[2015] IECA 28

THE COURT OF APPEAL

Peart J.
Irvine J.
Hogan J

[2014 No. 63]

IN THE MATTER OF THE PLANNING AND DEVELOPMENT ACTS 2000 TO 2011 AND IN THEMATTER OF AN APPLICATION PURSUANT TO SECTION 160 OF THE PLANNING AND DEVELOPMENT ACT 2000

MICHAEL McCOY AND

SOUTH DUBLIN COUNTY COUNCIL

APPLICANTS/RESPONDENTS

AND

SHILLELAGH QUARRIES LIMITED, JOHN MURPHY, DECLAN MURPHY, THOMAS MURPHY, SANDRA MURPHY AND JOAN MURPHY

RESPONDENTS/APPELLANTS

JUDGMENT of the Court delivered by Mr. Justice Gerard Hogan on 19th February 2015

1. In the present proceedings the first applicant (and respondent to this appeal), Mr. McCoy ("the applicant"), contends that the defendants (and appellants in this appeal) ("the appellants") are operating a quarry without the benefit of planning permission, contrary to the

provisions of s. 32 of the Planning and Development Act 2000 ("the 2000 Act"). The applicant lives close to the quarry which is situated at Ballinscorney Upper, Brittas, Co. Dublin, immediately adjacent to the Dublin/Wicklow border. The applicant has now sought a planning injunction pursuant to s. 160 of the 2000 Act directed against the continued operation of the quarry.

2. The defendants ("the appellants") admit that they have no such permission, but they maintain that is unnecessary in that they can show that the quarry has been in continuous operation prior to the coming into force of the immediate precursor to the 2000 Act, the Local Government (Planning and Development) Act 1963 and that there has been no intensification of use since that date. On the hearing of this appeal we were informed that this issue is scheduled to be heard by the High Court over a two week period commencing on April 15th, 2015.

3. While this issue also forms an important part of the background to this appeal, the immediate question for consideration by this Court is a more specific one, namely, whether the respondent could properly apply for and obtain what is known as a protective costs order under the combined provisions of ss. 3, 4 and 7 of the Environment (Miscellaneous Provisions) Act 2011 ("the 2011 Act"). A further question is the extent to which the interpretation of these provisions of the 2011 Act should be informed by the provisions of the Aarhus Convention, a topic to which we shall presently return. In her judgment in the High Court, Baker J. held that the present case came within the scope of the protective costs jurisdiction provided for by the 2011 Act and that it was appropriate to make such an order: see *McCoy v. Shillelagh Quarries Ltd.* [2014] IEHC 511.

4. As will be seen, the fundamental issue before the Court presents a question of statutory interpretation of no little difficulty. It is, however, first necessary to explain and to set out the relevant statutory provisions.

The relevant statutory provisions of the 2011 Act

5. The relevant statutory provisions are to be found in the Long Title and Part 2 of the 2011 Act. The Long Title recites that one of the objects of the 2011 Act is "to give effect to certain articles" of the Aarhus Convention and for judicial notice to be taken of the Convention. Sections 3 to 7 then modify in a significant fashion the traditional costs order regime. In effect, an applicant may apply by notice of motion seeking a declaration pursuant to s. 7 to the effect that s. 3 applies to the proceedings. Where it has been determined that s.3 applies to the proceedings, then the starting point is that, subject to the provisions of s. 3(2), s. 3(3) and s. 3(4), each party is required to abide their own costs: see s. 3(1). Where, however, the applicant obtains relief in the proceedings, then s. 3(2) provides that he or she may be awarded some or all of their costs which is to be borne by the respondent "to the extent that the acts or omissions of the respondent…contributed to the applicant…obtaining relief." Section 3(3) empowers the courts to make an award of costs against any party (including an applicant) where it has been determined that the claim is frivolous or vexatious or by reference to the manner in which they have conducted proceedings or are in contempt of court. Section 3(4) empowers the court to make an order for 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."

6. Section 4 then deals with the scope of application of s. 3 and it is this section which presents the issue of statutory interpretation which is at the heart of this appeal. Section 4 provides:

> "(1) Section 3 applies to civil proceedings, other than proceedings referred to in subsection (3), instituted by a person -

(a) for the purpose of ensuring compliance with, or the enforcement of, a statutory requirement or condition or other requirement attached to a licence, permit, permission, lease or consent specified in subsection (4), or

(b) in respect of the contravention of, or the failure to comply with such licence, permit, permission, lease or consent,

and where the failure to ensure such compliance with, or enforcement of, such statutory requirement, condition or other requirement referred to in paragraph (a), or such contravention or failure to comply referred to in paragraph (b), has caused, is causing, or is likely to cause, damage to the environment."

