Neutral Citation: [2017] IEHC 606

THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 468 JR]

BETWEEN

FERGUS O'CONNOR

APPLICANT

AND

COUNTY COUNCIL OF THE COUNTY OF OFFALY

RESPONDENT

AND

TAG-A-BIN LIMITED

FIRST NAMED NOTICE PARTY

AND

COUNTY COUNCIL OF THE COUNTY OF MEATH

SECOND NAMED NOTICE PARTY

JUDGMENT of Ms. Justice Baker delivered on the 13th day of October, 2017.

1. This judgment concerns the scope of the special costs provisions of s. 3 of the Environment (Miscellaneous Provisions) Act 2011 ("the Act").

2. The applicant has commenced proceedings for judicial review of a decision of Offaly County Council ("Offaly") made on 31st March, 2016, by which it granted Tag-A-Bin Limited, the first notice party, a renewal of a national waste collection permit.

3. Offaly is the body nominated under s. 34(1)(a)(aa) of the Waste Management Act 1996 and is thereby charged with responsibility for renewing national waste collection permits in respect of different functional areas in the State. The applicant is the owner of land adjoining the waste facility operated by Tag-A-Bin, and until the matters complained of in these proceedings, operated the business of a riding school and equestrian centre.

4. The grounds on which relief in the form of *certiorari* and declaratory relief is sought are, *inter alia*, that the respondent had failed to properly apply, and/or had acted contrary to, Article(s) 28 and/or 29 of the Waste Management (Collection Permit) Regulations 2007 (S.I. No. 820/2007) ("the Regulations of 2007"), as amended, and s. 34A of the Waste Management Act 1996. It is also pleaded that the Habitats Directive (Council Directive 92/43/EEC of 21 May 1992) and the European Communities (Birds and Natural Habitats) Regulations 2011 (S.I No. 477/2011) have not been complied with by the respondent in its decision to grant the licence or decline to revoke the licence. Relief is also sought for a declaration that Offaly is acting *ultra vires* and without jurisdiction in purporting to act as a national waste permit collection office.

5. By notice of motion dated 23rd January, 2017, the applicant seeks a declaration pursuant to s. 7 of the Act that the special costs provisions of s. 3 apply to the proceedings. The application is opposed by Offaly.

6. Prior to the issue of the motion, the applicant through his solicitor by letter of 18th October, 2016 requested that the respondent agree that s. 3 of the Act applies to the proceedings. Following detailed correspondence between the parties, the respondent by letter of 17th November, 2016 refused the request, in reliance on an argument that the threshold requirement in s. 4(1)(a) of the Act had not been met as the proceedings were not for the purpose of ensuring compliance with, or enforcement of, a statutory requirement or condition or other requirement attached to a licence, permit, permission, lease or consent. That argument formed the basis of the opposition at the hearing of the motion.

Statutory provisions

7. The relevant statutory provisions are found in Part 2 of the Act and the long title recites that one of the objects of the Act is "to give effect to certain articles" of the Aarhus Convention and that judicial notice be taken of that Convention.

8. Section 3 envisages that the starting point in regard to costs in proceedings to which Part 2 of the Act applies is that each party bear its own costs, and to that extent s. 3(1) displaces the normal rule that costs "follow the event".

9. As Noonan J. said in *Diamrem Limited v. Cliffs of Moher Centre Limited & Anor.* [2017] IEHC 191, section 3 "establishes a very significant exception to the rule that costs follow the event" (para. 27).

10. Section 4 of the Act sets out the types of proceedings to which s. 3 applies and s. 4(1) provides as follows:

> "(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."

11. It is clear from the judgment of Hogan J. in *McCoy & Anor. v. Shillelagh Quarries Limited & Ors.* [2015] IECA 28, [2015] 1 I.R. 627 that the reference to "statutory requirement" in s. 4(1)(a) of the Act 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" (para. 28). The threshold tests are alternative.

12. A party who seeks to rely on s. 3 of the Act must also establish that the failure to comply with the statutory requirements, or the conditions of a licence or permit, is causing or is likely to cause damage to the environment.

13. "Damage to the environment" is defined in s. 4(2) as including damage, *inter alia* to air, water, soil, land, landscape, biological diversity, health and safety of persons and conditions of human life. While the respondent denies that the applicant has established a causative link between the alleged failures, the subject matter of the proceedings, and damage or likely damage to the environment, and argues that no credible allegation has been made, or evidence adduced, that environmental damage has occurred or is likely to occur, there is no argument made that the proceedings do not concern the environment as broadly defined in section 4(2).

