THE COURT OF APPEAL
CIVIL
NEUTRAL CITATION NUMBER: [2020] IECA 72
COURT OF APPEAL RECORD NO. 2017 615
HIGH COURT RECORD NO. 2016/JR

Whelan J.
Noonan J.
Murray J.

BETWEEN/

FERGUS O'CONNOR

RESPONDENT/APPLICANT

- AND -

THE COUNTY COUNCIL OF THE COUNTY OF OFFALY

APPELLANT/RESPONDENT

- AND -

TAG-A-BIN LIMITED

FIRST NAMED NOTICE PARTY

- AND -

THE COUNTY COUNCIL OF THE COUNTY OF MEATH

SECOND NAMED NOTICE PARTY

JUDGMENT of Mr. Justice Murray delivered on the 20th day of March 2020

1. Section 3 of the Environment (Miscellaneous Provisions) Act 2011 ('the Act') provides that the normal principle governing the award of costs in proceedings – that they follow the 'event' – does not apply to certain categories of legal action. Section 7 of the Act enables a party to proceedings at any time before or during the course of those proceedings to seek a determination from the Court that s.3 applies to that action. By Order of the High Court (Baker J.) of 14 November, the Court declared pursuant to the former provision, that the special costs provisions of the latter section apply to the present proceedings. That Order, which is the subject of this appeal, followed from a reserved judgment delivered on 13 October, 2017 ([2017] IEHC 606).

2. The proceedings comprise a challenge to a decision of the appellant of 31 March 2016 to grant to the first notice party a renewal of a national waste collection permit. The decision was made pursuant to the provisions of the Waste Management (Permit Collection) Regulations 2007-2016 ('the 2007 Regulations'). The authority of the appellant to grant the permit arose from its nomination as National Waste Collection Permit Office ('NWCPO') pursuant to s.34(1)(aa) of the Waste Management Act 1996 as amended. The permit authorised the first notice party to collect 75 categories of waste, including hazardous waste, in every area of the State.

3. The challenge was brought in a context where the respondent had operated a riding school and equestrian centre on property owned by him and adjacent to the premises of the first named notice party. That premises is in Dunmoe, County Meath. It was the

respondent's contention that the first notice party was bringing waste onto its property, storing it there, and washing down trucks and skips used in the course of the collection activity. This was all said to be occurring in circumstances where the premises was not an authorised waste facility. The respondent contended *inter alia* that this represented a breach of the conditions of the permit. Those conditions provided that the first notice party should not cause environmental pollution during the course of the waste collection activity to which the permit related. Further, the lands at Dunmoe were not listed in the collection permit as an authorised facility to which the waste might be taken. The respondent had complained to both Meath County Council and the appellant of these matters and says that when reviewing the waste permit issued to the first notice party, the appellant ought – having regard to the respondent's complaints – to have either refused to review, or to have revoked, the permit. He says that had the permit been revoked, the first notice party would not have been in a position to collect waste and thus there would be no waste to be stored on or disposed of from the property. He contends that as a consequence of noise, odours and concerns for the health and safety of persons arising from the alleged activities of the first named notice party, he was forced to close the horse-riding school he had operated from his property.

4. Leave to seek relief by way of Judicial Review was granted on 27 June 2016 by Humphreys J. The application was made *ex parte*. The essential grounds relied upon by the respondent in support of the relief claimed in the proceedings are as follows:

   (i) In granting the permit and/or in failing to revoke it, it was claimed that the appellant failed to properly investigate and/or consider the respondent's claim that the first notice party was acting in breach of conditions of the waste permit and/or failed to consider that its activities were causing or at risk of causing environmental pollution and/or failed to take proper account of the planning status of the lands on which the activity was being conducted. In consequence – it was claimed – the appellant acted in breach of *inter alia* Articles 28 and/or 29 of the 2007 Regulations.

   (ii) It was contended that the appellant failed to carry out any screening for appropriate assessment when granting the permit. This, it was said, amounted to a failure to comply with Article 42 of the Habitats Directive and Regulations implementing same.

   (iii) It was alleged that the appellant had acted *ultra vires* and without jurisdiction in purporting to act as the NWCPO when it had not lawfully been nominated to that position.

   (iv) It was claimed there had been an ineffective delegation of power by the manager of the appellant to the appellant's director of services, the latter being the person who made the decision to grant renewal of the permit.

5. The central issue presented by this appeal depends on the relationship between these grounds and the provisions of s.3 of the Act. As I have noted, s.3(1) provides that subject

to certain exceptions that are not relevant to this appeal, '*in proceedings to which this section applies, each party (including any notice party) shall bear its own costs*'. Subject to an exclusion that is not relevant here, the scope of s.3 is defined in s.4(1) of the Act, as follows:

> *"Section 3 applies to civil proceedings … instituted by a person –*
>
> *(a) for the purpose of ensuring compliance with, or the enforcement of, a statutory requirement or condition or other requirement attached to a licence, permit, permission, lease or consent specified in subsection (4), or*
>
> *(b) in respect of the contravention of, or the failure to comply with such licence, permit, permission, lease or consent,*
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> *and where the failure to ensure such compliance with, or enforcement of, such statutory requirement, condition or other requirement referred to in paragraph (a), or such contravention or failure to comply referred to in paragraph (b) has caused, is causing or is likely to cause, damage to the environment."*

6. The licences or permits listed in ss. 4 and referred to in s.4(1)(a), include (ss (4)(e)):

> *"a waste collection permit granted pursuant to section 34, or a waste licence granted pursuant to section 40, of the Act of 1996."*

7. The phrase *damage to the environment* as it appears in s.4(1) is elaborated upon in two further sub sections of s.4. 'Damage' as defined in s.4(5) includes '*any adverse effect on any matter specified in paragraphs (a) to (i) of subsection (2)*'. *'Damage to the environment'* includes damage to *inter alia* air, water, soil, land, landscape, biological diversity, health and safety of persons and conditions of human life (s.4(2)).

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8. I have already noted that the High Court made an order under s.7. Specifically, Baker J. determined that these proceedings fell within s.4(1)(a). In that regard, Baker J. commenced her analysis from the proposition that proceedings which seek to ensure compliance with a statutory requirement may come within s.4 even where there is no permit or licence in issue the conditions of which are claimed to have been breached (at para. 21). This followed from the decision of this Court in *McCoy and anor. v. Shillelagh Quarries Ltd. and ors* [2015] IECA 28, [2015] 1 IR 627, in which it was decided that that part of the provision referring to *'statutory requirement'* presents a freestanding test. Section 4(1)(a) accordingly applies to proceedings which are either designed to ensure compliance with or enforcement of a statutory requirement or, alternatively, compliance with or enforcement of a condition or other requirement attached to a licence or other form of development consent (at para. 28).

