[2023] IEHC 114

THE HIGH COURT

JUDICIAL REVIEW

[2021 No. 810 JR]

BETWEEN

BALLYBODEN TIDY TOWNS GROUP

APPLICANT

AND

AN BORD PLEANÁLA, IRELAND, THE ATTORNEY GENERAL AND SOUTH DUBLIN COUNTY COUNCIL

RESPONDENTS

JUDGMENT of Humphreys J. delivered on the 10th day of March, 2023

1. This application by a notice party developer for liberty to defend proceedings that the board is willing to concede illustrates a general point about judicial review, and indeed about the reciprocal nature of rights and equality generally. Judicial review is not a problem to be solved, but an indispensable pillar of the rule of law in a free and democratic society, baked into our system as a necessary consequence of rights protected by administrative law, the Constitution, the ECHR and EU law.

2. Judicial review in some current discourse is frequently associated with environmental applicants, but that would be a misunderstanding. In the planning context it is equally available to landowners and developers as it is to other participants in the process. Indeed, landowners and developers frequently avail of this right, a fact which oddly seems to attract little comment in the public discussion of judicial review.

3. Ideally there should be an equal acceptance of the right of access to the court of all participants, subject to them having adequate grounds to do so and to meeting any lawful procedural requirements. The application also highlights the point that equal rights, such as those of access to the court, are not exclusively for any particular group, still less groups that may be socially favoured at any given time. In principle, rights and equality are for everybody, subject of course to the possibility of valid legal provision otherwise in specific situations. Thus, in general, and absent lawful provision to the contrary, there should be a reasonable equivalence of rights for interested parties to participate in the process, including the judicial process, even bearing in mind that an identical symmetry of arrangements between applicants and opposing parties is not possible. As the notice

party put it in oral submissions, "there is fundamentally here an issue of access to justice". That applies to developers as much as to environmental applicants.

4. That said, the detail of the law in relation to judicial review is not beyond amendment, evolution and clarification, but it is only stating the obvious to say that, under our system, any such hypothetical changes must ensure that legal, constitutional, ECHR and EU law rights are fully vindicated.

Facts

5. From 2004 onwards, a number of development permissions were sought and obtained by the notice party developer on a site at Stocking Avenue, Woodstown, Dublin 16.

6. On 20th March, 2015, South Dublin County Council granted permission for a first phase, known as White Pines North, including 172 dwellings.

7. On 14th and 28th February, 2018, permission for the White Pines South phase was granted by the council, including 106 dwellings.

8. On 27th February, 2020, permission for a commercial development on the site, White Pines Retail, was granted by the council.

9. On 19th July, 2021, the board granted permission for the impugned development, White Pines East SHD, which included 241 dwellings. The present proceedings were issued on 9th September, 2021, seeking *certiorari* of that decision.

10. On 16th September, 2021, the board granted permission for a further tranche of development, White Pines Central SHD, including 114 dwellings. That has been challenged in separate judicial review proceedings [2021 No. 933 JR].

11. The present proceedings were served in October, 2021 and were before the court for directions on 11th October, 2021. Reliefs 5 to 7 against the State were modularised and adjourned generally. On 24th January, 2022, the board was allowed time for opposition papers and the notice party was given three weeks to issue a motion regarding the applicant's standing.

12. On 14th February, 2022, the council was added as a respondent, without prejudice to any objection that could be made in due course, the applicant was allowed to file an amended statement of grounds adding the council as such, and the matter was adjourned generally as against both the State and the council. The notice party informed the court that it was not bringing a standing motion and accordingly, the three-week period for the board's opposition papers was reactivated with one further week for the notice party thereafter.

13. On 14th March, 2022, the board was given further time for opposition. A final adjournment was granted on a peremptory basis to permit the board's opposition papers on 4th April, 2022. The reason for the hesitation became clear when on 13th May, 2022, the board wrote to the parties stating that it would not oppose the claim for *certiorari* on the basis of core ground 10, which related to an alleged failure to assess whether there was adequate public transport capacity. This was notified to the court when the matter was next listed on 16th May, 2022.

