[2013] IEHC 430.

THE HIGH COURT

[2012 No. 470 MCA]

BETWEEN

HOLLY HUNTER

APPLICANT

AND

NURENDALE LIMITED TRADING AS PANDA WASTE

RESPONDENT

Judgment of Mr. Justice Hedigan delivered on 17th of September 2013.

1. The respondent operates a commercial waste facility at Rathdrinagh, Beauparc, Navan, County Meath, which is located approximately seventy metres away from the applicant's family home. In the main s.160 proceedings herein commenced by way of originating notice of motion dated 21st December, 2012, the applicant seeks the following orders pursuant to s. 160 of the Planning and Development Act 2000:

(1) an order restraining the respondent, its servants or agents, or any persons acting in concert with them, from carrying out or continuing to carry out any unauthorised development of lands at Rathdrinagh, Beauparc, Navan, County Meath; and

(2) an order requiring the respondent, its servants or agents, to return and restore the lands at Rathdrinagh, Beauparc, Navan, County Meath, to their condition prior to the commencement of the unauthorised development.

2. The respondent operates a waste facility on lands which are located approximately seventy metres away from a house in which the applicant lives with her husband and children. It is this facility which is the subject of the s. 160 proceedings. The applicant alleges the facility is not being carried on in accordance with the planning permission granted.

3. In judicial review proceedings commenced by notice of motion dated the 22nd October, 2012, the applicant sought an order of certiorari quashing the decision of the Environmental Protection Agency (EPA) dated the 11th July, 2012, whereby it purported to grant a technical amendment to a waste licence WO 140 – 03 granted by the EPA in respect of this facility. The applicant's home adjacent to this facility is in the legal ownership of her husband, Richard Hunter. The applicant contends that the site has not been operated in accordance with the planning permission granted or with the conditions laid down in the waste licence. She argues that the respondent has persistently exceeded the tonnages permitted at the facility and has operated the facility outside the permitted hours. Consequently she submits that she has experienced severe nuisance arising from the facility and that it has given rise to serious local nuisance generally.

4. The licence was originally issued to the respondent on the 26th March, 2009. In 2011 the office of Environmental Enforcement drew the respondent's attention to the terms of Schedule A of the waste licence and indicated that there was an incompatibility between the waste actually accepted at the facility and the terms of Schedule A of the licence insofar as the same appeared to limit the respondent to receiving "dry recyclable household" waste rather than "household" waste. The inspector appointed by the EPA indicated in her report that the restriction on the types of waste to be accepted was inserted by way of "oversight", *i.e.* it was done in error.

5. The respondent subsequently applied to the EPA for a technical amendment to the terms of a licence to change the reference to "dry recyclable house waste" in Schedule A to "household" waste. By decision of the EPA taken on the 11th July, 2012, it substituted "household" waste for "dry recyclable household" waste. The technical amendment changes the household waste stream permitted at the facility from green bin dry recyclable waste to black bin household putrescible waste and increases the tonnages permitted.

6. A new shed (known as Shed 3) was built to accommodate increased capacity at the facility. The applicant argues that the shed is only suitable for dry recyclable waste. The shed was destroyed by fire on the 13th June, 2012. The applicant contends that the respondent initiated demolition and reconstruction of the shed in the absence of a grant of planning permission and this forms part of her proceedings under s. 160 of the Planning and Development Act 2000.

7. The applicant is a Chinese national and has no assets. The respondent has alleged that she may have been appointed sole applicant in these proceedings since she has no assets, whereas her husband does. The respondent originally sought an order directing the applicant to provide security for its costs in the proceedings. Now, however, as an alternative it wishes the Court to direct that the applicant's husband be joined as a notice party to the proceedings in order to fix him with responsibility for any costs order made in favour of the respondent. The applicant denies that she is the sole applicant for the purposes of avoiding a costs order against her husband and she contends that in any event no such costs order can be made in the within proceedings having regard to the 2011 Act. In response to the respondent's application to add Mr. Hunter as a notice party, the applicant seeks an order pursuant to s. 7 of the Environmental (Miscellaneous Provisions) Act 2011 declaring that s. 3 of that Act

applies to the within proceedings. This application is commonly known as a protective costs application. This particular application is the first such that has come before the Irish courts. It is with these two preliminary applications that the Court is concerned today.

