

APPROVED

[2024] IEHC 471



**THE HIGH COURT
CIRCUIT APPEAL**

2023 62 CA

BETWEEN

**JOHN LYONS
MARY LYONS**

APPLICANTS

AND

**PATRICK MCDONAGH
SUPERMAC'S IRELAND LTD
FUNWORLD (IRELAND) LTD**

RESPONDENTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 31 July 2024

INTRODUCTION

1. This judgment addresses the allocation of the costs of an appeal from the Circuit Court. The underlying proceedings take the form of an application for a planning injunction pursuant to section 160 of the Planning and Development Act 2000. The appeal was withdrawn on the day of the scheduled hearing.

NO REDACTION REQUIRED

PROCEDURAL HISTORY

2. These proceedings relate to commercial premises at Ennis Road, Limerick. The premises are owned by Supermac's Ireland Ltd. Part of the premises is leased to the applicants, Mr. & Mrs. Lyons, and is used for the purposes of a restaurant. The other, larger, part of the premises is used as a bowling alley. The bowling alley trades under the style "*Funworld*". It appears that the bowling alley is operated by the third respondent.
3. The applicants instituted these proceedings before the Circuit Court in March 2023 by way of an application pursuant to section 160 of the Planning and Development Act 2000 ("*PDA 2000*"). In brief, it was alleged that the respondents were in breach of planning control in two respects. First, it was said that the permanent closure of an internal door, which connected the two parts of the premises, represented a breach of planning permission (Reg. Ref. P94/284). Secondly, it was said that works consisting of the installation of a commercial kitchen and an associated extractor system required planning permission.
4. The first of these two allegations had formed part of an earlier complaint made to the planning authority on the applicants' behalf by their architect. Thereafter, the planning authority served a statutory warning letter upon the third respondent on 3 February 2023. The warning letter alleged that "*the closing up of an interconnecting door which subdivides the unit*" represented unauthorised development. The planning authority elaborated upon their position in a letter of 28 February 2023, saying that the premises had been subdivided from one unit into two units and that this represented unauthorised development.
5. Mr. Patrick McDonagh made a substantive reply to the planning authority on 6 March 2023 on behalf of the respondents. Relevantly, it was submitted that

the closure of the door represented internal works which were exempted development under section 4(1)(h) of the PDA 2000. As appears below, the planning authority has since accepted the correctness of this submission.

6. The applicants made an *ex parte* application for interim relief on 13 March 2023. The Circuit Court granted an interim order, and the matter was made returnable to 16 March 2023. On that date, the Circuit Court refused the application. It appears, although this is not entirely clear, that the Circuit Court treated the matter as the full hearing of the application under section 160 of the PDA 2000, rather than simply a hearing on an application for an interlocutory injunction. One of the distinctive features of the procedure under section 160 of the PDA 2000 is that final orders are generally made on the basis of affidavit evidence alone. Accordingly, the distinction between a “*full*” hearing and an “*interlocutory*” hearing is not always readily apparent. At all events, it is the Circuit Court’s order of 16 March 2023 which is the subject of the appeal.
7. Having regard to what has occurred since, it is relevant to note that the Circuit Court’s decision to refuse the application was informed, in large part, by the fact that the judge considered that matters were “*in hand*”, in that the respondents were actively engaging with the planning authority and seeking to regularise the planning position. The judge adverted to the possibility of an application for retention planning permission.
8. With respect, it is difficult to understand why, in those circumstances, the Circuit Court thought it appropriate to dismiss the application for a planning injunction. It is expressly provided, at section 162(3) of the PDA 2000, that no enforcement action (which includes an application under section 160) shall be stayed or withdrawn by reason of an application for retention planning permission or the

grant of that permission. If the Circuit Court had considered it appropriate to allow the respondents a short period of time within which to pursue an application for retention planning permission, the proper approach would have been to grant injunctive relief subject to a stay on execution.

9. The applicants filed their appeal to the High Court on 22 March 2023. A hearing date was subsequently fixed, on 3 July 2023, for 7 March 2024.
10. Prior to the fixing of the hearing date, the planning authority had written to Mr. McDonagh on 28 June 2023 as follows:

“The Planning Authority is satisfied that the closure of the adjoining door is exempt under Section 4(1)(h) of the Planning and Development (*sic*).

