APPROVED

AN ARD-CHÚIRT
THE HIGH COURT

[2025] IEHC 83

Record No. 2023/94MCA

BETWEEN/

DAVID MALONE

APPLICANT

-AND-

GCHL LIMITED

FIRST NAMED RESPONDENT

-AND-

ENVIRONMENTAL PROTECTION AGENCY

SECOND NAMED RESPONDENT

-AND-

KILDARE COUNTY COUNCIL

FIRST NAMED NOTICE PARTY

AND

BALYNA ENVIRONMENTAL ACTION GROUP

SECOND NAMED NOTICE PARTY

(No. 2)

JUDGMENT of Mr. Justice Conleth Bradley delivered on the 4th day of February 2025

INTRODUCTION

1. In *Malone v GCHL Ltd & The EPA & Ors* [2024] IEHC 336 ('the principal judgment'), I determined in a preliminary application brought by the EPA ("the Agency") that there was no jurisdictional basis for the specific relief sought against the Agency in an '*enforcement action*' brought by Mr. Malone under section 160 of the Planning and Development Act 2000 (as amended) and section 57 of the Waste Management Act 1996 (as amended) against GCHL Ltd., in the context of the restoration of the former Ballinderry quarry pit by that company.

2. Essentially, Mr. Malone had sought, as part of the suite of reliefs in the enforcement action brought against GCHL Ltd, to seek an additional relief and to prohibit the Agency from determining the Waste License application made to it by the GCHL Ltd for the restoration of the quarry pit.

3. Consequently, Mr. Malone's enforcement action as against GCHL Ltd (referred to in the Notice of Motion as 'the first named Respondent') continues in the following format and the fifth relief sought as against the Agency has been struck out arising from the principal judgment:

> "*(1) An Order for the first named Respondent, their successors and assigns, to cease forthwith the unauthorised developments, consisting of the excavation and processing of quarry materials, together with the importation of waste at the Ballinderry Quarry, Carbury, County Kildare prior to the first named*

respondent having the unauthorised development regularised by receiving substituted consent from An Bord Pleanála in accordance with section 177C(1) [of the Planning and Development Act 2000 (as amended)]*;*

(2) An Order for the first named Respondent, their successors and assigns, to prohibit any further unauthorised disposal of waste at the Ballinderry Quarry Carbury, County Kildare pending the first named Respondent being in receipt of a waste licence from the second named Respondent in accordance with section 40 of the Waste Management Act, 1996 as amended;

(3) An Order for the first named Respondent to have the waste illegally disposed at the Ballinderry Quarry, Carbury, County Kildare removed by an authorised contractor and shall be taken to a waste facility authorised to accept such waste materials;

(4) an Order compelling the first named Respondent to return the Ballinderry Quarry, Carbury, County Kildare to its previous condition prior to the unauthorised developments taking place as a result of a breach of Condition 4 of An Bord Pleanála permission reference: - PL09.205039;

(5) ~~an Order prohibiting the second named Respondent processing the waste licence application reference W0298-001 prior to the first named Respondent submitting a Remedial Environmental Impact Assessment Report and Remedial Nature Impact Statement to An Bord Pleanála seeking substitute to consent in accordance with section 177C(1) of the [Planning~~

~~and Development Act 2000 (as amended)~~];[1]

(6) Applicant's costs;

(7) Any such further or other order as this Honourable Court deems meet."

4. This is the Agency's costs application arising from the principal judgment.

5. As the consequence of the principal judgment is effectively to release the Agency from the proceedings as a respondent in the enforcement action, it is appropriate that I determine the costs of the preliminary application.

