

THE HIGH COURT

[2022] IEHC 112

[Record No. 2020/527JR]

BETWEEN

KERRY FISH (IRELAND) UNLIMITED COMPANY

APPLICANT

AND

KERRY COUNTY COUNCIL

RESPONDENT

RULING of Mr. Justice Barr on final order and costs.

1. This is the court's ruling in relation to the final order and costs arising out of the judgment of the court delivered in this matter on 21st January, 2022, reported at [2022] IEHC 29.
2. Having regard to the content of the court's judgment, the parties were agreed that the final order should reflect the fact that all the reliefs sought by the applicant were refused.
3. The respondent submitted that as it had been entirely successful in the application, an order should be made that its costs should be discharged by the applicant.
4. The applicant submitted that there should be no order as to costs, or in the alternative, if costs were awarded to the respondent, they should reflect the requirements of the Aarhus Convention of not being prohibitively expensive, due to the fact that the applicant had challenged the respondent's decision on environmental grounds.
5. In support of its application that there should be no order as to costs, it was submitted on behalf of the applicant that the application came within the provisions of s. 50B of the Planning and Development Act 2000 (as amended). It was submitted that sub-s. 1 of that section provided that the costs protection provisions should apply to proceedings in the High Court by way of judicial review of any decision or purported decision made or purportedly made, or any action taken or purportedly taken, pursuant to, *inter alia*, paras. 3 or 4 of Article 6 of the Habitats Directive. It was submitted that if s. 50B applies, the default position is that each party bears its own costs, subject to certain exceptions that are stated in the section.
6. It was pointed out that in matters coming within the scope of the Planning and Development Acts, the requirements of the Habitats Directive were implemented/transposed by amendment of the Acts themselves. In the case of other consent schemes under a wide range of statutes, including s. 38 of the Road Traffic Act, 1994, a different approach was taken. It was submitted that the requirements of the Habitats Directive were integrated into the various statutory consent schemes *via* SI 477/2001, insofar as the consent schemes applied to a "project" under one of the Acts set out in the second schedule of the statutory instrument. It was submitted that s. 38 of the Road Traffic Act 1994, when read in conjunction with SI 477 of 2011, was a statutory provision that gave effect to the Habitats Directive. Accordingly, it was submitted that the provisions of s. 50B of the 2000 Act applied. It was submitted that on this basis, the court should make no order as to costs.

7. In the alternative, it was submitted that having regard to the provisions of Art. 9 of the Aarhus Convention, if the court were to make any award of costs in favour of the respondent, it should have regard to the requirements of the Convention, which effectively provide that where costs are awarded against a person, who has mounted what may be termed an environmental challenge to a decision or measure, those costs should not be prohibitively expensive.
8. In this regard, the applicant relied on the decision of the CJEU in the *Northeast Pylon Pressure Campaign Ltd. v. An Bord Pleanála & Ors.* (Case-470/16), and in particular to paras. 59-65 thereof, which it was submitted set down the principle that the requirements of the Convention applied even where the person challenging the decision had not established a link between the alleged breach of national environmental law and damage to the environment. In particular, the applicant relied on paras. 64 and 65:

"64. *Thus, the contracting parties to that Convention clearly sought to apply the protection against prohibitive expense to challenges aimed at enforcing environmental law in the abstract, without making such protection subject to the demonstration of any link with existing or, a fortiori, potential damage to the environment.*

65. *Accordingly, the answer to the sixth and seventh questions is that a Member State cannot derogate from the requirement that certain judicial procedures not be prohibitively expensive, laid down by Article 9(4) of the Aarhus Convention and Article 11(4) of Directive 2011/92, where a challenge is deemed frivolous or vexatious, or where there is no link between the alleged breach of national environmental law and damage to the environment."*
9. The applicant also referred to the decision of the Supreme Court in *Klohn v. An Bord Pleanála* [2021] IESC 51, as an example of a case where the court had to assess what level of costs should be awarded against the applicant, so as not to be prohibitively expensive. In that case, the Taxing Master had assessed the respondent's costs at €86,000 which the applicant would have to discharge. On the hearing of the appeal, the Supreme Court noted that the applicant had already incurred costs in mounting the challenge of €30,000. In the circumstances the court reduced the level of costs which the applicant would have to pay to the respondent from the sum as set by the Taxing Master, to €1,250.00.
10. It was submitted on behalf of the applicant that insofar as the respondent might complain that certain emails which had passed between the applicant and the respondent prior to the lifting of the traffic calming measures, had not been exhibited at the *ex parte* leave stage, it was submitted that that was not relevant for two reasons: firstly, the respondent had the relevant emails and secondly, no application had been made to set aside the grant of leave obtained by the applicant.
11. The response on behalf of the respondent was somewhat general in nature, due to the fact that it had not had sight of the applicant's submission on costs, when it made its

submission. However, on the basis that the applicant would seek to have no order for costs made in the proceedings, it was submitted that s. 50B of the 2000 Act did not apply in this case. This was for the simple reason that there was no reference in the applicant's pleadings to the 2011 Regulations. The court had accepted that point in its judgment. Furthermore, the court had gone on to hold that even if those regulations did apply, the decision to lift the suspension on the traffic calming measures, was not a "project" within the meaning of the 2011 Regulations. Accordingly, it was submitted that neither the 2000 Act, nor the provisions of the Environment (Miscellaneous Provisions) Act 2011, had any relevance to the proceedings herein.

