[2023] IEHC 232

THE HIGH COURT
JUDICIAL REVIEW

[2021 No. 1123 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:

FIONUALA SHERWIN

APPLICANT

AND
AN BORD PLEANÁLA

RESPONDENT

AND
CWTC MULTI FAMILY ICAV

NOTICE PARTY

(No. 2)

JUDGMENT of Humphreys J. delivered on the 8th day of May, 2023

1. In *Sherwin v. An Bord Pleanála (No. 1)* [2023] IEHC 26, [2023] 1 JIC 2701 (Unreported, High Court, 27th January, 2023) I granted *certiorari* of a decision approving a development under the strategic housing development (SHD) procedure at the former Clonliffe College Seminary Campus.

2. The notice party developer now applies for leave to appeal in respect of the following three questions:

(i) whether the provisions of s. 57(10)(b) of the Planning and Development Act 2000, as amended, apply to the proposed demolition of any part of a protected structure;

(ii) whether, in circumstances where, on a proper interpretation, a development plan allows appreciable flexibility, discretion and/or planning judgement to the decision-maker, the standard of review is that for irrationality rather than "full-blooded" as an issue of law; and

(iii) whether, in light of the provisions of ss. 8(5), 9 and 10(3) of the Planning and Development (Housing) and Residential Tenancies Act 2016, the requirement to state the main reasons and considerations on which the decision is based necessarily involves an obligation to provide reasons for disagreeing with recommendations contained in relevant planning authority departmental reports.

3. It is almost a cliché that virtually any judicial review appellant can make points about the standard of review and the standard of reasons, and the notice party here has done both. It has in fairness added a further point which I will address first.

4. The law on leave to appeal has recently been summarised by Barniville J. (as he then was) in *Cork Harbour Alliance for a Safe Environment v. An Bord Pleanála* [2022] IEHC 231, [2022] 4 JIC 2601 (Unreported, High Court, 26th April, 2022) at para. 32 and by Holland J. in *Monkstown Road Residents Association v. An Bord Pleanála* [2023] IEHC 9, [2023] 1 JIC 1907 (Unreported, High Court, 19th January, 2023).

5. I note in passing that the board did not seek leave to appeal and nor did it take a position supporting or opposing the notice party's application. It did briefly intervene in the hearing to suggest that the court should not get into an area of law which was not defined in the No. 1 judgment, a contribution which effectively reinforced the fact-specific nature of the decision. The board's non-involvement is not fatal to the leave to appeal application but nor is it irrelevant, in that in any given case a statutory decision-maker is normally better placed than an individual party to identify which questions and issues are of such systemic importance as to need appellate clarification.

Question 1 – demolition of part of a protected structure

6. Insofar as it is suggested that prohibition of demolition of a protected structure does not include prohibition of demolition of part of a structure, I do not see that as something in relation to which doubt arises. The Planning and Development Act 2000 defines a structure as including part of a structure (s. 2(1)).

7. I did take the view that a partial demolition that would result in an enhancement to the interests of the structure overall (say by removing a later unsympathetic extension) would not be caught by s. 57(10) of the 2000 Act. That is a point in favour of the developer, so is not a basis for appeal by that party.

8. The notice party then complains that "minor" partial demolitions could be caught by the legislation, but even leaving aside the general insignificance in law of *de minimis* impacts, the exceptional circumstances clause in s. 57(10) allows any minor detriment to be outweighed by the

more significant benefit of the works overall insofar as they enable the structure to be kept in use (as explained in the No. 1 judgment).