The application to join Richard Hunter as a notice party

8. With regard to this application, the respondent primarily relies upon the judgment of Mr. Justice Clarke in *Mooreview Developments Ltd. v. First Active Plc* [2011] IEHC 117 where he considered the question as to whether the Court had jurisdiction to add a party to proceedings after hearing the substantial action, either under Order 15, rule 13 of the Rules of the Superior Courts 1986 or pursuant to s. 53 of the Judicature (Ireland) Act 1877, for the purposes of making that party liable for the costs of the proceedings. In *Mooreview*, Clarke J. found that persons cannot be made to sue if they do not wish to and, therefore, cannot be added as plaintiffs against their will. However, the respondent argues that the plaintiff's husband could be joined as a notice party to the proceedings. In this regard it relies on Clarke J.'s finding that where proceedings are initiated and controlled by a person who, although not a party to the proceedings, has a direct personal financial interest in their result, it would not be just for such a person pursing his own interests to be able to do so with no risk to himself should the proceedings fail or be discontinued. Clarke J. held that the key factors to be taken into account by a court when deciding whether to exercise its jurisdiction to make a non-party liable for costs are: –

(1) The extent to which it might have been reasonable to think that the party, who was primarily liable for the costs for which the non-party

was to be made liable, could meet any costs if it failed in the proceedings;

(2) the degree of possible benefit of the proceedings to the non-party concerned;

(3) any factors touching on whether the proceedings were pursued reasonably and in a reasonable fashion.

The Court also was referred to *Cullen v. Wicklow County Manager* [2010] IESC 49 and to *Thema International Fund Plc v. HSBC Institution Trust Services (Ireland) Ltd.* [2008] 10983P.

The application for a protective costs order

9. Section 7 of the 2011 Act provides: –

"7 – (1) A party to proceedings to which section 3 applies may at any time before, or during the course of, the proceedings apply to the court for a determination that section 3 applies to those proceedings.

(2) Where an application is made under subsection (1), the court may make a determination that section 3 applies to those proceedings.

(3) Without prejudice to subsection (1), the parties to proceedings referred to in subsection (1), may, at any time, agree that section 3 applies to those proceedings.

(4) Before proceedings referred to in section 3 are instituted, the persons who would be the parties to those proceedings if those proceedings were instituted, may, before the institution of those proceedings and without prejudice to subsection (1), agree that section 3 applies to those proceedings.

(5) An application under subsection (1) shall be by motion on notice to the parties concerned."

Section 3 of the Act states: –

"3 – (1) Notwithstanding anything contained in any other enactment or in –

(a) Order 99 of the Rules of the Superior Courts (S.I. No. 15 of 1986),

(b) Order 66 of the Circuit Court Rules (S.I. No. 510 of 2001), or

(c) Order 51 of the District Court Rules (S.I. No. 93 of 1997),

and subject to subsections (2), (3) and (4), in proceedings to which this section applies, each party (including any notice party) shall bear its own costs.

(2) The costs of the proceedings, or a portion of such costs, as are appropriate, may be awarded to the applicant, or as the case may be, the plaintiff, to the extent that he or she succeeds in obtaining relief and any of those costs shall be borne by the respondent, or as the case may be, defendant or any notice party, to the extent that the acts or omissions of the respondent, or as the case may be, defendant or any notice party, contributed to the applicant, or as the case may be, plaintiff obtaining relief.

(3) A court may award costs against a party in proceedings to which this section applies if the court considers it appropriate to do so –

(a) where the court considers that a claim or counter-claim by the party is frivolous or vexatious,

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

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

(4) Subsection (1) 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 'court' shall be construed as, in relation to particular proceedings to which this section applies, a reference to the District Court, the Circuit Court, the High Court or the Supreme Court, as may be appropriate.

10. Section 4 of the Act applies (among other things) to a licence granted under s. 40 of the Waste Management Act 1996. The section stipulates when s. 3 of the Act may apply and sets out the circumstances under which an order may be granted. The section is applicable where it is sought to ensure compliance with or enforcement of a statutory requirement or condition attached to a licence permit or permission when failure to comply with such permission has caused, is causing, or is likely to cause environmental damage. Such damage encompasses harm to air, water, soil, land, biological diversity and the interaction between all or any of those things. It also pertains to harm caused to the health and safety of humans. The section further stipulates that an order shall not be granted in circumstances where the applicant seeks damages arising from damaged property/persons or where the proceedings are instituted by a statutory body (being a County/City Council or a body established by statute) or the Minister.