9. From there, Baker J. stressed that a court in hearing an application under s.7 is concerned with the substance and not merely the form of the proceedings (at para. 23). To that extent, she held that the Court should undertake an objective assessment of the

action in order to determine whether *'as a matter of reality and substance, the proceedings are for the purpose of ensuring compliance with or enforcement of either a statutory provision or condition' per* Finlay Geoghegan J. in *CLM Properties Limited v. Greenstar Holdings Limited and ors* [2014] IEHC 288). Thus, a claim which was advanced in order to achieve a collateral purpose would not come within the section. Examples from the case law identified by Baker J. included proceedings brought not to secure compliance with a condition within the meaning of s.4(1), but to prevent a neighbouring landowner from building a house (*Rowan v. Kerry County Council* [2012] IEHC 544) and proceedings brought with a view to obtaining payment of monies due (*CLM Properties Limited v. Greenstar Holdings Limited and ors*).

10. Baker J. agreed with two relevant contentions advanced by the appellant. She accepted its argument that the mere fact that proceedings relate to a permit or licence does not bring the action within s.4(1). Proceedings in respect of such a licence, she emphasised, must meet one of the two alternative conditions set out in s.4(1) (at para. 32). Further, Baker J. rejected the proposition advanced by the respondent that the fact that the Waste Management Act 1996 and waste collection permit granted pursuant to s.34 of that Act were expressly included in the list of legislation and permissions in s.4(4)(e) of itself meant that these proceedings were an action in which the enforcement of a requirement or condition in such a permit was in issue (at para 33).

11. The High Court Judge's characterisation of the essential features of the claim was central to her conclusion that the proceedings fell within s.3 of the Act. In that regard she focussed on the contention that in renewing the permit the appellant failed to have regard to the respondent's complaints as regards the breach of the conditions of the permit and the manner in which the facility was operated with the consequent risk of environmental pollution. While the substance of the relief sought was directed to quashing the permit, the Court concluded (at para. 43):

> *"if the applicant succeeds in quashing the permit, the proceedings will have had the effect of ensuring compliance with the statutory requirements that a waste facility be operated only with the benefit of a permit and that the permit be granted in accordance with the requirements of Articles 28 and 29."*

12. In substance, the trial Judge thus felt, these proceedings comprise an action by which the applicant seeks to ensure compliance with the statutory requirement that a waste facility be licensed by law. The applicant, she said, impugns the granting of a permit and by that means seeks to ensure compliance with a statutory requirement that there be a valid licence. Similarly, (at para. 45) as to the *vires* argument, the object of the proceedings was to obtain compliance by the appellant with the statutory requirements that it should issue a permit only when competent to do so, and only when the relevant statutory requirements were met. Accordingly, and having regard to fact that there was no collateral or extraneous purpose to the proceedings, the Court held that the threshold test in s.4(1)(a) was satisfied, and the proceedings were for the purposes of ensuring compliance with a statutory requirement within the meaning of the provision.

13. Baker J. then proceeded to address whether a link had been established between the grant of or failure to revoke the permit, and damage to the environment. Noting the requirement imposed by the text of s.4(1) upon a party seeking to bring their claim within s.3 to establish a causative and direct link between the failure to ensure compliance with or enforcement of a statutory requirement and damage or likely damage to the environment (*Callaghan v. An Bord Pleanála* [2015] IEHC 357), Baker J. concluded that the respondent had made out a connection sufficient to meet the test at this stage. That link required that the Court be satisfied that the claim '*had a certain degree of substance and that it had a reasonable prospect of success*' (*McCoy and anor. v. Shillelagh Quarries Limited and ors*). Because leave had been granted by Humphreys J. on 27 June 2016, Baker J. said, '*it must therefore be said that the proceedings meet the threshold that there exists an arguable case in respect of the grounds pleaded*' (at para. 59). Referring to the evidence in the case, the Court was satisfied that there was a *prima facie* case that damage to the environment was occurring. The Court, she said, could not at this stage of the proceedings resolve any conflict regarding the evidence. Essentially, Baker J. reasoned, the permit was extant, there was damage to the environment arising from the current activities, and the evidence before the Court met the criteria that it have some reasonable foundation (at para. 62). She formulated – and found to have been satisfied – the following onus on a party seeking an order under s.7 (at para. 65):

> *"…to establish that he or she has a reasonable case with a reasonable prospect of success, and to make out a stateable argument that damage to the environment is occurring or is likely to occur."*

14. Finally, the Court determined that the respondent had established that his financial resources were such as to meet the test as to means suggested in some of the authorities. Noting that there was no provision in the legislation that enabled an application under s.7 to be heard otherwise than in public, the Court expressed the view that the Oireachtas did not intend extensive financial disclosure in a public arena of the financial circumstances of an applicant for such relief.

15. Following the judgment of Baker J., the proceedings came for trial before Faherty J. in the High Court. She delivered her judgment in the substantive case on 20 December 2019. This was after the oral hearing of this appeal. The High Court dismissed the proceedings.

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16. The various contentions advanced by the appellant in support of its claim that Baker J. erred in making an order under s.7 can be grouped under two headings. In the first place, the appellant says that s.4 is concerned solely with what are described by the appellant as 'enforcement proceedings'. In this action, it is said, the respondent seeks quash the permit, not to ensure compliance with any statutory requirement or permission. Such reliefs, it is claimed, would not be appropriate in the context of judicial review proceedings. In consequence, it is said, proceedings by way of judicial review are outside the scope of s.4. The appellant contends that allegations of non-compliance with the permit should be addressed by way of appropriate enforcement proceedings seeking relief to restrain such breaches and/or to obtain compliance with the conditions of the permit.

In this case, it is argued, these would have to assume the form of proceedings pursuant to ss.57 or 58 of the Waste Management Act 1996.

17. From there, it is contended that the Judge erred in deciding that the respondent had disclosed a reasonable and/or arguable and/or *prima facie* basis for its claim. The appellant says that the decision to grant renewal of the permit under Article 28 of the 2007 Regulations did not amount to or comprise a decision to refuse to revoke the permit. There was, it is said, no evidential basis for the contention that there had been non-compliance with Article 28 of the Regulations. The power to revoke, it is argued, arises under Article 29 and is a discretionary power, which the appellant neither had to nor did, exercise.

18. The appellant's written submissions, it should be noted, do not engage with the other issues raised by the respondent in the substantive proceedings, that is the alleged breach of the Habitats Directive and Regulations implementing same, the asserted invalidity of the purported discharge by the appellant of the function of NWCO, or the claim that the purported delegation to the appellant's director of services of the function of granting the renewal, was ineffective. Although Baker J. addressed her judgment only to the proceedings insofar as relief was claimed based upon non-compliance with Articles 28 and 29 of the 2007 Regulations, no cross appeal or notice to vary was served by the respondent insofar as the other reliefs were concerned. Both parties, however, briefly addressed the argument based upon the Habitats Directive in their oral submissions to the Court.

19. The appellant does not take issue with the decision of the Court in respect of the requirement to establish damage to the environment, any questions of causation arising in this case in respect of that issue, or the legal or factual basis for the view reached by the Court that the respondent had to, and did, present sufficient evidence of its financial circumstances to enable the Court to grant the relief claimed. To that extent, it is not necessary for the Court to consider whether the trial Judge was correct in concluding that there was an implied limitation on the obligation of a party seeking a protective costs order to make public disclosure of his financial affairs. Nor is any issue taken as the Court's findings in respect of the motivation of the respondent in bringing the proceedings.

