

APPROVED

[2022] IEHC 96



THE HIGH COURT

2020 No. 161 JR

IN THE MATTER OF THE ENVIRONMENT (MISCELLANEOUS
PROVISIONS) ACT 2011

IN THE MATTER OF ORDER 84B OF THE RULES OF THE SUPERIOR
COURTS

BETWEEN

AN TAISCE – THE NATIONAL TRUST FOR IRELAND

APPLICANT

AND

THE MINISTER FOR AGRICULTURE FOOD AND MARINE
IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 28 February 2022

INTRODUCTION

1. A special costs regime applies in respect of particular types of environmental litigation. 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 proceedings are unsuccessful.

NO REDACTION REQUIRED

2. The precise parameters of this regime, and whether it applies to legal proceedings in whole or in part, 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 application for leave to appeal to the Supreme Court (Appeal 03/22). Separately, the High Court has indicated an intention to make a reference to the Court of Justice of the European Union for a preliminary ruling on the implications, for the domestic law on costs, of the Aarhus Convention (*Enniskerry Alliance v. An Bord Pleanála* [2022] IEHC 6).
3. Given the uncertainties surrounding the special costs regime, the Oireachtas has put in place a statutory mechanism under the Environment (Miscellaneous Provisions) Act 2011 whereby the parties to intended or existing proceedings can apply for a determination, in advance, as to whether the special costs regime applies to their proceedings. The principal issue for resolution in this judgment is whether a party who has been unsuccessful in such an application should be required to pay the costs of same. Put shortly, the judgment is concerned with who should pay the costs of the costs application.

PROCEDURAL HISTORY

4. An Taisce seeks to challenge the grant of a large number of aquaculture licences. The relevant aquaculture licences purport to authorise the bottom cultivation of mussels in Wexford harbour.
5. The governing legislation, the Fisheries (Amendment) Act 1997, provides for a two stage decision-making process. An application for an aquaculture licence is

made in the first instance to the Minister for Agriculture Food and Marine. Thereafter, there is a statutory right of appeal to the Aquaculture Licences Appeals Board.

6. On the facts of the present case, the Minister had made thirty-six related decisions. An Taisce sought to appeal these decisions to the Aquaculture Licence Appeals Board by way of a single, omnibus appeal. The Aquaculture Licence Appeals Board rejected this form of appeal as invalid. It is this decision to reject the appeal which An Taisce intends to challenge by way of judicial review.
7. To this end, An Taisce has prepared a detailed statement of grounds and has arranged to have same stamped with the appropriate fee. An Taisce has not, however, formally issued those proceedings out of the Central Office of the High Court, and has not moved an application for leave to apply for judicial review before a judge of the High Court.
8. As an aside, it should be noted that if and when An Taisce does make such an application for leave, an issue will arise in respect of time-limits. The Fisheries (Amendment) Act 1997 prescribes a strict three-month time-limit for the making of an application for leave to apply for judicial review. It also prescribes that the application must be made on notice to the respondent decision-maker and to the parties to the statutory appeal. An Taisce, seemingly, intends to argue that the prescription of an absolute time-limit, without any saver whereby a court has discretion to extend time for good and sufficient reason, is unconstitutional. In this regard, An Taisce intends to rely upon the judgment of the Supreme Court in *White v. Dublin City Council* [2004] IESC 35, [2004] 1 I.R. 545.

9. The reason that An Taisce has not yet taken steps to progress the intended judicial review proceedings is that it wishes to know, in advance, whether the proceedings will attract the special costs regime provided for in the case of particular types of environmental litigation. This regime is provided for under section 50B of the Planning and Development Act 2000 and Part 2 of the Environment (Miscellaneous Provisions) Act 2011. The latter provision is not confined to enforcement proceedings, but extends to at least some types of judicial review proceedings: *O'Connor v. Offaly County Council* [2020] IECA 72.
10. The Oireachtas has put in place a statutory mechanism which allows for a determination to be made on whether the special costs regime applies. 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.
11. An Taisce has not, as yet, sought to avail of this statutory mechanism. This is because An Taisce apprehends that if it is unsuccessful in an application for a costs-protection determination, then it might be liable to pay the costs incurred by the other parties in respect of the application. An Taisce estimates that were this to occur, it might be exposed to a costs liability in the range of €300,000 (plus VAT). This estimate has been arrived at as follows. Each of the thirteen holders of the impugned aquaculture licences would have to be joined as notice parties to the intended judicial review proceedings, and would be entitled to participate in any application for a costs-protection determination. An Taisce has estimated that the costs of any one party for such an application would be in

the range of €20,000 (plus VAT). (This figure has not been challenged by the other side in the within proceedings). An Taisce suggests that were the respondents and each of the thirteen notice parties to the intended judicial review proceedings to participate in a contested application for a costs-protection determination, their aggregate legal costs could be as much as €300,000 (plus VAT).

