THE HIGH COURT

JUDICIAL REVIEW

[2022] IEHC 328

[2021 No. 1110 JR]

IN THE MATTER OF SECTION 50 OF THE PLANNING AND DEVELOPMENT ACT 2000 (AS AMENDED)

BETWEEN

SAVE ROSCAM PENINSULA CLG, SOPHIE CACCIAGUIDI-FAHY, MARTIN FAHY AND PHILIP HARKIN

APPLICANTS

AND

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

RESPONDENTS

AND

ALBER DEVELOPMENTS LIMITED

NOTICE PARTY

(No. 2)

AND

THE HIGH COURT

JUDICIAL REVIEW

[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

ABBEY 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 Thursday the 9th day of June, 2022

1. In *Save Roscam Peninsula CLG v. An Bord Pleanála (No. 1)* [2022] IEHC 202, [2022] 4 JIC 0809 (Unreported, High Court, 8th April, 2022), I refused a declaration that the applicants were entitled to costs protection under s. 50B of the Planning and Development Act 2000 or the Environment (Miscellaneous Provisions) Act 2011, and adjourned the applicants' points relating to the interpretative application under the Aarhus Convention pending a proposed reference to the CJEU.

2. In *Abbey Park v. An Bord Pleanála* [2022] IEHC 201, [2022] 4 JIC 0808 (Unreported, High Court, 8th April, 2022), I made a similar order refusing relief under s. 50B of the 2000 Act and under the 2011 Act, but adjourned the Aarhus interpretative obligation issue pending the proposed reference in *Enniskerry Alliance v. An Bord Pleanála* [2022] IEHC 6, [2022] 1 JIC 1410 (Unreported, High Court, 14th January, 2022).

3. Both applicants now seek leave to appeal to the Court of Appeal under s. 50A(7) of the 2000 Act. The caselaw in that regard is well established and is referred to in the parties' submissions, and was recently helpfully summarised by Barniville J. 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).

The questions in Abbey Park

4. After some discussion with counsel on both sides, a rewording was arrived at to which the board did not object. Those reworded questions which I am now certifying are as follows:

> "1. Was the Court correct to conclude that only challenges to a decision or purported decision made or purportedly made, any action taken or purportedly taken or any failure to take any action, pursuant to a statutory provision that gives effect to the SEA Directive, in other words, challenges to the SEA process itself (as opposed to challenge based on any document that has been subjected to the SEA process), came within the ambit of the costs protection regime for the purposes of section 50B(1)(a)(II) of the Planning and Development Act 2000 (as amended)?
>
> 2. Was the Court correct to take the view that the fact that a development consent envisages a density of housing greater than that in a local area plan that was subject to SEA does not constitute "damage to the environment" within meaning of section 4(1) of the Environment (Miscellaneous Provisions) Act 2011?"

The questions in Save Roscam

5. The applicants proposed a complex series of questions. The first sub-question of the first question is as follows:

> "Should the damage requirement in S.4(1) of the Environment (Miscellaneous Provisions) Act 2011 be interpreted as meaning:
>
> - That the Applicant must establish a likelihood of tangible ecological harm such as impact on specific species, habitats or natural resources, above and beyond impact of a type that can be alleged in respect of any development (as held by the High Court in Enniskerry Alliance and Protect East Meath v Bord Pleanala, [2022] IEHC 6)?"

6. It seems to me that while the gist of this question is acceptable, it does not quite highlight the issues involved, so after some discussion with counsel this question was reworded as follows:

"Does "damage to the environment" in section 4(1) of the Environment (Miscellaneous Provisions) Act 2011 require the damage to be both

(a) tangible in the sense of being above and beyond the type that can be alleged in respect of any development, and

(b) ecological in the sense of damage to the existing environment as opposed to merely arising where a development is proposed that is arguably less environmentally beneficial than another alternative hypothetical development".

7. The board did not object to leave to appeal being granted in those terms. I should emphasise that insofar as I used the term "ecological" in *Enniskerry Alliance*, I had in mind damage to the environment *as it exists*, as opposed to the failure to bring into being a hypothetical future environment than was more desirable than the proposed development would be. I was not trying to limit damage purely to the natural environment as opposed to the built environment. Thus, I was by no means excluding harm to the human environment so that for example an action to prevent a structure from being unlawfully demolished would be covered by the 2011 Act as would an injunction against an unauthorised use of lands or an order seeking the reinstatement of a demolished structure. However, what I considered was not included under the 2011 Act was the mere erection of a building that was in some way less environmentally desirable than some other hypothetical building, so for example, a housing development with a particular density that was greater than that for which the applicant was contending. That did not seem to me to be the type of damage to the environment that was envisaged by the 2011 Act, but I should say expressly for the avoidance of doubt that I was not in any way intending to confine damage to the natural environment alone. The statute itself makes that clear anyway.