9. The notice party argues that if a hypothetical Victorian house is a protected structure (and already the hypothetical puts one on alert – a fair number of people live in Victorian houses but most Victorian houses are not protected structures) and has a more recent extension which is proposed to be demolished and replaced, with some minor impacts or openings on the old structure, then such works would fall foul of s. 57(10) on the basis of the No. 1 judgment. That sounds dramatic but such bogeyman scenarios are best left for a case in which they arise. At that point it will be discovered that there is no bogeyman because s. 57(10) is not an absolute prohibition; the exceptional circumstances test allows a view to be taken that the new works would enhance the interest of the structure overall, thus justifying the minor impacts thereby created. If on the other hand the proposed new extension would require partial demolition that would *not* enhance the interests of the structure, for example because the scale of the 21st century extension would overwhelm the historic fabric, then the perfectly valid and legitimate policy of the legislation has the logic that permission for such a hypothetical extension should not be granted. Refusal of permission insofar as that is required on conservation grounds should be seen as a natural and appropriate consequence of the legislation, not as a horrific nightmare scenario that should keep courts, appellate or otherwise, awake at night or that should provoke the legal system into straining every sinew to allow development at the expense of historic buildings; but even if I am wrong about that, the point about how to deal with minor partial demolition can be considered in a case where it properly arises.

10. This is not a case about minor partial demolition. The notice party's proposed demolitions within the protected structures go well beyond the incidental (although they include the incidental, such as the new openings). If the only problem was the openings then we could talk about the relevance of the *de minimis* issue. But for example, the permission includes the demolition of the fine internal corridor brickwork in the main seminary block, of which the conservation officer of the city council said: "[t]he removal of the brick arches is regrettable as this element is considered to be of character and high architectural quality and demonstrates the development of the building over time".

Question 2 – standard of judicial review

11. The standard of judicial review is well-ridden hobby-horse at this stage and is reasonably well traversed at appellate level. When I said that there was "no way" that the development could be said to respect the height, scale and mass of the protected structures, that was not me usurping the board's planning judgement. I was saying that no reasonable board could consider that it did constitute such respect. If a towering eighteen-storey building on the Clonliffe site respects the height, scale and mass of these historic structures, then language loses all meaning. The lack of coherence between the height, scale and mass of the existing and proposed structures is blatant on the face of the materials; or to put it another way, an assertion that there is such respect simply flies in the face of common sense. Also relevant is the fact that the board didn't actually hold that the development respects the height, scale and mass of the protected structures. So there is strictly no second-guessing because there wasn't even a first guess. One could alternatively have phrased the point as a failure by the board to address its mind to the correct question, so in that sense we don't even get to the question of the scope of their planning judgement because there was no attempted exercise of such judgement on that specific question.

12. I was trying to make a similar point when I mentioned, agreeing with the developer, that the demolition of the "hideous" (the developer's term) mezzanine level in the assembly hall would enhance the interest of the structure (para. 200). That was not a usurpation of the board's planning judgment either. It was what I thought would be the conclusion of "any rational planning decision maker". The notice party of course quibbles with my phrasing but such an exercise is always possible. The point I was trying to make in both instances was the same – while many things fall within a broad spectrum of planning judgement, at a certain stage, when the argument becomes overwhelming, the spectrum beings to converge on a point at which all reasonable decision-makers would find themselves. The possible condemnation of a decision as irrational applies even in a field where one applies the most conventionally deferential approach to judicial review: see for example *Attorney General (McGarry) v. Sligo County Council* [1991] 1 IR 99 where the Supreme Court considered that the decision to put a refuse dump in a sand and gravel pit at the site of the Carrowmore Passage Grave Cemetery, a site of international importance, was irrational; *Wilkinson v. Dublin County Council* [1991] ILRM 605 (Costello J.) which involved another discretionary planning decision being condemned as irrational (admittedly this decision is respectfully somewhat unpersuasive on the facts insofar as one can judge from what is stated in the judgment, but the principle that even discretionary decisions can be condemned as irrational is clear and undisputed).

13. The No. 1 judgment was not intended to break new ground in the jurisprudence of judicial review in general or as regards the standard of review in particular; and should not be read as if it

did so. The argument made here is unfortunately another example of the "appellant's fallacy": the belief that one must adopt a worst-case over-interpretation of a first-instance decision for the purpose of claiming sensational implications which can then be shot down on appeal.

