Neutral Citation: [2014] IEHC 511

THE HIGH COURT

[2013 No. 218 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

MICHAEL MCCOY AND SOUTH DUBLIN COUNTY COUNCIL

APPLICANTS

AND

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

RESPONDENTS

JUDGMENT of Ms. Justice Baker delivered on the 16th day of July, 2014

1. This is an application for a declaration pursuant to ss. 3 and 7 of the Environment (Miscellaneous Provisions) Act 2011 ("the Act of 2011"). The provisions of s. 3 the Act of 2011 have the effect of displacing the ordinary rules regarding the award of costs in litigation. The making of a declaration has the effect that each party to proceedings shall, in the absence of factors identified in the legislation, bear their own costs.

2. The applicant has commenced these proceedings pursuant to s. 160 of the Planning and Development Act 2000, against the respondents who own or operate a quarry at lands at Ballinascorney Upper, Brittas, Co. Dublin. The applicant is a resident of adjoining lands and asserts that the quarrying which he says is unauthorised is being carried out in an area of great natural beauty and ecological sensitivity and that the carrying out of this activity without planning permission is a matter of great concern to him and to the natural environment.

The Legislative Context

3. The law has long recognised the role of individual citizens in enforcing or seeking to enforce environmental protection and the unique role and interest of the citizen of the protection of the environment. This finds reflection in s. 160 of the Planning and Development Act 2000, which permits a citizen who can show sufficient *locus standi* to bring enforcement proceedings under the planning code, it being recognised that the primary enforcement body, the relevant local authority is on occasion unable or unwilling to commence the enforcement proceedings.

4. The Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters, known as the Aarhus Convention, was a United Nations sponsored convention entered into in order to facilitate parties taking actions supportive of environmental protection. The Aarhus Convention was approved by the European Union in Council Decision 2005/370/EC of 17th February, 2005 and was incorporated into Irish law by the Environment (Miscellaneous) Provisions Act 2011. The stated aim of the Aarhus Convention itself was the promotion of the involvement of citizens in environmental matters and to improve the enforcement of environmental law within the Union. Ireland signed the Aarhus Convention on 25th June, 1998, it was ratified on 20th June, 2012, and it is legally binding on the State from that date.

5. One aspect of the public right to participate in environmental matters is the right of the public to access to the courts to enforce environmental law, whether this be against public bodies, individual citizens or corporate persons. Article 9 of the Convention which is entitled Access to Justice requires the parties to the Convention to "*ensure that any person…has access to a review procedure by a court of law or other independent and impartial body established by law*". Parties to the Convention were required to ensure that members of the public having a sufficient interest should have access to court procedures to challenge either substantive or procedural legality of any decision, act or omission in environmental matters. The Article requires that access be to an expeditious procedure which is either free of charge or inexpensive. What constitutes sufficient interest was one left to the individual requirements of national law but the Article specifically provided that such national provisions should be consistent with the objective of giving the public concerned wide access to justice within the scope of the Convention.

The Irish Statutory Provisions

6. Sections 7 and 3 of the Act of 2011 provide as follows:

> *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.*
>
> *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.

7. The class of relevant proceedings is set out in s 4:

4. (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.

(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).

(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.

8. The statutory provisions are lengthy but in essence what the Irish legislation does is to displace the normal costs rule in litigation. As explained by Kearns P. in *Indaver NV t/a Indaver Ireland v. An Bord Pleanála* [2013] IEHC 11 at para 17:

> *"Generally the costs of proceedings are at the discretion of the Court and usually costs are said to "follow the event" - the losing side is liable to pay the costs of the other side. However, judicial discretion in judicial review cases concerned with specific environmental matters has been limited by the s. 33 of the Planning and Development (Amendment) Act, 2010 Act (the "2012 Act") and further amended by s. 21 of the Environment (Miscellaneous Provisions) Act, 2011 (the "2011 Act")."*

9. As Hogan J. in *Kimpton Vale Developments Limited v. An Bord Pleanála* [2013] IEHC 442 states at para. 23 s. 3 "*introduces a new default rule whereby, absent special circumstances, the normal rule will be that of no order for costs*."