7. The phrase "damage to the environment" in s. 4(1) is then defined as follows by s. 4(2):

"(2) Without prejudice to the generality of subsection (1), damage to the environment includes damage to all or any of the following:

(a) air and the atmosphere;

(b) water, including coastal and marine areas;

(c) soil;

(d) land;

(e) landscapes and natural sites;

(f) biological diversity, including any component of such diversity, and genetically modified organisms;

(g) health and safety of persons and conditions of human life;

(h) cultural sites and built environment;

(i) the interaction between all or any of the matters specified in paragraphs (a) to (h)"

9. Section 4(3) and s. 4(4) further clarify the scope of application of these provisions:

"(3) Section 3 shall not apply -

(a) to proceedings, or any part of proceedings, referred to in subsection (1) for which damages, arising from damage to persons or property, are sought, or

(b) to proceedings instituted by a statutory body or a Minister of the Government.

(4) For the purposes of subsection (1), this section applies to -

(a) a licence, or a revised licence, granted under section 83 of the Environmental Protection Agency Act 1992,

(b) a licence granted pursuant to section 32 of the Act of 1987,

(c) a licence granted under section 4 or 16 of the Local Government (Water Pollution) Act 1977,

(d) a licence granted under section 63, or a water services licence granted under section 81, of the Water Services Act 2007,

(e) a waste collection permit granted pursuant to section 34, or a waste licence granted pursuant to section 40, of the Act of 1996,

(f) a licence granted pursuant to section 23(6), 26 or 29 of the Wildlife Act 1976,

(g) a permit granted pursuant to section 5 of the Dumping at Sea Act 1996,

(h) a licence granted under section 40, or a general felling licence granted under section 49, of the Forestry Act 1946,

(i) a licence granted pursuant to section 30 of the Radiological Protection Act 1991,

(j) a lease made under section 2, or a licence granted under section 3 of the Foreshore Act 1933,

(k) a prospecting licence granted under section 8, a State acquired minerals licence granted under section 22 or an ancillary rights licence granted under section 40, of the Minerals Development Act 1940,

(l) an exploration licence granted under section 8, a petroleum prospecting licence granted under section 9, a reserved area licence granted under section 19, or a working facilities permit granted under section 26, of the Petroleum and Other Minerals Development Act 1960,

(m) a consent pursuant to section 40 of the Gas Act 1976,

(n) a permission or approval granted pursuant to the Planning and Development Act 2000.

(5) In this section -

"damage", in relation to the environment, includes any adverse effect on any matter specified in paragraphs (a) to (i) of subsection (2);

"statutory body" means any of the following:

(a) a body established by or under statute;

(b) a county council within the meaning of the Local Government Act 2001;

(c) a city council within the meaning of the Local Government Act 2001.

(6) In this section a reference to a licence, revised licence, permit, permission, approval, lease or consent is a reference to such licence, permit, lease or consent and any conditions or other requirements attached to it and to any renewal or revision of such licence, permit, permission, approval, lease or consent."

10. To complete the picture, s. 8 provides that judicial notice shall be taken of the Aarhus Convention.

11. The central issue which arises in the present appeal is whether the present proceedings properly come within the scope of s. 4(1) of the 2011 Act at all. In a most careful argument, counsel for the respondent, Mr. Connolly S.C., contended that they did not. His argument in essence was that s. 4(1) only applied to proceedings which involved the enforcement of an existing planning permission or planning condition or other similar requirement which was the subject of a positive decision by a planning authority or other similar body. He submitted that this argument was further buttressed by the terms of the Aarhus Convention itself, as it applied only to *environmental decisions*. Here there was admittedly no such decision, since the respondents' case rests entirely upon the existence of an established pre-1964 user. This question is at the heart of the present appeal, but any detailed consideration of it must first be postponed pending an examination of the terms of the Aarhus Convention and its status in our domestic law. It is to that issue which we can now turn.

