Neutral Citation Number: [2013] IEHC 591

THE HIGH COURT

[2012 No. 783 J.R.]

IN THE MATTER OF THE WASTE MANAGEMENT ACTS 1996 TO 2011

BETWEEN

HOLLY HUNTER

APPLICANT

AND

THE ENVIRONMENTAL PROTECTION AGENCY

RESPONDENT

AND

NURENDALE LIMITED TRADING AS

PANDA WASTE SERVICES LIMITED

NOTICE PARTY

THE HIGH COURT

[2012 No. 470 MCA]

IN THE MATTER OF SECTION 160 OF THE PLANNING AND DEVELOPMENT ACTS

BETWEEN

HOLLY HUNTER

APPLICANT

AND

NURENDALE LIMITED TRADING AS

PANDA WASTE SERVICES LIMITED

RESPONDENT

DECISION of Mr. Justice Hedigan on 20th day of December 2013

1. In this application, costs are sought by the applicant in respect of:

(a) the judicial review proceedings which have now concluded, the notice party having decided to concede.

(b) The s. 160 proceedings which are still in train.

2. The Judicial Review Proceedings

On 14th January, 2013, at a very early stage in the judicial review proceedings, the respondent conceded the relief sought and agreed an order for costs in favour of the applicant and the notice party. In essence, the proceedings arose because of an error made by the respondent in granting a waste licence and their subsequent attempt to remedy this. No fault was ever alleged against the notice party. The notice party, notwithstanding the concession by the respondents, decided to continue these proceedings. There have been since then numerous appearances in court involving considerable expenditure on the part of the applicant before the notice party decided to concede. These included an opposed application for leave to seek judicial review, albeit a short, somewhat truncated application. The applicant argues that they should have conceded when the EPA did as the entire case was based upon internal failings within the EPA. The notice party argues that it was entitled to maintain the proceedings until now.

3. These are proceedings to which s. 50B of the Planning and Development Acts 2000 to 2012 apply. Section 50B, as relevant to these proceedings, provides as follows:

> "(2) Notwithstanding anything contained in O. 99 of the Rules of the Superior Courts (S.I. No. 15 of 1986) and subject to sub-sections (2A), (3) and (4), in proceedings to which this section applies, each party to the proceedings (including any notice party) shall bear its own costs.
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> (2A) The costs of proceedings or a portion of such costs, as are appropriate, may be awarded to the applicant to the extent that the applicant succeeds in obtaining relief and any of those costs shall be borne by the respondent or notice party or both of them, to the extent that the actions or omissions of the respondent or notice party, or both of them, contributed to the applicant obtaining relief.

(3) The court may award costs against a party in proceedings to which this section applies if the court considers it appropriate to do so -

(a) because the court considers that a claim or counterclaim by the party is frivolous or vexatious

(b) because of the manner in which the party has conducted the proceedings, or

(c) where the party is in contempt of court

(4) Sub-section (2) does not affect the court's entitlement to award costs in favour of a party in a matter of exceptional public importance and where, in the special circumstances of the case, it is in the interests of justice to do so.

(5) In this section, a reference to 'the court' shall be construed as, in relation to particular proceedings to which this section applies, a reference to the High Court or the Supreme Court, as may be appropriate."

4. The 'default' position, therefore, is that there should no order as to costs, save where sub-sections (2A) or (3) apply.

5. The notice party argues that 2A applies only to pre-litigation 'actions or omissions' of the notice party to the extent those may have contributed to the applicants obtaining relief. It argues that nothing they did contributed to the applicants obtaining relief. Only the acts or omissions of the EPA did this. They were completely uninvolved.

Insofar as the applicant might claim under (3)(b), they argue that the only thing they can properly be criticised for is in not conceding the relief sought when the respondent, EPA, did so on 14th December, 2012. This, they argue, was something they were advised to do as it was considered that the basic licence under which they had been operating was threatened by the proceedings. This, they say, is conduct that cannot be criticised or penalised under sub-section 3(b). The applicant, when asked about this concern of the notice party, conceded readily that it was not thus threatened. The notice party therefore argues that in the judicial review proceedings, the default rule applies.

6. The applicant argues that there is nothing to be found in sub-section 2A that limits the 'actions or omissions' to the pre-litigation phase of proceedings. If this was so, they claim it would allow a party, such as the notice party herein, to readily outspend parties such as the applicant herein. This would be contrary to the provisions of the Aarhus Convention that seek to ensure access to justice for members of the public.

If the court is not disposed to find thus, they rely upon sub-section 3(b) and claim that the action of the notice party in not conceding one year ago, when the EPA did, was conduct which unnecessarily dragged out the proceedings involving them in very considerable expense.

