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Claims under Race Relations (NI) Order 1997 – grant of assistance by Commission for Racial Equality – appeals from dismissal of claims in the County Court – appeals withdrawn – application by defendants for costs order against Commission – relevant principles – impact of ECHR on the issue.

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

ON APPEAL FROM THE COUNTY COURT FOR THE DIVISION OF CRAIGAVON

BETWEEN:

THOMAS WARD, ANN WARD, ROSALINE WARD AND MARGARET WARD

(Plaintiffs) Appellants;

and

BIMLA SABHERWAL, JAGDISH SABHERWAL, PARDEEP SABHERWAL, SHANTI SABHERWAL AND KANTI SABHERWAL T/A NATH BROS, FASHION WHOLESALE AND RETAIL

(Defendants) Respondents.

JUDGMENT

GIRVAN J

THE PROCEEDINGS

By civil bills dated 29 April 1999 the plaintiffs Thomas Ward, Ann Ward, Rosaline Ward and Margaret Ward, members of what is now officially called the Inish Traveller Community claimed damages for alleged wrongful discrimination and breach of

duty under articles 21(1) and (2) of the Race Relations (Northern Ireland) Order 1997 ("the 1997 Order") in and about the provision by the defendants to the plaintiffs of goods facilities and services at retail premises known as "Gino" in Portadown County Armagh. The plaintiffs also sought declaratory and injunctive relief.

THE RELEVANT STATUTORY PROVISIONS

Under article 3(1)(a) of the 1997 Order a person discriminates against another person in any circumstances relevant for the purposes of the Order if on racial grounds he treats the other less favourably than he treats or would treat other persons on racial grounds. Under article 5(2)(a) this includes the grounds of belonging to the Irish Traveller Community. Under article 21 it is unlawful for any person concerned with the provision for payment or otherwise of goods facilities or services to the public or a section of the public to discriminate against a person who seeks to obtain or use those goods facilities or services by refusing or deliberately omitting to provide him with any of them or by refusing or deliberately omitting to provide him with goods facilities or services of the same quality in the same manner and on the same terms as are normal in his case in relation to other members of the public.

Article 42 of the 1997 Order established the Commission for Racial Equality ("the Commission"). In broad terms the duties of the Commission are stated to be the elimination of discrimination, the promotion of equality of opportunity in good relations between persons of different racial groups and the keeping of the relevant legislation under review. The Order sets out the powers and duties of the Commission in greater detail. These include the provisions of article 64 which in paragraph 1 provides:-

> "Where, in relation to proceedings or prospective proceedings under this Order, an individual who is an actual or prospective complainant or claimant applies to the Commission for assistance under this Article, the Commission shall consider the application and may grant it if it thinks fit to do so –

(a) on the ground that the case raises a question of principle; or
(b) on the ground that it is unreasonable, having regard to the complexity of the case or to the applicant's position in relation to the respondent or another person involved or to any other matter to expect the applicant to deal with the case unaided; or
(c) by reason of any other special consideration."

Under article 64(2) assistance by the Commission may include the giving of advice, attempting to procure settlements, arranging for the giving of advice or assistance by a solicitor or counsel, arranging for representation by any person or any other form of assistance. Where the power to arrange for representation by any person including assistance as is usually given by a solicitor or counsel in the steps preliminary or incidental to any proceedings or in arriving at or giving effect to a compromise to avoid or bring to an end any proceedings exercised it is expressly provided that that does not affect the law or practice regulating the descriptions of persons who may appear in, conduct, defend and address the court in any proceedings.

THE COMMISSION'S TERMS FOR GRANTING ASSISTANCE TO THE PLAINTIFFS

Application was made by the plaintiffs to the Commission for support in the bringing of proceedings against the defendants in the County Court. The relevant committee of the Commission decided that assistance would be extended to lodging proceedings and representation in the County Court, the terms of assistance being those set out in the Commission's letter of 21 April 1999. The conditions set out in the letter included the following material provisions:-

(a) Condition 1 provided that the plaintiffs and any legal representatives appointed were required to keep the Commission informed of the progress and development of the cases.

(b) Condition 2 provided that the Commission's view should be taken into account in the preparation of the cases and if appropriate the legal representatives appointed would consult the Commission on the cases generally.

(c) Condition 3 provided that in the event of a settlement or a conciliation being proposed, the Commission would be consulted before any final decision was made. In pursuit of its statutory remit, the Commission seeks to ensure that any settlements include terms which will assist it to effect changes in the respondents' practices for the purposes of eliminating discrimination.

