THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 49

Record Number: 2017/506

Ryan P.
Peart J.
Whelan J.

BETWEEN:

NORTH MEATH WIND FARM LIMITED AND ELEMENT POWER IRELAND LIMITED

APPLICANTS/RESPONDENTS

- AND -

AN BORD PLEANÁLA

RESPONDENT

- AND -

NORTH MEATH WIND INFORMATION GROUP AND JOHN CALLAGHAN

APPELLANTS

JUDGMENT OF MR. JUSTICE MICHAEL PEART DELIVERED ON THE 23RD DAY OF FEBRUARY 2018

1. By Order of the High Court (McGovern J.) the appellants' application pursuant to Ord. 84, r. 22(2) of the Rules of the Superior Courts to be joined as a notice parties in these proceedings was refused, and the costs of that application were awarded to the applicants. They now appeal to this Court against that refusal.

2. The grounds upon which they appeal against that order are, as set forth in the notice of appeal, essentially that the trial judge erred, firstly, in deciding that the North Meath Wind Information Group ("the Group") could not be joined as it is an unincorporated association; secondly, in deciding that Mr Callaghan was not affected or substantially affected by the development in respect of which the applicants are attempting to obtain development consent, and therefore does not have the necessary *locus standi*, notwithstanding the fact that he participated fully in the development consent procedure pursuant to Council Directive 2011/92/EU; and thirdly, in relation to the costs order, that the trial judge erred in awarding costs against the appellants because the judicial review proceedings to which the appellants seek to be joined as notice parties relate to the environment, and that in the light of the requirements of Council Directive 2011/92/EU and of Council Directive 2014/52/EU the trial judge erred in the manner in which he exercised his discretion in relation to the costs of the application.

3. A brief account of the background facts will suffice. I will refer to the applicants in the judicial review proceedings as "the developer" to avoid confusion with the Group and Mr O'Callaghan who were the applicants in relation to their notice of motion seeking to be joined as notice parties.

4. Since 2012 the developer has been trying to achieve development consent for a number of substantial windfarms in Co. Meath. Thus far none has achieved such consent. There has been local opposition to the proposals, including by the Group, of which Mr O'Callaghan is a member. He resides in the vicinity of one of the proposed development sites, namely Castletownmoor, where the developer seeks to erect 25 turbines, albeit at a distance of some 4.8 km according to the affidavit of Donal O'Sullivan sworn on the 11th October 2017 on behalf of the developer.

5. The Group comprises local residents from the Kells area. It was formed in 2012 when residents became aware of the developer's proposals to locate a large windfarm in their area. The first such project was what is referred to as the Greenwire Project. That project has not advanced beyond an application for Strategic Infrastructure Development status, but apparently remains live on the website of An Bord Pleanála. The second project is the Emlagh Wind Farm which is proposed to be located in the Carlanstown area of north Meath. That project achieved SID status, enabling the application for development consent was made directly to An Bord Pleanála. However, judicial review proceedings were brought against the decision to grant the project SID status. Those proceedings failed in the High Court, as did an appeal. According to one of the affidavits grounding the Group's present application to be joined, the Supreme Court has granted leave to appeal to that court, and a hearing date has been allocated.

6. It is the third proposed development which is the subject of the present proceedings. It is the Castletownmoor project. That project was granted SID status. However, the application for development consent was refused by An Bord Pleanála. That decision to refuse development consent is the subject of the developer's present judicial review proceedings which are listed to be heard in the Commercial Court on the 18th January next, and to which the Group and Mr Callaghan seek to be joined as notice parties, so that they can be served with all the relevant documents to enable them to participate in that hearing in the High Court.

7. I have set forth only a very brief summary of the background. The full detail of the extensive efforts that the Group and particular individuals within the Group, including Mr Callaghan, have gone to in order to resist the developer's attempts to develop these windfarms in their area are detailed in the affidavits filed in support of the application by the Group and by Mr Callaghan to be joined as notice parties. They have had to raise funds. They have lodged objections, and have attended and participated in oral hearings and many public meetings. They have prepared and lodged lengthy submissions to An Bord Pleanála. They have brought legal proceedings, albeit unsuccessfully. These efforts have been considerable both in terms of time, effort and expense, and are themselves testament to the depth of feeling which exists within the Group in relation to these proposals for windfarms which they consider will adversely affect them as residents in the areas concerned. Mr Callaghan has been personally heavily involved in these efforts.

8. As I have said already, the application for development consent for the project at Castletownmoor was refused by An Bord Pleanála. The present proceedings by way of judicial review are brought by the developer in an effort to quash that decision to refuse consent. The Group and Mr Callaghan only discovered the existence of those proceedings via the media, since they are not parties to the proceedings and were not served with the proceedings. They are not therefore aware of the basis upon which the developer seeks to have the Board's refusal decision quashed. Nonetheless, they seek to be joined so that they can be served with the documents filed in those proceedings, and so that they may participate, and make submissions to the Court. They are very concerned that if the judicial review proceedings succeed the decision to refuse consent will be quashed, and the matter will be remitted to An Bord Pleanála for a fresh decision. This, it is submitted, will set all the efforts to date at nought. Mr Callaghan in his grounding affidavit expressed his belief that the Board's refusal of consent was largely based on his submissions and those of the Group generally. They wish to be heard in the hearing of these proceedings as they say that as residents in the area of the proposed windfarm at Castletownmoor they stand to be adversely affected by any decision to grant permission for it, and ought therefore to be permitted to participate in these proceedings, and for that purpose to be joined as notice parties.