11. The respondent submits that it is clear from a reading of s. 4(1) of the Act that s. 3 will only apply (and as a consequence the Court may only make a protective costs order) where the applicant is seeking to force compliance with an extant planning permission or licence or where it is alleged that there has been a contravention of or failure to comply with conditions attaching to a planning permission or licence. The benefit of the Act, the respondent asserts, is not available in cases where it is argued that development is carried out in the absence of a licence or planning permission, i.e. in the case of wholly unauthorised development. Thus the respondent argues that the applicant's complaint that it is operating certain aspects of its facility with no planning permission whatsoever removes the proceedings from the scope of s. 4(1) of the 2011 Act and means that the Court does not have jurisdiction to grant the costs order sought.

The applicant, however, argues that the reference to "statutory requirement or condition or other requirement" in s. 4(1) is disjunctive, and argues thus that the section is referring to compliance with a statutory provision, on the one hand, or a condition or requirement attaching to a licence/permission, on the other hand. The applicant argues that since there is a statutory requirement to obtain planning permission for development, the section is sufficiently broad to cover situations where no planning permission has been obtained and does not alone relate to situations where the applicant complains of a contravention of an existing planning permission. It contends that it is clear that it is a provision of national law that planning permission is required and failure to obtain the same where necessary renders persons in breach of a provision of national law. The applicant contends that it could not be the intention of ss. 3 and 4 of the Act to permit an artificial distinction between development that has planning permission and development that does not.

12. The respondent refers the Court to the Queen, on the application of *David Edwards & Anor. v. Environment Agency & Ors.* (C – 260/11), 11th April, 2013. In this request for a preliminary ruling under Article 267 TFEU, the European Court held that the costs in environmental cases should not be prohibitively expensive and this meant that persons should not be prevented from pursuing a claim for review by reason of the financial burden that might arise as a result. (See paras. 38 – 48 thereof). The Court ruled that national courts in determining the issue of costs must carry out an objective analysis of the amount of costs and whether on an objective analysis it might be considered excessive. The courts in doing such an analysis must consider the situation of the parties, whether the claimant had a reasonable prospect of success, the importance of the environmental issues in question, the complexity of the law and procedures and the existence of a protective costs regime. The respondent argues that the applicant does not in fact have a reasonable prospect of success. It concedes the test in regard to this is less than the classic test as set out in *McNamara v. An Bord Pleanála* (No. 1) [1995] 2 ILRM 125, i.e. reasonable, arguable, weighty, not trivial or tenuous. It does claim that the applicant must put forward a case that has a certain element of substance to it. The probability of success, it concedes, is not a test but the applicant must stand a good chance of getting over the threshold in respect of the argument raised. The respondent also claims that there is not sufficient evidence of potential damage to the environment nor that any emissions are occurring at the site in a manner which breaches conditions attaching to the planning permission. It urges the Court should be slow to conclude that damage to the environment as envisaged in s. 4 of the Act arises. It refers to an inequality of arms in that the respondent cannot return to Court to request that the 2011 provisions should not apply if the Court now makes a declaration that they do. On the other hand, the

applicant, if the Court rejects its application for a costs protection order at this stage, may apply again on the basis that she was bringing it under s. 3(4) as being a matter of exceptional public importance. The respondent notes that the applicant has also instituted a damages claim, albeit in different proceedings.

The decision of the Court

13. The application to add Richard Hunter as a notice party for the purpose of fixing him with an order for costs in the event the applications fail: –

Is there a jurisdiction to do this? I am satisfied that in certain circumstances there is. See *Mooreview*, where having reviewed the law in relation to this matter, Clarke J. held that the key factors to be taken into account by a court when deciding its jurisdiction to make a non-party liable for costs are –

(1) the extent to which it might have been reasonable to think that the party, who was primarily liable for the costs for which the non-party was to be made liable, could meet any costs if it failed in the proceedings;

(2) the degree of possible benefit of the proceedings to the non-party concerned;

(3) any factors touching on whether the proceedings were pursued reasonably and in a reasonable fashion.

