



THE COURT OF APPEAL

Court of Appeal Record No. 2019/426
Neutral Citation Number [2021] IECA 314

Costello J.
Donnelly J.
Collins J.

BETWEEN/

SPENCER PLACE DEVELOPMENT COMPANY LIMITED

APPLICANT/APELLANT

- AND -

DUBLIN CITY COUNCIL

RESPONDENT

COSTS JUDGMENT OF THE COURT delivered by Ms. Justice Costello on the 25th day of November 2021

1. On 30 May 2019, the High Court (Simons J.) gave judgment dismissing the application for judicial review ([2019] IEHC 384). The respondent ("the City Council") applied for its costs and the applicant ("the developer") resisted the application on the basis that the provisions of s. 50B of the Planning and Development Act 2000 ("PDA 2000") applied and there should be no order as to costs, notwithstanding the fact that the developer had been unsuccessful in its application for judicial review.
2. In his judgment, delivered on 6 September 2019, Simons J. held that the special costs rules under s. 50B do not apply to the proceedings, that the proceedings were subject to the conventional costs rules under O. 99 of the Rules of the Superior Courts, and that there was no special reason why the developer, as the unsuccessful party in the proceedings, should not be liable to pay the City Council's costs. Accordingly, he ordered the developer to pay the costs of the City Council in respect of, and incidental to, the proceedings.
3. The developer appealed the substantive judgment and the costs judgment. This court heard the substantive appeal and delivered judgment on 2 October 2020 dismissing the appeal in separate judgments given by Collins J. and myself ([2020] IECA 268). The

court received further written and oral submissions in light of the decision on the substantive appeal and this is my judgment on the appeal in respect of the costs of the High Court.

Background

4. The developer is the lessee of lands at Spencer Place, Spencer Dock, Dublin 1. The lands are located in the North Lotts and Grand Canal Strategic Development Zone, as designated pursuant to s. 166 of the PDA 2000. The City Council is designated as the development agency for the North Lotts and Grand Canal and Strategic Development Zone. The developer's lands at Spencer Place had the benefit of planning permission reference number DSDZ2661/17 as amended by DSDZ4184/18 for a mixed use development.
5. The Minister for Housing, Planning and Local Government ("the Minister") issued Urban Development and Building Height Guidelines for Planning Authorities in December 2018 under s. 28 of the PDA 2000 following a process of public consultation ("the Guidelines"). Section 28(1) requires planning authorities to have regard to ministerial guidelines in the performance of their functions under the Act, including the determination of planning applications. Section 28(1C) provides that ministerial guidelines may contain specific planning policy requirements with which planning authorities, regional assemblies and An Bord Pleanála *shall comply* in the performance of their functions.
6. The overall policy of the Guidelines promulgated by the Minister in December 2018 was to increase building height in appropriate urban locations. The developer considered that the Guidelines applied to strategic development zone planning schemes in the same manner as to development plans and local area plans. Officials of the City Council expressed a contrary view, namely that the Guidelines did not affect extant planning schemes and that the implementation of Specific Planning Policy Requirement 3(A) (SPPR3(A)) to sites within the SDZ was to be achieved by way of a review of the planning scheme, as required under SPPR3(B).
7. The developer lodged two applications for planning permission with the City Council seeking to increase the height in respect of the development for which it already had planning permission.
8. Separately, the City Planner, Mr. John O'Hara, prepared a Briefing Note on the City Development Plan and Height Guidelines for the Corporate Policy Group of the council at its request. The Briefing Note was presented to the elected members of the City Council at a meeting on 4 March 2019 where the council "noted" the Briefing Note.
9. The dispute between the developer and the City Council centred on the interaction between the Guidelines and the Statutory Planning Scheme adopted in respect of this Strategic Development Zone. In its statement required to ground the application for judicial review the developer sought the following relief:-

