THE HIGH COURT

2017 No. 86 MCA

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 160 OF THE PLANNING AND DEVELOPMENT ACT 2000, AS AMENDED

Between:

ST MARGARET'S CONCERNED RESIDENTS, HELEN MERRIMAN,

MICHAEL REDMOND, ADRIENNE MCDONNELL, PETER COLGAN, ELIZABETH MCDONNELL, TREVOR REDMOND, PATRICIA DEIGHEN, MARGARET THOMAS, NOEL REILLY, HELEN GILLIGAN, JAMES SCULLY, FERGUS RICE, NOEL DEEGAN, VALERIAN SALAGEAN, SIDNEY RYAN, GREG FARRELL, SHEELAGH MORRIS, JIMMY O'CONNELL, SILE HAND, DECLAN MC DONNELL, ELIZABETH ROONEY AND DESMOND O'CONNOR

Applicants

AND

DUBLIN AIRPORT AUTHORITY PLC

Respondent

JUDGMENT of Mr Justice Max Barrett delivered on 14th February, 2018.

I

Introduction

1. This is an application for costs following on the delivery by the court of its judgment (the 'principal judgment') in the above-titled proceedings on 21st November last. It is contended by the applicants and (rightly) accepted by Dublin Airport Authority that, by virtue of s.4(1) and (4)(n) of the Environment (Miscellaneous Provisions) Act 2011,[Section 4(1) provides that *"Section 3* [of the Act of 2011] *applies to civil proceedings…instituted by a person…(b) in respect of the contravention of, or the failure to comply with…* [a] *licence, permit, permission, lease or consent* [specified in section 4(4)]. Section 4(4) provides that *"For the purposes of subsection (1), this section applies to…(n) a permission or approval granted pursuant to the Planning and Development Act 2000".*] the within proceedings come within the ambit of s.3 of that Act. As Dublin Airport Authority accepts matters to be so, that seems to the court to yield the consequence that there is, in effect, that agreement between the parties which is contemplated by s.7(3) of the Act of 2011,[Section 7(3) provides that *"Without prejudice to subsection (1), the parties to proceedings referred to in subsection (1), may, at any time, agree that section 3 applies to these proceedings."*] thus obviating the need for the court to make a determination under s.7(1) of the Act of 2011 that s.3 applies. [Section 7(1) provides that *"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. The fact that s.3 of the Act of 2011 is applicable to the within proceedings has the result that the applicable default rule as to costs is not that 'costs follow the event' but rather that, to quote from s.3(1) "*each party…shall bear its own costs*". Thus the applicants, who failed in their original application, start out from a legally privileged position: despite having instituted failed proceedings that ran for a couple of days in the High Court, the starting-point under the Act of 2011 is that they need only bear their own costs, a generous statutory starting-point (and, as will be seen from the consideration hereafter of s.3(3) of the Act of 2011, it is but a starting-point, though it will likely often also be the end-point in most applications as to costs that come within the scope of s.3) which is properly reflective of the position presenting at law under (i) the Aarhus Convention, i.e. the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus, Denmark on 25th June, 1998 (as considered, *inter alia*, by Clarke J., as he then was, in *Conway v. Ireland and ors* [2017] IESC 13, paras. 1 and 2.4), and (ii) the judgments of the High Court in*, inter alia*, (a) *O'Mahony Developments Limited v. An Bord Pleanála* [2015] IEHC 757, paras. 1 and 2, and (b) *Merriman and ors. v. Fingal County Council and ors* [2017] IEHC 695, paras. 241-265).

II

Section 3(3) of the Act of 2011

3. It is possible under s.3(3) of the Act of 2011, for a court to award costs against a party in proceedings to which s.3 applies if certain factors present, viz:

> *"(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 court."*

4. As it happens, Dublin Airport Authority is satisfied that each side should bear its own costs and has not sought any award of costs against the applicants – though, in truth, this may not be so much of a 'give'; certainly the court struggles offhand to see how the Authority would have established any of the above-quoted factors to present in the circumstances of the within proceedings.

III

Section 3(4) of the Act of 2011

5. Section 3(4) of the Act of 2011 provides as follows:

> *"Subsection 1* [so s.3(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".

