Neutral Citation: [2017] IEHC 191

THE HIGH COURT

[2016 No. 259 MCA]

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

BETWEEN

DIAMREM LIMITED

APPLICANT

AND

CLIFFS OF MOHER CENTRE LIMITED AND CLARE COUNTY COUNCIL

RESPONDENTS

JUDGMENT of Mr. Justice Noonan delivered on the 27th day of March, 2017

1. The substantive proceedings herein consist of an application pursuant to s. 160 of the Planning and Development Act 2000 (as amended) ("the PDA") whereby the applicant seeks an order compelling the respondents to comply with the terms of a planning permission for the development of a visitor centre at the Cliffs of Moher, Co. Clare. The application now before the court is one for security for the respondents' costs and is made pursuant to s. 52 of the Companies Act 2014.

Background Facts

2. The first respondent was established by the second respondent ("the Council") for the purposes of developing a new visitor centre at the Cliffs of Moher. The first respondent applied for and obtained planning permission for this development in 2002, under reference 01/333. The permission granted, ultimately by An Bord Pleanála, was subject to a number of conditions which included a standard condition that the development would be carried out in accordance with the plans and particulars lodged with the application and conditions 3 and 7 which provided as follows:-

> "3. Details of the proposed Mobility Management Strategy shall be submitted to the planning authority for written agreement prior to the commencement of development.
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> Reason: In the interest of traffic, safety and visitor management…
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> 7. Detailed proposals, including full particulars of the temporary car park to be provided during the period of construction and the storage of excavated materials from the site, shall be submitted to and agreed with the planning authority prior to the commencement of the development.
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> Reason: In the interest of orderly development."

3. The s. 160 application is grounded on an affidavit of John D. Flanagan, a director and, in effect, the proprietor of the applicant. He avers that the report by the An Bord Pleanála inspector considers that a park and ride system should be put in place to service the visitor centre rather than a car park on site. Against this background, the Mobility Management Strategy requirement was included in the permission. Mr. Flanagan says that the second respondent in its response to condition 3 indicated that it proposed to omit the permanent car park for which permission had been granted beside the visitor centre and instead retain the temporary car park pending full assessment of a park and ride scheme to be implemented when the centre was completed and operational. Mr. Flanagan says, therefore, that the Council agreed that the temporary car park was only to be retained until the implementation of the park and ride system.

4. In 2009, another company associated with Mr. Flanagan obtained two planning permissions for separate park and ride systems to be located respectively in Liscannor and Doolin to serve the Cliffs of Moher Visitor Centre. Applications to extend these permissions were made successfully in 2014 and 2015. He avers that the continued retention of the temporary car park is incompatible with the viability of a park and ride system for obvious reasons and this was recognised by the An Bord Pleanála inspector in his original report. It would appear that the visitor centre has been operational since in or around 2007 and the temporary car park is still retained in situ by the Council after some eleven years. The applicant company was incorporated in May 2014, for the purposes of operating the park and ride system and subsequently entered into an agreement in 2015 with the Council for that purpose. The applicant complains that its business has essentially been undermined and frustrated by the refusal of the Council to close the temporary car park, thereby rendering the business non-viable.

5. Although the essential thrust of the s. 160 application herein is based on the applicant's commercial interests, in his affidavit Mr. Flanagan also refers to the fact that there was a clear undertaking by the Council to discontinue the temporary car park so as to, *inter alia*, ensure that the ecologically sensitive site would be protected. He further avers that the discontinuation of the car park is necessary to enable the visitor centre to operate in an environmentally appropriate manner.

6. Following the institution of the within proceedings, the respondents' solicitors wrote to the applicant's solicitors on the 9th of September, 2016, seeking security for costs having regard to the fact that the applicant was only incorporated in 2014 and appeared to have no significant assets. Reference was also made to an associated company in receivership and the fact that Mr. Flanagan had a judgment in excess of €10m registered against him. In a response of the 27th of September, 2016, the applicant's solicitors declined to furnish security for costs and went on to say:

> "Given the nature of the proceedings herein, our client is entitled to a protective costs order under the Aarhus Convention in respect of their proceedings and in particular following the decision of the Court of Appeal in McCoy v. Shillelagh Quarries & Ors."

7. The respondents' solicitors replied on the 13th of October, 2016, indicating that they disputed the applicant's entitlement to a protective costs order and awaited receipt of its notice of motion and grounding affidavit in that regard. Before any such application was brought by the applicant, the within application for security for costs was initiated by way of notice of motion on the 17th of November, 2016.

Section 52

8. Section 52 of the Companies Act 2014 provides:

> "Where a company is plaintiff in any action or other legal proceeding, any judge having jurisdiction in the matter, may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his or her defence, require security to be given for those costs and may stay all proceedings until the security is given."

