[2025] IEHC 19

THE HIGH COURT
PLANNING & ENVIRONMENT

[H.JR.2022.0000174]

IN THE MATTER OF SECTION 50 OF THE PLANNING AND DEVELOPMENT ACT 2000 (AS AMENDED)

BETWEEN

HUGH RAFFERTY

APPLICANT

AND

AN BORD PLEANÁLA, MINISTER FOR HOUSING HERITAGE AND LOCAL GOVERNMENT, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

URBAN LIFE (BMD) LIMITED AND DUBLIN CITY COUNCIL

NOTICE PARTIES

JUDGMENT of Humphreys J. delivered on Monday the 20th day of January 2025

1. The board conceded this judicial review, but the developer (the first named notice party) then sought time to consider its position. When, after five months, the developer eventually decided not to contest the matter either, it then denied liability for the costs of the various mention dates during that period. The question here, seven months on from what could have been the final order, is the plausibility of such an approach.

Geographical context

2. The matter relates to a proposed strategic housing development of 99 build-to-rent apartment units at Beaumont Road, Beaumont Avenue, Grace Park Road and Ellenfield Road, Beaumont, Dublin

Procedural history

3. A motion to admit the proceedings to the List, post-leave, was granted on 24th October 2022.

4. On 24th October 2022, following an application to amend the statement of grounds, the matter was adjourned for two weeks with the applicant to circulate amended statement of grounds and a verifying affidavit. The possibility of modularisation was raised on the same date.

5. On 7th November 2022, the board agreed a pragmatic approach to costs protection and it was agreed to modularise the matter against the State. The matter was adjourned for a week to file the amended statement of grounds.

6. On 14th November 2022, a further two weeks were given for the amended statement of grounds.

7. The matter was then listed on 5th December 2022 for directions, with parties to agree costs protection and directions in the meantime.

8. Subsequently, the amendment issue was parked for the hearing.

9. On 2nd October 2023, the matter was adjourned to 4th December 2023 to allow time for the first named notice party to file its opposition papers.

10. The first named notice party had not in fact filed its opposition papers by 4th December 2023, and revised directions were agreed on that date.

11. The next List to Fix Dates was on 12th February 2024, but nobody applied for a date.

12. On 29th April 2024, the matter was adjourned to the June 2024 List to Fix Dates (24th June 2024).

13. On 17th June 2024, the board conceded and agreed to pay costs to the date of their letter. This stated:

> "DATE: 17 June 2024
> OUR REF: JOME/BOR007/0040
> Re: Rafferty v An Bord Pleanala, Minister for Housing, Heritage and Local Government, Ireland and the Attorney General and Urban Life (BMD) Limited and Dublin City Council
> Record No: [2022/174 JR]
> Next date: 24 June LTFD
> Dear Colleagues,
> We refer to the above matter.
> The Board has considered the Applicant's Statement of Grounds filed on 3 March 2022. Having done so, the Board will not oppose the Applicant's claim for certiorari quashing the Board's decision dated 11 January 2022 authorising a proposed strategic housing development of 99 build-to-rent apartment units at Beaumont Road, Beaumont Avenue,

Grace Park Road and Ellenfield Road, Beaumont, Dublin (ABP 310709-21), in the particular circumstances of this case, having regard to the pleas advanced in Core Ground 3.

We note that we previously expressed our consent to an adjournment to the next List to Fix Dates on 24 June. We propose the below final orders can be made on that date, subject to the parties and to the Court:

1. An order of certiorari quashing decision ABP 310709-21;

2. An order for the Applicant's costs as against the An Bord Pleanála up to and including the date of this letter to be adjudicated in default of agreement; and

3. An order remitting the matter back to An Bord Pleanála to be determined in accordance with law.

If the first named notice party/developer is not seeking remittal, then the order regarding remittal can be deleted. We await hearing from you in this regard."

14. On 24th June 2024, the matter was adjourned to 8th July 2024.

15. In the meantime, on 5th July 2024, the parties were notified that the first named notice party intended to instruct new solicitors.

16. On 8th July 2024, the matter was adjourned to 29th July 2024.

17. On 29th July 2024, the matter was adjourned to 9th September 2024.

18. On 6th September 2024, the first named notice party's new solicitors had been instructed and the matter was adjourned on consent to 21st October 2024.

