APPROVED **[2024] IEHC 559**

THE HIGH COURT
CIRCUIT APPEAL

2023 96 CA

IN THE MATTER OF SECTION 160 OF THE PLANNING AND DEVELOPMENT ACT 2000

BETWEEN

STEPHEN MCCANN

APPLICANT

AND

PATRICK FURLONG

RESPONDENT

JUDGMENT of Mr. Justice Garrett Simons delivered on 27 September 2024

INTRODUCTION

1. The principal judgment in these enforcement proceedings was delivered on 18 June 2024, *McCann v. Furlong* [2024] IEHC 342. This supplemental judgment addresses the incidence of legal costs. The parties delivered written submissions on legal costs on 28 June 2024 and 1 July 2024, respectively. Those submissions have been carefully considered in preparing this judgment.

DISCUSSION

2. Both parties agree that these enforcement proceedings are subject to the special costs rules prescribed under Part 2 of the Environment (Miscellaneous Provisions) Act 2011 (as amended) ("*EMP Act 2011*"). The default position under the special costs rules is that each party bears its own costs. This is subject to the following proviso under section 3(2) of the EMP Act 2011:

> "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."

3. The applicant in the present proceedings has been entirely successful in the proceedings. The applicant secured, *inter alia*, an order directing the cessation of the use and operation of the unauthorised development identified in the notice of motion (comprising a milking parlour and ancillary structures). An order was also made directing that the unauthorised structures be removed and that the lands be reinstated to their condition prior to the commencement of the unauthorised development.

4. The respondent has sought, in his written submissions, to resist a costs order on the following basis:

> "Notwithstanding subsections (2), (3) and (4), it is submitted that while the Court has granted relief to the *applicant* (the moving party), the applicant is responsible for his own costs in so far as he instigated the proceedings (which is his right), instead of relying on the Planning Authority who could have equally have done so, and with no cost to the applicant. It is further submitted that there has been no case proven that the applicant has in fact suffered materially, by the actions of the respondent other than the Planning Authorities assumption that the respondent's actions *MAY HAVE* contributed to

> *health hazard, traffic hazard and viability of local wells*. Finally, as a result of the Honourable Court's determinations (which are in no way contested), the respondent will suffer extreme hardship and huge expense (admitted, all be of his own making), now asks that the Court's provisional view in the matter of costs be respectfully changed to 'costs be borne by each party'."
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> *Emphasis in original

5. As appears, the respondent has advanced three arguments in support of his submission that each party should bear its own costs. These are considered in turn below.

6. The first argument is that the applicant should have relied on the planning authority to take enforcement proceedings. With respect, this argument appears to be premised on a misunderstanding of the role of the public in the enforcement of planning control. Section 160 of the Planning and Development Act 2000 ("*PDA 2000*") confers the right on any person to institute enforcement proceedings. This right exists in parallel to the extensive enforcement powers conferred upon a planning authority under Part VIII of the PDA 2000. Crucially, there is no requirement for a member of the public to await any action on the part of the local planning authority prior to the institution of enforcement proceedings.

7. This principle is illustrated by *Lagan Asphalt Ltd v. Hanly Quarries Ltd* [2021] IEHC 450. The issue before the court in that judgment had been whether proceedings under section 160 of the PDA 2000 should be stayed pending a decision by the local planning authority to take enforcement action. The High Court held as follows:

> "It would be wholly disproportionate to stay proceedings under section 160 of the PDA 2000 pending the outcome of a local planning authority's investigation. The summary procedure under section 160 is intended to ensure that

