Neutral Citation [2016] IEHC 697

THE HIGH COURT

[2015 No. 49 JR]

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 50 AND 50A OF THE PLANNING AND DEVELOPMENT ACT 2000 (AS AMENDED)

AND IN THE MATTER OF AN APPLICATION

BETWEEN

DUNNES STORES

APPLICANT

– AND –

AN BORD PLEANÁLA

RESPONDENT

– AND –

KILKENNY COUNTY COUNCIL

FIRST-NAMED NOTICE PARTY

– AND –

DEERLAND CONSTRUCTION LIMITED

SECOND-NAMED NOTICE PARTY

JUDGMENT of Mr Justice Max Barrett delivered on 6th December, 2016.

I. Introduction

1. There are ultimately three different scales upon which costs can be measured, *viz*. party and party costs, solicitor and client costs, and solicitor and own client costs. The typical measure of costs is on a party and party basis, but the court has a discretion to award costs on a higher scale where appropriate. Deerland Construction Limited comes now to court seeking costs on a solicitor and client basis following on the court's judgments in *Dunnes Stores v. An Bord Pleanála* [2015] IEHC 716 (the main proceedings) and *Dunnes Stores v. An Bord Pleanála* [2016] IEHC 263 (the application for a certificate to appeal). An Bord Pleanála too is seeking its costs but on a party and party basis only.

II. Some Salient Elements of the Court's Previous Judgments

(i) Overview

2. Before proceeding to consider the merits of the costs application, it is helpful to recall some salient observations from the court's previous judgments.

(ii) The Judgment in the Main Proceedings

3. In its judgment in the main proceedings, the court, at para. 1, observed as follows:

> *"Dunnes Stores has brought this application ostensibly for one purpose; in truth the application serves a very different end. On its face, the application is concerned with the legality of a decision of An Bord Pleanála to grant certain retention permission to Deerland Construction. That permission concerns a shopping centre development at Ferrybank, in County Kilkenny. The 'anchor store' at that development is owned by Dunnes. The retention permission authorises five alterations which, individually and collectively, are minor and cosmetic in nature. In a twist worthy of Lewis Carroll, Dunnes in fact has no issue with the alterations that are the subject of the retention permission. So why have these proceedings been commenced? If truth be told, they have nothing to do with planning law and everything to do with Dunnes securing an advantage for itself in a long-running contractual dispute with Deerland and National Asset Loan Management Limited ('NALM')."*

4. Later, at paras. 3 to 5 of its judgment, under the section heading "*iii. Standard reliefs, minor alterations and strange proceedings*", the court observed as follows:

> *"a. The standard*
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> *3. On the face of it, this application aims at securing the following reliefs: (1) an order of certiorari quashing the decision of An Bord Pleanála to grant retention permission in respect of the Centre; (2) a declaration that the said grant of planning permission is ultra vires, invalid and/or of no legal effect; and (3) certain other ancillary reliefs.*
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> *b. The minor*
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> *4. On the face of it, the court is being asked, more particularly, to review a retention permission in respect of: (i) a lift motor room/staircase enclosure over-run on the east elevation of the shopping centre; (ii) an external landscaped area at the northern boundary of the sight, including omission of a permitted bridge; (iii) the placement of red glazing panels, instead of stone panels, at the ground floor main entrance lobby; and (iv) louvred screens on the shopping centre roof.*
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> *c. The strange*

5. Now for the strange bit: Dunnes has no objection to the just-mentioned adjustments. So this is a judicial review of the granting of retention permission where the party that has brought the application (Dunnes) has no issue with the substance of the adjustments to which that permission relates. That must be something of a first, so far as planning-related judicial review applications are concerned. But whether it is or not, the fact that Dunnes has no issue with the substance of the adjustments to which the retention permission relates offers considerable support for the contention that Dunnes, in coming to court with the within application, has engaged in an 'abuse of process'."

5. Moving on, at para.75 of its judgment, the court identified the relevant factors in an abuse of process application, stating, *inter alia*, as follows:

"The court, before striking out for 'abuse of process', must…be satisfied by way of evidence that the plaintiff, in commencing these proceedings, (i) has an ulterior motive, (ii) seeks a collateral advantage beyond what the law offers, and (iii) has instituted the proceedings for a purpose which the law does not recognise as a legitimate use of the remedy sought…".

6. The court was satisfied that all three of those criteria had been satisfied, *i.e.* that Dunnes had commenced the proceedings for an ulterior motive, was seeking a collateral advantage and had instituted proceedings for a purpose not recognised as legitimate.

7. Finally, at para. 81 of its judgment, the court summarised its conclusions as follows:

"For the reasons stated above, the court finds that the true object of this judicial review application is to enable Dunnes to delay or avoid compliance with its contractual obligations to fit-out and occupy the anchor store and/or to facilitate the creation of a contrived legal justification for Dunnes' long-time failure to comply with those obligations. These purposes are entirely collateral to the remedies being sought in the within application and have no connection to the objects which the public law procedures now being invoked by Dunnes were designed to achieve. That this is the true purpose of Dunnes is not a matter of conjecture or surmise. It is the irresistible and logical conclusion to be drawn from the detailed consideration of the facts in which the court has engaged above. The court refuses the reliefs sought, declines to enter into any consideration of the purported planning-related issues raised by Dunnes, and dismisses the proceedings as involving an 'abuse of process'."