THE POSITION OF THE AGENCY

6. In summary, the Agency equates the finding in the principal judgment, that the relief sought in paragraph 5 of the Notice of Motion dated 30th March 2023 had no jurisdictional basis (and, if necessary was bound to fail and represents an abuse of process) having regard to the remedies available as per the statutory and regulatory enforcement process in the planning and waste management codes, as satisfying the effective disapplication – in section 3(3)(b) of the Environment (Miscellaneous Provisions) Act 2011 ("the 2011 Act")) (*i.e.*, the manner in which Mr. Malone conducted the proceedings) (or, in the alternative, section 3(3)(a) of the 2011 Act (*i.e.*, the application was frivolous and vexatious) - of the no costs default provision in section 3(1) of the 2011 Act.

[1] For the purposes of this ruling on costs, the strike-through represents the relief at paragraph 5 of the Notice of Motion being struck out as per the principal judgment.

7. The effect, therefore, of the Agency's position is that I should grant it the costs of its application against Mr. Malone but initiate a process of measuring those costs. The Agency points to correspondence which it sent to Mr. Malone prior to bringing this preliminary application which called upon him to discontinue the proceedings as against it. Mr. Malone refused to do so, which necessitated the bringing of this application in which they ultimately succeeded.

8. It was submitted on behalf of the Agency that the 2011 Act applies and that the enforcement action falls within the scope of section 4 of the 2011 Act ('civil proceedings relating to certain licences, *etc*.) and therefore, section 3 of the 2011 Act applies. The Agency contends that the exceptions in section 3(3)(a) and (b) of the 2011 Act to the default position that the costs of the proceedings are to be borne by each party, are applicable on the facts of this case, *i.e.*, a court may award costs against a party in proceedings to which this section applies if the court considers it appropriate to do so: (a) where it considers that a claim or counter-claim by the party is frivolous or vexatious; or (b) by reason of the manner in which the party has conducted the proceedings.

9. Assuming section 3(3) of the 2011 Act applies, the Agency submits that a process of measuring costs is required by virtue of the *interpretative obligation* arising from Article 9 of the Aarhus Convention and that Mr. Malone should have an opportunity to adduce evidence on Affidavit to address these matters to ensure that any costs order is '*not prohibitively expensive*' (NPE) and refers to a series of authorities, including, Case C-260/11 *Edwards & Pallikaropoulos v Environment Agency*,

ECLI:EU:C:2013:221, *Hunter v Nurendale t/a Panda Waste* [2013] IEHC 430, [2013] 2 I.R. 373, *Kelly Dunne v Guessford Ltd* [2022] IEHC 427, and *Klohn v An Bord Pleanála* [2021] IESC 51.

10. On behalf of the Agency, reference was also made to the UK's *Civil Procedure Rules, Part 46-Costs-Special Cases* and the provisions in paragraph 46.26 of the CPR under the sub-heading the "*Limit on costs recoverable from a party in an Aarhus Claim Convention claim*", and paragraph 47.27 "*Varying the limit on costs recoverable from a party in an Aarhus Convention claim*."

11. In brief, subject to other provisions, paragraph 46.26 of the CPR (*Part 46-Costs-Special Cases*) provides that a claimant may not be ordered to pay costs exceeding £5,000 where the claimant was claiming only as an individual and not as, or on behalf of, a business or other legal person and £10,000 in all other cases; and, for a defendant the amount is £35,000. In the absence of any evidence by Mr. Malone, it was submitted on behalf of the Agency that a starting point, based on this UK guidance, was a maximum figure of €6,000 which Mr. Malone would be liable for and which sum of money he could further address in a subsequent Affidavit.

12. After the principal judgment was delivered, by letter dated 18th July 2024, the solicitors on behalf of the Agency wrote to Mr. Malone and referred to earlier correspondence and set out the legal costs which the Agency had incurred from the time of correspondence dated 8th June 2023 to the hearing of the Agency's preliminary application which amounted to a total of €20,250.21. The letter also invited Mr. Malone to furnish an affidavit and to provide details of his financial

resources, including his assets, liabilities, income and expenditure. The letter pointed out that if the court was minded to make a costs order against Mr. Malone, this would assist in the process of assessing whether he considered such costs to be prohibitively expensive. The Agency delivered legal submissions on 14th June 2024 and Mr. Malone delivered legal submissions on 26th June 2024. Emails on this issue were also exchanged between the parties.

