

**Judgment Title:** Kenny -v- An Bord Pleanála

**Neutral Citation:** [2010] IEHC 321

**High Court Record Number:** 2010 71 IA

**Date of Delivery:** 23/07/2010

**Court:** High Court

**Composition of Court:**

**Judgment by:** Cooke J.

**Status of Judgment:** Approved

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**THE HIGH COURT**

**2010 71 IA**

**IN THE MATTER OF AN INTENDED ACTION**

**BETWEEN**

**JAMES KENNY**

**PLAINTIFF**

**AND**

**AN BORD PLEANÁLA**

**DEFENDANT**

**JUDGMENT of Mr. Justice Cooke delivered the 23rd day of July, 2010.**

1. This is an *ex parte* application by the above named plaintiff for liberty to issue a plenary summons in the Central Office of the High Court in a proceeding to be brought against the above named defendant in which it is proposed to claim as the principal relief an injunction restraining the defendant and the City Sheriff (although the latter is not to be joined as a party,) from enforcing an order for

costs recovered by the defendant against the plaintiff in a proceeding between the same parties bearing the record number 2000/532 JR. The leave of the Court to issue the summons is necessary because an order of 30th March, 2006, ( Clarke J.) in a case brought by this plaintiff against the Provost, Fellows and Scholars of the University of Dublin, Trinity College ("the University") and An Bord Pleanála (Record No. 2005/3320P) included a so-called "Isaac Wunder order" which restrains the plaintiff from issuing:

"...any further proceedings against the second named defendant herein without the prior leave of this Honourable Court save in respect of making an application for leave to seek judicial review seeking to challenge on new grounds the grant of the planning permission on the basis of the fraud which he contends subject to persuading this Honourable Court that an extension of time for the making of such an application be granted."

2. So far as the Court can gather from the narrative endorsement on the proposed summons, an injunction to restrain execution of the existing order for costs in favour of the defendant is to be sought upon the basis that the applicant has made a complaint to the European Commission about the outcome of the judicial review proceeding he took against the defendant and the University in relation to a planning permission granted to the latter for student residences at Dartry, Dublin, on a property adjacent to the plaintiff's house. The plaintiff also proposes to allege that an application which he made to the High Court by way of judicial review (Record No. 2000/532 JR) was unsuccessful in obtaining leave before McKechnie J. because of fraud in that relevant information or evidence available on the planning files of the defendant was not disclosed to the Judge and would have had a decisive bearing on submissions made by the University as notice party at that leave hearing. It is also alleged that the defendant knew that the planning application for the development in question was deficient in that it failed to comply with the requirements of Council Directive 85/337/EEC of 27th June, 1985 on the assessment of the effects of certain public and private projects on the environment.

3. Subsequent to the failure of the leave application the plaintiff lodged a complaint with the European Commission which, according to correspondence produced, has been accepted for examination by the Directorate General - Environment as "Irish EU Pilot Case 622/09/ENVI".

4. The background to this context appears to be as follows. Article 10a of Directive 85/337 (as amended) provides that in national legal systems members of the public with sufficient interest must have access to a review procedure before a court or other independent body established by law to challenge the legality of development consent decisions (or in Irish terms planning permissions,) to which the Directive applies. That Article requires that such a procedure must be "fair, equitable, timely and not prohibitively expensive".

5. In 2007 the European Commission brought enforcement proceedings against Ireland alleging that the State had failed correctly or adequately to transpose that provision into national law. In its judgment of 16th July, 2009, in Case C-427/07 the Court of Justice upheld the Commission's claim that Ireland had so failed to fulfil its obligations under Directive 85/337/EEC.

6. The current state of the investigation of the plaintiff's complaint to the European Commission is given by it in a letter dated 27th April, 2010, addressed to Mr. Kenny. The Commission requested comments on a series of aspects of the complaint from the Irish authorities including: "comments on the aspect of very high costs being imposed simply in respect of the leave stage of judicial review proceedings and the compatibility of high leave related costs with Articles 3 (8) and (9) of the Aarhus Convention and Article 10a of Directive 2003/35/EC".

7. In response the Irish authorities have stated, according to the letter, that the issues raised in the plaintiff's complaint are similar to those arising in Case C-427/07 which they are taking steps to address. The authorities say that they are working to amend the Rules of the Superior Courts to ensure that costs awarded in proceedings under the Directives would not be prohibitively expensive. The Commission reports "for this reason, the Irish authorities consider it is not appropriate to deal with your pilot case at this time and request that it be closed". In response the Commission says it has requested further clarification from the Irish authorities "on the extent to which they intend to address the high costs in your case by way of follow up to the ECJ ruling mentioned above".

8. As the Court understands the history of the different proceedings, the order for costs which is sought to be resisted by the plaintiff arises out of an order made by McKechnie J. on 15th March, 2001, in favour of An Bord Pleanála. Article 10a was introduced into Directive 85/337/EEC by Directive 2003/35/EC of 26th May, 2003, Article 6 of which required the amendments to be brought into force by transposition into national law by 25th June, 2005, at the latest. It follows that even if the European Commission has reason to question the adequacy of Ireland's measures giving effect to the costs aspects of judicial review for the purposes of Article 10a, no further proceeding taken by it could have any retroactive effect upon a costs order validly obtained in 2001 more than four years before the implementation date of the amending provision. Furthermore, and in any event, no proceeding taken by the Commission against the State could have any effect upon the position of the proposed defendant as an independent agency. Even if the plaintiff could get around the fact that the obligation to ensure that costs in judicial review of planning permissions were not prohibitively expensive only became effective as against Ireland as a Member State on 25th June, 2005, the complaint made to the Commission could produce no result which could prevent the Board relying upon an order for costs validly obtained in March, 2001. Even if the order for costs had been made after 25th June, 2005, non-compliance with the Article 10a obligation could, at the very most, merely give rise to a possible claim on the part of the plaintiff against Ireland for reimbursement of some part of the excessive costs incurred. No proceeding at Union level by the Commission against Ireland could operate so as to stay or annul an order obtained by a third party in a national court let alone one obtained on a date prior to the entry into force of the legislation giving rise to the Member State's obligation.

9. A citizen has a constitutional right of access to the High Court but no entitlement to abuse that right. The purpose of and justification for the jurisdiction to impose an "Isaac Wunder" order is two-fold. It safeguards the integrity of that constitutional right by preventing its abuse by the repeated introduction of unfounded or vexatious claims against the same party; and secondly, it protects a defendant from being unjustifiably exposed to

unnecessary costs by having to meet unfounded claims brought by the same litigant. It follows that the Court ought not to grant leave by way of exception to such an order unless it is satisfied that the claim proposed to be served is not a vexatious repetition of the same grievance already disposed of and that it is not a claim which is manifestly unfounded or unstateable.

10. In the judgment of the Court the reliefs proposed to be claimed in the draft plenary summons are unfounded and unstateable. The complaint made to the European Commission is incapable of producing a result which has any bearing upon the validity of a costs order obtained in 2001. The reliefs proposed to be claimed in the endorsement on the summons are unrelated to the allegation of fraud in respect of the judicial review proceeding and, as is clear from the terms of the "Isaac Wunder" element in the order of 30th March, 2006, any such claim is outside the restriction imposed by that order.

11. For these reasons the Court refuses the application.