(d) By condition 5 it was provided that where the Commission grants assistance by way of legal representation it will appoint a legal representative of its own choice.

(e) Condition 7 states that the Commission is under no obligation to meet any costs made against the plaintiffs. Only in exceptional circumstances would the Commission consider a request to meet all or part of a costs order.

(f) By condition 10 it was provided that the Commission's decision to offer assistance would be reviewed at any time for any reason set out thereafter including failure by the plaintiffs to act in accordance with advice given by the Commission and/or its appointed legal representative.

(g) By condition 12 it was provided that the plaintiffs were liable to reimburse the Commission for any costs or expenses incurred in providing the plaintiffs with assistance. The recovery of such costs or expenses should constitute a first charge on any costs or expenses recovered in the context of proceedings whether by virtue of a judgment order or otherwise.

(h) By condition 13 it was provided that in the event that there were negotiations to settle the cases the Commission would not agree to be bound by a no publicity

clause in view of the statutory obligation to produce an annual report which accurately reflected its work in assisting discrimination cases.

The plaintiffs each signed acknowledgements that they were prepared to accept the conditions on which the offers of assistance were made. They authorised the legal representatives appointed by the Commission in the case to disclose to the Commission any matters that might be necessary.

The firm of Fisher & Fisher was appointed to represent the plaintiffs in the proceedings.

Although the applicants were persons of limited means and thus would have been eligible for legal aid if the legal aid authorities considered that they had cases worth pursuing it appears that the legal aid authorities deemed legal aid inappropriate in a case which was supported by the Commission.

THE COURSE OF THE PROCEEDINGS

The County Court Judge dismissed the plaintiffs' claims on the merits on 15 February 2000 with costs against the plaintiffs. Mr Harkin on behalf of the defendants stated to this court that the defendants were not aware of the funding arrangements between the plaintiffs and the Commission and did not apply to the County Court Judge for an order that the costs be paid by the Commission.

On the plaintiffs' side it was considered appropriate to appeal the dismissal of the claims and by notices of appeal dated 6 March 2000 the solicitors lodged appeals to this court against the County Court decrees of dismissal.

It was common case between the parties that in a case falling within section 59 of the Judicature (Northern Ireland) Act 1978 the High Court has the power to order a non-party to pay all or some of the costs of the proceedings. Section 59(1) of the 1978 Act provides:-

> "Subject to the provisions of this Act and to rules of court and to the express provisions of any other statutory provision, the

> costs of and incidental to all proceedings in the High Court and the Court of Appeal, including the administration of estates and trusts, shall be in the discretion of the court and the court shall have power to determine by whom and to what extent the costs are to be paid."

It is to be noted that section 59 of the 1978 Act in terms only applies to proceedings in the High Court and the Court of Appeal and does not apply to proceedings in the County Court as such. Counsel submitted that there was no similar power vested in the County Court. However, article 34(1) of the County Courts (Northern Ireland) Order 1980 provides that a County Court in relation to any proceedings within its jurisdiction shall have the like powers of the High Court and powers to grant such relief, redress or remedy as ought to be granted or given in the like case in the High Court and in as full and ample a manner.

In addition article 54(2) of the 1997 Order provides that in claims under Part III of the 1997 Order (which includes article 21) all such remedies shall be obtainable in such proceedings as would be obtainable in the High Court.

It is thus clear that the County Court has jurisdiction in appropriate cases to make an order for costs against a third party such as the Commission.

In addition under article 64(e) of the County Courts (Northern Ireland) Order 1980 the High Court has power to make such order as to costs incurred in the appeal and in the proceedings in the County Court as the appellate court thinks fit.

THE APPEALS

Before appealing the plaintiffs and the solicitors were in communication with the Commission and requested authority to lodge notices of appeal. By letter of 29 February 2000 the Commission agreed that the plaintiffs should lodge an appeal but that any further action should await counsel's opinion on the merits. In their letter they pointed out that:-

> "It might be sensible in the circumstances to advise the solicitors for the defendants that you are taking this step in

> order to protect the Wards' right to appeal the County Court decision."