12. The Chair of An Taisce has averred on affidavit that the imposition of a costs liability in the range of €300,000 (plus VAT) would, in effect, bankrupt the organisation. It is explained that An Taisce is a charitable body and operates on very limited funding.
13. In an attempt to avoid such a costs exposure, An Taisce has, instead, instituted the within parallel proceedings against the Minister for Agriculture Food and Marine, Ireland and the Attorney General (“*the State parties*”). The within proceedings have been instituted by way of an originating notice of motion, purportedly pursuant to Order 84B of the Rules of the Superior Courts. The originating notice of motion seeks a series of orders in relation to the liability for costs. In essence, the within proceedings seek a court direction to the effect that the Irish State must indemnify An Taisce in respect of any costs which might be ordered against it in the context of an unsuccessful application for a costs-protection determination.
14. The rationale for this approach—as set out in the grounding affidavit of the Chair of An Taisce and in the written legal submissions—is that the Irish State has failed properly to transpose the requirements of EU environmental law in respect of legal costs. It is said that An Taisce cannot begin its intended judicial review proceedings without exposing itself to the risk of costs; and that it cannot even

bring an application for a costs-protection determination without exposing itself to having to pay the costs of that application. It is further said that An Taisce has felt itself constrained, before bringing an application seeking a costs-protection determination, to seek reassurance from the Irish State that it (An Taisce) will not be liable to pay the costs of such application. If and insofar as the domestic legislation exposes it to a liability to pay the costs of the holders of the impugned aquaculture licences, An Taisce seeks an indemnity from the Irish State. It is said that the Irish State is obliged to provide such an indemnity in order to make good its (alleged) failure to implement EU environmental law in respect of costs correctly. An Taisce cites article 11 of the Environmental Impact Assessment Directive (2011/92/EU) ("*EIA Directive*"), and, more generally, the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ("*Aarhus Convention*").

15. The initial position of the State parties had been that there was no justification for An Taisce's failure to avail of the statutory mechanism provided, i.e. by applying for a costs-protection determination under section 7 of the Environment (Miscellaneous Provisions) Act 2011. Insofar as the State parties' own attitude to the intended judicial review proceedings is concerned, the Chief State Solicitor's Office has indicated, in open correspondence, that proceedings in the form set out in the exhibited statement of grounds would, indeed, attract costs protection.
16. The within proceedings came on for hearing before this court on 28 October 2021. The matter was adjourned, from time to time, to allow counsel on behalf of the State parties to take instructions in respect of the question of whether, on

its proper interpretation, section 7 of the Environment (Miscellaneous Provisions) Act 2011 does not envisage the making of a costs order against an unsuccessful applicant under that section.

17. The matter ultimately came before the court again on 21 January 2022. On that occasion, counsel on behalf of the State parties confirmed that that was, indeed, their interpretation of the legislation.
18. Judgment was reserved to today's date in order to allow this court to consider the transcript of the initial hearing; the written legal submissions; and the relevant authorities, before giving its ruling on the proper interpretation of the legislation.

DISCUSSION AND DECISION

19. The principal issue for determination in this judgment is whether a party who has been unsuccessful in an application for a costs-protection determination under section 7 of the Environment (Miscellaneous Provisions) Act 2011 is liable to pay the costs of that application.
20. The issue arises in circumstances where there is a *legitimus contradictor* before the court, in the form of a Minister of the Government, and, more especially, the Attorney General, who has a role as defender of the public interest. If there was a plausible alternative interpretation of the section open, then the State parties would have been in a position to articulate same.
21. As it happens, the parties to the within proceedings have now reached consensus as to the correct interpretation of the statutory provisions. The State parties have confirmed that they accept that a costs order should not normally be made against an unsuccessful applicant for a costs-protection determination.