6. Section 3(4) was the subject of the following commentary by the court in its judgment in *An Taisce v. McTigue Quarries Ltd* [2016] IEHC 701, paras.6–9 (inclusive) under the heading "*Effect of Section 3*(4)":

> **"6**. *In essence, what s.3 does is to displace the normal costs rule in litigation. As Hogan J. observed in* Kimpton Vale Developments Limited v. An Bord Pleanála *[2013] IEHC 442, para. 23, s.3 introduces a new default rule whereby, absent special circumstances, the normal order as to costs will be one of no order as to costs. Where special circumstances are present, and the matter arising is one of exceptional public importance, s.3(4) comes into play, pursuant to which the court:*
>
> *(i) is entitled (not obliged) to award costs to a party, where*
>
> *(ii) the matter presenting is one of exceptional public importance, and*
>
> *(iii) in the special circumstances of the case it is in the interests of justice for the court to award those costs.*
>
> [It is possible to read s.3(4) disjunctively, with (ii) and (iii) being alternate grounds; however, the court's sense, and the meaning urged on the court by all the parties in the within application, is that the word "and" in s.3(4) falls to be read as having a conjunctive effect.]
>
> *7. The effect of s.3(4) is that the court has two questions to answer in the within application:*
>
> *(1) was the matter presenting in this case one of exceptional public importance?*
>
> *(2) are there special circumstances which render it in the interests of justice that costs should be awarded to a particular party?*
>
> *8. In passing, the court notes that it does not consider that the factors relevant to determining whether the matter presenting is one of exceptional public importance cannot also inform the court's determination of whether the requisite special circumstances are present, and vice versa. Moreover, as a general rule and without seeking to constrain the freedom enjoyed by the court in this regard, it would seem safe to assert that the interests of justice seem likely generally to incline the court towards exercising the entitlement acknowledged by s.3(4) to arise where a matter of exceptional public importance has arisen to be addressed and the requisite special circumstances present.*
>
> *9. Notably, s.3(4) does not distinguish between parties, in terms of whether they are public or private persons. Thus it allows for the possibility that the court would award costs in favour of a party, and so against another party, whether a public or private person, provided the matter that presented in particular proceedings was of exceptional public importance – and there is no reason why such a matter could not present between entirely private parties – and in the special circumstances of the case it is in the interests of justice that such an award be made."*

IV

Some Additional Points Arising

(i) Exclusion of Other Grounds for Reversal of Applicable Default Rule as to Costs?

7. Section 3(4) states simply and solely that "*Subsection 1* [so s.3(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"*. It would seem to follow as a matter of plain English and/or perhaps as a consequence of the maxim *expressio unius est exclusio alterius*, that subsection (1) *does* therefore affect (by obviating) the court's entitlement to depart from the default rule as to costs which it would otherwise enjoy under the general law outside the ambit of matters of exceptional public importance (often referred to as 'public interest litigation'). The more common examples, outside of public interest litigation, where a court will depart from the applicable default rule as to costs (which is generally that 'costs follow the event'), and this is not an exhaustive listing, are where (a) a party has acted unreasonably or improperly (the court's jurisdiction in this regard being supplanted, though not quite replicated, by s.3(3)) and (b) an order which conforms with the applicable default rule would cause hardship, which ground for departing from the applicable default rule as to costs was accepted by Geoghegan J. in *M.N. v S.M.* (Costs) [2005] 4 I.R. 461. (It could be, of course, that such hardship would constitute a special circumstance which in a matter of exceptional public importance would avail a party under s.3(4)).

(ii) A Matter of Exceptional Public Importance.

(a). The Express Text of Section 3(4).

8. One point worth noting in passing is that s.3(4) refers to "*a matter of exceptional public importance*", it does not refer to "*an issue of exceptional public importance*" (a phrase used by Dublin Airport Authority in its submissions), and it does not refer, to borrow from the phraseology of s.50A(7) of the Planning and Development Act 2000, as amended, to "*a point of law of exceptional public importance*". Offhand it is difficult to see that a case could be "*a matter of exceptional public importance*" without it also entailing "*an issue of exceptional public importance"*. However, the word "*matter*" does not have the same meaning as "*issue*" and it seems to the court to be important to use the correct terminology if one is not inadvertently to depart from the meaning of s.3(4).

(b) 'Exceptional Public Importance'.