> alleged breaches of the planning legislation are addressed expeditiously. It would be destructive of this legislative intent, and inconsistent with the importance attached to public participation in all aspects of the planning process (including enforcement), were such proceedings to become becalmed for months on end pending a decision from the local planning authority. The limited benefit, if any, to the court in learning the views of the planning authority would be out of all scale to the enormous disbenefit caused by the delay, which delay would undermine the effectiveness of section 160.
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> The proper approach is to allow section 160 proceedings to take their own course. As it happens, in many instances the views of the planning authority will have become known prior to the proceedings having been allocated a hearing date. It is only in urgent cases, where an early hearing date has been fixed, that the proceedings will likely outpace the planning authority's investigation. Put otherwise, a stay would only ever have practical consequences in an urgent case. A stay would be singularly inappropriate in such a case.
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> It is apparent from the provisions of sections 153(8) and 160(7) that the various remedies under Part VIII of the PDA 2000 are not intended to be mutually exclusive. The existence of these proceedings does not, therefore, preclude the planning authority from instituting its own proceedings. Moreover, the planning authority could, if so minded, apply to be joined as co-applicant in these proceedings. Equally, a decision by the planning authority not to pursue enforcement action would not affect the applicant's statutory right to pursue these proceedings."

8. The same logic extends, by analogy, to the allocation of legal costs. It would undermine the effectiveness of the statutory remedy created under section 160 of the PDA 2000 to deny a successful applicant their costs on the ground that they might, instead, have awaited the taking of enforcement action by the local planning authority. This would be to privilege enforcement action by a planning authority over that by the public. There is nothing in either the PDA 2000 or the EMP Act 2011 which supports such an interpretation. Rather, it is apparent from the express wording of section 3(2) of the EMP Act 2011 (cited above) that a

successful private applicant is entitled, in principle, to recover their legal costs. (It should be explained that the special costs rules do not apply at all to enforcement proceedings instituted by a statutory body such as a planning authority).

9. The second argument advanced by the respondent in opposition to a costs order involves an allegation that it has not been proven that the applicant has "*suffered materially*" in consequence of the actions of the respondent. With respect, there is no requirement on an applicant to satisfy any supposed threshold of material suffering as a precondition to securing a costs order. Rather, the principal determinant of the incidence of legal costs under section 3(2) of the EMP Act 2011 (cited above) is the extent to which the acts or omissions of a respondent contributed to an applicant obtaining relief. Here, as outlined in the principal judgment, the respondent had engaged in large scale unauthorised development in circumstances where there can have been no reasonable basis for his having thought that the development was exempted from the requirement to obtain planning permission. The applicant obtained relief precisely because the respondent had acted in flagrant breach of the planning legislation. It follows that the applicant is entitled to a costs order against the respondent.

10. For the reasons explained, it is not a prerequisite to the making of a costs order that an applicant establish material suffering. For completeness, it should be recorded that even if such a threshold existed—and there is no such threshold—it would have been met in the present case. As outlined in the principal judgment, the uncontroverted evidence establishes that the unauthorised development is interfering with the amenity of the neighbouring dwelling house and appears to have polluted its water supply.

11. The third and final argument advanced by the respondent is that the making of a costs order would cause him hardship and huge expense. The written submission, very properly, admits that this hardship and expense would all be of the respondent's own making. This admission is sufficient to dispose of this argument. At the risk of repetition, the respondent chose to engage in large scale unauthorised development in circumstances where there can have been no reasonable basis for his having thought that the development was exempted from the requirement to obtain planning permission. Thereafter, the respondent contrived to drag out the enforcement proceedings for a number of years, by seeking multiple adjournments and pursuing an unmeritorious appeal. All of this resulted in the applicant having to incur significant legal costs unnecessarily. It is in the interests of justice that the applicant be entitled to recoup those legal costs from the respondent.

CONCLUSION AND FORM OF ORDER

12. For the reasons explained herein, an order is made, pursuant to Part 2 of the Environment (Miscellaneous Provisions) Act 2011, directing the respondent to pay the legal costs incurred by the applicant in respect of these proceedings.
13. For the avoidance of doubt, the costs order includes, *inter alia*, the costs incurred before both the Circuit Court and the High Court; all reserved costs; the costs of all written submissions (including the written submissions on costs); the costs of all court listings; and the costs of the affidavits filed on behalf of the applicant.
14. 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. The parties have liberty to apply.