14. On 20th June, 2022, the notice party informed the court that it wished to seek liberty to defend, and a motion to that effect was issued on 6th July, 2022, returnable for 11th July, 2022. The board then indicated that it was agreeable to an order for costs against it, up to and including 20th June, 2022, and was excused thereafter from the proceedings with liberty to apply.

15. The notice party was given until 22nd September, 2022 for written legal submissions in relation to the liberty to defend motion. Undated submissions were delivered in due course. The applicant was allowed until 8th October, 2022 for replying submissions. The matter was then adjourned by consent for a period and in the meantime submissions were delivered dated 22nd October, 2022. The matter was next listed on 21st November, 2022 and a hearing date for the present application for liberty to defend was fixed for 28th February, 2023, when the motion was heard.

The existing law

16. The only authority directly in point on the circumstances in which a notice party can defend proceedings when the statutory decision-maker is positively conceding them is *Protect East Meath Limited v. An Bord Pleanála & Ors* (I) [2020] IEHC 294, [2021] 2 I.R. 796, [2020] 6 JIC 1901. McDonald J. noted at para. 51 that there had been no previous precedent on this issue and at para. 60 said that "[e]ach case would have to be considered in its own context". He went on to indicate that a court would be slow to look behind a concession made by the decision-maker unless the notice party was in a position to place "sufficient objective evidence before the court" (para. 64) to demonstrate that there was "a sound basis" (para. 60) to suggest that the concession was incorrect, speaking in that case in the context of an issue under the habitats directive. It appears from the judgment that no issues regarding constitutional, ECHR or EU law rights were raised in that case and the matter was considered purely in terms of administrative law arguments.

Whether the notice party's application is a challenge covered by s. 50 of the 2000 Act

17. The applicant in submissions argues that by going behind the board's concession, the notice party is collaterally questioning the validity of a decision of the board covered by s. 50 of the Planning

and Development Act, 2000, the so-called "decision" being the board not opposing relief. That issue was raised in *Protect East Meath* but not decided (para. 71). Unfortunately, the applicant's submission under this heading involves a fundamental misconception. The board's decision to concede is not a decision under the 2000 Act, it is a litigation decision made in the course of proceedings. It has nothing to do with the 2000 Act or procedures under that Act, and indeed like virtually any litigation decision by a public body, it is not, in principle, judicially reviewable. The notice party's remedy is to apply for liberty to defend the proceedings, not to seek judicial review of a decision taken in the litigation itself. This would in any event be very close to the absurd procedure of the High Court authorising a judicial review of processes supervised by the court itself. To ramp the absurdity one notch further up, if one were to foolishly swallow the Alice-in-Wonderland potion offered by the applicant here and legitimise such a mechanism, one would be unwittingly catapulted into a parallel world where an applicant could seek judicial review of the board's decision *to contest* the proceedings, unleashing an infinite loop where any litigation involving public bodies gave rise to judicial reviews of all decisions taken by such bodies within the litigation, and then of all decisions within the judicial reviews, and so on until the heat death of the Universe.

The argument that the notice party does not have to meet any threshold

18. The notice party said that its "primary" position was that it did not have to meet any threshold as to the merits of its proposed defence in order to force a hearing on a point that the decision-maker was conceding. I do not accept that, simply because I think that that issue has already in effect been decided in *Protect East Meath*, and that logically the approach there should not be limited to the habitats context. That would be totally *ad hoc*. A reinforcing factor is that defending proceedings where the decision-maker is willing to concede the point does impose a cost on the system and absorbs resources generally that are in demand from other litigants. That is not a reason to shut out a notice party altogether, but it is a reason to require a notice party to show that it has a point, as demonstrated to an appropriate standard.

