

## THE HIGH COURT

[2012 No. 389 MCA]

## IN THE MATTER OF AN APPLICATION BY DYMPHNA MAHER

**Judgment of Mr. Justice Hedigan delivered on 22nd day of October, 2012.**

1. There are two applications made on behalf of the applicant today. The first is for an order *ex parte* guaranteeing against any liability for costs in proceedings the plaintiff wishes to bring in respect of certain planning decisions made recently. It is made upon the basis that this Court is a European Court and should give effect to the prohibitive costs prevention provisions of the Aarhus Convention.
2. In my view, the *modus operandi* whereby the State has attempted to give effect to this Convention is to be found in the provisions of the Environmental Protection Act 2011 and specifically section 3. This provides for the courts to make no order for costs in certain cases to which s. 3 of the Environmental Protection Act applies. It provides this may be done by agreement with the intended defendants or by notice of motion on them for an order that the proceedings are ones to which s. 3 applies.
3. No provision is made for this Court to make *ex parte* an order such as is sought herein. It is not for this Court to legislate in this way and I will not do so. The correct approach is for the plaintiff to seek to obtain the consent of those intended defendants or failing that to bring a motion on notice to those parties for a declaration that s. 3 applies.
4. The second application today is that, in the event I would refuse the order sought and direct the application be dealt with by way of notice of motion on the intended defendants, I would make an order that no order for costs would be awarded against the applicant were the motion to fail. I do not believe I have any jurisdiction to make such an order. The issue of costs will be for the Judge who hears the motion. I consider that this may well be unsatisfactory to the applicant as it leaves her in peril of an order for costs of that motion. I cannot accept those costs would be as high as has been represented today but I am conscious that such as they are they may mount an insuperable obstacle to the applicant bringing a motion.
5. Whilst I am sympathetic to the applicant's situation in this regard, I am unaware of any legal authority that will permit me to make such an order. It is very arguable that the absence of some legal provision permitting an applicant to bring such a motion without exposure to an order for costs acts in such a way as to nullify the State's efforts to comply with its obligation to ensure that costs in certain planning matters are not prohibitive. As things stand, I have no power to change this.
6. Both the orders sought must be refused.