Village Residents Association Limited, Applicant, v. **An Bord Pleanála** and **McDonald's Restaurants of Ireland Limited** and **Kilkenny Corporation,** Respondents **(No. 2)**
[1999 No. 238 J.R.]

High Court 23rd March, 2000

Practice – Pre-emptive costs order – Security for costs – Criteria for determining application – Whether jurisdiction to make pre-emptive costs order – Rules of the Superior Courts, 1986 (S.I. No. 15), O. 99, r. 1 – Companies Act, 1963 (No. 33), s. 390.

The applicant, a company incorporated by a concerned residents group, sought judicial review of a decision of the first respondent on the basis that the decision did not provide adequate reasons for a material contravention of the development plan for the area.

The second respondent applied to the High Court for an order for security for costs against the applicant pursuant to s. 390 of the Companies Act, 1963.

The applicant applied to the High Court for a pre-emptive costs order *i.e.* that it would not be liable for the costs of the action or the reserved costs of any other party to date.

The applicant argued that certain special circumstances existed for the making of a pre-emptive costs order and resisting a security for costs order, insofar as (a) the matter was one of genuine public interest; (b) the second respondent was acting in concert with the owner of the property in implementing the development; (c) the applicant could show "substantial grounds" for contending the decision was flawed; (d) the second respondent had delayed in bringing the application for security for costs, and; (e) the second respondent's purpose in seeking security for costs was in order to stifle the applicant's legitimate claims.

Held by the High Court (Laffoy J.), making the order for security for costs in favour of the second respondent and refusing the applicant's application for pre-emptive costs, 1, that the court had jurisdiction to make a pre-emptive costs order if the issues raised in the proceedings were a matter of general public importance and if the making of the order would be both in the public interest and in the interest of justice.

Reg. v. Lord Chancelor, Ex p. C.P.A.G. [1999] 1 W.L.R. 347 followed.

2. That the decision to award costs was in the discretion of the court and could be dealt with at any stage in the proceedings even though the proceedings had not been concluded.

3. That, in considering whether a matter was in the public interest, the court had to have regard to whether it raised a question of general public importance in which no party had a private interest and that having had an opportunity to consider the merits of the case following short argument in the course of the application, the court considered it was in the public interest to make the order having regard to the financial resources of the parties, the amount of costs to be ordered and whether the paying party had a superior capacity to bear the burden of those costs.

Lancefort Ltd. v. An Bord Pleanála (No. 2) [1999] 2 I.R. 270 considered.

4. That compliance with the statutory ground that there must be "substantial grounds" for seeking to impugn a decision as invalid did not constitute a special

circumstance for the purpose of resisting a security for costs order. Moreover, the strength or otherwise of a party's case was not an appropriate consideration on an application for security for costs, unless the case of the applicant was unanswerable in which case security should be refused.

Comhlucht Páipéar Ríomhaireachta Teo. v. Udarás na Gaeltachta [1990] 1 I.R. 320; *Lismore Homes Ltd. (in receivership) v. Bank of Ireland Finance Ltd.* [1999] 1 I.R. 501 followed.

Cases mentioned in this report:-

Blakeston Ltd. v. Kennedy (Unreported, High Court, Morris J., 18th October, 1995).

Comhlucht Páipéar Ríomhaireachta Teo. v. Udarás na Gaeltachta [1990] 1 I.R. 320; [1990] I.L.R.M. 266.

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

Lancefort Ltd. v. An Bord Pleanála (No. 1) [1998] 2 I.R. 511.

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

Lismore Homes Ltd. (in receivership) v. Bank of Ireland Finance Ltd. [1999] 1 I.R. 501.

McDonald v. Horn [1995] 1 All E.R. 961; [1995] I.C.R. 685.

Oakes v. Lynch (Unreported, Supreme Court, 27th November, 1953).

Reg. v. Lord Chancellor, Ex p. C.P.A.G. [1999] 1 W.L.R. 347; [1998] 2 All E.R. 755.

S.E.E. Co. Ltd. v. Public Lighting Services Ltd. [1987] I.L.R.M. 255.

State (Fitzgerald) v. An Bord Pleanála [1985] I.L.R.M. 117.

