



**THE COURT OF APPEAL**

**Neutral Citation Number: [2019] IECA 155**

**Record No. 2017/400**

**Whelan J.  
McGovern J.  
Costello J.**

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

**BETWEEN/**

**ELAINE MORGAN**

**AND (BY ORDER)**

**CARLOW COUNTY COUNCIL**

**APPLICANTS/RESPONDENTS**

**AND**

**SLANEYGIO LIMITED**

**AND**

**JOSEPH GERMAINE**

**RESPONDENTS/APPELLANTS**

**JUDGMENT of Ms. Justice Costello delivered on the 5th day of June, 2019**

**Introduction**

1. The appeal in this case was against an order of the High Court of the 7th July, 2017 made by Baker J. under s.160 of the Planning and Development Act, 2000 ("the PDA") and against the order for costs. At the commencement of the appeal, counsel for the appellants indicated that the appeal was to be confined to the High Court order for costs. It was said the trial judge erred in awarding any costs on the High Court scale contrary to the mandatory provisions of s.17 of the Courts Act 1981 (as amended).

**Background**

2. The proceedings commenced on the 1st November, 2016 when Ms Morgan, the first named respondent, sought an interim injunction pursuant to s.160 of the PDA in relation to the demolition of the entire building formerly situate at No. 25 Dublin Street, Carlow. The facts have been fully set out in the judgment of the High Court of the 4th May, 2017, *Morgan v Slaneygio* [2017] IEHC 284. For the purposes of this appeal it is sufficient to note that the building was completely demolished over the Halloween bank holiday weekend in 2016. Demolition work commenced on Saturday morning at about 10.30 am and continued, despite protest and threat of legal action, until restrained by order of the High Court on Tuesday the 1st November, 2016 when the first named respondent applied for an injunction pursuant to s.160 of the PDA initially to restrain on an interim basis the continuation of certain demolition works and ultimately to require the restoration of the affected property to its original condition.

3. The High Court, Noonan J., granted an interim order and related reliefs and the matter was initially returnable to the 3rd November, 2016. Thereafter the matter was adjourned to the 10th and 17th of November, 21st of December, 2016 and the 11th January, 2017. On the 10th November, 2016 Carlow County Council (the second respondent) was joined as a co-applicant in its capacity as the relevant planning authority. On the 23rd February, 2017 the parties were directed to exchange written submissions directed to whether or not the works carried out were exempted development within the meaning of s.4 (1)(h) of the PDA and thus did not constitute an unauthorised development and therefore were subject to the discretion of the court in relation to granting reliefs pursuant to s.160. The first named respondent was given leave to issue a motion pursuant to Order 40, r. 1 to cross-examine the second named appellant on his two replying affidavits.

4. The application was heard on the 10th March, 2017 and on the 4th May, 2017 the trial judge gave her reserved decision. She held that the works in question were not exempted development within the meaning of s.4(1)(h) and that accordingly the works carried out over the Halloween bank holiday weekend were unauthorised development. Accordingly, the court had jurisdiction to make an order under s.160 and the remaining issue for decision was whether she should exercise her discretion so to do in the circumstances of the case.

5. The appellants contended that she should not make an order under s.160 as they were prepared to give an undertaking to restore the building. The precise parameters of this undertaking were never clarified. The trial judge directed that the second named appellant be cross-examined on his affidavits in order that she could resolve conflicts of fact on the affidavits, therefore meaning she could exercise her discretion whether or not to make an order pursuant to s.160.

6. On the 15th June, 2017, the second named appellant was cross-examined on his affidavits for several hours. Once this had concluded, counsel for the appellants accepted that in principle it was appropriate for the trial judge to make an order under s.160. The remaining issue was the form of that order. Counsel for the appellants proposed submitting plans and construction drawings for the restoration of the demolished premises "*as close as makes no difference*" which could be attached to the order to be made by the High Court. The trial judge noted that the appellants accepted that it was appropriate that she exercise her discretion to make an order and adjourned the matter for two weeks to allow counsel for the appellants to propose a form of order to the respondents to ascertain whether an agreement could be reached between the parties.