22. Of course, the correct interpretation of primary legislation is not the sole preserve of the parties to any particular set of proceedings. Rather, it is a matter for the court to rule upon even if the parties are in agreement. The court must endeavour to reach the correct interpretation of the legislation; if necessary by considering relevant issues of EU law or constitutional law not raised by the parties. The parties would, obviously, be invited to make submissions on any such issues identified by the court.
23. The role of the court in interpreting domestic legislation which gives effect to EU law has been explained as follows by the Supreme Court in *Callaghan v. An Bord Pleanála* [2017] IESC 60 (at paragraphs 4.4 and 4.5):

“Where an Irish court is considering the proper interpretation of a statutory measure it may well take into account any constitutional principles which might impact on the proper construction of the legislation concerned. Indeed, it is fair to say that a court might very well be reluctant to disregard such constitutional questions of interpretation even if they were not specifically raised by the parties. A court, and in particular a court of final appeal, is, as a matter of national law, required to give a definitive interpretation of a legislative measure which comes into question in the course of proceedings properly before it. It could not be ruled out, therefore, that a court in such circumstances would be reluctant to give a construction to legislation without having regard to any constitutional issues which might impact on the proper construction of the measure concerned in accordance with *East Donegal* principles. This might well be so where there would be a real risk that the Court would give an incorrect interpretation of the legislation in question if it did not itself raise the constitutional construction issue. It must be recalled that the proper interpretation of legislation is objective and is not dependent, necessarily, on the arguments put forward by the parties.

By analogy it seems to me that it is at least arguable that an Irish court, in order to comply with the principle of conforming interpretation, would be required to have regard, even on its own motion, to provisions of [European] Union law where those provisions might have an impact on the proper interpretation of national measures under consideration.”

24. I turn next to apply these principles to the interpretation of section 7 of the Environment (Miscellaneous Provisions) Act 2011. The section falls to be interpreted in a manner which is consistent with EU law, having regard to the provisions of article 11 of the EIA Directive, and, more generally, to the Aarhus Convention.
25. The section itself is silent on the question of the allocation of the costs of an application made under it. It is necessary, therefore, to move beyond the literal wording and to consider the legislative intent underpinning the section. 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.
26. It would defeat this legislative intent—and undermine the very purpose of the section—were the moving party to be at risk of having the costs of an application awarded against it. It would be self-contradictory to make it a condition of obtaining certainty as to costs that the moving party have to run the gauntlet of an adverse costs order. The costs of an application for a costs-protection determination could themselves be prohibitively expensive.
27. In this regard, the approach of the Advocate General in Case C-470/16, *North East Pylon Pressure Campaign*, EU:C:2017:781 is instructive. The Advocate General suggested that the failure of a Member State to put in place clear and unambiguous rules in respect of the “*not prohibitively expensive*” requirement

under article 11 of the EIA Directive should not be visited upon applicants. These observations were made in the context of an uncertainty as to the stage in judicial review proceedings at which costs protection is available under domestic law. The Advocate General stated that the fundamental objective of article 11 of the EIA Directive would be undermined if an applicant would only know whether or not the action was taken at a correct stage, and whether or not he or she would be exposed to prohibitive costs, *after* the case was instituted and the costs incurred, as a result of a failure by the Member State to determine, in advance, clearly and unambiguously the stage at which a procedure may be initiated.

28. The same logic extends to an application for a costs-protection determination. The legislative provisions governing the availability of costs protection under domestic law are complex. Following upon the judgment of the Court of Appeal in *Heather Hill Management Company v. An Bord Pleanála* [2021] IECA 259, an applicant must not only assess whether their proceedings might attract costs protection in principle, but must go further and assess each individual ground of challenge with a view to assessing whether it attracts costs protection in its own right. The domestic costs rules, as interpreted by the Court of Appeal, draw a distinction between various categories of grounds of challenge in environmental litigation as follows: (i) grounds alleging an infringement of the public participation provisions of the EIA Directive; (ii) grounds alleging a breach of national environmental law (possibly confined to fields which coincide with those also covered by EU environmental law); and (iii) grounds alleging a breach of non-environmental law (possibly without distinction as between domestic or EU law).

29. The assignment of each ground in any particular set of proceedings to the correct pigeonhole is not a straightforward task, and has already resulted in a slew of interlocutory applications in respect of costs protection in other judicial review proceedings. The size and shape of the pigeonholes themselves is now to be the subject of a reference for a preliminary ruling by the High Court in *Enniskerry Alliance v. An Bord Pleanála* [2022] IEHC 6.
30. Given the uncertainty and unpredictability of the domestic law rules on costs, the existence of a statutory mechanism whereby an applicant can obtain a prior determination on the question of whether costs protection applies represents an essential safeguard. It would be contrary to the Irish State's obligations under EU environmental law if an applicant would only know whether or not they are entitled to costs protection by exposing themselves to the risk of having to pay the prohibitive costs of an application under section 7 of the Environment (Miscellaneous Provisions) Act 2011.
31. I am satisfied, therefore, that on its correct interpretation section 7 of the Environment (Miscellaneous Provisions) Act 2011 does not envisage that a costs order would be made against an unsuccessful applicant under that section. The ordinary rule will be that each party bears its own costs of the application. In an exceptional case, where an applicant has demonstrated bad faith or has otherwise engaged in litigation misconduct, then it might be open to the court to mark its disapproval by the making of a costs order. This would, however, be very much the exception.
32. In practice, an applicant who contends that their proceedings attract the special costs regime should write to the other parties prior to the bringing of any application pursuant to section 7 of the Environment (Miscellaneous Provisions)

Act 2011. If the other parties agree that costs protection is appropriate to the proceedings, then an application for a costs-protection determination will be unnecessary. The matter can be dealt with on consent in accordance with section 7(3). It is only if the parties are in disagreement that an application will then become necessary.