Village Residents Association Ltd. v. An Bord Pleanála (No. 1) [2000] 1 I.R. 65; [2000] 2 I.L.R.M. 59.

Motion on notice.

The facts of the case, together with the reliefs sought, have been summarised in the headnote and are fully set out in the judgment of Laffoy J., *infra.*

On the 5th November, 1999, the applicant was given leave by the High Court (Geoghegan J.) to apply by way of judicial review for various reliefs in respect of the first respondent's decision of the 30th April, 1999.

By notice of motion dated the 29th November, 1999, the second respondent sought security for the costs of opposing the applicant's application.

By notice of motion dated the 1st February, 2000, the applicant sought a pre-emptive costs order against the first and second respondents.

Both motions were heard by the High Court (Laffoy J.) on the 15th and 16th March, 2000.

Patrick Treacy (with him *David Hardiman S.C.*) for the applicant.

Nuala Butler for the respondent.

Garrett Simons (with him *Michael Collins S.C.*) for the second respondent.

Cur. adv. vult.

Laffoy J. 23rd March, 2000

Factual background

On the 30th April, 1999, the first respondent, on an appeal by the second respondent against a decision of the notice party to refuse permission for development comprising a change of use of part of the ground floor of existing premises from a hotel facility to a restaurant with drive-through facility for the sale of hot food for consumption off the premises and other alterations and associated site works at premises adjoining the Village Inn, Upper Patrick Street, Kilkenny, decided to grant permission for the said development subject to conditions.

The applicant was incorporated on the 24th June, 1999, as a company limited by guarantee not having a share capital under the Companies Acts, 1963 to 1990, with the primary object of representing interested members of the community of the Village in the city of Kilkenny in the preservation and protection, improvement of the amenities and environment in the locality and taking such legal or other actions as might be considered necessary or desirable to support such interests. The applicant has approximately 150 members, some of whom are residents of the Village and others of whom are teachers in or parents of children attending two schools in the locality and concerned citizens.

These proceedings were initiated by notice of motion dated the 25th June, 1999, wherein the applicant sought leave to apply by way of judicial review for various reliefs, including an order of *certiorari* of the decision of the first respondent made on the 30th April, 1999. The application for leave was heard in this court by Geoghegan J. over three days in October, 1999. During the hearing the second respondent challenged the *locus standi* of the applicant. By order dated the 11th November, 1999, the applicant was granted leave to apply for an order of *certiorari* quashing the decision of the first respondent of the 30th April, 1999, on one only of the ten grounds advanced by the applicant, that is to say, that the first respon-

dent did not give adequate reasons for granting the permission in that the reasons as given did not provide an explanation or at least an adequate explanation as to why the first respondent made a decision which it was alleged constituted a material contravention of the development plan.

On the 12th November, 1999, the second respondent's solicitors wrote to the applicant's solicitors seeking an undertaking that the applicant would furnish to the second respondent security for costs. No such undertaking was forthcoming.

The freehold owner of the premises at the Village Inn, the subject of the decision of the 30th April, 1999, Denis Treacy, is not a party to these proceedings. The applicant has not at any time sought a direction from the court that the grant of leave should operate as a stay of the decision of the 30th April, 1999, under O. 84, r. 20(7) of the Rules of the Superior Courts, 1986, nor has the applicant sought injunctive relief to restrain the implementation of the development to which that decision relates. On the 23rd February, 2000, Mr. Treacy notified the applicant and the second respondent that he was proceeding to develop his property in accordance with the decision of the 30th April, 1999. That work commenced on the 6th March, 2000.

The applications

There are two applications before the court.

The first is the application of the second respondent, on foot of a notice of motion dated the 29th November, 1999, seeking an order pursuant to s. 390 of the Companies Act, 1963, that the applicant should provide security for the second respondent's costs in opposing these proceedings.

The second is the applicant's application on foot of a notice of motion dated the 1st February, 2000, seeking orders in the following terms:-

(1) what has been referred to by counsel as a pre-emptive costs order, that is to say, an order directing that the applicant shall not be liable for the costs of any other party to these proceedings as may arise, or for the reserved costs of any such party as have arisen in the proceedings to date;
(2) an order directing that the applicant shall not have to furnish security for costs of any other party to the proceedings; and
(3) an order granting such costs as have arisen in the proceedings to date in favour of the applicant as against the first and second respondents jointly and severally.