14. "Damage" is defined in s. 4(5) of the Act in broad terms as including "any adverse effect on any matter".

15. Section 4(4) is also of relevance and identifies the type of licence or permit to which s. 4(1)(b) applies. The relevant provision is s. 4(4)(e):

> "(4) For the purposes of subsection (1), this section applies to—
>
> …
>
> (e) a waste collection permit granted pursuant to section 34, or a waste licence granted pursuant to section 40, of the Act of 1996,"

16. Section 4(6) applies to a licence, permit or any "renewal or revision of such licence". Section 4(6) provides:

> "(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."

17. The Act expressly identifies proceedings for judicial review as coming within the relevant provisions, and s. 6(a) provides as follows:

> "6. — Section 3 applies to —
>
> (a) proceedings in the High Court by way of judicial review or of seeking leave to apply for judicial review, of proceedings referred to in section 4 or 5, …"

18. Accordingly, the present proceedings are civil proceedings in the form of judicial review to which s. 3 may apply.

The test in s. 4(1)

19. In *McCoy & Anor. v. Shillelagh Quarries Limited & Ors.*, the Court of Appeal upheld the order of the High Court which made a determination that s. 3 applied to the proceedings. Those proceedings were taken under s. 160 of the Planning and Development Act 2000 ("PDA"), and the respondent had argued that s. 4(1) did not apply to the proceedings, but only to proceedings which involved the enforcement of an existing planning permission or planning condition or other similar requirement, i.e. the enforcement of a positive decision by the planning authority or other similar body. The defence to the substantive proceedings in that case, *inter alia*, was that the respondent claimed to be continuing a pre-1964 user of a quarry in respect of which no planning permission was required. Hogan J. giving the judgment of the Court considered that the proceedings did involve "an application for the enforcement of a statutory condition" (para. 53).

20. Hogan J. regarded the use of the disjunctive "or" in s. 4(1) as indicative of an intention by the Oireachtas that the scope of s. 4(1) was broad enough to include applications for the enforcement of statutory requirements and that this is a freestanding test, distinct and separate from proceedings the purpose of which was to ensure compliance with existing conditions or requirements attached to an existing licence, permit or other form of development consent.

21. The Court held accordingly that proceedings under s. 160 could fall within the scope of s. 4(1) even in circumstances where those proceedings were not taken to enforce a condition in an extant planning permission. Hogan J. considered that it was sufficient for the purposes of an application that proceedings "concern the enforcement or compliance with the statutory requirement *simpliciter*" (para. 28) and did not need to arise from, or be imposed by virtue of, the exercise of a statutory power. *Ipso facto*, proceedings which seek to ensure compliance with a statutory requirement that for example, planning permission is required for an activity, may come within the provisions even where there is no permit, licence etc. issued under a statute the conditions of which are claimed to have been breached.

22. Hedigan J. in *Hunter v. Nurendale Limited t/a Panda Waste* [2013] IEHC 430, [2013] 2 I.R. 373 had taken a similar view. He rejected the argument that s. 4 could apply only where there was an existing planning permission, and did not apply where the claim was founded on an assertion that a development was unauthorised for want of permission. At para. 15 of his judgment, Hedigan J. said the following:

> "…because s. 4 refers to the enforcement of a statutory requirement, it appears to me that s. 3 would cover a situation where there was no planning permission in existence because that would be a situation where there had been a failure to comply with the statutory requirement."

A matter of the substance of the proceedings

23. It is clear too that a court hearing an application under s. 7 will look to the substance and not merely the form of the proceedings.

24. Finlay Geoghegan J. in *CLM Properties Limited v. Greenstar Holdings Limited & Ors.* [2014] IEHC 288 held that the test involves

looking "at the question as to whether, as a matter of reality and substance, the proceedings are for the purpose of ensuring compliance with or enforcement of either a statutory provision or condition". The test is objective, and requires an objective assessment of the substance of the proceedings, not merely of the form of the pleadings, or the manner by which they are commenced.

25. Finlay Geoghegan J. adopted the reasoning of Birmingham J. in *Rowan v. Kerry County Council* [2012] IEHC 544. Birmingham J. was dealing with proceedings which had concluded, and where the unsuccessful plaintiff had contended that costs should not be awarded against him as the proceedings were brought to ensure compliance with the provisions of a planning permission. He noted that the proceedings did not in themselves, or on their face, purport to seek to secure compliance with the terms of the conditions of the planning permission, but were a challenge by way of judicial review of a planning decision. He noted that an examination of the pleadings did not suggest that they fell within the scope of s. 3, but that the court had nonetheless to consider whether "as a matter of reality and substance" the proceedings "were designed to ensure compliance with a condition, because of concern that non-compliance will result in damage to the environment in the sense of jeopardising the safety of people".

