APPROVED **[2022] IEHC 427**

THE HIGH COURT

2018 No. 308 MCA

IN THE MATTER OF SECTION 160 OF THE PLANNING AND DEVELOPMENT ACT 2000 (AS AMENDED)

BETWEEN

ELAINE KELLY DUNNE
NOEL MOORE
ANN FLYNN
DAVID KELLY
ANNETTE McGRATH
LOUISE O'SULLIVAN
CLAIRE MOORE
MATT KELLY
MICHAEL KELLY

APPLICANTS

AND

GUESSFORD LIMITED
(TRADING AS OXIGEN ENVIRONMENTAL)

RESPONDENT

JUDGMENT of Mr. Justice Garrett Simons delivered on 19 July 2022

INTRODUCTION

1. This judgment addresses the appropriate costs order to be made in respect of an unsuccessful application for attachment and committal. The applicants herein had applied to have two directors of a waste management company, Guessford Ltd, committed to prison for alleged disobedience of an earlier court order.

2. The general rule in relation to legal costs is that a successful party is entitled to recover its costs against the losing party. Were this general rule to apply in the present case, the applicants would be liable for the other side's costs of the unsuccessful application for attachment and committal. However, the applicants assert a right to costs protection pursuant to Part 2 of the Environment (Miscellaneous Provisions) Act 2011. The respondent company and the directors submit that costs protection does not apply.

PROCEDURAL HISTORY

3. The within proceedings are enforcement proceedings taken pursuant to Section 160 of the Planning and Development Act 2000 ("***PDA 2000***"). The proceedings concern the planning status of a waste facility located at Barnan, Daingean, County Offaly ("***the waste facility***"). The proceedings have been brought by a number of individuals who live in the vicinity of the waste facility ("***the applicants***"). The respondent to the enforcement proceedings is the operator of the waste facility, Guessford Ltd ("***the respondent company***").

4. Save where necessary to distinguish between them in a particular context, the respondent company and the directors will be referred to collectively as "***the respondents***". It should be explained, however, that the only respondent actually named in the proceedings is the company. Just how the directors came to be involved in the proceedings is explained below.

5. This court delivered a reserved judgment on the substantive merits of the enforcement proceedings on 21 September 2021, *Kelly Dunne v. Guessford Ltd* [2021] IEHC 583 ("***the principal judgment***").

6. The parties subsequently submitted an agreed text of the draft order to the court, via the registrar, on 10 November 2021. The registrar then endeavoured to translate this agreed text into the house style of a formal court order. Unfortunately, the registrar's version did not capture all of the detail of the agreed text nor of the principal judgment.

7. The order had been perfected, i.e. formally drawn up, on 15 November 2021. The eight-week period allowed for compliance with the court order expired on 10 January 2022. The applicants took the view that the respondent company had not complied with the court order as of that date. Accordingly, the applicants issued a motion in February 2022 for the attachment and committal of two of the directors of the respondent company. That motion will be referred to as "***the contempt motion***" where convenient. The contempt motion was unsuccessful for the reasons set out in a reserved judgment delivered on 2 June 2022, *Kelly Dunne v. Guessford Ltd* [2022] IEHC 264 ("***the contempt judgment***").

8. The history of the contempt motion is set out in detail in the contempt judgment. For present purposes, the following points should be noted. First, the contempt motion was opposed by the respondent company alone. The solicitors acting on behalf of the company did not formally come on record for either of the directors until *after* the hearing of the contempt motion had concluded. This occurred at a short supplemental hearing on 30 May 2022. Counsel for the company confirmed on that date that his solicitor had instructions to represent one of the directors, Mr. Aidan Doyle. The contempt motion against the second director had been withdrawn in circumstances where the applicants were unable to prove personal service of the contempt motion. The fact that the directors were content to allow their interests to be protected by the legal team representing the

company is, potentially at least, relevant to the allocation of legal costs. If an individual, who had not previously been implicated in proceedings, were required to engage legal representation at their own expense in response to a contempt motion, then they might have stronger grounds for saying that they should be entitled to recover their costs.

9. Secondly, the hearing of the contempt motion had been prolonged by the cross-examination of a number of individuals on the affidavits they had sworn in the context of the motion. The necessity for cross-examination had, in part, arisen as a result of certain shortcomings in the affidavits filed on behalf of the applicants. These shortcomings have been described in detail in the contempt judgment. Had the affidavits filed on behalf of the applicants been more accurate, much of the cross-examination could have been avoided and the hearing of the contempt motion completed in one day. In the event, the hearing took two full days.