14. Indeed I did say expressly that one can see an argument for some planning judgement when one gets into the question of what structures would appear as dominating and what would appear as complementary. It was in that context that I went on to say that the question of whether the scale of the new structures respected the existing scale was not a matter of planning judgement but one of fact. That has to be read in the context of particular facts here where the development was vastly out of scale with historic buildings. Of course in other developments there will be cases within the zone where there is room for debate and planning judgement about what constitutes "respect". But this is not a borderline case.

Reasons for disagreeing with the planning authority

15. The issue of reasons is again a matter that is well traversed at appellate level. The standard comes down in practice to there being a requirement to give the main reasons on the main issues.

16. When I said that disagreeing with the planning authority on something is virtually by definition disagreeing on a main issue, that was not a definitional pronouncement but in reality an empirical observation, because local authorities tend in practice to focus on key net issues rather than to raise unfocused minor objections. If councils were counterfactually to engage in scattergun "witch's brew" tactics (to borrow a term from *Hellfire Massy Residents Association v. An Bord Pleanála* [2022] IESC 38, [2022] 10 JIC 2402 (Unreported, Supreme Court, 24th October, 2022) *per* O'Donnell C.J. at para. 22), then my comment about councils' reasons being among the main reasons would not apply.

17. The only intervention made by the board in the leave to appeal hearing was to say that the judgment did not define the chief executive's report as *de jure* including any attached reports, so that court should not do so now. That emphasises the point that this is a fact-specific issue.

18. In case the notice party is implying that I was confusing the conservation officer's report and the chief executive's report, that is not correct. The whole discussion in the No. 1 judgment opens with identifying the conservation officer as being the source of recommendation to refuse permission having regard to the impact on protected structures (para. 183). The conservation officer's report came to the board *via* the chief executive, and indeed the notice party does not dispute that.

19. In any event the board's inspector said expressly that the conservation officer's report was "contained within the chief executive's report" and treated it as such. The inspector said specifically as follows at para. 11.8.10:

> "The report of the Conservation Officer, as contained within the Chief Executive Report provides a detailed and thorough assessment of the proposed development and I refer the Bord to same. In the interests of brevity, I shall broadly summarise this report. It states that the proposed alteration, refurbishment and re-use of the Seminary building to provide new long-term residential accommodation would be supported in principle. The general principle of its redevelopment replicates that of the original historic layout. It is accepted that significant interventions are required to facilitate a new use in the Protected Structure and that the placement of the new extension directly adjacent to the rear elevation of the Seminary building reduces the impact on the footprint of the cloister garden that an atrium design approach would have created."

20. It is not open to the opposing parties to challenge the decision-making process and I do not think the notice party can revisit that conclusion at this stage or on these facts.

General problems with the proposed appeal

21. Finally, there are two other matters worth mentioning; whether one considers them under the heading of the lack of exceptional public importance or the lack of desirability of an appeal in the public interest does not hugely matter.

22. Firstly as submitted by the applicant, the identified questions on which leave to appeal is sought were not the only problems with the decision, so even if all questions are certified and resolved as proposed by the notice party, that would not result in the decision being upheld. On reviewing the judgment in full the following can be mentioned:

(i) The judgment found that the required approach of minimising impacts on protected structures was almost reversed (para. 239). That is not directly challenged by the notice party's questions.

(ii) Section 57(10) was never considered at all by the board, and the approach of regarding this as an infirmity was consistent with previous case law: *O'Brien v. Dun Laoghaire Rathdown County Council* [2006] IEHC 177, [2006] 6 JIC 0106 (Unreported, High Court, 1st June, 2006). Issue is not taken with that caselaw in the questions.

(iii) There was no approach of impact minimisation as regards the national monument on site. The dramatic loss of curtilage and the construction of a major thoroughfare through the site virtually right up to the doorstep of the national monument was a matter on which the board didn't even properly ask the question about impact minimisation. The impacts on the national monument as such (as opposed to as a protected structure) are not addressed in the notice party's questions.

(iv) The board had adopted a nebulous test of balance. That difficulty is not directly addressed in the notice party's questions either.

(v) Finally, the problem with the huge subterranean structure proposed was not just a question of reasons (as potentially addressed in the notice party's third question), but an unacknowledged material contravention (para. 237). That issue is not challenged in the notice party's questions.