- "1. *A declaration that the legal interpretation provided in the Briefing Note of the respondent, as stated in a document entitled "Briefing Note on City Development Plan and Height Guidelines" prepared by the City Planner, dated 31 January 2019, and presented to the elected members at a Council meeting on 4 March 2019, that Part (A) of Specific Planning Policy Requirement 3 ("SPPR3(A)") under the "Urban Development and Building Heights – Guidelines for Planning Authorities" (December 2018) (the "Building Height Guidelines") do not apply to an approved Strategic Development Zone (SDZ) planning scheme is ultra vires and/or incorrect as a matter of law.*
2. *A declaration that SPPR3(A) has legal effect from the date of the publication of the Building Height Guidelines (December 2018) and that the respondent is accordingly obliged pursuant to s. 28(1C) of the Planning and Development Act 2000, as amended ("the Act of 2000"), to apply SPPR3(A) in the performance of its functions and, in particular, the determination of planning applications for development within the area of any SDZ planning scheme, including the North Lotts and Grand Canal Planning Scheme 2014, as the date of publication of the Building Height Guidelines.*
3. *A declaration that the respondent is obliged to apply and/or comply with the Building Height Guidelines and in particular, SPPR3(A) thereof, in determining planning applications providing for building heights in excess of maximum height standards under the North Lotts and Grand Canal Planning Scheme 2014, prior to undertaking and/or completing any review and/or amendment of the said planning scheme pursuant to SPPR3(B) of the Building Height Guidelines."*
10. The gravamen of the developer's complaint was that the City Council had committed itself to an allegedly erroneous interpretation of the Guidelines and that this error would adversely affect the outcome of the two planning applications. As the trial judge held, the thrust of the proceedings was directed to the future outcome of the two pending planning applications. But for the existence of the planning applications, the developer might not have the requisite "*sufficient interest*" to maintain the proceedings.
11. The developer at all times sought to rely upon the Guidelines. It did not challenge their adoption or their substantive provisions. Specifically, it did not allege that there was any breach of any of the requirements of the Strategic Environmental Assessment Directive. It has not joined the Minister to the proceedings. The legality of the decision to adopt the Guidelines was not in issue in the proceedings.
12. The Briefing Note was not issued pursuant to any provision of the PDA 2000 (a point emphasised by the developer as the trial judge noted at para. 11 of his judgment). There was no challenge to the note and the developer emphasised that it was not seeking *certiorari* of the Briefing Note or challenging the decision to issue the Briefing Note. It was seeking a declaration that the interpretation it advanced of the Guidelines was the correct one and specifically that the Guidelines applied to applications for planning

permission within the area of SDZ planning schemes, in this case, the North Lotts and Grand Canal Planning Scheme 2014.

13. No issue of EU law was raised in the Statement of Grounds; the SEA Directive is not referred to in the Statement of Grounds and no relief pursuant to ss. 50 or 50B of PDA 2000 was sought by the developer.
14. During the hearing, the trial judge raised the issue whether, in interpreting the Guidelines, it would be legitimate to have regard to the outcome of the Strategic Environmental Assessment (SEA) carried out as part of the process leading up to the issuing of the Guidelines in December 2018, pursuant to the SEA Directive. The obligation to carry out SEA arises as a matter of EU law under the SEA Directive on the assessment of the effects of certain plans and programmes on the environment. The requirement is to subject planning guidelines to SEA. This has been transposed into national law by an amendment to s. 28 of the PDA 2000 effected by the Planning and Development (Amendment) Act 2018. It was not contested that the draft guidelines had been subject to strategic environmental assessment pursuant to the SEA Directive or that the Guidelines were adopted pursuant to s. 28 of the PDA 2000. The central issue, from the perspective of the costs of proceedings, was the implications, if any, this had for the application of the special costs rules set out in s. 50B of the PDA 2000.
15. The key provisions of s. 50B as of September 2019 are as follows:-

"50B(1) This section applies to proceedings of the following kinds:

(a) proceedings in the High Court by way of judicial review, or of seeking leave to apply for judicial review, of -

- (i) any decision or purported decision made or purportedly made,*
 - (ii) any action taken or purportedly taken,*
 - (iii) any failure to take any action,*
- pursuant to a statutory provision that gives effect to -*

...

(II) Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment, or

...