26. Birmingham J. concluded that in substance the proceedings were not designed to secure compliance with a condition but were issued to "advance the applicant's private agenda to prevent a neighbouring landowner build a house". He concluded that so viewed the proceedings were not ones to which the Act applied, and that the ordinary rules in relation to costs were applicable.

27. In *CLM Properties Limited v. Greenstar Holdings Limited & Ors*. Finlay Geoghegan J. held that while the alleged statutory obligations and alleged failure "formed part of the legal basis of the plaintiff's claim", the purpose of the proceedings was the recovery of money by the plaintiff by a form of tracing. Finlay Geoghegan J. concluded that the proceedings were not for the purpose of ensuring compliance with, or enforcement of, the statutory requirement or condition within the meaning of s. 4(1)(a) of the Act as:

> "In reality and substance, the purpose of the proceedings is to obtain payment to the plaintiff of the monies allegedly due to it by the first and second named defendants for work done by the plaintiff at specified landfill sites operated by the first and second named defendants." (para. 10)

The substance of the present action

28. The dispute between the parties in the present case relates to whether the proceedings are proceedings which seek to ensure compliance with, or enforce, a statutory requirement, or a condition or other requirement attached to a licence or permit, or in respect of a contravention of a permit.

29. The applicant argues that the grounds on which review is sought concern, and seek to enforce compliance with, a statutory requirement within the meaning of s. 4(1)(a), and also concern and involve an attempt to ensure compliance with the conditions of a permit, as it is pleaded that Offaly ought to have refused the application for the renewal of the permit, or have revoked the permit, due to the breach of numerous identified conditions of the existing permit of Tag-A-Bin Limited.

30. The respondent argues that the proceedings are not an action to enforce an environmental provision but to quash a licence. Counsel points to the requirement in s. 4(1)(a) and says that in substance the proceedings do not have as their purpose ensuring compliance with or enforcement of the statutory requirement, nor the purpose of the enforcement of a condition in a waste permit. It is argued equally that the proceedings are not in respect of a contravention of or failure to comply with the licence.

31. It is further argued that whilst declaratory relief is sought with regard to the jurisdiction of Offaly to grant a waste permit, this form of relief is subsidiary to the primary relief sought, a quashing of the decision of the respondent made on 31st March, 2016, to grant a waste collection permit to Tag-a-Bin. It is not sought to enforce any of the elements or conditions in that permit, but to quash it.

32. I accept the argument that while s. 4(4) of the Act identifies the types of licences or permits to which s. 3 applies, proceedings in respect of such licence must meet one of the two alternative conditions set out in section 4(1). Thus, the mere fact the proceedings relate to a permit or licence does not bring the proceedings within section 4(1).

33. I also reject the argument of the applicant that the fact the Waste Management Act 1996 and a waste collection permit granted pursuant to s. 34 thereof, is expressly included in the list of legislation and permissions in section 4(4)(e), of itself makes the present proceedings ones in which the enforcement of a requirement or condition in such permit is in issue.

34. I turn to examine the substance of the proceedings with these considerations in mind.

Discussion

35. In broad terms, the statement of grounds shows that the purpose of the proceedings is to quash the decision by Offaly to grant, or not to revoke, a waste collection permit. In substance, therefore, the purpose of the proceedings is to quash the decision of 31st March, 2016. The declarations sought with regard to the *vires* of the respondent to act as national permit agency are ancillary to that primary relief, but if a declaration is made that Offaly did not have vires, it will directly impact on the validity of the existing permit.

36. No leave is sought for the purpose of enforcing the permit already granted. The action rather is one to require that Offaly comply with the statutory requirements regulating the grant of a permit, and that the permit be issued by a body authorised to do so.

37. The grounds on which relief is sought are broadly speaking that the Council failed to properly consider or investigate the alleged breaches of the conditions attached to its existing permit, or the fact that Tag-A-Bin was alleged to be causing environmental pollution. Tag-A-Bin has the benefit of a permit but no authorisation to bring the waste it collects onto the lands where it is held and where activities such as washing down skips are carried out.