12. Without prejudice to that submission, it was submitted that there were exceptions to the costs relieving provisions in both Acts, which provided that parties would not be relieved of the obligation to pay costs if the application was held to be frivolous or vexatious, or because of the manner in which the moving party had conducted the proceedings. In this regard, it was submitted that in failing to exhibit the relevant email correspondence, which, it was submitted, made it clear that the applicant and others had requested the lifting of the traffic calming measures due to the restrictions imposed due to the Covid-19 Pandemic and which further made it clear that the measures were being lifted on a temporary basis, had not been made available to the court at the *ex parte* stage. It was submitted that even if the statutory provisions did apply, the court was entitled to have regard to such conduct and to disentitle the applicant to the benefit of the protection conferred by those sections.
13. It was submitted that it was clear from the emails, that it had been indicated to the applicant that the lifting of the traffic calming measures was temporary in nature. The principal shareholder in the applicant knew that and had accepted it at the time. It was submitted that he had then sought to mount an opportunistic attack on the lifting of the suspension of the traffic calming measures and their reintroduction, while not putting the full picture before the court at the *ex parte* stage.
14. It was further submitted that the court, when considering the issue of costs, should have regard to the fact that the applicant's challenge was originally on a totally different basis, which was only abandoned at the hearing of the contested application. The applicant had then proceeded on only one ground pleaded at ground E(xvi) of the statement of grounds, which had made an oblique reference to an alleged breach of the Habitats Directive. The applicant had never established that there was the remotest possibility of an adverse effect on the Tralee Bay SPA by the reintroduction of the traffic calming measures in the two streets in the town of Tralee.
15. It was submitted that in all the circumstances of the case, there was no basis on which the applicant could avoid paying the costs of the respondent.

Conclusions.

16. While a significant amount of law, both Irish and European, was referred to in the written submissions of the parties, which dealt with the costs protection regime when people are

making a challenge to a measure on environmental grounds, the court must have regard to the realities of the case that it heard.

17. This case involved a challenge to the lifting of a suspension on traffic calming measures in two streets in Tralee Town in 2020. The applicant is a trader on one of the streets. The principal shareholder in the applicant company has always been against the introduction of the traffic calming measures, whereby the streets in question were closed to vehicular traffic for certain hours during the day.
18. As owner of the applicant, he made submissions against the proposal to introduce the traffic calming measures prior to their introduction. He made further submissions at the review of the measures, which was carried out approximately one year later.
19. When he and others suggested the suspension of the traffic calming measures, due to the restrictions in place due to Covid-19 in 2020 and when that request was granted by the respondent, he saw an opportunity to prevent the suspension of the operation of the traffic calming measures being lifted. To that end, he brought a judicial review application challenging the lifting of the suspension on a large number of grounds. He abandoned grounds (i)-(xv) at the hearing. That left him with ground (xvi) which alleged breach of the requirements of the Habitats Directive. The court found against him on that ground of challenge.
20. It is hard not to come to the conclusion that that ground of challenge was only pleaded in the first place as a failsafe mechanism to protect the applicant from an adverse costs order, should it be unsuccessful in its primary challenge to the decision.
21. There was absolutely no evidence that the reintroduction of the closure of the roads to vehicular traffic during the day, could possibly cause any adverse impact on the Tralee Bay SPA, or on any other European site.
22. It is also noteworthy, that the applicant did not exhibit the emails which passed between him and representatives of the respondent in 2020, when he was lobbying for the lifting of the traffic calming measures, due to the difficulty that he and other traders were experiencing due to the general fear in the community at that time in relation to the prevalence and effects of Covid-19. In essence, it was submitted to the respondent that members of the general public were so fearful of Covid-19 that they were only prepared to go to shops if they could pull up very close to them in their cars, thereby reducing to the minimum, the amount of time that they would be exposed to infection from other people. It was in response to that plea, that the respondent suspended the operation of the traffic calming measures for a number of weeks in 2020.
23. The court is satisfied that the applicant was trying to use the opportunity afforded by the reasonable actions of the respondent in lifting the traffic calming measures, due to the trading difficulties caused by the Covid-19 restrictions, as a means of achieving a goal long pursued by the applicant; being the removal of the traffic calming measures. In reality, the applicant's challenge had nothing to do with protection of the environment, or

of any flora or fauna. In these circumstances, the costs relieving provisions in the 2000 Act, or in the 2011 Act, or in the Aarhus Convention, are not applicable in the circumstances of this case.

24. The court is satisfied that as the respondent was entirely successful in resisting the applicant's challenge in these proceedings, the general rule that costs follow the event, as provided for in s. 169 of the Legal Services Regulation Act 2015 and in O. 99 of the Rules of the Superior Courts, should apply.
25. The final order of the court shall provide for the following:
 - (a) Refuse all the reliefs sought by the applicant;
 - (b) costs of the action, to include the costs of submissions, are awarded to the respondent against the applicant; such costs to be adjudicated upon in default of agreement;
 - (c) there shall be a stay on the order for costs herein for 28 days and if a notice of appeal is lodged by the applicant, the stay is to continue until the final determination of the matter before the Court of Appeal.

Mr. Justice Anthony Barr

1st March, 2022.