[2022] IEHC 631

THE HIGH COURT

JUDICIAL REVIEW

[2021 No. 961 JR]

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTIONS 50, 50A and 50B OF THE PLANNING AND DEVELOPMENT ACT 2000, AS AMENDED

BETWEEN

HICKWELL LIMITED AND HICKCASTLE LIMITED

APPLICANTS

AND

MEATH COUNTY COUNCIL

RESPONDENT

(No. 2)

JUDGMENT of Humphreys J. delivered on the 18th day of November, 2022.

1. In *Hickwell Ltd v. Meath County Council (No. 1)* [2022] IEHC 418 (Unreported, High Court, 12th July, 2022) I decided in principle to grant relief in relation to a challenge to the indicative road route through areas MP2 and MP3 set out in Land Use Zoning Map Sheet 13(a) ("Dunboyne-Clonee-Pace Land Use Zoning Map") to the Meath County Development Plan 2021 to 2027, which passes through the applicants' lands. I am now dealing with the form of the order and costs.

Form of the order

2. In *Hickwell (No. 1),* I left open the question of the precise form of the order. That was originally at the request of the council, but in fact the applicants took full advantage of that, illustrating the principle that a facility to one party is generally a facility to all parties. The applicants pressed for an order of *certiorari* applying to the road as a whole, as opposed to just the portion of it that passes through their lands.

3. When this issue was first argued on 29th July, 2022, the question arose as to notification of other landowners that might be affected by such a wider order. I gave the applicants liberty to put any such additional identified landowners on notice, and to serve papers by way of a link. Subsequent to this, counsel for the Ward family appeared, indicating their opposition to the road which takes up 1.5 km of their lands. Other private parties wrote indicating that generally they were not supportive of the road. Solicitors for Runways were also notified but indicated that they were not getting involved.

4. It is true that the other landowners did not advance legal arguments or the like, but that does not hugely matter. For present purposes, the important thing is that they do not have any issue with the order of *certiorari* affecting the road as a whole. It is also true that the applicants could have joined those parties at the outset, but no injustice is in fact being done by them being notified now, in circumstances where it turns out that they are not objecting.

Only an aficionado of pointless formalism would see that as a fatal obstacle to making the order at this point, now that we know that the parties affected have no objection. It would be different if they were seeking to revisit conclusions in the No. 1 judgment, not having been notified at the appropriate time. At the absolute best from the applicants' point of view, that might require a rehearing. However, such a scenario does not arise here.

5. The road is essentially in three sections. From north to south those are as follows:

   (i) a section through the north-west of the applicants' lands which has not been the subject of any development consent. The indicative route of the road at this location was introduced by the current development plan, and there was no road at all across these lands in the previous development plan (see exhibit DC3 to affidavit of Denis Coakley).

   (ii) the section through the applicants' lands in respect of which it is agreed that there should be an order of *certiorari*; and

   (iii) a section through lands to the south-east of the applicants' lands owned by Facebook/Runways. The road through those lands had been consented to, but of course quashing the alignment in the development plan does not affect anything in the existing consents.

6. The critical point in terms of the form of the order is that the No. 1 judgment held that there was a lack of reasons as to the need for the road as a whole, as opposed to just the route of the road as it went through the applicants' lands (see paras. 49 to 53). It logically follows that the order of *certiorari* should address that flaw. The applicants draw attention to the decision in *Dover District Council v. CPRE Kent* [2017] UKSC 79, [2018] 1WLR 108 *per* Lord Carnwath at para. 68 where, analogously to the present case, "the defect in reasons goes to the heart of the justification for the permission and undermines its validity. The only appropriate remedy is to quash the permission."

7. The council endeavours to support what it calls the court's "first instinct" to make an order of *certiorari* to the extent that the road crosses the applicants' lands as suggested at one point in the No. 1 judgment. In essence, the simple but, for that reason, fatally effective riposte to that is (although the applicants' counsel was too diplomatic to say so quite so bluntly) that the wording of that line in the No. 1 judgment is mistaken because it does not incorporate the point that the applicants' reasons argument applies to the road as a whole, as opposed to just the road as it crosses the applicants' lands. Once that infelicity of wording has been pointed out, the logical implication is clear, which is that the road as a whole should be subject to an order of *certiorari.*

8. I note finally under this heading that remittal does not arise because the council did not seek it. However, whether and to what extent remittal is really appropriate in a case of quashing a provision of a development plan seems to be questionable. That is for the very simple reason that detailed, elaborate and technical statutory provision of an express nature has been made in s. 13 of the Planning and Development Act 2000 as to how a development plan is to be varied.

