[2011] IEHC 488

The High Court
Commercial
Judicial Review
2011 No 434 JR

In the Matter of an Application pursuant to Section 50 of the Planning and Development Acts, 2000-2010

Between

JC Savage Supermarket Limited and Des Becton

Applicants

-and-

An Bord Pleanála

Respondent

-and-

Fingal County Council, Lidl Ireland GmbH, Teresa Crothers, Patrick Hughes, Noleen Hughes, Christopher Sheridan, Jacinta Sheridan and Maeve Slattery

Notice Parties

Judgment of Mr Justice Charleton delivered on the 22nd day of November 2011

1.0 This application by a notice party for costs in a judicial review application that has been withdrawn hinges on s.50B of the Planning and Development Act 2000, as amended. In turn, how that is to be applied by this Court depends upon the principles of statutory interpretation.

Background

1.1 On the 11th of April 2011, An Bord Pleanála granted planning permission on appeal to the notice party Lidl Ireland GmbH ("Lidl") for the development of a supermarket, of a kind with which we are all increasingly familiar, at Rathbeale Road, Swords, County Dublin. The applicants, who are a neighbour and the owner of a nearby existing supermarket, commenced judicial review proceedings claiming that this decision was beyond the powers of the Board. The focus of the judicial review was on the condition attached to the permission which required a revised car park layout and a revised landscaping scheme to be "agreed in writing with the planning authority prior to commencement of development." Section 34(5) of the Planning and Development Act 2000 as amended ("the Act of 2000"), allows a condition that points of detail relating to the grant of a planning permission be agreed between the planning authority and the person carrying out the development. It might be commented that the point at issue in the case was always going to be difficult to bring home.

1.2 Leave to commence proceedings was given by Peart J. on the 30th of May; on the 11th of July the case was admitted to the commercial list by order of Kelly J.; Lidl, as notice party, filed opposition papers

on the 14th of July; the Board did likewise on the 8th of August; all affidavits were to be completed by the first week in August; and on the 9th of September the solicitors for the applicants wrote to the other parties indicating that they were withdrawing the case. A trial date had already been scheduled for the case and set for October 25th. On receiving that letter, the Board as respondent did not seek costs or any other order apart from the striking out of the case. Lidl took a different view as notice party. Lidl seeks its costs pursuant to Order 99 rule 1 of the Rules of the Superior Courts which provides that costs should follow the event, in this case a dismissal of the proceedings by consent, absent a special reason to the contrary which must be stated in the court order. The applicants counter argue that this rule does not apply by virtue of a particular amendment of the Act of 2000; and they further claim that even if it does that costs should be limited to opposition papers and should not extend to the trial costs.

Amendment as to costs

2.0 The original form of s. 50 of the Act of 2000 has been subject to many amendments. As originally cast, it provided for the swift disposal by way of judicial review of challenges to planning decisions and said nothing about costs. On amendment by s. 12 of the Planning and Development (Amendment) Act 2002, slight changes to the original wording were made which are not relevant here and nothing was done as to costs. With the Planning and Development (Strategic Infrastructure) Act 2006 ("the Act of 2006"), there was a tightening of the conditions for application, a requirement that every step be challenged in time, and not just the ultimate decision, and the time limit wording was altered; see *Mac Mahon v An Bord Pleanála* [2010] IEHC 431 (Unreported, High Court, Charleton J, 8 December 2010). It is to be noted that this change was generally applied to all planning procedures and not just to the gas and electricity strategic infrastructure projects which are at the core of the legislation through the incorporation of new sections 182 A, B, C and D with ancillary changes into the original legislation by s. 4 of the Act of 2006. Again, there was no provision as to costs. By s. 33 of the Planning and Development (Amendment) Act 2010 a new section was inserted that for the first time established special rules for costs in particular cases. This is the new s. 50B of the Act of 2000. It is necessary to quote the section in full:-

