliance on the two principles referred to, to the exclusion of all the circumstances, including the fact that the respondent had won the case.

[12] A second aspect of the defendants' argument was the submission that the High Court wrongly considered as relevant the fact that the plaintiff had been successful in obtaining an interlocutory injunction halting the road project in question in earlier and separate proceedings referred to as *Dunne v. Dun Laoghaire-Rathdown County Council* [2003] 1

I.R. 567, and also that this had, in turn, led to a successful challenge by another party in other proceedings to a ministerial order concerning the same road project. The passage in the decision on costs to which counsel for the defendants referred reads as follows:-

> "Of particular significance on the issue of costs, in my view, is the fact that the plaintiff was successful in obtaining an interlocutory injunction in *Dunne v. Dun Laoghaire-Rathdown County Council* [2003] 1 I.R. 567, which effectively halted road works at Carrigmines Castle without a valid consent under s. 14 of the National Monuments Act 1930, as amended. This led to the making on the 3rd July, 2003, of the joint consent and the ministerial order which were subsequently successfully challenged in *Mulcreevy v. Minister for Environment* [2004] IESC 5, [2004] 1 I.R. 72. That successful challenge, in turn, provoked the enactment of a special provision in s. 8 of the Act of 2004 in relation to the south eastern route, which I have concluded was given by a policy designed to ensure the completion of the motorway without any input in relation to national monument protection implications from any external party to the first and fourth defendants and their respective advisors. Against that background, I consider that the issues raised in these proceedings, adopting the words of Dyson J. in *R. v. Lord Chancellor, ex parte Child Poverty Action Group* [1999] 1 W.L.R. 347 at p. 358, were 'truly ones of general public importance'. They were difficult issues of public law. It was in the public interest that they be clarified."

[13] In the course of the appeal, counsel for the defendants submitted that the previous proceedings were not factors which the High Court should have taken into account in determining that the issues in this particular case were of general public importance.

[14] Counsel for the plaintiff submitted that, firstly, the High Court was correct in the approach which it adopted and, secondly, it was, in any event, exercising its discretion in the ordinary way having regard to all the circumstances of the case and that this court should not interfere with the exercise of that discretion.

[15] As regards the second aspect of the defendants' submission, counsel for the plaintiff submitted that, on a correct interpretation of the High Court's decision, it did not rely on the previous proceedings as a material fact in its decision to award costs. In any event, it was submitted that the decision which it made was within the ambit of its discretion.

[16] At least on one view of the High Court's judgment, the question of costs was decided on the basis that this case fell into a particular category of cases in which a discretion to depart from the normal rule would invariably be governed by the two principles identified by counsel

on the basis of the case law cited as establishing two determining principles. In the course of its decision, the High Court stated (Laffoy J.) "that the plaintiff was within that rare category of litigants who truly have no private interest in the outcome of the proceedings". I am not sure that it is such a rare category but if the alternative view advanced by counsel for the plaintiff were taken, namely that the High Court's decision was within the normal ambit of its discretion to depart from the general rule, the question still arises as to whether any undue weight was given to the two principles relied upon.

[17] The basic law governing the question of costs in civil proceedings may be found in s. 14(2) of the Courts (Supplemental Provisions) Act 1961 which provides that the jurisdiction of the High Court "shall be exercised so far as regards pleading, practice and procedure, generally, including liability to costs, in the manner provided by the Rules of Court." Order 99 of the Rules of the Superior Courts 1986 provides that the costs of and incidental to every proceeding shall be in the discretion of the superior courts and in particular, at sub-rule. 4, that costs shall follow the event unless the Court otherwise orders. Moreover, the Act of 1961 and the Rules of the Superior Courts 1986 adopt and incorporate the procedure and practice which applied in our courts for a very long time. There has been no fixed rule or principle determining the ambit of that discretion and, in particular, no overriding principle which determines that it must be exercised in favour of an unsuccessful plaintiff in specified circumstances or in a particular class of case. In *Hewthorn & Co. v. Heathcott* (1905) 39 I.L.T.R. 248, Kenny J. stated:-

> "It is well settled law, as is shown by the authorities cited to me, that when costs are in the discretion of a judge he must exercise that discretion upon the special facts and circumstances of the case before him and not be content to apply some hard and fast rule."

