

**THE HIGH COURT
JUDICIAL REVIEW**

[2022] IEHC 201
[2021 No. 972 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

ABBAY PARK AND DISTRICT RESIDENTS ASSOCIATION BALDOYLE

APPLICANT

AND

**AN BORD PLEANÁLA, IRELAND, THE ATTORNEY GENERAL AND FINGAL COUNTY
COUNCIL**

RESPONDENTS

AND

THE SHORELINE PARTNERSHIP

NOTICE PARTY

JUDGMENT of Humphreys J. delivered on Friday the 8th day of April, 2022

1. The primary relief sought by the applicant is an order of *certiorari* by way of application for judicial review quashing the decision of the respondent of 23rd November, 2021 granting planning permission to the notice party for the construction of 1,221 residential units at lands at Baldoyle, Dublin 13 (ABP Ref. 311016-21).

Relevant parties

2. The case has been adjourned as against the State. The notice party developer is not getting involved in the costs issue.
3. The case against the local authority concerned, Fingal County Council, has already been adjourned. Hence, the parties to the present costs application are limited to the applicant and the board.

Grounds of challenge

4. The applicability of costs protection to grounds 1 to 3 is disputed. Those grounds provide as follows:
 - (i). "The decision to grant planning permission of 22 September 2021 ('the impugned decision') constituted a grant of planning permission in material contravention of Objective 4D.2 of the Baldoyle-Stapolin Local Area Plan ('the LAP') that was not made pursuant to section 37(2)(b) of the 2000 Act as required by section 9(6)(c) of the Planning and Development (Housing) and Residential Tenancies Act 2016 ('the 2016 Act').
 - (ii). The impugned decision constituted a grant of planning permission in material contravention of §6.4 and Table 6.1 of the LAP that was not made pursuant to section 37(2)(b) of the 2000 Act as required by section 9(6)(c) of the Planning and Development (Housing) and Residential Tenancies Act 2016 ('the 2016 Act').

- (iii). The impugned decision constituted a grant of planning permission in material contravention of Objective WW4 of the LAP that was not made pursuant to section 37(2)(b) of the 2000 Act as required by the 2016 Act.”
5. Ground 4 provides as follows: “[t]he impugned decision is invalid as the Board failed to consider adequately or at all the cumulative effects of the proposed development on the environment and/or the effects of embodied carbon for the purposes of section 171A and 172 of the Planning and Development Act 2000 (when read with Article 299A of the Planning and Development Act Regulations 2001) and/or relied on irrelevant considerations and/or failed to take into account relevant considerations.” The board concedes that the not-prohibitively-expensive-costs rule applies to this under the Aarhus Convention.
6. Ground 5 is the claim against the State of non-transposition and has been adjourned.
7. Grounds 6 and 7 provide as follows:
- “6. The impugned decision is invalid in that it contravenes Articles 1 and 3 of Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment (‘the SEA Directive’) by granting planning permission in Material Contraventions of the CDP as identified at Grounds 1, 2, 3 and 4 and 8 above (and the additional material contraventions identified by the Inspector).
7. The impugned decision is invalid in that it contravenes the Applicant’s public participation rights under Article 6(4) of the EIA Directive, Articles 6 and 9 of the Aarhus Convention and/or section 8 of the 2016 Act by failing to give any or any adequate notice of proposals that materially contravene the CDP.”
8. The board concedes that the not-prohibitively-expensive-costs rule applies to these grounds under the Aarhus Convention.
9. The board correctly makes the point that the applicant’s motion regarding protective costs incorrectly covers all the grounds whereas in fact it should only apply to the grounds where there is a dispute: see *Shannon v. McGuinness* [1997] IEHC 54, [1999] 3 I.R. 274, *Lennon v. Cork City Council* [2006] IEHC 438, [2006] 12 JIC 1905 (Unreported, High Court, Smyth J., 19th December, 2006), *Milebush Properties Limited v. Tameside Metropolitan Borough Council* [2011] EWCA Civ. 270.