9. The problem basically is that the development plan is adopted as a whole, so it is not as if there is a particular point in the process to which the draft plan can be remitted if the adopted plan is partly quashed on *certiorari*. The rest of the plan just stands and there is nothing as such to remit. It is perhaps slightly different if the whole plan is quashed, or if a variation is quashed in full for some reason – in those circumstances the process could be remitted back to whenever it went wrong. But if part of a decision is quashed with the rest left standing, there is not any "proposal" that can be remitted to any particular point – the whole statutory process involves the draft plan moving forward as a unit with all parts broadly moving at the same speed (albeit those meetings to consider the same stages of particular parts would take place at different but closely related dates). One possible response to partial quashing is to just do nothing, and that may well be acceptable in some cases. Alternatively, the obviously preferable way to address any partial quashing (if the Chief Executive can persuade members that doing so is desirable and appropriate) is by way of statutory variation.

10. Under those circumstances, it seems doubtful legally, especially having regard by analogy to the policy of the Planning and Development, Maritime and Valuation (Amendment) Act 2022 (albeit that this applies to permissions rather than plans as such), for the court to repeat the experimental procedure adopted in *Christian & Ors. v. Dublin City Council* [2012] IEHC 163, [2012] 2 I.R. 506, [2013] 2 I.L.R.M. 466, [2012] 4 JIC 2708 of engaging in a quasi-legislative process of creating proto-statutory mechanisms by order, in circumstances where express statutory provision already exists.

11. The law in relation to permissions is that remittal does not arise if it would not be lawful to remit, and there is no huge reason in principle why a corresponding approach to that extent at least should not apply in other areas. This must include a situation where the law has specified how exactly a decision can be amended. In the case of a plan, an order would either have to replicate exactly the statutory provisions for variation (in which case it would be so pointless as to constitute the wasteful consumption of judicial resources and legal costs, contrary to legal principles), or to amend those statutory procedures (in which case it would be substantively unlawful). Hence, I think that, perhaps absent exceptional circumstances, have-a-go attempts by the judiciary to devise *ad hoc* procedures for variation of development plans (or of any other decision where there is already adequate provision to allow the decision-maker to amend it) are generally not appropriate. It would be different if the body concerned did not have power to adjust its decision itself – but councils *do* have such a power, and do not need the "help" of the judiciary in that regard.

12. Matters might be different if there was some other, unchallenged, provision of the plan that simply had to be amended, as a purely consequential result of partial *certiorari,* in order to be workable (although the court can make this amendment itself under s. 50A(9) of the 2000 Act). Or if some significant practical problem of an immediate nature would arise that had to be catered for, prior to the coming into effect of any potential variation (in that regard a court must have flexible remedies at its disposal including potentially to stay the order of *certiorari* in whole or in part until a variation can be adopted). The first of these situations does not arise because nobody in the present case has applied under s. 50A (9), and the second does not arise on the facts.

13. With the form of the order addressed, I turn now to the dispute about costs.

Costs

14. The applicants did not win all their arguments, so were not "wholly successful" within the meaning of s. 169 of the Legal Services Regulation Act 2015. That section therefore does not apply. What applies instead is s. 168, which gives the court a limited degree of discretion. But discretion is not to be misunderstood as if it were freedom. "Discretion, like the hole in the doughnut, does not exist except as an area left open by a surrounding belt of restriction" (Ronald M. Dworkin, "The Model of Rules", *University of Chicago Law Review,* Vol. 35, No. 1 (Autumn, 1967), pp. 14-46 at p. 32; see also *Brogden v. Investec Bank Plc*. [2014] EWHC 2785 (Comm), 2014 WL 3843440 *per* Leggatt J.). Indeed in the *Case of Prohibitions* [1607] EWHC J23 (KB), (1607) 77 ER 1342, 12 Coke Reports 64, 4 Inst 41, Lord Coke described discretion (in the Institutes of the Laws of England report) as an "incertain and crooked cord" compared to "the golden and straight met-wand of the law". He had a point – O'Donnell J. covered similar ground in *Quinn Insurance Limited (Under Administration) v. PricewaterhouseCoopers* [2021] IESC 15, [2021] 1 I.L.R.M. 253 at para. 10: "The progress of the law often involves the reduction of complex theories, or apparently wide discretion, to clear rules which can be readily applied. This is, in general, a beneficial process. As was once said, there are many areas where it is more important that the law be clear rather than clever. If parties have a shared understanding of the manner in which the law will be applied, they can order their affairs accordingly and avoid the stress, delay, cost and uncertainty involved in legal proceedings where the outcome cannot be predicted with confidence. But the rules of thumb to which a broad discretion can be reduced must be applied with an understanding of the overall objective sought to be achieved, and for which the discretion is granted." In this sense, a court dealing with costs is not "at large". The starting point on costs is the substantive result, and any discretion must be exercised with regard in the foreground to the fact that the applicants won the case and are therefore presumptively entitled to all of their costs.

