Neutral Citation: [2014] IEHC 512

THE HIGH COURT

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

[2013 No. 218 MCA]

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 10th day of October, 2014

1. On 16th July, 2014, following a hearing after which I reserved judgment, I made a declaration pursuant to s. 7 of the Environment (Miscellaneous Provisions) Act 2011 (the Act of 2011) that s. 3 of the Act of 2011 applies to these proceedings.

2. Following the making of the order, I adjourned the matter to enable the parties to consider the judgment before I heard argument as the costs of the application. My particular concern was to reflect the spirit of the legislation that costs in environmental matters not be prohibitively expensive, and I was concerned that the costs of the motion for the section 7 declaration might be significant in that context.

3. Counsel argued the costs matter before me and the respondents served a Calderbank type letter of offer in which a small sum was offered in satisfaction of the costs claim.

4. The form of order which I have made has the effect of limiting in accordance with the statutory provisions the jurisdiction of the court to order costs against or in favour of the person in whose favour the declaration is made. This form of order differs from the common law cost protection orders made, for example, by Laffoy J. in *Village Residence Association v. An Bord Pleanála (No. 2)* [2000] 4 I.R. 321, by reference to s. 14 of the Courts Supplemental Provisions Act 1961 and O. 19, r. 1 and r. 5 of the Rules of the Superior Court, by Kelly J. in *Friends of the Curragh Environment Limited v. An Bord Pleanála* [2006] IEHC 390 and by Clarke J. in *Rosborough v. Cork County Council* [2008] IEHC 94.

5. The statutory costs order is more in the form of a costs limitation order and no rules of court as yet govern the means by which an application for a declaration may be made. The Act in s. 7(5) provides that the application should be made by notice of motion, and the applicant in conformity with this provision, made application by motion grounded on his own relatively short affidavit. The fourth defendant swore an affidavit in reply saying that the application was "wholly misconceived", and that the proceedings were not within the class of proceedings to which section 3 of the Act of 2011 applied. Thus far the affidavit evidence raised the correct tests for the court in determining the application for the declaration. However the respondent also submitted a lengthy affidavit to the court from an engineer, and other affidavits which went to the merits of the substantive claim under section 160 of the Act of 2000, and this had the effect of lengthening the hearing and complicating the matters argued before me unnecessarily.

6. The application made in this case was an application which was statutory in origin and arose under the provisions of the Act of 2011 which applies to the environmental litigation in respect of which that Act applies. It seems to me that the Oireachtas intended the application to be made in a summary fashion, and this is clear from the fact that it was envisaged that application would be made by motion in the substantive proceedings and not by originating pledging. Further the legalisation envisages that the application be for a determination that section 3 applies to the proceedings, namely that each party shall bear its own costs, subject only to the limited preserved discretion in the court to award costs for or against any party in the circumstances provided in subsections (2) and (3). The declaration is for that reason of a different class of order than that made by way of costs protection order at common law, and is merely for a declaration that the costs limitation regime introduced by section 3 shall apply. It seems to me in that context that the manner in which the respondents raised certain issues in the replying affidavits and in submissions added to the costs of the hearing before me.

7. Further, the legislation expressly in section 7 allows the parties to environmental litigation to agree that each of them shall bear their own costs and that section 3 applies, and this agreement may be made before or after the proceedings commence. The legislation thus envisages in my view that an applicant or respondent to proceedings call upon the other to agree that section 3 does apply to the litigation, or the intended litigation, and in those circumstances a motion would not be necessary. The applicant's solicitors wrote to the respondents on 16th December 2013 seeking such agreement before a relying affidavit was served and before the motion came on for hearing. It may be preferable that such a letter be sent before an application is made, or indeed before the litigation commences or at the time of intuition, but nonetheless the applicant did give the respondent an opportunity to consider the application of section 3 at an early enough stage to have avoided the costs of the hearing of the motion.

8. For these reasons it seems to me that the applicant is entitled to his costs of the application, to be taxed in default of agreement. I note the service by the respondents of an Calderbank type letter of offer with regard to the quantum of costs which was served after I made my order in the substantive application, and while this is often, and may usually be, a prudent approach with which the court will find favour, I do not regard the level of the offer, which is at the lower end of the scale for the costs of a standard motion on notice, to be sufficient, having regard to the difficult matters canvassed by the respondents in the hearing and on affidavit, some of which in my view went beyond what was necessary to enable the me to decide the matter.

9. Therefore I order that the applicant is to have the costs of the motion to be taxed in default of agreement.