> "(1) This section applies to proceedings of the following kinds:
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> (a) proceedings in the High Court by way of judicial review, or of seeking leave to apply for judicial review, of—
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> (i) any decision or purported decision made or purportedly made,
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> (ii) any action taken or purportedly taken, or
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> (iii) any failure to take any action,
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> pursuant to a law of the State that gives effect to—
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> (I) a provision of Council Directive 85/337/EEC of 27 June 1985 to which Article 10a (inserted by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directive 85/337/EEC and 96/61/EC) of that Council Directive applies,
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> (II) Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment, or
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> (III) a provision of Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control to which Article 16 of that Directive applies; or

(b) an appeal (including an appeal by way of case stated) to the Supreme Court from a decision of the High Court in a proceeding referred to in paragraph (a);

(c) proceedings in the High Court or the Supreme Court for interim or interlocutory relief in relation to a proceeding referred to in paragraph (a) or (b).

(2) Notwithstanding anything contained in Order 99 of the Rules of the Superior Courts and subject to subsections (3) and (4), in proceedings to which this section applies, each party (including any notice party) shall bear its own costs.

(3) The Court may award costs against a party in proceedings to which this section applies if the Court considers it appropriate to do so—

(a) because the Court considers that a claim or counterclaim by the party is frivolous or vexatious,

(b) because of the manner in which the party has conducted the proceedings, or

(c) where the party is in contempt of the Court.

(4) Subsection (2) does not affect the Court's entitlement to award costs in favour of a party in a matter of exceptional public importance and where in the special circumstances of the case it is in the interests of justice to do so.

(5) In this section a reference to 'the Court' shall be construed as, in relation to particular proceedings to which this section applies, a reference to the High Court or the Supreme Court, as may be appropriate".

2.1 This new section was necessitated by Ireland's obligations under European law. In particular, Article 10a of Council Directive of 27 June 1985
on the assessment of the effects of certain public and private projects on the environment (85/337/EEC) as inserted by Article 7 of Council Directive of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice. Article 10a provides:-

"Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned:
(a) having a sufficient interest, or alternatively,
(b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition,
have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive.

Member States shall determine at what stage the decisions, acts or omissions may be challenged.

What constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice. To this end, the interest of any non-governmental organisation meeting the requirements referred to in Article 1(2), shall be deemed sufficient for the purpose of subparagraph (a) of this Article. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) of this Article.

The provisions of this Article shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of

administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

Any such procedure shall be fair, equitable, timely and not prohibitively expensive.

In order to further the effectiveness of the provisions of this article, Member States shall ensure that practical information is made available to the public on access to administrative and judicial review procedures".

2.2 Council Directives 85/337/EEC and 96/61/EC (2003/35/EC) thus impose an obligation on the State to provide for swift and cost effective judicial review of development consent decisions to which the Directive applies. Under Article 4.1 of the Directive, projects listed in Annex I must automatically be the subject of an environmental assessment by the deciding authority before development consent is granted. Projects listed under Annex II are, pursuant to Article 4.2, to be decided on a case by case basis. Turning to Annex I, the projects listed include oil refineries, nuclear power stations, major pipeline projects and the larger type of airports. Turning to Annex II, there is nothing there which could encompass the small development that would have been in issue in this case, that of a local supermarket. It is clear from the Directive that the obligation to carry out such an assessment as to the effect on the environment of a proposed development is confined to certain projects, that the obligation arose for the first time in Irish law as a result of the Directive and was expressed nationally in Part X of the Act of 2000, and that it does not apply to ordinary permissions granted in the usual way under s. 34 of that Act. Public notice and public participation through observation are central to environmental assessment under the Directive. The same principles apply to ordinary planning applications which do not require an assessment as to their environmental impact but there the central focus is proper planning and sustainable development. Of course that is at the core of every development application, planning law is pointless without that focus, but it is only in some instances that the further process of assessing the effect of a proposed development arises. Further, it is clear that Article 10a by its own terms within the context of the Directive does not oblige the State to provide for swift and cost-effective remedies by way of judicial review of projects that are not included in Annex I of the Directive or that are incorporated on a case by case basis by the relevant authorities under Annex II.

