**Lancefort Limited,** Applicant v. **An Bord Pleanála, Ireland** and **The Attorney General,** Respondents; **Treasury Holdings Limited,** Notice Party [1997 No. 49 J.R.]

High Court 23rd June, 1997.

*Practice - Security for costs - Criteria in determining application - Procedure to be followed - Rules of the Superior Courts, 1986, (S.I. No. 15), O. 29, r. 1 - Companies Act, 1963, (No. 33), s. 390 - Local Government (Planning and Development) Act, 1976, (No. 20), s. 14(8).*

Section 390 of the Companies Act, 1963, provides:-

"Where a limited company is plaintiff in any action or other legal proceeding, any judge having jurisdiction in the matter, may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs and may stay all proceedings until the security is given."

Order 29, r. 1, of the Rules of the Superior Courts, 1986, provides:-

"When a party shall require security for costs from another party, he shall be at liberty to apply by notice to the party for such security; and in case the latter shall not, within forty-eight hours after service thereof, undertake by notice to comply therewith, the party requiring the security shall be at liberty to apply to the court for an order that the said party do furnish such security."

The applicant was incorporated for the purpose of, *inter alia,* co-ordinating a number of individuals' efforts in advancing their resistance to, what they saw, as the destruction of important listed buildings in the city of Dublin. The applicant obtained leave to seek *certiorari* quashing a decision of the first respondent which granted permission to the notice party to develop a site in the city of Dublin, and for leave to seek a declaration that s. 14(8) of the Local Government (Planning and Development) Act, 1976, was unconstitutional. The second respondent and the notice party brought an application seeking security for costs.

*Held* by Morris J. in granting the application for security for costs, 1, that an application for security for costs should not ordinarily be entertained if the court was satisfied that the matter raised a point of law of public importance,

*Fallon v. An Bord Pleanála* [1992] 2 I.R. 380 followed.

2. That a challenge to the constitutionality of an Act did not necessarily raise a point of law of public importance.

3. That in considering whether a matter raised a point of law of public importance, the court should consider whether the law was in a state of uncertainty, and whether it was in the common good that the law be clarified so as to enable the courts to administer justice in the instant case and future cases.

*Fallon v. An Bord Pleanála* [1992] 2 I.R. 380 followed. *The People (Attorney General) v. Giles* [1974] I.R. 422 considered.

4. That the court should further take into account whether the applicant was specially chosen so that it was not a mark for costs, and whether it had any special interest in the result of the action.

*Fallon v. An Bord Pleanála* [1992] 2 I.R. 380 followed.

5. That failure to make a demand for security for costs as required in the Rules of the Superior Courts, 1986, did not invalidate the application.

6. That it was permissible to bring an application for security for costs under s. 390 of the Companies Act, 1963, by way of O. 29, r. 1 of the Rules of the Superior Courts, 1986.

Cases mentioned in this report:-

*Fallon v. An Bord Pleanála* [1992] 2 I.R. 380; [1991] I.L.R.M. 799.

*Maher v. Phelan* [1996] 1 I.R. 95; [1996] 1 I.L.R.M. 359.

*Midland Bank Ltd. v. Crossley-Cooke* [1969] I.R. 56.

*The People (Attorney General) v. Giles* [1974] I.R. 422; 110 I.L.T.R. 33.

*Proetta v. Neil* [1996] 1 I.R. 100; [1996] 1 I.L.R.M. 457.

**Notice of motion.**

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

On the 6th June, 1997, the High Court (Morris J.) gave leave to the applicant to seek *certiorari* by way of judicial review quashing a decision of the first respondent which granted permission to the notice party to develop a site in the city of Dublin, and for leave to seek a declaration by way of judicial review that s. 14(8) of the Local Government (Planning and Development) Act, 1976, was unconstitutional. The second respondent and the notice party brought motions seeking security for costs and these motions came on for hearing before the High Court (Morris J.) on the 16th June, 1997.

*Colm MacEochaidh* (with him *Paul Callan S.C.*) for the applicant.

*Eamonn Galligan* for the second respondent.

*Rory Brady S.C.* (with him *Denis McDonald*) for the notice party.

*Cur. adv. vult.*

**Morris J.** 23rd June, 1997

This judgment is given on the application for security for costs brought by the notice party and the second respondent, namely, Treasury Holdings Ltd. and Ireland and the Attorney General.

The applications are based on s. 390 of the Companies Act, 1963, which provides:-

> "Where a limited company is plaintiff in any action or other legal proceeding, any judge having jurisdiction in the matter, may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs and may stay all proceedings until the security is given."

Counsel for the applicant has accepted, on behalf of the applicant, that the applicant is without assets and it follows that it would be unable to pay the costs of the respondents and the notice party if successful.

It is also accepted on behalf of the applicant that the section by providing that it applies to "any action or other legal proceeding" is sufficiently wide and embraces an application for judicial review which is the case before the Court at the present time.