Questions proposed to be referred to the CJEU in *Enniskerry*

10. In *Enniskerry v. An Bord Pleanála* [2022] IEHC 6 (Unreported, High Court, 14th January, 2022), two sets of questions were approved for referral to the CJEU in principle. The first four questions related to the scope of the not-prohibitively-expensive rule and are as follows:
- (i). Does the interpretative obligation set out in Case C-470/16 *North East Pylon Pressure Campaign Limited v. An Bord Pleanála* whereby in proceedings where the application of national environmental law is at issue, it is for the national court to give an

interpretation of national procedural law which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) and (4) of the Aarhus Convention, so that judicial procedures are not prohibitively expensive, apply only within the sphere of EU environmental law.

- (ii). Where an applicant challenges a decision that is subject to procedures laid down in EU environmental law, is the challenge to be considered as falling within the sphere of EU environmental law even if the grounds of challenge do not relate to EU environmental law.
 - (iii). In particular, is a challenge that is not based on directive 2001/42 (the strategic environmental assessment directive), but that relates to alleged material contravention of an instrument of general application that was subject to strategic environmental assessment, to be considered as a challenge falling within the sphere of EU environmental law.
 - (iv). Is a challenge to be considered as falling outside the interpretative obligation set out in Case C-470/16 *North East Pylon Pressure Campaign Limited v. An Bord Pleanála*, either as not being one where the application of national environmental law is in issue or as not within the sphere of EU environmental law, merely because it involves classic judicial review grounds that are not environment-specific but that are raised in the context of a challenge to a development consent or other environmental issue.
11. The second set of questions related to the issue of whether not-prohibitively-expensive-costs meant no order as to costs in the absence of any defining legislation. Those questions were as follows:
- (i). Does the general EU law principle of legal certainty as applied in the context of the interpretative obligation set out in Case C-470/16 *North East Pylon Pressure Campaign Limited v. An Bord Pleanála* whereby in proceedings where the application of national environmental law is at issue, it is for the national court to give an interpretation of national procedural law which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) and (4) of the Aarhus Convention, so that judicial procedures are not prohibitively expensive, have the effect that the domestic law of a member state should provide rules that are sufficiently certain so that an applicant can know prior to initiating proceedings whether the not-prohibitively-expensive rule applies and if so what the maximum amount of the not-prohibitively-expensive costs can be predicted to be in advance.
 - (ii). In the absence of provision in the domestic law of a member state providing rules that are sufficiently certain so that an applicant can know prior to initiating proceedings whether the not-prohibitively-expensive rule applies and if so what the maximum amount of the not-prohibitively-expensive costs can be predicted to be in advance, does the general EU law principle of legal certainty as applied in the context of the interpretative obligation set out in Case C-470/16 *North East Pylon Pressure Campaign Limited v. An Bord Pleanála* whereby in proceedings where the application

of national environmental law is at issue, it is for the national court to give an interpretation of national procedural law which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) and (4) of the Aarhus Convention, so that judicial procedures are not prohibitively expensive have the effect that a domestic court should disapply national procedural rules allowing for any costs to be awarded against applicants in proceedings covered by the not-prohibitively-expensive rule thus providing for no order as to costs if the applicants are unsuccessful.

12. There have been a number of developments since the judgment in *Enniskerry* which are set out in a separate judgment being delivered in *Save Roscam Peninsula CLG v. An Bord Pleanála* [2022] IEHC 202 in respect of a motion in that case which was heard with the costs motion in the present case.

Issues under s. 50B and the 2011 Act

13. In broad terms neither s. 50B nor the 2011 Act apply to any of the disputed grounds of challenge for the reasons explained in *Enniskerry*.