9. The fundamental principles to be applied in such applications were usefully summarised by Clarke J. in *Connaughton Road Construction Ltd v. Laing O'Rourke (Ireland) Ltd* [2009] IEHC 7 where he said (at para. 2.1):

> "(1) In order to succeed in obtaining security for costs an initial onus rests upon the moving party to establish:
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> (a) That he had a *prima facie* defence to the plaintiff's claim, and
>
> (b) That the plaintiff would not be able to pay the moving party's costs if the moving party be successful.
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> (2) In the event that the above two facts are established, then security ought to be required unless it could be shown that there were specific circumstances in the case with ought to cause the court to exercise its discretion not the make the order sought.
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> In this regard the onus rests upon the party resisting the order. The most common examples of such special circumstances include cases where a plaintiff's liability to discharge the defendant's costs of successfully defending the action concerned flow from the wrong allegedly committed by the moving party or where there has been delay by the moving party in seeking the order sought."

The Arguments

10. The respondents submit that all the criteria identified in *Connaughton Road* are met in this case. They raise a number of matters by way of defence. First, they say that the planning permission contains no stipulation requiring removal of the temporary car park. They submit that the applicant's claim proceeds on the basis that the planning permission required that the principle means of access to the visitors centre should be by way of park and ride facility, when the permission in fact contains no such condition.

11. Secondly the respondents submit that the applicant's claim is statute barred. A seven year time limit applies to s. 160 enforcement proceedings. In the case of a development without planning permission, the seven year runs from the date of commencement of the development. In the case of a development which has planning permission, the seven years runs from the date of the expiration of the five year life of the planning permission. By either yard stick, the claim is out of time.

12. Thirdly, the respondents say that the closure of the car park would not be in the public interest and this gives rise to a defence under the Planning and Development Act 2000.

13. They further submit that no question of a protective costs order arises in this case because no environmental issues are raised by the applicant in the main proceedings. In the originating notice of motion, no protective costs order is claimed and despite the correspondence to which I have already referred extending an invitation to the applicant to apply for such an order, no application has in fact been made.

14. In response, counsel for the applicant contends that the application is entirely misconceived in circumstances where it could not be reasonably contended by the respondents that a car park for 481 vehicles adjacent to such an important national site raises no environmental issues. In such circumstances, the provisions of the Aarhus Convention, as incorporated into Irish law by the Environment (Miscellaneous) Provisions Act 2011 ("the 2011 Act"), clearly envisage that any person, which includes a body corporate, is entitled to seek enforcement of the planning code in respect of environmental matters without incurring the risk of costs being awarded against such applicant. The intention of that legislation clearly precludes reliance on s. 52 of the Companies Act 2014. That section must be read in the light of the 2011 Act and was clearly intended to provide for situations where costs normally follow the event. That does not arise here.

15. Apart from that submission, the applicant contends that the respondents, who are in effect the planning authority seeking to stand over an unauthorised development, have in reality no defence. The requirement for them to complete the development in accordance with the plans and particulars lodged means they have to comply with the commitment clearly given to An Bord Pleanála to implement the park and ride system and close the temporary car park. In effect, the respondents are contending that there is no temporal limitation on the car park and they are entitled to treat it as permanent in the absence of any permission to that effect.

16. The applicant argues that the claim is clearly not statute barred in circumstances where the continuing user of the car park on an ongoing basis is what is complained of by the applicant, not its construction. There could be no question of the public interest favouring retention by a planning authority of an unauthorised development so close to an ecologically sensitive site. The reality is that the council is making substantial profits from the use of this unlawful car park which it does not wish to forgo, despite assurances given to An Bord Pleanála.

17. As an alternative to the foregoing submission, the applicant contends that special circumstances arise which should in this case influence the court to exercise its discretion against granting security for costs. The applicant's inability to meet those costs stems directly from the wrong complained of by the Council in circumstances where its business is being fatally undermined by the retention of the unauthorised temporary car park.

Discussion

18. The first stage in an application of this nature is for the court to assess whether there is what has been described as a "*prima facie*" defence. It is clear that an analysis of this issue cannot involve a determination of whether or not such defence is likely to succeed. Rather, before the court could come to the conclusion that there is no prima facie defence, it would have to be satisfied that there are no foreseeable circumstances in which the defence advanced could succeed. As Lynch J. delivering the judgment of the Supreme Court in *Lismore Homes Ltd v. Bank of Ireland Finance Ltd (No. 2)* [1999] 1 I.R. 501 remarked (at p. 513):

> "The strength or otherwise of the party's case is not an appropriate consideration unless the plaintiff's case is unanswerable in which circumstance security should be refused."

19. McCarthy J. made similar observations in *Comhlucht Páipéar Ríomhaireachta Teo v. Úduras na Gaeltachta* [1990] ILRM 266 where he said that the strength of the plaintiff's case was not a ground for refusing security unless it is clear that there is in reality no defence.

20. It seems to me that in the present case, it could not by any stretch of the imagination be suggested that the plaintiff has shown that its case is unanswerable. Substantial issues have been raised by way of defence and it is not for me on the hearing of this application to engage in any detailed analysis of the strength of the defence or whether or not it is likely to succeed. Accordingly I am satisfied that a prima facie defence has been demonstrated by the respondents. I am also satisfied that the evidence establishes that the applicant is unlikely to be able to meet the costs of the Council in these proceedings if awarded against it, a point not seriously contested by the applicant.