Applying these factors to this case, the following appears clear from the evidence before the Court.

(1) The applicant is impecunious and the house adjacent to the waste facility is in the legal ownership of Mr. Hunter. It is therefore

reasonable to believe that she would be unable to meet any order for costs that might be awarded against her.

(2) As the proposed notice party is owner of the property which it is alleged is subject to the effects of the complaint made by the applicant, he clearly has at least a half share in any benefit that might accrue from successful proceedings.

(3) It appears that the real complainant throughout has in fact been Mr. Hunter. All the complaints made concerning the facility have in fact come from him. In the circumstances it appears clear that the applicant was put forward in that capacity in order to protect Mr. Hunter from any liability for costs.

In order to do justice to the parties and in accordance with the principles set out in *Mooreview*, it is appropriate that an order be made joining Richard Hunter as a notice party in this case for the purpose of fixing him with liability for costs in the event that that was appropriate.

The application for a protective costs order

14. In response to the above application by the respondent, the applicant seeks an order pursuant to s. 7 of the Environmental (Miscellaneous Provisions) Act 2011 declaring that s. 3 of that Act applies. See paragraph 3.1 above. This statutory provision is intended to give effect to the Aarhus Convention of the 17th February, 2005 which provides as follows:

"In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information,

public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention."

Article 9(4) states that: –

"In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive."

Article 9(5) provides: –

"In order to further the effectiveness of the provisions of this article, each Party shall ensure that information is provided to the public on access to administrative and judicial review procedures and shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice."

On an application for a preliminary ruling by the courts of the United Kingdom in the Queen on the application of *David Edwards & Anor. v. Environment Agency & Anor.* The European Court considered the provisions of this Convention. Paragraphs 38 – 48 are particularly instructive in relation to this application. In those paragraphs of its judgment, the Court sets out the criteria for making a costs protection order such as is sought here. Those criteria are summed up in para. 46 of the judgment as follows: –

"46. It must therefore be held that, where the national court is required to determine, in the context referred to in paragraph 41 of the present judgment, whether judicial proceedings on environmental matters are prohibitively expensive for a claimant, it cannot act solely on the basis of that claimant's financial situation but must also carry out an objective analysis of the amount of the costs. It may also take into account the situation of the parties

> concerned, whether the claimant has a reasonable prospect of success, the importance of what is at stake for the claimant and for the protection of the environment, the complexity of the relevant law and procedure, the potentially frivolous nature of the claim at its various stages, and the existence of a national legal aid scheme or a costs protection regime."

Applying these criteria to the circumstances herein, the first question relates to the likely costs of the proceedings herein. The affidavits of Holly Hunter and Eamon Waters sworn herein do not deal specifically with the amount of costs likely to be incurred in bringing these proceedings and/or defending them. Mr. Waters simply states in his affidavit sworn on the 15th February, 2013 that the company will be obliged to expend significant amounts of money on defending the case. The applicant does not take issue with this statement. It seems to me that affidavits sworn supporting a case for a costs protection order should give some broad indication of what the costs of those proceedings are likely to be in the event that an applicant was to be made liable for them. I understand that this is the first application for such an order and a certain measure of uncertainty as to what is required to ground the application exists. I have been asked to indicate what I think the requirements of the Court are in dealing with such an application and I will deal with that at the end of this judgment. However, for the present moment it appears as a matter of common knowledge that the costs of defending this matter will be of a very high order indeed. What are the resources of the applicant? The Court must not act solely on the basis of the applicant's financial situation but also take into account the amount of the costs involved. It seems to me again that in future applications an applicant for a costs protection order ought to set out broadly what their financial situation is so as to assist the Court to make an assessment in this regard. In the circumstances of this case

