THE HIGH COURT

JUDICIAL REVIEW

[2022] IEHC 387

[2022 No. 67 JR]

IN THE MATTER OF SECTION 50, 50A AND 50B OF THE PLANNING AND DEVELOPMENT ACT 2000 AND IN THE MATTER OF THE PLANNING AND DEVELOPMENT (HOUSING) AND RESIDENTIAL TENANCIES ACT 2016

BETWEEN

BALBRIGGAN COMMUNITY COUNCIL

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

AND

RHONELLEN DEVELOPMENTS LIMITED

NOTICE PARTY

JUDGMENT of Humphreys J. delivered on Friday the 1st day of July, 2022

1. The developer in this case engaged in pre-application consultations with Fingal County Council and the board on 7th May, 2021. The outcome of that process was that the inspector reported that the application required amendment, and the board ordered to that effect on 17th May, 2021 (reference ABP-308916-21).

2. The formal planning application under the strategic housing development procedure was made on 11th August, 2021.

3. Following a site visit, the inspector issued a report running to 157 pages, on 22nd November, 2021, recommending that permission be granted subject to 30 conditions.

4. The board generally adopted the inspector's report and granted permission for the construction of 101 build to rent apartments at Balbriggan, County Dublin (reference ABP-311095-21) by direction dated 23rd November, 2021 with the formal decision being made on 30th November, 2021.

5. The applicant filed a statement of grounds in which the primary relief sought was an order of *certiorari* of that decision. I granted leave on 7th February, 2022. The originating notice of motion (notice of motion No. 1) was filed on 10th February, 2022.

6. In response, the notice party developer filed a notice of motion on 16th March, 2022 (notice of motion No. 2) seeking an order pursuant to the inherent jurisdiction of the court setting aside the grant of leave.

7. The grounding affidavit complains among other things of the applicant's failure to address various matters relating to its standing and also seeks to make the legal point that it is now too late to provide further information on these matters.

8. The question of costs of the motion was raised and the notice party wrote on 23rd March, 2022 stating that there would be no order for costs against the applicant if the motion was successful.

9. The applicant then replied on 25th March, 2022 asking for confirmation that this assurance would cover any appeals or any preliminary reference to the CJEU.

10. The notice party replied on 30th March, 2022 indicating that there would be no order for costs in relation to the High Court, but that the question of costs protection for appeals or a preliminary reference was premature at this point.

11. On 28th April, 2022, the applicant filed another notice of motion (notice of motion No. 3) seeking costs protection declarations under s. 50B of the Planning and Development Act 2000, the Environment (Miscellaneous Provisions) Act 2011 and in effect the Aarhus convention interpretative obligation under EU law as implemented through the court's general costs discretion.

12. The matter was listed for directions on 16th May, 2022, at which point I gave the parties liberty to file submissions on the preliminary question of whether the applicant should be required to address the standing motion at this point notwithstanding definitive clarity on costs in relation to any appeal.

13. That preliminary question was heard on 20th June, 2022.

The prematurity of the applicant's objection

14. The fundamental problem for the applicant is that at the particular stage we are at in the proceedings, namely merely the issue of the notice party's motion, the applicant is not in any jeopardy as to costs, at least until such time as that motion is listed for hearing.

15. I appreciate that once there is a hearing on any given matter, there will be a judgment or ruling or order, and at that point the matter is out of the hands of the trial court because any party may appeal to the Court of Appeal, unless leave of the trial court is necessary, or seek leave to appeal to the Supreme Court from that court. So, in circumstances such as these (where there is some comfort as to the High Court costs but not any further than that), any uncertainty about costs really crystallises at the point when the matter is listed for hearing. We are not at that point yet.

16. The appropriate and normal course at this stage would be for the applicant to actually deliver a detailed replying affidavit to the notice party's motion, the notice party could then reply and there could then be an exchange of written submissions at which point the question would properly arise as to whether the applicant could be subjected to a hearing of the motion without more extensive costs protection.

17. What the applicant should do is actually address in writing such of the points raised by the notice party as call for a response. The costs assurances that it has already provide full and

complete protection for that exercise. Conceivably, in the light of full particulars of the applicant's case regarding standing being put on affidavit and in submissions, the notice party could be persuaded that such a case might have merit. Even if it doesn't have that effect, the exercise of putting the case on paper is risk-free in costs terms at this stage and is very much worth attempting before a preliminary issue of this kind really properly arises. It is exactly the same exercise in microcosm as where a respondent or notice party takes a pragmatic approach to the filing of pleadings, leaving over the need for heavy argument to a later date that might in the end not materialise.

18. The applicant's failure to put any details as to its standing on affidavit also has a second dimension which is whether the applicant can even make its case at all without doing so.

The applicant's failure to set out details of its standing on affidavit

19. There is a question mark over whether the applicant has even done enough to demonstrate a plausible argument that it has standing in such a way as to even ground the factual basis for making a point that it should get costs protection. Given the choice between making lofty legal points about Luxembourg and Aarhus on the one hand, and doing the hard work of actually properly seeking to explain the factual position in a granular way on affidavit by reference to express engagement with the statutory criteria, the applicant has unfortunately taken the easy option.