10. Thirdly, the question of whether the special costs regime under Part 2 of the Environment (Miscellaneous Provisions) Act 2011 applied to the proceedings was not addressed by the parties at the time the court order was drawn up in November 2021. This is, presumably, because the question was academic in circumstances where the applicants had succeeded in the substantive application under Section 160 of the PDA 2000. A successful applicant is normally entitled to recover its costs under either regime. It was only in the aftermath of the delivery of the judgment on the contempt motion that the question of which costs rules applied came into sharp focus for the first time.

11. It should be observed, however, that one of the reliefs expressly pleaded in the originating notice of motion of 31 July 2018 is an order that "*the protective costs*

provisions" under Part 2 of the 2011 Act are applicable to the proceedings. The respondent company was thus on notice, from the very outset, that the applicants were contending that costs protection applied. It would have been open to the respondent company to have applied for an advance ruling on whether costs protection applied if it disputed this contention. The procedural mechanism by which this could have been done is discussed under the next heading below.

12. Finally, for completeness, it should be noted that the principal judgment was appealed to the Court of Appeal and that appeal will be heard on 20 July 2022.

STATUTORY FRAMEWORK GOVERNING LEGAL COSTS

13. Generally, the allocation of legal costs is governed by Part 11 of the Legal Services Regulation Act 2015 and the recast Order 99 of the Rules of the Superior Courts. In brief, the default position is that a party who has been "*entirely successful*" in legal proceedings is entitled to recover their costs as against the unsuccessful party. The court retains a broad discretion to depart from the default position. The type of factors which can be taken into account in the exercise of this discretion have been identified at Section 169(1) of the Legal Services Regulation Act 2015.

14. A special costs regime applies in respect of particular types of environmental litigation. Insofar as relevant to enforcement proceedings, the special costs regime is to be found under Part 2 of the Environment (Miscellaneous Provisions) Act 2011 ("***the 2011 Act***" where convenient). The regime affords a form of costs protection to applicants, whereby they are shielded from having to pay the winning side's costs in the event that the enforcement proceedings are

unsuccessful. If successful, the applicants are normally entitled to their costs. See Section 3(2) of the 2011 Act as follows:

> "(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."

15. The court retains a discretion, pursuant to Sections 3(3) and (4) of the 2011 Act, to make a different form of costs order as follows:

> "(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—
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> (a) where the court considers that a claim or counter-claim by the party is frivolous or vexatious,
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> (b) by reason of the manner in which the party has conducted the proceedings, or
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> (c) where the party is in contempt of the court.
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> (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."

16. Insofar as relevant to the present proceedings, costs protection applies to civil proceedings which have been instituted for the purpose of ensuring compliance with, or the enforcement of, a planning permission: see Section 4 of the 2011 Act. Costs protection also applies where the complaint is that no planning permission has been obtained. The Court of Appeal in *McCoy v. Shillelagh Quarries Ltd* [2015] IECA 28; [2015] 1 I.R. 627 rejected an argument that costs protection only applied to proceedings which involved the enforcement of an

existing planning permission or planning condition or other similar requirement which was the subject of a positive decision by a planning authority.

17. The Oireachtas has put in place a procedural mechanism which allows for a determination to be made on whether the special costs regime applies to any particular set of proceedings. This mechanism is provided for under Section 7 of the Environment (Miscellaneous Provisions) Act 2011. A determination under this section will be referred to in this judgment as "***a costs-protection determination***". The determination may be made at any stage, including in advance of the issuing of proceedings.

18. The purpose of the mechanism has been described as follows in *An Taisce v. Minister for Agriculture Food and the Marine* [2022] IEHC 96 (at paragraph 10):

> "[…] The Legislature has put in place a mechanism which allows the parties to proposed or existing proceedings to apply for a determination, in advance, as to whether the special costs regime applies to their proceedings. It is implicit in this that the Legislature recognised the importance to parties of having certainty and predictability as to the costs position. It is also implicit that the Legislature recognised that the question of whether the special costs regime applies might not be clear-cut, and hence the need for a prior ruling by a court."

19. The mechanism is typically invoked in the context of judicial review proceedings rather than enforcement proceedings. This is because the operation of costs protection in judicial review proceedings is a matter of ongoing controversy. There have been a number of conflicting judgments at the level of the High Court, and the leading judgment of the Court of Appeal in *Heather Hill Management Company v. An Bord Pleanála* [2021] IECA 259 is now the subject of an appeal to the Supreme Court.