2.3 The applicants argue that s. 50B of the Act of 2000 is an amplification of what was required under Article 10a of the Directive; that the section provides for more in Irish law than the State's obligations under European law require. In case C-427/07, *Commission v Ireland* 16th July 2009, the European Court of Justice ruled that Article 10a of the Directive was not implemented merely through the ordinary form of judicial discretion in the award, or denial, of costs to a successful party or the exceptional jurisdiction sometimes to award a proportion of costs to an unsuccessful party. This is the ordinary jurisdiction as to costs under Order 99 of the Rules of the Superior Courts. It is of general application to all cases. But the applicants contend that such jurisdiction does apply anymore to planning cases because of s. 50B. In rejecting Ireland's argument that judicial discretion was sufficient as a national measure implementing Article 10a, the Court stated at paragraphs 92-94:-

"92 As regards the fourth argument concerning the costs of proceedings, it is clear from Article 10a of Directive 85/337, inserted by Article 3(7) of Directive 2003/35, and Article 15a of Directive 96/61, inserted by Article 4(4) of Directive 2003/35, that the procedures established in the context of those provisions must not be prohibitively expensive. That covers only the costs arising from participation in such procedures. Such a condition does not prevent the courts from making an order for costs provided that the amount of those costs complies with that requirement.

93 Although it is common ground that the Irish courts may decline to order an unsuccessful party to pay the costs and can, in addition, order expenditure incurred by the unsuccessful party to be borne by the other party, that is merely a discretionary practice on the part of the courts.

94 That mere practice which cannot, by definition, be certain, in the light of the requirements laid down by the settled case-law of the Court, cited in paragraphs 54 and 55 of this judgment, cannot be regarded as valid implementation of the obligations arising from Article 10a of Directive 85/337, inserted by Article 3(7) of Directive 2003/35, and Article 15a of Directive 96/61, inserted by Article 4(4) of Directive 2003/35."

2.4 The applicants assert that the Oireachtas was very careful in amending the Act of 2000 so as to remedy the defect identified in that case and they contend that the law went further and amended the entirety of Irish planning law whereby s. 50B is now the costs provision for every planning judicial review. I note that a further special provision as to costs was introduced by s.3 of the Environment (Miscellaneous Provisions) Act 2011 whereby the default provision as to costs becomes that each party bears its own costs. That applies by s. 4 of the Act of 2011 to enforcement provisions relating to certain licences. This is a special and exceptional provision. The argument for the applicants is that the Act of 2011 did not amend the planning code as to costs because s. 50B had already done so.

2.5 In order to properly deal with these arguments, a short restatement of the principles of statutory construction is necessary.

Statutory interpretation

3. 0 The applicable rules of statutory interpretation may be concisely stated. Since the publication of Dodd, *Statutory Interpretation in Ireland* (Dublin: Tottel Publishing, 2008) access has been usefully given to the leading authorities, from Irish and many other sources, in a most helpful way. Bennion's detailed text *Bennion on Statutory Interpretation* (London: LexisNexis, 5th edn., 2008) is also to be consulted. The first rule of statutory interpretation is that the words of a statute should be given the literal meaning which those words bear; *Health Service Executive v Brookshore Ltd* [2010] I.E.H.C. 165 (High Court, unreported, Charleton J., 19 May 2010). Broom describes the literal approach as follows in *Broom's Legal Maxims* (1st edn., 1845) at p. 268, as cited in *Bennion on Statutory Interpretation* at p. 865:-

> "A court of law will not make any interpretation contrary to the express letter of a statute; for nothing can so well explain the meaning of the makers of the act as their own direct words, *since index animi sermo* (language conveys the intention of the mind), and *maledicta expositio quae corrumpit textum* (an exposition which corrupts the text is bad), it would be dangerous to give scope for making a construction in any case against the express words, where the meaning of the makers is not opposed to them, and when no inconvenience will follow from a literal interpretation".