7. When the matter came back before the court on the 7th July, 2017, no detailed drawings, plans or construction drawings had been furnished, though scale plans and elevations were furnished on the morning to the parties. The judge did not accept that these could form the basis of an order and as a result she gave a very detailed order requiring *inter alia* that the drawings and specifications for the reconstruction of the premises were to be prepared by the second respondent's conservation architect.

8. In relation to the costs incurred in the application to date she made a very considered and particular order in favour of the applicants against the respondents jointly and severally to be taxed in the following terms:-

*"It is ordered that the costs of the hearing before Noonan J. on the 1st November, 2016 and the costs of the hearing before this Court on the 10th and 17th November 2016 be taxed on the High Court scale, thereafter the costs of the within proceedings are to be taxed on the Circuit Court scale including the cost of the transcript save and except for the cost of the proceedings on the 7th July, 2017 and the legal submissions of the parties that are to be taxed on the High Court scale."*

9. This court has been given no note of her reasons for making an order in these terms, though the following facts and arguments were advanced on the application for costs which it may be inferred were relevant to her decision. The demolition work commenced at 10.30 am on the Saturday of the bank holiday weekend, meaning that public offices were closed and it was not possible to obtain a certificate of rateable valuation for the premises in advance of moving the application. The Circuit Court was not sitting in Carlow on the 1st November, 2016 when the first named respondent was in a position to make an *ex parte* application to court but it was possible to make that application that morning to the High Court. As the applicant (the first named respondent) was an established barrister practising on the South Eastern Circuit, it was apprehended that a judge of the circuit would recuse him or herself from hearing an application for an interim injunction *ex parte* where she was the moving party, which in turn, in all likelihood, would lead to a delay in moving the application. The matter was extremely urgent as the demolition works were continuing on the 1st November, 2016. There was no such risk if the matter was brought in the High Court.

10. It is to be inferred from her order that the trial judge was satisfied in all the circumstances that it was appropriate to commence the proceedings in the High Court and she awarded costs on the High Court scale for the *ex parte* application and the 10th and 17th November, 2016. It is also to be inferred that once the certificate of rateable valuation for the premises was placed before the court by the appellants she accepted that the matter could have continued upon remittal in the Circuit Court. For this reason, she awarded costs of the proceedings on the Circuit Court scale thereafter, including the hearing on 10th March, 2017, save as regards the written submissions and the hearing on 15th June, 2017.

11. She ordered the parties to file written submissions and she gave a reserved judgment on the issue of whether the "works" were exempted development. She believed it was appropriate that the costs of the written submissions should be on the High Court scale. While there is no note of the judge's reasoning on this point there can be no doubt that the importance and complexity of the issues involved would have entitled her to exercise her discretion accordingly.

12. Finally, she awarded High Court costs in respect of the second day of hearing on 15th June, 2017 when the second named appellant was cross-examined for several hours before his counsel ultimately accepted that it was appropriate that the trial judge make an order under s.160. She clearly marked her view that these costs were unnecessarily incurred by awarding High Court costs for this day in contrast to the costs awarded for the hearing on the 10th March, 2017.

13. It is to be noted that the first named respondent applied for her costs on a solicitor and client basis but the trial judge instead made the very specific, considered order set out above.

### **Grounds of appeal**

14. Notwithstanding the concession of counsel for the appellants to Baker J. on the 15th June, 2017, the appellants appealed the entire judgment and order. In relation to the costs, these were appealed on the basis that she awarded "*the substantive part of the costs on the High Court scale notwithstanding that the proceedings should have been brought in the Circuit Court.*" They also appealed the refusal of the trial judge to make a differential costs order in favour of the appellants in circumstances where the proceedings were brought in the High Court and it was open to the first named applicant to bring the proceedings in the Circuit Court.

15. The appellants argued that s.17 of the Courts Act 1981(as amended) imposes a cap on the costs that can be recovered by an applicant where an order is made in his favour but the court is not the lowest court having jurisdiction to make an order granting the relief the subject of the order. They submitted that the first named applicant could have brought the proceedings in the Circuit Court as it had jurisdiction to make the orders sought. They relied upon the decision of Dunne J. in *Meath County Council v. Rooney* [2009] IEHC 564 where it was held that the provisions of s.17 are mandatory in effect and that where a case is one in which the Circuit Court would have jurisdiction, an order for Circuit Court costs should be made. Counsel for the appellants submitted that as the provisions of s.17 are mandatory, the Act "*allows no room for debate*". He said the intention of the Oireachtas was particularly clear because the provisions of s.17 as originally enacted allowed for discretion and that the Act had been subsequently amended to remove the discretion of the court.