38. It is pleaded that the conditions of the existing permit, including condition 2.13, stipulate that environmental pollution not be caused by the permit holder, and the applicant claims that Tag-A-Bin is, in the process it now carries out at the site, is acting in breach of condition 2.2 of its licence, which requires that any waste collected is to be transferred to a facility which is itself licensed. The applicant does not seek however, to secure compliance with any conditions in the existing permit or to restrain actions which are alleged to be non-compliant with those conditions.

39. Section 34 of the Waste Management Act 1996 permitted the making of Regulations and the Regulations of 2007 were made pursuant to that statutory power. The applicant claims that in renewing the permit, or failing to revoke it, the respondent failed to

comply with the statutory requirements contained in Articles 28 and 29 of the Regulations of 2007 and failed to apply the statutory criteria in considering the application for a renewal. In particular, it is alleged that there has been a breach of Article 28(6) which provides:

> "(6) A nominated authority shall not grant a reviewed waste collection permit unless it is satisfied that—
>
> (a) the activity concerned, carried on in accordance with such conditions as are attached to the reviewed waste collection permit, will not cause environmental pollution,
>
> (b) any emissions from the activity concerned will not result in the contravention of any relevant standard, including any standard for an environmental medium, or any relevant emission limit value, prescribed under any enactment, and
>
> (c) the applicant is a fit and proper person."

40. A breach of Article 29(1) which provides as follow is also pleaded:

> "29. (1) A nominated authority may revoke a waste collection permit if it appears to it that—
>
> (a) the permit holder, or other relevant person, is not, in its reasonable opinion, a fit and proper person,
>
> (b) the activity being carried out is, or may be, in contravention of the conditions of the waste collection permit granted by the nominated authority,
>
> (c) the activity is, or may be, in contravention of the Waste Management (Facility Permit and Registration) Regulations 2007; Waste Management (Movement of Hazardous Waste) Regulations, 1998 or Waste Management (Transfrontier Shipment of Waste) Regulations 1998,
>
> (d) the permit holder, or other relevant person, is likely, by a continuation of his or her activities, to cause environmental pollution, or
>
> (e) the permit holder, or other relevant person, is participating in, or facilitating, the onward movement of waste to unauthorised facilities or unauthorised collectors."

41. The applicant claims that the respondent failed to have regard to the current nature of the operations of Tag-A-Bin, including that it brings onto, and stores waste on, an unauthorised facility, and it is therefore argued that all five of the circumstances set out in Article 29(1)(a) to (e) are satisfied, in that waste is being brought to an unauthorised facility in contravention of the Regulations and of the permit.

42. Put simply, the claim of the applicant is that in renewing the permit, Offaly failed to have regard to the submissions of the applicant relating to the breach of the conditions of the permit, and the operation of the existing waste collection facility, and the fact that waste was being transferred to, and stored at, an unauthorised facility and involves the risk of environmental pollution therefrom.

43. While I accept the argument of the respondent that the substance of the relief sought is to quash the permit, I consider that if the applicant succeeds in quashing the permit, the proceedings will have had the effect of ensuring compliance with the statutory requirements that a waste facility be operated only with the benefit of a permit and that the permit be granted in accordance with the requirements of Articles 28 and 29 of the Regulations of 2007.

44. The purpose of those Regulations is to protect the environment from damage by waste collection, processing or storage activities. It is true that the proceedings do not directly seek to require that Tag-a-Bin comply with the conditions in its permit, but nonetheless, I consider that in substance these proceedings are ones by which the applicant seeks to ensure compliance with the statutory requirement that a waste facility be licensed by law. The applicant seeks to impugn the granting of a permit and by that means seeks to ensure compliance with a statutory requirement that there be a valid licence.

45. The primary claim in the present proceedings is that the permit under which Tag-a-Bin operates was invalidly granted, both on the vires argument and because the decision was made without a full consideration of the statutory requirements. The proceedings seek compliance by Offaly with the statutory requirements that it should issue a permit only when it is competent to do so, and only when the statutory requirements are met.

46. Therefore, I consider that the threshold test of s. 4(1)(a) is met and the proceedings are for the purpose of ensuring compliance with a statutory requirement within the meaning of the subsection.

47. I am satisfied also that the applicant is not pursuing a merely private or personal agenda and has no collateral or extraneous purpose such as was found by the High Court in *Rowan v. Kerry County Council* or in *CLM Properties Limited v. Greenstar Holdings Limited & Ors.*

48. I am satisfied therefore, that the proceedings meet the first part of the alternative test in s. 4(1)(a) as explained by the Court of Appeal in *McCoy & Anor. v. Shillelagh Quarries Limited & Ors*.