20. More generally, it is legitimate, to an extent, to have regard to the genesis of costs protection when interpreting the provisions of Part 2 of the Environment (Miscellaneous Provisions) Act 2011. As appears from the long title to the Act, the legislation is intended to give effect to certain articles of the Aarhus Convention on access to justice in environmental matters. The provisions of the Aarhus Convention are not directly applicable in the domestic legal order, and the wording of Articles 9(3) and 9(4) thereof are contingent on national law concepts. There is nevertheless an interpretive obligation on a national court to give an interpretation of national procedural law which, to the fullest extent possible, is consistent with these provisions (Case C-470/16, *North East Pylon Pressure Campaign v. An Bord Pleanála,* ECLI:EU:C:2018:185).

21. Relevantly, a national court must have regard to the objective that the costs of proceedings, which seek to challenge acts and omissions by private persons which contravene provisions of national law relating to the environment, should not be prohibitively expensive. This is sometimes referred to by the shorthand "***NPE***". The Supreme Court in *Klohn v. An Bord Pleanála* [2021] IESC 51 held that this interpretative obligation applies to the measurement (or adjudication) of the quantum of the legal costs payable by a party. Clarke C.J. stated (at paragraph 3.8) that the adjudication process may very well have to depart from the norm in assessing the costs to be paid so as to ensure that they are not prohibitively expensive; that may include, in an appropriate case, assessing the costs to be paid at zero.

22. The Supreme Court also held that the assessment of whether costs are prohibitively expensive involves both an objective and a subjective element. See paragraph 5.3 of the judgment as follows:

> "It is clear from the jurisprudence of the CJEU in cases such as *Edwards* that the overall assessment of the level of costs which may be NPE involves both an objective and a subjective element. A very wealthy party might well be able to afford a very large sum in costs but that does not necessarily mean that the sum concerned might be considered NPE if it could act as a significant deterrent to that party bringing proceedings. Thus, there may be an objective limit on the amount of costs which can properly be awarded in proceedings to which the NPE regime applies. However, it is also clear that the subjective position of the particular applicant must also be taken into account."

23. I will return, at paragraph 50 below, to apply these principles to the measurement of the costs in the present case.

DOES COSTS PROTECTION APPLY TO THESE PROCEEDINGS?

24. These proceedings have been brought pursuant to Section 160 of the PDA 2000. In brief, that section allows the court, on the application of any person, to make orders restraining the carrying out of unauthorised development. Relevantly, a court may make an order requiring that development is carried out in conformity with planning permission.

25. These proceedings are quintessentially the type of enforcement proceedings which come within the definition under Section 4 of the Environment (Miscellaneous Provisions) Act 2011. The principal relief sought in the proceedings had been to ensure that the waste facility was operated in accordance with the planning permission granted in June 2010.

26. Notwithstanding this, the respondents now contend that neither the substantive application nor the contempt motion qualify for costs protection. More specifically, it is submitted that it is a condition precedent to the availability of the special costs rules that an application must have been made in advance for a costs-protection determination. It is further submitted that if the applicants had

wished to avail of costs protection, then they should have brought an application for a costs-protection determination in advance of the hearing of the substantive application in July 2021. On the respondents' argument, it is not open to a party to seek to invoke costs protection for the first time at the conclusion of proceedings. Having failed to make an application in advance for a costs-protection determination, the applicants are, it is said, not entitled to costs protection. Instead, the general rule is said to apply and the applicants are liable to pay the costs of the respondents as the successful party in the contempt motion.

27. The respondents make a related argument to the effect that the applicants have not, in any event, established an entitlement to costs protection. In particular, it is said that the applicants have failed to adduce any financial evidence which demonstrates that the costs of the proceedings would be prohibitively expensive for them. The respondents cite the judgment of the High Court (Hedigan J.) in *Hunter v. Nurendale Ltd t/a Panda Waste* [2013] IEHC 430; [2013] 2 I.R. 373 as authority for the proposition that the court must have evidence that the party would be unable to meet a costs order made against them.

28. It has to be said that these submissions on the part of the respondents are novel. Whereas the special costs regime has given rise to many judgments, it does not appear to have been previously argued that an application for a costs-protection determination is a condition precedent to the availability of costs protection.

