THE COURT OF APPEAL

Unapproved

Haughton J.
Ní Raifeartaigh J.
Binchy J.

Neutral Citation Number [2020] IECA 202
Appeal No. 2018/139
High Court Record No. 2014/89 CA

IN THE MATTER OF THE DATA PROTECTION ACTS, 1988 AND 2003

IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 26

OF THE DATA PROTECTION ACTS, 1988 & 2003

BETWEEN/

PETER NOWAK

APPELLANT

- AND -

THE DATA PROTECTION COMMISSIONER

RESPONDENT

-AND-

PRICE WATERHOUSE COOPER

NOTICE PARTY

Appeal No. 2018/140
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- AND -

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RESPONDENT

-AND-

THE INSTITUTE OF CHARTERED ACCOUNTANTS IN IRELAND

NOTICE PARTY

Costs Judgment of Mr. Justice Robert Haughton delivered on the 27th day of July, 2020

Introduction

1. These two matters originated in the Circuit Court (Deery J) and resulted in appeals on different points of law to the High Court (Coffey J), and in turn further appeals on points of

law to this court, which appeals were heard consecutively on 5 May 2020. In the first appeal Binchy J delivered a written judgment on 1 July 2020 dismissing the appeal, and Haughton and Ni Raifeartaigh JJ agreed. In the second appeal I delivered a written judgment on 1 July 2020 dismissing the appeal, and Binchy and Ni Raifeartaigh JJ agreed. This judgment addresses the costs in each of these cases in turn, and should be read with the principal judgments in each case. The court has considered written submissions from all concerned parties. No party has sought an oral hearing on the costs issues and I do not consider that it is necessary to reconvene to hear further submissions.

Appeal 2018/139

2. This appeal related to the appellant Mr. Nowak's claim before the respondent ("the DPC") to be entitled to disclosure under the data protection regime of a Memorandum constituting a submission made by the Notice Party to the Chartered Accountants Regulatory Board ("CARB") in response to a complaint by the appellant about the Notice Party's accounting practices. Mr. Nowak argued unsuccessfully in all courts that the Memorandum constituted personal data.

3. The first costs issue that needs to be noted relates to the DPC's cross-appeal against the costs order made in the High Court in which the trial judge vacated the order of Circuit Court granting costs to the DPC and Notice party against Mr. Nowak, and ordered that there be no order as to costs in the High Court and the Circuit Court.

4. In his principal Judgment in para.68 Binchy J addressed the DPC's cross appeal thus:

> "64. As far as costs are concerned, it is first necessary to consider the costs incurred in the Circuit Court and High Court appeals, which are the subject of the respondent's cross appeal. I can see no reason to depart from the normal rule that costs should follow the event in those proceedings. To that extent only therefore, I would overturn the decision of Coffey J. in the court below and order that the

appellant shall discharge all of the costs incurred by the respondent in the Circuit Court and in the High Court, when taxed and ascertained."

Accordingly this court has already decided to vacate the High Court order in relation to the costs of the DPC before it and the Circuit Court, and to order that the DPC is entitled to those costs against Mr. Nowak.

5. The Notice Party also cross-appealed in respect of the trial judge's 'no order as to costs' ruling, and in its submission now seeks a similar order to that made in favour of the DPC. The Notice Party was properly joined as a notice party to the proceedings and successfully defended its interests in the Circuit Court and the High Court. This was necessary as Mr. Nowak made some allegations – including a suggestion that the DPC had never inspected the Memorandum submitted by the Notice Party to CARB - that required affidavit evidence from the Notice Party in order to rebut them, and clearly it had a strong interest in supporting the legal argument that the Memorandum did not come within the definition of 'personal data'. It also had to address a submission to this court by Mr. Nowak that the Notice Party was an illegal entity. The Notice Party was an active participant in the Circuit Court, High Court and this court. As in the case of the DPC, the starting point is that as the Notice Party was entirely successful the normal rule that costs should follow the event should apply. The onus is on Mr. Nowak to persuade the court not to apply the normal rule, but nothing has been advanced by him in his submissions to suggest that there are any special or unusual circumstances that would justify the court in departing from 'the normal rule'.