Accordingly, no further action will be taken on this file (DC-424-22).

Please note that case file reference DC-130-23 issued for the installation of a new kitchen at Funworld, Ennis Road for the preparation of hot food for consumption and sale to the public requires Planning Permission.

If this matter is not resolved as soon as possible, further Enforcement proceedings will be initiated.”

11. As discussed at paragraphs 32 to 36 below, the parties are in disagreement as to whether the planning authority sent a copy of this letter to the applicants’ architect at the time. There is a “*copy*” letter addressed to the architect on the planning authority’s file (since provided by way of non-party discovery), but the architect has averred that the (original) letter was never received.
12. An application for the retention of unauthorised development was submitted to the planning authority by the third respondent on 11 September 2023 (Reg. Ref. 23/60665). The applicants submitted an observation/objection on the planning application but same was rejected as having been made outside the five week

time-limit prescribed. The planning authority ultimately made a decision to grant retention planning permission on 26 January 2024.

13. A first-instance decision of a planning authority will ripen into a “*grant*” of planning permission in the event that no appeal is made to An Bord Pleanála within a four week period (PDA 2000, section 34(11)). No appeal has been brought to An Bord Pleanála against the decision of 26 January 2024. Accordingly, the planning authority issued a formal grant of retention planning permission on 29 February 2024, i.e. a mere one week prior to the date scheduled for the hearing of the appeal to the High Court.
14. As is standard practice, these appeal proceedings appeared in the call-over list on the Thursday preceding the allocated hearing date (Thursday, 29 February 2024). The purpose of this weekly call-over list is for parties to confirm whether their cases are going on as scheduled, and, if so, to confirm that the pleadings and written legal submissions (if required) have been lodged in the List Room. The parties in the present case should have informed the judge at the call-over list that retention planning permission had been obtained. This represented a significant event in the context of the proceedings and would, at the very least, have the practical effect of reducing the hearing time required for the appeal. The respondents should also have applied to the judge for “*special leave*” to file an affidavit explaining that retention planning permission had been obtained and exhibiting the relevant documentation. The leave of the court is required under section 37 of the Courts of Justice Act 1936 and Order 61 of the Rules of the Superior Courts. No such application was made, yet an affidavit was subsequently filed, without leave, on 5 March 2024. This affidavit referred to

the decision to grant retention planning permission of 26 January 2024 and exhibited a copy of the letter of 28 June 2023 from the planning authority.

15. It is all the more surprising that these matters were not addressed at the call over in circumstances where there had been a contest on another aspect of the case. This was not a scenario where, as often happens, a case was called on in a perfunctory manner. Rather, counsel for the applicants had sought to adjourn the hearing in order to facilitate a (then) intended change of solicitors. This application was successfully opposed by counsel for the respondents. It is unfortunate that neither side took the opportunity to apprise the court of the fact that a decision to grant retention planning permission had been made.
16. The appeal proceedings were assigned to me for hearing, and I read the papers in advance. The papers lodged in the List Room did not include a copy of the affidavit which had been filed in the Central Office on 5 March 2024. This was handed in loose at the hearing.
17. Counsel on behalf of the applicants indicated at the outset of the hearing on 7 March 2024 that the appeal against the order of the Circuit Court was being withdrawn. Counsel explained that the appeal was being withdrawn having regard to the affidavit which had been filed on 5 March 2024. Counsel stated that his side were not aware of the letter of 28 June 2023 until they received a copy of that affidavit after close of business on 4 March 2024. Counsel referred to the earlier position of the planning authority as stated in correspondence in February 2023. (This earlier correspondence appeared to suggest that the permanent closure of the internal door represented unauthorised development). Counsel was critical of the fact that the existence of the letter of 28 June 2023 was not disclosed prior to the fixing of a date for the appeal in July 2023.

Counsel was also critical of the failure of the respondents to have indicated, prior to the call-over list, an intention to file fresh evidence and their failure to seek the leave of the court to file fresh evidence. Counsel submitted that his side should be allowed their costs, with a fallback submission that there should be no order as to costs.