The order in which I propose considering the issues which arise on the applications is as follows. First, I propose considering whether the applicant is entitled to a pre-emptive costs order. This issue arises between the

applicant, on the one hand, and the first and second respondents, on the other hand. Secondly, I will consider whether the applicant should be required to give the second respondent security for its costs. Only the second respondent and the applicant are concerned with this issue. Finally, I will consider whether an order should be made at this juncture in relation to the reserved costs of the previous stage of the proceedings. In this connection, there has been only one order in these proceedings, the order of the 11th November, 1999, on the applicant's motion for leave and in that order the question of costs was reserved. Counsel for the applicant made it clear that despite the terms in which the relief in respect of the reserved costs was sought in the notice of motion, his application was directed against the second respondent only and would arise only if the second respondent were given security for costs.

Before addressing the issues, I propose considering the judgment delivered by Geoghegan J. on the 5th November, 1999, on the application for leave insofar as it is germane to the issues.

Judgment of Geoghegan J.

Setting out the background to the *locus standi* challenge, Geoghegan J. stated as follows in *Village Residents Association Ltd. v. An Bord Pleanála (No. 1)* [2000] 1 I.R. 65 at p. 68:-

> "The members of the company are local people including the principals of two schools who oppose the permission. Although none of the members of the company were official objectors before the first respondent, two of them who were prime movers in the establishment of the company did lodge objections which were one day late and were therefore not accepted. It is suggested that I should draw an inference that the sole purpose of the application being made in the name of this company is to avoid the effects of an expensive costs order if the application was unsuccessful. Although it is conceded that there would probably be good grounds for making an order for security for costs, it is suggested that traditionally the security for costs represents only about one-third of the full costs."

Later, at p. 71, Geoghegan J. stated that he had come to the conclusion that, on the principles enunciated by Keane J., as he then was, in his judgment in the Supreme Court appeal in *Lancefort Limited v. An Bord Pleanála (No. 2)* [1999] 2 I.R. 270, the applicant does have sufficient *locus standi*. He then went on to say at p. 72:-

> "I am being asked by counsel for the second respondent to infer that the sole purpose for which the applicant company was formed after the decision of the board was as I indicated earlier on in this judg-

ment for the purpose of avoiding costs liability and that even though security for costs might be given that would probably only be on the basis of one-third of the full costs. I have no doubt that there may have been mixed motives but I do not think that I should draw any such inference. Clearly the company in its membership consists of a number of people genuinely concerned about the permission and it is unwieldy and unwise to try and mount litigation in the name of or on behalf of an unincorporated association. It would seem to me that it would have been sensible that a company should be formed quite independently of any costs saving consideration. Furthermore, I do not think that I should pay any attention to the argument based on the practice of the Master of the High Court in fixing security for costs. It may well be that the Master would in fact fix adequate security or alternatively if he applied some rigid rule of practice to the contrary, the first or second respondent might be entitled to appeal that decision. At any rate, I do not think there is an invariable practice that the security is confined to one-third of the costs. But if this is a problem, it is a problem to be resolved at the stage of the application for security for costs and it is not a ground for this court holding that the applicant has no *locus standi* unless the court was to find that as a matter of probability there was nothing but an abuse of the process here in forming the company and in naming the company as the applicant.

The concerns of the members of the applicant company which is a company limited by guarantee would give them as individuals a sufficient interest to bring judicial review proceedings and in the circumstances it is appropriate to lift the corporate veil and regard the company which has been formed only for the particular purpose as having the sufficient interest."

As to the ground on which leave was granted, Geoghegan J. summarised his views at p. 70 as follows:-

"It seems to me that the applicant has crossed the threshold necessary to get leave. There is a substantial argument to be made that take-aways of all kinds were prohibited by the development plan particularly having regard to the planning history and to the notice party's [Kilkenny Corporation's] own interpretation more than once of its own plan including its interpretation of it in this instance. Clearly the notice party [Kilkenny Corporation] itself considered that its plan applied to restaurants with take-away facilities as well as to exclusive take-aways. If the applicant were to succeed in that argument it would have substantial grounds for further arguing that the decision of the first respondent constituted a material contravention of the plan. Again, if the applicant were successful in both arguments there are in my view sub-

stantial grounds for arguing that in cases where a planning authority invokes its power under s. 14(8) of the Act of 1976, it should include its reasons for doing so as part of its reasons for granting planning permission."