In *D.B. v. Minister for Health and Children* [2003] 3 I.R. 12, Denham J. said at p. 21:

> "In construing statutes, words should be given their natural and ordinary meaning. The approach taken by the courts to the construction of statutes was described by Blayney J. in *Howard v. Commissioners of Public Works* [1994] 1 I.R. 101. He emphasised that the cardinal rule for the construction of statutes was that they be construed according to the intention expressed in the acts themselves. If the words of the statute are precise and unambiguous then no more is necessary than to give them their ordinary sense. When the words are clear and unambiguous they declare best the intention of the legislature. If the meaning of the statute is not plain, then a court may move on to apply other rules of construction; it is not the role of the court to speculate as to the intention of the legislature. In that case I held also that statutes

should be construed according to the intention expressed in the legislation and that the words used in the statute declare best the intent of the Act".

3.1 In legislation words may be technical in origin or statutes may draw on words which are in common use. Legislation may be directed towards a specialist body or towards the general public. Henchy J. in *Inspector of Taxes v. Kiernan* [1981] I.R. 117 at p. 122 concisely delineated the proper approach to the construction of these various classes of legislation:-

> "The statutory provisions we are concerned with here are plainly addressed to the public generally, rather than to a selected section thereof who might be expected to use words in a specialised sense. Accordingly, the word "cattle" should be given the meaning which an ordinary member of the public would intend it to have when using it ordinarily.
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> Secondly, if a word or expression is used in a statute creating a penal or taxation liability, and there is looseness or ambiguity attaching to it, the word should be construed strictly so as to prevent a fresh imposition of liability from being created unfairly by the use of oblique or slack language: see Lord Esher M.R. in *Tuck & Sons v. Priester* [(1887) 19 Q.B.D. 629] (at p. 638); Lord Reid in *Director of Public Prosecutions v. Ottewell* [[1970] A.C. 642] (at p. 649) and Lord Denning *M.R. in Farrell v. Alexander* [[1975] 3 W.L.R. 642] (at pp. 650-1). As used in the statutory provisions in question here, the word "cattle" calls for such a strict construction.
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> Thirdly, when the word which requires to be given its natural and ordinary meaning is a simple word which has a widespread and unambiguous currency, the judge construing it should draw primarily on his own experience of its use. Dictionaries or other literary sources should be looked at only when alternative meanings, regional usages or other obliquities are shown to cast doubt on the singularity of its ordinary meaning, or when there are grounds for suggesting that the meaning of the word has changed since the statute in question was passed. In regard to "cattle", which is an ordinary and widely used word, one's experience is that in its modern usage the word, as it would fall from the lips of the man in the street, would be intended to mean and would be taken to mean no more than bovine animals. To the ordinary person, cattle, sheep and pigs are distinct forms of livestock".

3.2 If an ambiguity clouds the meaning of a statutory provision so that it is obscure or ambiguous, at common law a provision is required to be given a construction that reflects the intention of the legislator from the context and purpose of the legislation. This rule is preserved in s. 5 of the Interpretation Act 2005. In addition, it is declared that if a literal interpretation causes an absurdity or an apparent meaning which undermines the intention that is clear from the context of the legislation, such a result is to be avoided in favour of one which reflects the plain intention of the legislation. Section 5 of the Act provides as follows:--

> "(1) In construing a provision of any Act (other than a provision that relates to the imposition of a penal or other sanction)-
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> (a) that is obscure or ambiguous, or
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> (b) that on a literal interpretation would be absurd or would fail to reflect the plain intention of—
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> (i) in the case of an Act to which *paragraph (a)* of the definition of "Act" in *section 2 (1)* relates, the Oireachtas, or
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> (ii) in the case of an Act to which *paragraph (b)* of that definition relates, the parliament concerned,

the provision shall be given a construction that reflects the plain intention of the Oireachtas or parliament concerned, as the case may be, where that intention can be ascertained from the Act as a whole.

