THE HIGH COURT
JUDICIAL REVIEW

[2021] IEHC 34
[2020 No. 469 JR]

BETWEEN

DUBLIN CITY COUNCIL

APPLICANT

AND
AN BORD PLEANÁLA

RESPONDENT

AND
SPENCER PLACE DEVELOPMENT COMPANY LTD.

NOTICE PARTY

(NO. 2)

JUDGMENT of Mr. Justice Richard Humphreys delivered on Thursday the 28th day of January, 2021

1. In *Dublin City Council v. An Bord Pleanála (No. 1)* [2020] IEHC 557, [2020] 11 JIC 1203 (Unreported, High Court, 12th November, 2020), I granted an order of *certiorari* of a decision of the board in respect of a strategic housing development in material contravention of a planning scheme. Three consequential issues now arise for decision:

   (i). leave to appeal;

   (ii). the costs of the proceedings to date; and

   (iii). the question of a stay on the order of *certiorari*.

2. In those respects I have received helpful submissions from Mr. Stephen Dodd S.C. (with Mr. Stephen Hughes B.L.) for the applicant and from Mr. Eamonn Galligan S.C. (with Ms. Suzanne Murray B.L.) for the notice party. The board didn't participate in this leg of the proceedings, has consented to a costs order against it and has indicated that it does not propose to participate in any potential appellate context. On 21st December, 2020 having heard the matter, I informed the parties of the order being made and indicated that reasons would be given later.

3. The test for leave to appeal under s. 50A(7) of the Planning and Development Act 2000 has been well canvassed in caselaw, particularly in *Glancré Teoranta v. An Bord Pleanála* [2006] IEHC 250 (Unreported, High Court, MacMenamin J., 13th July, 2006) and in *Arklow Holidays Ltd v. An Bord Pleanála* [2006] IEHC 102, [2007] 4 I.R. 112 *per* Clarke J.

4. The notice party developer here proposes that I should certify the following question as one of exceptional public importance for the purposes of an appeal: "[d]oes the Board have jurisdiction under the Planning and Development (Housing) and Residential Tenancies Act 2016, as amended, to grant permission [for strategic housing development] in material contravention of a planning scheme?"

5. The notice party submits that the question satisfies existing caselaw. It also submits that the question is determinative in the sense that if answered differently it would change the result of the case (see *S.A. v. Minister for Justice and Equality* [2016] IEHC 646, [2016]

11 JIC 1404 (Unreported, High Court, 14th November, 2016)). In the latter respect, however, it has to be pointed out that there were some other points that didn't have to be decided, in view of my answer to the primary question in the proceedings. Hypothetically, even if I am wrong on the primary question, it may be that the council would prevail anyway on one of the other issues. Or maybe not - one can't say because we didn't get to that point. However, it would not be appropriate for the court to get in to a position where it was precluded from granting leave to appeal unless it also opined, *obiter*, all possible issues in the case. That would not always be in the interests of justice. Furthermore, it would create a situation where a decision on a proliferation of potentially *obiter* points would be incentivised, which would be undesirable for a whole host of reasons, not least from the point of view of keeping the length of cases within manageable bounds in the interests not just of these litigants but of other litigants competing for scare judicial resources.

6. The applicant submitted that the criteria for leave to appeal were not met by reason of a number of factors as follows:

(i). The Court of Appeal has already addressed some of the relevant issues in *Spencer Place Development Company Ltd. v. Dublin City Council* [2020] IECA 268 (Unreported, Court of Appeal, Collins J. (Costello and Donnelly JJ. concurring), 2nd October, 2020), so it is submitted that leave to appeal in the present case rather does not add any value. But while it is true that the Court of Appeal has already addressed some relevant issues, that court did not decide the precise point that now arises.

(ii). It is submitted that there is no evidence that the ruling would affect other cases. There may be something in that objection, but at least one can say that there is some potential to affect other cases. Specifically, the decision could affect strategic infrastructure developments by analogy because the logic of the No. 1 judgment is not limited to strategic housing development, albeit that that was the only point formally decided.

(iii). It is suggested that this is not a case where there is any uncertainty. However, when one talks about the law not needing any further clarification, that is normally in a context where either there already is appellate authority or where a number of cases have been decided and there is something approaching clear and consistent jurisprudence. That is not the case here. The point hasn't arisen across a range of decisions; only in this case.

(iv). It is argued that allowing leave to appeal would create uncertainty. That is true on a literal basis, in the sense that raising any point in any case or any appeal creates potential uncertainty - but only for a limited period until an appellate decision. There must be a balance between certainty and finality on the one hand, and ensuring full ventilation of appeal remedies and providing an opportunity for appellate courts to take a view on the issues on the other.

(v). The legislation is due to expire imminently. That is a fair point and logically limits the relevance of the No. 1 judgment. But there are two factors that qualify that objection here. Firstly, there could be other cases in the pipeline and indeed the legislation will apply where pre-application consultation has been entered into before the expiry of the legislation, so there is some life in it yet. Also and more fundamentally, the decision has a direct read-across by analogy to the strategic infrastructure development legislation which is not time-limited.

(vi). It is said that it is not desirable in the public interest for there to be an appeal because the board isn't appealing. At first sight that sounds like a relevant factor, but the board's position is not determinative. For example, if the board had refused the application on the grounds that it thought that it didn't have jurisdiction, that wouldn't have been a bar to the developer challenging that decision or then seeking leave to appeal. So logically the board's stance now of not getting involved can't be such a bar.