[18] Undoubtedly, the fact that a plaintiff is not seeking a private personal advantage and that the issues raised are of special and general public importance are factors which may be taken into account, along with all other circumstances of the case, in deciding whether there is sufficient reason to exercise a discretion to depart from the general rule that costs follow the event. However, insofar as the High Court may have considered that the two principles to which it referred are, in themselves, the determining factors in a category of cases which may be described as public interest litigation, I do not find that the authorities cited support such an approach.

[19] In the first of those authorities, *McEvoy v. Meath County Council* [2003] 1 I.R. 208, the High Court (Quirke J.) in its ruling on costs took into account the fact that the proceedings in that case fell into a category which it described as "public interest challenges". It relied on a description of a

"public law challenge" as set out by Dyson J. in *R. v. Lord Chancellor, ex parte Child Poverty Action Group* [1999] 1 W.L.R. 347. The only passage cited from that judgment by the High Court (Quirke J.) was one in which Dyson J. at p. 353 set out what he saw to be the essential characteristics of a public law challenge. The passage cited at p. 229 by Quirke J. was as follows:-

> "The essential characteristics of a public law challenge are that it raises public law issues which are of general importance, where the applicant has no private interest in the outcome of the case. It is obvious that many, indeed most judicial review challenges, do not fall into the category of public interest challenges so defined. This is because even if they do raise issues of general importance, they are cases in which the applicant is seeking to protect some private interests of his or her own."

[20] The description is a succinct and useful one. Its descriptive nature does not involve the statement of any principle of law. Neither do I consider the description to be definitive or exhaustive of what might generally be referred to as public interest litigation where an applicant does not seek to protect some private interest of his or her own. Such proceedings may be brought for a whole range of reasons and may be motivated by the most altruistic objectives in the community interest, the pursuit of a political agenda of a pressure group or a speculative strategy to at least delay the proposed project of a public body. I do not think it necessary to hypothesise further. Suffice it to say that each case would need to be assessed according to its own context, facts and circumstances. Indeed, the High Court (Quirke J.) cited a *dictum* from the judgment of Denham J. in *Lancefort Ltd. v. An Bord Pleanála (No. 2)* [1999] 2 I.R. 270 to the effect that a contention by an applicant in proceedings that he is acting in the public interest must be analysed in the circumstances of each case. That case was concerned with *locus standi* rather than an issue as to costs.

[21] In any event, apart from the descriptive passage referred to, Quirke J. did not rely further on any other aspect of *R. v. Lord Chancellor, ex parte Child Poverty Action Group* [1999] 1 W.L.R. 347, which is perfectly understandable since it concerned an application under English law for a pre-emptive costs order where an applicant sought an order awarding him costs of the proceedings prior to any hearing on the merits. The parties in that case agreed that the English court had jurisdiction to make such an order on the basis of English law, including statute law and practice. Furthermore, decisions of other common law jurisdictions concerning matters of their practice and procedure, must, because of their very nature, be considered with caution: see the observations of Kennedy C.J. in *Little v. Dublin Tram Co. & Another* [1929] I.R. 642 at p. 657.

[22] However, it is the case that in *McEvoy v. Meath County Council* [2003] 1 I.R. 208, Quirke J. took into account, in deciding to award costs to the unsuccessful applicants in judicial review proceedings, that neither of them were seeking to protect some private interest of their own and that they acted solely by way of furtherance of a public interest in the environment. These are legitimate factors which a court may take into account in exercising its discretion pursuant to O. 99 of the Rules of the Superior Courts 1986. But Quirke J. did not hold them to be determinative factors. On the contrary, he went on to say that, in exercising his discretion as to costs, he was also taking into account certain findings of fact which he had made. These included his finding at p. 231 that:-

> "the trial of these proceedings was unnecessarily prolonged by reason of the fact that a vast amount of documentation had to be analysed and considered in order to determine questions of fact which could have been readily determined by agreement between the parties. The overwhelming majority of those issues of fact were determined in favour of the applicants."

He also added at p. 231:-

> "Furthermore, the contention on behalf of the respondent, that zoning decisions which were inconsistent with the guidelines could be explained by the fact that the guidelines contained 'long term' objectives, was not supported by any credible evidence and required a complete examination of the minutes of the various meetings at which decisions were made. This examination disclosed no record which would support that contention."