Damage to the environment: a link is required

49. The respondent argues that no link is made out between the grant of, or failure to revoke, the permit and damage to the environment.

50. The respondent argues that while para. 14 of the second affidavit of the applicant sworn on 23rd January, 2017 contains a generalised allegation of damage to the business of the applicant, no credible evidence has been presented that environmental damage has occurred or is likely to occur.

51. In *Callaghan v. An Bord Pleanála & Ors.* [2015] IEHC 357 Costello J. took the view that s. 4(1) requires a causative link between the failure to ensure compliance with, or enforcement of, a statutory requirement and damage or likely damage to the environment, and that the link had to be direct.

52. The applicant in *Callaghan v. An Bord Pleanála & Ors.* sought to challenge a decision of the Board that a proposed wind farm development constituted strategic infrastructure development governed by s. 37A of the PDA. At para. 95 of her judgment, Costello J. stated:

> "If the Court were to grant the applicant the determination pursuant to s.7 that he seeks, it would be predicated upon an assumption that this entire process would not be carried out properly in due course. Clearly, the Court cannot proceed on that basis. Simply put, this application does not fall within the parameters of s.4 and therefore s.3 of the Act of 2011 cannot apply to the proceedings. I refuse the determination sought."

53. Humphreys J. has made a request for a preliminary ruling pursuant to Article 267 of the TFEU with regard, *inter alia*, to the question of whether the requirement of national law for a causative link between an alleged unlawful act or decision, and damage to the environment, is compatible with the Aarhus Convention in *North East Pylon Pressure Campaign Limited & Anor. v. An Bord Pleanála & Ors.* [2016] IEHC 490.

54. I consider that notwithstanding the making of a preliminary reference by Humphreys J. in *North East Pylon Pressure Campaign Limited & Anor. v. An Bord Pleanála & Ors.,* the present application does not raise a difficulty of the type identified by Costello J. or Humphreys J. as in my view the applicant has shown a link sufficient to meet the test at this stage. I turn now to set out the basis of that view.

Nature of evidence required

55. The judgment of Hedigan J. in *Hunter v. Nurendale Limited t/a Panda Waste* set out guidance as to the evidence required in an application under section 7. With regard to the strength of the case, the applicant is required to "set out the reasons why he believes that there is a reasonable prospect of success" and what is at stake for the claimant and for the protection of the environment. In *McCoy & Anor. v. Shillelagh Quarries Limited & Ors.* the Court of Appeal accepted this test as articulated by Hedigan J. as "whether the claim had a certain degree of substance and that it had a reasonable prospect of success."

56. As regard to the threshold of proof to be met, a number of matters must be noted. An application under s. 7 is one that is brought by motion in the substantive proceedings, and as I commented at para. 6 of my judgment in *McCoy & Anor. v. Shillelagh Quarries Limited & Ors.* [2014] IEHC 512 "in a summary fashion". As Hogan J. in the decision of the Court of Appeal commented,, an application for a declaration under s. 7 can be made even in advance of proceedings being instituted, and must in the circumstances not involve a hearing akin to a trial.

57. This analysis is supported by the express terms of s. 7 which provides for an application "at any time", including before the proceedings.

58. Hogan J. identified a clear difficulty with an application early in proceedings or before proceedings were instituted, in that "the strength of the claim may be difficult to assess at the outset of proceedings" (para. 40), and noted in that context that the order sought under s. 7 is a final order albeit that the protection given by s. 7 may be lost in certain circumstances.

59. Leave to bring an application for judicial review has already been granted by Humphreys J. on 27th June, 2016, and it must therefore be said that the proceedings meet the threshold that there exists an arguable case in respect of the grounds pleaded. There is evidence on affidavit, including photographic evidence, of the delivery and storage of rubbish, the discharge of run-off from the cleaning of skips on site, complaints of strong odours of waste, and the carrying out of the sorting of waste on the site.

60. Paragraph 32 of the affidavit grounding the application for judicial review sworn on 27th June, 2016, refers to "loud, impulsive and tonal noise emissions". On 27th August, 2015, warning letters under s. 152 of the PDA issued from Meath County Council in respect of the storage of skips on site. A submission by Patrick O'Donnell of Earth Science Partnership (Ire) Limited Consulting Engineers, Geologists and Environmental Scientists on behalf of the applicant sent to Offaly sets out in some detail the alleged environmental damage in the form of discharge to ground water of unsuitable water run-off from the storage of skips on site, the storage of skips loaded with rubbish on site, the spray painting, welding and repairing of skips, and the fact the area in question is 210m from the nearest watercourse and 608m from the River Boyne NATURA 2000 site and the River Boyne and Blackwater SAC and SPA.