20. The applicant did not seem to be in any great hurry to clarify whether it accepted that it was required to make a plausible showing of standing before it could make the point that it was entitled to costs protection to defend the standing motion. But assuming that there is such an obligation, and bearing in mind that no particularly identifiable contrary argument has been advanced so far, what is clear from the affidavits is that despite multiple opportunities the applicant has done little or nothing to engage with the statutory requirements as to standing. Those requirements are all set out in detail in *Dublin 8 Residents Association v. An Bord Pleanála* [2022] IEHC 116, [2022] 3 JIC 1106 (Unreported, High Court, 11th March, 2022), and it would certainly be good practice at the very least for applicants to say on affidavit how they comply when seeking leave for future judicial reviews.

21. The applicant in fact has had three opportunities to do so: the grounding affidavit in the substantive proceedings, the thus-far-unavailed-of possibility of replying to the notice party's motion about standing, and its own grounding affidavit in the protective costs motion. But on no occasion has it really properly engaged with the factual requirements as to standing in a way that engages expressly with the statutory criteria.

22. At the hearing, the applicant submitted that it had said on affidavit that it has participated in the proceedings, but on closer examination that isn't quite right. There is no reference to that in the narrative of the applicant's grounding affidavit, but rather the court is expected to infer that from the fact that a document is exhibited without any narrative reference or explanation as to its provenance or otherwise. Maybe that is enough, or maybe it isn't. That is before we even get into the fact that the applicant has ignored all of the questions raised by the notice

party in its affidavit, such as what the constitution of the applicant might be and how did this decision to take the proceedings come to be made.

23. While I appreciate that some of the notice party's demands might be regarded as possibly imaginative, and certainly I am not saying at this stage that all of them are legally required, parties to any proceedings in an ideal world should act reasonably and should give information that other parties reasonably request. The applicant has simply ignored the notice party's queries.

24. The upshot under this heading is that either the applicant has failed so far to put sufficient facts on affidavit to demonstrate that it can make a plausible argument that it has standing, or alternatively has perhaps just about scraped over the bar of doing the absolute bare minimum (leaving the bar rocking noisily on its hinges in the process). But on any view it has fallen short of providing pertinent information as to its position.

Appropriate procedure from here

25. On either or both of the above grounds, the inevitable conclusion is that the applicant is not entitled to any more comfort that it currently has while we are still at the written stage of the procedure. In circumstances where the applicant has tried to make an issue of the matter at this point, prior to being put in any actual costs jeopardy, by completely ignoring the notice party's queries, and by failing to engage evidentially in any granular way with the statutory criteria, the applicant's somewhat waspish attitude is for the most part unnecessary and for the remaining part premature.

26. The appropriate procedure now is that, without prejudice to any legal objection that the notice party may seek to make in due course, the applicant should reply to the notice party's affidavit in the standing motion. The notice party may then reply on affidavit, and following that, the parties should then deliver submissions on the standing motion. These submissions should deal with both the merits of the standing motion and also the question of whether the applicant is entitled to additional costs protection at the stage of fixing a hearing date for that motion.

27. Once we get to the point of fixing a hearing date for the motion, I appreciate that the applicant can make the case that some jeopardy might arise, so before that date is fixed but after all papers are filed, we can revisit the question. Perhaps at that stage the applicant might have persuaded everyone that it has standing, or persuaded the notice party to offer wider assurances. But if not, the matter can be considered in the light of how matters then stand. Likewise the notice party can renew its objection that the applicant has no entitlement to pause the process at that stage. That is "or not" in the question of whether or not the applicant should get any further assurances, and of course that can be considered in the light of all of the information before the court at that point.

Costs of the preliminary issue

28. The applicant was wholly unsuccessful in terms of the outcome it sought from the hearing on 20th June, 2022, so it seems to me that the appropriate order is no order as to costs of that

hearing and the costs associated with it including legal submissions, which is what I would provisionally propose subject to any argument to the contrary.

Order

29. In view of the foregoing, the order will be as follows:

(i). The applicant should within two weeks of this judgment and without prejudice to any legal objection that the notice party may make in due course, file an affidavit replying to the notice party's motion as to standing.

(ii). The notice party may then have a further two weeks to reply.

(iii). The applicant should then within a further period of two weeks file a written legal submission dealing with the merits of the notice party's motion assuming that the matter is still in issue and may include in that any submission it wishes to make at that point regarding whether that standing motion should be listed for hearing in the absence of further enhancement of the costs protection that is applicable at that point.

(iv). The notice party will then have a further period of two weeks to file replying written legal submissions on those matters.

(v). These periods will exclude the month of August.

(vi). The matter will then be listed for mention on 3rd October, 2022 at 2 pm at which point the question of whether or not the applicant is entitled to any further costs protection can be revisited, prior to the notice party's motion being listed for hearing.

(vii). Unless any party notifies the list registrar within the next 2 weeks of its intention to contend otherwise (in which case the matter will be dealt with at the next mention date) there will no order as to the costs associated with the preliminary hearing on 20th June, 2022, including costs of written legal submissions.