20. That being so, the appellant's submissions reduce themselves to six issues arising from the proper interpretation of ss.3 and 4 of the Act.

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21. Mr. Galligan SC for the appellant began his oral submissions by contending that s.3 did not apply to proceedings by way of judicial review. The provision, he said, was concerned only with what he described as 'enforcement proceedings', which description - it was suggested – precluded proceedings by way of judicial review. He cited in this regard the comments of Simons J. in *Heather Hill Management Company CLG and ors v. An Bord Pleanála* [2019] IEHC 186 at para. 106 where the Court said of the judgment of Baker J. in this case:

> *"Whereas the conventional wisdom had been that the EMPA 2011 was intended to regulate the costs of enforcement proceedings, with the costs of judicial review proceedings dealt with separately under section 50B of the PDA 2000, the recent judgment of the High Court in O'Connor v. Offaly County Council [2017] IEHC 606 confirms that the 2011 Act can, in principle, apply to judicial review proceedings also."*

22. I think that this submission is misconceived. For a start, proceedings by way of judicial review fall – at least *prima facie* – within the description '*civil proceedings*' as it appears in s.4 (see for example, *MOS v. Residential Institutions Redress Board and ors.* [2017] IEHC 251 para. 51 where MacDermott J. observed of the rule making power conferred on the Superior Courts Rules Committee by section 36 of the Courts of Justice Act 1924 *'[j]udicial review proceedings are clearly civil proceedings the pleadings and procedure of which may be regulated by rules of court'*). There is nothing in the text of either ss.3 or 4 to suggest that that the Oireachtas intended that the scope of such proceedings be limited by reference to the form they assume. While provision is made for special costs orders in certain judicial review proceedings by s.50B of the Planning and Development Act 2000, it does not follow that judicial review proceedings as a whole are implicitly excluded from the terms of the 2011 Act. Such an argument would require that s.3 be impressed with a qualification which neither the language nor context of the provision, read together with s.4, bears. No suggestion that relief by way of judicial review be excluded from the 2011 Act was made in *Waterville Fisheries Development Ltd v. Aquaculture Licences Appeals Board and ors.* [2014] IEHC 522 or in *North East Pylon Pressure Campaign Ltd. and anor v. an Bord Pleanála* [2018] IEHC 622 (each of which comprised proceedings by way of Judicial Review).

23. If correct, the contention would generate the potential for some anomaly given that there is no general rule of procedural exclusivity attending Order 84 RSC (*Shell E&P Ireland Ltd. v. McGrath* [2013] IESC 1, [2013] 1 IR 247). The objection – at least in the form in which it was advanced in this appeal – could be avoided by seeking relief by plenary action. More fundamentally, the argument ignores the fact that some actions by way of judicial review may present relief seeking 'enforcement'. Counsel for the applicant thus accepted in the course of his oral submissions that in an appropriate case, an application for relief by way of *mandamus* could fall within the section.

24. Reference was made in this regard by both parties in their submissions and by the Court in its judgment, to s.6(a) of the Act. This provides:

> *"Section 3 applies to –*
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> *Proceedings in the High Court by way of judicial review or of seeking leave to apply for judicial review, of proceedings referred to in section 4 or 5."*

25. I do not believe that this provision adds to the discussion. The effect of this subsection is to confirm that certain satellite litigation around proceedings which themselves come within s.3, also fall within the section. Section 6 confirms that this is so not only in

respect of proceedings by way of judicial review of such actions, but also appeals, appeals by way of case stated, and proceedings for interim and interlocutory relief arising from such claims. It makes sense that the Oireachtas would wish to confirm that the special cost rules operate not only in respect of an action in, for example, the District Court, to which s.3 did apply, but also to proceedings seeking to quash the decision of the Court in such an action. Absent that clarification there would be obvious scope for contending that the cost rules were limited to the underlying case. None of this can be credibly interpreted as implying that the only proceedings by way of judicial review that fall within the scope of s.3 are those expressly provided for in s.6(a). The central question in determining whether any given action falls within s.3 is not the form of the proceedings, but the object of the claim they seek to advance.

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26. This leads to a related issue. The question of whether these proceedings – be it by way of judicial review or otherwise – fall within s.4(1)(a) or (b), is not conclusively resolved by reference to the fact that the relief claimed by the respondent is directed to a quashing of the permit. Section 4(1)(a) is engaged where proceedings can be properly characterised as being for the purpose of ensuring compliance with, or the enforcement of, a statutory requirement. As Baker J. stressed in her judgment, the reference in s. 4(1)(a) to a *'statutory requirement'* is free standing. This both follows from the decision in *McCoy v. Shillalagh Quarries Ltd.*, and from a purposive interpretation of the provisions. The intention, as Hogan J. said in McCoy, is to *'facilitate access to justice by persons who contended that certain acts or omissions of other parties were illegal and caused or were likely to cause damage to the environment, a term which was itself generously defined'* (at para. 31). It is thus unsurprising that in characterising a claim as within or without the reference to '*statutory requirement*' a broad view has been adopted by some Courts. *North East Pylon Pressure Campaign Ltd. and anor. v. An Bord Pleanála and ors.* involved a multi-faceted and pre-emptive attack on proceedings before the first named respondent arising from an application for development consent for the construction of an electricity interconnector. In the proceedings, orders of certiorari and declaratory relief was claimed addressed to the invalidity of the development consent process, particularly the application for that consent (see *North East Pylon Pressure Campaign Limited & anor -v- An Bord Pleanála* [2016] IEHC 300 at para. 38). In his judgment addressing costs ([2018] IEHC 622) Humphreys J. operated on the basis that the section was engaged by a claim in which '*all of the points raised can go back directly or indirectly to a statutory requirement*' (at para. 15). He posited a possible exception in respect of one aspect of the case directed to the validity of the designation by the Minister for Communications, Energy and Natural Resources of An Bord Pleanála as the competent authority under Regulation 347/2013, a function which itself did not involve any power of adjudication over the application for development consent.

27. However, even if the reference to a 'statutory requirement' is defined this broadly (and I express no view as to whether it should be), the apparent breadth of the phrase is bounded in three ways. First, the applicant must make out to a certain standard that it has a claim – I will turn shortly to what this means. Second, at least as the law presently

stands, there is imposed over the provision a requirement of damage to the environment. Because there is no issue in this appeal arising from that component of s.4(1), it is not necessary for this Court to determine the apparent consequence of the decision of the CJEU in Case C-470/16 *North East Pylon Pressure Campaign Limited v. An Bord Pleanála*, 15 March 2018 that this requirement presents a breach of EU law. In both *North East Pylon Pressure Campaign Ltd. and anor. v. An Bord Pleanála and ors.*, and *Heather Hill Management Company clg v. An Bord Pleanála*, the High Court has suggested that any such infirmity is properly addressed not by declaring invalid that part of the provision imposing this requirement, but in applying the general discretion conferred by O.99 RSC (now s.169 of the Legal Services Regulation Act 2015), so that in cases where the imposition of such a hurdle would represent a breach of EU law, no order as to costs is made. There may be some controversy as to when exactly that issue would arise: Hogan, Morgan and Daly describe such a breach as arising in '*cases covered by EU law'* (Hogan, Morgan and Daily "*Administrative Law in Ireland*" 5th ed. (Dublin, 2019) at para. 18-132). Humphreys J. suggests it sufficient if the grounds of challenge '*relate to a field covered by EU Environmental law*' [2018] IEHC 622 (at para. 27).