Quirke J. in conclusion stated at p. 231:-

> "In all of the circumstances, I am satisfied that the appropriate exercise of my discretion requires that the respondent pay 100% of the costs of and associated with the daily transcript of the proceedings and 50% of the applicants' costs of and incidental to the proceedings."

Furthermore, there was not a simple award of costs to the losing party but an apportionment of costs.

[23] In short, it is clear that Quirke J. was exercising his discretion pursuant to O. 99 of the Rules of the Superior Courts 1986 having regard to all the circumstances of the case and that he did not award costs on the basis that the public interest aspect of the litigation put it into a special category which determined the manner in which he could exercise his discretion.

[24] The second authority relied upon was *Sinnott v. Martin* [2004] IESC 67, [2004] IESC 136, [2004] 1 I.R. 121. In that case the High Court (Kelly J.), which cited *McEvoy v. Meath County Council* [2003] 1 I.R. 208 with approval, refused to award costs to petitioners in an election petition for a range of reasons which included a finding that the petitioners had a

private interest in the outcome of the proceedings and did not fall within the ambit of public interest litigation and that the issues, important as they were, did not raise "public law issues of such importance as to entitle me, as a matter of discretion to award costs in favour of the unsuccessful petitioner or other parties claiming costs against the Minister".

In that light, any observations of the High Court (Kelly J.) on the awarding of costs in so-called public interest litigation could be considered *obiter* but, in any event, I did not find that there is anything in *Sinnott v. Martin* which would support the contention that the public interest element coupled with issues of general public importance govern or determine the exercise of a court's discretion on the issue of costs. On the contrary, the judgment indicates there are other factors which may also have to be taken into account according to the circumstances of the case.

[25] As previously indicated, these elements are relevant factors which may be taken into account in the circumstances of a case as a whole. Because these elements are found to be present it does not necessarily follow that an award of costs must invariably be made in favour of an unsuccessful plaintiff or applicant. Equally, the absence of those elements does not, for that reason alone, exclude a court exercising its discretion to award an unsuccessful applicant his or her costs if, in all the circumstances of the case, the court is satisfied that there are other special circumstances that justify a departure from the normal rule.

[26] The rule of law that costs normally follow the event, that the successful party to proceedings should not have to pay the costs of those proceedings which should be borne by the unsuccessful party, has an obvious equitable basis. As a counterpoint to that general rule of law, the court has a discretionary jurisdiction to vary or depart from that rule of law if, in the special circumstances of a case, the interests of justice require that it should do so. There is no predetermined category of cases which fall outside the full ambit of that jurisdiction. If there were to be a specific category of cases to which the general rule of law on costs did not apply that would be a matter for legislation since it is not for the courts to establish a cohesive code according to which costs would always be imposed on certain successful defendants for the benefit of certain unsuccessful plaintiffs.

[27] Where a court considers that it should exercise a discretion to depart from the normal rule as to costs, it is not completely at large but must do so on a reasoned basis, indicating the factors which, in the circumstances of the case, warrant such a departure. It would neither be possible nor desirable to attempt to list or define what all those factors are. It is invariably a combination of factors which is involved. An issue such as this is decided on a case by case basis and decided cases indicate the nature of

the factors which may be relevant but it is the factors or combination of factors in the context of the individual case which determine the issue.

[28] Accordingly, any departure from the general rule is one which must be decided by a court in the circumstances of each case. In *Curtin v. Dáil Éireann* [2006] IESC 27, (Unreported, Supreme Court, 6th April, 2006) this court stated:-

> "The general rule is that costs follow the event subject to the court having a discretion, for a special reason, to make a different order. It is a discretion to be exercised in the circumstances and context of each case and is one which is so exercised from time to time.
>
> Counsel for all parties referred to previous decisions of this court and the High Court, in which a discretion was exercised to make an order concerning costs which did not follow the general rule. It would neither be possible nor desirable to lay down one definitive rule according to which exceptions are to be made to the general rule. For the discretionary function of the court to be exercised in the context of each case militates against such a definitive rule of exception and it is also the reason why previous decisions of such a question are always of limited value."