The Aarhus Convention and its status in Irish law

11. The Aarhus Convention (or, to give it its full title, the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters) is an international agreement which was negotiated under the auspices of the UN Economic Committee for Europe. The relevant provisions of the Aarhus Convention so far as costs are concerned are those contained in Article 9(3) and Article 9(4):

> "3. In addition.....each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

4. 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. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible."

12. Although the Convention is in strictness simply a regional agreement, as Hogan J. said in the High Court in *Waterville Fisheries Development Association Ltd. v. Acquaculture Licensing Appeals Board (No.3)* [2014] IEHC 522:

"…. it is quite possibly the most influential international agreement of its kind in the sphere of international environmental law. Perhaps one of the reasons that the Convention has proved to be so influential is that it has been ratified by the European Union and that it has been transposed into certain key areas of EU environmental law, on which the latest version of the Environmental Impact Assessment Directive (2011/92/EU) is only the most prominent example."

13. As this passage hints at, one of the complications presented by the Aarhus Convention is that it has also been ratified by the European Union as well as by the individual Member States (including Ireland). As it is clear from Article 216(2) TFEU, the Union adopts a largely monist attitude to international agreements of this kind, so that such international agreements adopted by the Union bind its institutions and generally prevail over legislative and administrative acts adopted by those institutions: see generally EU:C:2008:312 *Intertanko*, paragraph 42 and EU:C:2015: 5 *Council of the European Union v. Stichting Natuur en Milieu,* paragraph 44. The Court of Justice has further held that the existence of such an international agreement can be invoked in support of an action for annulment of EU secondary legislation under certain conditions, chief among them that the agreement is

unconditional and sufficiently precise: see, *e.g., Intertanko*, paragraph 45 and C-366/10 *Air Transport Association of America*, EU:C:2011:864, paragraph 54.

14. To the extent, therefore, that the Aarhus Convention has been subsumed into EU law (either by virtue of the fact that it is an international agreement adopted by the Union or its provisions have been incorporated into primary EU legislation such as new consolidated version of the Environmental Impact Assessment Directive 2011/92/EU), this Court would be obliged, in an appropriate case, to give effect to the terms of the Convention as part of these wider EU law obligations.

15. The question, however, of giving effect to the terms of the Convention as part of our EU law obligations simply does not arise here because it not in dispute that the present case is governed entirely by national law. As the Supreme Court recently confirmed in *Sweeney v. Governor of Loughan House Open Prison* [2014] IESC 42, [2014] 2 I.L.R.M. 401, in such cases the status of the international agreement in domestic law is governed entirely by Article 29.6 of the Constitution which provides:

> "No international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas."

11. It is clear that the 2011 Act did not, as such, make the Aarhus Convention part of our domestic law. It is true that s. 8 of the 2011 Act provides that judicial notice shall be taken of the terms of the Convention, but this in itself could not suffice to require any "special meaning" to be given to the scope of application of s. 4 of the 2011 Act: see *CLM Properties Ltd. v. Greenstar Holding Ltd.* [2014] IEHC 288, *per* Finlay Geoghegan J.

12. It is equally true that the long title of the 2011 Act declares that one of its objects is "to give effect to certain articles" of the Aarhus Convention. Yet the Convention was not, as such, made part of our domestic law. As Hogan J. pointed out in the High Court in *Kimpton Vale Developments Ltd. v. An Bord Pleanála* [2013] IEHC 442 and, more recently, in

Waterville Fisheries, it would, of course, have been open to the Oireachtas to do just that. A recent example is provided by s. 20B of the Jurisdiction of Courts and Enforcement of Judgments Act 1998 (which was inserted by s. 1 of the Jurisdiction of Courts and Enforcement of Judgments (Amendment) Act 2012) which provides that the Lugano Convention of 2007 "has force of law in the State." Unlike, therefore, the treatment of the Aarhus Convention in the 2011 Act, in that latter example, the 2012 Act gave the Lugano Convention an autonomous, directly applicable status in Irish law, so that, for instance, the relevant provisions of the Convention could be invoked appropriately on a free standing basis in all categories of litigation without further ado.

13. The 2011 Act did not make the Aarhus Convention part of the law of the State in quite that sense. What happened instead was that the Oireachtas sought to approximate our domestic law to the requirements of Article 9(3) and Article 9(4) of the Aarhus Convention by providing in ss. 3 to 7 of the 2011 Act for the modified costs rule in the manner which has already been described. If, however, it were subsequently ever to transpire that, for example, these provisions of the 2011 Act did not sufficiently approximate to the requirements of Article 9(3) and Article 9(4) of the Aarhus Convention, then the only remedy in that situation would be for the Oireachtas to amend the law.