61. All of these taken together establish a *prima facie* case that damage to the environment is already occurring, and having regard to the authorities and the nature of the application as one grounded on affidavit, it is not the function of the court to resolve any conflict regarding that evidence at this juncture.

62. The circumstances in which Costello J. refused to grant an order under s. 7 of the Act were quite different, and she correctly pointed to the fact that she could not proceed on an assumption that the planning process would not conclude in a lawful way. In the present case, the applicant seeks to quash a permit and does not seek an order in the context of an anticipated failure to comply with statutory conditions in the grant of that permit in the future. The permit is extant and the affidavit evidence shows *prima facie* that there is present environment damage from the current activities.

63. By analogy with the case law on the test to be applied in granting summary judgment, I consider that an application for a declaration under s. 7 requires an applicant to make more than "mere assertions" of damage or likely damage to the environment, and I borrow that phrase from the much-quoted dicta of Hardiman J. in *Aer Rianta c.p.t. v. Ryanair Limited.* [2001] IESC 94, and consider that the affidavit evidence must, as described by Charleton J. in *National Asset Loan Management Limited v. Barden* [2013] IEHC 32, [2013] 2 I.R. 28, have "some reasonable foundation".

64. This reasoning is supported by the Court of Appeal in *McCoy & Anor. v. Shillelagh Quarries Limited & Ors*. where, *inter alia*, that Court considered whether the respondent was correct that the making of an order was premature as "many important factual and other issues remained to be determined" (para. 36). Hogan J. expressed the view that a narrow approach to that question "would effectively undermine and frustrate" the object of the relevant statutory provisions, to facilitate access to justice in regard to environmental matters. He went on to say at para. 38:

> "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."

65. I consider then that the test is one which requires an applicant to go beyond mere assertions, to establish that he or she has a reasonable case with a reasonable prospect of success, and to make out a stateable argument that damage to the environment is occurring or is likely to occur.

66. Having regard to the evidence in the present case outlined above, I am of the view that the applicant has met this test and I reject the argument of the respondents to the contrary.

The financial circumstances of the applicant
67. In *Hunter v. Nurendale Limited t/a Panda Waste*, Hedigan J. set out a requirement that an applicant for a declaration under s. 7 should "set out a broad statement" of his financial situation. The Court of Appeal approved this element of the test in *McCoy & Anor. v. Shillelagh Quarries Limited & Ors.*

68. The applicant has set out his financial circumstances in his grounding affidavit, and avers that he operated, until the matters complained of in the proceedings, a commercial riding school which he has been forced to close and has thereby lost his livelihood. He has also set out that he has no contingency arrangement with his solicitor and that legal aid is not available. The applicant is in broadly similar circumstances to those of Mr. McCoy where Hogan J. noted that no contrary suggestion had been made by the respondent to the averment by Mr. McCoy that he was a student and had limited means.

69. The evidence of difficult financial circumstances in the present case is more detailed than that accepted as sufficient in *McCoy & Anor. v. Shillelagh Quarries Limited & Ors*. The applicant says he has lost his livelihood. He is the sole registered owner of the lands at Dunmoe which he purchased in 1983, and on which he has operated an equestrian centre until April, 2016, and while he has five horses on the land he was not able to take in additional animals "because of concerns over the viability of the business". At para. 14 of his affidavit sworn on 23rd January, 2017, he says he was required to close the school, and at para. 12 says he has "limited means to fund the present proceedings". He says he is self-employed and formerly operated a small but successful riding school. That riding school has been closed and he says, "this has caused me substantial financial hardship as this was my only form of income".

70. In that regard, I am mindful that the applicant *prima facie* will have to fund the litigation from his own resources. I am also of the view that, as no statutory provision exists by which an application for a declaration under s. 7 can be made other than in public, a purposive interpretation of the legislation would not suggest the Oireachtas contemplated extensive disclosure in a public arena of the financial circumstances of an applicant.

71. For these reasons, the financial matters disclosed are sufficient to meet the test in the authorities.

72. In the circumstances, I propose making a declaration pursuant to s. 7 of the Environment (Miscellaneous Provisions) Act 2011 that the special costs provisions of s. 3 of that Act apply to the present proceedings.