18. In response to a question from the bench, counsel submitted that the proceedings were not governed by Part 2 of the Environment (Miscellaneous Provisions) Act 2011 in circumstances where the “*damage to the environment*” requirement was not fulfilled.
19. In reply, counsel for the respondents submitted that the applicants’ architect had been “*in constant contact with*” the planning authority in relation to the planning issues, and that the respondents’ solicitors would have “*assumed*” that the planning authority would have sent a copy of the letter of 28 June 2023 to the applicants’ architect. The implication being that the applicants cannot have been taken by surprise by the content of the late affidavit.
20. Counsel was unable to explain why the leave of the court had not been sought, at the call-over list, to file fresh evidence. Counsel submitted that even if the late affidavit had not been filed, the appeal would not have succeeded any way.
21. Having heard submissions from both sides on the question of costs, judgment had been reserved until 14 March 2024.
22. On the afternoon prior to the date scheduled for the delivery of the judgment, the respondents’ solicitors contacted my registrar and forwarded copy correspondence which had been sent to the applicants’ solicitors. In brief, it was contended that the submission, by their counsel, that the applicants had not been aware until March 2024 of the contents of the letter of 28 June 2023 was

incorrect. The contention was advanced by reference to inquiries which the respondents' side had since made of officials in the planning authority.

23. Having regard to this correspondence, the reserved judgment was not delivered on 14 March 2024 as had been scheduled. Instead, the case was listed for further submissions on 21 March 2024. The parties were urged to take a commonsense approach to costs. Thereafter, there was a further exchange of affidavits and the respondents sought and obtained an order for non-party discovery against the planning authority. The case had to be adjourned from time to time for direction applications. The court heard final submissions on costs on 26 July 2024. Judgment was reserved until today's date.

DISCUSSION AND DECISION

24. In circumstances where the appeal has been withdrawn, the only issue outstanding between the parties is the incidence of costs. Before turning to consider this issue, it is necessary, first, to determine which costs regime applies to these proceedings. Part 2 of the Environment (Miscellaneous Provisions) Act 2011 provides that certain types of enforcement proceedings are subject to a special costs regime. In brief, the default position under this special costs regime is that each party to enforcement proceedings should bear its own costs. The court has a statutory discretion to make a different order for costs having regard to factors such as, for example, the conduct of the litigation by the parties. As currently drafted, the special costs regime only applies in circumstances where the alleged breach is giving rise to damage to the environment. Counsel on behalf of the applicants indicated that, having regard to this prerequisite, his side were not submitting that the case was subject to the special costs regime. This

concession is sensibly made in circumstances where these proceedings do not raise any issue of EU environmental law which might otherwise necessitate the “*damage to the environment*” requirement being disapplied.

25. The allocation of costs, therefore, falls to be determined by reference to the conventional costs regime under Part 11 of the Legal Services Regulation Act 2015.
26. The practical effect of the grant of retention planning permission is that the proceedings have been rendered largely moot. The planning status of the premises has been regularised and there are no legacy issues which require to be addressed. This is not a case, for example, where orders are sought to have the land restored to its condition prior to the commencement of the unauthorised development. Rather, the grant of retention planning permission has resolved one of two principal areas of dispute between the parties.
27. The normal approach which is taken in respect of proceedings which have been rendered moot as the result of a unilateral act of one of the parties is that such party should bear the costs of the proceedings. This approach has been explained by the Court of Appeal in *Hughes v. Revenue Commissioners* [2021] IECA 5 (at paragraphs 31 to 34). The Court of Appeal emphasised that the starting point is that the court has an overriding discretion in relation to the awarding of costs, and the principles stated are properly viewed as presenting a framework for the application of the court’s discretion in the allocation of costs in a particular context and should not be applied inflexibly or in an excessively prescriptive manner.
28. One of the two principal issues pursued by the applicants had been whether the works consisting of the installation of a commercial kitchen and an associated

extractor system represented unauthorised development. The applicants' stance on this issue has been vindicated in that an application for retention planning permission had to be made to regularise the planning status of these works. An application for *retention* planning permission is only ever necessary where "*unauthorised development*" has been carried out: see section 34(12C) of the PDA 2000. The status of these unauthorised works was only regularised by the grant of retention planning permission on 29 February 2024. The unilateral act of the respondents in securing retention planning permission has rendered this aspect of the proceedings moot. The applicants acted reasonably in pursuing these enforcement proceedings before the Circuit Court, and on appeal to the High Court, up to that date.