14. In any event, it must be recalled that these provisions of the Aarhus Convention envisaged that steps would be taken in national law ("...laid down in its national law...") to prescribe the conditions by which members of the public could ensure access to judicial procedures "to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment" (Article (9(3)). A further requirement was that these procedures would not be "prohibitively expensive" (Article 9(4)).

15. Mr. Connolly SC sought to demonstrate that the Convention was principally concerned with access to *environmental decision-making* and that as there was in fact no decision of a planning authority (or other similar body) at issue in the present proceedings, the Convention should be deemed not to apply. This, in turn, he submitted was an important – perhaps even decisive – factor in the interpretation of the scope of the 2011 Act. We are not persuaded that this is so, given that Article 9(3) expressly refers to access to judicial procedures in respect of "acts *and omissions* by private persons and public authorities which contravene provisions of its national law relating to the environment." (emphasis supplied). The gist of the claim here, after all, is that the respondent's omission to obtain planning permission contravenes the planning permission requirements of the 2000 Act.

16. Quite apart from this, however, it is necessarily implicit in the respondent's submission that the Aarhus Convention in general – and Article 9(3) and Article 9(4) in particular – has a fixed and unyielding meaning which could decisively govern our interpretation of the 2011 Act, at least in cases of doubt.

17. It is true, of course, that there is a general presumption that the Oireachtas intended to legislate in a manner consistent with the State's treaty obligations: see, *e.g., O'Domhnaill v. Merrick* [1984] I.R. 151, 159 *per* Henchy J. It likewise follows that the courts should, where possible, seek to interpret such legislation in a manner which is consistent with our international obligations: see *Sweeney v. Governor of Loughan House Open Prison* [2014] IESC 42, [2014] 2 I.L.R.M. 401, 417, *per* Clarke J.

18. That must be especially so in the present case given that the long title of the 2011 Act declares that one of its objects is to give effect to the Aarhus Convention. Yet it must equally be observed that, as we have noted already, these critical provisions of the Aarhus Convention are themselves expressed to be contingent on the application of national law, so that, for example, within the sphere of application of EU law, these obligations are not

regarded as sufficiently clear and unambiguous in themselves so as to create direct effects for the purposes of EU law. As the Court of Justice recently observed in *Stichting Natuur en Milieu*, para. 47

> "With regard to Article 9(3) of the Aarhus Convention, that article does not contain any unconditional and sufficiently precise obligation capable of directly regulating the legal position of individuals and therefore does not meet those conditions. Since only members of the public who 'meet the criteria, if any, laid down in … national law' are entitled to exercise the rights provided for in Article 9(3), that provision is subject, in its implementation or effects, to the adoption of a subsequent measure."

19. All of this means that neither Article 9(3) or, for that matter, Article 9(4) can be regarded as prescribing firm criteria which would facilitate any judicial assessment of whether their objectives had actually been met by legislation (whether at EU or, as here, national level) designed to give effect to these provisions.

20. For all these reasons, therefore, it cannot be said that neither the existence of the Aarhus Convention in general or Article 9(3) or Article 9(4) in particular could or should decisively influence the interpretation of the 2011 Act. The situation might have been different had, for example, these provisions of the Convention contained firm criteria against which the new costs rules contained in the 2011 Act might have been measured, such that the presumption that the Oireachtas did not intend to depart from the terms of our international obligations would have more strongly come into play.

The interpretation of s. 4 of the 2011 Act

21. Turning now to the construction of s. 4 of the 2011 Act, the fundamental question is whether the language of the opening lines of s. 4(1)(a) (…"for the purpose of ensuring compliance with, or the enforcement of, a statutory requirement or condition or other requirement attached to a licence, permit, permission, lease or consent specified in subsection

(4)…") should be read disjunctively. In other words, does it suffice for present purposes to bring the case within the scope of s. 4(1) that these proceedings concern the enforcement or compliance with a statutory requirement *simpliciter*? Or, alternatively, must the proceedings be concerned with the enforcement or compliance with "a statutory requirement or condition or other requirement" attached to a "licence, permit, permission, lease or consent" specified in s. 4(4)?

