[2022] IEHC 683

THE HIGH COURT

JUDICIAL REVIEW

[2021 No. 959 JR]

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

BETWEEN

KILLEGLAND ESTATES LIMITED

APPLICANT

AND

MEATH COUNTY COUNCIL

RESPONDENT

AND

CORNELIUS GILTINANE AND PATRICIA GILTINANE

NOTICE PARTIES

AND

THE HIGH COURT

JUDICIAL REVIEW

[2021 No. 964 JR]

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

BETWEEN

MCGARRELL REILLY HOMES LIMITED AND ALCOVE IRELAND EIGHT LIMITED

APPLICANTS

AND

MEATH COUNTY COUNCIL

RESPONDENT

(No. 2)

JUDGMENT of Humphreys J. delivered on the 9th day of December 2022.

1. In *Killegland v. Meath County Council (No. 1)* [2022] IEHC 393, [2022] 7 JIC 0106 (Unreported, High Court, 1st July, 2022) and *McGarrell Reilly v. Meath County Council* [2022] IEHC 394, [2022] 7 JIC 0107 (Unreported, High Court, 1st July, 2022), I refused orders seeking to quash the Meath County Development Plan. The applicants now seek leave to appeal, advancing an implausible total of fourteen points of alleged exceptional public importance. The law relating to leave to appeal is fairly well traversed and is referred to in written submissions. Both cases were very fact-heavy, and if one were to generalise, the elaborate legal superstructure that is now put forward gives the impression of being

somewhat artificially imposed on top of that factual matrix for the purposes of the putative appellate process.

2. More generally, the Supreme Court has noted in *Irish Asphalt Ltd v. An Bord Pleanála* [1996] 2 I.R. 179, [1996] WJSC-SC 1476 that the policy behind the restriction on appeal in the development context is that there should be a greater degree of certainty, and relatedly a greater degree of expedition, in the finalisation of planning judicial reviews.

3. If, therefore, the statutory approach leans towards finality in respect of the micro-destabilisation of the planning situation caused by the further litigation of an issue in respect of an individual development consent, it must logically lean at least as far towards finality in the case of the macro-destabilisation relating to the quashing or otherwise of a more general planning instrument such as a city or county development plan. As put on behalf of the council, this question of finality impacts on "all citizens in County Meath" insofar as concerns "upholding the certainty of zoning in County Meath". That does not of course mean that one cannot have leave to appeal in respect of a legal issue arising from a development plan, but the basis for doing so should be clear. This is not such a case.

Papers before the court

4. In tandem with what was offered to the court at the substantive hearing, I had the benefit of materials placed on the ShareFile platform including as follows: in Killegland, submissions, books of authorities, judgments, exhibits, affidavits, a core book and pleadings, running to a total of 2,118 pages, and in McGarrell Reilly similar materials which amounted to 3,803 pages, making 5,921 pages of material in total.

The fundamental problem for the applicant

5. The fundamental problem for both applicants is summarised essentially in para. 20 of the *McGarrell Reilly* judgment. In accordance with the National Planning Framework, the distribution of new housing must be in accordance with a core strategy that forms a coherent whole when looking at all parts of the county. The county hierarchy in turn must be formed in the context of the regional and national housing hierarchy, so that no individual piece of land anywhere can be looked at in isolation, and everything joins up within an overall headline level of housing provision. That headline level has already been accounted for in other, unchallenged, parts of the plan. The fundamental problem for the applicants is that a challenge to the individual zoning of a particular piece of land in isolation from any challenge to the overall hierarchy and distribution of housing provision is a pointless exercise, because no lawful outcome can result in the court creating (or making any order that would facilitate the council in creating) additional housing provision out of thin air for the benefit of the applicants' lands. Any additional housing on their lands would breach the hierarchical and sequential approach set out in the unchallenged core strategy. The applicants in both of these cases have simply not engaged with that point.

6. That lack of engagement has been a feature of the entire process. They did not engage with this difficulty when they made submissions to the council originally at the Draft Development Plan stage, nor did they seek any relief in the proceedings based on any substantial ground as to why the core strategy was defective. One can contrast that with the approach taken by a different landowner, submission reference number MH-C5-627 on

behalf of Glenvel GP (Jersey) Ltd, which proposed not just a rezoning of specified lands to A2 housing, but also an amendment to the core strategy as set out at the Chief Executive's report, p. 152. The Glenvel landowners also made the fallback argument that if the overall allocation was not increased then the council should list their lands for housing in a sequential manner. That submission, in contrast to the approach of these applicants, acknowledges the fundamental dynamic of the process and the need for each individual piece of land to find its place in an overall jigsaw, where the housing allocation is determined hierarchically within an overall envelope.