15. This was a relatively short case which, despite its complexity, consumed only two days. That is a tribute to the ability of both sides to present their positions effectively and economically. Generally, partial discounting of costs is not really an issue for short hearings in the one-to-

two-day category. I made the point in *Flannery & Ors. v. An Bord Pleanála* [2022] IEHC 327 (Unreported, High Court, 8th June, 2022) at para. 35 that in order to outweigh the downsides of a discounting exercise, especially in an Aarhus Convention context, and having regard to the capacity of such an exercise to consume costs and to create satellite issues unnecessarily, discounting should normally only be considered if an applicant falls significantly short of winning the majority of her significant and decided points. Analogous sentiments of practicality are reflected in Murray J.'s judgment in *Heather Hill Management Co. CLG v. An Bord Pleanála* [2022] IESC 43, in particular para. 212: an over-elaborate rule has an "unwieldy and counterproductive consequence" and creates the "real risk of the substantive issues ... becoming satellites to endless, expensive and time-consuming battles ... It is not evident … who benefits from this: certainly not those with a stake in the rapid disposition of legal disputes of this kind".

16. In this case, the applicants won on essentially four points:

(i) reasons on the need for the road;
(ii) reasons on the indicative route of the road;
(iii) an incorrect reason in relation to the road being an objective of the plan, which it wasn't;
(iv) disproportionate interference with property.

17. The case would not have been significantly different in time terms if confined to those four issues. In particular, there was no way that this would have been a one-day case. The applicants took about four hours in submissions, most of which were spent in opening documents, in making winning points, and in making cross-cutting points. I think it's reasonable to accept the applicants' estimate that no more than one hour was spent on the losing points. I didn't see that time estimate as having been effectively displaced by the council. But even if I'm wrong in doing so and even if a bit more than one hour could be attributed to the losing points, that in itself in no way justifies reducing the fees of a two-day hearing to those of a one-day hearing or reducing them by 50%, as implausibly suggested by the council (which would be an even larger deduction than reducing fees to one day, since brief and instruction fees are normally, and quite properly, front-loaded into the first day).

18. Overall, this case would have been a two-day hearing under any circumstances, even if the applicants had confined themselves to the winning points. There is therefore no sufficiently pressing basis for any discount. While it might feel gratifying in the short term to knock a few percent off the winning party's costs because they made a few losing points, one has to look at the bigger picture. To indulge in that kind of superficially appealing exercise would massively incentivise applications by losers to avoid paying full costs, and thus would create a situation where the court would have to deal with a greatly increased frequency of second rounds of disputes. Such an approach would be a licence to argue, to disagree, to nit-pick, to rack up costs. It would create unacceptable certainty for the parties, and particularly, unfairly,

for the winning party. Murray J.'s analysis in *Heather Hill* could be applied just as much to satellite arguments about cheese-paring of the winner's costs as it does to the question of cheese-paring costs protection for the loser.

19. By contrast, an approach that necessitates the identification of a day or days that were wasted, or a discrete motion or application or piece of paperwork that was otiose, before going the route of a discount, is simple, workable, predictable, and fair. To do otherwise is to invite further consumption of court time, which itself impacts on litigants generally (a category who in any individual case are not before the court and who therefore depend on the court itself to ensure that their interests are represented in the policies and procedures adopted). All this consumes limited judicial resources without a sufficient corresponding advantage.

20. Ultimately, the courts can either be a part of the solution or a part of the problem. The former stance involves approaches that do not incentivise proliferation or multiplication of applications, and that therefore lean towards discounting costs only where there is a clear basis for doing so by reason of a conclusion that some clearly severable unit of costs - the costs of a day or days or a discrete motion or application or piece of chargeable paperwork - would have been saved had the winning side taken a different approach by excluding the losing points. Such considerations don't apply here because the case would have taken two days anyway. A fraction of a day is not a severable unit of costs because costs of court hearings are billed and adjudicated generally on the basis of a fee per day, albeit with due regard to how much time and effort is involved.

21. Finally, there is the question of the costs hearing itself. In normal situations, a hearing (especially a relatively compact hearing) on costs impliedly encompasses the costs of the costs, because otherwise one would enter a death spiral whereby every costs application sparked a further application as to the costs of the last one. As the applicants have prevailed on the issues of the form of the order and costs, it seems pointless to have a separate hearing on the costs of those issues, so those should simply follow the event. In relation to those matters at least, the applicants seem to have been "wholly successful" for s. 169 purposes.

Order

22. For these reasons the appropriate order is as follows:

(i) that there be an order of *certiorari* removing, for the purpose of being quashed, the indicative road route through areas MP2 and MP3 set out in Land Use Zoning Map Sheet 13(a) ("Dunboyne-Clonee-Pace Land Use Zoning Map") to the Meath County Development Plan 2021 to 2027; and

(ii) that costs of the proceedings be awarded to the applicants including:
(a). costs of the leave application, certifying for two counsel;
(b). costs of the substantive hearing;

(c). costs of written submissions for the substantive hearing;

(d). costs of the subsequent hearing as to the form of order and as to costs;

(e). costs of written submissions in relation to that subsequent hearing;

(f). any reserved costs not included in the foregoing.