[29] Even accepting the submission of counsel for the plaintiff that the High Court did not approach the question of costs on the basis that there was a category of cases in which, by reference to the two principles in question, costs should invariably be awarded to unsuccessful applicants or plaintiffs, I do feel nonetheless that there was undue weight given to those principles as determining factors. I think it goes too far to say that:-

> "the court's discretion as to costs in this type of public law litigation [is not] in any way dependant on one or more of the issues of fact or law raised being decided in favour of the plaintiff or applicant."

[30] Such an approach seems to discount excessively, if not altogether exclude from consideration, the normal rule that, if the issues in the case have been decided in favour of one party, that normally means that the successful party is entitled to his or her costs.

[31] I now turn to the question of the High Court's reference to previous proceedings brought by the plaintiff in this case and *Mulcreevy v. Minister for Environment* [2004] IESC 5, [2004] I.R. 72 to which the High Court (Laffoy J.) also referred. I think it is evident that these proceedings were a material part of the trial judge's conclusion that the issues raised in this particular case fell within the second principle which she announced, namely that they were of sufficient general public importance. This is clear from her statement where it is said "of particular significance on the issue of costs, in my view, is" and she went on to refer to the plaintiff's earlier

proceedings and then to the other successful proceedings. She concluded by stating immediately after the reference to those proceedings:-

> "Against that background, I consider that the issues raised in these proceedings … were 'truly ones of general public importance'."

[32] While one could not say that earlier litigation was never relevant from some contextual point of view on an issue of costs, in the circumstances of this case, I find it difficult to see how the earlier proceedings referred to could have a material bearing on whether the issues in this particular case could be considered to be of such general public importance to justify an exceptional departure from the ordinary rule that costs follow the event. I think the High Court was incorrect in taking either one of those cases into account for the purpose of determining whether issues in this particular case fell into that category.

[33] In the circumstances, I feel that this court is required to review the decision of the costs awarded in the High Court and exercise its own discretion on the issue as appealed by the defendants.

[34] Turning to the substantive question of costs of the High Court, the plaintiff argued that, in dealing with the issue in the exercise of its discretion, this court should nonetheless conclude that the particular circumstances of this case do indeed warrant a departure from the normal rule in awarding costs to the plaintiff of the proceedings in the High Court. The plaintiff relied, as the factors to be taken into account, on the fact that he was not defending any personal interest in bringing these proceedings and was seeking to ensure that the project in question, and particularly insofar as it affected a national monument, was carried out in accordance with law. He reiterated that the case involved issues of such public importance that this factor should also be weighed in the balance in deciding to award him his costs.

[35] Accepting that the plaintiff brought the proceedings in the interests of promoting compliance with the law and without any private interest in the matter, I do not consider that the issues raised in the proceedings were of such special and general importance as to warrant a departure from the general rule. Undoubtedly, it could be said that issues concerning subject matters such as the environment or national monuments have an importance in the public mind, but a further factor for the court is whether the legal issues raised, rather than the subject matter itself, were of special and general public importance. In this case nothing exceptional was raised in the issues of law which were before the court so as to warrant a departure from the general rule.

[36] Having regard to all the circumstances of the case, the ordinary rule should apply to the costs of the High Court proceedings and that costs should follow the event.

[37] Accordingly, I would allow the appeal against the order for costs made in favour of the plaintiff in the High Court and substitute an order awarding costs to the respective defendants of the High Court proceedings.

Costs of the Appeal

[38] The plaintiff appealed the decision of the High Court dismissing these proceedings. This court having upheld the decision of the High Court, the plaintiff was unsuccessful. Costs should follow the event, there being no circumstances arising in the appeal which would justify departure from the normal rule. Accordingly, the plaintiff must pay the costs of the defendants of his unsuccessful appeal.

Denham J.
[39] I agree.

Hardiman J.
[40] I also agree.

Geoghegan J.
[41] I also agree.

Kearns J.
[42] I also agree.

Solicitors for the plaintiff: *James B. Joyce & Co.*

Solicitor for the first, second and third defendants: *The Chief State Solicitor.*

Solicitors for the fourth defendant: *Edward C. Hughes.*

Paul Christopher, Barrister