7. It seems to me that sub-section 2A does in fact apply only to pre-litigation 'actions or omissions' because sub-section 3(b) provides a remedy for any conduct of either party in respect of the manner in which they conducted the proceedings. Sub-section 3(b) is drafted sufficiently widely to cover either party and seems the better provision under which to move. For the purposes of this particular application, sub-section 3(b) seems quite adequate for the applicant's purpose and allows the notice party to defend itself just as fully. Whilst an order for costs made thereunder is in the nature of a penalty, the manner in which a party conducted the proceedings does not require any moral turpitude on the part of the party criticised in order for it to be fixed with costs. The court should simply look at how the proceedings were conducted. If, as here, they have delayed one year before conceding, in the course of which there occurred numerous appearances before the court, including the contested application for leave, then there is, in my view, a case to answer. The notice party's only fear is that outlined above i.e. their fear that the underlying licence would be threatened. Yet, on the evidence before me, when the notice party posited this fear to the applicant's legal advisers, they were able to assure them that this was not so. This assurance as to what troubled them should have been brought to the attention of the appellants in December 2012, or very soon thereafter. Their failure to clarify this question was the cause of a great deal of expense incurred by the applicant and it does not appear just that they should have to bear this cost.

Thus, in my judgment, the applicant is entitled to the costs of these judicial review proceedings to date, including the costs of this application.

8. The s. 160 proceedings are still in train. The applicant in this case applied to the court for a 'Protective Costs Order' (PCO) pursuant to s. 7 of the Environmental Miscellaneous Provisions Act 2011, to the effect that s. 3 applies. This section provides as follows:

"3.— (1) Notwithstanding anything contained in any other enactment or in—

(a) Order 99 of the Rules of the Superior Courts (S.I. No. 15 of 1986),

(b) Order 66 of the Circuit Court Rules (S.I. No. 510 of 2001), or

(c) Order 51 of the District Court Rules (S.I. No. 93 of 1997),

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.

(2) The costs of the proceedings, or a portion of such costs, as are appropriate, may be awarded to the applicant, or as the case may be, the plaintiff, to the extent that he or she succeeds in obtaining relief and any of those costs shall be borne by the respondent, or as the case may be, defendant or any notice party, to the extent that the acts or omissions of the respondent, or as the case may be, defendant or any notice party, contributed to the applicant, or as the case may be, plaintiff obtaining relief.

(3) A court may award costs against a party in proceedings to which this section applies if the court considers it appropriate to do so—

(a) where the court considers that a claim or counter-claim by the party is frivolous or vexatious,

(b) by reason of the manner in which the party has conducted the proceedings, or

(c) where the party is in contempt of the court."

(4) Subsection (1) does not affect the court's entitlement to award costs in favour of a party in a matter of exceptional public importance and where in the special circumstances of the case it is in the interests of justice to do so.

(5) In this section a reference to 'court' shall be construed as, in relation to particular proceedings to which this section applies, a reference to the District Court, the Circuit Court, the High Court or the Supreme Court, as may be appropriate."

The court granted this order and now the applicant seeks an order for the costs of this application. The costs of the application will not be insubstantial owing to the novelty of the order which involved a hearing that stretched into a second day. The result of this order is such that even if the applicant loses in the substantive proceedings, she cannot be the subject of a costs order against her, save in very exceptional circumstances. This application was opposed by the respondent herein, Panda Waste Services.

9. The respondent argues that they cannot get their costs, save for exceptional reasons. They point to the paucity of evidence supporting the claim for a PCO herein. They claim an order for costs would 'convict' them of s. 3(2) or (3)(b) misconduct. They note that sub-section (4) should not apply as the applicants are pursuing private litigation herein.

10. Firstly, I think it would be unjust to make an order for the costs of the PCO in the applicant's favour at this juncture because she could go on and lose the substantive action and not fall within one of the exceptions as noted above. It seems clear that an application for a PCO may be considered a standard form of procedure in future proceedings such as herein. Thus, the liability for costs should be treated in the same manner as the costs of issuing the proceedings and other interlocutory applications where neither party is found at fault. Such costs would, I think, always be ordered as costs in the action. It seems to me that that approach is the most logical and just, here. The applicant may lose the substantive action and will benefit from the PCO. On the other hand, it would be unjust if, having won the action and being precluded from recovering its costs, the respondent would still have to pay a part of the losing side's ordinary costs other than in the exceptional circumstances set out in section 3.

Thus, I will order that the costs of the application for the PCO will be costs in the action.