What the appropriate threshold for a notice party is

19. Paragraph 14 of the affidavit of Mr. Cassidy on behalf of the notice party seems to accept that there is a requirement to set out the basis of a proposed defence when seeking liberty to defend. That seems consistent with *Protect East Meath*. McDonald J. in that case did not lay down any rigid red lines as to what the threshold was, and used a variety of formulae: "sufficient basis" (para. 21), "a sound basis" (para. 60) and "a strong case" (paras. 64 and 66). It seems to me that the centre of gravity of these various formulations is reasonably close to the threshold that a planning applicant

has to meet to have its points heard, namely substantial grounds. The applicant here argues that there has to be a high threshold because the presumption of validity has disappeared in a case where the decision-maker concedes. Assuming that it is right about that (and I do not need to decide that now), that only reinforces the case for symmetry with an applicant. A party making a leave application has to overcome the presumption of validity at least to the level of showing substantial grounds allowing it to make the case. So there is a logic to a notice party having a similar threshold in seeking to be allowed to defend a decision that the decision-maker does not wish to stand over. Again, the court has to be called upon to apply a certain procedural level playing-field here. To make its point, an applicant has to show substantial grounds; it would illogical and unequal to demand that a notice party has to show something significantly more.

20. In written submissions, both the notice party and applicant went into some detail about the merits or otherwise of the potential points of defence. I do not need to decide any of that now, but merely to consider what the correct threshold is and whether the notice party has met it. On balance, I think that the concept of substantial grounds legitimately represents the correct test at least in the planning context. It may well be that a less exacting test of arguable grounds might apply where that is the threshold for an applicant in the given subject area, but I do not need to decide that.

Whether the threshold is satisfied on the facts

21. Returning to Mr. Cassidy's affidavit, paras. 15 to 23 set out what are basically legal submissions, paras. 24 to 32 exhibit the material contravention statement and the statement of consistency and discuss these, paras. 32 to 42 set out further submissions, para. 43 provides evidential material regarding bus transport, paras. 44 to 47 exhibit the relevant chapter of the EIA report and planning report and discuss those and the traffic and transport assessment, paras. 48 to 50 discuss the conceded issue and provide evidential support for the notice party's position, and paras. 51 to 53 provide further submissions. In my view, notwithstanding that the applicant has sought to answer these various points, it seems to me that, at this stage of the proceedings, the notice party has demonstrated substantial grounds on which it should be allowed to defend the case.

Rights and rule of law considerations

22. If I am wrong about all of the foregoing, and if the notice party does not meet the test arising from *Protect East Meath*, I would then need to consider the notice party's rights, particularly under the Constitution, the ECHR and the EU Charter insofar as it arises. On a reading of the judgment, such rights were not argued in *Protect East Meath*. The problem fundamentally with the applicant's position is that it would in effect deprive the notice party of any meaningful remedy.

23. If the board had refused the application for permission, the notice party could have judicially reviewed that decision; whereas if the applicant is correct, the notice party is worse off now that the permission has been granted and the board has folded its tent in the proceedings. That would be somewhat perverse in itself but, more fundamentally, would deprive the notice party of any route to court to ventilate its position. The applicant's counter-argument, which was that the notice party could judicially review the board's decision to concede, is totally implausible and procedurally misconceived for the reasons specified above.

24. The punchline is essentially that, subject to the court being satisfied that there are sufficient grounds for the proposed defence, an appropriately interested party such as an applicant for a permission has an entitlement to be heard on an application to quash that permission, even where the decision-maker is proposing to concede relief. That principle is not confined to planning law.

25. That entitlement, in my view, properly arises from a number of sources:

(i) as a matter of fair procedures in administrative law;

(ii) as an aspect of the right of access to the court as an unenumerated constitutional right in order to vindicate the applicant's property rights or any other rights;

(iii) in a case in which it arises, under the EU Charter in terms of the notice party's rights to property and to an effective remedy under articles 17 and 47 of the Charter (although that only arises in a case where EU law rights are engaged, which does not apply here because the question of defending core ground 10 is a purely domestic law point); and

(iv) in terms of the right to an effective remedy and to peaceful enjoyment of possessions under Article 13 and Article 1 of Protocol 1 to the ECHR, as implemented in domestic law by the European Convention on Human Rights Act 2003.