though, it being common case and a matter of general knowledge that the costs will be of an extremely high nature, I think I may take it that the costs will be of a very high level and therefore something that the applicant is unlikely to be capable of meeting without very serious and prejudicial financial consequences. Does the claimant have a reasonable prospect of success? It is conceded that the *McNamara* standard is one that would be too high in the circumstances of this type of application. I agree with this. I think that when the European Court refers to a reasonable prospect of success, it requires that an applicant should be pressing a case that does have a certain measure of substance to it. It is not required that there be a probability of success but there must be, it seems to me, a least a good chance of success. It is always hard to judge at this early stage of a case just what the chances of success are and as to whether there is some substance to the application. Nonetheless, it seems to me that bearing in mind the EPA do not intend to defend the judicial review proceedings, and bearing in mind the extent of the issues between the parties as identified in the schedule of relevant information, i.e. questions such as intensification, noise levels, hours of operation, night lighting on site, the building of a large construction adjacent to Shed 3, the demolition of the skip repair building, the two composting tunnels, the internal structures in Shed 3, and the demolition and reconstruction and cladding of Shed 3, all suggest that there is at the very least some substance to the claim made herein and, thus, it appears to satisfy the requirement of a reasonable prospect of success. It is also clear to the Court that the issues at stake are of very considerable importance to the applicant. The complaints she makes go to the very heart of her ability to lead a peaceful life in her home. Moreover, questions relating to intensification of use of a waste disposal facility *per se* together with the presence of odiferous municipal waste, noise level, out of hours operation, night lights, failure to build a reed bed system,

unauthorised composting tunnels as alleged, all are matters which appear to be ones involving the protection of the environment. The complexity of the relevant law and procedure goes without saying. Cases such as of this nature are notoriously difficult and complex cases. I do not believe that it has been seriously argued that the claim in question is frivolous. It is clearly brought very seriously and involves serious issues. No information has been provided to the Court as to the existence of legal aid in relation to this matter. I must assume that legal aid is not available for an application such as is being brought by the applicant.

15. Taking into account all the above, it seems to me that this is a case to which s. 3 applies. I do not accept the argument put forward on the part of the respondent that the application is in respect of a development which has no planning permission or is a hybrid. In the first place, it is clear that the development does in fact have planning permission. The issue is whether that planning permission covers the various developments that have occurred and/or whether all the conditions of that planning permission have been complied with. The fact that the applicant claims both the failure to comply with planning permission and the absence of planning permission in the same set of proceedings does not appear to me to take the case out of s. 3. In any event, because s.4 refers to the enforcement of a statutory requirement, it appears to me that s. 3 would cover a situation where there was no planning permission in existence because that would be a situation where there had been a failure to comply with the statutory requirement. The respondent further claims that the applicant is seeking damages in other proceedings and that this disqualifies these proceedings from being covered by s. 3. This does not appear to me to be correct. No s. 3 costs protection order is sought in respect of these completely separate proceedings, i.e. nuisance proceedings which seek damages. Clearly, none would be granted in such a

case because s. 3 would not apply. That does not mean that these proceedings are disqualified from s. 3 protection. Moreover, it seems to me that the very nature of the reliefs sought by the applicant herein are reliefs that, whilst certainly in the private interests of the applicant and her family, are also of considerable public interest. Thus, in my view, the applicant is entitled to a protective costs order pursuant to s. 3 as sought.

16. It seems to me that the procedure that should be followed in bringing an application such as this in future ought to be at least as follows: –

(a) The proceedings should be brought by motion on notice supported by an affidavit of the applicant which should set out firstly what broadly the expenses involved in such an application would be;

(b) secondly, the applicant should set out a broad statement of the claimant's financial situation;

(c) thirdly, the applicant should set out the reasons why he believes that there is a reasonable prospect of success,

(d) fourthly, the applicant should set out clearly what is at stake for the claimant and for the protection of the environment;

(e) fifthly, the applicant should deal with any possible claim of frivolous proceedings, should that arise; and

(f) finally, the applicant should deal with the existence of any possible legal aid scheme or any contingency arrangement in relation to costs that may have been made with their solicitors.

The respondent in any replying affidavit that it wished to make should set out its broad view of the potential costs involved in the case, should express its view in relation to the situation of the parties concerned in the application, and also whether

the claimant has a reasonable prospect of success and why it does not, if that is to be claimed. It should also deal with the importance of the issues at stake for the protection of the environment and set out the full reasoning as to why the claim in question is a frivolous one if that is to be claimed and should also deal, if necessary, with the question of legal aid or any contingency arrangement. Prior to the application, both parties should agree a schedule of relevant information (or so-called Scott Schedule) as was provided for the benefit of the Court in these proceedings, setting out the gist of each claim and the response that is made thereto.

17th Sept 2013

No Redaction Needed