

HIGH COURT

[2021] IEHC 402
[2020 No. 42 JR]

**IN THE MATTER OF SECTION 50 AND 50(A) OF THE PLANNING AND DEVELOPMENT
ACT 2000 (AS AMENDED)**

BETWEEN

DONAL MCDAID

APPLICANT

- AND -

MONAGHAN COUNTY COUNCIL

RESPONDENT

JUDGMENT of Mr Justice Max Barrett delivered on 10th June 2021.

SUMMARY

This is a costs application in which, for the reasons stated hereafter, the court will make no order as to costs. This summary is part of the court's judgment.

1. This is a costs application that raises an interesting quandary.
2. The Council received, on 18th October 2019, an application that was submitted on behalf of Mr McDaid, a farmer, for retention of a cattle underpass. The application was refused by way of refusal dated 12th November 2019. Ostensibly, therefore, the respondent proceeded to determine the application and make its decision to refuse some 3 weeks and 4 days from the date of receipt of Mr McDaid's application. Thus the apparent pace of progress was quicker than the five week process contemplated by, e.g., Articles 20, 29 and 30 of the Planning and Development Regulations ('PDR') 2001. This five-week period is significant. As noted in the statement of grounds:

"2.1 The period of five weeks is significant in the planning application process given that five weeks is the timeframe under Article 20 PDR 2001 as amended for a site notice to be maintained in position on the lands or structure concerned from the date of receipt of the application for permission. The purpose of the site notice is to notify members of the public of the intention to make the application as provided by Article 17(1)(b) PDR 2001 as amended. The period of 5 weeks is the timeframe for public consultation provided under Article 29(1)(a) PDR 2001 as amended whereby any person or body may make submissions or observations in respect of the application if they so wish within that timeframe. Article 31(g) requires that the planning authority in deciding a planning application in accordance with section 34(3) of the 2000 Act has regard to submissions or observations received in accordance with the Regulations.

2.13 The purpose of the 5 week restriction on the planning authority in making its decision under Article 30 coincides with and facilitates the five week period in which the public is on notice of the application, the 5 week period in which members of the public and bodies may make submissions and observations in respect of the application which the planning authority is required to consider when making its decision."

3. The within proceedings, which revolve around the above-described ostensible error, were commenced by *ex parte* application on 20th January 2020. Discovery was thereafter sought and it turned out in the discovery process that the Council had in fact reached its decision in accordance with the legally prescribed timeline, *i.e.* the error in dating was 'but' a clerical error. Once this fact was realised the within proceedings fell to be abandoned and the Council is now seeking the costs that it has incurred to date in the proceedings. It does not deny that there was a clerical error as regards the date but points to its substantive compliance with the law, to the fact that the within proceedings are being abandoned by Mr McDaid, and to the fact that these proceedings could perhaps have been avoided if, instead of coming to court, Mr McDaid had engaged in prior correspondence with the Council.
4. If the court might deal with the last point first, there is no legal requirement on a party to double-check with a planning authority that it has done its job right before commencing court proceedings arising out of an error on a planning file. A party is entitled to commence judicial review proceedings by reference to such documentation as exists on the relevant planning file. Where a planning authority has erred (be that a clerical error – and a clerical error, though clerical, is nonetheless an error – or a more substantial error) then the consequences of that error will play out in whatever way they play out in the ensuing proceedings. Of course, planning authorities and staff within planning authorities will err – we are all human and we all err – and the courts do not require that people or processes be perfect. But neither do the courts require a double-checking process such as that contended for by the Council, whereby an affected person needs to engage in correspondence with a planning authority before commencing court proceedings in respect of an ostensible, documented error of timing that eventually turns out to have been a clerical error, rather than a more substantial error.
5. How is the court to resolve the question of costs where (i) the applicant has commenced proceedings by reference to an error that turns out to be a clerical error, not a more substantial error, with the result that the applicant then abandons his application, and (ii) the respondent has made 'but' a clerical error, made no more substantial error, yet through that clerical error has become the subject of duly commenced proceedings that fall ultimately to be abandoned? In truth, the answer seems fairly obvious: the fairest course of action is that no order as to costs should issue (with the result that the parties should each bear their own costs). This is a course of action which recognises that the applicant's key point was ultimately mistaken, while also recognising that the situation (and proceedings) that arose were ultimately of the Council's making. But does the law allow the court to reach such a conclusion? It does, but in a legal judgment one must go through the law, not around it; thus the court considers the applicable law below.
6. Since late-2019 a new costs regime has come into force by virtue of Part 11 of the Legal Services Regulation Act 2015 and the revision of Order 99 of the Rules of the Superior Courts. Section 169(4) of the Act of 2015 is the relevant provision for the purposes of the within application. It provides as follows:

"Unless the court before which civil proceedings were commenced orders otherwise, or the parties to those proceedings agree otherwise, a party who discontinues or abandons the proceedings after they are commenced (including discontinuance or abandonment of an appeal) is liable to pay the reasonable costs of every other party who has incurred costs in the defence of the civil proceedings concerned until the discontinuance or abandonment."

7. Why would the court before which civil proceedings were commenced order "otherwise"? Section 169(4) does not identify why a court would do so. However, O.99, r.3(1) is of aid in this regard. It provides as follows:

"The High Court, in considering the awarding of the costs of any action or step in any proceedings, and the Supreme Court and Court of Appeal in considering the awarding of the costs of any appeal or step in any appeal, in respect of a claim or counterclaim, shall have regard to the matters set out in section 169(1) of the 2015 Act, where applicable."

8. Thus, although the Act of 2015 itself makes no link between s.169(4) and 169(1), O.99, r.3(1) requires a court acting under s.169(4) to have regard to the factors identified in s.169(1). That said, O.99, r.3(1) requires only that the deciding court "have regard to" the matters set out in s.169(1). It does not indicate that the deciding court cannot have regard to other matters and the court does not see how O.99, r.3(1) could contain such a prohibition, for the text of s.169(4) (primary law) does not constrain the deciding court, so how could O.99, r.3(1) (secondary law) purport to do so? – and, as mentioned, it does not purport to do so.

9. As just touched upon, s.169(1) provides as follows:

"A party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings unless the court orders otherwise, having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties, including [but, it seems, not limited to] – (a) conduct before and during the proceedings, (b) whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings, (c) the manner in which the parties conducted all or any part of their cases, (d) whether a successful party exaggerated his or her claim, (e) whether a party made a payment into court and the date of that payment, (f) whether a party made an offer to settle the matter the subject of the proceedings, and if so, the date, terms, and circumstances of that offer, and (g) where the parties were invited by the court to settle the claim (whether by mediation or otherwise) and the court considers that one or more than one of the parties was or were unreasonable in refusing to engage in the settlement discussions or in mediation".

10. In the within proceedings: no criticism falls to be made of the conduct of the applicant or respondent whether before or during the proceedings; it was reasonable for the applicant to raise, pursue or contest the timing issue on which these proceedings turn; no criticism

falls to be made of the manner in which the parties conducted all or any part of the proceedings; and Mr McDaid did not exaggerate his claim. The court does not see that the other factors identified in s.169(1) are of any practical relevance in the context of the present application. The court notes its observations previously above as to how and why the proceedings were commenced and where the responsibility for same ultimately lies.

11. In passing, the court notes an oddity that presents in s.169 and to which attention has recently been drawn in a learned article by Mr Gearóid Carey, Solicitor, entitled "Costs Awards under Part 11 of the Legal Services Regulation Act 2015: Recent Guidance" (2021) 28(5) *Commercial Law Practitioner* 83, at p. 84, in terms with which the court respectfully agrees:

"[A]lthough the heading of s.169 is 'Costs to follow event', what s.169 prescribes is not what is conventionally understood as the 'event' because it provides that a party is only prima facie entitled to their costs where they are 'entirely successful'. This is a new qualification and it would appear to limit awards of costs without deduction to cases where the party has prevailed on everything, which is potentially a higher threshold than simply succeeding on the 'event'. It is also noteworthy that the reference to the 'event' in the heading to s.169 is the only reference to 'event' in the context of costs in the LSRA and, tellingly, the new Ord.99 has no provision by reference to which the substantive award of costs is determined by the 'event'. In those circumstances, the heading to s.169 is something of a red herring, if not a misnomer, by reference to what it actually provides."

12. A question also perhaps arises as to the need for s.169(2) as it is not clear to this Court, even in the absence of s.169(2), how a court could conceivably make an order without giving reasons for that order, however brief they might be in the context of a costs application. As a provision s.169(2) seems but to require the doing of that which in any event falls to be done.
13. For the reasons stated above, the court will make no order as to costs.