THE POSITION OF MR. MALONE

13. Mr. Malone referred to and relied on written submissions dated 26th June 2024 and his Affidavit sworn on 11th September 2024. In his Affidavit, Mr. Malone *inter alia* stated:

> "*I request the Honourable Court to grant the Applicant permission to have Case 2023/94 MCA appealed to the Supreme Court and to defer a ruling on costs until the Applicant's substantive EU law issues are adjudicated by an EU judge in a decentralised EU court, as required under Article 19(1) of the TEU.*"

14. Mr. Malone does not require the leave of this court to appeal the principal judgment to the Court of Appeal.

15. Further, as set out earlier, it is appropriate to determine the costs of this application rather than to defer their consideration.

16. In addressing Mr. Malone's reference to O. 19, r. 28 of the Rules of the Superior Courts 1986 ("RSC 1986") in his Affidavit and oral submissions and in the context of Article 19 TEU, in the principal judgment at paragraph 55 and footnote 9, I had in fact left over the specific question of the applicability of O. 19, r. 28 of the RSC to proceedings brought pursuant to section 160 of the Planning and Development Act 2000 (as amended) and section 57 of the Waste Management Act 1996 (as amended), to another case where these matters could be more fully argued by parties. In doing so, I also referred to the questions raised by (Maurice) Collins J. in the decision of the Court of Appeal in *North Westmeath Turbine Action Group & Ors v An Bord Pleanála & Ors* [2022] IECA 126, paragraph 10, footnote 5, and the discussion of similar issues by Holland J. in *Mount Salus Residents' Owners Management Company Limited By Guarantee v An Bord Pleanála & Others* [2023] IEHC 691 at paragraphs 49 to 57.

17. Mr. Malone's oral submissions summarised his more detailed written submissions which in the main constituted what are, in essence, points of appeal in relation to the principal judgment having regard to his submissions at the initial hearing on EU law and which were addressed in the principal judgment, for example, from paragraphs 28 to 41.

18. He stated, for example that paragraph 5 of the Notice of Motion dated 30th March 2023 was crucial to his substantive EU law case and that it concerned "*the Agency's failure to implement legislation adopted by EU institutions under Article 288 of the TFEU or the legislation transposed into Irish law by the Oireachtas under section 3*

of the European Communities Act, 1972 to implement the CJEU judgments in Cases C-50/09, C-215/06 and C-494/01", which cases were also referred to in the principal judgment.

19. Mr. Malone further stated, *inter alia*, that his EU law case had precedence over domestic law, referred to the obligations on emanations of the State to implement European Directives and that he had filed a total of ten complaints with the European Commission.

DISCUSSION & DECISION

20. In his ruling on costs in *Hoey v Waterways Ireland* [2024] IECA 272, Binchy J.[2] observed as follows, at paragraphs 11 and 12 of the ruling of the Court of Appeal, on the costs of that application:

> "*(11) The default position so far as costs are concerned is that set out in s.169(1) of the* [Legal Services Regulation Act 2015] *which provides:-"169.(1) 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*– [the range

[2] The Court of Appeal comprised Noonan, Binchy and Butler JJ.

of factors set out at sub-paras.(a) –(g)].

(12) However, in order to have any prospect of avoiding an order for costs under s.169(1) of the 2015 Act, it is not enough for the appellant merely to assert or call in aid the Convention. The appellant must go further; he must advance arguments to demonstrate that these proceedings fall within the scope of the Convention or the Environment (Miscellaneous Provisions) Act, 2011 (the "2011 Act") which implemented certain provisions of the Convention, including certain provisions as to costs."