(iii) The Judgment in the Application for a Certificate to Appeal

8. In the context of Dunnes' application for a certificate to appeal, the court had further occasion to make a number of observations in relation to the case that Dunnes had made. Thus, at para. 28 of its second judgment, when considering the decision in *Quinn Group v. An Bord Pleanála* [2001] 1 I.R. 505 and the extent to which the court's initial judgment had involved some departure from those principles or some novel application of them, the court observed, *inter alia*, as follows:

"In the next section of its judgment below, the court considers how its judgment of last November conforms to the logic of Quirke J. in Quinn Group v. An Bord Pleanála *[2001] 1 I.R. 505. The court mentions that judgment at this juncture because tellingly, despite trawling through precedents, counsel for Deerland have been unable to find a single reported judicial review application – not one – in which Quinn Group has been relied upon in the decade and a half since it was reported. It has been cited in several non-judicial review proceedings; however, it appears that Deerland is the first developer or respondent in the last 15 years or so to rely upon Quinn Group as an authority in judicial review proceedings. So, although the court is no soothsayer, the notion that developers will be rushing to court to rely on its judgment of last November, a judgment that (a) conforms to Quinn Group and (b) is so clearly rooted in its own particular and peculiar facts, seems to the court to be fanciful. That said, if Dunnes or other would-be anchor tenants are minded to bring judicial review proceedings in circumstances akin to those which presented last November – circumstances that are so peculiar it seems unlikely, albeit not impossible, that they would arise again –developers might, and might be right, to seek to pray in aid the decision in Quinn Group or even this Court's judgment of last November. But they could not pray in aid some novel legal change; for the law is long established, and has gone unchanged by this Court."*

9. Later, at paras. 53-54 of its judgment, when considering the issue of transcendent importance, as referred to by McMenamin J. in *Glancré Teoranta v. An Bord Pleanála* [2006] IEHC 250, the court observed, *inter alia,* as follows:

"53....Simply put, therefore, the court would have had to ask itself, had it found one or more of the points of law raised by Dunnes to be points of law of exceptional public importance (and the court has not so found), that the said point(s) of law went beyond the range or limits or – perhaps a better word – the 'parameters' of the present case. And the court's answer to this question would have been 'no'.

54. Why so? Why 'no'? Because, as the court outlined in its judgment of last November, at paras. 33 to 44, the primary focus of Dunnes' argument at that hearing was not the substance of the legal principles governing the dismissal of proceedings brought for a collateral purpose, but rather the application of those legal principles to the facts at hand. Dunnes disputed Deerland's allegations about its motives. Indeed, despite the court's judgment it continues to do so now, and therein perhaps lies a critical difficulty with the present application. For while Dunnes has sought to frame its would-be appeal as raising exceptional points of law arising, its true difficulty appears to be with the court's unexceptional application of principle to the most exceptional of facts."

10. Then, in para. 93 of its judgment, when considering, again by reference to the *Glancré* principles, whether there would be some affirmative public benefit to be derived from the proposed appeal, the court observed as follows:

"Insofar as identifying an 'affirmative public benefit' *is concerned, Dunnes effectively suggests that the court in its judgment of last November has opened the floodgates to a deluge of developers who will descend upon the law-courts seeking dismissal of proceedings on the basis of motive alone. In this regard, the court would reiterate the points it has made at Section B, Part 2, Item II, above. Suffice it here to note the following:(i) it is a bald assertion, no more;(ii) there has been no suggestion that the appeal would bring any environmental or planning benefit to the public; (iii) despite its being a decade and a half since the High Court offered, in Quinn Group, a virtually identical statement of principle to that offered by the court in its judgment of last November, no deluge of developers has yet to arrive at the courts;(iv) the court's findings in its judgment of last November were highly dependent on the particular and unique facts presenting."*

III. The Decision in Geaney

11. Order 99, rules 10(1) and (3) of the Rules of the Superior Courts (1986), as amended, provides as follows, under the heading "*Amount of costs*":

> *"(1) This rule applies to costs which by or under these Rules or any order or direction of the Court are to be paid to a party to any proceedings either by another party to those proceedings or out of any fund…*
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> *(3) The Court in awarding costs to which this rule applies may in any case in which it thinks fit to do so, order or direct that the costs shall be taxed on the solicitor and client basis."*

12. There are few cases that deal with the question as to when it is appropriate to award costs on a basis other than a party-and-party basis. The principal authority appears to be the decision of the High Court (Kelly J.) in *Geaney v. Elan Corporation plc* [2005] IEHC 111, and even in that authority there is a relatively concise consideration of the question.