8. I appreciate that the applicants in *Enniskerry Alliance* are contending that this interpretation of the 2011 Act has no statutory basis, but that is a terminological misunderstanding. The statutory basis is the phrase "damage to the environment", and in the context of interpreting that, there is a need to identify what type of damage is intended to be covered. While the subject matter of damage is referred to in the statute, the form and intensity of damage isn't spelled out in the legislation, so if trying to work out what was impliedly intended means coming up with something that has "no statutory basis", then no interpretation of the phrase can be said to have a statutory basis. The applicants are using the concept of a "statutory basis" to mean confined to that which is expressly articulated. That isn't a correct use of language. It is reminiscent of the debating trick, debunked by Richard Dawkins, that defines "evidence" as that which one can expressly see oneself during a lifetime, hence "proving" by circularity of definition that there is no evidence for processes that can take place over geological time (like the evolution of species). The basic fallacy is the same – the problem for either argument is that some things that are not expressly visible nonetheless validly exist. Obviously an appellate court may disagree with whether my interpretation of the 2011 Act is one of those things.

9. The applicants' next two sub-questions are:

> "Should the damage requirement in S.4(1) of the Environment (Miscellaneous Provisions) Act 2011 be interpreted as meaning:
>
> - That the Applicant merely has to establish that the claim "somehow relates to the environment" (as posited by the High Court in Jennings v Bord Pleanala, Holland J, 3 May 2022)?
>
> - Or does it have some other meaning?"

10. Those seem to be essentially repetitious of the first question because if the appellate courts do not think that my interpretation is correct, they will no doubt specify what the correct interpretation is.

11. The applicants' next sub-question is:

> - "Or is the Court required to set aside the damage requirement, having regard to paragraph 50 of the decision in Case C-470/16 North East Pylon, even on a question of contravention of purely national law?"

12. The problem with that is that it does not arise from the judgment, and the applicant seems to more or less accept that it was not argued.

13. The applicants' second question is:

> "Does paragraph 50 of the decision in Case C-470/16 North East Pylon preclude the Court from adopting a different interpretation of Article 9(3) of the Aarhus Convention in respect of grounds of review based on national law
>
> - in proceedings where some of the grounds allege breach of national law and other grounds allege breach of European law, and
>
> - in proceedings where all of the grounds raised are grounds of national law,
>
> - And in particular, do they preclude an interpretation of Article 9(3) which restricts review to grounds other than "classic grounds of judicial review"?"

14. That is completely misconceived because I have not decided any of those questions. They only arise after the proposed reference is answered. So an application for leave to appeal based on this question is completely premature.

15. The applicants' third question is:

"What, if any, grounds of judicial review can the Court take into consideration for the purposes of Section 50B of the 2000 Act that are not "classic grounds of judicial review"?"

16. Again, that is a complete misunderstanding. It was not argued that the classic grounds of judicial review concept is relevant to s. 50B of the 2000 Act. Rather it relates to the interpretative obligation and thus to the proposed reference. The situation in relation to that category will be dealt with following the CJEU judgment.

17. Insofar as the applicants' submissions on leave to appeal state: "[i]n Enniskerry, the Court held that Section 50B only applies to specific grounds within proceedings that seek to challenge the legality of decisions on grounds other than "classic grounds of judicial review," applying the judgment of the Court of Appeal in Heather Hill Management Company CLG v. An Bord Pleanála, [2021] IECA 259" - that unfortunately is simply not correct. The judgment quite clearly doesn't decide that. The questions and submissions confuse and mix together a number of concepts that are both logically distinct and separately treated in *Enniskerry Alliance*.

18. Obliquely the applicant is implying by this submission that the proposed reference in *Enniskerry Alliance* has a major impact on the interpretation of s. 50B and of the 2011 Act so that in effect the latter questions blend into the former. I disagree.