(vii). It is suggested that regard should be had to the fact that the notice party is only seeking its own commercial interest. That in itself doesn't preclude the satisfying of either limb of the test. In some circumstances, the fact that a party is litigating on a commercial basis might be particularly relevant to costs or other procedural issues, but doesn't in itself preclude leave to appeal.

(viii). The No. 1 judgment found that the council's interpretation was more likely to lead to protection of the environment, so the council now argues that that proposition is relevant to their contention that the public interest limb of the test has not been satisfied. While I am going to admit that it is very tempting to give weight to that argument, I must balance that against the institutional reality that a first-instance court must approach leave to appeal on the basis that an appellate court may or may not agree with the approach in the substantive judgment. So in that regard, the lack of a clear and consistent jurisprudence on the issue is of relevance. A first-instance court can't refuse leave to appeal simply on the basis that it thinks its decision was correct, although it could do so if it could be demonstrated either by appellate authority or by clear and consistent first-instance jurisprudence that an appeal would not be in the public interest.

7. In all the circumstances, the notice party has made out a case for leave to appeal, and the objections made to the application are not decisive. Overall, I consider that the statutory test has been satisfied here so I will grant leave to appeal.

Costs

8. The general principle is that costs follow the event, so it's up to the notice party to show why not. A letter of 27th November, 2020 was written in that regard and further submissions have been made on behalf of the notice party seeking no order as to costs, for a number of reasons, including the following:

(i). It is submitted that this was a decision of the respondent and an order is normally made against a respondent who in essence committed a legal error. That is true insofar as it goes, but on the other hand the notice party didn't have to try to stand over the decision so by doing so it came into the frame for a costs order.

(ii). It is effectively suggested that an order for costs is not necessary because the applicant has an order against another party. That, however, has never precluded joint and several liability for costs.

(iii). It is also submitted that the notice party didn't prolong the case significantly. I'm not sure that that's totally true, although they're certainly prolonging it now, but there is a more fundamental problem with that submission. Whether a particular unsuccessful intervention by the winning side in proceedings had the effect of prolonging those proceedings is potentially relevant to the *Veolia Water principle (Veolia Water UK Plc. v. Fingal County Council* [2006] IEHC 240, [2007] 2 I.R. 81), which can apply if the proceedings are "complex" in that they take up a significant amount of time. But that is not hugely relevant to the basic order of costs following the event. If an action is brought or defended by multiple parties, it is not the law that an order for costs can only be made against any individual unsuccessful party if that individual party has specifically prolonged the action. In principle costs follow the event jointly and severally against all losing parties. That is not an absolute position in that if a particular losing party makes only a brief intervention in a case where the vast bulk of representing the losing point of view is taken up by someone else, then there may well be a case for allowing the small fry to escape costs liability. After all, there must be some incentive for brevity and concision and for saving the time of the court. I took that approach in *Star Elm Frames Ltd. & Companies Act 2014* [2016] IEHC 666, [2016] 10 JIC 0313 (Unreported, High Court, 3rd October, 2016), para. 48, making no order as to costs in respect of a losing intervention by one legal team that was measured in minutes in the context of a matter that was almost entirely defended by another party and that lasted three days overall. But this is nothing like such a case. Here a significant burden of defending the action, similar to the burden on the respondent, was taken on by the notice party in pleadings, affidavits, written submissions and oral submissions.

(iv). Reliance is placed on the lack of clarity in the legislation and it is suggested that, therefore, a public law entity should pay the costs. But neither the city council nor the board are responsible for the legislation either.

9. In all the circumstances it seems to me that costs must follow the event both in accordance with the general principle and as something required by s. 169 of the Legal Services Regulation Act 2015 in the absence of sufficient reason to order otherwise. Declining to make the usual order could in principle create anomalies *inter partes*, particularly in the context of either appellate proceedings or other proceedings between the parties, albeit that may be theoretical here given the special costs rules in environmental cases.

Stay on the order of *certiorari*

10. The notice party has applied for a stay on the order of *certiorari*, which was opposed by the applicant. When the court is considering the question of a stay it needs to balance a number of relevant factors. These include:

    (i). preserving the status quo;

    (ii). ensuring that the position on the ground is not prejudiced in terms of the possible range of decisions that an appellate court might potentially make;

    (iii). precluding damage to the environment – a matter of significant weight that would normally preclude further development during the proceedings or appeal pending finalisation of a challenge;

    (iv). preventing an undesirable situation whereby a development was constructed that might later be found to be unauthorised;

    (v). preventing unnecessary enforcement actions against a partly-constructed development that might ultimately be shown to be authorised; and

    (vi). factoring in the element that a mere undertaking by the local authority not to take enforcement action even if it were forthcoming, which it isn't, would not suffice because a third party could take enforcement proceedings.

11. It seems to me that the correct balance is achieved in the present case by a stay on any account being taken of the order of *certiorari* for the purposes of any enforcement action, whether by the applicant or any other person, including proceedings under s. 160 of the Planning and Development Act 2000, in respect of works carried out before 16th October, 2020 (being the date of the oral pronouncement of the order of *certiorari*), pending the final determination of the proceedings. That precludes further development pending final determination of the appeal but doesn't leave the developer exposed to enforcement proceedings in the meantime.

Order

12. Accordingly, the order announced on 21st December, 2020 was as follows:

    (i). to grant leave to appeal and to certify the question as proposed by the notice party, such leave to appeal to include the costs;

    (ii). costs including reserved costs in favour of the applicant against the respondent (by consent), and against the notice party (jointly and severally);

    (iii). a stay on the order of *certiorari* in the terms set out above;

    (iv). a stay on the costs order for 28 days and if notice of appeal is served within that period until the final determination of the appeal; and

    (v). by consent, no order as to the costs of the leave to appeal application.