

THE HIGH COURT

[2022] IEHC 63
2021 No. 10 MCA

**IN THE MATTER OF THE PLANNING AND DEVELOPMENT ACTS 2000 TO 2020
AND IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 160 OF THE
PLANNING AND DEVELOPMENT ACT, 2000 (AS AMENDED)**

BETWEEN:

KILSARAN CONCRETE UNLIMITED COMPANY

APPLICANT

AND

O'REILLY OAKSTOWN LIMITED AND

O'REILLY BROS LTD

RESPONDENTS

**JUDGMENT OF MS. JUSTICE SIOBHÁN PHELAN DELIVERED ON THE 8TH FEBRUARY,
2022**

INTRODUCTION

1. These proceedings are brought pursuant to s. 160 of the Planning and Development Act 2000 (as amended). In the proceedings, the applicant seeks orders restraining unauthorised development on lands owned by the first named respondents at Oakstown, Trim, County Meath. The applicant seeks an order restraining the unauthorised use of the lands for and in connection with the manufacture of ready-mix concrete for sale off-site. In addition, the applicant seeks orders requiring the removal of unauthorised structures which have been erected on the lands.
2. The respondents brought an application to remit these proceedings to the Circuit Court on the basis that the market value of the lands was less than €3 million. The first named respondent's site is approximately 3 hectares in area.
3. On 18 January 2022, this Court delivered a ruling indicating that it would remit the s. 160 proceedings to the Circuit Court: see *Kilsaran Concrete Unlimited Company v. O'Reilly Oakstown Limited and another* [2022] IEHC 33.
4. Following the court's ruling, counsel for the respondents applied for the costs of the motion to remit. In view of the potential complexities raised, not least in relation to the applicability of cost protection in Part 2 of the Environment (Miscellaneous Provisions) Act 2011 (the "2011 Act") to these proceedings, the court requested the parties to provide submissions on costs and fixed a period of seven days from the 21st January 2022 for receipt of same.
5. Written submissions were received from the applicants but not from the respondents within that time-frame. On the 4th February 2022, written submissions were delivered late and were received by the Court with the consent of the applicant. The court notes and shares the applicant's concern at the delay caused by the late filing of submissions from the respondent. Delay is particularly regrettable in proceedings of this nature where there is a need for expedition.

COSTS ISSUES FOR DETERMINATION

6. There are two costs issues which arise for consideration following the decision to remit these s. 160 proceedings to the Circuit Court.

7. First, the court must deal with the costs of the proceedings in the High Court to date.
8. Secondly, the court must deal with the costs of the remittal application within the proceedings itself.

COSTS OF THE PROCEEDINGS IN THE HIGH COURT TO DATE

9. The court has been referred on behalf of the applicant to the decision in *Parkborough Limited v. Kelly* [2008] IEHC 401 by Laffoy J. where the court confirmed that where an order to remit is made, the normal rule in relation to the costs of the proceedings in the High Court is to reserve the costs of the High Court to the hearing of the action in the Circuit Court, so that the successful party in the lower court who is awarded reserved costs will be entitled to the costs of the proceedings in the High Court up to the date of remittal at the High Court scale. Laffoy J. refused to depart from that normal rule and awarded costs of the High Court proceedings in favour of either the plaintiff or defendant. At para. 23 of the judgment, Laffoy J. expressed the view that not only was such an order inappropriate in circumstances where the proceedings had not been determined, but that there was no jurisdiction to make it:

"The outcome of a defended plenary action is determined by a plenary hearing on oral evidence. There has been no such hearing in this case. If the order to remit is acceded to, and I have already indicated to the parties that I intend acceding to it, the plenary hearing will take place in the Circuit Court. The outcome will identify 'the event' by reference to which the fundamental rule in relation to where liability for costs should lie will be determined, although, of course, it will be at the discretion of the Circuit Court Judge whether the fundamental rule is applied. Until then, the Court has no jurisdiction to make an order as to who is liable for the costs." (para. 23)

10. It is submitted on behalf of the applicant that the foregoing observations apply *mutatis mutandis* to proceedings which are heard on affidavit.
11. The court has further been referred to Delany and McGrath on Civil Procedure (Fourth Edition) at para. 8-19 where the jurisdiction of the lower court to deal with costs is addressed in the following terms:

