



THE COURT OF APPEAL

Neutral Citation Number: [2021] IECA 140

Record Number: 2019/442

**Whelan J.
Noonan J.
Power J.**

BETWEEN/

CLARE COUNTY COUNCIL

RESPONDENT

- AND -

BERNARD MCDONAGH AND HELEN MCDONAGH

APPELLANTS

Judgment as to costs of Whelan J. delivered on the 11th day of May 2021

1. The judgment in this matter was delivered on 12 November 2020. The appellants were wholly unsuccessful.
2. At para. 58 of the judgment it was reiterated that the occupation of the Cahercallamore site, the property of Clare County Council, by the appellants was the fourth instance in short succession in which the appellants have occupied or taken possession for habitation purposes either a part of the public highway or lands which are owned by the Council.
3. The judgment held that:
 - i. the evidence was consistent only with a decision having been made by the appellants to engage in repeated breaches of the planning legislation, acts of trespass and unlawful conduct for the purposes of exerting pressure on the Council to secure housing demands of a bespoke nature, kind and scale for which the appellants have established no lawful entitlement (para. 57);
 - ii. at no time were the appellants left under an impression that they were to be permitted to continue to reside on the Cahercallamore lands (para. 61);
 - iii. the statutory obligations of the Council do not extend to an obligation to provide accommodation or a site exclusively for the extended McDonagh family (para. 68);

- iv. the decision under appeal was made in the exercise of the trial judge's discretion, based on a correct application of the relevant principles, and the decision was one that was clearly open to him on the evidence (para. 84);
 - v. the appellants did not dispute the title of the Council to the property in question, nor did they identify any stateable legal basis which entitled them to trespass on the Council's property (para. 84);
 - vi. the enforcement procedure operated and as applied by the High Court was proportionate to the legitimate aim which the Planning and Development Act 2000 pursued (para. 85);
 - vii. the Council identified compelling reasons in the public interest for taking the enforcement proceedings repeatedly against the appellants (para. 86);
 - viii. the measures invoked by the Council and applied by the court were well within the wide margin of appreciation afforded to the State and state authorities (para. 87);
 - ix. neither the alleged failure of the Council to draw down funds for Traveller specific accommodation nor any asserted non-compliance with any obligation pursuant to the Housing (Traveller Accommodation) Act 1998, were same to be proven at trial, could give rise to a valid defence either to the claim for relief under s. 160 of the Planning and Development Act 2000 or the claim to restrain trespass (para. 88);
 - x. the appellants rejected several wholly reasonable offers of housing by the Council (para. 89);
 - xi. the appellants' demand that that the Council provide them forthwith with six dwelling houses for the exclusive use of the appellants and five of their sons, with the latter's partners/spouses and children was not reasonable (para. 90);
 - xii. the conduct of the appellants was tantamount to asserting a veto over accommodation offered, a right which was not established to exist (para. 90);
 - xiii. the evidence points towards a strong likelihood that the respondent Council will succeed at trial in light of the clear breaches of the Planning and Development Act 2000 and the continuing acts of trespass of the appellants (para. 95(b)(i)); and,
 - xiv. the appellants lacked the requisite close and continuous links with Cahercallamore which is a prerequisite to establishing a Convention-recognised "home". Hence, no fair question to be tried has been established by the appellants as could warrant an interference with the determination of the High Court (para. 95(b)(ii)).
4. At para. 96 of the judgment it was held that the appellants failed to establish any basis on which it could be concluded that the High Court judge fell into error in granting the interlocutory reliefs sought by the Council and refusing the claims advanced by the appellants. The appeal was therefore dismissed.

5. In order to minimise the overall risk to the welfare, health and safety of the appellants pending the trial in the exceptional context caused by the Covid-19 pandemic, the parties were invited to make submissions as to whether a short stay was warranted and the purpose, extent, terms and duration of same.
6. The said submissions were also to address the issue of costs.
7. The parties were referred to s. 5(7) of the Emergency Measures in the Public Interest (Covid-19) Act, repealed on 1 August 2020 by s. 13(b) of the Residential Tenancies and Valuation Act 2020, and *Chichester District Council v. Sullivan* [2020] EWHC 2154.