28. I would, however, note that this approach – if correct – might not affect the operation of s.7. Section 7 is only concerned with a determination of whether s.3 applies, not with a pre-emptive exercise of discretion under the general law.

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29. More importantly, however, s.4 is limited by the object of the proceedings – they must be directed to ensuring compliance with those statutory requirements or must seek to enforce them. In this regard, there is an important distinction between ss.4(1)(a) and (b). Section 4(1)(a) is, on its face, intended to be forward looking. While one might say that proceedings – and in particular proceedings by way of judicial review – which seek declaratory relief or *certiorari* 'enforce' or 'ensure compliance' with statutory requirements by correcting a past illegality, there is a critical distinction drawn within s.4(1)(a) and (b) which strongly suggests that it was not intended that s.4(1)(a) extend this far. Section 4(1)(b) is directed to proceedings which are *'in respect of the contravention of, or the failure to comply with'* the measures referred to there. However, this provision – most conspicuously – refers only to a *'licence, permit, permission, lease, or consent'*. Each of these is also itemised in the forward-looking terms of s.4(1)(a). The 'statutory requirement'' which features in s.4(1)(a) is not referenced in s.4(1)(b).

30. If this is correct, it means that the scope of proceedings within the meaning of s.4(1)(a) is limited to cases in which, looking to the action as a whole, the applicant seeks to ensure compliance with or enforce into the future, an identified statutory requirement. Noting that proceedings which seek to claim damages arising from damage to persons or property are excluded from the provision (s.4(3)), proceedings which seek only *certiorari* or declaratory relief with a view to the correction of historic illegality, are not within the terms of the provision unless they arise from the provisions of a licence, registration, permit, permission or lease. Therefore, to bring its claim within s.4(1) – where that claim is based only on the '*statutory requirement*' limb of s.4(1)(a) – the applicant must identify

some action into the future which it is seeking to compel, or which it is seeking to compel should be conducted in a particular way and in accordance with a statutory requirement in the sense in which I have explained that term.

31. It might be said that this is to introduce an unduly formalistic requirement which could, through strategic pleading, be circumvented. Thus, an applicant might instead of simply seeking to quash a decision, seek to quash it and seek an order that it be made again in accordance with an identified interpretation of the statute. It might be said that such an interpretation would render the provision in breach of the Aarhus Convention to which it was intended the Act would give effect. Indeed, it may well be asked why such a distinction would be introduced into the legislation at all.

32. While none of these propositions is insubstantial, neither do they displace what appears to me to be a clear intention on the part of the Oireachtas to limit the scope of the 2011 Act insofar as it is concerned with proceedings alleging breach of statutory requirements. That distinction is, as I have explained, conspicuous as between ss.4(1)(a) and (b). The only conclusion that can be drawn is that it was intended to differentiate between two types of claim – the claim to ensure compliance with or to enforce a provision, and the claim in respect of the contravention of such a provision – and to exclude those claims alleging a breach of statutory requirements from the latter, but not the former. That the distinction is repeated in the final part of s.4(1), reinforces this:

> "… and where the failure to ensure such compliance with, or enforcement of, such statutory requirement, condition, or other requirement referred to in paragraph (a) or such contravention or failure to comply referred to in paragraph (b) has caused, is causing or is likely to cause, damage to the environment."

33. Insofar as objections based upon strategic pleading are concerned, these can be addressed by the Court looking at a general level to the true objective of the proceedings (as did Baker J.), and insofar as objections based on formal distinctions between forward looking proceedings and actions concerned with past contraventions are concerned, those distinctions are already familiar to the law insofar as there are cases in which only *certiorari* or declaratory orders are appropriate and cases in which remittal, orders of *mandamus* or *prohibition* will issue. Whether this represents a breach of EU law as explained in *North East Pylon Pressure Campaign Ltd. v. An Bord Pleanála*, and, if so, what the consequence of that is, can only be properly determined in a case in which the issue arises.

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34. I have already noted that Baker J. concluded that the proceedings fell within s.4(1)(a) for the following reason (at para. 43):

> "… if the applicant succeeds in quashing the permit, the proceedings will have had the effect of ensuring compliance with the statutory requirements that a waste facility be operated only with the benefit of a permit and that the permit be granted

in accordance with the requirements of Articles 28 and 29 of the Regulations of 2007."

35. A similar conclusion was expressed at para. 44 of the judgment *'in substance these proceedings are ones by which the applicant seeks to ensure compliance with the statutory requirement that a waste facility be licensed by law'*.

36. The appellant is correct when it says that paras. 43 and 44 of the judgment appear to contain an error. The permit the subject of the proceedings did not authorise the operation of a waste facility. The operation of a waste facility is governed by the provisions of the Waste Management Act 1996 and the Waste Management (Facility Permit and Registration) Regulations 2007-2008. The waste permit itself only granted the authority to collect and transport waste (s.34 of the Waste Management Act 1996). The respondent could have – but did not – seek to enforce the licence, or indeed could have sought to compel the appropriate authority to do so and had this been done such proceedings would have come within the terms of s.4(1)(a). However, if the relief as actually sought in the proceedings is granted, it means only that the waste permit is quashed, and that the first notice party ceases to enjoy the legal entitlement to continue to collect and transport waste.

37. That said, the references by the trial Judge to the waste facility being authorised by a permit are not in truth material; it is clear from the judgment as a whole that the Court fully appreciated the difference between waste collection and the operation of a facility. What is more fundamental, however, is the proposition that by seeking to quash a permit granted in the past by reference to breaches of Articles 28 and 29 which have already taken place, the applicant is seeking to enforce on an ongoing basis the provision pursuant to which the permit was granted in the first place. This was expressed by the trial Judge as follows (at para. 44) :

> *"The applicant seeks to impugn the granting of a permit and by that means seeks to ensure compliance with a statutory requirement that there be a valid licence."*

38. It appears to me that this correctly describes the substance of the respondent's claim, explains why these proceedings are in a form that properly comes within s.4(1)(a), and highlights the error underlying the persistent assertion by the appellant in its submissions that because these are not 'enforcement' proceedings, they do not come within the subsection. The respondent's concern was, at the time the proceedings were instituted, with an ongoing state of affairs. The first notice party (the respondent alleged) was collecting waste on foot of a permit that was invalid. That invalidity (on the respondent's case) arose from a failure to comply with the requirements of a number of separate legislative provisions. If the underlying claim were well placed, it would mean that a separate statutory provision (s.34(1)) was being breached, because an activity which could only be conducted on foot of a licence, was being conducted on foot of a permit which was, in law, invalid. Compliance with s.34(1) required that the underlying invalidity be determined by the Court. Not every claim by way of judicial review will present that feature. Proceedings seeking declaratory relief in respect of an entirely historic event

would not seek to ensure present compliance or enforce the legal requirement in issue in the terms expressed in s.4(1)(a). However, in this case that is precisely what the action seeks to do. The applicant's objective was, when he issued the proceedings, to preclude the continuation of an activity which – he said – was unlawful. It appears to me that Baker J. was correct in concluding that the proceedings thus understood fell within the terms of s.4(1)(a).