### **Discussion**

16. Section 17(4) of the Courts Act 1981 as originally enacted provided:-

*"Where an order is made by a court in favour of the plaintiff or applicant in any proceedings (other than an action specified in subsections (1) to (3) of this section) and the court in which the proceedings were commenced is not the lowest court having jurisdiction to make an order granting the relief (which expression includes in this section damages) the subject of the order, the plaintiff shall not be entitled to recover more costs than he would have been entitled to recover if the proceedings had been commenced in the lowest court unless the order is made by a judge and the judge grants a special certificate under this section."* (emphasis added)

17. It is clear therefore, as originally enacted, the section expressly provided that a judge is not required to confine a successful

plaintiff to the costs that the plaintiff would have been entitled to recover if the proceedings had been commenced in the lowest court and the judge is expressly empowered to grant a special certificate under the section. This proviso was removed when s.17 of the Act of 1981 was substituted by s.14 of the Courts Act 1991 in the following terms:-

*"...17(1) Where an order is made by a court in favour of the plaintiff or applicant in any proceedings (other than an action specified in subsections (2) and (3) of this section) and the court is not the lowest court having jurisdiction to make an order granting the relief the subject of the order, the plaintiff shall not be entitled to recover more costs than he would have been entitled to recover if the proceedings had been commenced and determined in the said lowest court."*

In subs. (2), as amended by s.19 of the Courts and Civil Law (Miscellaneous Provisions) Act, 2013, the court is given a discretion in relation to the scale of the costs where the damages recovered by the plaintiff exceeds €64,000 but does not exceed €75,000. If the judge is to exercise his or her discretion pursuant to subs. (2) the judge must be of the opinion that it was reasonable in the interests of justice generally, owing to the exceptional nature of the proceedings or any question of law contained therein, that the proceedings should have been commenced and determined in the High Court.

18. In *Meath County Council v Rooney*, the applicant sought an order pursuant to the provisions of s.160 of the PDA restraining the respondents from carrying out any unauthorised development at certain lands in County Meath. The proceedings were compromised but the issue of costs remained to be resolved. The respondents argued that the applicant was entitled to costs on the Circuit Court scale as they were proceedings that could have been commenced in the Circuit Court. The trial judge noted that the proceedings did not involve a claim for damages but nonetheless held that s.17 was applicable to the facts of the case. She held that the provision was mandatory in its terms. In the absence of any evidence as to the rateable valuation of the lands at issue in the proceedings she indicated that there should be an enquiry into that issue and, if the Circuit Court would have had jurisdiction, that an order for Circuit Court costs should be made.

19. This decision does not assist in the issue for determination on this appeal as s.161 was not apparently cited to the trial judge and she was not addressed on whether the provisions of s.17 of the Act of 1981 applied in the context of an application brought under s.160 of the PDA. Thus the judgment does not consider s. 161, a provision which is of central importance in this appeal.

20. In this case, the respondents to the appeal argued that the trial judge was entitled to make the order she made in respect of costs on the basis of the provisions of s.161 and that s.17 of the Act of 1981 did not apply in the circumstances.

21. To state the obvious, the Act of 2000 postdates the Act of 1981 and the amendment of 1991. The Oireachtas is presumed to know the law. If the provisions of s.160 and s.161 of the PDA are inconsistent with the provisions of s.17, then the later provisions override the inconsistent provisions of pre-existing law (*Bennion on Statutory Interpretation* (6th Ed.) (s.32)).