Is an application under section 3 appropriate in this class of application?

10. The respondents urge upon an argument that the applicant is not entitled to a declaration having regard to the nature of the proceedings. This argument is made primarily on the contention advanced by the respondent that the use of the land is not unauthorised development in that it commenced before 1st October, 1964, the operative date of the 1963 Act, the first Planning Act by which planning permission might have been required. There being no statutory requirement to obtain planning permission when the quarrying activity commenced, it is argued that no statutory requirement can now be said to exist.

11. The argument is that the substantive proceedings under s. 160 of the Planning and Development Act 2000 is not therefore an application to "enforce compliance" with any planning permission, but rather for a declaration that the quarrying activity is wholly

unauthorised and being carried out without the benefit of any planning permission at all.

12. This narrow interpretation of the class of proceedings to which the provisions apply was rejected by Hedigan J. in the first case in which a declaration was made in this jurisdiction, *Holly Hunter v. Nurendale Limited t/a Panda Waste* [2013] IEHC 430. That particular case was a hybrid in that part of the development in question did have planning permission, and the applicant challenged both the failure to comply with that planning permission and the absence of planning permission in respect of other classes of activities carried out. Hedigan J., albeit *obiter*, said that because s. 4 of the Act of 2011 referred to the "enforcement" of the statutory requirement that it appeared to him that s. 3 would apply to a situation where there was no planning permission in existence, as that would amount to a situation where there had been a "failure to comply" with the statutory requirement to have planning permission. He, in effect, accepted the argument that the class of action to which s. 3 applied was expressed in the legislation in the disjunctive and that an application could be made *inter alia* to ensure compliance with the statutory requirement for permission.

13. I accept his analysis of the disjunctive nature of s. 4(1) and in those circumstances accept as a matter of interpretation that a declaration may be made by a court in proceedings seeking the enforcement of a statutory requirement that planning permission be in existence for a particular use of land. The statement of Hedigan J. that an application under s. 3 may be made in cases where the applicant claims that no planning permission exists where one is mandated seems to me to be correct.

14. Accordingly, I accept that the applicant is entitled to bring this application.

Is the application premature?
15. The respondents also argue that this application is premature and point to the fact that the making at this stage of a declaration in favour of the applicant is a substantial fetter on the discretion of the trial judge hearing the application with correspondingly substantial consequences for the respondent.

16. The legislative provisions are quite clear and provide that any party to proceedings to which s. 3 applies may at any time before or during the course of proceedings apply to the court for a declaration. The application for such an order may be made at any time, and indeed the section is so widely drafted that it contemplates an application being made before the hearing commences, and at any stage before pleadings close, or indeed at any time during the currency of the substantive trial itself.

17. Further, the making of a declaration does not, of itself, give complete immunity to a party who has the benefit of such an order and the trial judge retains a discretion in certain circumstances identified in the section, and it is clear from s. 3, sub-sections (2), (3) and (4), that the trial judge retains a power to grant costs in matters of exceptional public importance or when, in the special circumstances of the case, it is in the interests of justice to do so, to grant costs to a successful party in the limited circumstances where it can be shown where the acts or omissions of the other party contributed to the plaintiff or counterclaimant obtaining relief. Equally, costs may be awarded against a party if the court considers that a claim or counterclaim is frivolous or vexatious. These retained discretions are exercisable by a court which has heard the evidence and would appear to lie at the conclusion of the case. This would suggest to me that the legislation did not regard it as the norm that the making of a declaration would await the substantive hearing.