*"It is important to note that the jurisdiction of the lower court to deal with costs will be circumscribed by the order of remittal and it is not open to the lower court to award costs of the High Court proceedings if this has not been done by the High Court dealing with the remittal application. Thus, in *McEvoy v. Fitzpatrick*, where Hanna J. made an Order in the High Court of an application for remittal that the costs of the defendant in the High Court would be costs in the cause but made no provision for the plaintiff's costs, it was held by the Supreme Court that the Circuit Court judge had no power to allow the plaintiff those costs."*

12. In the circumstances, it is submitted on behalf of the applicant that the appropriate order is to reserve the costs of the proceedings in the High Court of both parties to the Circuit

Court judge, where the High Court has made no adjudication on the substance of the case.

13. I did not understand the respondents to disagree with this submission when the costs issue was mooted in court and the thrust of their oral submission related to the costs of the remittal application. The written submissions received on behalf of the respondents does not address this aspect of the court's costs considerations but again focusses on the costs of the remittal application.

COSTS OF THE REMITTAL APPLICATION

14. The respondents' application to remit originated by way of a notice of motion dated 24 March 2021, headed in the record number and title of the s. 160 proceedings and grounded upon an affidavit of the respondents' solicitor, also sworn on the 24 March 2021.
15. Submissions made on behalf of the applicant identify the starting position regarding costs of interlocutory applications as that set out in O. 99, r. 2(3) of the Rules of the Superior Courts. This provides as follows:

"2. Subject to the provisions of statute (including sections 168 and 169 of the 2015 Act) and except as otherwise provided by these Rules:

[...]

(3) The High Court, the Court of Appeal or the Supreme Court, upon determining any interlocutory application, shall make an award of costs save where it is not possible justly to adjudicate upon liability for costs on the basis of the interlocutory application."
16. It is submitted on behalf of the applicant that where it is not possible to so justly adjudicate, the question of costs should be reserved.
17. The respondents seek the costs of the remittal application on the basis of the general principle that costs follow the "event", which was an order remitting the proceedings to the Circuit Court.
18. The applicant acknowledges that in the ordinary course, such an application would be straightforward, and the applicant would have difficulty in reasonably opposing an order to that effect, subject to seeking a stay on such order pending the outcome of the proceedings.
19. In the present case, however, the position is complicated by the fact that the applicant may be entitled to the benefit of costs protection under the 2011 Act. The possibility of the applicant contending that costs protection applies is acknowledged by the respondents' solicitor at para. 11 of his affidavit grounding the motion to remit and was a key feature of the application to remit because the potential applicability of the 2011 Act

was identified as a potential prejudice to the respondent in the event that they were to succeed in defending the application under section 160.

20. In view of considerations relating to the applicability of the 2011 Act, the applicant has submitted that there are two options open to the court with regard to the costs of the remittal application.
21. First, it is open to the court to determine costs of the remittal application at this stage, but that will involve the court having to form a view on whether the costs protection provisions in Part 2 of the 2011 Act apply to these proceedings. If the court concludes that costs protection is available, it is submitted that the default order applies to the proceedings and application within the proceedings, meaning that both parties should bear their costs of the remittal application.
22. The second option is to reserve the costs of the motion to remit to the Circuit Court judge, on the basis that it would be unjust to deprive the applicant of the benefit of costs protection in respect of this application, should the 2011 Act apply. In the absence of a decision on the question of the applicability of the 2011 Act, it is not possible to “justly adjudicate” upon liability for costs at this juncture, because to award costs against the applicant would deprive it of the benefit of costs protection, should it be found to apply.
23. The respondents, on the hand, maintain firstly that the 2011 Act does not apply to the remittal application. Alternatively, they contend that if it does apply (contrary to their primary argument) then as the moving party on the motion to remit, they are the “applicant” within the meaning of the 2011 Act. They contend that the respondents are entitled to costs on either scenario.

COSTS PROTECTION UNDER THE 2011 ACT

24. In the present case, it has been noted by the court in the main decision on the remittal application that these proceedings may benefit from costs protection under the provisions of the 2011 Act. As noted in *Simons on Planning Law* (Third Edition) at paras. 11-648:

“The 2011 Act applies to s.160 proceedings taken by a member of the public but not to proceedings taken by a planning authority. The 2011 Act provides that, subject to certain exemptions, each party is to bear its own costs. The principal exception to this is that a *successful* applicant will generally be entitled to costs.” [emphasis in original.]