6. In a reply submission by Mr. Nowak by email of 23 July 2020 he responds specifically to the Notice Party's submissions on costs and contests its claims by repeating his assertion that "it is an illegal entity and does not exist in law", and further asserting that directors and partners of the Notice Party hold "invalid qualifications and auditing certificates" and that their work is "legally invalid and of a criminal nature". These were not points pleaded, or supported

by any evidence, or argued by Mr. Nowak, before the Circuit Court or the High Court, and so far as this court is concerned they appeared for the first time in his written submissions to this court in support of his appeal. In the course of the hearing as presiding judge I made it clear to Mr. Nowak that he could not pursue these points, and this is referred to at paragraph 15 of the judgment of Binchy J as follows:

> "15. In his written submissions dated 29th June, 2018, the appellant purports to expand on those grounds of appeal by adding thereto a claim that the notice party is an illegal entity and as a consequence the Memoranda relate to illegal and invalid audit work. He made additional submissions arising out of this argument, but at the outset of the hearing of this appeal, Haughton J. presiding, informed the appellant that it was not open to him to raise this ground of appeal, for the first time, by way of submissions to this Court, and ruled that the appellant would not be allowed to address the Court in relation to this new ground of appeal, or to rely upon it in any way.

It is equally impermissible for Mr. Nowak to pursue these matters, upon which there cannot be any adjudication in this appeal, in support of his submission on costs, and his attempt to do so is at this stage scandalous and an abuse of the process. These remarks apply equally to the second issue which I address below.

7. I would therefore vacate the order of the High Court and order that the Notice Party is entitled to its costs in the Circuit Court and in the High Court against Mr. Nowak.

8. The second issue that falls to be determined is that the DPC and the Notice Party seek their costs of the appeal before this court.

9. The normal rule that costs should follow the event is now enshrined in section 169(1) of the Legal Services Regulation Act, 2015 which came into effect on 7 October 2019 by virtue of S.I. no.400/2019 and applies to this appeal. It provides -

"169. (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 refusing to engage in the settlement discussions or in mediation."

10. The DPC and Notice Party were "entirely successful" in this appeal. Mr. Nowak in his first emailed submission (6 July 2020) suggests that he brought the proceedings in the public interest. However his desire to obtain the Memorandum was clearly motivated by private interest, against a background that he had been 'let go' as a trainee accountant by the Notice Party after failing an accountancy exam, and had lodged a complaint with CARB in relation to the Notice Party's accountancy practices. In the balance of his email, the content of which I will mention briefly later, Mr. Nowak does not point to any aspect of the nature or circumstances of the case, or any matter concerning the conduct of the proceedings by the DPC or Notice Party, or any matter coming with (a)-(g) in s.169(1), that might lead the court to do

anything other than award them their costs. Furthermore I consider that it was necessary for the Notice Party to make written and oral submissions on the appeal, particularly in light of Mr. Nowak's ill-advised attempt to introduce in his submissions and pursue a claim that had not been pleaded and was not properly before the court that the Notice Party was 'not a legal accountancy firm'.

11. I would therefore order that the DPC and the Notice Party are entitled to their costs of the appeal as against Mr. Nowak.

Appeal 2018/140

12. This appeal related to Mr. Nowak's claim under the data protection regime to be entitled to his original accountancy exam scripts held by Institute of Chartered Accountants in Ireland ("ICAI"). First it should be recalled that although the ICAI was a notice party in these proceedings it did not make submissions or appear on the appeal to this court. I addressed this at paragraph 80 of my principal judgment stating –

> "….I would therefore affirm the order of the High Court in respect of ICAI's costs (i.e no order as to its costs in the Circuit Court and the High Court)."

13. Secondly, in the High Court the trial judge again vacated the costs order in favour of the DPC made in the Circuit Court, and substituted it with 'no order as to costs' in both the Circuit Court and High Court. The DPC cross-appealed this order, seeking its costs in the Circuit Court and High Court.