18. Furthermore, it expressly provided in s. 10 of the Act of 2011, that in interpreting any provisions of the Act, the court shall have regard to the purpose and intent of the Aarhus Convention itself, and accordingly, a purposive interpretation of the section would suggest that an applicant for a declaration would usually wish to avail of the protective regime as early as possible in proceedings.

19. For me to reject the application on the grounds that it is premature and ought not to have been brought at this early stage in the proceedings would amount to a failure by me to take account of the broad provisions of s. 7(1) and in fact that the legislature clearly envisaged no express restriction on the time at which application could be made. Indeed, having regard to the fact that an application can be made before the proceedings commenced, the making of an application at this stage where substantial affidavits have been served and where the matter is progressing to trial seems to me appropriate.

Is there a real or reasonable prospect of success?
20. The case law has established that the test that the court applies in granting a protective costs order is higher than the bar set in certain other interlocutory matters. In *Holly Hunter v. Nurendale Limited t/a Panda Waste,* Hedigan J. quoted with approval the ruling of the European Court in *David Edwards & Anor. v. Environmental Agency & Anor.* (Cases C- 260/11), 11th April, 2013 where the court said that an applicant for a protective costs order must show that he or she has a reasonable prospect of success. Hedigan J. identified the test as being one that requires:-

> *"[T]hat 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, at least a good chance of success."*

21. Hedigan J. made it clear that the bar was not as low as requiring that the application not be frivolous or vexatious, but not as high as the test set out in *McNamara v. An Bord Pleanala (No. 1)* [1995] 2 ILRM 125, i.e. that the case be reasonable, arguable, weighty and not trivial or tenuous. The proceedings must be substantive, have a certain measure of substance and there must be a reasonable prospect of success. This approach accords with the general aim of the Aarhus Convention and the desirability that the State would provide access to justice for actions which reasonably may be said to protect the natural or built environment.

22. Applying that test to the instant case, it cannot be doubted that the quarrying activity carried out by the first named respondent on lands owned by the other respondents has been conducted in one form or another for many years. The evidence from the respondents is that this work commenced before the operative date of the Planning Code in October 1964. The nub of the question that will come to be decided by the court in the substantive case is whether the respondents are correct in saying that there has not been any intensification of note in the quarrying activity, and that accordingly, planning permission is not required for that activity which is immune from the requirement by virtue of pre-1964 user. The applicant points to litigation which has occurred surrounding the operation of the Shillelagh Quarries commencing with an action in 1978 in *Frank Patterson and Eily Patterson v. Martha Murphy & Trading Services Ltd.* [1978] ILRM 85, a judgment of Costello J. in which he held, inter alia, that there was a quarrying activity which required planning permission. There was a private law nuisance element to that case which was subsequently resolved by consent with the effect that the orders made by Costello J. were vacated, but the applicant urges upon the court the proposition, which seems to be legally correct, that the findings of Costello J., albeit that the issue before that court was not a planning case, are findings of fact that the then operation in 1978 differed materially from those carried out prior to 1st October 1964.

23. Later litigation in the case of *Shillelagh Quarries Ltd. v. An Bord Pleanála* [2012] IEHC 257, involved an application by the first named respondent in this case, the applicant in that case, to judicially review a decision of the Bord that it was "precluded from considering a grant of planning permission". Hedigan J. accepted that there was a difference in planning terms between the pre-1964

quarrying activity and that carried out post-1964 and held that there was intensification amounting to a change of use which required a fresh planning application. The judicial review arose from a refusal of An Bord Pleanála on 24th December, 2010, of an application by the first respondent pursuant to s. 261 of the Planning and Development Act 2000.

24. In addition, the applicant in this case submitted a s. 5 reference to An Bord Pleanála in respect of the status of the quarry and the Bord determined that the quarry was development and not exempt development.

25. The evidence before me is that the quarrying activity engaged in by the first respondent on the lands of the other respondents has not ceased and the applicant claims that the development is unauthorised, primarily because it is of an intensity and quality that is different from that which operated on the lands before 1964. The applicant has shown some significant history of findings by relevant bodies of unauthorised user.