19. On 17th October 2024, the first named notice party sought more time to consult with counsel and to confirm instructions.

20. On 21st October 2024, the first named notice party sought four weeks to consider its position and the matter was adjourned to a List to Fix Dates intended at that time to be held in January 2025.

21. On 18th November 2024, the first named notice party confirmed that it was not defending the proceedings.

22. On 22nd November 2024, the applicant's solicitors circulated a proposed order in which it was suggested that the board pay costs up to the date of the order:

"DRAFT CONSENT ORDER

1. An Order of certiorari quashing the the [*sic*] decision of the First Respondent, An Bord Pleanála (the Board), dated 11 January 2022, file reference 310709, authorising a proposed strategic housing development of 99 build-to-rent apartment units at Beaumont Road, Beaumont Avenue, Grace Park Road and Ellenfield Road, Beaumont, Dublin.

2. An Order striking out the within proceedings against the Second, Third and Fourth Respondents ('the State Respondents'), without prejudice to the entitlement of the Applicant to ventilate the same points against the State Respondents in future proceedings.

3. An Order that the matter be remitted to the First Respondent for further consideration and determination in accordance with law.

4. An Order that the First Respondent do pay the Applicant's costs, including reserved costs, incurred to the date of this Order, such costs to be adjudicated in default of agreement.

5. The Court certifies for two counsel in respect of the Applicant's costs in the within proceedings for the purposes of legal costs adjudication."

23. On 25th November 2024, the matter was listed for final orders and it was understood that if an agreed form of words was reached the parties could send that in by email to the court.

24. On 28th November 2024, the board indicated that it did not agree to pay costs post-concession other than those involved with drawing up the final order and making it available, and preparing the bill of costs.

25. On 28th November 2024, the applicant asked the first named notice party if it agreed to pay post-concession costs.

26. On 10th December 2024, the first named notice party indicated that it did not so agree.

27. A hearing on the costs issue was listed on 16th December 2024 (the final Monday List of the calendar year) but not reached due to pressure of business on that date. It was adjourned to 13th January 2025 and heard on that date.

28. Following that hearing I announced the order and said that reasons would follow, and am now providing those.

Relief sought

29. The reliefs sought in the statement of grounds are as follows (relevant ones in bold):

"D. Reliefs

The Applicant seeks the following Orders:

1. An Order of Certiorari pursuant to Order 84 of the Rules of the Superior Courts 1986 as amended and Section 50 of the Planning and Development Act 2000 as amended quashing the decision of the First Respondent, An Bord Pleanála (the

Board), dated 11 January 2022, file reference 310709, authorising a proposed strategic housing development of 99 build-to-rent apartment units at Beaumont Road, Beaumont Avenue, Grace Park Road and Ellenfield Road, Beaumont, Dublin.

2. Such declaration(s) of the legal rights and/or legal position of the applicant and (if and insofar as legally permissible and appropriate) persons similarly situated and/or of the legal duties and/or legal position of the Respondents as the court considers appropriate.

2A A declaration that Article 109 of the Planning and Development Regulations 2001 as amended is invalid, ultra vires, and contrary to Article 4(3) of Council Directive 2011/92 on environmental impact assessment as amended, and should be set aside.

3. A declaration that the Urban Development and Building Heights Guidelines for Planning Authorities 2018 (and / or 2020) are invalid, ultra vires and / or unconstitutional and should be set aside.

4. A stay pursuant to Order 84 Rule 20(8)(b) of the Rules of the Superior Courts on the operation of the above Board Decision of 11 January 2022, file reference 310709, pending conclusion of the present proceedings.

5. A Declaratory Order pursuant to Section 7 of the Environment (Miscellaneous Provisions) Act 2011 as amended, Order 99 of the Rules of the Superior Courts as amended, the inherent jurisdiction of the Court, Article 47 of the Charter on Fundamental Rights of the European Union, Articles 4(3) and 19(1) of the Treaty on European Union, and / or Article 9 of the Convention on Access to Information, Public Participation In Decision-Making and Access to Justice In Environmental Matters done at Aarhus, Denmark, on 25 June 1998 (the Aarhus Convention), confirming that Section 50B of the Planning and Development Act 2000 as amended and / or Sections 3 and 4 of the Environment (Miscellaneous Provisions) Act 2011 apply to the Grounds set out at Part E hereof.