14. Although argument was not addressed to the cross-appeal in written or oral submissions, the DPC reserved the right to do so in due course, and in my principal judgment I did address the issue at some length in paragraphs 71-78 and expressed a provisional view subject to considering further submissions. The costs/outlay issue facing the High Court was not straightforward, and fell to be determined against a back-drop, elaborated on in my

principal judgment, that Mr Nowak had been successful on certain issues before the CJEU and the Supreme Court. I concluded my treatment of the issue with the following:

> "78. … The trial judge would have been entitled in the exercise of his discretion to have awarded all or the substantial part of his outlays in the Circuit Court to Mr. Nowak; equally he would have been entitled to award the costs of the appeal pursued on the third issue to the Respondent. It may well have been – although I readily accept that this is speculation on my part – that the trial judge decided instead that justice would best be met by simply making no order as to the costs/outlays in the Circuit Court, and no order as to the costs of the appeal that he did hear and determine, notwithstanding that Mr. Nowak lost that appeal. This is the type of balancing exercise that is not infrequently carried out by courts when addressing costs. Whatever the reasoning that was adopted by the trial judge, the outcome was one reached by him in the exercise of his discretion, and in my view it would be difficult to say that he erred in principle or that this court should interfere with the exercise of his discretion. This court has often expressed the view that deference is due to a trial judge in the exercise of their discretion, and that it will be slow to interfere. My preliminary view, unless persuaded otherwise, is that this court should not interfere with the costs orders made by the trial judge."

15. In their written Submission on costs the DPC position is stated thus:

> "5. The DPC has indicated her willingness to accept the preliminary view expressed by the Court in the Judgment (§78) and will not pursue the cross-appeal in respect of the Costs Order of the High Court."

16. Accordingly for the reasons given my principal judgment I would dismiss the cross-appeal and affirm the order of the High Court making no order as to the DPC's costs in the Circuit Court and in the High Court.

17. Thirdly the DPC seeks its costs of this appeal pursuant to s.169(1) because it was "entirely successful" and there is no basis within the considerations mentioned in the section for the court to decide otherwise. This accords with the preliminary view that I expressed in paragraph 79 of my principal judgment:

> "Mr. Nowak decided to pursue the appeal, and he has lost it and the respondent was "entirely successful". The arguments that Mr. Nowak raised were substantially the same as those that were rejected in the High Court. None of the considerations listed in (a)-(g) would seem to have any application. In my view the costs of the appeal should follow the event, and therefore the respondent should be entitled to its costs. This is reinforced by the fact that ICAI offered sight of the original scripts, but Mr. Nowak did not take up the offer. This is my preliminary view, unless persuaded otherwise."

18. Mr .Nowak in his emailed submissions raises a number of matters that prompt him to request that no order as to costs be made "at this juncture". He makes one submission that deserves to be addressed (the others will be mentioned briefly in a moment). He submits that –

> "(h) The proceedings were brought in the public interest and substantial amount of my valuable time and resources was spent on these proceedings".

19. As in Appeal 2018/139, I do not accept Mr.Nowak's assertion that he brought these proceedings in the public interest. He brought them originally because he failed an accountancy exam and he wished to examine the scripts which he said contained personal data. This was to further his own interests, not the public interest. Along the way the DPC ruled his

claim to be ill-founded in law and he successfully persuaded the Supreme Court that he was nevertheless entitled to pursue a statutory appeal. He then had to convince the CJEU (as he did) that the scripts contained 'personal data'. But the fact that he had to go through these hoops, with results that may be of benefit to other persons, does not convert his private interest into a public one. The benefit to other persons is incidental. The outcome of many statutory appeals or judicial review proceedings brought for private benefit, to correct a wrong, may benefit other individuals, but this incidental public element does not mean that the proceedings were brought in the public interest – or that, if they fail, the unsuccessful litigant should escape the costs consequences. Mr. Nowak chose to pursue this appeal, first to the High Court then to this court, seeking the actual exam scripts, in circumstances where he believed, without any credible basis for such belief, that the original scripts had been destroyed by ICAI. This had nothing to do with public interest. In his submissions to this court on the appeal he sought to pursue an argument, not raised in his Notice of Appeal and entirely unsupported by evidence, that –

> "24. … Access to the originals of personal data would be specifically desirable if there are suspicions of manipulation, re-engineering of copies provided or fraud."