Pre-emptive costs order

I understand that this is the first time an order of this nature has been formally sought in this jurisdiction.

It was submitted on behalf of the applicant that the court has jurisdiction to make what has been referred to as a pre-emptive costs order or a protective costs order analogous to the jurisdiction vested in the English High Court which was recognised by Dyson J. in *Reg. v. Lord Chancellor, ex p., C.P.A.G.* [1999] 1 W.L.R. 347 and that this is an appropriate case in which to make an order pre-empting the making of an order for costs against the applicant in favour of any other party at a later stage in these proceedings.

As the only authority referred to, it is necessary to consider *Reg. v. Lord Chancellor, ex p., C.P.A.G.* [1999] 1 W.L.R. 347 in some depth. Dyson J. was there dealing with two separate and distinct applications for pre-emptive costs orders.

The first was sought by the Child Poverty Action Group, a registered charity, the objects of which included the promotion of action for the relief of poverty among children and families with children. It engaged in test case work in the area of welfare benefits law and supported cases before social security commissioners and in the courts. The judicial review proceedings in which the pre-emptive costs order was sought challenged a decision of the Lord Chancellor refusing to exercise his power under s. 14 of the Legal Aid Act, 1988, to extend legal aid to at least some cases before social security tribunals and commissioners. Leave was granted.

There were two applicants for pre-emptive costs orders in the other judicial review proceedings, Amnesty International U.K. and the Redress Trust, two international human rights organisations, whose objects include the abolition of torture and who were concerned with the enforcement of the laws relating to weapons of torture. The decision challenged by them in the substantive proceedings was a decision of the Director of Public Prosecutions not to prosecute two individuals for possession of an electro-shock baton without a licence, a strict liability offence under the Firearms Act, 1968. Leave was granted.

The order sought by the respective applicants in each of the judicial review proceedings was that no order as to costs be made against it or them whatever the ultimate outcome of the relevant substantive proceedings. It

was common case that the court had jurisdiction to make such orders at an interlocutory stage in the proceedings. In his judgment, Dyson J. explained that the jurisdiction was based on -

(a) s. 51 of the Supreme Court Act, 1981, which provides that, subject to the provisions thereof or any other enactment and to the rules of court, the costs of and incidental to all proceedings shall be at the discretion of the court and the court shall have full power to determine by whom and to what extent the costs shall be paid, and

(b) O. 62, r. 3(3) of the Rules of the Supreme Court in force in England and Wales which provides that, if the court in the exercise of its discretion sees fit to make any order as to costs of any proceedings, the court shall order the costs to follow the event, except where it appears to the court that in all the circumstances of the case some other order should be made as to the whole or any part of the costs.

Dyson J. acknowledged that there was a distinction to be made between ordinary private law litigation, on the one hand, and what he called "public interest challenges", on the other hand. In relation to the former he quoted a passage from the judgment of Hoffman L.J. in *McDonald v. Horn* [1995] 1 All E.R. 961 at p. 969 to the effect that the general rule that costs follow the event is a formidable obstacle to any pre-emptive costs order as between adverse parties in ordinary litigation, it being difficult to imagine a case falling within the general principle in which it would be possible for a court properly to exercise its discretion in advance of the substantive decision.

Having concluded that there was jurisdiction to make a pre-emptive costs order in a case involving a public interest challenge, Dyson J. went on to explain his understanding of the concept of a public interest challenge in the following passage at p. 353:-

> "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 interest of his or her own".