Submissions of Clare County Council

8. The respondent submitted that it is entitled to the costs of the appeal on the basis that:
 - i. it was entirely successful before the High Court and the Court of Appeal;
 - ii. it was found at para. 95(b)(i) of the judgment that there is a strong likelihood that the respondent would succeed at trial in light of the clear breaches of the planning legislation and continuing acts of trespass of the appellants;
 - iii. it was found at para. 95(d) of the judgment that the respondent acted proportionately and reasonably;
 - iv. the appellants have been in *situ* on the lands at Cahercallamore for over two years whilst these proceedings have been heard.
9. Section 169(1) of the Legal Services Regulation Act 2015 was invoked by the Council as giving expression to the “normal rule” that costs follow the event unless, for special reasons, the court otherwise directs.
10. On the issue of a stay, the respondent submitted that the order of this court ought to have been stayed until 31 December 2020. In addition, the respondent submitted that the appellants ought to provide a solemn undertaking to this court that they, and their extended family, will immediately and fully vacate the site occupied by them at Cahercallamore, Ennis, Co. Clare and further undertake not to thereafter occupy any highway or roadway within a one-mile radius of that site upon the lapse of any stay that this court may attach to its order.
11. In particular, the County Council submitted that:
 - i. it owes statutory duties as a housing authority which require it to assess the needs of the appellants and to provide appropriate accommodation to them where its resources permit it to do so;
 - ii. at the time the submissions were filed, the respondent had no available Traveller specific accommodation to be provided to the appellants. Further, it had no Traveller specific sites to meet the bespoke housing demands of all of the extended family of the appellants;

- iii. it will make efforts to provide non-Traveller specific accommodation if the appellants indicate a readiness to accept such;
 - iv. the court found at para. 64 of the judgment that the appellants previously refused four offers of accommodation;
 - v. the appellants' relatives brought extra mobile homes onto the site at Cahercallamore constituting an increased level of unauthorised and ongoing occupation of the site;
 - vi. following the previous proceedings wherein the appellants were ordered to vacate the Ashline site, the appellants moved to a nearby laneway (which constituted a public right of way) at Ashline, followed by a further move to trespass at the respondent's lands at Cahercallamore; and,
 - vii. paragraph (vii) of the general indorsement of claim of the plenary summons seeks to restrain the appellants from placing their caravans, property or associated vehicles on any lands within a five-mile radius of the Traveller accommodation facility at St. Enda's Beechpark, Ennis, Co. Clare.
12. The County Council submitted that *Chichester District Council v. Sullivan* can be distinguished on two bases. First, it was asserted that in *Chichester* the defendants owned sub-plots on the site in question. In this instance, the appellants are trespassers *simpliciter*. Second, the Council is the appropriate housing authority dealing with the appellants' housing application and has been found to have behaved proportionately and reasonably in its dealings with the appellants.
13. It was submitted that should any extenuating circumstances arise as might require any extension on the period of any stay granted, the respondent Council is in a position to fully assess the needs of the appellants and to make an assessment of whether or not they ought to vacate the lands in light of the prevailing circumstances following the expiration of the stay.

Position of the appellants

14. By a letter dated 26 April 2021 (as amended on 28 April 2021), the appellants' solicitor set out their position as follows:
- i. the appellants' solicitor and the appellants were served with copies of the respondent's submissions;
 - ii. the appellants' solicitor discussed the matter with the first named appellant and communicated advice from counsel;
 - iii. the appellants oppose the making of orders that follow from the court's judgment, arguing that it will leave them homeless but understand that their current legal representation is not in a position to pursue a *pro bono* appeal of this court's decision on their behalf;

- iv. the appellants are in receipt of social welfare payments and do not enjoy good health such that orders for costs would be difficult for the respondent to enforce, it was argued; and,
- v. the appellants would consider non-Traveller specific accommodation if it were such that would enable them to live together as an extended family unit that, they say, is customary among Travellers.