14. Section 50B(1) of the 2000 Act provides as follows:

“This section applies to proceedings of the following kinds:

- (a) proceedings in the High Court by way of judicial review, or of seeking leave to apply for judicial review, of —
 - (i) any decision or purported decision made or purportedly made,
 - (ii) any action taken or purportedly taken,
 - (iii) any failure to take any action,
pursuant to a statutory provision that gives effect to —
 - (I) a provision of Council Directive 85/337/EEC of 27 June 1985 to which Article 10a (inserted by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directive 85/337/EEC and 96/61/EC) of that Council Directive applies,
 - (II) Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment, or
 - (III) a provision of Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control to which Article 16 of that Directive applies, or
 - (IV) paragraph 3 or 4 of Article 6 of the Habitats Directive; or
- (b) an appeal (including an appeal by way of case stated) to the Supreme Court from a decision of the High Court in a proceeding referred to in *paragraph (a)* ;

- (c) proceedings in the High Court or the Supreme Court for interim or interlocutory relief in relation to a proceeding referred to in *paragraph (a) or (b)* .”
15. It is true that para. (a)(I) requires the impugned decision to be under an enactment giving effect to public participation provisions whereas para. (a)(II) does not have such a rider. That provision requires the challenge to relate to a statutory provision giving effect to the SEA directive. However, that does not mean that a challenge to anything that is subject to SEA gets costs protection. The challenge has to be based on a statutory provision giving effect to the SEA directive - hence in effect to the actual process of assessment itself. So I do not accept that there is any basis to say that s. 50B applies to any of the contested grounds.
16. The applicant also argued that a contravention of a Local Area Plan (LAP) amounted to the sort of ecological harm discussed in *Enniskerry* for the purposes of the 2011 Act, but that is not the case in the sort of general terms contended for. The interpretation of the 2011 Act applied in *Enniskerry* requires, among other things, some tangible ecological harm going beyond what can be alleged in any planning case, not simply sub-optimal land use. Excessive density does not seem to me to be the kind of tangible ecological harm to which the 2011 Act was intended to apply.
17. Insofar as the LAP envisages protection against ecological harms by providing for a protection of birds for example, that is all well and good but it does not mean that *any* contravention of the LAP inherently involves tangible ecological harm. There must be something specifically connecting the statutory provision proposed to be implemented by the proceedings with the threatened outcome of ecological harm which is sought to be prevented.
18. Hence I conclude that neither s. 50B of the 2000 Act nor the 2011 Act apply to any aspect of this action. We then turn to what to do about the Aarhus claim.

Options for the court in relation to contested EU questions

19. In the context where the applicant’s Aarhus points raise referable questions of EU law, and as discussed in the companion judgment in *Save Roscam*, the options would be to make a further reference in the present case, adjourn this motion pending the outcome in *Enniskerry*, or decide the points myself here (which wouldn’t make much sense since I am referring them in *Enniskerry*) .
20. Here, while the board wasn’t seeking an adjournment (although in effect the applicant was), none of the parties were particularly pressing for the European law issues to be decided by way of a reference from the present motion, and in addition no new European law issue was raised by the applicant who simply relied on the questions already referred in *Enniskerry*.
21. In those circumstances it seems to me that it would be an acceptable exercise of the court’s discretionary power to adjourn proceedings if I were simply to park the Aarhus aspects of

the present motion pending a resolution of the *Enniskerry* case. That can be revisited if for any reason the *Enniskerry* reference does not proceed.

22. The question of protection under O. 99 RSC does not arise at this point pending clarification of the scope of the interpretative obligation to give effect to the Aarhus Convention.

Costs of the costs application

23. There was no issue about the costs of the costs application because the board agreed that there would be no order as to costs if and to the extent that the applicant was unsuccessful.

Order

24. Accordingly, the order will be as follows:

- (i). I will refuse a declaration that the applicant is entitled to costs protection under s. 50B of the 2000 Act or under the 2011 Act;
- (ii). By consent I will order that insofar as the applicant's costs motion is unsuccessful, the applicant will not be liable for costs of that motion.
- (iii). I will adjourn the remaining aspects of the applicant's protective costs motion pending the outcome of the reference in *Enniskerry* subject to that being revisited if for any reason the *Enniskerry* reference does not proceed;
- (iv). For the avoidance of doubt I will direct that the order be perfected at this point in case any parties wish to take any procedural steps elsewhere in relation to the aspects of the motion that are being decided now; and
- (v). the matter will be listed on Monday 25th July, 2022 for review.