(2) In construing a provision of a statutory instrument (other than a provision that relates to the imposition of a penal or other sanction) –

(a) that is obscure or ambiguous, or

(b) that on a literal interpretation would be absurd or would fail to reflect the plain intention of the instrument as a whole in the context of the enactment (including the Act) under which it was made,

the provision shall be given a construction that reflects the plain intention of the maker of the instrument where that intention can be ascertained from the instrument as a whole in the context of that enactment."

3.3 The language of the Interpretation Act 2005 was derived from the recommendations of the Law Reform Commission *Report on Statutory Drafting and Interpretation: Plain Language and the Law* (LRC 61-2000). The wording follows the judgment of Keane J. in *Mulcahy v. Minister for the Marine* (Unreported, High Court , Keane J., 4th November 1994,), which the Law Reform Commission described as adopting a "moderately purposive approach" at p. 19 of its *Report*. In that case, Keane J. stated the law thus at p. 23:-

> "While the Court is not, in the absence of a constitutional challenge, entitled to do violence to the plain language of an enactment in order to avoid an unjust or anom(a)lous consequence, that does not preclude the Court from departing from the literal construction of an enactment and adopting in its place a teleological or purposive approach, if that would more faithfully reflect the true legislative intention gathered from the Act as a whole."

3.4 The correct construction of the statute is thus derived from the wording of the section seen within its appropriate context. In that regard the long title to an Act may be of some limited use and may be an aid to construction. This can be part of the necessary context required to give effect to the intention of the legislator, as illustrated in the case of *Minister for Agriculture and Food v. The Information Commissioner* [2000] 1 I.R. 309 at 312. The long title to a statute cannot be invoked in order to modify the interpretation of a section where the language is clear and unequivocal; *The People (D.P.P.) v. Quilligan* [1986] 1 I.R. 495, in that instance s. 30 of the Offences Against the State Act, 1939 as amended.

3.5 The legislative history of an enactment can illuminate its meaning. If a section is grafted into an enactment in order to deal with a situation that may not have been provided for in earlier version of an Act, or if a section is amended, it can become clear that the legislature is defining statute law in a particular way so as to make up for what was missing or to change the wording in order to facilitate a new situation or eliminate an old mischief. This approach emerges from the judgment of Fennelly J. in *Iarnród Éireann v. Hallbrooke* [2001] 1 I.R. 237, which concerned the amendment of the Trade Union Act 1941, by the Trade Union Act 1942, in order to facilitate negotiations in-house. That principle is of equal application where an amendment is necessitated by the decision of a court which the legislation is designed to overturn or to modify.

3.6 Words used in a statute are not to be approached as if they are rhetorical or reiterative. Where possible, each word must be given a meaning because it is only by that approach that effect is given to the intention of the legislature. The use, for instance, of different words in the same context, implies that

a variation in meaning is required to be taken by a judge construing the statute. As Egan J. remarked in *Cork County Council v. Whillock* [1993] 1 I.R. 231 at p. 239:-

> "There is abundant authority for the presumption that words are not used in the statute without a meaning and are not tautologous or superfluous, and so effect must be given, if possible, to all the words used, for the legislature must be deemed not to waste its words or to say anything in vain".

It follows also that the express inclusion of a situation within a statute, or the express inclusion of several situations, can imply that what is not included is to be excluded from the scope of an enactment. This is sometimes expressed in the Latin maxim *expressio unius est exclusio alterius*. The expression of a general principle in a section of an enactment that is followed by an illustrative list is different and will not attract that rule.