21. Instead, it seems to me that the real gravamen of the applicant's resistance to an order for security rests on the Aarhus Convention and its alter ego in Irish law, the 2011 Act. Section 3 subs. 1 of that Act provides as follows:

> "(1) Notwithstanding anything contained in any other enactment or in—
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> (a) Order 99 of the Rules of the Superior Courts (S.I. No. 15 of 1986),
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> (b) Order 66 of the Circuit Court Rules (S.I. No. 510 of 2001), or
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> (c) Order 51 of the District Court Rules (S.I. No. 93 of 1997),
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> 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."

22. The section goes on to provide for certain exceptions to that overarching principle. Section 4 of the Act goes on to provide as follows:

> "4.— (1) Section 3 applies to civil proceedings, other than proceedings referred to in subsection (3) [*not relevant here*], instituted by a person—
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> (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
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> (b) in respect of the contravention of, or the failure to comply with such licence, permit, permission, lease or consent,
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> 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.
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> (2) Without prejudice to the generality of subsection (1), damage to the environment includes damage to all or any of the following:
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> (a) air and the atmosphere;
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> (b) water, including coastal and marine areas;
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> (c) soil;
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> (d) land;
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> (e) landscapes and natural sites;
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> (f) biological diversity, including any component of such diversity, and genetically modified organisms;
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> (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)."

23. The section goes on to provide that amongst the matters covered are permissions granted pursuant to the PDA.

24. Section 7 of the 2011 Act provides:

> "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…"

25. Accordingly an application for a protective costs order can be made at any time up to the final determination of the proceedings. Such applications should be made by way of notice of motion and grounding affidavit – see *Hunter v. Nurendale Ltd* [2013] IEHC 430.

26. The context for the enactment of the 2011 Act was explained by Baker J. in her judgment in *McCoy v. Shillelagh Quarries Ltd* [2014] IEHC 511 where she said (at p.2):

> "[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.
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> [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."

27. It is clear therefore that in cases to which it applies, the 2011 Act establishes a very significant exception to the rule that costs follow the event. It seems to me that s. 52 of the 2014 Act has to be read in the light of that exception. Section 52 is clearly predicated on the basis that the party seeking security for its costs will in the normal way if it succeeds in its defence be awarded those costs. The underlying rationale of the section is that a defendant should not have to be on risk of being unable to recover any costs if sued unsuccessfully by an impecunious company. Of course that risk does not arise in a case to which the 2011 Act applies.

28. The respondents argue that there is in reality no environmental aspect to this case at all and this is underpinned by the fact that the applicant has yet to make any application for a protective costs order. It is undoubtedly true to say that the primary motivation behind these proceedings is the applicant's own economic interests. However, those interests and the protection of the environment are not automatically mutually exclusive. It is not obvious to me that it could never be said that the permanent retention of a temporary car park for 481 vehicles beside one of the State's foremost locations of natural beauty gives rise to an environmental issue. Similarly, it seems to me that I could not safely conclude at this stage of the proceedings that the applicant could never be entitled to a protective costs order. I also have to weigh in the balance the undoubted fact that if an order for security for costs is granted, this may have the effect of bringing the applicant's proceedings to an end.

29. However, even if I were to be wrong in expressing those views, it seems to me that there are special circumstances in this case which would justify the court in exercising its discretion against granting an order for security for costs.

30. The respondents argue that there is little or no evidence from the exhibited accounts of the applicant that it has suffered any loss as a result of the matters complained of. There is, of course, the further fact that, as the respondents argue, the applicant company was not formed until 2014 by which stage the car park complained of had already existed for some seven years. As the respondents put it, the applicant came to the harm of which it now complains. I am not sure that this is an entirely accurate characterisation of what has occurred in this case.

31. There is no dispute about the fact that the car park in issue has ever been other than temporary. Although it has existed for over a decade, its designation as temporary clearly implies that it must be closed sooner or later. The applicant says that that time arrived when the park and ride system put in place on foot of an agreement with the County Council came on stream. The applicant, in effect, says it was entitled to expect that the car park would close once the system became operational. It complains that not only did the Council grant its application for planning permission to operate the system but actually entered into a commercial agreement with it to do so.

32. In taking those steps, the Council must have known that the system could never have been viably operated as long as the temporary car park remained open. The applicant says that as a matter of common sense, nobody is going to use its park and ride system to visit the Cliffs of Moher when they can simply drive their car there and park in the Council's car park. The establishment of such a basic proposition does not depend on any elaborate analysis of the applicant's accounts. Therefore, while the applicant may not be able to establish definitively that its impecuniosity derives directly from the conduct complained of, it seems to me that the continued retention of the car park must at least potentially have a significant adverse impact on the applicant's ability to operate the park and ride system. Indeed, this was recognised by the An Bord Pleanála inspector explicitly in his report as far back as 2002.

33. In my view, therefore, apart altogether from the appropriateness of a security for costs application in s. 160 proceedings involving environmental issues, the facts as I have outlined them constitute special circumstances which would warrant the court in exercising its discretion against the grant of security.

34. Accordingly, I will refuse this application.