33. I am fortified in my interpretation by reference to the judgment of the High Court (Humphreys J.) in *Enniskerry Alliance v. An Bord Pleanála* [2022] IEHC 6. There, the court held that the right to an effective remedy implies that a party seeking to assert a right to costs protection must be entitled to rely on costs protection in making that assertion. The matter is put as follows (at paragraph 76 of the judgment):

“Following this issue being raised in the applicants’ submissions, it was accepted by the board and agreed to by the notice parties that the applicants having raised an arguable point as to their entitlement in each case to not prohibitively expensive costs, should, therefore, be entitled to the application of the not-prohibitively-expensive costs rule in relation to the costs of the costs argument, even if the applicants are ultimately unsuccessful in that argument. That is an illustration in its own way of the point that the right to an effective remedy is really the most fundamental of all rights. Rights are meaningless unless they can be enforced, so to enforce the right to argue for not-prohibitively-expensive costs, one needs the protection of a not-prohibitively-expensive procedure in order to even make the argument.”

34. Whereas the question of the interpretation of section 7 of the Environment (Miscellaneous Provisions) Act 2011 may not have been fully ventilated before him—the issue appears simply to have been accepted by all parties—Humphreys J. had been satisfied that costs protection must be available in the context of an application for a costs-protection determination. Similarly, the reference to the applicants in that case having raised an “*arguable point*” in

respect of costs protection appears to leave open the possibility of an adverse costs order being made where an application for a costs-determination is frivolous or vexatious.

CONCLUSION AND FORM OF ORDER

35. On its correct interpretation, section 7 of the Environment (Miscellaneous Provisions) Act 2011 does not envisage that a costs order would be made against an *unsuccessful* applicant under that section. Rather, the ordinary rule will be that each party bears its own costs of the unsuccessful application. In an exceptional case, where an applicant has demonstrated bad faith or has otherwise engaged in litigation misconduct, then it might be open to the court to mark its disapproval by the making of a costs order. This would, however, very much be the exception.
36. Having regard to this interpretation, the apprehensions expressed by An Taisce now fall away. It is, in principle, open to An Taisce to make their application for a costs-protection determination now, in advance of issuing their judicial review proceedings, secure in the knowledge that a costs order will not be made against them if unsuccessful in that application.
37. It is unnecessary, therefore, for An Taisce to pursue the relief sought in the within proceedings. There is no requirement for the State parties to provide a costs indemnity in circumstances where the concerns of An Taisce can all be addressed by way of an application pursuant to section 7 of the Environment (Miscellaneous Provisions) Act 2011.
38. For completeness, if and insofar as there is any doubt as to whether sections 3 and 7 of the Environment (Miscellaneous Provisions) Act 2011 apply to judicial

review proceedings (as opposed to enforcement proceedings), the logic above applies equally to any application for costs protection made pursuant to Order 99 of the Rules of the Superior Courts or the court's inherent jurisdiction. It would be contrary to the Irish State's obligations under EU environmental law if an applicant would only know whether or not they are entitled to costs protection by exposing themselves to the risk of having to pay the costs of an application seeking a costs ruling, regardless of the form in which that application is brought before the court.

39. Accordingly, I propose to make the following orders. First, a declaration as to the effect of section 7 of the Environment (Miscellaneous Provisions) Act 2011. Secondly, an order striking out the balance of the within proceedings. I will hear the parties further on the question of the costs of the within proceedings.
40. The case will be listed before me remotely on Tuesday, 15 March 2022 at 10.45 AM. If the parties wish to contend for a different form of order than that proposed above, they may do so on that occasion. The parties may also apply for case management directions, if desired, in respect of the proposed judicial review proceedings. The parties will have liberty to apply.

Appearances

James Devlin, SC and Alan Doyle for the applicant instructed by Fieldfisher Ireland
Frank Callanan, SC and Tom Fitzpatrick for the respondents instructed by the Chief State Solicitor

Approved
Gemma S. Mans