26. The respondent says that the activity in which it is engaged is not of any greater intensity having regard to population increases and that contemporary extraction methods differ from those in use before 1964. Clearly there is a significant contest between the parties as to whether the use of the lands at Brittas, Co. Dublin is unauthorised.

27. It is not my function to determine the substantive issue between the parties. I must, however, be satisfied that there is a reasonable prospect of success. Having regard to the litigation history of this site and that planning decisions relevant to the matters now in issue in these substantive proceedings have been made in favour of the proposition advanced by the applicant that the user of the lands constitutes unlawful quarrying, I am of the view that the applicant has satisfied the test that his proceedings have a reasonable prospect of success. How the evidence will evolve and how ultimately the substantive proceedings will be determined is a matter that does not concern me and I am satisfied that the evidence points to the applicant having more than a fair issue to be tried and that he has a reasonable prospect of success.

Protection of the Environment
28. The applicant must also show that there is something at stake for the environment such that there is some general and not merely private interest raised in the proceedings. The applicant's affidavit avers to the fact that quarrying activity has been carried out on an area of great natural beauty and ecological sensitivity which has been so designated in the Development Plan for South County Dublin.

29. He says on affidavit that the continuation of the quarrying activity could adversely affect the overall landscape character and that it is likely to cause damage to the environment, and that he believes that the quarrying activity has an effect on water and air quality in the area and that this is likely to be very serious. The respondent denies the environmental effect and makes a sophisticated argument that the quarrying operation has no impact on water quality or air quality in the vicinity nor does it have any significant adverse impact of visible amenity. The court must be satisfied that the questions in this case are environmental questions of public importance, that the issues concern the environment and not merely the private ownership or enjoyment of land. I am satisfied that this test is met and does not require the balancing of the possible evidence or assertions by the parties but merely that the court be satisfied that the proceedings relate to the general public interest in the environment and not to private enjoyment of land.

Procedural Tests
30. Hedigan J. in *Holly Hunter v. Nurendale Limited t/a Panda Waste* set out his views as to the method to which an application for a declaration might be brought and the proofs that an applicant should adduce in the application. He pointed out that the court had to consider the situation of the parties and in that a case he had evidence that the applicant was impecunious and it was reasonable to believe she could not meet any order for costs that might be awarded against her.

31. He said that in general, the court would look to the resources of an applicant bringing proceedings in an environmental matter but that 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*". He said, albeit obiter, but in a strong statement of principle, that an applicant ought to set out broadly what their financial situation is so as to assist the court in making an assessment.

32. Mr. McCoy in para. 9 of his affidavit makes the simple averment that he is in full time education and is not a person of "*substantial means*". He does not identify if he is the owner of the property in which he resides, or the source or extent of his income. In saying that he is not a person of "*substantial means*" he does identify, albeit in few words, that his resources are limited. I do not think it was the intention of Hedigan J. in outlining the proofs to require that a person would disclose the intimate and private elements of his or her financial circumstance.

33. The replying affidavit of Thomas Murphy sworn in this application, does not doubt that the applicant is of limited means nor that he is a full time student. This is not an application where there are a number of applicants, some of whom are of more or less financial weight and might carry more or less financial risk in the proceedings, nor a case which involves an analysis of the relative litigation risks of various parties to proceedings, nor indeed is it a case where the applicant is a limited company. It does not require any great analysis or debate for this Court to accept that a student who describes himself as not having financial means would not be in a position to meet the costs of a High Court case involving very complicated issues of fact and law.