21. In *Little v The Chief Appeals Officer & Ors* [2024] IESC 53, Murray J. observed, in dealing with costs in public interest litigation specifically before the Supreme Court (as distinct from the Court of Appeal or the High Court), that:

"*The Court can articulate, amplify and explain the factors relevant to the exercise of its discretion under ss. 168 and 169. What it cannot do is, under the guise of reframing its discretion, change the law outside the parameters set by the Oireachtas. It cannot be ignored (as evidenced by the provisions dealing with the costs of certain environmental litigation to which I have referred earlier) that when the Oireachtas wished to release an identified category of litigants from the obligation to pay costs it has done so expressly, nor can the Court disregard*

in framing its discretion, the fact that the Oireachtas has specified that a wholly successful party –without distinction – is 'entitled' to their costs".

22. Whilst the gravamen of the Agency's submission on this costs application *accepts*, in principle, the application of the (default) no costs rule under the 2011 Act, *argues* that this default position is disapplied because of the manner in which Mr. Malone conducted the proceedings (and by reference to the findings in the principal judgment) and *submits* that such costs are required to be measured in order to ensure that they are not prohibitively expensive, in the circumstances of this application, and for the following reasons, I propose to make no order as to costs.

23. First, the complexity in this application arises from the fact that the relief sought in paragraph 5 of the Notice of Motion– the order of prohibition restraining the Agency from processing the waste licence application – (which has been struck out consequent upon the principal judgment), is effectively a 'judicial review' type remedy but which had been sought, in this case, within the four corners of a statutory enforcement application made under the planning and waste management codes.

24. As in the principal judgment, I express no view on the merits of that relief.

25. Procedurally, however, I have found that it was not a relief which was appropriate for a statutory enforcement application under the planning and waste management codes having regard in particular to section 160 of the Planning and Development 2000 (as amended) and sections 43(5) and 57 of the Waste Management Act 1996 (as amended*), i.e.*, the relief sought in paragraph 5 of the Notice of Motion dated 30th

March 2023 had no jurisdictional basis and was bound to fail and represents an abuse of process having regard to the remedies which are available as per the statutory and regulatory enforcement process in the planning and waste management codes.

26. Second, Article 9(4) of the Aarhus Convention provides that the procedures in *inter alia* Article 9(3) to challenge acts and omissions by private persons and public authorities which contravene provisions of its *national law relating to the environment* shall include adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and '*not prohibitively expensive*' (*i.e.*, NPE). Whilst the provisions of the Aarhus Convention are not directly applicable in the Irish domestic legal order, Part 2 of the 2011 Act is directed to the implementation of Article 9(4) of Aarhus insofar as it applies to Article 9(3)[3]: see *Heather Hill Management Company CLG v An Bord Pleanála & Ors* [2022] IESC 43 per Murray J. at paragraph 184.

27. Third, generally, the costs protection provisions in Part 2 of the 2011 Act apply to enforcement actions (brought pursuant to section 160 of the Planning and Development Act 2000) which have been instituted for the purpose of ensuring compliance with, or the enforcement of, a planning permission or where no planning permission has been obtained: *McCoy v Shillelagh Quarries Ltd* [2015] IECA 28; [2015] 1 I.R. 627; *Kelly Dunne v Guessford Limited* [2022] IEHC 427.

28. The default position under the 2011 Act that each party is to bear its own costs is

[3] In addition to Article 9(1) of the Aarhus Convention which concerns proceedings on access to information on the environment.

subject to section 3(2) of the 2011 Act (costs, or a portion thereof may be awarded to the applicant/plaintiff relative to their success in obtaining relief): see *McCann v Furlong* [2024] IEHC 559 per Simons J. at paragraphs 2-11, and section 3(3)(a) of the 2011 Act (where (a) an application is frivolous or vexatious or section 3(3)(b) of the 2011 Act having regard to the manner in which the party has conducted the proceedings. As mentioned earlier, the Agency rely on section 3(3)(b) of the 2011 Act and, in the alternative, on section 3(3)(a) of the 2011 Act.

