[2023] IEHC 365

THE HIGH COURT
JUDICIAL REVIEW

[2022 No. 474 JR]

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

BETWEEN

JOHN CONWAY

APPLICANT

AND

AN BORD PLEANÁLA, THE MINISTER FOR HOUSING, LOCAL GOVERNMENT AND HERITAGE, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

SILVERMOUNT LIMITED

NOTICE PARTY

(No. 2)

JUDGMENT of Humphreys J. delivered on the 30th day of June, 2023

Judgment history

1. In *Conway v. An Bord Pleanála and Others (No. 1)* [2023] IEHC 178 (Unreported, High Court, 18th April, 2023), I rejected the applicant's challenge to the constitutional validity of s. 28(1C) of the Planning and Development Act 2000 and the legal validity of two guidelines made under that provision.

2. The facts and procedural history are set out in that judgment. I am now dealing with leave to appeal and costs.

Application for leave to appeal

3. The applicant doesn't need leave to appeal the decision on the validity of the primary legislation (see s. 50A(8) of the 2000 Act).

4. The initial suggestion was that the applicant did by contrast need leave to appeal in relation to the guidelines. But that view doesn't stand up to a whole lot of scrutiny. The basic problem for that argument is that s. 50(2) of the 2000 Act generally only applies to decisions of the board and councils, not to decisions of the Minister (such as to adopt the guidelines here).

5. The fact that the case began under s. 50 of the 2000 Act is explained by the fact that the applicant initially challenged a particular decision of the board, but it was agreed to extricate the developer from that and allow the case to proceed without the formality of needing to also challenge a specific board order. That wasn't intended to worsen the applicant's position regarding costs, and it would be unfair and indeed unconscionable to try to revisit that in a way that would disadvantage the applicant. Thus he should logically be entitled to continued s. 50B costs protection for the duration, as the parties in fact agreed.

6. In any event, s. 50B is wider than s. 50 (s. 50B(1)(a)(i) doesn't limit the decision-makers to which it applies in the way that s. 50(2) does), and therefore merely because the action comes within, or is treated as coming within, s. 50B doesn't mean that it automatically also comes within s. 50. Even if costs protection technically doesn't apply, it has been afforded as an agreed concession. But constitutional rights of appeal can't be cut back as a consequence, only by virtue of a statutory provision.

7. Any restriction of rights of appeal needs to be construed reasonably strictly. So the mere fact that a challenge includes, or as here included, an element that was subject to leave to appeal (in this case, a challenge to a decision of the board) doesn't have the effect that such a requirement seeps across to elements of the case that would not otherwise require leave to appeal, such as a challenge to guidelines.

8. There is simply no statutory restriction on the right to appeal an order of the High Court regarding the validity of a decision of the Minister under the 2000 Act, such as to make guidelines, because that falls outside s. 50(2). So leave to appeal isn't necessary here.

9. Therefore I will make no order on the application for leave to appeal, but I will give liberty to renew the application in case an appellate court disagrees with that.

Costs

10. The applicant seeks his costs despite being unsuccessful. Even acknowledging that I found some merit in certain sub-points made by the applicant in the main hearing, and that there has been some flexibility in costs in the caselaw in relation to constitutional challenges to legislation, and that the applicant can meet some of the criteria in such caselaw, as referred to in submissions, the basic problem is the underlying significant asymmetry in planning law in favour of applicants in respect of costs. It would make the system even more one-sided than it already is to award costs to a losing applicant unless something truly exceptional arises. I don't think this case meets that standard.

Therefore s. 50B(4) of the Planning and Development 2000 Act isn't satisfied: see by analogy *An Taisce – National Trust for Ireland v. An Bord Pleanála* [2022] IESC 18, [2022] 4 JIC 0402 (Unreported, Supreme Court, 4th April, 2022) para. 5, *Right to Know CLG v. Commissioner for Environmental Information* [2022] IESC 28, [2022] 6 JIC 2802 (Unreported, Supreme Court, 28th June, 2022) para. 8.

11. While a challenge to legislation could in principle invoke the possibility of a costs award in the context of public interest litigation, one has to have some regard to the context in the given case. The context here was that:

(i) the challenge was somewhat abstract, and the applicant picked on this particular development because it ticked certain legal boxes for him rather than because of the development itself – certainly the applicant had been shopping around for a while to find some development to be a host organism in which he could incubate this particular legal point (he went as far as initiating a previous judicial review in respect of another development for the purpose of making the points he advanced here, but was prevailed upon to discontinue those proceedings);

(ii) while he did make a submission, the development didn't affect him in any practical way; and

(iii) the essential superstructure of the applicant's argument fell apart under analysis because the nature of the challenge was such as to selectively attack the Minister's role in the process without properly considering similarly broad powers conferred on other actors such as local authorities – on that basis the claim as framed was imbalanced, one-sided and artificial and was never going to get anywhere.

12. So I don't think that this really comes into the category where a departure from the default of no order as to costs must apply. Insofar as any residual discretion arises I don't see this case as warranting the benefit of such discretion for reasons along the lines of those articulated.

13. The appropriate order is therefore no order as to costs and logically that should also apply to the present application. The parties agreed in any event that I could decide on costs of the present applications without bringing them back for further submissions.

Order

14. For the foregoing reasons, it will be ordered that:

(i) there be no order on the application for leave to appeal on the basis that leave to appeal is not required;

(ii) there be liberty to renew the application for leave to appeal in the event that, contrary to the foregoing, an appellate court considers that leave to appeal is in fact required;

(iii) there be no order as to the costs of the proceedings;

(iv) the substantive order dismissing the proceedings be perfected forthwith on that basis; and

(v) this order be perfected forthwith with no order as to the costs of the present applications.