Dyson J. later stated that the discretion to make pre-emptive costs orders even in cases involving public interest challenges should be exercised only in the most exceptional circumstances and he set out his conclusions as to the necessary conditions for the making of such orders in the following passage at p. 358:-

> "I conclude, therefore, that the necessary conditions for the making of a pre-emptive costs order in public interest challenge cases are that the court is satisfied that the issues raised are truly ones of general public importance, and that it has a sufficient appreciation of the merits of the claim that it can conclude that it is in the public interest to make the order. Unless the court can be so satisfied by short argument, it is unlikely to make the order in any event. Otherwise, there is a real risk that such applications would lead, in effect, to dress rehearsals of the substantive applications, which in my view would be undesirable. These necessary conditions are not, however, sufficient for the making of an order. The court must also have regard to the financial resources of the applicant and respondent, and the amount of costs likely to be in issue. It will be more likely to make an order where the respondent clearly has a superior capacity to bear the costs of the proceedings than the applicant, and where it is satisfied that, unless the order is made, the applicant will probably discontinue the proceedings, and will be acting reasonably in so doing."

In applying the foregoing criteria to the applications before him, Dyson J. concluded that it had not been established on either application that the necessary conditions were fulfilled.

As to whether in an appropriate case this court has jurisdiction to make a pre-emptive costs order, I did not understand either counsel for the first respondent or counsel for the second respondent to contend that no such jurisdiction exists. Indeed, counsel on behalf of the applicant urged that the position is much more clear cut in this jurisdiction than in England and Wales because of the existence of O. 99, r. 5 of the Rules of 1986. In my view, the jurisdiction does exist. Section 14 of the Courts (Supplemental Provisions) Act, 1961, provides that the jurisdiction vested in and exercisable by this court is to be exercised so far as regards pleading, practice and procedure generally, including liability to costs, in the manner provided by the rules of court in force when the Act of 1961 came into operation. As far back as 1905, if not further back in time, the rules have provided that costs were in the discretion of the court and that the general rule was that costs would follow the event unless a court should for special cause shown and mentioned in the order otherwise direct (see O. 65, r. 1 of the Rules of the Supreme Court (Ireland), 1905). The position under the Rules of 1986 is that O. 99, r. 1(1) provides that the costs of and incidental to every proceeding in the superior courts shall be in the discretion of those courts respectively. The general rule reflected in sub-rr. (3) and (4) of r. 1 is that, unless otherwise ordered, costs follow the event. Rule 5 provides that costs may be dealt with by the court at any stage of the proceedings or after the conclusion of the proceedings and that an order for the payment of costs

may require the costs to be paid forthwith, notwithstanding that the proceedings have not been concluded.

While I am satisfied that the court has jurisdiction in an appropriate case to deal with costs at an interlocutory stage in a manner which ensures that a particular party will not be faced with an order for costs against him at the conclusion of the proceedings, it is difficult in the abstract to identify the type or types of cases in which the interests of justice would require the court to deal with the costs issue in such a manner and it would be unwise to attempt to do so. For the reasons adumbrated in the passage from the judgment of Hoffman L. J. quoted by Dyson J. in *Reg. v. Lord Chancellor, ex p., C.P.A.G.* [1999] 1 W.L.R. 347, I cannot envisage such an approach to a costs issue having any place in ordinary *inter partes* civil litigation. As a broad proposition the principles enunciated by Dyson J. - confining the possibility of making such orders to cases involving public interest challenges, as Dyson J. explained the concept of a public interest challenge, and requiring that the issues raised on the challenge be of general public importance and that at the stage at which it is asked to make the order the court should have a sufficient appreciation of the merits of the claim to conclude that it is in the public interest to make the order - would seem to meet the fundamental rubric that the interests of justice should require that the order be made. Having said that, it maybe that in a particular type of case other factors may come into play. For instance, in judicial review proceedings challenging the validity of a decision of An Bord Pleanála or of a planning authority which has no private, as opposed to public, ramifications and, therefore, where what is at issue is a true public interest issue of general importance, perhaps a heritage protection issue or an environmental issue, it might well be that there would exist policy considerations reflected in legislation which the courts would have to have regard to. The observations of Keane J., as he then was, on the question of *locus standi* in *Lancefort Ltd. v. An Bord Pleanála (No. 2)* [1999] 2 I.R. 270, highlight the multiplicity of factors and considerations which might arise and, for my part, are sufficient to discourage any generalisation as to the circumstances in which it would be appropriate to make a pre-emptive costs order.