Counsel for the applicant has made what I perceive to be a preliminary point in response to the application. It is submitted that the application is brought pursuant to O. 29 of the Rules of the Superior Courts, 1986 and that on the authorities the Court does not have any jurisdiction to entertain such an application based upon this Order.

Order 29, r. 1, provides:-

> "When a party shall require security for costs from another party, he shall be at liberty to apply by notice to the party for such security; and in case the latter shall not, within forty-eight hours after service thereof, undertake by notice to comply therewith, the party requiring the security shall be at liberty to apply to the court for an order that the said party do furnish such security."

The point is taken by counsel for the applicant that no demand was made in accordance with the rule. A second point is taken that on the authorities the court does not have power to grant the relief under that rule.

With regard to the first of these points, while undoubtedly the party requiring security for costs is required to make the appropriate demand, the failure to make such a demand would only be relevant, in my view, if it transpired that the applicant were prepared to give the security for costs and never had the opportunity to do so by reason of the failure on the part

of the moving party to make the demand. In these circumstances, in my view, the appropriate relief would be to make such order as to costs as the occasion required including the costs of such party attending court. In my view a failure to make a demand of this nature does not invalidate the application.

The second point on this issue arises in the following way. Counsel for the applicant submits that in recent cases, and in particular *Maher v. Phelan* [1996] 1 I.R. 95, Carroll J. held that an order should not be made when the application is based on O. 29, rule 1. Counsel cites the following passage from her judgment at p. 98 in support of that submission:-

> ". . . as the law stands it is not possible to get an order for security for costs against an individual plaintiff resident in the jurisdiction regardless of circumstances. Different considerations apply to companies which are not relevant to consider here . . .
>
> Since an individual litigant, being a plaintiff resident in Ireland cannot be ordered to give security for costs, therefore a plaintiff resident outside Ireland within the E.U. should not be so ordered."

In my view in this and the other cases referred to (including *Proetta v. Neill* [1996] 1 I.R. 100), the basis upon which the claim was made for security for costs was the plaintiff's residence abroad.

The issue before the court was whether the fact that there was a machinery created by the Jurisdiction of Courts and Enforcement of Judgments (European Communities) Act, 1988 and other European Union legislation affected the established practice that security for costs would be granted where, among other matters, the plaintiff resided out of the jurisdiction but in the European Union.

The extracts to which counsel refers in the judgments must, in my view, be read in the context of being applicable to that issue. I do not believe that they support the submission that an application under s. 390 of the Companies Act, 1963, is improperly before the court if brought under O. 29, r. 1 or that the court has no power to make an order under the rule.

The facts in relation to this application are already fully set out in judgments which I have delivered in this case and I extract the following facts as being, in my view, relevant to the present issues.

The applicant has obtained leave to apply to the court by way of judicial review seeking an order that a decision of An Bord Pleanála dated the 11th December, 1996, granting a permission to the notice party to develop a site in the city of Dublin is invalid and should be quashed by way of an order of *certiorari*.

The applicant has also obtained an order granting it leave to apply to the Court by way of judicial review for a declaration that s. 14(8) of the Local Government (Planning and Development) Act, 1976, is repugnant to the Constitution and is void.

The application for leave to seek judicial review was resisted by certain of the respondents and by the notice party on the grounds that the applicant, being a limited liability company limited by guarantee, did not have the *locus standi* necessary to maintain a judicial review application. In the course of my judgment I said that I was satisfied that Mr. Michael Smith and the persons who associated with him were people genuinely committed and concerned to the protection of, *inter alia,* listed buildings in the city of Dublin. Mr. Smith had effectively carried the full weight of the opposition mounted by An Taisce to the granting of the permission and had attended at the hearing of the appeal before An Bord Pleanála.

After An Bord Pleanála gave its decision, An Taisce resolved not to challenge the decision through the courts. Accordingly, Mr. Smith and his associates incorporated the applicant for the purpose of co-ordinating their efforts in advancing their resistance to, what they saw, as the destruction of important listed buildings in the city of Dublin. They used the applicant as the named applicant in these proceedings.

In determining the issue of the *locus standi* of the applicant to maintain the proceedings, I held that, being satisfied of Mr. Smith's *bona fides*, he and his associates should not be shut out simply because they chose to mount their application in the name of a limited company and that this amounted to contravening circumstances upon which the Court should exercise its discretion to allow the application.

It is necessary to summarise the case upon which the applicant will rely in seeking the declaration that s. 14(8) of the Act of 1976 is repugnant to the Constitution and void.

Sub-section (8) of s. 14 provides:-

> "(8) The Board may in determining an appeal under section 26 or 27 of the Principal Act decide to grant a permission or approval even if the proposed development contravenes materially the development plan or any special amenity area order relating to the area of the planning authority to whose decision the appeal relates."

It is submitted that by giving An Bord Pleanála, an un-elected body, these powers the State has set at naught the democratic process and has failed to comply with its constitutional obligations to protect the right of private ownership of external goods.