9. As to the notion of "*exceptional public importance*", the court accepts the contention made by Dublin Airport Authority, by reference to case-law such as *Curtin v. Clerk of Dáil Éireann* [2006] IESC 27, *Pringle v. Government of Ireland* [2014] IEHC 174 and *Collins v. Minister for Finance* [2014] IEHC 79, that what is found to be sufficiently exceptional as to justify a departure from the

applicable default rule as to costs tends to be truly exceptional in the sense of involving uncharted legal territory and/or being of national or even international importance. However, the court does not accept that "*a matter of exceptional public importance*" necessarily has to have a national, let alone an international dimension before it could come within the ambit of s.3(4). For example, matters commonly arise in public discourse that are clearly of exceptional public importance because of their impact on a segment of the population, but which are not of national or international importance. One need merely have regard to the minutes of meetings of local councils up and down the country to find an abundance of matters which are of exceptional public importance to the public within the jurisdiction of those councils and which fall properly to be debated by the public representatives sitting on those councils, but which would not, for example, be fit matters for consideration in the national parliament. Any one of those matters, it seems to the court, would have at least the potential, in the right case, to be found to be "*a matter of exceptional public importance*", even though it did not impact on the entire nation, let alone have international implications. Conversely, it is also possible of course that a matter might be of exceptional importance to several, perhaps even more than several members of the public, and still not be "*a matter of exceptional public importance*".

(c) The Decision in *Callaghan*.

10. Reference was made by Dublin Airport Authority to the decision in *Callaghan v. An Bord Pleanála and ors* [2015] IEHC 618, with some emphasis being placed on the fact that notwithstanding that Costello J. found that her decision in that case, *inter alia*, involved one point of law of exceptional public importance, and otherwise satisfied the requirements of s.50A(7) of the Act of 2000 such that a certificate allowing an appeal by the failed applicant in the judicial review application should follow, the successful applicant for that certificate (who had been unsuccessful in the judicial review application which preceded it) should pay the full costs of the judicial review application. The court respectfully is not persuaded that the decision in *Callaghan* is of assistance when it comes to the determination of the within application. What the decision in *Callaghan* shows in essence is that just because a decision of the court may be found to involve, to borrow from s.50A(7) of the Act of 2000, "*a point of law of exceptional public importance*", does not necessarily yield the consequence that, to borrow from the wording of Costello J., at para.20 (echoing the judgment of Murray C.J. in *Dunne v. Minister for the Environment* [2008] 2 I.R. 775), "*there are sufficient special circumstances…that justify a departure from the normal rule that costs follow the event*." No doubt, the just-quoted finding is helpful in terms of the evolution of the understanding of the import of s.50A(7) of the Act of 2000 and the interaction between that provision and the general law as to costs. However, it seems largely, if not completely, irrelevant in the context of a case such as that now presenting which simply does not come within the ambit of s.50A.

(d) Private Interest.

11. Because s.3(4) involves the court finding, *inter alia*, that it was confronted with "*a matter of exceptional public importance*", what appears to be contemplated in this regard is that what will typically be before the court is some species of public interest litigation involving the State or some emanation of the State, though as the court noted in *McTigue*, para 9, "[T]*here is no reason why such a matter could not present between entirely private parties*". That this is so points again to why it is important to have regard to the express text of s.3(4) and not implicitly to recall *R. v. Lord Chancellor, ex parte Child Poverty Action Group* [1999] 1 WLR 347, 353, and the reference of Dyson J. in that judgment to a public law challenge being one "*where the applicant has no private interest*" and then to conclude by reference to Irish case-law which treats with the private interest dimension of public interest litigation that the presence/absence of a private interest is, to borrow from the submissions of Dublin Airport Authority, a "*highly relevant consideration*" in the context of a s.3(4) application. Even on Dublin Airport Authority's best day, that would be to put matters too high; Costello J. in *Callaghan*, at para. 11, describes it as merely "*a relevant factor"*, not a 'highly relevant' factor and she acknowledged (as, in fairness, does Dublin Airport Authority), by reference to the decision of the Supreme Court in *Dunne*, that the presence of a private interest in the outcome of a case is not in any event fatal to a finding that what presents is some form of public interest litigation. It is perhaps useful in this regard to recall the following observations of Murray C.J. in his judgment in *Dunne*, at 783-4:

> "*Where a court considers that it should exercise a discretion to depart from the normal rule as to costs* [in the within application that subsisting under s.3(1) of the Act of 2011], *it is not completely at large but must do so on a reasoned basis, indicating the factors which, in the circumstances of the case, warrant such a departure. It would neither be possible nor desirable to attempt to list or define what those factors are. It is invariably a combination of factors which is involved. An issue such as this is decided on a case by case basis and decided cases indicate the nature of the factors which may be relevant but it is the factors or combination of factors in the context of the individual case which determine the issue."*

12. Two points, it seems to the court, might usefully be made in light of the foregoing. First, one key factor, the importance of which ought not to be under-stated, is the express wording of applicable statute which, in the case of the Act of 2011, (a) establishes a radically different default costs regime to that which generally prevails (and then makes associated provision) in the context of the cases to which it relates, and (b) in s.3(4), merely requires the court to examine whether what presents before it is "*a matter of exceptional public importance*", making no reference to the presence/absence of private interest. Second, to the extent that the private interest dimension of proceedings is raised, as it has been raised by Dublin Airport Authority in the context of the within application, it is a factor which, if one has regard to the above-quoted text of Murray C.J. may have little or no relevance in any one case, so patent is it in that case that what is there before the court is or involves, to borrow from s.3(4), *"a matter of exceptional public importance"*; or it may have much relevance; it just depends on the case.