Notwithstanding this advice the solicitors failed to inform the defendants' solicitors that the notices of appeal had been lodged as a protective measure, failed to ensure that the appeal procedure was taken no further pending counsel's opinion and allowed the appeal to come on for hearing without informing either the defendants or the court of the fact that the plaintiffs were undecided whether to pursue the appeal. Counsel delayed furnishing an opinion on the merits of the claim. The appeal came on for hearing in the list on 9 June 2000 and was adjourned. On 16 June 2000 the Commission wrote to the plaintiff's solicitors pointing out that the costs involved in the appeal were not assisted but pressed for counsel's opinion before any further assistance was provided. Following receipt of counsel's opinion the Commission decided not to extend assistance to the Wards to enable them to be represented at the appeal. The Commission asked the solicitors to withdraw the appeals. Notices of withdrawal of the appeals were sent to the court on 14 September 2000.

The appeals thus having been abandoned, the only issue of a determination at this stage relates to the question of costs. The defendants asked the court to exercise its powers to award costs against the Commission.

THE APPLICATION FOR COSTS AGAINST THE COMMISSION

Mr Harkin on behalf of the defendants argued that the Commission should be ordered to pay the costs of the proceedings in the County Court and in this court. Relying on Murphy v Young & Co Brewery Plc [1997] 1 All ER 518 he argued that the Commission effectively controlled the litigation, had a clear interest in the conduct and outcome of it and appointed the solicitors to act for the plaintiffs. The proceedings would never have been brought had the Commission not decided to provide representation and assistance. Although as between the plaintiffs and the Commission it was understood that the Commission would

not be liable for the defendants' costs that agreement did not govern the question whether an order should be made against the Commission in favour of the defendants.

Mr O'Hara QC who appeared in this court (but not in the court below) and only appeared on the issue of costs on behalf of the plaintiffs and for the Commission argued that the plaintiffs were persons of no means and would have been entitled to legal aid had the legal aid authorities not taken the view that since they were assisted by the Commission it was inappropriate to grant them legal aid. The Commission did not apply a means test. In this case the Commission considered that the case raised important matters of principle which the Commission was entitled to consider should be pursued with its assistance. If legal aid had been granted effectively no recovery of costs from the plaintiffs would have been possible. He contended that it would frustrate the policy and purpose of the legislation to throw the defendants' costs unto the Commission which has limited funds available to pursue its statutory function.

THE AUTHORITIES

In Murphy v Young & Co Brewery Plc [1997] 1 All ER 519 the Court of Appeal reviewed the authorities in relation to the question when it is appropriate to make an order for costs against an non party to the proceedings. In that case the plaintiffs, managers of a public house employed by the defendants sued for wrongful dismissal. The defendants' counterclaimed for monies due under an agreement relating to the public house. The plaintiffs' legal expenses were funded by an insurance company with an agreement for cover up to a maximum of £25,000 in respect of any claim arising out of the same cause of action. The plaintiffs' claim was dismissed and the defendants were awarded £16,000 on their counter claim with costs of £43,000. The defendants joined the plaintiffs' insurers in order to seek an order for costs against them. The insurers argued that the plaintiffs had exhausted their right to an indemnity in respect of the action since their own costs exceeded £25,000

and that accordingly it could not be under a liability to meet the defendants' costs. The defendants contended that since the insurers had funded the plaintiffs conduct of the litigation pursuant to a commercial agreement and had exercised a degree of control over the conduct of the litigation it could not seek to rely on that limit of liability. The trial judge having refused to make an order for costs against the insurers the Court of Appeal dismissed the defendants' appeal against the decision. Phillips LJ in his judgment reviewed the authorities and set out some guidance as to the factors to be taken into account in exercising the powers under Section 51 of the Supreme Court Act 1981 which is identical for present purposes to Section 59 of the 1978 Act.

From the guidance provided by the Murphy decision and from the other authorities such as Symphony Group Plc v Hodgson [1993] 4 All ER 143, Singh v Observer Newspaper Limited [1989] 2 All ER 751 and Aiden Shipping Co Limited v Interbulk Limited [1986] AC 965 it is possible to distil a number of principles or guidelines. Thus:-

(a) Making an order for costs against a non party is exceptional.

(b) If a party officiously intermeddles in a dispute in which he has no interest and provides financial assistance to one or other of the parties without justification an order for costs against him might well be appropriate.

(c) Where a non party supports an unsuccessful party in terms which place the non party under a clear contractual obligation to indemnify the unsuccessful party against his liability to pay the costs of the successful party it may well be appropriate to make such an order.

