

## THE HIGH COURT

[2015 No. 302 MCA]

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

BETWEEN

AN TAISCE – THE NATIONAL TRUST FOR IRELAND

APPLICANT

– AND –

McTIGUE QUARRIES LIMITED and GARRY MCTIGUE

and CAROLINE MCTIGUE

RESPONDENTS

JUDGMENT of Mr Justice Max Barrett delivered on 6th December, 2016.

## I. Introduction

1. In its recent judgment in *An Taisce – The National Trust for Ireland v. McTigue Quarries Ltd & ors* [2016] IEHC 620, the court had to address, by reference, *inter alia*, to s.177O of the Planning and Development Act 2000, the novel question of the precise effect of a substitute consent, and whether the Oireachtas, in enacting, *inter alia*, s.177O, meant that, for all intents and purposes, such a consent should have the same effect as a planning permission.

2. It would be fair to say that on almost all counts and in almost every respect, the court in its previous judgment in these proceedings accepted the reasoning of An Taisce as regards the precise purport of the applicable legislation and the consequent import of a substitute consent. Mindful, however, that it was sitting at a remove from where the events at issue in the proceedings had transpired, and concerned not to use the sledgehammer of injunctive relief in circumstances where it would, thanks to the judgment of the court, now clearly be open to the local authority to commence enforcement proceedings under the planning code, if and as the authority deemed appropriate, the court declined to grant the injunctive relief sought in the proceedings, 'passing the baton' instead to the local authority as the party best placed to decide how best to proceed by reference to the facts 'on the ground'.

3. Following separate application at the hearing, the court also granted a protective costs order to An Taisce in circumstances where, to borrow from para. 25 of the court's judgment, *"It did not appear that [the availability of such order]...was a matter of much contention between the parties; [but] neither was it a matter of agreement between them."*

4. In all the circumstances presenting, the court indicated at the end of its written judgment that it would hear the parties as to any submissions they might wish to make regarding the issue of costs, in light particularly of s.3(4) of the Environmental (Miscellaneous Provisions) Act 2011, the costs in issue being those of the main proceedings and also the application for the protective costs order. An Taisce has now applied for its costs in the within proceedings, pursuant to s.3(4), and in circumstances where, notwithstanding that the injunctive relief sought at the proceedings was declined, An Taisce succeeded in respect of the nuanced and novel issues of statutory interpretation arising and the respondents failed in respect of all legal arguments advanced.

## II. Applicable Law

5. It is useful to quote s.3 of the Act of 2011 at this juncture:

*"(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)...*

*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."

[Emphasis added].

### III. Effect of Section 3(4)

6. In essence, what s.3 does is 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.

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. A Matter of Exceptional Public Importance?

10. Was the matter presenting in this case one of exceptional public importance? An Taisce submits, and the court accepts, that:

- (i) the issues arising as regards the nature and effect of substitute consents, and the court's adjudication upon those issues in favour of An Taisce's contentions has (a) clarified an area of planning law which does not appear previously to have been the subject of judicial scrutiny, with (b) that clarification having exposed a potential lacuna in respect of the status of other developments that are currently being carried out in the absence of the requisite planning permission and on a misinterpretation or misunderstanding as to the statutory provisions concerning or impinging upon substitute consents;
- (ii) the correct interpretation of the provisions aforesaid is of public importance and in the public interest of securing compliance with the planning and development code; and
- (iii) the national obligations arising from the relevant European legislation more than suffice to convert the points of law arising from points of law that transcend 'mere' public importance and become instead points of law of 'exceptional' public importance.

11. In reaching its conclusions in the above regard the court is mindful of the decision of Costello J. in *Callaghan v. An Bord Pleanála & ors* [2015] IEHC 493, and indeed to its own observations as to the true nature of exceptionality in *Connolly v. An Bord Pleanála & ors* [2016] IEHC 624, para.2, viz.:

*"That a point of law may relate to a matter of some private significance does not suffice to convert it into "a point of law of exceptional public importance", even where the party claiming such a point to arise is a public body. Moreover, a point of law of exceptional public importance is, by its nature, not just a point of law of public importance (itself a difficult enough hurdle to jump) but of a degree of public importance that is exceptional (a still higher hurdle to be vaulted)."*

### V. Special Circumstances?

12. Are there special circumstances which render it in the interests of justice that costs should be awarded to An Taisce pursuant to s.3(4) of the Act of 2011? The court considers a number of special circumstances to present:

- (i) An Taisce has been successful on almost all counts and in almost every respect;
- (ii) a consequence of the court's findings in its previous judgment is that the respondents are engaged in a notable breach of the planning and development code, albeit that the court's regard to this factor in the within costs application is tempered to some extent by the fact that this breach was not entirely apparent until the court's judgment was rendered;
- (iii) An Taisce, a charity working to preserve and protect Ireland's natural and built heritage, brought the within

proceedings for a legitimate and lawful purpose and was successful except as regards the refusal of injunctive relief; and

(iv) the court, in exercising its discretion not to grant the injunctive relief sought, proceeded so not because of anything An Taisce did but for the reasons stated previously above. In short, it seems to the court that the conduct of An Taisce and its *bona fide* purpose in bringing the within proceedings in pursuit of its broader public interest function of working to preserve and protect the natural and built heritage of our republic are further factors to be considered in the context of the within costs application.

13. There is also what might be described, albeit not with complete accuracy, as the 'test case' dimension to the within proceedings and which the court has already touched upon above, namely that, although there is not a line of cases queued up behind the within proceedings, by virtue of the within proceedings:

(a) an area of planning law which does not appear previously to have been the subject of judicial scrutiny was clarified, with

(b) such clarification having exposed a potential lacuna in respect of the status of other developments that are similarly placed nationwide.

14. In this regard the court notes that in *Dublin Corporation v. Bentham* [1993] 2 I.R. 58, Morris J. awarded costs to the respondent, despite the fact that certain orders were granted against the respondent, in circumstances where the respondent had defeated certain legal points in what was considered to be a 'test case'. Per Morris J., at 68:

*"With regard to costs I take the view that the respondents have succeeded in defeating what was stated by the applicant to have been a test case and, notwithstanding the fact that the applicant has succeeded on the second leg of its claim, I am of the opinion that the respondents are entitled to their costs."*

15. It seems to the court that Bentham is relevant to the present case in terms of demonstrating "*special circumstances*" in the form of a case in which the victor in a case might have orders made against it (or, as here, not obtain an order sought), notwithstanding that it succeeds on the critical point/s of law arising.

## **VI. Conclusion**

16. Having regard to all of the foregoing, the court considers that this is a case in which it is appropriate to invoke its entitlement, acknowledged by s.3(4) of the Act of 2011, to award the costs of An Taisce's principal application and also its application for a protective costs order in favour of An Taisce, the matter arising in the proceedings having been one of exceptional public importance and it being in the interests of justice so to order having regard to the special circumstances of the case.