34. As to the likely costs of the proceedings, it was urged on me by counsel for the respondents that the applicant has given no indication of these costs, and that the judgment of Hedigan J. in *Holly Hunter v. Nurendale Limited t/a Panda Waste* did require that the court would have to take into account the amount of the likely costs, and would require for that purpose on some evidence as to the likely amount of costs. In that case, the court held that it was "*common case and a matter of general knowledge that the costs would be of an extremely high nature*" and of an order "*that the applicant was unlikely to be capable of meeting without very serious and prejudicial and financial consequences*."

35. Hedigan J. suggested that in future cases an applicant should set out broadly the expenses involved. It has been urged upon me the applicant has said nothing in his affidavit as to the likely costs. In para. 8 of the grounding affidavit, the applicant avers to the fact that the respondents have engaged both junior and senior counsel and have indicated that they intend filing between five and six replying affidavits. This has been borne out by the argument before me and indeed the highly technical nature of the affidavits in the substantive proceedings.

36. In particular, the applicant says that previous enforcement proceedings were "*very costly*" and goes on to say that it is "*likely that the costs in these proceedings will be significant*". My view is that this is a sufficient averment in this particular case as it is possible for me to extrapolate that the costs will be very high from the long history of proceedings of which the applicant has some knowledge, and he was in a position to give direct evidence that the previous litigation was, as he put it "very costly", and because I

have had the benefit of reading the substantial and technical affidavits sworn to date in the substantive proceedings. There may be cases where there was no such history and indeed many cases where at the time of the application for a declaration the court could have no real sense of the extent and difficulty of the legal argument and technical evidence that might be before the trial judge. In this case, the circumstances are different and twelve replying affidavits have been served to date of which three are lengthy and contain highly complex evidence of a technical nature, two of them from a Tim Paul, chartered mineral surveyor, and from a Joseph Bonner, town planning consultant. It seems probable that costs will be high indeed if the matter runs to a full hearing, and at this stage it appears from submissions that not only will the matter run to full hearing, but that it will likely run on oral hearing.

The joining of the local authority

37. Counsel for the respondents makes an argument that is not canvassed in *Holly Hunter v. Nurendale Limited t/a Panda Waste* and that is that as the local authority has now been joined to the proceedings as co-applicant that it is disproportionate and unnecessary to make declaration in favour of the applicant at this stage. South Dublin County Council was joined on consent and on its own motion returnable before the court on the same day as the motion for the declaration. Counsel for the respondents argued that there exists as a result a factor which should restrain the court in its discretion from granting the declaration at this stage. He says this is primarily because the declaration would not be available to a local authority by virtue of the provisions of s. 6(1) (c) of the Act. He says further that there is now in reality a "*deep pocket*", but more fundamentally he says that there is no prospect of two orders for costs being made in the case and accordingly if costs are awarded against the applicants it would be a joint and several order which can be met by the now newly joined co-applicant. In essence it is argued that if another citizen were co-joined as applicant the situation would be different, but what is joined now as co-applicant is a party in whose favour a declaration cannot be made, and the making now of a declaration in favour of one of two co-applicants unnecessarily ties the hands of the court in its discretion such that if costs are to be awarded they can only be ordered against the newly joined local authority applicant.

38. The discretion of a court to award costs is wide, and a court may award costs for or in favour of a party further in whole or in part. The jurisprudence with respect to costs has changed significantly in the last number of years and the courts now take a nuanced and broad view of the costs question and frequently do break down the issues and the way in which the trial was run, in order to properly understand how costs are incurred and where they should lie. The court no longer applies a simple test of costs following the event, and the court looks to what the true "*event*" is and how and by what means a party succeeded and to what extent a party succeeded or failed in establishing the event. This has the effect that on occasions a party may win a case but not obtain all of his or her costs if the court takes the view that some parts of the litigation were unnecessary lengthy and that unnecessary costs occurred as a result thereof should not be awarded in favour of a party causing or contributing to the unnecessary costs. See the often quoted judgment of Clarke J. in *Veolia Water UK v. Fingal County Council (No.2)* 2006 IEHC 240.