V

Two Questions

(i) Overview.

13. Section 3(4) of the Act of 2011 allows the court "*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"*. As the court indicated at para.7 of its judgment in *McTigue*:

> "*The effect of s.3(4) is that the court has two questions to answer in the within application:*
>
> *(1) was the matter presenting in this case one of exceptional public importance?*
>
> *(2) are there special circumstances which render it in the interests of justice that costs should be awarded to a particular party?".*

14. The answer to each of these questions must be 'yes' before an order could be made under s.3(4).

15. The court turns now to the first of the questions aforesaid.

(ii) Question (1).

Was the matter presenting in this case one of exceptional public importance?

16. Three contentions are made by the applicants when it comes to this first question:

(1) that the proceedings concerned the commencement of an enormous infrastructural development without there having been previous satisfaction of a planning condition that was intended to protect the community and the environment from the effects of that development. The need to protect the environment and the community has the result that what presented before the court was a matter of exceptional public importance.

The court is mindful in this regard of Murray CJ's observation in Dunne, at para.35 that "*Undoubtedly, it could be said that issues concerning subject matters such as the environment or national monuments have an importance in the public mind, but a further factor for the court is whether the legal issues raised, rather than the subject matter itself were of special and general public importance*". Unfortunately for the applicants the court does not see that the legal issues arising in this case were of exceptional public importance, albeit that they were of importance to the applicants. Indeed, when the court has regard, in particular, to its observations at para.86 of the principal judgment, it struggles to see that (notwithstanding the understandable importance attached by the applicants to the application), it was confronted with even a matter of public importance, never mind a matter of exceptional public importance.

(2) that the proceedings involved a novel and new point of law concerning the breach of a planning condition which related to environmental protection.

This is a reference, in particular, to para. 80 of the principal judgment and the court's reference therein to "*a novel point presenting*". However, the courts are presented on a daily basis with cases that involve novel points of law or facts which require some aspect of the law to be considered in a novel context. That does not suffice of itself to convert every such case into a matter of "*exceptional public importance*". In truth, such novelty (at least in the within proceedings) seems more a "*special circumstance*" that might incline the court to depart from the default rule as to costs applicable. But to get to that point of departure under s.3 of the Act of 2011, one must be treating with a matter of "*exceptional public importance*", and again, when the court has regard, in particular, to its observations at para.86 of the principal judgment, it struggles to see that (notwithstanding the understandable importance attached by the applicants to the application made), it was confronted even with a matter of public importance, never mind a matter of exceptional public importance.

(3) that the court's finding that the court's finding that *Wicklow County Council v. Fortune (No. 4)* **[2014] IEHC 267 is a continuing and binding authority for the proposition that it is open to the court to grant the declaratory relief sought by the applicants (a) has brought clarity to this issue, and (b) by so doing, from a precedential perspective, has the potential to have effect and bearing in planning law enforcement litigation generally and so far beyond the factual circumstances of the within proceedings.**

Every case involves argument that the same law has (per one party) X meaning/result or (per another party) Y meaning/result. That a court is persuaded by one side rather than another and issues a judgment to that effect will always have some precedential value. More is required before what can be said to have been before such court was a matter of exceptional public importance, and the court, modesty aside, does not consider that its finding as to *Fortune (No. 4)* is possessed of such significance as to render the matter that was before the court one of exceptional public importance.

17. It follows from the foregoing that the court's answer to the question 'Was the matter presenting in this case one of exceptional public importance?' is and must be 'no'.

(iii) Question (2).

Are there special circumstances which render it

in the interests of justice that costs should be awarded to a particular party?

18. As mentioned above, the answer to each of Question (1) and (2) requires to be 'yes' before the court could invoke the jurisdiction acknowledged by s.3(4). As the court's answer to Question (1) is 'no', it is not necessary for the court to consider Question (2).

VI

Conclusion

19. For the reasons aforesaid, the court will apply the default rule as to costs under s.3(1) of the Act of 2011 and order that each party bear its own costs.