6. A Declaratory Order pursuant to Section 7 of the Environment (Miscellaneous Provisions) Act 2011 as amended, Order 99 of the Rules of the Superior Courts as amended, and/or pursuant to the inherent jurisdiction of the Court, that, if and insofar as the Applicants may not be entitled to an Order in the terms of the preceding paragraph, or an Order to equivalent effect, the State has failed adequately to guarantee and defend the Applicants' right to bring proceedings at a cost that is not prohibitively expensive, has failed to ensure the Applicants' right to effective judicial protection, and / or has failed to ensure reasonable predictability in relation to the costs of proceedings, and has accordingly failed to comply with the requirements of Article 47 of the Charter on Fundamental Rights of the European Union, Articles 4(3) and 19(1) of the Treaty on European Union, and / or Article 9 of the Aarhus Convention.

7. A Declaratory Order pursuant to Order 84 Rule 18(2) of the rules of the Superior Courts as amended and Article 4(3) of the Treaty on European Union, that the Minister, Ireland and the Attorney General, and / or the Board, are required by law to pay to the Applicants on the conclusion of the present proceedings, the amount of any costs which the Applicants may be ordered to pay to the other Respondents or Notice Parties, or so much of such sum as may be necessary to ensure that the costs borne by the Applicants in the proceedings are not prohibitively expensive for it.

8. An order referring a question or questions of law for determination by the Court of Justice of the European Union.

9. If necessary, an extension of time to apply for leave to seek judicial review of the decision of the Board, pursuant to Section 50(8) of the 2000 Act.

10. Further or other relief.

11. **Costs**."

Core grounds

30. The core grounds are (the conceded one is core ground 3 in bold):

"(a) Core Grounds

Domestic Law Grounds

1. The impugned decision is invalid because the Board erred in law in its interpretation and application of SPPR3 and part 3.2 of the Height Guidelines when it held that the conditions of part 3.2 of the Height Guidelines and S28(1C) of the 2000 Act were satisfied and invoked its material contravention powers under S37(2)(b)(i) and (iii) of the 2000 Act.

2. The impugned decision is invalid because the Board erred in in failing to have any, or any adequate, regard to para 4.12 of the Sustainability Guidelines in relation to sustainable development, passive solar design, and reduction of energy demand, and so acted contrary to S28(1) and S143 of the 2000 Act, and materially contravened Development Plan Objective CCO12 without invoking the procedure pursuant to S37(2) of the 2000 Act.

3. The impugned decision is invalid because the Board erred in its interpretation and application of SPPR3 and para 3.2 of the Height Guidelines in

relation to transport, contrary to S28(1), S28(1C), S34(2)(ba) and S143 of the 2000 Act.

4. The impugned decision is invalid because the Board erred in failing to have any, or any adequate, regard to para 4.10 of the Sustainability Guidelines in relation to transport, contrary to S28(1) and S143 of the 2000 Act.

4A The impugned decision is invalid because the Board breached S37(2)(b)(i) of the 2000 Act and / or acted unreasonably by finding that the Proposed Development was of strategic or national importance and/or breached S34(10) of the 2000 Act by failing to give reasons for so-finding.

EU Law Grounds

5. The impugned decision is invalid because the Board, in purporting to apply the Sustainability Guidelines and the Height Guidelines in the manner set out above, failed to apply, erred in its interpretation of, or failed to give adequate reasons to explain its understanding of, the concept of sustainable development for the purposes of S34(2)(a) of the 2000 Act, or for the purposes of S34(2)(a) of the 2000 Act read in light of the Climate Neutrality Regulation, Binding Reductions Regulation and A4(3) of the Treaty on European Union, and failed to determine whether the proposed development would be sustainable.

6. The Board either erred in finding that the Proposed Development was of strategic national importance for the purposes of S37(2)(b)(i) of the 2000 Act, or erred in finding that there was no real likelihood of it having significant effects on the environment in breach of A4(3) of the EIA Directive and/or A109 of the 2001 Regulations and/or Section 171A of the 2000 Act.

6. The impugned decision is invalid because the Board contravened Articles 2(1) and 4(3) of the EIA Directive and/or A109 of the 2001 Regulations and/or S171A of the 2000 Act and / or acted unreasonably by concluding that the project need not undergo either EIA Screening or EIA in accordance with Articles 5 to 10 of the EIA Directive and/or by failing to state the main reasons for not requiring such assessments.