39. Because of this, should the applicants succeed fully or in part in the proceedings, the trial court would, in the absence of a declaration, have a discretion as to where costs should lie, and that discretion could in principle be exercised to award cost of some days to the first applicant and costs of different days to the second applicant. The declaration would in the absence of a finding that one of the exceptions in s. 3(3) applies, benefits the respondents as Mr. McCoy would not take any benefit from such finding. It is for example possible that the trial judge may take the view that all of the evidence on a particular technical question was adduced by the local authority and accordingly that Mr. McCoy should not, absent a declaration, have had all or indeed any of the costs for that part of the case. This result is possible even if the case does not run in a modular way. It is also possible that should the two applicants fail between themselves to agree on the form of the expert evidence and should their two experts give identical or almost identical evidence that the court might regard the conduct of the case as justifying an award of costs against Mr. McCoy notwithstanding the making of a declaration. The order would protect the first personal applicant from an award of costs against him and equally protects the respondents from having to pay Mr. McCoy's costs, but does not prevent the trial judge in making a nuanced and reasoned judgment with regard to costs notwithstanding the existence of a declaration. Further, the court has the power under s. 3(3) to award costs against a party by reason of the manner in which the party has conducted the proceedings and also has power to award costs in favour of party in a matter of exceptional public importance or where "*in the special circumstances of the case*" it is in the interest of justice to do so.

40. It seems to me that the trial judge's discretion is sufficiently wide to offer protection to both the applicant and the respondents should a declaration be made at this stage in favour of Mr. McCoy, and indeed it seems to me that the making of such a declaration does not prevent an argument that the interest of justice may ultimately mean that a costs order be made in favour of or against Mr. McCoy especially in the context of the addition of an additional party. Thus the interests of the respondents are also protected.

41. It must be borne in mind that while South Dublin County Council has now been joined as co-applicant, the first applicant has no control over how the County Council conduct the case and indeed it is possible that the County Council could come to a compromise with the respondents which would then leave the first applicant with the choice whether to continue the proceedings or not. These two applicants therefore are, at least at this stage of the proceedings, separate, and are entitled to and may well choose to conduct the case in a different way and on a different factual and legal basis.

Limited order?

42. It is also being argued that the court can grant relief as it thinks fit, and that a declaration could be granted to the applicant limited to any costs incurred up to the joinder of South Dublin County Council. There may be cases where this may be an appropriate order and where a local authority did choose to take over fully the running of litigation. The grounding affidavit of Alan O'Connor does not assert that it is the intention of South Dublin County Council to take over the running of the case from Mr. McCoy and the grounding affidavit merely avers to a proposition that the joinder of that County Council is "*necessary in order to enable the court to effectually and completely to adjudicate upon and settle all questions involved in the case presently before the court*". In those circumstances, it does not seem to me to be appropriate at this stage to limit the extent of the costs order but as noted above, the respondents are entitled to seek that the court exercise its discretionary power under s. 3(3) and s. (4) in the light of the conduct of the case subsequent to the joinder of South Dublin County Council.

Conclusion

43. In conclusion, this seems to me to be a proper case in which to make a declaration. The application before this Court must take into account the purpose of the Aarhus Convention and s. 8 of the Act of 2011 expressly requires that judicial notice shall be taken of that Convention. The purpose of the Convention, and this is reflected in the short title to the Act of 2011, was to facilitate public access to justice in environmental matters. In essence what the applicant seeks is a degree of comfort that he may now proceed with this case and prepare for trial without the fear should he lose, the costs would be awarded against him and one must assume that the award of costs could have significant and possibly even catastrophic results for the applicant. The making of an order has the effect that he must bear his own costs and cannot, without being able to argue that one of the exceptions in s. 3(3) apply, hope to recover his costs even should he succeed. Thus a degree of comfort to both parties exists once an order is made, and that mutuality also informs the court in its power to make an order.

44. Accordingly, I will make the order sought.