The grounds upon which the applicant resists the application for security for costs can, I believe, be summarised as follows:-

It is submitted that by obtaining the leave of the court to apply for judicial review, the applicant has established that it has a "substantial case" within the meaning of the Local Government (Planning and Development) Act, 1963, as amended. It submits that this case is one which raises a question of law of public importance and it submits that in these circumstances the court should not, on the authorities, entertain an order for security for costs.

I have considered the Supreme Court authorities in *Midland Bank Ltd. v. Crossley-Cooke* [1969] I.R. 56 and *Fallon v. An Bord Pleanála* [1992] 2 I.R. 380. I consider in the context of the applicant's opposition to the application these are the relevant authorities and in particular that part of the judgment of the Chief Justice where he says at p. 384:-

> "The second mandatory condition, as it were, laid down in that judgment [in *Midland Bank Ltd. v. Crossley-Cooke*] is that the Court should not ordinarily entertain an application for security for costs if it is satisfied that the question at issue in the case is a question of law of public importance. That, therefore, is the next issue that this Court must determine, and I am satisfied that the issue as outlined with regard to the powers of the planning authority under s. 28 of the Act of 1963, and the events that have happened in this case, and in the manner in which the issue arises in this case is not, and could not be characterised as a point of law of public importance. It is a point of law of importance, but so is every point of law arising in any case, but it is peculiarly to deal with and arising from a series of complex facts in this particular case. A simple analogy, which I think is the standard I would be bound to apply, is that if this were a point of law arising of the same character and type, and in the same way on individual facts in a criminal case, there could be no question of giving a certificate under s. 29 of the Courts of Justice Act, 1924, so as to lead to an appeal from the Court of Criminal Appeal to this Court."

I am of the view that while a challenge to the constitutionality of a section which permits An Bord Pleanála to materially contravene a development plan must be regarded as of importance, I am unable to conclude that the point is of such gravity and importance that it transcends the interests and considerations of the parties actually before the court. On the facts of this case I find myself of the same view as the Chief Justice was in *Fallon* that "it is a point of law of importance but so is every point of law arising in any case". The Chief Justice suggests that an analogy

would be whether the question was one which would give rise to the granting of a certificate under s. 29 of the Courts of Justice Act, 1924. I have been unable to discover any statement of principle upon which the Court of Criminal Appeal acts in granting or withholding such a certificate and s. 29 refers only to "a point of law of exceptional public importance", however, in *The People (Attorney General) v. Giles* [1974] I.R. 422, Walsh J. reviews the circumstances in which certificates were granted in the 50 years prior to that hearing. He found that there were only 22. One related to the fundamental question of whether a successful appellant in the Court of Criminal Appeal was entitled to costs; several related to points fundamental to the convictions; one dealt with the question of whether the sentence for murder was a mandatory sentence of penal servitude and another whether the mandatory sentence was death.

I am unable to identify any thread or common strain running through the cases in which the Court of Criminal Appeal granted the certificate, save this: it seems to me that in all cases the law, at the time of granting the certificate, remained in a state of uncertainty and it was in the common good that the law be clarified so as to enable the courts to administer the law not only in the instant case but in future cases.

I see a clear distinction between that situation and the present case. Apart from the applicant asserting that the section is unconstitutional and wishing to make a case to that effect, no uncertainty exists nor has existed. An Bord Pleanála can continue to operate as heretofore without the need for clarification or enlightenment from the court.

There is, in my view, a further factor to be considered in this case. In *Fallon v. An Bord Pleanála* [1992] 2 I.R. 380, the applicant was identified as someone who had been "specifically chosen from a number of people to take the action, in that he was not a mark for costs and had no special material interest in the result of the action or any very special aesthetic or general interest". He was in fact a 28 year old telephonist and receptionist. In the present case counsel for the applicant identified as one of the reasons for the incorporation of the applicant and its use as the applicant, was to avoid the risk of financial ruin to Mr. Smith and his associates, should the application fail. While I felt that the mistake which they made in taking this step, should in justice not prejudice their rights to maintain the claim in the name of the company, I believe that the opportunity now presents itself to them to demonstrate their commitment by providing the necessary funds to support the company's application. For this reason I do not see that an order requiring that provision be made for security for costs will in any way stifle the action. If Mr. Smith and his associates

choose to do so they can finance the company to meet the order I propose to make.

Being satisfied, as I am, that the requirements of the section have been complied with, I propose to make an order requiring that the applicant pay sufficient security for costs of the second respondent and the notice party and I direct that the matter be set down before the Master of the High Court for the purpose of assessing the amount of the costs.

I direct that there will be a stay on all the proceedings in this case until the security is given in accordance with the section.

Solicitor for the applicant: *David Soden.*

Solicitor for the second respondent: *The Chief State Solicitor.*

Solicitors for the notice party: *Arthur Cox.*

Patrick Leonard, Barrister