19. As regards Section 50B, that reflects EU directives and has a clear, ascertainable meaning. I see the EU law issues arising under that section as *acte clair*. Maybe there could be a longer argument about whether EIA screening involves public participation, but I suspect it would have to be on the basis of arguments and materials not opened in *Enniskerry Alliance*. On the basis of the materials that *were* opened, screening isn't covered. But either way an appellate court doesn't need the answers to the *Enniskerry* questions in order to interpret s. 50B. I didn't refer the question of whether EIA screening was covered by EU public participation rules because the applicants didn't point to anything concrete that suggested it was. So there is no overlap. Maybe if they come up with something new on appeal, the Supreme Court will feel that that is a referrable question in itself, or maybe not, but either way, the existing proposed references don't impact on the question before the Supreme Court under the heading of s. 50B.

20. As regards the 2011 Act, again the same conclusion applies. Notwithstanding the relevance of Aarhus to that Act, an appellate court doesn't need the answers to the questions I have proposed in *Enniskerry* in order to interpret the 2011 Act. That is because there are really only three options:

    (i). To disregard the damage requirement, as proposed by the applicant in the second question here but not actually argued. The problem there is that the damage requirement is baked in to the section. It can't simply be "set aside" leaving something operable behind. The whole of sections 3 and 4 would fall as a result.

I don't see that as necessary or appropriate for the simple reason that O. 99 RSC is available to fill any gaps. So even accepting that the 2011 Act is inadequate to implement Aarhus, it doesn't follow that Irish law overall can't implement Aarhus. But if a court was minded to nullify the 2011 Act it can do that without the answers to the proposed reference.

(ii). To read damage so widely that it pretty much covers everything, not just in subject matter (which we know it does), but in form and intensity of damage. That's what the applicants in *Enniskerry* wanted of course, but I didn't do that because of the somewhat unfavourable mood music from the Court of Appeal, particularly in *Heather Hill,* which was not exactly suggestive of a wide scope for the 2011 Act. Obviously appellate courts aren't as constrained by that. But since the entire damage requirement is contrary to Aarhus, the court doesn't need to know what Aarhus means exactly (as sought by the proposed reference) in order to read the damage condition so widely that, as a restriction on costs protection, it dissolves into nothingness.

(iii). Finally, although the meaning of the 2011 Act is anything but clear, it must be given some sort of a meaning. A court could take the view that it doesn't need to try the impossible of giving full effect to Aarhus, because the damage requirement is inconsistent with Aarhus anyway. So the Act can just be interpreted like any other Act, in line with normal statutory interpretation, and in the knowledge that the general costs discretion remains and can be used to fill any Aarhus gaps, once we know (post the proposed reference, assuming it goes ahead) what Aarhus means. That's the approach I took on the basis that it was the only one left standing.

Possible leapfrog appeals

21. Insofar as the question of the costs of environmental litigation is coming to a head in the Supreme Court, in that that court has granted a number of applications for leave to appeal in relation to that topic ([2022] IESCDET 66 (Heather Hill), 67 (Protect East Meath) and 68 (Enniskerry Alliance)), insofar as I may be allowed to do so I would respectfully endorse the suggestion that the parties in the present matters might give the Supreme Court the option of accepting these appeals directly, especially as they relate directly to the *Enniskerry* issues. It would assist from a first instance point of view if such clarification of environmental costs matters as can be obtained will be obtained in early course. At the risk of stating the obvious, that comes with the slight caveat that if following the appellate courts' interpretation of s. 50B and the 2011 Act there is a potential category of environmental litigation that is not protected by those enactments, then the question of the Aarhus interpretative obligation and the proposed references would still on the face of things have a potential continued relevance. On the other hand, if s. 50B and the 2011 Act end up being interpreted as covering everything then there wouldn't seem to be much point in continuing with the proposed references, subject to any contrary argument of course.

Costs of the leave to appeal application

22. In Abbey Park it was agreed that costs of the leave to appeal application would be reserved.

23. In Save Roscam the board sought no order as to costs, whereas the applicants applied for their costs. I adjourned that issue to 11th July, 2022 in order to allow further instructions on the matter to be taken.

Order

24. Accordingly, the order will be:

(i). in Save Roscam, that:

(a) the applicants be granted leave to appeal under s. 50A(7) of the 2000 Act on the question set out in the judgment that is certified for that purpose; and

(b) the costs of that application be adjourned to 11th July, 2022;

(ii). in Abbey Park that:

(a) the applicants be granted leave to appeal under s. 50A(7) of the 2000 Act on the basis of the questions set out in the judgment that are certified for that purpose; and

(b) the costs of that application be reserved.