THE HIGH COURT

JUDICIAL REVIEW

[2011 No. 154 J.R.]

BETWEEN

SHILLELAGH QUARRIES LIMITED

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

SOUTH DUBLIN COUNTY COUNCIL

AND

DUBLIN MOUNTAIN CONSERVATION AND ENVIRONMENTAL GROUP

NOTICE PARTIES

Judgment of Mr. Justice Hedigan delivered on 31st day of July, 2012.

1. In the judgment delivered on the 27th June, 2012 following a telescoped hearing pursuant to s. 50A(2)(b) of the Planning and Development Act 2000, as amended, this Court refused leave to seek judicial review of a decision of An Bord Pleanála for the reasons set out in that judgment.

2. The application to An Bord Pleanála involved a quarry which was registered by South Dublin County Council (SDCC) and in respect of which it was considering requiring the making of an application for planning permission and the preparation of an environmental impact study. Submissions concerning the operation and history of the quarry were made by the second notice party. SDCC did decide to grant planning permission and the second notice party appealed this to An Bord Pleanála. An Bord Pleanála refused permission and that was the decision challenged herein. As part of the reasons for refusing permission, An Bord Pleanála described the quarry as "a proposed development of a class which requires an environmental impact assessment in accordance with EU Directive 85/337/EEC as amended".

3. Counsel for An Bord Pleanála has applied for its costs and has opened the provisions of s. 50B as inserted by s. 33 of the Planning and Development Act 2010. This amendment was made in order to meet Ireland's obligations under EU law as determined by the European Court of Justice on the 16th July, 2009. Counsel has very helpfully opened the judgment of my colleague, Charleton J., in the case of *J C. Savage Supermarkets v. An Bord Pleanála* (delivered on the 22nd November, 2011) where he dealt with the same issue of costs that arises here. The obligation is that, in certain planning cases, in order to ensure access to Court to challenge decisions, the general public must have a cost effective way of doing so. Such review should be fair, equitable, timely and not prohibitively expensive. Section 50B attempts to do this by providing that in such cases, the default order that costs follow the event is set aside and save for certain limited exceptions, no order as to costs should be made. Counsel for An Bord Pleanála, supported by counsel for the notice party, argue the within proceedings do not come within that class of case and, consequently, the normal order should apply and they should have their costs of successfully defending the application.

4. Charleton J., having outlined the relevant statutory provision and the principles of statutory interpretation applicable, very helpfully applied those principles at 4.0 to 4.2 of his judgment as follows:-

> **"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.
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> 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."

5. I gratefully adopt this very helpful interpretation of these new provisions in relation to costs. Applying these and in particular, 4.2, to the facts of this case, I note that An Bord Pleanála in its decision of the 24th December, 2010 at Part 2 thereof, described the project the subject matter of these proceedings in the following way:

"It is considered that as the proposed development for which permission is sought is of a class that requires an environmental impact assessment in accordance with the requirements of EU Directive 85/337/EEC (as amended) and that it includes a significant element of retention permission, the Board is, therefore, precluded from considering a grant of planning permission in this case."

The project was one which required an environmental impact assessment. Upon that basis it falls within the limited class of cases envisaged by s. 50B. Thus pursuant to s. 50B (2) the respondent and the notice party should bear their own costs.

6. Counsel for the notice party prays in aid subs. (3)(b) and (c) largely based upon the fact that notwithstanding a High Court order made more than thirty years ago, the quarry has remained open and active. I think nonetheless that there is little information before the Court as to what occurred during this period. No enforcement or contempt proceedings were brought and I do not think it would be just to impose what really amounts to a penalty in the absence of convincing evidence. Counsel for the notice party has also raised s. 4 of this Act and pleads that what was involved in this case were matters of exceptional public importance and that there were special circumstances that should persuade the Court to award the notice party his costs. I do not think that there is any convincing evidence before the Court that there is any exceptional public importance attached to this case. It is one of many cases involving quarries under recent legislation, all of which cases are of considerable public importance but something over and above the norm would be required in order to move the Court to make an order for costs on the basis of there being anything exceptional about this particular quarry case. The only other ground on which s. 4 could be invoked is where there are special circumstances. It is undoubtedly an unusual case in the fact that this quarry has continued in operation for a long time notwithstanding the decision of the High Court in *Patterson v. Martha Murphy* [1978] ILRM 85. As noted above, since I have no information as to what occurred in the interim between the judgment in that case and the events giving rise to this application, I cannot take anything in that regard into account. The only other matters raised under s. 4 by counsel for the notice party are the special circumstances of the case in the sense that the notice party were the ones who appealed the decision of SDCC to An Bord Pleanála. I do not see how this particular fact could give rise to any finding of special circumstances, such an appeal by such a group being not a very unusual circumstance.

7. For the above reasons it appears to me that this case is one to which the new provisions of s. 50B apply and that therefore pursuant to subs. (2), each party should bear its own costs.