(d) When a body such as a trade union or insurers, not subject to any relevant limit, funds unsuccessful litigation on behalf of a member the following factors are in addition to the funding itself likely to be present and where they are a costs order would be appropriate -

(i) An implied obligation owed to the party to indemnify that party against the costs of the successful party.

(ii) An interest on the part of the relevant body in supporting and being seen to support the member's claim.

(iii) A responsibility for the decision whether the litigation is to be pursued and for the conduct of the litigation.

(iv) An expectation based on a convention that the body will bear the costs of the successful party if the supported party loses.

(e) Where an insurer has limited liability up to a limited sum it will not always be appropriate to order the insurers to meet the liability beyond that amount.

(f) The court is required to exercise a discretion in determining whether to order costs against the non party.

Phillips LJ pointed out that it must be remembered that the ultimate question is what is reasonable and just on the facts of the individual case and so the principles stated were guidelines only.

WHETHER THE ECHR AFFECTS THE CASE

The question arises as to whether any of the provisions of the Convention throw light on the question when it is appropriate to order a third party to pay costs. Clearly if the court is considering making an order against a third party the third party must have an opportunity to be heard and to present arguments and evidence as to why such an order should not be made. This principle was recognised by the court in Murphy even before the incorporation of the convention into domestic law by the Human Rights Act 1998 (see Phillips LJ [1997] 1 All ER at 525 (c) to (f)). Article 6 thus adds nothing to the pre-existing domestic law in this context.

Mr O'Hara assisted the court by referring the court to the ECHR jurisprudence. He did not in reality seek to argue that there was anything in Convention law which called for a difference of approach on the part of the courts as stated in Murphy and the earlier cases therein referred to. Mr Harkin did not seek to rely on any Convention points.

The Convention jurisprudence on the question of costs is relatively undeveloped. What appears clear is that article 6(1) does not guarantee a successful litigant a right to costs. In Dublin Well Women Centre Limited v Ireland [1997] 23 EHRR 125 the Commission stated that:-

> "The notion of a fair trial within the meaning of article 6(1) of the Convention concerns mainly procedural aspects as well as the right of access to a court and the right to equality of arms. It does not include any guarantees as to the assessment by domestic courts of arguments advanced by parties or the outcome of proceedings including decisions on the award of costs."

Thus while the Commission's view in Grepne v UK [1966] DR 268 that "it is not an unreasonable requirement of civil litigation that the unsuccessful party may have to pay the adversary's costs" in Dublin Well Woman Centre the Commission makes clear that it did not consider that the requirement of a fair trial necessitated the making of an order for costs against the unsuccessful party. It would follow a fortiori that the court is not bound to make an order for costs against a party providing funding to assist the unsuccessful party. The principle of equality of arms does not give rise to any such requirement. While Robins v UK [1998] 26 EHRR 527 makes clear that there must be fairness in the procedures to be followed in awarding or allocating costs it does not establish a substantive right to a costs order in any particular form.

In view of the approach adopted by Mr O'Hara and Mr Harkin in relation to the relevance of the Convention which appeared to concede that nothing in Convention law

affects the question how the court should exercise its discretion I shall proceed upon that basis.

THE COURT'S DECISION IN RESPECT OF THE COSTS IN THE COUNTY COURT

Looking at the circumstances prevailing in the present case the following factors appear to be material:-

a. The Commission is a statutory body charged with the function (inter alia) of arranging for representation and assistance to a party in the steps incidental to proceedings. In providing representation and assistance the Commission is carrying out a public law function. It derives no financial benefit from the litigation though its public law function of working towards the elimination of racial discrimination and the promotion of equality. It thus differs from bodies such as a trade union (whose members make subscriptions to a central fund and whose relations are governed by contract) or insurers (commercial entities funded by insurance premiums or subscriptions). To impose an order for costs against the Commission in circumstances such as those prevailing here would in some measure militate against a fearless pursuit by the Commission of its statutory functions.

b. The Commission made clear in its conditions that it was not accepting liability for the other side's costs. This is a factor though in itself cannot be determinative if other factors favour a costs order against the Commission since it would be tantamount to the Commission by its contract with the plaintiffs (to which the defendants are not privy) avoiding consequences which justice may call for.

c. There is no public policy reason that a costs order must or should be enforceable against a publicly funded statutory body supporting an impecunious plaintiff in such circumstances. If the plaintiffs had been legally aided (which appears likely

if the Commission had not backed the claims) a costs order would not have been made against the legal aid fund unless the defendants could show severe financial hardship.

d. I have heard no evidence that the plaintiffs' claims were manifestly misconceived or that the Commission's decision to support them was irrational or wholly unjustified in the circumstances.