22. Part VIII of the PDA deals with the enforcement of the provisions of planning law. It provides that any person who has carried out or is carrying out unauthorised development shall be guilty of an offence and provides a number of ways in which the planning code may be enforced. These include both civil and criminal proceedings. Sections 160 and 161 of the Act provide:-

*"160. (1) Where an unauthorised development has been, is being or is likely to be carried out or continued, the High Court or the Circuit Court may, on the application of a planning authority or any other person, whether or not the person has an interest in the land, by order require any person to do or not to do, or to cease to do, as the case may be, anything that the Court considers necessary and specifies in the order to ensure, as appropriate, the following:*

*(a) that the unauthorised development is not carried out or continued;*

*(b) in so far as is practicable, that any land is restored to its condition prior to the commencement of any unauthorised development;*

*(c) that any development is carried out in conformity with—*

*(i) in the case of a permission granted under this Act, the permission pertaining to that development or any condition to which the permission is subject ...*

*(2) In making an order under subsection (1), where appropriate, the Court may order the carrying out of any works, including the restoration, reconstruction, removal, demolition or alteration of any structure or other feature.*

*(3) (a) An application to the High Court or the Circuit Court for an order under this section shall be by motion and the Court when considering the matter may make such interim or interlocutory order (if any) as it considers appropriate.*

*(b) Subject to section 161, the order by which an application under this section is determined may contain such terms and conditions (if any) as to the payment of costs as the Court considers appropriate.*

*(4) (a) Rules of court may provide for an order under this section to be made against a person whose identity is unknown.*

*(b) Any relevant rules of Court made in respect of section 27 (inserted by section 19 of the Act of 1992) of the Act of 1976 shall apply to this section and shall be construed to that effect.*

*(5) (a) An application under this section to the Circuit Court shall be made to the judge of the Circuit Court for the circuit in which the land which is the subject of the application is situated.*

*(b) The Circuit Court shall have jurisdiction to hear and determine an application under this section where the market value of the land which is the subject of the application does not exceed €3,000,000.*

*(c) The Circuit Court may, for the purposes of paragraph (b), in relation to land that has not been given a market value or is the subject with other land of a market value, determine that its market value would exceed, or would not exceed, €3,000,000.*

*(d) Where the market value of any land which is the subject of an application under this section exceeds €3,000,000, the Circuit Court shall, if an application is made to it in that behalf by any person having an interest in the proceedings, transfer the proceedings to the High Court, but any order made or act done in the course of such proceedings before the transfer shall be valid unless discharged or varied by the High Court by order.*

*(e) In this subsection 'market value' means, in relation to land, the price that would have been obtained in respect of the unencumbered fee simple were the land to have been sold on the open market, in the year immediately preceding the bringing of the proceedings concerned, in such manner and subject to such conditions as might reasonably be calculated to have resulted in the vendor obtaining the best price for the land. ...*

161. (1) *The court shall, unless it is satisfied that there are special and substantial reasons for not so doing, order the person to pay—*

*(a) where a person is convicted of an offence under this Part, to the planning authority, or*

*(b) where the person is the subject of an order under section 160, to the planning authority or to any other person as appropriate,*

*the costs and expenses of the action, measured by the court.*

*(2) Where costs or expenses are to be paid to the authority, they shall include any such costs or expenses reasonably incurred by the authority in relation to the investigation, detection and prosecution of the offence or order, as appropriate, including costs incurred in respect of the remuneration and other expenses of employees, consultants and advisers."*

23. Section 160 grants concurrent jurisdiction to the High Court and the Circuit Court. It does not mandate the bringing of an application in the Circuit Court where the Circuit Court has jurisdiction or vice versa. Subsection (5) provides that an application brought under the section to the Circuit Court shall be made to the judge of the Circuit Court for the circuit in which the land which is the subject of the application is situate. Sub paragraphs (b) to (e) set out the jurisdiction of the Circuit Court in relation to an application under s.160 by reference to the market value of the land which is the subject of the application. If the market value of the land in question exceeds €3,000,000, the Circuit Court judge is not required to transfer the application to the High Court unless he or she is requested to do so. Prior to the 11th January, 2017 the jurisdiction was established by reference to the rateable valuation of the relevant land.

