



**AN CHÚIRT UACHTARACH
THE SUPREME COURT**

Supreme Court Record No: S:AP:IE:2023:000072
High Court Record No: 2021 562 JR

**O'Donnell CJ
Charleton J
O'Malley J
Woulfe J
Donnelly J**

Between/

CROFTON BUILDINGS MANAGEMENT CLG

and STEPHANIE BOURKE

Appellants

AND

AN BORD PLEANÁLA

Respondent

AND

FITZWILLIAM DL LIMITED

Notice Party

RULING of the Court on costs delivered electronically this 29th day of May, 2024.

Introduction

1. On 24 April 2024, Donnelly J. delivered judgment (*nem diss*) dismissing the appellant's appeal against the remittal of proceedings for reconsideration by the respondent, An Bord Pleanála ("the Board"), but varied the Order of the High Court to the extent that the

directions (referred to as terms in the Order of the High Court) upon which the remittal had been ordered are to be deleted. Despite being unsuccessful, the appellant now seeks their costs against the Board and against the notice party pursuant to s. 50(B)(4) of the Planning and Development Act, 2000 (“the Act of 2000”).

2. The full facts of the appeal are set out in the judgment. Briefly, the appellant appealed the remittal of proceedings to the Board following the making of an order of *certiorari* of the Board’s grant of planning permission to the Notice Party. The judgment addressed the meaning of s. 50A(9A) of the Act of 2000; this section is the first statutory intervention into the power of the High Court to order remittal. The section requires that when the applicant for the planning permission/approval applies for remittal, it is mandatory for the High Court to “remit the matter ... unless the Court considers, having regard to the circumstances of the case, that it would not be lawful to do so”. Remittal is now the default position in planning cases; refusal to remit is now limited to the situation where the Court is satisfied that it would not be lawful to do so. That threshold – in effect, unlawfulness – is a high threshold to reach. It is only reached where the Board/planning authority cannot reach a lawful decision to grant or not to grant the permission/approval. The circumstances in which the High Court may refuse to remit will therefore be rare and exceptional.
3. In relation to directions, the Court held that the High Court may give appropriate directions on remittal but the appropriateness of giving directions may not arise in most cases bearing in mind the Board’s powers and duties under the planning code to act fairly and within *vires* in reaching its decisions. Thus, the Court varied the Order of the High Court by removing the directions made by the High Court as to the procedure to be adopted by the Board upon remittal.
4. The costs in environmental matters are dealt with in s. 50B of the Act of 2000 and, in accordance with subsection (2), the default position is that each party is to bear its own

costs. Subsection (4) provides however that: “Subsection (2) does not affect the Court’s entitlement to award costs in favour of a party in a matter of exceptional public importance and where in the special circumstances of the case it is in the interests of justice to do so”.

5. The appellants acknowledge recent costs decisions of this Court, such as *An Taisce v An Bord Pleanála (No. 4)* [2022] IESC 18 and *Right to Know CLG v Commissioner for Environmental Information* [2022] IESC 28, in which the unsuccessful litigant was refused an order for costs but submits that this is a test case which will have a significant impact in terms of saving costs and time on pending proceedings before the High Court (approximately 10-20 pending legal proceedings) and extant applications before the Board (over 60 applications). The judgment clarifies the meaning and effect of s. 50(9A) which deals with remittals to the Board. Furthermore, they submit that the position adopted by the Board, who did not oppose the successful grant of leave to the Court of Appeal, and the benefit which the Board has derived from the appellants pursuing this appeal is such that this ought to be granted. The appellants also point out that the Notice Party was unsuccessful in seeking to have the directions upheld, that the judgment clarifies a) the stage in the process to which remittal ought to be made and b) the development plan which applies to the remitted proceedings before the Board.
6. The Board and the Notice Party oppose the making of an Order for costs. The Board submits that if the appellants are entitled to any costs order it should be against the Notice Party only. The Notice Party submits that it would be very unfair to award costs against the Notice Party in circumstances where they cannot obtain costs against the appellants even though successful, nor can they be awarded costs against the Board even in circumstances where the Board was responsible for the error which led to the substantive relief in the first place. Moreover, the Notice party submits that it was only the Board that benefitted from the clarification of the law on remittal in its decision-making process.

7. The starting point is that the appellants lost their appeal and, without the intervention of the costs provisions of the 2000 Act, presumptively they would be liable for the costs of both the Board and the Notice Party. While this was a case where the High Court held that it was a matter of exceptional public importance justifying an appeal to the Court of Appeal and this Court agreed that it was a matter of general public importance, this is insufficient to justify the award of costs to an unsuccessful party. The Court's discretion to award costs in favour of the unsuccessful party is where the matter is of exceptional public importance *and where in the special circumstances of the case it is in the interests of justice to do so.*
8. The Notice Party are a private entity who sought and were granted planning permission but, due to an error in the Board's decision making, that planning permission was quashed. They had to bear their own costs in the High Court and while they were on the hazard for a costs order against them in this Court, they would have to bear their own costs (at a minimum) even where, as here, they successfully defended the appeal. Although one aspect for which they advocated, namely, the Court to give directions, was not accepted by this Court, this does not change the position that they were successful in the overall appeal. The Notice Party do not stand to gain in any systemic way from the clarity brought by the judgment as to remittals to the Board. There are no special circumstances that make it in the interests of justice to award the appellants their costs against the Notice Party.
9. The Board are in a different position because, undoubtedly, they will benefit from the clarification of the law in respect of remittal of proceedings. This was a test case where there were other cases dependent on the outcome. Even when a case is in the nature of a test case, it is not obligatory that the discretion to award costs to the unsuccessful litigant most be exercised. The Board in this case was successful in the appeal and the arguments made were, in most aspects, adopted by the Court. The Board is, as this Court in *An Taisce* pointed out, a body established by statute with no powers or functions other than those

conferred by law. It is apparent that no constitutional right of the appellants was at issue in this appeal. This was a case about procedure: would the Notice Party/developer be permitted to have their application remitted for reconsideration by the Board or would they be obliged to make a fresh application for planning permission? Along with the order quashing the original decision, in the High Court the appellants had been awarded their costs of the substantive application for judicial review with no order for costs being made in respect of their application for leave to appeal. While it is not required that an unsuccessful party must have taken proceedings in the general public interest, as distinct from self-interest, for an award of costs to be made in their favour, it is a factor to which the Court is entitled to have regard.

10. The Court must consider and balance all the above factors. Although this was an appeal which clarified the law, was a test case, and for which the Board has the benefit of an appellate decision, these appellants lost the appeal, brought in their own interest, on the primary issue that there be no remittal. They have the benefit of a High Court costs order on the substantive issue. In light of all relevant factors, the Court considers that there are no special circumstances which would require, in the interests of justice, the making of a costs order in favour of the appellant against the Board.

11. In conclusion, this is not an exceptional case where an award of the unsuccessful appellants costs, or a portion of such costs, would be justified as against the successful respondents to the appeal. For the reasons set out above, this Court will make no Order on the costs of the appeal.