23. On this basis it would appear that any appeal would be essentially moot even if the notice party was hypothetically correct on all matters raised in the questions. That does not necessarily favour the grant of leave to appeal: *Clonres v. An Bord Pleanála* [2022] IESCDET 71, citing *Lofinmakin v. Minister for Justice* [2013] 4 I.R. 274 *ELG v. HSE* [2021] IESC 82.

24. A final matter relevant to leave to appeal is that there has been a lot of water under the bridge since the board order here under the SHD procedure was signed on 4th November, 2021 by the board's former deputy chairperson, Mr. Paul Hyde.

25. Legislation abolishing the SHD procedure was enacted the following month (Planning and Development (Large-scale Residential Developments) Act 2021). Planning policy now is that large housing development applications should be made in the first instance to local authorities, and indeed the lack of consideration of the points made by the local authority here was central to the outcome. I do not think that the public interest would be particularly served by a further prolongation of this particular process. That interest would be better served by a fresh application under the law as it now stands. The written submissions expressly rely on the now repealed legislation – see paras. 4, 23, 43 to 46 and 55 to 56. This case is not the ideal vehicle for any residual points which in any event do not particularly arise on the facts and would not make any difference to the outcome for the reasons explained.

Conclusion on leave to appeal

26. At the risk of over-summarisation, the application for leave to appeal should be refused having regard to the following:

(i) The 2000 Act already answers the question as to whether a structure includes part of a structure.

(ii) The legal implications of minor or incidental demolition of parts of protected structures can be addressed in a case limited to such types of demolition. This is not such a case.

(iii) The second and third questions over-interpret the No. 1 judgment.

(iv) The second and third questions deal with issues already well traversed by appellate courts (standard of review and standard of reasons).

(v) In this case the board failed to even properly address the question of whether the height, mass and scale of the protected structures had been respected, so we don't even get to the point where the exercise of their planning judgement comes into play (even if it could rationally have been exercised in favour of there being such respect here).

(vi) The board *via* its inspector treated the conservation officer's report as included in the Chief Executive's report in this particular case, so it is not open to the notice party to question that now.

(vii) In any event the conservation officer's report came to the board through the Chief Executive in this particular case.

(viii) Even assuming that all questions were answered in a sense favouring the notice party, the proposed appeal would be moot because the decision was also quashed on other grounds in respect of which no leave to appeal is sought.

(ix) The legislative procedure under which the application was made has been repealed, and the statutory policy now is that such applications should be made to the local authority in the first instance.

(x) Overall the issues are raised in a general form but in many respects are highly fact-specific.

(xi) Finally but not irrelevantly, the board has neither sought leave to appeal nor intervened in support of or opposing the proposed appeal.

Costs

27. Having regard to the outcome, I will include a default order of costs of the leave to appeal in favour of the applicant, but the notice party can argue to the contrary.

28. As regards the costs of the proceedings themselves, the board was only willing to pay costs up to the date of the judgment on 27th January, 2023 and not the subsequent mention date when the notice party first indicated an intention to seek leave to appeal on 20th February, 2023. However, because the No. 1 judgment didn't itself include a default order to costs, there would have had to be a mention date in any event even without a leave to appeal application, so I provisionally think that the applicant's costs against the board properly include the costs up to 20th February, 2023. I will leave the option for the board to argue otherwise given that I only heard the parties' positions on the issues rather than any detailed reasons.

29. The default subject to any final submissions will then be the board is liable for costs up to 20th February, 2023 and the notice party will be liable for costs thereafter.

Order

30. For the foregoing reasons, the order will be that:

(i) leave to appeal be refused;

(ii) there will be an order for costs of the proceedings in favour of the applicant including reserved costs:

(a) as against the board up to the 20th February, 2023 and

(b) as against the notice party thereafter; and

(iii) the foregoing order will be perfected following the expiry of 7 days from the date of this judgment unless written legal submissions to the contrary are lodged with the court before then by any party, in which case the matter will be listed in the next convenient Monday List.