25. At paras. 11-657, it is noted that:

“The general rule in civil (as opposed to criminal) legal proceedings is that costs ‘follow the event’. Thus, the successful party is normally entitled to an order directing the unsuccessful party to pay its legal costs. The general rule is displaced by the 2011 Act. The 2011 Act introduced a rule to the effect that each party must generally bear its costs, and, secondly, that the 2011 costs rules do not apply where the proceedings are taken by a planning authority (as opposed to by a member of the public).”

26. Part 2 of the 2011 Act, containing ss. 3 to 8, is headed "[c]osts of Certain Proceedings to be Borne by Each Party in Certain Circumstances". The default position, which is set out in s. 3, is that each party to proceedings to which Part 2 of the 2011 Act applies shall bear its own costs. The types of proceeding to which the default position in s. 3 shall apply are listed in s. 4 and these include proceedings for purpose of ensuring compliance with or enforcement of a requirement relating to planning permission, where it is being alleged that such non-compliance or failure to comply has caused, is causing or is likely to cause damage to the environment, examples of which are set out in section 4(2).
27. The judgment of the Court of Appeal in *McCoy and South Dublin County Council v. Shillelagh Quarries Limited* [2014] IEHC 511 confirms that the special costs rules under Part 2 of the 2011 Act are not confined to cases alleging a breach of planning permission but extend to cases of wholly unauthorised development.
28. The applicant contends that Part 2 of the 2011 Act applies to the proceedings, because the proceedings are seeking to enforce compliance with a retention permission granted by Meath County Council in 1982 (Planning Reg. Ref. No. 82/562), as well as enforcing obligations arising from the failure of the respondents to obtain planning permission, with the effect that the development complained of is unauthorised development. In both scenarios, the applicant contends that such non-compliance is resulting in damage to the environment of the type envisaged in s. 4(2) of the 2011 Act and it has put evidence to that effect before the court. In such circumstances, it is submitted on behalf of the applicant that the proceedings are of a type contemplated by ss. 3 and 4 of the 2011 Act.
29. The respondents accept (without conceding the point) that the 2011 Act may have application to the proceedings but contends that it has no application in the context of the motion to remit, because that application is made pursuant to s. 25 of the Courts of Justice Act 1924 (as amended by s. 11 of the Courts of Justice Act 1936). Section 25 of the 1924 Act provides that "when any action shall be pending in the High Court which might have been commenced in the Circuit Court, any party to such action may, at any time before service of the notice of trial therein, apply to the High Court that the action be remitted or transferred to the Circuit Court ...". They say that the proceedings which the Court was concerned with on the application before it was comprised of the remittal application and the court was not engaged in an adjudication of or determination of an issue in the s. 160 proceedings.
30. I do not accept the respondents' position to be correct in law. It is clear that the action in the present case which is sought to be remitted is the s. 160 proceedings. I agree with the applicant's submission that the motion to remit is brought within the umbrella of the s. 160 proceedings. It is not a free-standing application which exists independently of these proceedings. The outcome of the respondents' motion is that the s. 160 proceedings have been remitted. Thus, if the 2011 Act confers costs protection on the s. 160 proceedings, then the motion to remit, as an application within the s. 160 proceedings, is governed by the default provision as to costs as set out in s. 3 of the 2011 Act.