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39. That then leads to the next stage of the analysis suggested by the trial Judge - the question of whether the respondent had made out a sufficiently plausible claim to merit the making of an Order under s.7. Here, also, there is a preliminary question to be resolved. This relates to the correct standard applicable to the resolution of that issue.

40. As the case law on this issue has developed in this jurisdiction., the starting point is the decision of the CJEU in Case C-260/11, *David Edwards & Anor. v. Environment Agency & Ors.*, 11 April, 2003. This arose from a reference by the United Kingdom Supreme Court in proceedings brought in connection with a decision of the Environment Agency to approve the operation of a cement works. The case having failed at first instance and on appeal to the Court of Appeal and the appeal having been dismissed by the House of Lords, an order for costs was made against one of the applicants who had pursued those appeals. The relevant costs officers having decided that they were competent to adjudicate on arguments advanced by the applicant based on the prohibition on prohibitively expensive procedures within the meaning of Article 9(4) of the Aarhus Convention as implemented by Article 10a of Directive 85/337/EEC and Article 15a of Directive 96/61/EC, the issue of whether they had that competence was referred to a panel of the Supreme Court (that Court having in the meantime been established). The Supreme Court, in turn, referred to the CJEU a series of questions as to the proper interpretation and application of these provisions. The questions, it is to be noted, arose at the point where the proceedings were concluded (an application for a protective costs order having been earlier refused). However, the Court made it clear (at para. 44) that the assessment of whether or not costs are prohibitively expensive ought not to differ depending on whether the national court was deciding on costs at the conclusion of the proceedings, an appeal or a second appeal. In the course of answering those questions, the CJEU said (at para. 42):

> *"The Court may also take into account the situation of the parties concerned, whether the claimant has a reasonable prospect of success, the importance of what is at stake for the claimant and for the protection of the environment, the complexity of the relevant law and procedure and the potentially frivolous nature of the claim at its various stages."*

41. This formulation has been re-iterated more recently by the CJEU in Case C-470/16 *North East Pylon Pressure Campaign and Sheehy v An Bord Pleanála and others*, 15 March, 2018 (a decision made on foot of a reference made at the conclusion of those proceedings), with one important qualification (at para. 61):

> *"It is … open to the national court to take account of factors such as, in particular, whether the challenge has a reasonable chance of success, or whether it is frivolous or vexatious,* ***provided that the amount of the costs imposed on the applicant is not unreasonably high****."*
>
> (Emphasis added)

42. The decision in Edwards influenced the approach adopted by Hedigan J. in *Hunter v. Nurendale Ltd. t/a Panda Waste* [2013] IEHC 430, [2013] 2 IR 373. There, an application was made under s.7 of the 2011 Act in respect of proceedings brought by the applicant pursuant to s.160 of the Planning and Development Act 2000. Although the CJEU had been concerned with the general considerations to be taken into account in giving effect to the not prohibitively expensive principle, Hedigan J. applied the comments of the CJEU in fashioning how the discretion of the Court in considering an application under s.7, should be approached. It was from this analysis by the CJEU that he derived the requirements applied by Baker J. in her judgment in this case in respect of the financial means of the applicant for the relief. As I have already noted, this issue is not before this Court.

43. However, Hedigan J. also said (at para. 14):

> *"I think that when the European Court of Justice refers to a reasonable prospect of success, it requires that an applicant should be pressing a case that does have a certain measure of substance to it. It is not required that there be a probability of success but there must be, it seems to me, at least a good chance of success."*

44. Hedigan J. later referenced this in terms of there being '*some substance to the claim'*, and to '*a reasonable prospect of success*' (at para. 14). Notably, the Court did not apply the familiar test of arguability applicable to the leave stage of an *ex parte* application for judicial review, the test applicable to the striking out of proceedings under O.19 Rule 28 RSC or the inherent jurisdiction of the Court, or indeed the test underpinning the substantial grounds requirement imposed by statute for certain types of inter partes leave applications (this in fact being a standard which Hedigan J. references the respondent in that case as having conceded as being higher than the obligation in an application under s.7 – see para. 12 of the judgment). Instead, the standard Hedigan J. suggested for application under s.7 is that adopted in England for an inter partes application for leave to seek judicial review (see *R v. Cotswold District Council* (1998) 75 P&CR 515, at pp. 530 to 531). The application of such a standard in that context has been rejected in this jurisdiction (*DC v. DPP* [2005] 4 IR 281 at p. 289).

45. Hedigan J.'s analysis of the provision was taken up by this Court in *McCoy v. Shillalagh Quarries Ltd. McCoy* similarly concerned an application under s.7, this time in connection with proceedings which sought to prevent the operation of a quarry without the benefit of planning permission. The substantive issue in the case related to whether s.4(1) applied to proceedings which involved no decision, an argument which was of importance because the claim of the respondent was that it was operating the quarry in accordance with a

pre-1963 user. Having determined (at para. 20) that the provisions of the Aarhus Convention did not *'decisively influence'* the interpretation of the 2011 Act, and having determined that s.4(1)(a) applied where there was a breach of a statutory provision alone (at para. 35), the Court proceeded to determine how it should approach the exercise of the discretion vested in it by s.7.

46. In that regard, the Court observed the intent behind the protective cost order as being to ensure that the environmental litigant could know in advance whether the litigation could be safely continued from a costs perspective (at para. 38). At the same time, it felt that such an order should not be lightly made having regard to the impact it may have on the respondent (at para. 43). Referring to the decision of CJEU in *Edwards* (and describing that judgment as being concerned with a protective costs order), citing its reference to *'reasonable prospect of success'* and to Hedigan J's judgment in *Hunter*, the Court proceeded to approve the finding of Baker J. (who was also the High Court Judge in that case) that the proceedings did enjoy a *'reasonable prospect of success'* (at para. 40). It bears emphasis that while Hedigan J's formulation was in general terms certainly described as *'helpful'*, the Court did not in fact posit in terms an inflexible requirement that proceedings enjoy a *'reasonable prospect of success'* as a precondition to obtaining relief under s. 7. The most it said was that the CJEU in *Edwards* had said that a national court called upon to make a protective costs order could take into account *inter alia* whether the claimant has such a reasonable prospect of success.

47. It follows from the foregoing, that there is no authority binding on this Court determining that before an Order can be made under s.7, it must be established that the proceedings enjoy a reasonable prospect of success. In determining what standard should be applied to this issue, it is necessary to go back to the structure adopted by the legislature within the 2011 Act.

48. It would have been open to the Oireachtas in framing the special costs provisions to confer a discretion upon the Court and to condition that discretion by reference to *inter alia* the strength of the underlying claim, the financial position of the applicant for relief or the complexity of the case. Instead of doing this, the draftsman has applied a sharp rule applicable to a specific type of proceedings. Section 3(1) imposes a mandate that where the section applies to proceedings, each party shall bear its own costs. Section 4 defines the proceedings to which s.3 applies. A case either falls within these provisions, or it does not.

