THE HIGH COURT
JUDICIAL REVIEW

[2022] IEHC 136
[2020 No. 693 JR]

BETWEEN

JOHN CONWAY AND LOUTH ENVIRONMENTAL GROUP

APPLICANTS

AND

AN BORD PLEANÁLA

RESPONDENT

AND

CREKAV TRADING GP LIMITED

NOTICE PARTY

JUDGMENT of Humphreys J. delivered on Friday the 25th day of March, 2022

1. In *Clonres CLG v. An Bord Pleanála (No. 1)* [2018] IEHC 473, [2018] 7 JIC 3130 (Unreported, High Court, 31st July 2018), Barniville J. granted *certiorari* of a permission granted by the board for a housing development on the lands to which the proceedings relate. Following remittal, refusal and a further judicial review by the developer (*Crekav Trading GP Ltd. v. An Bord Pleanál*a [2020] IEHC 400, [2020] 7 JIC 3108 (Unreported, High Court, Barniville J., 31st July, 2020)), a fresh application was made.

2. In *Clonres CLG v. An Bord Pleanála (No. 2)* [2021] IEHC 303, [2021] 5 JIC 706 (Unreported, High Court, 7th May, 2021), I quashed a grant of permission by the board on foot of that further application.

3. In *Clonres CLG v. An Bord Pleanála (No. 3*) [2022] IEHC 42, [2022] 2 JIC 0404 (Unreported, High Court, 4th February, 2022), I refused leave to appeal.

4. An issue has now arisen as to costs. The most recent permission was challenged in three separate cases: *Clonres CLG v. An Bord Pleanála* [2020 No. 725 JR], *Conway v. An Bord Pleanála* [2020 No. 693 JR] and *Sweetman v. An Bord Pleanála* [2020 No. 729 JR].

5. In Clonres, the costs issue was resolved with an order for costs against the board. In Sweetman, a final order was made by consent in agreed terms. But in Conway, a costs issue arose because, while the board was prepared to pay all the costs, the applicants wanted an order for costs against both the board and the notice party developer.

6. Section 50B(2A) of the Planning and Development Act 2000 provides that "[t]he 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."

7. At an early stage of proceedings the parties agreed that the section would be taken to apply and I will act as if that were the case, although in fact it clearly does not apply to the points on which the case was decided because those were domestic law points: see *Clonres (No. 2)* at para. 110.

Section 50B(2A) is not mechanistic

8. Even working on the flawed assumption that s.50B(2A) applies here, it would be an unduly restrictive interpretation to regard it as requiring a mechanistic mandatory calculation of the exact extent to which both the respondent and notice party contributed to the applicants obtaining relief and mandating an apportionment accordingly in every case.

9. The apportionment element of sub-s. (2A) is primarily designed for the benefit of the board rather than the applicant. In ordinary course, a public sector body that makes a decision that is later quashed would be the first port of call for costs, so sub-s. (2A) allows the board in effect to off-load some of those costs to the developer.

10. The subsection does not apply unless the applicant wins the case and gets relief, so they will be getting their costs either way and indeed generally will be in a better position if they obtain an order for costs against a public body than against the notice party developer (who is normally, although not always, a private sector entity).

11. Thus it seems to me that it's primarily up to the board in the first instance to seek an apportionment of costs, which they have not done here. I do not read sub-s. (2A) as mandating the court to force such an apportionment as between the board and the notice party in all cases, especially if those parties do not want that to happen. That is not to say that the court could not do that if circumstances so warrant, but it does not seem to me that there is any automatically inflexible or invariable requirement to do so.

The argument that the error stemmed from the notice party's documentation

12. The applicants contend that the notice party should pay costs or part of the costs because the error stemmed from inadequate documentation submitted.

13. However, the principle is that inadequate documentation by a developer or any applicant in an administrative process is not *in itself* a ground for *certiorari* unless the document is an indispensable one like an application form: see *Atlantic Diamond v. An Bord Pleanála* [2021] IEHC 322, [2021] 5 JIC 1403 (Unreported, High Court, 14th May, 2021).

14. Generally, if there are defects in a developer's documentation, the board or the decision-maker should refuse the application or require further information if that is a lawful option. It is the failure *by the decision-maker* to do that that gives rise to a ground for *certiorari,* not the defects in the documentation itself. Applicants seem to frequently misunderstand this by pleading shortcomings by the developer as grounds for *certiorari* – which they generally aren't. It's the grant of permission *by the decision-maker* in erroneous reliance on flawed material or a failure to rectify such inadequacies that creates a pleadable ground. So I do not think that any defects in the developer's material are in and of themselves an automatic ground for a costs order.

Whether the notice party's participation in the proceedings was such that an order for costs should be made

15. The applicants also rely on the notice party having defended the proceedings. That *did* prolong the case, but that is significantly diluted by the fact that both Conway and Clonres

were heard together, and indeed by the fact that in Clonres no order for costs was sought against the developer.

16. But even if the impact of the notice party's contribution was not so diluted, the court is not obliged to make an order for costs against a notice party in such circumstances. There may be circumstances where that is appropriate, and failure to leave open the option of an apportioned costs order against a developer would create a perverse incentive for developers to have a free run in intervening, prolonging the hearing, and raising new points needing decision, thereby consuming not just hearing time but additional judicial cognitive resources and writing time. So the prospect of apportionment must remain on the table as a possibility. And even accepting the point that as a losing party it is up to the notice party here to show why costs should not follow the event against it, I don't see any pressing need for such an order here.

17. That is reinforced by the fact that it is not clear to me that there was any substantial increase in the length of the hearing as a result of the notice party's participation in the Conway case above and beyond the increase caused by its participation in the Clonres case, in circumstances where both were heard together. Nor did the developer raise a vast suite of unique points that went far beyond what the board submitted. Where I did previously award costs against a developer (*Dublin City Council v. An Bord Pleanála (No. 2)* [2021] IEHC 34, [2021] 1 JIC 2801 (Unreported, High Court, 28th January, 2021), currently under appeal), that seems to have to some extent taken into account the amount of time thereby consumed (see para. 8(iii)). That wouldn't necessarily feature in every case and I don't think it features to the same extent in this case for the reasons outlined. In addition, further dimensions and submissions were raised at the hearing of the costs issue here that on my reading didn't especially feature in the *Dublin City Council* case.

Order

18. Accordingly, the order made on 7th March, 2022 for which I now give reasons was that:

    (i). the applicants would have their costs as against the board (including reserved costs); and

    (ii). there will be no order for costs against the notice party.