Validity Grounds

7. In the alternative to Ground 6 above, the impugned decision is invalid because the Board's determination that the Proposed Development did not require to be the subject of an EIA was based on A109 of the 2001 Regulations which is invalid because it fails to implement A4(3) of the EIA Directive.

8. In the alternative to Ground 5 above, the impugned decision is invalid because it is based on invalid Guidelines which exceed the powers conferred on the Minister by S28(1C) of the 2000 Act.

9. In the alternative to Ground 6 above, the impugned decision is invalid because it is based on SPPR3 of the Height Guidelines, which are adopted pursuant to Section 28(1C) of the 2000 Act, and that Section is contrary to Article 15.2.1 of the Constitution."

Section 50B and its application here

31. The relevant provisions are:

"(2) Notwithstanding anything contained in Order 99 of the Rules of the Superior Courts (S.I. No. 15 of 1986) and subject to subsections (2A), (3) and (4), in proceedings to which this section applies, each party to the proceedings (including any first named notice party) shall bear its own costs.

(2A) The costs of proceedings, or a portion of such costs, as are appropriate, may be awarded to the applicant to the extent that the applicant succeeds in obtaining relief and any of those costs shall be borne by the respondent or first named notice party, or both of them, to the extent that the actions or omissions of the respondent or first named notice party, or both of them, contributed to the applicant obtaining relief.

(3) The Court may award costs against a party in proceedings to which this section applies if the Court considers it appropriate to do so—

(a) because the Court considers that a claim or counterclaim by the party is frivolous or vexatious,

(b) because of the manner in which the party has conducted the proceedings, or

(c) where the party is in contempt of the Court."

32. This isn't a case covered by sub-s. (4).

33. There are two possible bases for an order against a notice party that tries unsuccessfully to defend proceedings:

(i) The primary issue under (2A) firstly is whose mistake caused *certiorari*. The answer in this case is both opposing parties. The developer failed to provide sufficient information which led to a situation where the board granted permission without the necessary tests being satisfied as pleaded in core ground 3. This is a viable route

for costs against a notice party if on the facts they have contributed to the problem, for example, as here, by not providing sufficient information.

(ii) The broader point is that sub-s. (2A) doesn't eliminate the general rule that a party can be ordered to pay costs if they inflict costs on other parties, due to making unnecessary and unsuccessful applications – this is reflected in (3)(b). A very narrow reading of (3)(b) would leave the court powerless to deal with stateable but time-wasting applications.

34. The board argued that if a notice party causes costs to be incurred by defending the case, then those costs are acts and omissions that contribute to an applicant obtaining relief within (2A). I think this does too much violence to the sub-section. As the first named notice party submits, "relief" in sub-s. (2A) means substantive relief. So liability for a notice party has to come under one or other of the two headings above.

35. Applying that here, the first named notice party could properly be made liable under either (i) or (ii).

36. I also need to note that the State attended in an essentially watching brief capacity but there was no application relating to the State. The case has already been modularised against the State parties so there is no basis for them to pay costs in any conceivable view.

37. I now turn specifically to the four periods of costs involved in the proceedings.

Period 1 – Costs up to and including 17th June 2024

38. The board agreed to pay costs up to and including 17th June 2024.

Period 2 – Costs 18th June 2024 to date relating to preparing final order and preparing bill of costs in relation to the board's costs

39. If a respondent or other opposing party concedes, they can't completely limit liability by putting a cut-off date for costs in a letter. It normally necessarily follows that there is at least one mention date – normally the next one – to allow the court to make the order in question.

40. The board in fact agreed that it will be liable for costs following 17th June 2024 purely insofar as they relate to drawing up the final order and informing the court of this (in reality this would normally be limited to a small amount of *inter partes* correspondence and one mention date). The board is not making an objection to an order that it should pay the costs of the applicant preparing a bill of costs in relation to the board's costs (that is something that would normally be dealt with by consent or in the adjudication process, although maybe for clarity there is something to be said for including this term in agreements). The extent that costs arise under this heading in the circumstances here (*i.e.*, which letters, which mention date, what costs exactly) can be determined by agreement or legal costs adjudication.