I do take into account that the Commission's decision to back the plaintiffs meant that the plaintiffs could pursue ultimately unsuccessful claims which necessitated the incurring by the defendants of not insignificant costs and expenses in the defence of the proceedings and there is thus an element of unfairness in a successful defendant obtaining an effectively valueless costs order against an unsuccessful plaintiff. It must be recognised that this is a feature of some litigation though it is something that in some measure can be guarded against by insurance. As it happens in this case it appears that the defendants' insurance cover effectively covers the costs incurred.

There are two other matters which must be borne in mind. The defendants in this case did not ask the County Court Judge to make an order against the Commission at the conclusion of the cases. While this may have been due to lack of a full appreciation of the relationship between the Commission and the plaintiffs the defendants could easily have ascertained the true situation before the conclusion of the cases. It is undesirable for a party on appeal to ask the court to exercise a discretion which was available to the trial judge, particularly where as in the present case there has been no rehearing on the merits and no evidence called.

In Valentine on civil proceedings in the County Court at paragraph 19.49 it is stated that if an appeal is withdrawn:-

> "the High Court Judge has no jurisdiction to amend the decree or grant any relief to the respondent unless there is a cross appeal."

Taylor v McGale (1916) 50 ILTR 140 is cited as authority for this proposition. In that case the plaintiff had obtained an order for committal against the defendant in the County Court. The defendant appealed but withdrew his appeal in time at the same time pointing out what he claimed to be a mistake in the form of the decree which vitiated it. The plaintiff applied to the Assize Judge for an order amending the decree or otherwise granting him relief in spite of the withdrawal. Gordon J in a very shortly reported judgment held that he had no jurisdiction to give the plaintiff any relief in the matter.

Since the withdrawal of the appeals leaves intact the decrees of the lower court, since the decrees ordered costs against the plaintiffs and since there was no cross appeal seeking a different costs order, on this ground also it would be inappropriate to order costs against the Commission.

THE COURT'S DECISION IN RESPECT OF THE COSTS OF THE APPEAL

Different considerations arise in respect of the costs of the appeal. The correspondence furnished to the court indicates that it was the Commission which instructed the plaintiffs' solicitors to issue notices of appeal. It rather appears that the plaintiffs had little involvement in the decision to do so. By that stage there had been a full hearing on the merits and the only reason the Commission decided to lodge the notices of appeal at that stage was because the 21 day period for appeal was running out and the Commission was awaiting counsel's opinion on the merits of an appeal. It is difficult to understand why counsel could not have timeously given an opinion before the expiry of the 21 days and it is even more difficult to understand why thereafter it took a further very protracted period for counsel's opinion to be furnished.

Under the provisions of Order 33 rule 4 a successful defendant is required to forward the appropriate forms of decree to the office for signing and sealing. In the event of an appeal such form of decree shall be lodged within a reasonable time before the hearing of the appeal. I was informed by counsel that the costs of obtaining decrees dismissing the claims was £220. Launching appeals thus triggered immediate cost implications for the successful defendants. Furthermore once the appeals were launched, in the absence of a clear statement that nothing further should be done by the defendants pending a determination by the plaintiffs of whether they were genuinely going to pursue the appeals, the defendants were bound to incur costs in preparing for a defence of the appeals.

While the failure by the plaintiffs' solicitors to take steps to minimise the costs of the appeal and the failure by counsel to properly advise on the merits of an appeal can be laid at the feet of the legal advisers rather than the Commission, in the circumstances I consider that it is right to make an order for the costs of the appeal against the Commission. The defendants were forced to incur wholly unnecessary further expenditure in defending ultimately abandoned appeals as a result of the actions of the Commission which may have a remedy against its legal advisers. The public policy arguments which militate against the making of a costs order against the Commission in respect of proceedings at first instance have considerably less force when the plaintiffs have had a hearing on the merits and have been unsuccessful. Furthermore the appeal turned out to be misconceived. The Commission should have appreciated the costs implications for the defendants if appeals, were launched and should have appreciated that the defendants would already have incurred significant and effectively irrecoverable costs. In the circumstances I consider that it would be appropriate to order the Commission to pay the costs of the appeals and I shall direct taxation of those costs.

GIRL3074

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