(2) Notwithstanding anything contained in Order 99 of the Rules of the Superior Courts (S.I. Number 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 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 notice party, or both of them, to the extent that the actions or omissions of the respondent or notice party, or both of them, contributed to the applicant obtaining relief."

16. As the trial judge held, the normal rule under O. 99 of the Rules of the Superior Courts is thereby disapplied. Instead, the default position is that each party bears its own costs, though an applicant who has been successful in the proceedings may be awarded all or part of their costs against either the respondent or the notice party or both of them.
17. In the High Court, the developer argued that the making of the Guidelines under s. 28 is subject to SEA assessment. Section 28 is a statutory provision that gives effect to the SEA Directive within the meaning of s. 50B. The decision under s. 28 to adopt the Guidelines is, according to the developer, therefore a "*decision*" within the meaning of s. 50B. It is permissible to seek declaratory relief by way of judicial review. The developer sought declaratory relief concerning the interpretation of the Guidelines in these proceedings by way of judicial review. In *Heather Hill Management Company CLG v. An Bord Pleanála* [2019] IEHC 186, the High Court held that whether or not s. 50B applied was to be determined by reference to the proceedings and not to the grounds of relief. If the proceedings sought judicial review of a decision or action made or taken pursuant to a statutory provision that gives effect to one of the four specified directives then, regardless of the grounds of relief upon which judicial review was sought, the special costs rules provided in s. 50B applied. The developer argued that, applying this principle, it was entitled to the benefit of the special costs rules in s. 50B and therefore no order as to costs should be made in the proceedings.
18. The developer also argued that the interpretation of s. 50B should be informed by the provisions of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ("the Aarhus Convention") in support of its interpretation of s. 50B of the PDA 2000. As this argument was abandoned on appeal, it is not necessary to consider it further in this judgment. The issues raised may be determined in a case at a future time where they potentially could influence the outcome of the application for costs.

The decision of the High Court

19. The High Court held that it was necessary to identify the "*statutory provision*" pursuant to which the decision or action impugned in the proceedings was made or taken. The Briefing Note was not itself a measure taken pursuant to any "provision" of the PDA 2000 and it was not a "*decision*" or "*action*" for the purposes of ss. 50 and 50A. He summarised the developer's submissions in para. 35:-

"35. For the purposes of the costs application, the Applicant now adopts a more nuanced approach. The Applicant puts forward two related contentions as follows.

- (i) The proceedings concerned the correct interpretation of the building height guidelines. The making of statutory guidelines under section 28 of the PDA 2000 is now – as a result of amendments introduced under the Planning and*

Development (Amendment) Act 2018 – subject to assessment for the purposes of the SEA Directive. The SEA Directive is one of the four EU Directives enumerated under section 50B. On this basis, it is contended that section 28 represents a "statutory provision" which gives effect to the SEA Directive and thus the special costs rules under section 50B are triggered.

(ii) The Applicant seeks to characterise the case as one which had been concerned in substance with a "threatened" contravention of section 28(1C) of the PDA 2000. That subsection provides that planning authorities shall, in the performance of their functions, comply with specific planning policy requirements. The argument runs to the effect that were Dublin City Council to fail to interpret the building height guidelines correctly when adjudicating on the two planning applications pending before it, then this would have contravened section 28(1C). On this argument, the proceedings fall within the scope of section 50B as interpreted in the light of article 9(3) of the Aarhus Convention. (See, in particular, paragraphs 26 and 32 of the supplemental written legal submissions)."

20. The trial judge rejected the first argument on the grounds that it is a prerequisite to the triggering of s. 50B that the judicial review proceedings should seek to challenge a "decision" or "action" made or taken pursuant to a statutory provision which gives effect to one or other of the four enumerated EU Directives. He held it was not sufficient that proceedings concern the "interpretation" of a statutory provision which gives effect to one of the four EU Directives, but that there must be an identified "decision" or "action".
21. As regards the second argument, he held that the fact that the judicial review proceedings had been brought in anticipation of a decision being reached in contravention of s. 28(1C) precludes any reliance on the special costs rules. He said the express language of s. 50B requires that it must be possible to identify a decision, action or omission which has been made or taken prior to the institution of the judicial review proceedings. Therefore, in its ordinary and natural meaning, s. 50B does not apply to proceedings which merely allege an apprehended contravention of s. 28(1C). He held that if an applicant wishes to avail of s. 50B costs protection, they must await an actually "decision" or "action".
22. For these reasons, he held that s. 50B did not apply to the proceedings and he applied the provisions of O. 99 of the Rules of the Superior Courts and awarded the City Council its costs of the proceedings.