22. Mr. Connolly S.C. contended strongly for the latter proposition, arguing that the word "attached" was the critical one, as these proceedings had to be concerned with either a statutory requirement or condition or other requirement attached to a permission or other similar development consent. He sought to buttress this argument by drawing on the terms of the Aarhus Convention to demonstrate that as its provisions were solely concerned with positive decisions taken by planning authorities and similar bodies, it would be wrong to construe the 2011 Act as reaching a case such as the present one where it was contended that the respondent had simply failed to obtain a planning permission which (it was said) was objectively required.

23. A somewhat similar issue was presented in *Montemunio v. Minister for Communications, Marine and Natural Resources* [2013] IESC 40. Here the relevant words of certain fisheries legislation provided for the forfeiture of:

> "all or any of the following found on the boat to which the offence relates:
>
> (a) fish,
>
> (b) any fishing gear."

24. The Supreme Court held that the word "or" was plainly used in the disjunctive sense. As Hardiman J. put it:

> "Where two things are separated in speech or writing by the word 'or' they are distinguished from each other or set in antithesis by or; they are set up as alternatives

to the other word or words so separated. It follows that the words so separated are not identical, but are different in nature or meaning.....[As the legislation enacted by the Oireachtas provided that] the words 'or any' follow the word 'all'. On the ordinary and natural meaning of words, the effect of this addition is to create an *alternative* to the forfeiture of 'all' of the gear and catch."

25. The same reasoning can be applied by analogy to the present case, as the use of the word "or" in this context is clearly disjunctive. In other words, s. 4(1)(a) applies to proceedings designed to proceedings which are either designed to ensure compliance or enforcement with a statutory requirement or, alternatively, with a condition or other requirement attached to a licence or other form of development consent. It is true that s. 4(1)(a) would have made this clearer had the indefinite article "a" been used between the word "or" and the word "condition" so that the sub-section then read:

"...for the purpose of ensuring compliance with, or the enforcement of, a statutory requirement or **[a]** condition or other requirement attached to a licence, permit, permission, lease or consent specified in subsection (4)..."

26. In that example the disjunctive character of the first use of the word "or" is admittedly plainer. Yet any doubts regarding the true meaning of these words in s. 4(1)(a) is dispelled once the language of the final lines of the sub-section which come immediately after paragraph (b) is also considered:

"....and where the failure to ensure such compliance with, or enforcement of, such *statutory requirement, condition or other requirement referred to in paragraph (a),* or such contravention or failure to comply referred to in paragraph (b), has caused, is causing, or is likely to cause, damage to the environment." (emphasis supplied)

27. The italicised words make it clear that the Oireachtas understood that the references in s. 4(1)(a) were intended to be disjunctive.

28. For all of these reasons, therefore, we consider that Baker J. was correct in her conclusion that the reference to "statutory requirement" in s. 4(1)(a) is a free standing one which is distinct and separate from proceedings designed to ensure the compliance with or enforcement of a condition or other requirement of a licence, permit or other form of development consent. It follows, accordingly, the present s. 160 proceedings fall within the scope of s. 4(1) and, therefore, by extension, the High Court had jurisdiction to make the appropriate protective costs order under s. 7 of the 2011 Act.

Whether the making of the protective costs order was premature

29. The question of whether the High Court had a jurisdiction to make a protective costs order at this stage of the proceedings can next be considered. The appellants contend that many important factual and other issues remain to be determined in these proceedings. These include questions as to whether the appellants were in fact obliged to obtain planning permission in respect of the quarry and whether the operation of the quarry has caused or is likely to cause damage to the environment. In these circumstances they object to the granting of a protective costs order by what they submitted was a form of interlocutory order, since this was, in effect, to pre-judge the outcome of the proceedings.

30. It is, of course, perfectly correct to say that a court should not endeavour to resolve complex factual or legal issues by interlocutory order: see, *e.g., Irish Shell Ltd. v. Elm Motors Ltd.* [1984] I.R. 200, 224, *per* McCarthy J. Yet if the courts were to hold that a protective costs order could not be made until the outcome of the proceedings when all of these matters had been determined, it would effectively undermine and frustrate the object of Part II of the 2011 Act.