In any event, I am satisfied that this case meets none of the criteria laid down by Dyson J. and, moreover, that the interests of justice do not require that the order sought by the applicant be made. First, the challenge here is not a public law challenge in the sense that that concept was explained by Dyson J. The members of the company clearly have a private interest in the outcome of the application. Secondly, I am not satisfied that the ground on which the applicant was granted leave raises an issue of general public importance. Within the framework of the planning code as it existed on the

30th April, 1999, whether the first respondent was obliged to ascribe reasons for overturning a refusal by a planning authority to grant permission on the ground that it would materially contravene the development plan would have raised an issue of general public importance. However, as the passage from the judgment of Geoghegan J., which I have quoted earlier illustrates, there are a number of controversies to be disposed of before that issue is reached in the instant case, controversies in relation to the proper construction of the development plan and whether the decision of the first respondent was in material contravention thereof. In my view, the issue of general public importance is not sufficiently immediate to justify a pre-emptive costs order. Thirdly, I am not satisfied that I have sufficient appreciation of the merits of the application to conclude that it would be in the public interest to make a pre-emptive costs order. That on the application for leave the applicant satisfied the "substantial grounds" test is not on its own, a circumstance from which one can conclude that it is in the public interest to insulate the applicant against a future order for costs without awaiting the outcome of the applicant's challenge. Fourthly, the applicant seeks a pre-emptive costs order against a non-public body, the second respondent, which is a private company. Of all litigants embroiled in an issue as to whether the first respondent should give reasons for materially contravening a development plan, why should the second respondent be penalised in costs? In my view, there is no valid reason and it would fly in the face of justice to make such an order.

In my view, there is nothing exceptional about the applicant's case. In fact, it is no different from most applications for judicial review of planning decisions. The applicant has not established any basis for holding that it has an entitlement to a pre-emptive costs order either against the first or second respondents.

Security for costs

There is no discernible dispute as to the criteria by which the court normally determines whether a plaintiff should be required to give security for costs to a defendant under s. 390 of the Companies Act, 1963. It is not in dispute that where, as here, it is conceded by the applicant that it would in all probability not be able to discharge an order for costs made against it at the conclusion of the proceedings, there remains a discretion in the court which may be exercised in special circumstances but the onus is on the party attempting to resist the order for security to establish that the special circumstances exist.

Before considering the special circumstances contended for by counsel on behalf of the applicant, it is necessary to consider an argument advanced

on behalf of the second respondent, which is peculiar to this type of proceeding, where the standing of the plaintiff or applicant has been put in issue at an interlocutory stage. Counsel for the second respondent submitted that in this type of case the provision of security for costs may be a *quid pro quo* for affording *locus standi*. In *Lancefort Ltd. v. An Bord Pleanála (No. 2)* [1999] 2 I.R. 270, in which the factual matrix in which the issue of standing arose was very similar to the factual matrix in which it has arisen in this case - the applicant being a limited liability company incorporated subsequent to the making of the decision sought to be impugned - in delivering the majority judgment in the Supreme Court, Keane J., as he then was, stated as follows at p. 317:-

> "It is, understandably, a matter of concern that companies of this nature can be formed simply to afford residents' associations and other objectors immunity against the costs of legal challenges to the granting of planning permissions. Our law, however, recognises the right of persons associating together for non-profit making or charitable activities to incorporate themselves as limited companies and the fact that they have chosen so to do should not of itself deprive them in every case of *locus standi*. While shielding the members against an order for costs in the event of the company becoming involved in litigation may well be a consequence of limited liability, it is not necessarily the only reason why citizens concerned with issues as to the environment may decide to incorporate themselves as a company. It must also be remembered that, in the case of such a company, the High Court may order security for costs to be provided under s. 390 of the Companies Act, 1963, as indeed happened in this case."

In my view, it is quite clear from the foregoing passage that the existence of a mechanism for obtaining security for costs is a factor to which regard may be had in considering a *locus standi* challenge in a case such as this. It was obviously a factor Geoghegan J. was invited to have regard to on the application for leave in the instant case, although I infer from his judgment that it was to the perceived frailties of the mechanism that his attention was directed. At any rate, it is clear from the second passage of his judgment which I have quoted earlier that it was a factor he had regard to and that he envisaged that an application such as the application now before the court might be made.