49. Accordingly, where no protective costs order has been sought, at the conclusion of a case, the Court must, if called upon to do so, determine if the action is within these provisions. If the action does fall within s.3, one of a number of things may occur.

    (i) If the applicant for the relief succeeds in his claim he may recover some or all of his costs (s.3(2)).

    (ii) If the case is one of exceptional public importance, the applicant for such relief may also recover his costs in accordance with the established case law (s.3(4)).

(iii) If the applicant's claim or counter-claim is frivolous or vexatious, if he conducts the proceedings in a way that justifies an order for costs against him or if he is in contempt of court, an order may be made against him (s.3(3)). I will return to this shortly.

50. In all other cases, the court must make no order as to costs (s.3(2)). It has no discretion in this regard. This is important insofar as the criteria for the making of an order under s.7 are concerned. Given that an unsuccessful claimant in proceedings who does not seek an order under s.7 and merely relies on s.3 at the conclusion of his case does not have to establish that his claim enjoyed a reasonable prospect of success – the only requirement as to the merits of the case is that it not be frivolous or vexations – it is not immediately obvious to me how or why that obligation can or should be applied as a matter of course when an application is brought under s. 7.

51. Subsections (1) and (2) of s.7 state:

"(1) A party to proceedings to which section 3 applies may at any time before, or during the course of, the proceedings apply to the court for a determination that section 3 applies to those proceedings.

(2) Where an application is made under subsection (1), the court may make a determination that section 3 applies to those proceedings."

52. Insofar as s.7 is framed in terms that allow an application to be brought *'before or during the course of the proceedings'* it clearly envisages an application that is distinct from the application for costs made in the ordinary course at the conclusion of a case. Two consequences relevant to the scope of the discretion conferred by the section follow from this. First, while an Order that s.3 applies (or indeed an affirmative order that it does not apply) made on foot of an application under s.7 is a final determination of the issue subject only to appeal (see *McCoy v. Shillalagh Quarries Ltd.*at para. 39 and 54), the Court may decline to make an order under the provision but may leave it open to the applicant to agitate his contention that s.3 does apply to the case at a later point in time. This follows from the extent of the discretion vested by s.7(2).

53. Second, as I have noted, even if the Court grants the application, an order made under s.7 does not guarantee that the applicant will at the end of the day be immunised from an adverse costs order. The determination is merely to the effect that s.3 applies to his case. Section 3 itself provides that the subsequent conduct of the applicant may debar him from obtaining such an order, and the provision allows the Court at the conclusion of the case to order costs against the claimant if it decides that the case was frivolous or vexatious. This is the terminology of Order 19 Rule 28 RSC, and has a broader reach than the language used might at first suggest. It includes a claim in which the plaintiff has no reasonable chance of succeeding (*Farley v. Ireland*, Unreported, Supreme Court, 1st May 1997), which it is obvious cannot succeed (*Riordan v. Ireland (No.5)* [2001] 4 IR 463), which is unsustainable in law (*McCoy v. Shillalagh Quarries Ltd.* at para. 39) or (as

Charlton J. has said of this provision) which is '*without merit*' (*Sweetman v. Shell E&P Ireland Limited* [2016] IESC 58, [2016] 1 IR 742 at para. 20).

54. By definition, where the legislature has conferred a general discretion of the kind provided for in s.7(2), the intention is that the Court should approach the task of determining whether to make an order pursuant to the provision on a case by case basis albeit by reference to identified principle. To that extent, the factors identified by Hedigan J. in *Hunter v. Nurendale Limited* and applied by this Court in *McCoy v. Shillalagh Quarries Ltd.* may be of assistance in some cases. However, they should not be applied indiscriminately.

55. The purpose of any discretion of the kind conferred by s.7 is to ensure that any order made by the Court both gives effect to the overall intention of the legislation and does so in a manner that has regard to the legitimate interests of the parties to the action. If a requirement that an applicant is to establish a case that enjoys a particular likelihood of success is to be imposed in the exercise of that discretion, it must be justified in any given case by some legitimate interest of one of the parties that requires that the discretion be conditioned in this way.

56. The applicant – obviously – has an interest in obtaining a protective costs order so as to give it an assurance in respect of its exposure in the event it loses the case. The respondent's interest, however, is not a corresponding one. Whatever its strategic preference may be, in a case in which s.3 properly construed applies the legitimate interest of the respondent which falls to be protected is not the interest in not having a protective cost order made against it *per se*. If an order that s.3 applies is properly made it matters not to the respondent whether it is made at an early stage of the proceedings, or a late one. Its legitimate interest is in not having such an order made at an early stage in circumstances where it may emerge that s.3 does not apply to the action at all.

57. Once that is understood, the first and critical question in determining whether to grant a protective costs order under s.7 is whether the Court is confident based on the information before it at the time the application is made, that it can (a) determine whether the proceedings fall within s.3 and (b) be sure that nothing is likely to happen after the making of such an order that will affect the answer to that question. Given (as I explain shortly) that the Court is concerned only to characterise the proceedings, to determine that they disclose a stateable claim, and to determine whether the characterisation of the claim brings it within or without s.3, the answer to both of these questions should be in the affirmative in many cases.

58. However, cases will occur in which the Court cannot be confident that the issue of whether section 3 applies is ripe for determination or even if it appears as if it is, that nothing will change before the trial. It could, for example, be that a respondent will be in a position to present a credible basis for contending that as the evidence develops or discovery is obtained, it may emerge that a claim is brought for a purpose other than as envisaged by s.3. There will be cases in which it might be said that as the claim develops, parts of the proceedings which are within s.3 may subside, thereby affecting the overall

application of the provision (a hypothesis, I should state, which assumes that proceedings can be 'split' for the purposes of the provision – an issue to which I return later). Insofar as a requirement of damage to the environment remains part of the text of s.4, and therefore forms part of the proofs in an application under s.7, this is a fact sensitive issue which in some cases a respondent may be able to say could be affected by the evidence.

59. In all of these circumstances, considerations such as requiring that a case be strong, or reasonable, or that the applicant show that he is a person of means, or that the issue of whether s.3 applies be postponed to the trial of the case could intrude into the discretion of the Court in deciding whether it is appropriate to make such an order at an early stage. The decision in *McCoy* establishes that it is permissible to take account of these factors when exercising that discretion. However, in most cases in which the Court determines that the action falls within s.3, that it is stateable, and that there is no basis for believing that the application of s.3 will change as the proceedings develop, it is hard to see how these considerations are relevant, and harder to see where the Court obtains the power to condition the exercise of its discretion by reference to whether the claim enjoys a reasonable prospect of success.