The appeal

23. The developer argued that the trial judge erred in concluding that s. 50B is only triggered where the judicial review proceedings seek to challenge a decision or action made or taken pursuant to a statutory provision which gives effect to one or more of the four Directives listed in s. 50B. It argued that s. 50B is also triggered where declaratory relief is sought by way of judicial review. It had sought declaratory relief in relation to the correct legal interpretation to be applied to ministerial guidelines issued under s. 28 of the

PDA 2000, which is a statutory provision giving effect to the provisions of the SEA Directive which, in turn, is one of the four Directives listed in s. 50B. It argued that the trial judge failed to have regard to the fact that the Guidelines comprised a decision which was made pursuant to a statutory provision giving effect to one of the four directives referred to in s. 50B and, accordingly, the proceedings came within the scope of s. 50B. It also argued that the High Court erred in determining that the proceedings were brought on a *quia timet* basis. The proceedings did not seek *quia timet* relief as the declarations sought by way of judicial review concerned the interpretation of the Guidelines which had already been issued pursuant to s. 28 of the PDA 2000.

Discussion

24. The court has recently given judgment in the appeal in the case of *Heather Hill Management Company CLG v. An Bord Pleanála* [2021] IECA 259. The decision of the High Court, upon which the developer relied in this case, was reversed and I held that in enacting s. 50B the Oireachtas intended to give effect to the State's obligations under the four Directives listed in s. 50B and did not intend to create a new, wider protective costs regime for judicial review proceedings in planning and development matters.
25. Whether an unsuccessful applicant is to benefit from the protective costs provisions of s. 50B is to be determined by reference to the grounds upon which the applicant sought relief and the special costs rules do not extend to conventional public law grounds of challenge. It follows that simply because a decision or act was made or taken pursuant to a statutory provision which gives effect to one or more of the specified directives is not itself sufficient to attract the provisions of s. 50B. It is necessary to consider the grounds of challenge.
26. The statement of grounds for leave to seek judicial review does not contain a single reference to EU law or the four directives listed in s. 50B. There is no plea for a protective costs order ("PCO") or any reference to s. 50B in the reliefs sought, though there is a standard plea for the costs of the proceedings. By reference to the grounds upon which judicial review was sought, there is no basis for applying a PCO to any portion of the proceedings, still less the entire proceedings.
27. Aside altogether from this fundamental difficulty, there are further reasons to reject this appeal. Section 50B(1)(a) applies to proceedings by way of judicial review of any decision, purported decision, action or failure to take action pursuant to a statutory provision giving effect to one or more of the enumerated directives. It does not apply to judicial review of matters outside this scope. The proceedings must therefore include an application for judicial review of a decision, act or omission if they are to come within the scope of s. 50B. In this case, no such relief is sought. The fact that it is permissible under the Rules of the Superior Courts to seek declaratory relief by way of judicial review does not mean that proceedings which seek only declaratory relief come within the scope of s. 50B.
28. There must be a decision and there must be a challenge to the legality of the decision itself or the process leading to the decision. Judicial review which seeks a declaration in

isolation, divorced from a challenge to a decision will not benefit from the provisions of s. 50B. As the High Court pointed out, the developer had to establish that it had "*sufficient interest*" to bring the proceedings in the first place and it could only do so by reference to the Briefing Note and the two pending applications for planning permission. But, it sought no relief in respect of the Briefing Note and, as I held in my judgment in the substantive appeal, the proceedings were premature insofar as they related to the apprehended decision to be made in respect of the two applications for planning permission. While it is possible to seek declaratory relief by way of judicial review, it does not follow that because proceedings are brought by way of judicial review seeking declaratory relief that s. 50B applies.