31. Nor does the Court accept the respondents' alternative argument, admittedly advanced with lukewarm conviction, which was to the effect that for the purpose of the remittal application, it is an "applicant" within the meaning of the 2011 Act and therefore entitled to seek its costs. The fact that the respondents were the moving parties on a motion within the proceedings does not confer on them the status of "the person" entitled to the benefit of the protective costs regime established under the 2011 Act. The respondents in bringing an application within the proceedings does not become a person(s) who institute(s) proceedings for the purpose of ensuring compliance with or the enforcement of a statutory obligation or condition or other requirement as more fully defined in s. 4 of the 2011 Act. I find the alternative argument made on behalf of the respondents to be entirely without merit.
32. The court has noted that the costs protection provisions of the 2011 Act may apply to these proceedings. If they are ultimately found to apply, then it seems to me that costs protection would apply to the motion to remit, with the effect that the parties would each bear their own costs of that application. If, on the other hand, they are found not to apply then the respondents should be entitled to the costs of having successfully pursued the remittal application.
33. In the absence of a decision on the applicability of costs protection, I consider that it is not possible for the court at this stage to "justly adjudicate upon liability for costs on the basis of the interlocutory application" (per O. 99, r. 2(4) of the Rules of the Superior Courts). I agree with the submission made that if the court were to award the respondents their costs of the motion to remit at this point, it would result in an injustice to the applicant if it were later to be established that the proceedings have the benefit of costs protection under Part 2 of the 2011 Act. However, if on the contrary, it were established that Part 2 of the 2011 Act does not apply, then the weight to be attached to a consideration of whether costs protection applies or not as a basis not to make an order for costs in favour of the respondent (and moving party) on their successful remittal application is diminished.
34. It was acknowledged in submissions filed on behalf of the applicant that if this Court decided to reserve costs, it would be open to this Court to reserve the respondents' costs only. If the court were to make such an order, then having regard to *McEvoy v. Fitzpatrick*, referred to above, the applicant would not be able to recover the costs of the motion to remit if it is ultimately successful in the proceedings. On the other hand, if the respondents were to successfully defend the proceedings, but Part 2 of the 2011 Act were found to confer costs protection, the parties would each bear their own costs of the motion. However, if the respondents were to succeed, but Part 2 of the 2011 Act were found not to apply to the proceedings, they would be entitled to seek their costs of the application to remit and the costs of the proceedings. The respondents posit a further alternative and submit that where the Court is not satisfied to follow the ordinary rule that costs follow the event and is not minded to make an order for costs at this juncture in respect of the remittal application, that the appropriate order is that the respondents' costs of the remittal action be costs in the cause.

CONCLUSION & ORDER

35. This Court is satisfied that the appropriate order in respect of the proceedings to date is to reserve the costs of the proceedings in the High Court of both parties to the Circuit Court judge. This is because the s. 160 application has yet to be determined both on its merits and as to the applicability of the 2011 Act.
36. As for the costs of the remittal application, I accept that the default position is that the High Court should decide the question of costs of an interlocutory application *at that time*, rather than reserving the costs, unless it is not possible justly to adjudicate upon the liability of same at that time. This Court is satisfied, however, that the remittal application is part of the proceedings in respect of which the provisions of the 2011 Act would apply if the Act applies to the proceedings. If it applies, it would preclude an order for costs being made against the applicant and in favour of the respondent on the remittal application notwithstanding that the applicant lost the argument as to remittal. If it does not apply, however, then in principle the respondents should be entitled to the costs of the motion which they successfully pursued before this Court.
37. As no determination has been made on the application of the 2011 Act, I consider that it is not possible to justly adjudicate upon liability for costs on the remittal application save and except to conclude, as I do, that the applicant should not recover costs as against the respondents in respect of an application which they unsuccessfully opposed.
38. This Court considers the proper order in the circumstances to be an order reserving the costs of the respondents only on the remittal application to the Circuit Court and to make no order in respect of the applicant's costs (as they unsuccessfully opposed the remittal application). It seems to me likely that this has the same effect as making the respondents' remittal costs "costs in the cause" as the respondents have suggested but has perhaps the advantage of more clearly reflecting the reasoning of the Court as regards its approach to costs in circumstances where ultimately it will fall to the Circuit Court judge dealing with the proceedings to deal with costs in line with the determination taken by that Court both on the merits of the s. 160 application and on the applicability or otherwise of the costs protection regime provided for under the 2011 Act.
39. In remitting these s. 160 proceedings to the Eastern Circuit, County of Meath, and on the basis that the costs protection issue has not yet been determined, this Court orders:
 - (i) the costs of the proceedings in the High Court (pre-remittal application) of both parties be reserved to the Circuit Court Judge; and
 - (ii) the respondents' costs of the motion to remit to the Circuit Court be reserved to the Circuit Court Judge to be subject to that court's determination on costs protection under the 2011 Act and;
 - (iii) no order in respect of the applicant's costs of the motion to remit to the Circuit Court.