60. It follows that there is no basis for superimposing on that statutory scheme a general requirement that an applicant for an order under s.7 establish that his case meets anything more than the basic threshold of stateability. The position is, as stated by Simons *Annual Review of Irish Law 2013* (at p.452) *'there is nothing in the legislation that requires the court to consider whether the applicant has a "reasonable prospect of success"'*. What has to be established (as the appellant itself characterises it at para. 23 of their submissions to this Court) is in the nature of a *prima facie* case, being a case, on the Judicial Review side, in which leave would be properly granted, and in other actions whether they satisfy the requirements of O.19 Rule 28 and/or would survive an application to dismiss under the inherent jurisdiction of the Court. In fact, it appears to me that unless contending that it is too early to decide if s.3 applies to the case, a respondent or defendant to proceedings faced with an application for a protective costs order should either accept that the proceeding meet the required threshold, or contemporaneously apply to set aside leave or strike out the proceedings.

61. In this case there was no suggestion that the characterisation of the respondent's claim was going to evolve or change so as to affect the application of s.3. The appellant's case was that as pleaded at the time of the application, the case fell without that provision. In that regard, as I have explained, I believe the respondent to have erred. No other circumstance justifying the exercise by the Court of its discretion against the relief sought having been advanced, an order under s.7 follows.

62. In this regard, I should state that as a general proposition I am unconvinced that the law in general or interests of the parties to proceedings of this kind is well served by the introduction of a multiplicity of complicating adjectives into what, at least in this context, should be the relatively straightforward exercise of determining whether a claim enjoys sufficient reality to impose a requirement that a party bear their own costs of the action in

the manner envisaged by s.3. The comments of Denham J. (as she then was) in *DC v. DPP* when rejecting the proposition that applications for leave to seek judicial review on notice should be determined by reference to the standard of whether a case presented a reasonably good prospect of success (at p. 289), apply equally here:

> *"… there is a real danger of developing a multiplicity of different approaches, that of G. v. Director of Public Prosecutions [1994] 1 IR 374, the test applied in specific statutory schemes, and that governing the position where a respondent is on notice in a particular area of litigation. Not only may there be legal difficulties in identifying and applying each different standard, but such an approach would also take up valuable court time."*

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63. That being so, the remainder of this inquiry becomes more straightforward. It reduces itself to whether in respect of the various reliefs pleaded in the case, the respondent has established an arguable claim. That question – I should emphasise – must (at least where leave has been granted *ex parte*) be determined *de novo* and in the light of the submissions advanced by the respondent to the proceedings. A grant of leave made on foot of an *ex parte* application is only provisional in nature and cannot deprive the respondent of the entitlement to contend that it should not have been granted (*Adam v. Minister for Justice* [2001] 3 IR 53, at p. 77).

64. The first contention is that the appellant acted unlawfully in granting the renewal of the permit without having any or any adequate regard to the complaints made by the respondent that the first notice party was taking waste collected by it pursuant to the permit, to an unauthorised facility. As presented by the respondent in this Court, that argument reduced itself to the effect of the provisions of Article 28 of the 2007 Regulations.

65. Article 28 of the 2007 Regulations provide a discretionary power vested in the appellant to grant a national waste collection permit. The power is framed in the first instance in general terms (Article 28(1)):

> *"a nominated authority may, on application being made to it for the review of a waste collection permit, grant a reviewed waste collection permit in accordance with these Regulations, or refuse to grant such a permit, in relation to the carrying on by the applicant of a waste collection activity relating to a region or regions."*

66. Article 28(6) proceeds to condition that power – negatively – as follows:

> *"A nominated authority shall not grant a reviewed waste collection permit unless it is satisfied that –*
>
> *(a) the activity concerned, carried on in accordance with such conditions as are attached to the reviewed waste collection permit, will not cause environmental pollution,*

(b) any emissions from the activity concerned will not result in the contravention of any relevant standard, including any standard for an environmental medium, or any relevant emission limit value, prescribed under any enactment, and

(c) the applicant is a fit and proper person."

67. In terms, I do not see that the respondent can advance any plausible basis for contending that the appellant failed to comply with any of these express conditions. If carried on in accordance with the permit ((a)), the activity would not cause environmental pollution. No emission from the activity was identified by the respondent which would engage (b). *'Fit and proper person'* is defined exhaustively in s.34D of the Waste Management Act 1996 in terms which are triggered by conviction for certain offences, by an identified absence of technical knowledge or qualification, by an inability to discharge financial commitments, or where there have been other adverse regulatory determinations made against the applicant for the permit (for example the revocation of a permit).

68. What the respondent can and does say, however, is that the general discretion vested in the appellant by Article 28 allows it to take account of the conduct of the first notice party of which he complains. The case advanced by the respondent is that where there is evidence that the holder of a waste collection permit is operating in a manner which is causing or risks causing environmental pollution, this is a material consideration in terms of whether the activity will cause environmental pollution. The appellant, it is said, cannot *'close its mind to the facts on the ground'* relating to how the collection permit is being operated by the applicant for renewal. The evidence here discloses, it is said, that the first notice party is bringing waste collected under the permit to an unauthorised facility where further activities are being carried out which raises a risk of environmental pollution. The respondent says that this is also relevant to the question of whether the applicant for renewal is a fit and proper person.

69. There is no doubt but that this argument faces some hurdles. The contention that the Regulations intend that all issues arising from the conduct of the applicant for renewal fall to be addressed exclusively under Article 28(6) is obviously substantial. However, given the threshold as I have defined it, the case meets the relevant threshold. Article 28(1) affords a general discretion. It does not expressly limit that discretion by reference to the remainder of the provision. There is a basis for contending that in exercising the power to review the permit, the appellant is required to take account of and have regard to submissions and evidence provided to it suggesting that an applicant for review of a permit is in breach of the conditions of the existing permit in such a way as to be the cause of environmental damage. This is all the more so given the asymmetry that would otherwise arise when Article 28 is juxtaposed with Article 29 which, on its face, gives rise to a basis for revocation where there has been non-compliance with a permit. It would give rise to the potential for some incongruity if the appellant had the power to consider revoking the licence where there had been an allegation of misconduct, but no power to

consider those same allegations when determining whether to review it. Certainly, it seems to me to be impossible to contend that the proposition is unarguable.

70. The argument advanced by the respondent in respect of Article 29 of the 2007 Regulations is, if anything, stronger. That provision states that a permit may be revoked where *inter alia*:

> *"(b) The activity is being carried out is, or may be, in contravention of the conditions of the waste collection permit granted by the nominated authority*
>
> *(c) the activity is, or may be, in contravention of the Waste Management (Facility Permit and Registration) Regulations 2007; Waste Management (Movement of Hazardous Waste) Regulations, 1998 or Waste Management (Transfrontier Shipment of Waste) Regulations 1998,*
>
> *(d) the permit holder, or other relevant person, is likely, by a continuation of his or her activities, to cause environmental pollution, or*
>
> *(e) the permit holder, or other relevant person, is participating in, or facilitating, the onward movement of waste to unauthorised facilities or unauthorised collectors."*

71. The respondent alleged and proposed a factual basis for the claim that the circumstances identified in each of (b), (c), (d) or (e) were occurring, there was an arguable basis for maintaining that the failure of the appellant to revoke, was in breach of the provision. The principal response of the appellant to this argument – that it had made no decision on the application for revocation – prompted the (unsurprising) response from the respondent that by granting the review of the permit, the appellant had effectively refused to revoke the existing permit. Whether that contention was well placed was a matter for the trial Judge. It is hard to see how the contention could be reasonably described as unarguable.