3.7 Where two interpretations of a statute are possible, one of which is in conformity with the Constitution and the other of which is not, the courts must opt for the constitutional interpretation; *McDonald v. Bord na gCon* [1965] 1 I.R. 217 at p. 239. A strained interpretation is not to be forced onto the wording of a statute, however, in order to keep its effect within constitutional boundaries: *Colgan v Independent Radio and Television Commission* [2000] 2 I.R. 490. A partial severance of words from an enactment in order to bestow constitutional conformity on it, should not be undertaken where the result is that the courts are in effect legislating – bringing into force a provision that the Oireachtas never intended; *Maher v. Attorney General* [1973] I.R. 140 at p. 147.

3.8 Moving on the legislation necessitated by the State's duty of effective cooperation with the institutions of the European Union, similar rules arise to those which apply in construing legislation where there is a challenge to its constitutionality. Where a national measure is passed in order to give effect to an obligation of the State which arises from European law, such national legislation must be construed so as conform to that legislative purpose. In *Marleasing SA v. La Commercial Internacional de Alimentacion SA* [1990] 4 E.C.R I-4135 (C-106/89), the European Court of Justice held:-

> "6. With regard to the question whether an individual may rely on the directive against a national law, it should be observed that, as the Court has consistently held, a directive may not of itself impose obligations on an individual and, consequently, a provision of a directive may not be relied upon as such against such a person (judgment in Case 152/84 *Marshall v Southampton and South-West Hampshire Area Health Authority* [1986] ECR 723).
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> 7. However, it is apparent from the documents before the Court that the national court seeks in substance to ascertain whether a national court hearing a case which falls within the scope of Directive 68/151 is required to interpret its national law in the light of the wording and the purpose of that directive in order to preclude a declaration of nullity of a public limited company on a ground other than those listed in Article 11 of the directive.
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> 8. In order to reply to that question, it should be observed that, as the Court pointed out in its judgment in Case 14/83 *Von Colson and Kamann v. Land Nordrhein-Westfalen* [1984] ECR 1891, paragraph 26, the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. It follows that, in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 189 of the Treaty.

9. It follows that the requirement that national law must be interpreted in conformity with Article 11 of Directive 68/151 precludes the interpretation of provisions of national law relating to public limited companies in such a manner that the nullity of a public limited company may be ordered on grounds other than those exhaustively listed in Article 11 of the directive in question."

3.9 Even where litigation is between domestic undertakings as to the correct interpretation of national legislation necessitated by European law, the obligation still applies. This is apparent from the decision of the European Court of Justice in the joined cases of *Pfeiffer and Others v. Deutsches Rotes Kreuz* [2004] E.C.R. I-08835 (C-397/01 to C-403/01), where the following observations were made by the Court:-

"111. It is the responsibility of the national courts in particular to provide the legal protection which individuals derive from the rules of Community law and to ensure that those rules are fully effective.

112. That is *a fortiori* the case when the national court is seised of a dispute concerning the application of domestic provisions which, as here, have been specifically enacted for the purpose of transposing a directive intended to confer rights on individuals. The national court must, in the light of the third paragraph of Article 249 EC, presume that the Member State, following its exercise of the discretion afforded it under that provision, had the intention of fulfilling entirely the obligations arising from the directive concerned (see Case C-334/92 *Wagner Miret* [1993] ECR I-6911, paragraph 20).

113. Thus, when it applies domestic law, and in particular legislative provisions specifically adopted for the purpose of implementing the requirements of a directive, the national court is bound to interpret national law, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive and consequently comply with the third paragraph of Article 249 EC (see to that effect, inter alia, the judgments cited above in *Von Colson and Kamann*, paragraph 26; *Marleasing* , paragraph 8, and *Faccini Dori* , paragraph 26; see also Case C-63/97 BMW [1999] ECR I-905, paragraph 22; Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial and Salvat Editores* [2000] ECR I-4941, paragraph 30; and Case C-408/01 *Adidas-Salomon and Adidas Benelux* [2003] ECR I-2537, paragraph 21)."