31. Part II of the 2011 Act sought to facilitate access to justice by persons who contended that certain acts or omissions of other parties were illegal and had caused or was likely to cause damage to the environment, a term which was itself generously defined. The way in

which this was to be done was to modify the traditional costs rules, as these were thought to inhibit environmental litigation of this kind. Thus, the protective costs regime is designed to facilitate an early application to court so that the environmental litigant can know in advance whether the litigation can be safely continued from a costs perspective in advance of the resolution of issues, many of which will doubtless be complex and time-consuming.

32. This is why s. 7(1) provides that a party to proceedings to which s. 3 applies "*may at any time before, or during the course of*, those proceedings apply to the court for a *determination* that s. 3 applies to those proceedings." (emphasis supplied) This sub-section moreover envisages that this matter will be finally determined by the court, even at this early stage of the proceedings. Given that any order of the court made under this sub-section determine the protective costs question, such an order should really be treated as being in the nature of a final order (subject only to appeal), much as the determination of a jurisdictional issue in the sphere of conflict of laws was held by the Supreme Court to be a final issue: see *Minister for Agriculture and Food v. Alte Leipziger AG* [2000] 4 I.R. 33. Just as in the case of ruling on a jurisdictional issue, a determination regarding protective costs can properly be described in the words of Barron J. in *Alte Leipziger* ([2000] 4 I.R. 33, 44) as an order "which disposes finally, subject to appeal, of a substantive right collateral to the main issue in the proceedings."

33. This approach admittedly brings its own difficulties. The strength of the claim may be difficult to assess at the outset of the proceedings. Nor can the potential unfairness in some circumstances of such an protective costs order be overlooked, since the effect of a s. 7(1) order might well be to expose the defendant operator to potentially ruinous costs in circumstances where he or she had no hope of every effectively recovering them.

34. It is also true that the protections given by the s. 7 order may nonetheless be subsequently lost, because the court can still ultimately make a costs order against the

beneficiary of a protective costs order should it ultimately transpire that, for example, the claim is "frivolous or vexatious": see s. 7(3)(a). In this statutory context, this term does not simply mean a claim that discloses no cause of action or one which is not brought in a *bona fide* manner but it would also include a claim which is simply unsustainable in law: see, by analogy, *Nowak v. Data Protection Commissioner* [2012] IEHC 449, [2013] 1 I.L.R.M. 207 and *Schrems v. Data Protection Commissioner* [2014] IEHC 310, [2014] 2 I.L.R.M. 401.

35. These considerations notwithstanding, it is nonetheless clear from the terms of s. 7 of the 2011 Act that the Court has a jurisdiction to make a final determination regarding a protective costs order at this early stage of the proceedings. Any other conclusion would defeat one of the principal objects of the 2011 Act and would be at odds with the actual language ("...at any time before, or during the course of the proceedings...") of s. 7(1).

Whether the Court ought to have made the protective costs order on the evidence before it

36. In view of these considerations and given that the making of such an order will potentially impact significantly on the rights of the other parties of the litigation, it is clear that a protective costs order should not be made lightly. It would be quite wrong to make an order of this kind *ex parte*, as this would amount to a grave breach of fair procedures: see, *e.g., O'Connor v. Environmental Protection Agency* [2012] IEHC 370, *DK v. Crowley* [2002] IESC 66, [2002] 2 I.R. 712. In the event that such an order is made, it is important that the costs protection thereby afforded is not abused. In this regard, courts should be particularly vigilant to ensure – if necessary of their own motion – that any subsequent litigation is pursued in a diligent and efficient manner.

37. The Court of Justice has equally been anxious to ensure that certain procedural and other safeguards are maintained in those Aarhus Convention cases coming within the rubric of EU law. Thus, in its judgment in Case C-260/11 *Edwards v. Environmental Agency* [2013]

ECR I-000 the Court said (at para. 42) that any national court called upon to make a protective costs order of this kind could take into account:

> "the situation of the parties concerned, whether the claimant has a reasonable prospects 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 and the potentially frivolous nature of the claim at its various stages..."

38. In his judgment in *Hunter v. Nurendale Ltd.* [2013] IEHC 430 Hedigan J. gave the following very helpful guidance regarding the manner in which in such an application should be brought. He held that any such application should be brought by notice of motion and that the grounding affidavit should address the following matters:

> "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."