Conclusions

- 15. By reason of an administrative oversight the submissions of the County Council were not brought to the attention of the court until late April 2021. On the issue of a stay, the respondent Council had proposed that the order be stayed until 31 December 2020 and sought an undertaking from the appellants that they would not relocate to a roadway or highway within one mile of the Cahercallamore lands.
- 16. No undertaking of any kind is forthcoming from the appellants. The conduct of the appellants seriously undermines the statutory housing remit of the respondent Council. The decision of *Chichester District Council v. Sullivan* is wholly distinguishable as the Council has correctly asserted and could afford no assistance to the appellants.
- 17. In all the circumstances I order that the appellants, their servants and agents and any party or parties acting in concert with them or either of them or connected with them and all other persons having notice or knowledge of the making of the order pending the trial of this action be compelled to remove forthwith themselves together with all caravans, vehicles and associated property from Clare County Council's lands at Cahercallamore, Ennis, Co. Clare, more particularly described in Folio CE50734F of the Register of Freeholders County of Clare with a stay on same until 31 May 2021 at 6pm.
- 18. Subject to the said order, all the orders of the High Court stand affirmed.

Costs

- 19. Murray J. in *Chubb European Group SE v. The Health Insurance Authority* [2020] IECA 183 observed:-

"...the legislative basis for the awarding of costs had changed, now appearing across the provisions of ss. 168 and 169 of the Legal Services Regulation Act 2015 ('the 2015 Act') and a recast O. 99 introduced by the Rules of the Superior Courts (Costs) Order 2019 SI 584/2019. The relevant sections of the 2015 Act came into force on 7 October 2019 and the new provisions of O. 99 took effect from 3 December 2019." (para. 5)

He further observed at para. 19 of the said judgment, having considered the recast O. 99 as it stands since 3 December 2019, and the relevant parts of ss. 168 and 169 of the Legal Services Regulation Act 2015:-

"...Reading these in conjunction with each other, it seems to me that the general principles now applicable to the costs of proceedings as a whole (as opposed to the costs of interlocutory applications) can be summarised as follows:

- (a) The general discretion of the Court in connection with the ordering of costs is preserved (s. 168(1)(a) and O. 99, r. 2(1)).
- (b) In considering the awarding of costs of any action, the Court should 'have regard to' the provisions of s. 169(1) (O. 99, r.3(1)).
- (c) In a case where the party seeking costs has been 'entirely successful in those proceedings', the party so succeeding 'is entitled' to an award of costs against the unsuccessful party unless the court orders otherwise (s. 169(1)).
- (d) In determining whether to 'order otherwise' the court should have regard to the 'nature and circumstances of the case' and 'the conduct of the proceedings by the parties' (s. 169(1)).
- (e) Further, the matters to which the court shall have regard in deciding whether to so order otherwise include the conduct of the parties before and during the proceedings, and whether it was reasonable for a party to raise, pursue or contest one or more issues (s. 169(1)(a) and (b))."

20. The appellants have identified no valid basis for refusing the County Council an order for costs. Section 169(1) of the Legal Services Regulation Act 2015 provides:-

"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..."

21. The conduct of the appellants in repeatedly breaching the planning legislation and committing acts of trespass as outlined in the judgment is to be deprecated and seriously undermines the discharge of the housing and planning compliance functions of the respondent and is a compelling factor under s. 169(1) of the 2015 Act that warrants an order for the County Council's costs of both the High Court and this court on appeal being made against the appellants. I direct that same be ascertained in default of agreement.
22. All the orders of the High Court are otherwise hereby affirmed.
23. As this judgment is delivered electronically, Noonan and Power JJ. have indicated their agreement with it.