26. In a way, this application illustrates the point that the right to an effective remedy is the most fundamental of all rights, because, in its absence, all other rights are meaningless. Thus, here if the notice party does not have access to the court to make its point, it might as well not have a property right at all, as far as the permission is concerned.

27. While there are undoubtedly pragmatic considerations for refusing the application, such as minimising the court's workload, it seems to me that, where rights are engaged, these have to have priority over mere questions of management of business and reduction of the number of matters before the court.

28. Relatedly, there is the principle of judicial restraint, but that is not hugely relevant here. Judicial restraint means that the court should not decide points it does not have to decide. That has no relevance to a situation where the court is properly called upon to decide a point, or where failure to decide it would impinge on a party's rights, as here. Admittedly, the doctrine is mentioned in passing in *Protect East Meath,* but that is merely an *obiter* reference to a loosely-related concept. The cases where that doctrine has arisen are not in fact an exact analogy to the type of situation considered here or in *Protect East Meath*.

29. Separately from the question of rights as such, it seems to me that an approach that allows a notice party to raise legal issues that a decision-maker wishes to concede does promote the rule of law in a more overall sense. In that absolute and admittedly rather abstract sense, it is in the interests of the rule of law that a decision-maker does not concede cases that it should be defending just as much as it is in the interests of the rule of law that it should not defend cases that it should be conceding.

Caveats

30. All of the above must be subject to a few caveats however. A notice party that steps into the shoes of a respondent must also take on the relevant obligations of the respondent, and subject to any argument as to what counts as relevant for this purpose, one could envisage a particular responsibility to apply itself to matters such as full disclosure of adverse matters in the process whether sought by anybody or not. Admittedly such obligations also appear to apply to notice parties who act alongside, rather than instead of, a respondent, but the detailed ramifications of such potential obligations can be worked out in a case in which they arise for decision. Furthermore, the court is not obliged to give the views of a notice party equal weight to those of the decision-maker. If the issue is the impact of something on the system as a whole, the decision-maker's views may weigh more heavily than those of a notice party. This focus may be particularly acute in any context where wider considerations of the public interest or general impacts may feature, such as leave to appeal or statutory interpretation more generally. There, a systemic view as seen by the decision-maker may have more import with the court than the perspectives of parties concerned only with a particular development. There may be other contexts where the views of the notice party may be given lesser weight, if any; for example where the issue raised is one peculiarly internal to the decision-maker rather than with anything related to the lawfulness of acts or omissions of the notice party as such. There may also be situations which don't arise for decision now where it would simply

be inappropriate to allow a notice party to step into the shoes of the respondent at all. But I don't need to consider that possibility further for present purposes.

Procedure to be adopted

17. The notice party wished, if successful, to reflect on whether the best approach is to list only core ground 10 as a preliminary issue or to list all issues for hearing. I will give the opportunity to the parties to consider this further.

18. The applicant, as noted above, also raises the reasonable question as to whether the presumption of validity should continue to attach to a decision that is being conceded by the decision-maker. That can be addressed at the hearing.

19. Likewise, the extent of the notice party's duty of candour can also be legitimately debated at the hearing (on this issue see Michael Fordham, *Judicial Review Handbook* 7th ed. (London, Bloomsbury, 2020), para. 10.4.12 which envisages duties on all opposing parties).

20. Finally, the notice party did not seem to want this matter dealt in tandem with the other White Pines judicial review referred to above so this case can just take its own course.

Order

21. Accordingly, the order will be:

(i) that the notice party have liberty to defend as sought at para. 1 of the notice of motion; and

(ii) that the matter be listed on a date to be notified by the List Registrar for directions as to the procedure to be adopted.