29. Matters are complicated, however, by the fact that the applicants had pursued a *second* issue in the proceedings, namely, whether the permanent closure of the internal door required planning permission. The applicants ultimately did not press this second issue. The reason offered by the applicants for their change in position is that the planning authority has expressed the opinion that the permanent closure of the internal door constituted exempted development. The applicants appear to accept, at least implicitly, that this opinion is correct.
30. It should be explained, however, that the opinion of the planning authority does not have any special legal status. The letter of 28 June 2023 does not constitute—as had been suggested optimistically by junior counsel for the respondents at one point—a formal determination on a reference pursuant to section 5 of the PDA 2000. No such reference had been made and, in consequence, none of the statutory formalities had been complied with. (As to

the status of a determination on a reference, see, generally, *Narconon Trust v. An Bord Pleanála* [2021] IECA 307).

31. A non-statutory expression of opinion by the planning authority would not have had any special standing in these enforcement proceedings. Importantly, the existence of the letter of 28 June 2023 did not preclude the applicants from pursuing this issue on appeal. It would ultimately have been a matter for the High Court to decide whether planning permission was required.
32. It follows, therefore, that the dispute which arose in March 2024 as to the precise date upon which the applicants' side first had sight of the letter of 28 June 2023 is largely an irrelevance. The fact of the matter is that the applicants pursued and then withdrew one of the two principal complaints in these enforcement proceedings. The fact that the planning authority had expressed a non-statutory opinion on the planning status of the works in question does not provide "cover" for this litigation strategy.
33. If and insofar as it might be thought necessary to resolve the factual dispute, I am satisfied, on the balance of probabilities, that the applicants' architect did not receive a contemporaneous copy of the letter of 28 June 2023. The architect has expressly stated on affidavit that he did not receive notification of any decision as to whether an enforcement notice was going to be issued and that he first became aware of the letter of 28 June 2023 following receipt of the respondents' affidavit of March 2024. In the absence of an application to cross-examine the architect on his affidavit, there is no basis for this court holding that his averments are incorrect (*RAS Medical Ltd v. Royal College of Surgeons* [2019] IESC 4, [2019] 1 I.R. 63).

34. The architect's averments are corroborated by an affidavit from an IT consultant who confirms that there was no evidence of an email having been received by the architect from the planning authority on 29 June 2023.
35. It is correct to say, as Mr. Patrick McDonagh does in his responding affidavit of 17 July 2024, that it is apparent, from the content of the written observation which the architect had sought to submit in respect of the retention application, that he (the architect) was aware that the planning authority did not consider that the subdivision of the bowling alley / leisure facility from the restaurant required planning permission. (The written observation is dated 13 October 2023 and had been rejected by the planning authority as having been made out of time). Mr. McDonagh also exhibits an email from the planning authority to the architect on 26 September 2023 which explains that the planning authority is of the opinion that the closure of the internal door is exempted development.
36. Thus, the state of the evidence is that whereas the architect had not received a copy of the letter of 28 June 2023 at the time, he was aware of the planning authority's attitude in at least general terms. It follows, therefore, that the sentiments expressed by the planning authority in the letter of 28 June 2023 cannot have come as a complete surprise to the applicants, even allowing that they only saw the letter for the first time in March 2024.
37. In summary, the applicants pursued two principal issues in these enforcement proceedings. The pursuit of the first issue had been reasonable, and the applicants' stance has been vindicated in that the respondents had to apply for retention planning permission. As to the second issue, the applicants withdrew their objection to the permanent closure of the internal door on the morning of the appeal hearing. The explanation offered for this withdrawal does not

safeguard the applicants in respect of costs. The applicants cannot rely on a supposed change in position on the part of the planning authority as justifying their litigation strategy in circumstances where, first, the planning authority's position had been known to them, in at least general terms, since the summer/autumn of 2023, and secondly, the non-statutory expression of opinion by the planning authority would not have had any special standing in these enforcement proceedings.