7. To put it another way, there is no lawful way for the court to make an order whereby a particular piece of land is to be added to the pile for housing, if the applicant has not challenged the size and distribution of the pile overall. The net position is that the total amount of provision for housing in County Meath is determined in the core strategy, and that provision is already spoken for in respect of other lands. There is thus no order that can be made that will be of benefit to the applicants, and the proceedings as constituted are futile in the absence of any pleaded let alone rational basis for challenging the core strategy. Thus the grant of leave to appeal cannot result ultimately in a benefit to the applicants on these pleadings, or affect the order actually made.

8. It seems to me that this very much engages by analogy the sentiments that motivated the Supreme Court in *Clonres v. An Bord Pleanála* [2022] IESCDET 71, where the court concluded as follows (and by contrast, for what it's worth (possibly not very much), that was a case where I had offered some respectful mild encouragement to the consideration of a leapfrog leave to appeal application): "This Court recently considered the law regarding mootness in *Lofinmakin v. Minister for Justice* [2013] 4 I.R. 274 and re-stated the established principle that the courts do not give advisory opinions or answer purely academic or hypothetical questions which are not in furtherance of the resolution of a dispute. See also the recent decision in *ELG v. HSE* [2021] IESC 82. That principle has the effect in the present application that the Court must decline to grant leave to appeal as there is no dispute which is capable of leading to the reversal or variation of the order made by the High Court by virtue the proposed appeal.". Unfortunately, a similar problem applies here.

9. In these circumstances I do not think it is necessary to deal with the application in further detail, but I can comment briefly on the applicants' fourteen points as follows:

(i) Question 1 in Killegland asks primarily about where reasons are to be found. Unfortunately for the applicants, this has already been clarified by the Supreme Court (see: *Connelly v. An Bord Pleanála* [2018] IESC 31, [2021] 2 I.R. 752, [2018] 2 I.L.R.M. 453, *Mallak v. Minister for Justice* [2012] IESC 59, [2012] 3 I.R. 297, [2013] 1 I.L.R.M. 73, *EMI Records (Ireland) Ltd v. Data Protection Commissioner* [2013] IESC 34, [2014] 1 I.L.R.M. 225). There is no legalistic straitjacket as to where reasons have to be set out. The court can identify them from the overall circumstances, which may vary from case to case.

(ii) Question 2 in Killegland asks where the reasons are to be found if not specified in the decision, but the same points apply. The Supreme Court has already on multiple occasions extracted reasons from the overall circumstances rather than rigidly from the face of the decision itself (see, for example: *P & F Sharpe Ltd v. Dublin City and County Manager* [1989] I.R. 701, [1989] I.L.R.M. 565, *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39, [1992] I.L.R.M. 237, [1991] WJSC-SC 1137).

(iii) Question 3 in Killegland asks whether there is a requirement to give specific reasons for disagreeing with the Chief Executive. This question does not arise on the facts because it implies that the members did not give specific reasons for their decision. On the particular facts here, there are specific reasons for the members decision that can be discerned throughout their process of adoption of the development plan, and a clear complex choreography of different steps which are set out in detail in the No.1 judgment.

(iv) Question 4 in Killegland asks about the extent of the obligation to address a landowner's submissions. This is the tired old argument about the extent of reasons - the Supreme Court has clarified that on numerous occasions (see: *Connelly v. An Bord Pleanála* [2018] IESC 31, [2021] 2 I.R. 752, [2018] 2 I.L.R.M. 453, *Balz v. An Bord Pleanála* [2019] IESC 90, [2020] 1 I.L.R.M. 367, *Y.Y. v. Minister for Justice and Equality* [2017] IESC 61, [2018] 1 I.L.R.M. 109).

(v) Question 5 in Killegland asks what the legal consequence is where lands are up-zoned as a result of other lands being down-zoned. This is totally fact-specific and is not a point of law at all. More fundamentally, the premise is incorrect because I held that the proposal to zone the applicant's lands in a particular way to facilitate public infrastructure was logically independent of the up-zoning of separate lands.

(vi) Turning to McGarrell Reilly, point 1 in that case asks whether the tiered approach to zoning under the National Planning Framework embodied in Appendix 3 in particular applied to zoned lands or not. Unfortunately for the applicants, there is no ambiguity whatsoever as to that issue. The clear language of the NPF expressly identifies the application of this approach to "zoned" lands. This is also entirely consistent with the judgment of McDonald J. in *Highlands Residents Association v. An Bord Pleanála* [2020] IEHC 622 (Unreported, High Court, 2nd December, 2020). In any event, I stated that if, counterfactually, the tiered approach did apply here, the Chief Executive's report contains adequate reasons for not strictly following that approach (see para. 183 of *Killegland (No. 1)).* Hence the particular facts here provide an answer in any event.

(vii) Question 2 in McGarrell Reilly asks whether the obligation of consistency with the National Planning Framework and Regional Spatial Economic Strategy

applies only to objectives or whether it applies to other texts. I am not sure how plausible this argument is on the pleadings in that the applicants' actual claimed case at core ground 1 in McGarrell Reilly is breach of the "objectives". The case can't be reconfigured at this stage, but in any event, s. 10(1A) of the 2000 Act is explicit that compliance is required with the "national and regional development objectives" of the NPF or RSES documents, not with every jot and tittle of those documents. To assert ambiguity requires one to ignore the express statutory language.