3.10 This principle of conforming interpretation between Irish statute law and the European legislation which necessitated that measure cannot be used beyond the scope of its proper purpose so as to impose a solution which contradicts the plain terms of national law, even though such a strained interpretation may be in conformity with an obligation under a Directive. The limit of the duty of the national courts is to interpret national law in the light of any European law obligation as far as this is possible. This cannot lead to results which are a distortion of what the enactment means or, as the European Court of Justice has put it, *contra legem.* In C-105/03 *Pupino* [2005] E.C.R. 1-05285 this was made clear:-

"47. The obligation on the national court to refer to the content of a framework decision when interpreting the relevant rules of its national law ceases when the latter cannot receive an application which would lead to a result compatible with that envisaged by that framework decision. In other words, the principle of conforming interpretation cannot serve as the basis for an interpretation of national law *contra legem.* That principle does, however, require that, where necessary, the national court consider the whole of national law in order to assess how far it can be applied in such a way as not to produce a result contrary to that envisaged by the framework decision."

3.11 Having stated the principles of statutory interpretation applicable to this issue, I return to the proper interpretation of s. 50B of the Act of 2000.

Application of the principles

4.0 The legislative history of s. 50B includes the prior forms of s. 50 of the Act of 2000 and the amendments thereto before that new section was introduced and the decision of the European Court of Justice of 16th July 2009 in case C-427/07, *Commission v Ireland*. Nothing in that legislative history shows any intention by the Oireachtas to provide that all planning cases were to become the exception to the ordinary rules as to costs which apply to every kind of judicial review and to every other form of litigation before the courts. The immediate spur to legislative action was the decision of the European Court of Justice in case C-427/07. Nothing in the judgment would have precipitated the Oireachtas into an intention to change the rules as to the award of costs beyond removing the ordinary discretion as to costs from the trial judge in one particular type of case. Specified, instead, was litigation that was concerned with the subject matter set out in s. 50B (1)(a) in three sub-paragraphs: environmental assessment cases, development plans which included projects that could change the nature of a local environment, and projects which required an integrated pollution prevention and control licence. By expressing these three, the Oireachtas was not inevitably to be construed as excluding litigation concerned with anything else. Rather, the new default rule set out in section 50B (2) that each party bear its own costs is expressed solely in the context of a challenge under any "law of the State that gives effect to" the three specified categories: these three and no more. There is nothing in the obligations of Ireland under European law which would have demanded a wholesale change on the rules as to judicial discretion in costs in planning cases.

4.1 The circumstances whereby the State by legislation grants rights beyond those required in a Directive are rare indeed. Rather, experience indicates that the default approach of the Oireachtas seems to be 'thus far and no further'. There can be exceptions, but where there are those exceptions same will emerge clearly on a comparison of national legislation and the precipitating European obligation. Further, the ordinary words of the section make it clear that only three categories of case are to be covered by the new default costs rule. I cannot do violence to the intention of the legislature. Any such interference would breach the separation of powers between the judicial and legislative branches of government. The intention of the Oireachtas is clear from the plain wording of s. 50B and the context reinforces the meaning in the same way. The new rule is an exception. The default provision by special enactment applicable to defined categories of planning cases is that each party bear its own costs but only in such cases. That special rule may exceptionally be overcome through the abuse by an applicant, or notice party supporting an applicant, of litigation as set out in s. 50B (3). Another exception set out in s. 50B (4) provides for the continuance of the rule that a losing party may be awarded some portion of their costs "in a matter of exceptional public importance and where in the special circumstances of the case it is in the interests of justice to do so."

4.2 The Court must therefore conclude that as this litigation did not concern a project which required an environmental assessment, costs must be adjudged according to the ordinary default rule that costs should follow the event unless there are exceptional circumstances.

Decision

5.0 The chronology indicates a desirable development in judicial review. The applicants, on consideration of the full papers, realised that they were wrong in bringing the case. In the exceptional circumstances whereby they immediately informed the respondent and the notice party more than six weeks before the trial date, in the exercise of the Court's discretion, the Court will award the notice party Lidl one third of its costs, including the costs of this motion.

Approved,