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72. While Baker J. explains in the course of her judgment why in her view the proceedings disclose to the required standard a claim under Articles 28 and 29 of the 2007 Regulations, the Court did not conduct a detailed analysis of the remaining grounds, nor did she suggest in her judgment that the claim could be 'spliced' with a special costs order being made in respect of some parts of the claim, but not others. In the course of oral argument, it was suggested by counsel for the appellant that the other aspects of the claim were not pressed by the respondent at the High Court hearing. It may well also be that the Judge simply assumed that once part, or at least a substantial part, of the claim fell within the scope of.s.3, it was appropriate to make an order under s.7. That would reflect the conclusion reached by Simons J. in *Heather Hill Management Company CLG v. An Bord Pleanála* in respect of s.50B of the Planning and Development Act 2000, a conclusion which, it might be noted, differs from that reached by Humphreys J. in *North East Pylon Pressure Group v. An Bord Pleanála* and by Herbert J. in the earlier case of *McCallig v. An Bord Pleanála* [2014] IEHC 353. The appellants have not sought to either suggest that the trial Judge was in error in adopting that approach, and they have not in

their written submissions advanced any argument as to the stateability or otherwise of the other grounds invoked by the respondent (although as I have observed, reference was made to the argument as regards the Habitats Directive in the course of the oral argument on this appeal).

73. That being so, the Court has heard no argument as to whether an application under s. 7 can or should be conducted on the basis of an analysis of the different causes of action in issue. There are two ways of viewing that question. One, consistent with the approach taken to s.4 itself, is to look at the proceedings in the round and to determine whether as a whole they have as their object the measures identified in ss.4(1)(a) or (b). The fact that s.3 speaks of the costs of '*proceedings*' might suggest that this is the correct analysis. Similar language in s.50B of the Planning and Development Act 2000 led Simons J. to that conclusion in *Heather Hill Management Company CLG v. An Bord Pleanála*.

74. On this basis, if a claim presents causes of action which form a central part of the case and which themselves come within ss.4(1)(a) or (b), it will be appropriate to make an order under the provision, subject to the right of the respondent to contend after the hearing that some parts of the claim were in fact not sustainable in law and thus that costs should be awarded against the applicant in respect of same. It is clear that s.3(3)(a) (which speaks of *'claims'* or *'counterclaims'* as opposed to *'proceedings'*) allows this to be done.

75. The second is to conduct a detailed analysis of each cause of action contained within a proceeding, and from there to determine whether each part of the claim falls within the provisions of the section – not merely in terms of being stateable, but also in the sense that they are claims of a kind within s.4(1)(a) or (b). The general costs jurisdiction of the Court as explained in the decision in *Veolia Water UK v. Fingal County Council (No.2)* [2006] IEHC 240, [2007] 2 IR 81, and the very fact that s.3 itself envisages an analysis of the separate claims in the action for the purposes of enabling costs to be awarded (s.3(3)(a)) support such an approach.

76. Given that the Court has heard no argument in respect of this issue, and noting that the decision in *Heather Hill Management Company CLG v. An Bord Pleanála* is under appeal, it would not be appropriate to address the question in this decision. This will not, in this case, produce any injustice. These claims certainly come within s.4(1)(a) for the reasons the claims based upon Article 28 and 29 do. If the other aspects of the claims are felt by the respondent to have been unstateable, they are free to apply to the trial Judge under s.3(3)(a) in respect of those claims at the conclusion of the case.

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77. It is to be noted that the appellant does not take issue with the decision of the Court in respect of the requirement to establish damage to the environment, any questions of causation arising in this case in respect of that issue, or the legal or factual basis for the view reached by the Court that the respondent had to, and did, present sufficient evidence of its financial circumstances to enable the Court to grant the relief claimed. Nor is any issue taken as to the Court's findings in respect of the motivation of the respondent

in bringing the proceedings. Thus, I do not address here any issues that may arise from these aspects of the decision of the High Court.

78. My conclusions in respect of those issues that do arise, are as follows.

79. First, there is no basis for the suggestion that s.3 of the Environment (Miscellaneous Provisions) Act 2011 does not apply to proceedings seeking relief by way of judicial review. It does. The issue in any given case is not the form the proceedings assume, but the nature of the relief claimed in those proceedings.

80. Second, s.4(1)(a) is engaged where proceedings can be properly characterised as being for the purpose of ensuring compliance with, or the enforcement of, a statutory requirement. The reference in s.4(1)(a) to a '*statutory requirement'* is free standing.

81. Third, the scope of proceedings referred to s.4(1)(a) is limited to cases in which, looking to the action as a whole, the applicant seeks to ensure compliance with or enforce into the future, an identified statutory requirement. To bring its claim within s.4(1) – where that claim is based only on the '*statutory requirement*' limb of s.4(1)(a) – the applicant must identify some action into the future which it is seeking to compel, or which it is seeking to compel should be conducted in a particular way and in accordance with a statutory requirement in the sense in which I explain that term in this judgement.

82. Fourth, in this case the respondent's concern was, at the time the proceedings were instituted, with an ongoing state of affairs. The first notice party (the respondent alleged) was collecting waste on foot of a permit that was alleged to be invalid. That invalidity (on the respondent's case) arose from a failure to comply with the requirements of a number of separate legislative provisions. If the underlying claim were well placed, it would mean that a separate statutory provision (s.34(1)) was being breached, because an activity which could only be conducted on foot of a licence, was being conducted on foot of a permit which was, in law, invalid. The question of whether there was compliance with s.34(1) required that the underlying invalidity be determined by the Court. The applicant's object was, when he issued the proceedings, to preclude the continuation of an activity which – he said – was unlawful. Accordingly, Baker J. was correct in concluding that the proceedings thus understood fell within the terms of s.4(1)(a).

83. Fifth, I can see no basis for superimposing on that statutory scheme a generally applicable requirement that an applicant for an order under s.7 establish that his case meets anything more than the basic threshold of stateability. In fact, it appears to me that a respondent or defendant to proceedings faced with an application for a protective costs order unless contending that section 3 does not apply or that it is too early to decide if it does, should either accept that the proceeding meet the required threshold, or contemporaneously apply to set aside leave or strike out the proceedings.

84. Sixth, I think it clear that the respondent's case insofar as based on Articles 28 and 29 of the 2007 Regulations meet that threshold of stateability.

85. Seventh, and finally, given that the Court has heard no argument in respect of the specific issue of whether a claim can or should be split for the purposes of analysis under s.3, and noting that the decision in *Heather Hill Management Company CLG v. An Bord Pleanála* is under appeal, that it would not be appropriate to address this issue in this decision. This will not, in this case, produce any injustice. These claims certainly come within s.4(1)(a) for the reasons the arguments as to Article 28 and 29 do. If the other aspects of the claims are felt by the respondent to have been unstateable, they are free to apply under s.3(3)(a) in respect of those claims at the conclusion of the case.

86. It follows that this appeal should be dismissed.