(viii) Point 3 in McGarrell Reilly asks whether the RSES can lawfully require a planning authority to provide for a matter outside the lifetime of a given plan. The problem here is that the 2000 Act is explicit on the lifetime of development plan (this follows from s. 11(1)). An express statutory framework cannot be displaced by the side-wind of a strategy document. My approach to this question is also totally consistent with the judgment in *Highlands Residents.* In any event, the point as embodied in para. 28 of the No. 1 judgment is only a fallback point, a matter that is made clear by the opening words ("strictly speaking however …"). The judgment does not actually turn on that: it turns on the primary points already discussed.

(ix) Point 4 in McGarrell Reilly asks what the standard of review is in assessing reasons where a local authority does not act consistently with the objectives of the NPF. That does not arise on the facts because the local authority *did* act consistently with the objectives of the NPF.

(x) Point 5 in McGarrell Reilly asks what the extent of the obligation to provide reasons is and where such reasons can be found in the context of zoning decisions. That has been dealt with above. The law in relation to reasons has been clarified almost *ad nauseum* by the Supreme Court, although no amount of clarification is ever going to be enough for certain applicants (in effect - "ah yes but you haven't clarified reasons in context X or with fact Y or to the extent of Z ....").

(xi) Point 6 in McGarrell Reilly asks whether s. 10(8) of the 2000 Act precludes a legitimate expectation in relation to zoning of land. The reference to s. 10(8) was under the heading of "some general considerations" rather than under the discussion of legitimate expectations, but in any event no plausible basis has been advanced as to why the meaning of s. 10(8) is unclear. The law on legitimate expectations was dealt with *in extenso* at paras. 33 to 36 of *McGarrell Reilly* in addition to the general considerations at paras. 39 to 49 of *Killegland (No. 1)*, citing previous jurisprudence including the important judgment of Dunne J. in *Mahon v. An Bord Pleanála* [2010] IEHC 495, [2010] 12 JIC 2109 (Unreported, High Court, 21st December, 2010). The applicants' question of law of exceptional public importance makes no attempt to engage with that.

(xii) Point 7 in McGarrell Reilly asks whether a landowner's positive record of development is an irrelevant consideration. The inherently objective nature of the carrying out of developments has the clear implication that purely personal factors are generally not determinative, and that decisions under the 2000 Act must be judged primarily by reference to the statutory metwand of proper planning and sustainable development. The judgment is also clear that even if I was wrong about the application of this principle to the facts in relation to the developer's record here, that would not have made any difference – see para. 41 of the No. 1 judgment.

(xiii) Point 8 in McGarrell Reilly asks whether the sequential approach in the Development Management Guidelines 2007 involves a distance approach or whether it involves other factors. Even leaving aside the abstract and hypothetical nature of the question, the premise is implausible because a sequential approach could never be collapsed into a mechanical distance-based question. Multiple geographical and social factors such as the need for green belts, recreational spaces and other community infrastructure have the inescapable conclusion that housing and economical development cannot rigidly march outwards on a purely distance basis from the centre of a settlement.

(xiv) Point 9 in McGarrell Reilly asks about the extent of reasons for departing from government guidelines, in particular the Development Management Guidelines 2007. The problem here is that the obligation in relation to these guidelines is purely a "have regard to" obligation which does not set out any additional requirement of reasoning. As noted above, the level of reasons generally has already been heavily traversed by the Supreme Court on multiple occasions, and while it's always possible to artificially come up with contexts or standpoints which haven't been expressly addressed in appellate jurisprudence, such an endless exercise almost nihilistically denies the possibility that anything could ever be clarified. The unending multiplicity of different fact situations that could be raised in future litigation means that an appeal in any one case becomes just a drop of certainty in a vast ocean of doubt, stretching to an endless, featureless, horizon of potentially required "clarification". A process whereby legal certainty becomes the work of a thousand lifetimes could not in itself be a basis for leave to appeal. That would nullify the whole concept of rationalising the appellate process in areas where finality is important, as acknowledged by the Supreme Court in *Irish Asphalt*.

Order

10. In these circumstances I do not need to address the public interest limb of the test.

11. Ultimately, the applicants' complaints come down to a merits-based disagreement clothed in a legal carapace. The applicants quite understandably want their lands zoned for immediate housing. The elected members considered that other uses were appropriate,

specifically, in Killegland, facilitating green space community infrastructure for the benefit of the community generally and walkers and children in particular, and in McGarrell Reilly, for a mix of uses including both community infrastructure and potential future housing. The local electoral process provides for a tie-breaker between legitimate different views on the merits of land use objectives, within legal constraints. Of course if some such constraint is infringed, the court has a role, but the fact that there will be winners and losers in the land use decision-making process doesn't in itself give rise to a basis for judicial intervention.

12. For the foregoing reasons, the application for leave to appeal is dismissed.