Period 3 – Costs 18th June 2024 prior to 16th December 2024 other than the foregoing

41. Whether under sub-s. (2A) or (3)(b), the first named notice party should in all the circumstances be held liable for the costs unnecessarily incurred as a result of it seeking time to defend the proceedings. The primary basis of such liability here is (3)(b): seeking time not only delayed the matter but imposed costs on the applicant unnecessarily. Secondly, those costs are also ultimately a consequence of the first named notice party having not put full information before the board to facilitate a valid decision, hence engaging (2A).

42. This is not salami-slicing or cheese-paring of costs that would create satellite litigation. It is dealing with a situation where there is a particular set of costs that the board can't be responsible for.

43. Furthermore, this isn't breaking any new ground. The foregoing approach is a similar order to the one I made *ex tempore* following the Supreme Court judgment in *Ballyboden Tidy Towns Group v. An Bord Pleanála* [2022] IESC 47, [2022] 11 JIC 1502 (Unreported, Supreme Court, Woulfe J., 15th November 2022).

44. Indeed the possibility of costs under (3)(b) is reciprocal – a jurisdiction to allow costs against a notice party here under that provision has the same basis as allowing set-off in favour of opposing parties of costs of an unsuccessful application made by an applicant who eventually obtains an order for some other costs.

Period 4 – Costs 16th December 2024 to 13th January 2025 relating to the costs hearing

45. It was agreed that the issue of the costs of dealing with costs could be dealt with as part of the overall decision. Those follow for similar reasons in favour of the applicant against the first named notice party. The applicant has effectively been wholly successful as against the developer. The developer did succeed in one minor subsidiary argument raised by the board, as noted above, but that is an irrelevant footnote given that the board succeeded in its two main points as to why a hesitating or objecting notice party, rather than a surrendering respondent, should be responsible for post-concession costs.

Summary

46. There isn't a lot to summarise but in essence:

(i) Section 50B(2A) of the 2000 Act applies not just to respondents who err in making decisions but also to notice parties who cause or contribute to that situation, for example by providing insufficient or incorrect material to the decision-maker;

(ii) Section 50B(3)(b) of the 2000 Act gives the court a jurisdiction to award costs against a party who makes an unsuccessful application or otherwise causes other parties to incur costs unnecessarily, even if the party concerned has not acted frivolously or vexatiously, abused the process, or acted in contempt of court. That applies equally to opposing parties that act in a way that adds to the costs of an applicant (being an applicant that obtains relief ultimately), as it would apply to costs of failed or unnecessary applications or steps by an otherwise winning applicant (thus allowing the court to award such costs by way of set off against the applicant's substantive costs, but (for the avoidance of doubt) not set-off to create a prohibitively expensive negative balance).

(iii) The notice party here is liable under either or both headings – it contributed to the relief ultimately granted by furnishing inadequate information in the application process, and delaying the finalisation of the matter imposed unnecessary costs on the applicant.

Order

47. For the foregoing reasons, the order made on 13th January 2025 was that:

(i) there be an order of *certiorari* quashing the decision of the first respondent, An Bord Pleanála dated 11th January 2022, file reference 310709, authorising a proposed strategic housing development of 99 build-to-rent apartment units at Beaumont Road, Beaumont Avenue, Grace Park Road And Ellenfield Road, Beaumont, Dublin;

(ii) there be an order striking out the proceedings against the second, third and fourth respondents without prejudice to the entitlement of the applicant to ventilate the same points against those respondents in future proceedings;

(iii) there be an order that the matter be remitted to the first respondent for further consideration and determination in accordance with law;

(iv) there be an order that the first respondent pay the following applicant's costs, including reserved costs, such costs to be adjudicated in default of agreement:

  (a) costs up to and including 17th June 2024; and

  (b) costs from 18th June 2024 to date relating to preparing the final order and preparing the bill of costs in relation to the board's costs;

(v) there be an order that the first named notice party pay the following applicant's costs, including reserved costs, such costs to be adjudicated in default of agreement:

  (a) costs from 18th June 2024 prior to 16th December 2024 other than the foregoing; and

  (b) costs from 16th December 2024 to 13th January 2025 relating to the costs hearing; and

(vi) there be a certificate for two counsel in respect of the applicant's costs in the proceedings for the purposes of legal costs adjudication.