38. The fact that the applicants pursued and then withdrew the second issue should be reflected in the costs order. This will be done by limiting the applicants to recovering two-thirds of the costs which would otherwise have been recoverable on taxation. The pursuit of the second issue will have resulted in *additional* costs having been incurred and this one-third discount represents a reasonable approximation of the costs attributable to the pursuit of the second issue. The pursuit of the second issue will not have resulted in a doubling of costs in circumstances where much of the legal work would have had to be carried out even if only the first issue had been pursued. It would, for example, still have been necessary to set out the description of the premises and general planning context on affidavit even if only the first issue had been pursued.
39. The position is different in respect of the costs incurred after 7 March 2024. The respondents insisted on interrogating the question of when the applicants first became aware of the planning authority's letter of 28 June 2023 ("*the date of knowledge issue*"). To this end, the respondents sought and obtained an order for non-party discovery against the planning authority. Both sides filed affidavits on the date of knowledge issue. The case had to be listed before the court on a number of occasions for directions. All of this will have resulted in

both sides incurring additional costs unnecessarily. The parties were warned that the costs of the costs dispute might be significant and were urged to take a commonsense approach. This seems to have fallen on deaf ears.

40. It was unreasonable for the respondents to have pursued the date of knowledge issue to the extent that they did. The issue is largely irrelevant to the incidence of the costs of the proceedings. In the event, having regard to the state of the evidence, the issue has been resolved in favour of the applicants.
41. It is only fair that the respondents should be responsible for these additional costs. The incurring of these costs could have been avoided and the proceedings brought to a conclusion months ago, i.e. in March 2024. Accordingly, the costs order will provide that the respondents are to pay the legal costs incurred by the applicants from 7 March 2024.

CONCLUSION AND FORM OF ORDER

42. For the reasons explained herein, two complementary costs orders will be made as follows. First, the applicants are entitled to recover from the respondents *two-thirds* of the costs incurred by them up and until 29 February 2024, i.e. the date upon which the grant of retention planning permission issued. These costs are to include the brief fee and general instructions fee referable to the appeal hearing scheduled for 7 March 2024. Given that the appeal hearing was only one week away, these costs would already have been incurred by 29 February 2024. Secondly, the applicants are entitled to recover, as against the respondents, the costs incurred by them from 7 March 2024 onwards. The respondents are also liable for all costs associated with the non-party discovery obtained against

the planning authority. For the avoidance of doubt, the one-third discount only applies to the first element of the costs order.

43. In default of agreement between the parties, the quantum of the costs is to be “*taxed*”, i.e. measured, by the County Registrar in accordance with Order 61 of the Rules of the Superior Courts.
44. For the avoidance of doubt, the costs orders include the costs incurred before the Circuit Court, all reserved costs, the costs of all court listings and the costs of the affidavits filed on behalf of the applicants. The costs are limited to the costs of one counsel only. These were straightforward enforcement proceedings and did not give rise to any issues which necessitated the retention of senior counsel. This is reflected in the fact that neither side considered it necessary to prepare written legal submissions.
45. The question of whether the costs order should be confined to one or more of the respondents has been canvassed briefly with counsel for the respondents on 21 March 2024. It would seem appropriate to exclude Mr. McDonagh personally from the costs order in circumstances where it *appears* that the premises are owned and operated by the two corporate respondents. If the respondents wish to confine the costs order in this manner, they should notify the registrar assigned to this case by 2 September 2024. Unless the applicants object, the order will be so confined.
46. In circumstances where the applicants have indicated that they are withdrawing the appeal, a formal order will be made striking out the proceedings.
47. Finally, it is appropriate to say something about the proper approach which parties should take to the weekly call-over list. The purpose of the practice of calling over the cases scheduled for the following week is to ensure the efficient

allocation of scarce judicial resources. Cases are assigned to individual judges following the call-over and each judge will set aside time to read the papers in advance of the hearing. The courts rely on the co-operation of solicitors and counsel in this regard. If there has been a significant development in proceedings which may result in the proceedings not going ahead or in the hearing time required being shortened, this should be flagged at the call over. It is contrary to the efficient running of the Non-Jury List for cases to remain listed for full hearing when they have, in fact, largely resolved. In the present case, for example, the half-day hearing slot could usefully have been allocated to another case.

Appearances

Daniel Cronin SC and Sheila Finn for the applicants instructed by Charles C. Daly & Co.

Gerry Kiely SC and James Charity for the respondents instructed by James O'Brien & Co. LLP