39. The test thus articulated by Hedigan J. – namely, whether the claim had a certain degree of substance and that had it a reasonable prospect of success – was then applied by Baker J. ~~so far~~ to as the present case. She noted that as the respondent did not have planning permission in respect of the quarry, the question then was whether there had been an intensification of use since 1964. She further noted that in 1978 Costello J. had determined in *Patterson v. Murphy* [1978] I.L.R.M. 85 that these particular quarrying activities were ones which required planning permission. It was, however, true that this was an action in nuisance which was later resolved between the parties and these findings were thereafter formally vacated. Furthermore, An Bord Pleanála determined in 2010 that it should refuse to make an order in the respondent's favour under s. 261 of the 2000 Act and in subsequent judicial review proceedings Hedigan J. accepted that there had been such an intensification of user since 1964 that planning permission was now required: see *Shillelagh Quarries Ltd. v. An Bord Pleanála* [2012] IEHC 257. In addition the Board had also ruled in s. 5 reference that that quarry did not constitute exempt development. G. H.

40. It was against that background and in view of "litigation history of the site" that Baker J. held that the applicant had, in fact, demonstrated that he had a reasonable prospect of success. We cannot disagree with that conclusion.

41. So far as the other factors enumerated by Hedigan J. in *Hunter* are concerned, the focus in the present appeal was that of the financial means of the applicant. It is true that the applicant's statement of means was simply a lapidary statement in the affidavit grounding the application for a protective costs order to the effect that he was in full time education and that he was not a person of substantial means. As Baker J. noted, he did not even state whether he

owned the house in which he was residing. It would certainly have been desirable had the applicant set out more precise details regarding his means in his grounding affidavit.

42. At the same time, it is of some importance that the respondents did not suggest that the applicant was not of limited means or that he was not in full-time education, as different considerations might well have arisen had such matters been in dispute. In these circumstances and given that the matter was not in controversy, we think that Baker J. was perfectly entitled to conclude that it would not require "any great analysis or debate" to accept in these circumstances that a full-time student would not be in a position to meet the costs of a complex and difficult witness action in the High Court which was scheduled to last for two weeks.

43. It is, admittedly, striking that the applicant in his affidavit did not address the final factor mentioned by Hedigan J. in *Hunter*, namely, "any contingency arrangement in relation to costs that may have been made with [his] solicitors." While we consider that it would have been preferable if he had done so, we are not persuaded given the particular circumstances of this case that this would have been a decisive consideration. The biggest obstacle to environmental litigation of this kind is the risk of exposure to the costs of the other parties to the litigation. It is against this risk that a potential applicant needs practical assurance in advance. Accordingly, even if the applicant had secured a fee arrangement with his own lawyers of a satisfactory kind, this still would not have obviated the difficulties faced by an applicant of limited means. An adverse costs order in litigation of this complexity and likely duration would financially cripple all but the most affluent.

44. It follows, therefore, that while it would have preferable and more satisfactory had the applicant furnished additional details in advance in his grounding affidavit as to both his means and any fee arrangements with his own solicitor in the manner suggested by Hedigan

J. in *Hunter*, in the circumstances of the present case these omissions cannot be regarded as critical for the reasons which we have just stated.

Conclusions

45. In summary, therefore, we would conclude as follows:

46. First, as the present proceedings involved an application for the enforcement of a statutory condition, the case came within the scope of s. 4(1) of the 2011 Act, such that the High Court had jurisdiction to make a protective costs order under s. 7 in a matter of this kind.

47. Second, the present application was not premature, given that the very language of s. 7(1) of the 2011 Act envisages that such an application can be brought even before the proceedings are actually commenced. Nor can a protective costs order made under s. 7 be properly regarded as an interlocutory matter: it is rather a final determination of the issue, subject only to an appeal.

48. Third, while it would have been preferable if the applicant had provided fuller details of his financial means and any arrangements which he made with his lawyers regarding contingent fee arrangements, given that the applicant's financial status was not in dispute and the object of any protective costs order is to safeguard the litigant against exposure to the costs of the other side, these omissions were not fatal. We think that Baker J. was fully entitled to conclude that, having regard to the likely costs entailed in a lengthy and complex witness action of the kind envisaged in the present case, the risk of an adverse costs order was likely to prove daunting for all potential litigants save for the most affluent.

49. It follows, accordingly, that, for the reasons just stated, the Court would dismiss this appeal.

Approved

Gerard Hogan

24th February 2015