In delivering judgment on the application for security for costs in *Lancefort Ltd. v. An Bord Pleanála* [1998] 2 I.R. 511, Morris J., as he then was, stated at p. 517 that the application for security presented an opportunity to the promoters of Lancefort to demonstrate their commitment by providing the necessary funds to support the company's application. In my view, when the court is invited on a challenge to standing to infer that

objectors to planning decisions have clothed themselves with limited liability for the less than pure motive of conferring immunity against costs on themselves and the challenge is successfully resisted, on a subsequent attempt to resist an application for security for costs by the company the *bona fides* of the members of the company requires cautious consideration.

Turning now to the special circumstances contended for by the applicant, my observations are as follows:-

(a) *Issue of genuine public importance*

It is well settled that the Supreme Court should not ordinarily entertain an application for security for costs on an appeal to that court if it is satisfied that the question at issue in the case is a question of law of public importance (*per* Finlay C.J. in *Fallon v. An Bord Pleanála* [1992] 2.I.R. 380 at p. 384). There is certainly a parallel between a substantive application for judicial review of a decision of a planning authority or the first respondent, where the issues have been distilled on the application for leave and the "substantial grounds" threshold has had to be overcome by the applicant, and an appeal from the High Court to the Supreme Court in this context of the entitlement to security for costs from the moving party. I am of the view that it is appropriate in this case to consider whether a question of law of public importance exists, as Morris J., as he then was, did on the application for security in *Lancefort Ltd. v. An Bord Pleanála* [1998] 2 I.R. 511. However, for the reasons outlined earlier for rejecting the applicant's contention that this case raises an issue of general public importance, I consider that it does not raise a question of law of public importance. For the same reasons I am of the view that the criteria for determining whether a question of law of public importance exists which can be extrapolated from the judgment of Morris J. in *Lancefort Ltd. v. An Bord Pleanála* [1998] 2 I.R. 511 - whether the point is of such gravity and importance as to transcend the interests of the parties actually before the court and whether it is in the interests of the common good that the law be clarified so as to enable it to be administered not only in the instant case but in future cases also - are not met.

(b) *Lack of bona fides on the part of the second respondent*

The court was invited to infer from the evidence that the second respondent is acting in concert with the owner, Mr. Treacy, in implementing the development to which the decision of the 30th April, 1999, relates. Having regard to the state of the evidence, which is affidavit evidence, in my view it would not be appropriate to draw that inference. In any event, the implementation of the development could not fundamentally undermine the jurisdiction of the court, as asserted by the applicant, because, as

has been held by the Supreme Court in the *State (Fitzgerald) v. An Bord Pleanála* [1985] I.L.R.M 117, in considering an application for retention permission a planning authority is not entitled to include in its consideration the degree of injury involved in the removal of a structure unlawfully erected. Moreover, it is open to the applicant to pursue an alternative remedy to halt the development: to seek to join Mr. Treacy in the proceedings and apply for a stay under O. 84 or to seek injunctive relief. I do not consider that the implementation of the development by Mr. Treacy is a ground for refusing the second respondent's application for security, nor do I find any conduct on the part of the second respondent which would preclude the giving of security.

(c) *"Substantial grounds" established by the applicant.*

The establishment of "substantial grounds" for contending that the decision of the 30th April, 1999, is invalid is a statutory requirement in this and in every similar case; in order to proceed to a substantive hearing, an applicant has to overcome this threshold. Complying with the statutory requirement cannot constitute a special circumstance. In any event, it is well settled that the strength or otherwise of a party's case is not an appropriate consideration on an application for security for costs, unless the case of the applicant is unanswerable in which circumstance security should be refused (*per* Barron J. in *Lismore Homes Ltd. (in receivership) v. Bank of Ireland Finance Ltd.* [1999] 1 I.R. 501 at p. 530, citing the decision of the Supreme Court in *Comhlucht Páipéar Ríomhaireachtha Teo v. Udarás na Gaeltachta* [1990] 1 I.R. 320.)