24. Subsection (3)(b) is particularly important for the purposes of this appeal. It provides that: "*subject to s.161, the order by which an application under this section is determined may contain such terms and conditions (if any) as to the payment of costs as the court considers appropriate.*" This sub paragraph applies to an application whether brought in the High Court or the Circuit Court. The discretion of the court is very wide indeed. It is limited solely by reference to s.161. The provisions of s.161 relevant to this appeal read as follows:-

*"(1) The court shall ...order the person to pay...*

*(b) where the person is the subject of an order under section 160, to the planning authority or to any other person as appropriate,*

*the costs and expenses of the action, measured by the court."*

25. Section 161 applies both to prosecutions and applications for injunctions. The court shall order the person to pay the costs and expenses of the action measured by the court. This underscores the power of the court to order the payment of such costs as it considers appropriate expressly provided in s.160(3)(b). The court is to measure the costs and expenses.

26. Subsection (2) of s.161 provides guidance as to how the court is to measure the costs. Where costs or expenses are to be paid to the authority (the planning authority), they should include any such costs or expenses reasonably incurred by the authority in relation to the investigation, detection and prosecution of the offence or order as appropriate. They even include the costs incurred in respect of the remuneration and other expenses of employees, consultants and advisors. It is thus quite clear that the scope of the costs orders which the court may measure and award to a planning authority is very wide indeed and may well exceed the costs that could be recovered upon taxation in the normal way. While subs. (2) expressly applies to the costs or expenses of the planning authority, it is to be inferred that the costs of an applicant for an order under s.160 who is not a planning authority would likewise extend to those reasonably incurred by that other party in relation to the investigation and bringing of the application which resulted in an order being made under s.160.

27. The primary jurisdiction of the court to award costs in relation to the application brought under s.160 is that set out in subs. (3) which entitles the court to order payment of costs as the court considers appropriate, subject to s.161, which in turn entitles the court to measure the costs and expenses of both the planning authority and the applicant for an order under s. 160. In my opinion, these provisions are self-contained and deliberately so, given the context of an application pursuant to s.160. In my opinion, with due respect to the decision of Dunne J. in *Meath County Council v Rooney*, the provisions of s.17 of the Act of 1981 do not apply to an application brought pursuant to s.160. In any event it is distinguishable since s. 161 was neither argued nor considered in that case. The provisions of s.17 are inconsistent with the later provisions of s.160(3) and s.161 of the PDA. As was pointed out by counsel for the first named respondent, it would be perfectly possible for a judge to measure costs pursuant to s.161 in an amount which would exceed the costs which the successful applicant for an order under s.160 might recover on taxation whether in the Circuit Court or the High Court, by reason of the express provisions of s.160 and 161. The application of the provisions of s.17(1) to an application brought under s.160 would therefore set at naught the provisions of s.160(3) and s.161.

28. For these reasons I do not agree that the trial judge had no discretion to award costs other than costs on the Circuit Court scale in the circumstances of this case. That being so, it was a matter for the exercise of her discretion as to how she awarded the costs of the application before her. It is quite clear that she exercised her discretion in a very judicious manner which reflected her view of the exigencies and justice of the case. Her approach was considered and nuanced. I see no basis on appeal why this court should interfere with her exercise of her discretion in this matter.

29. The appellants appealed the decision of the trial judge to refuse to make an order for differential costs pursuant to s.17(5) of the Act of 1981(as amended). It was accepted that the court had a discretion in this regard and, in light of my rejection of the appeal in relation to the award of costs in favour of the respondents, this appeal likewise must be rejected. The trial judge was entitled to refuse to make such an order and no real basis for interfering with the exercise of her discretion was advanced.

30. The first named respondent had sought her costs on a solicitor and client basis but this was not acceded to by the trial judge. She did not cross appeal this decision but she argued in response to the appeal of the order for costs that the order of the High Court should be varied to award her costs on that basis. She urged this court to vary the order if this court was minded to allow the appeal. As the appellants have failed in their appeal, this does not arise. However, I should add that the trial judge was best place to exercise her discretion on this very point and this court would be very slow to interfere with what was clearly a very considered, careful decision of the High Court judge on the issue of costs where she carefully assessed the relevant matters, including the option to bring the proceedings in the Circuit Court, and the reasonableness of the actions of all parties. I see no basis therefore upon which to interfere with her exercise of her discretion to vary the order as sought.

31. For these reasons I would dismiss the appeal and affirm the order of the High Court.