That argument was self-serving and had nothing to do with public interest and everything to do with Mr. Nowak's groundless suspicions, and was held by this court to be outside the scope of the appeal. Mr. Nowak has not therefore established a basis upon which he could assert that this was public interest litigation.

20. In his first email Mr. Nowak raises other matters: he asserts that this court's judgment was "wrong/misconceived or frivolous"; he asks that the issue of costs "for now be put on hold (a stay on costs) until this case is heard in the Supreme Court"; he says he will not accept or adhere "to an order of a court that has no basic knowledge of the data protection law"; he argues

that the DPC could have avoided a significant amount of costs if the legal work was done internally and she was represented by an in-house lawyer; and he makes other intemperate comments directed at this court. None of his submissions raise any matters of the sort contemplated by s.169(1) or sub-clauses (a)-(g) or are such as to persuade me to depart from the normal rule where a party that is successful is entitled to their costs against a party who is not successful.

21. Accordingly I would award the DPC the costs of the appeal against Mr. Nowak.

Stay – costs orders in both appeals

22. As just mentioned in his emailed submissions on costs Mr. Nowak states –

> "b) the issue of costs should, for now be put on hold (a stay on costs), until this case is heard by the Supreme Court…"

23. Clearly Mr. Nowak intends to seek the leave of the Supreme Court to further appeal both cases, and I treat this to be his request for a stay on the costs orders made against him pending any such application(s).

24. I would grant Mr.Nowak a stay on execution only in respect of the costs orders now made in each case for 21 days from the date of perfection of the orders, and in the event that he applies for leave to appeal then the stay on execution in the relevant case will continue pending the determination of the relevant leave application by the Supreme Court, and in the event that leave is granted execution of the costs order in the relevant case will be further stayed pending further order of that court.

Summary

25. In summary I would make the following orders:

Appeal 2018/139

1) Dismiss appeal.

2) Vacate the order of the High Court making no order as to the costs of the DPC and the Notice Party in the Circuit Court and the High Court, and substitute therefore an order that the DPC and the Notice Party be entitled to their costs of the Circuit Court and the High Court to be paid by Mr. Nowak, such costs to be taxed in default of agreement.

3) Order that the DPC and the Notice Party be entitled to their costs of the appeal to this court to be paid by Mr. Nowak, such costs to be taxed in default of agreement.

4) A stay on execution only in respect of all costs so ordered to be paid by Mr. Nowak for 21 days from the date of perfection of this order and in the event the Mr. Nowak applies for leave to appeal a further stay pending the determination of that application by the Supreme Court and in the event that leave to appeal is granted a further stay pending further order the Supreme Court.

Appeal 2018/140

1) Dismiss the appeal.

2) Affirm the order of the High Court making no order as to the costs of ICAI in the Circuit Court and High Court.

3) Dismiss the cross-appeal and affirm the order of the High Court vacating the order of the Circuit Court (which awarded costs to the DPC against Mr. Nowak) and making no order as to the costs of the DPC in the Circuit Court and the High Court.

4) Order that the DPC be entitled to the costs of the appeal in this court to be paid by Mr. Nowak such costs to be taxed in default of agreement.

5) A stay on execution only in respect of the costs so ordered to be paid by Mr. Nowak for 21 days from the date of perfection of this order and in the event the Mr. Nowak applies for leave to appeal a further stay pending the determination of that application

by the Supreme Court and in the event that leave to appeal is granted a further stay pending further order of the Supreme Court.

Since this decision is being delivered electronically, Ní Raifeartaigh and Binchy JJ. have authorised me to record their agreement with the terms of this judgment.