(d) *Delay.*

As a matter of fact, in my view, there has been no delay on the part of the second respondent in bringing the application for security. The initiating letter was despatched on the day immediately following the order of Geoghegan J. granting leave. I do not think that the second respondent can be faulted for, as it were, giving the applicant an initial free run, in the sense of not requiring to see the colour of the applicant's money on the application for leave. The relevance of delay on the part of a party seeking security for costs was explained in the following passage from the judgment of Morris J., as he then was, in *Blakeston Ltd. v. Kennedy* (Unreported, High Court, 18th October, 1995):-

> "The principle upon which the court should approach this aspect of the case has been dealt with in *Oakes v. Lynch* (Unreported, Supreme Court, 27th November, 1953) and *S.E.E. Company v. Public Lighting Services* [1987] I.L.R.M 255 and, as I understand the principle, it is this: If the party seeking security has delayed to such an extent

> as to commit the other party to an amount and a level of costs which it would never have become committed to had it known that it was to be required to provide security for costs and thereby altered its position to its detriment, then the court will not make the order. In *S.E.E. Company v. Public Lighting Services*, McCarthy J. considered that a delay of approximately seven months was excessive. However, a significant feature in that case was that during that seven month period the costs of preparing the transcript had been incurred."

There is no evidence here that the applicant altered its position to its detriment by reason of the application for security not having been made at the leave stage. As I have indicated, the costs of the application for leave have been reserved. The costs and expenses incurred by the applicant on the leave application cannot be regarded as nugatory expenditure in that the applicant got a result, in the sense that the applicant can proceed to a substantive hearing.

(e) *Second respondent's purpose - to stifle the applicant's claim*

The final ground on which it is alleged by the applicant that an order for security for costs should not be granted is that the true purpose of the second respondent in seeking security is to stifle the applicant's legitimate claim. Having rejected all of the other special circumstances contended for by the applicant, having regard to the facts of this case, I cannot see how this ground, on its own, could justify refusing the second respondent's application. It is quite clear that the impetus for the incorporation of the applicant, and I think it is reasonable to infer that its immediate sole *raison d'etre* was to constitute a vehicle for bringing these proceedings. By its very nature, the applicant can have no assets or finances other than those its members put into it or procure for it. Insofar as there are costs and expenses involved in prosecuting these proceedings (and, even if its own legal team is prepared to act on a *pro bono publico* basis, there will still be court fees and other costs of a like nature to be met), these costs and expenses must be funded by the members and, presumably, they are doing so voluntarily. By the same token, any costs and expenditure which the applicant has to assume involuntarily must be funded by the members. I respectfully agree with the views expressed by Morris J., as he then was, in the following passage from his judgment on *Lancefort Ltd. v. An Bord Pleanála* [1998] 2 I.R. 511 at p. 517, which I have already partly alluded to:-

> "… I believe that the opportunity now presents itself to [Mr. Smith and his associates] 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."

If an order for security for costs is made in the instant case the judicial review proceedings will only come to a halt if the members choose not to finance the applicant to enable it to give security.

I am satisfied that no special circumstance has been established by the applicant and that the second respondent is entitled to an order pursuant to s. 390 of the Act of 1963 that the applicant should provide security for the second respondent's costs of opposing the proceedings. The amount of the security will be quantified by the Master. There will be an order staying all further proceedings pending the giving of security.

Reserved costs

In reserving the question of costs in relation to the application for leave, Geoghegan J. was reserving or postponing the imposition of the burden of the costs for determination later either by agreement of the parties or by the judge trying the substantive application. In my view, in the absence of an express statutory provision or a rule of court (for example, O. 70, r. 75 of the Rules of the Superior Courts, 1986 relating to matrimonial causes or matters), in the absence of agreement, a judge of this court has no jurisdiction on an interlocutory application to determine where the burden of costs reserved on an earlier interlocutory application should lie. In any event, in the instant case, on the basis of my current appreciation of the merits of the case, even if I had jurisdiction, I would be unable to decide the issue of the costs of the application for leave. In the circumstances, I will make no order in relation to the reserved costs.

Order

As I have indicated, there will be an order for security on the second respondent's application and the applicant's application will be dismissed.

Solicitors for the applicant: *Michael J. Lanigan.*

Solicitors for the first respondent: *T.T.L. Overrend McCarron.*

Solicitors for the second respondent: *McCann Fitzgerald.*

Maeve Boyle, Barrister