29. In reply to a direct question from the court, counsel on behalf of the respondents confirmed that the logic of his side's argument applies to both the substantive application for relief under Section 160 of the PDA 2000 and the subsequent application for attachment and committal. Put otherwise, if the respondents'

argument is correct, then no one applying for relief under Section 160 of the PDA 2000 will be entitled to costs protection unless they have either made an application in advance for a costs-protection determination or have obtained written agreement from the other side that costs protection is available.

30. The novel interpretation contended for on behalf of the respondents is inconsistent with the approach of the Court of Appeal in *O'Connor v. Offaly County Council* [2020] IECA 72; [2021] 1 I.R. 1. The Court of Appeal had been addressing the legal test or criteria to be applied in ruling upon an application for a costs-protection determination. In interpreting the provisions governing costs-protection determinations, the Court of Appeal found it useful to consider what the position would be where no protective costs order has been sought in advance. The position is summarised as follows (at paragraphs 50 to 52 of the reported judgment):

> "It would have been open to the Oireachtas in framing the special costs provisions to confer a discretion upon the court and to condition that discretion by reference to, *inter alia*, the strength of the underlying claim, the financial position of the applicant for relief or the complexity of the case. Instead of doing this, the draftsman has applied a sharp rule applicable to a specific type of proceedings. Section 3(1) imposes a mandate that where the section applies to proceedings, each party shall bear its own costs. Section 4 defines the proceedings to which s. 3 applies. A case either falls within these provisions, or it does not.
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> Accordingly, where no protective costs order has been sought, at the conclusion of a case, the court must, if called upon to do so, determine if the action is within these provisions. If the action does fall within s. 3, one of a number of things may occur.
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> (i) If the applicant for the relief succeeds in his claim he may recover some or all of his costs (s. 3(2)).
>
> (ii) If the case is one of exceptional public importance, the applicant for such relief may also recover his

> costs in accordance with the established case law (s. 3(4)).
>
> (iii) If the applicant's claim or counterclaim is frivolous or vexatious, if he conducts the proceedings in a way that justifies an order for costs against him or if he is in contempt of court, an order may be made against him (s. 3(3)). I will return to this shortly.
>
> In all other cases, the court must make no order as to costs (s. 3(2)). It has no discretion in this regard. This is important insofar as the criteria for the making of an order under s. 7 are concerned. Given that an unsuccessful claimant in proceedings who does not seek an order under s. 7 and merely relies on s. 3 at the conclusion of his case does not have to establish that his claim enjoyed a reasonable prospect of success — the only requirement as to the merits of the case is that it not be frivolous or vexatious — it is not immediately obvious to me how or why that obligation can or should be applied as a matter of course when an application is brought under s. 7."

31. As appears, the judgment expressly contemplates that costs protection can be availed of even in the absence of a prior application for a costs-protection determination. At the conclusion of a case, the court must, if called upon to do so, determine if the proceedings come within any of the categories of "*civil proceedings*" prescribed under Section 4 of the 2011 Act so as to attract the special costs regime.

32. Indeed, it would have been surprising had the Court of Appeal found otherwise. It is apparent from the wording of the legislation that an application for a costs-protection determination is *optional* rather than mandatory. It is intended to allow for an advance ruling in those cases where there is a genuine doubt as to whether costs protection applies. On the facts of the present case, the proceedings, which seek to ensure compliance with a planning permission, are self-evidently of a type which attract costs protection. Indeed, the respondents have not made any argument to the contrary.

33. It is incorrect, therefore, to say that an application under Section 7 of the Environment (Miscellaneous Provisions) Act 2011 is a condition precedent to costs protection.

34. The respondents' related argument to the effect that the applicants, with a view to demonstrating that the legal costs would have been "*prohibitively expensive*", should have adduced evidence as to their financial means and as to any fee arrangement which they have with their own solicitors, is also incorrect. Irrespective of whether such matters represent essential "*proofs*" for an application for a costs-protection determination, it is not necessary to address such matters on a costs application at the conclusion of the proceedings: *O'Connor v. Offaly County Council* (cited above).

35. It is next necessary to consider whether the costs of the contempt motion fall to be treated differently from the costs of the substantive application under Section 160 of the PDA 2000. For the reasons which follow, I am satisfied that costs protection is equally applicable to the contempt motion.