29. The Briefing Note was not "*a decision*" taken pursuant to any statutory provision. The decision to adopt the Guidelines was taken pursuant to s. 28 of the PDA 2000, but that decision was not challenged. Far from challenging the Guidelines, or the decision to adopt them, the developer brought these proceedings to give effect to them (or, more correctly, its interpretation of them). The fact that the Guidelines were subject to SEA prior to the decision to adopt them does not mean that subsequent proceedings concerning the possible *application* or *interpretation* of the Guidelines thereby becomes judicial review of a decision taken *pursuant to a provision implementing the SEA Directive* within the meaning of s. 50B.
30. The interpretation advanced by the developer is far wider than the special costs rules mandated by EU law or the Aarhus Convention. It is accepted that this was so. The developer says that the breadth of the protection flows from the terms of s. 50B. Every single decision that is subject to SEA, EIA or AA assessment, including screening for AA, must come within the provisions of s. 50B even if there is no challenge to the validity of any of the assessments, or indeed if none of the grounds of challenge invoke issues of EU, or indeed environmental, law at all.
31. The trial judge noted that the interpretation and application of s. 50B "*has proved controversial*" and "*has given rise to a significant number of High Court judgments, not all of which are consistent with each other*". In *Heather Hill*, he decided that the qualifying criteria for costs protection under s. 50B are directed to the type of decision or action. He acknowledged that an alternative analysis of s. 50B held that the special costs rules only applied to those grounds of challenge which allege an infringement of the provisions of one or other of the four EU Directives enumerated under s. 50B. On this analysis, the costs have been apportioned between the different grounds of challenge, with some grounds attracting cost protections but others subject to conventional costs rules under O. 99. At para. 25, he said:-

"Were this alternative analysis to be applied to the present case, then the [developer] would undoubtedly be disqualified from benefitting from costs protection."

32. The trial judge stated that neither party before him strenuously argued that *Heather Hill* had been wrongly decided and, while he noted that his decision was under appeal, he

indicated that he proposed to proceed on the "*working assumption*" that it represented a correct statement of the law. His decision on the costs of the current case proceeded on the basis that, in order for the developer to establish a defence to the making of an order for costs under s. 50B, the decision under challenge must be a decision or purported decision taken pursuant to a provision giving effect to, in this case, the SEA Directive. The trial judge concluded that the decision was not a decision taken pursuant to any statutory provision and thus not a decision or purported decision within the scope of s. 50B. Likewise, there was no challenge to the validity of the SEA conducted prior to the adoption of the ministerial guidelines.

33. When this appeal was heard, judgment was pending in the appeal in *Heather Hill*. Judgment has since been delivered in that appeal and the trial judge's analysis of s. 50B has been rejected. In giving judgment on this appeal, we must have regard to that decision. In this case, the trial judge found that relief was not sought by the developer on any ground concerning the validity of the SEA assessment and therefore no part of these proceedings come within the scope of s. 50B. I agree with this aspect of his analysis. Applying my decision in *Heather Hill*, I conclude that there is no ground upon which relief was sought which could attract the special costs rules in s. 50B which therefore does not apply to any part of the proceedings.
34. That being so, the question of the costs of the proceedings falls to be determined by reference to O. 99 of the Rules of the Superior Courts and s. 169 of the Legal Services Regulation Act 2015. The trial judge exercised his discretion under those provisions and there has been no challenge to his exercise of his discretion in applying the usual rule that costs follow the event.
35. Accordingly, for all of these reasons I would reject the appeal and affirm the order of the High Court awarding the respondents the costs incurred in the High Court.
36. My provisional view is that the appellant, having failed in its appeal regarding the costs of the proceedings, is liable to pay the costs of the appeal, to be adjudicated in default of agreement. If the appellant wishes to contend for a different order as to costs it should contact the office of the Court of Appeal within 14 days to seek to have the matter listed for submissions before the court. If the appellant does not succeed in varying the proposed order it may be liable for the costs of such further hearing.
37. Donnelly and Collins JJ. have read this judgment in advance and indicated their agreement with it.