13. *Geaney* was a case on the Commercial List of the High Court and in the context of which an order for discovery had been made. An application was brought to strike out the defence and counterclaim on the basis that there had been a failure to make adequate discovery or, in the alternative, an order for further and better discovery. Kelly J. was satisfied, having reviewed the affidavit evidence and (unusually) heard oral evidence on the motion, that there had been significant shortcomings in how the defendant had discharged its discovery obligations. He declined to strike out the defence and counterclaim by reason of those shortcomings, but he made a series of detailed orders as to what was to happen by way of further and better discovery. After observing that he was "*not impressed with the Defendant's discharge of its Discovery obligations*", Kelly J. went on to "*indicate the Court's displeasure at the way in which the Defendant has* [complied with] *its obligations by way of a costs Order*", continuing as follows:

> *"In the Order for Discovery which I made on the contested* [application]*…I placed a stay on both execution and registration of that costs Order until the ultimate disposition of this action. That stay is now lifted and the costs of that application will have to be paid by the Defendant. In addition, I propose to make an order for the Plaintiff's costs of this application, to include all reserved costs and those costs will have to be paid by the Defendant on a solicitor and client basis. I see no reason why the Plaintiff should find himself out of pocket as a result of having to bring this application which has occupied the time of the court over the last two days and during last week also. So the costs of this motion will be awarded to the Plaintiff, to include all reserved costs and to be taxed on a solicitor and client basis."*

14. In passing, the court notes that Dunnes sought to contend at the hearing of the within application that the misbehaviour on its part in the within proceedings has been of a lesser order than that which offended the court in *Geaney*. The court respectfully does not accept this contention. In *Geaney*, there was a defendant who was defending proceedings in a bona fide manner but which had failed to discharge properly its obligations in relation to discovery. In other words, although there was a failing on the part of the defendant in relation to one aspect of the proceedings alone, that proved sufficient to trigger the exercise by the court of its discretion to award costs on a solicitor-and-client basis. Here, by contrast, the entire proceedings are infected by the abuse of process that subtended their commencement and thus the case for costs to be awarded on a solicitor and client basis is commensurately greater.

IV. Identification and Application of Principle

15. It seems to the court that the principles applicable to making an order of costs on a solicitor and client basis might be summarised as follows. First, in making such an order the court departs from the normal measure of costs. Second, this being so, there has to be a reason why the court departs from the usual order. Third, as indicated in *Geaney*, and accepted by the court as correct, the court will order costs on a solicitor and client basis when the court wishes to mark its especial disapproval and/or displeasure at how proceedings have been conducted and/or the basis on which proceedings have been brought.

16. For obvious reasons, the courts have always been watchful as to the integrity of their own processes, and where proceedings are brought which involve an abuse of process the very integrity of the court system is attacked. That is what occurred here and for that to occur is a serious matter. Applying the above-identified principles in the context of the within proceedings, and having regard to its previous judgments and, in particular the observations in those judgments quoted above, the court would make the following observations:

> - first, the court has previously found that the within proceedings involved an abuse of process. From start to finish, Dunnes pursued a collateral objective (ulterior motive) and abused the process of the court in an attempt to do so. These are circumstances in which it is appropriate for the court to mark its disapproval of the conduct of Dunnes by awarding costs on a solicitor and client basis.
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> - second, the case presents with certain unusual features that justify departing from the normal measure of costs. The court commented in its principal judgment about the strangeness of the fact that Dunnes had no complaint about the planning merits of the matters the subject of the retention application. And in its judgment on the certificate application, the court repeatedly emphasised the exceptional and peculiar facts of the case presenting.

17. The factors referred to above are very much outside the norm and bring one well into the sphere where it is appropriate for the court to exercise its discretion to award costs on a solicitor and client basis.

18. A further particular feature of the within proceedings, and one of which the court has been mindful in reaching its decision as to Deerland's application, is the fact that Deerland is a company which, to use a colloquialism, is 'in NAMA', *i.e.* the National Asset Management Agency is now the developer under the development agreement in relation to Ferrybank Shopping Centre. It follows therefore that Deerland's costs in the within proceedings will ultimately be borne by NAMA and the taxpayer. Recalling Kelly J.'s observation in *Geaney* that "*I see no reason why the Plaintiff should find himself out of pocket as a result of having to bring this application*", a question arises as to why should Deerland, NAMA or the taxpayer find themselves in a position where they are out of pocket because Dunnes brought proceedings which were an abuse of the process of the court? To borrow from the phraseology of Kelly J. in *Geaney*, the court sees no reason why they should.

V. Conclusion

19. For the reasons identified above, the court will order costs to Deerland on the basis sought by Deerland. As An Bord Pleanála has, not ungenerously, sought its costs on a party and party basis only, the court will order costs to An Bord Pleanála on the basis sought by the Board.

20. As requested by the parties, it appears on a consent basis, the court will order that the word "*now*", in para. 12 of its judgment in the certificate application, should read and be construed as reading "*not*".

21. Finally, at the hearing of the within applications, counsel for Dunnes asked for a stay on the court's order so that Dunnes could consider whether it wished to bring an appeal. The court does not know whether such a stay continues to be sought. However, as the court indicated the decision it was minded to make on the day of the hearing of the application, was clearly going to be writing a judgment that favoured the case urged upon it by counsel for Deerland, and the holiday period was then about to intervene (it has since passed), there did and does not appear to be any reason for granting a stay for the purpose for which it was sought.