36. The wording of Section 3(2) of the Environment (Miscellaneous Provisions) Act 2011 indicates that costs protection applies to the "*proceedings*". It is artificial to attempt, as counsel for the respondents does, to characterise a contempt motion as a separate set of proceedings, distinct from the substantive application. Rather, a contempt motion is brought within the existing enforcement proceedings and represents a crucial step in those proceedings. As correctly observed by counsel for the applicants, it would be absurd if costs protection were to be confined to an application for orders under Section 160 of the PDA 2000, and did not extend to an application to ensure compliance with the court order. The precise purpose of enforcement action is to achieve an adequate and

effective remedy for a breach of a planning permission. There is no logic in providing costs protection only to the point of the proceedings at which a court order is obtained. Unless the court order can be enforced then the purpose of affording costs protection, namely to ensure access to justice and an adequate and effective remedy for contraventions of national law relating to the environment, will not have been achieved.

37. This purposive interpretation of Part 2 of the Environment (Miscellaneous Provisions) Act 2011 is supported by reference to the wording of Section 3(3). This provides, *inter alia*, that a court may award costs against a party if the court considers it appropriate to do so where the party is in contempt of the court. This reinforces the point that contempt can arise as an issue within the context of proceedings to which costs protection applies.

IS DEPARTURE FROM DEFAULT POSITION WARRANTED?

38. For the reasons explained under the previous heading, I am satisfied that the contempt motion attracts the special costs regime provided under the Environment (Miscellaneous Provisions) Act 2011. The more difficult question is whether a departure from the default position, i.e. that a costs order will not normally be made against an unsuccessful applicant, is warranted in the particular circumstances of this case.

39. The legislation identifies, at Sections 3 and 4, a number of circumstances in which it might be appropriate to award costs against a party. The respondents rely on one of these, namely litigation conduct. It is submitted that costs should be awarded against the applicants by reason of the manner in which they conducted the proceedings. Emphasis was placed on the following factors:

(i) the failure of the applicants to reply to a request for a statement of the specific breaches of the court order being alleged; (ii) the failure to engage with the detailed affidavit evidence filed on behalf of the respondent company; (iii) the agitation of what the respondents contend is a new argument in respect of the acceptance of wooden pallets at the waste facility; (iv) the pursuit of an application against the directors; and (v) the failure to serve one of the directors.

40. There is a range of litigation conduct which might justify a departure from the default position. At one end of the spectrum, the conduct of a party might amount to an abuse of process. An example is provided by *Indaver Ireland v. An Bord Pleanála* [2013] IEHC 11; [2013] 1 I.R. 357. There, the High Court made a costs order against an applicant as the court determined that the applicant had no *bona fide* belief in the case at a certain point in the litigation; after that point therefore the proceedings could only be considered an abuse of court process. Moving along the spectrum, unreasonable conduct which has resulted in the other side incurring additional costs unnecessarily might justify a departure from the default position. See, by analogy, *Burke v. Workplace Relations Commission (No. 2)* [2022] IEHC 45.

41. It is important not to confuse reasonableness with correctness. A party who seeks to rely on costs protection will, almost by definition, have been *unsuccessful* in the proceedings. Were it otherwise, they would not need costs protection. It is not enough, therefore, to displace costs protection that a party has advanced arguments or pursued procedures which have been held to be incorrect. Rather, it must have been unreasonable for the party to conduct the proceedings in the manner in which it did. This is a different and higher threshold.

42. Applying these principles to the present case, the applicants had correctly identified that, as of mid-February 2022, there was an ongoing breach of the spirit of, if not necessarily the letter of, the court order of November 2021. The applicants acted reasonably therefore in seeking to bring the matter before the court. There were, however, a number of significant shortcomings in the procedures adopted to do this. The most fundamental of these, as found by the court, concerned compliance with Section 53 of the Companies Act 2014. For the reasons explained at paragraph 87 and onwards of the contempt judgment, this court held that had the applicants in the present case wished to preserve the possibility of seeking to enforce against the directors in addition to the respondent company, then they should have requested that a statement for the purpose of Section 53 of the Companies Act 2014 be included in the court order. The contempt judgment also identified more general concerns as to the propriety of seeking to move against the directors of the company personally, rather than against the company itself by way of an application to sequester its assets.

43. The principal determinant of whether the applicants should be denied costs protection is whether their motion to have the respondent company's directors committed to prison was not only procedurally and substantively incorrect—as I have found it to be—but was so obviously unfounded that their conduct in pursuing the application should be characterised as unreasonable.

44. The starting point for an analysis of this issue is that it is, in principle, open to an applicant to move against the directors of a company to enforce a court order made against the company. This is provided for under Order 42, rule 32 of the Rules of the Superior Courts. Thus, it was the execution of the application for attachment and committal, rather than the notion of moving against the directors,

which was flawed. It is also relevant that, as of the date of the issuance of the contempt motion, there appears to have been an ongoing breach of the spirit of, if not the letter of, the court order. Had a party pursued an application in the absence of any proper basis for same, then it might well be appropriate to make a costs order against them.