29. Fourth, (and following the above) the application of an *interpretative obligation* obliges the High Court to give an interpretation of national procedural law which, to the fullest extent possible, is consistent with these Aarhus Convention provisions: see *Kelly Dunne v Guessford Ltd* [2022] IEHC 427 per Simons J. at paragraph 20; Case C-470/16, *North East Pylon Pressure Campaign v An Bord Pleanála*, ECLI:EU:C:2018:185), *Heather Hill Management Company CLG v An Bord Pleanála & Ors* [2022] IESC 43.

30. Fifth, when viewed on a standalone basis (and again expressing no views on its merits), *ex hypothesi*, the terms of the relief framed in paragraph 5 of the Notice of Motion dated 30th March 2023 – "*an order prohibiting the second named Respondent processing the waste licence application reference W0298-001 prior to the first named Respondent submitting a Remedial Environmental Impact Assessment Report and Remedial Nature Impact Statement to An Bord Pleanála seeking substitute to consent in accordance with section 177C(1) of the* [Planning and Development Act 2000 (as amended)]" – if applied for separately from this enforcement action, would attract the costs protection as outlined in the judgment of

the Supreme Court (Murray J.) in *Heather Hill Management Company CLG v An Bord Pleanála & Ors* [2022] IESC 43.

31. Sixth, in terms of the spectrum between *incorrect* and *unreasonable* behaviour alluded to by Simons J. in *Kelly Dunne v Guessford Limited* [2022] IEHC 427 at paragraph 40 *et seq.*, and notwithstanding the correspondence on behalf of the Agency requesting Mr. Malone do discontinue its claim as against the Agency, the seeking of the remedy of prohibition against the Agency's processing of the waste application in an enforcement action where reliefs were sought as against GCHL Ltd under the statutory and regulatory planning and waste management codes, was misconceived and *incorrect* (and was a remedy that was not available in such an enforcement action and in that context was bound to fail and amounted to an abuse of process as having no jurisdictional basis) rather than amounting to *unreasonable* behaviour in the *conduct* of proceedings.

32. Accordingly, having regard to the reasons set out above and when considering the exemptions to the default scenario in section 3(1) of the 2011 Act (*i.e.*, the default scenario being that the costs of the enforcement application are to be borne by each party), I do not consider, having regard to '*the manner*' in which he conducted the proceedings (section 3(3)(b) of the 2011 Act) that costs should be awarded against Mr. Malone and nor do I consider that the terms of the relief in paragraph 5 of the Notice of Motion was '*frivolous or vexatious*' (section 3(3)(a) of the 2011 Act) such as to displace the application of the default costs provisions.

CONCLUSION

33. Whilst the interpretative obligation in the context of the NPE (and Aarhus) and the provisions of the 2011 Act allows a court in an appropriate case to award costs, or a portion of costs, against an applicant or plaintiff, I am of the view that the default scenario of no order as to costs is the appropriate order in this case.

34. The Oireachtas has legislated so as to make provision that applicants in certain types of proceedings and scenarios, may not in certain circumstances, if they are unsuccessful in those proceedings or a part of same, have costs ordered against them, for example, as per section 50B Planning and Development Act 2000 and Part 2 of the Environment (Miscellaneous Provisions) Act 2011, in particular sections 3,4 and 7 of the 2011 Act; see *Heather Hill Management Company CLG v An Bord Pleanála & Ors* [2022] IESC 43 beginning at paragraph 163.

35. As I have determined that the default scenario of no order as to costs applies on the facts of this case, it is unnecessary to engage in the process of measuring costs as suggested by the Agency.

PROPOSED ORDER

36. In the circumstances, I shall make no order as to costs in relation to the Agency's application regarding paragraph 5 of the Notice of Motion dated 30th March 2023.