45. The application in the present case was deficient in a number of crucial respects: (i) the court order did not contain the statement prescribed under Section 53 of the Companies Act 2014; (ii) the copy of the order as served did not bear an appropriate penal endorsement even for the purposes of Order 41, rule 8 and Order 44; and (iii) a copy of the contempt motion was not properly served on one of the two directors.

46. These deficiencies were fatal to the application to commit the directors to prison. I am not satisfied, however, that these deficiencies are so serious as to justify the withdrawal of costs protection. The procedural requirements for a contempt motion are not clear-cut and there is, arguably, some tension between the wording of Order 42, rule 32 and Section 53 of the Companies Act 2014. It is also telling that the respondent company did not place particular emphasis on these deficiencies at the time of the contempt motion. The contempt motion was resisted primarily on the basis that there was no breach of the court order ongoing as of the date of the hearing. Whereas there was some reliance placed on the issue of service, it is only now, in the specific context of the costs application, that emphasis is being laid on these deficiencies. This suggests that the deficiencies are not so obvious that it can be said that the applicants' conduct of the proceedings was unreasonable.

47. There is, however, another aspect of the conduct of the litigation which does justify a partial departure from the default position. As explained in the contempt judgment, the affidavits filed on behalf of the applicants were unsatisfactory in a number of respects. This resulted in the necessity for cross-examination of the deponents, and this added to the length of the hearing. The conduct of the applicants in this regard is of a different character to that discussed above. An individual deponent is expected to ensure that the content of their affidavit evidence is accurate. This is especially so where the affidavit is sworn in the context of an application which seeks to commit another individual to prison. The affidavits sworn on behalf of the applicants fell below this standard in some respects.

48. Whereas the affidavits were sworn by an individual applicant and by a non-party, the applicants as a collective are responsible for carriage of the proceedings and thus this conduct is attributable to them.

49. Having regard to this conduct, and to its consequence in terms of prolonging the hearing of the contempt motion, it is in the interests of justice that the applicants be made liable for the additional costs incurred. The costs order will be made in favour of the company, rather than the individual directors, in circumstances where the directors were content to leave it to the company to oppose the contempt motion. This costs order is to be set-off against the costs order made in favour of the applicants in respect of the substantive hearing.

50. Having regard to the need to ensure that costs are not prohibitively expensive (*Klohn v. An Bord Pleanála* [2021] IESC 51), the court will measure the costs itself (rather than referring the matter for adjudication by the Office of the Chief Legal Costs Adjudicator). The court has jurisdiction, under Order 99, rule 7, to

direct that a sum in gross be paid in lieu of adjudicated costs. My *provisional* view is that the appropriate amount is €10,000 (plus VAT if properly recoverable under Order 99, rule 2).

51. If either party wishes to make submissions on the amount of costs in accordance with the principles in *Landers v. Dixon* [2015] IECA 155; [2015] 1 I.R. 707, then they should notify the registrar by 30 July 2022, and file and serve a report of a legal costs accountant by 3 October 2022. The parties should note, however, that if the provisional view on the amount of costs is ultimately confirmed, then the objecting party will be liable to pay the additional costs incurred by the other side in measuring costs.

CONCLUSION AND FORM OF ORDER

52. These proceedings attract costs protection under Part 2 of the Environment (Miscellaneous Provisions) Act 2011. The costs protection applies to both the substantive application for relief under Section 160 of the Planning and Development Act 2000 and the subsequent contempt motion issued within the proceedings.

53. For the reasons set out under the previous heading above, there is nothing in the conduct of the proceedings which would justify a general departure from the default position that costs protection applies. This is subject to an exception in respect of the affidavits filed on behalf of the applicants. For the reasons explained at paragraphs 47 to 51 above, my *provisional* view is that the respondent company is entitled to set-off a sum of €10,000 (plus VAT if properly allowable under Order 99, rule 2) against the existing costs orders in favour of

the applicants. The procedural steps to be followed if either party wishes to contest the provisional view have been prescribed above.

Appearances

Oisin Collins, SC and Margaret Heavey for the applicants instructed by O'Connell Clarke Solicitors
Michael O'Higgins, SC and Michael O'Donnell for the respondents instructed by John C. Kieran & Son Solicitors

Approved Gerrett Simons