Unincorporated body lacks capacity

9. The first issue on this appeal is whether the Group, as distinct from Mr O'Callaghan, is disentitled to be joined as a party to the proceedings simply because it is an unincorporated body, and therefore not a legal entity. Counsel for the Group has submitted that it is an environmental nongovernmental organisation which meets the criteria specified in s. 50A of the Planning and Development Act 2000 ("the Act"), and therefore has both capacity and standing to be joined as a notice party to these proceedings. They submit that it is clear from the provisions of s. 50A of the Act that an exception is provided for to the general rule that an unincorporated entity does not have capacity to bring or become involved in legal proceedings.

10. Section 50 of the Act makes certain provisions regarding an application for leave to seek a judicial review of decisions made by a planning authority, a local authority, or An Bord Pleanála in the purported performance of a function under the Act. Section 50A thereof makes further provisions in relation to such applications, including the following at subs. (3):

> "(3) The Court shall not grant section 50 leave *unless it is satisfied that* –
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> (a) there are substantial grounds for contending that the decision or act concerned is invalid or ought to be quashed, and
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> (b) (i) the applicant has a sufficient interest in the matter which is the subject of the application or
>
> (ii) where the decision or act concerned relates to a development identified in or under regulations made under section 176, for the time being in force, as being development which may have significant effects on the environment, *the applicant*:-
>
> (I) *is a body or organisation* (other than a State authority, a public authority or governmental body or agency) the *aims or objectives of which relate to the promotion of environmental protection,*
>
> (II) has, during the period of 12 months preceding the date of the application, pursued those aims or objectives, and
>
> (III) satisfy such requirements (if any) as a body or organisation, if it were to make an appeal under section 37 (4) (c), would have to satisfy by virtue of section 37 (4) (d) (iii) (and, for this purpose, any requirement prescribed under section 37 (4) (e) (iv) shall apply as if the reference in it to the class of matter into which the decision, the subject of the appeal, falls where a reference to the class of matter into which the decision or act, the subject of the application for section 50 leave, falls).

11. The appellants submit that the section recognises the right of an unincorporated body such as the Group to be an applicant for judicial review, and that it should be considered also, at least by implication, to entitle such a body to participate as a notice party in proceedings brought by another applicant where it seek to be joined for that purpose.

12. The appellants have sought support for their submissions from the judgment of Clarke J. in *Sandymount and Merrion Residents Associates v. An Bord Pleanála and others* [2013] IESC 51. In that judgment the wording of s. 50A. was considered, and in particular whether s. 50A provided an exception to the general rule at common law that an unincorporated association has no separate legal identity as distinct from the individuals who comprise the membership, and therefore may not bring proceedings, and by extension for the purpose of the present case, be joined as notice parties to litigation commenced by others. The exception to the common law rule specifically provided under s. 50A fulfils one of the State's obligations arising under Council Directives 85/337/EEC and 96/61/EC ("the Public Participation Directive") to facilitate public participation in the planning process. Recital (4) provides:

> "Participation, including participation by *associations, organisations and groups, in particular non-governmental organisations* promoting environmental protection, should accordingly be fostered, including *inter alia* by promoting environmental education of the public" [emphasis provided].

13. I would mention in passing that a recital in precisely the same terms appears at Recital (17) of Council Directive 2011/92/EU which codified Council Directive 85/337/EEC and later amendments.

14. Having carried out a detailed analysis of the relevant provisions of the Public Participation Directive, Clarke J. concluded that:

> "It is a necessary inference to be drawn from s. 50A of the Act of 2000 that it is intended that any environmental non-governmental organisations meeting the criteria specified in the section are (in the absence of any regulation concerning capacity) entitled to bring relevant judicial review proceedings and have the necessary capacity so to do …… I was, therefore, satisfied that s. 50A of the Act of 2000 provides a clear statutory exception, by necessary implication, to the general rule that unincorporated bodies and associations cannot maintain proceedings."

15. On this question of capacity the developer, who is the applicant in these judicial review proceedings, submits that reliance upon the decision in *Sandymount and Merrion Residents Associates v. An Bord Pleanála and others* is misplaced since the section applies expressly only to applicants for leave to seek a judicial review to challenge a decision, and does not purport to extend to unincorporated bodies who seek to be joined as notice parties to an applicant's proceedings in order to assist in, or otherwise support

the Board in its defence to the developer's challenge.

16. It is true that in the *Sandymount* case the issue was whether the applicant in that case had capacity, being an unincorporated body. That was the context in which the case had to be decided. Article 11 of Council Directive 2011/92/EU provides:

> "Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned:
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> (a) having a sufficient interest, or alternatively,
>
> (b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition,
>
> have access to a review procedure before a court of law or another independent and impartial body established by law *to challenge the substantive or procedural legality of decisions*, acts or omissions subject to the public participation provisions of this Directive."

17. Recital 16 of Council Directive 2011/92/EU provides:

> "Effective public *participation* in the taking of decisions enables the public to express, and the decision-maker to take account of, opinions and concerns which may be relevant to those decisions, thereby increasing the accountability and transparency of the decision-making process and contributing to public awareness of environmental issues and support for the decisions taken."

18. Recital 17 provides:

> "Participation, including participation by associations, organisations and groups, in particular non-governmental organisations promoting environmental protection, should accordingly be fostered, including, inter alia by promoting environmental education of the public."

19. Unincorporated bodies or associations of individuals have a role to play in the decision-making process leading to decisions by planning authorities, local authorities and An Bord Pleanála. This role is recognised in the EU Council Directives such as that referred to, as well as in the Aarhus Convention. Indeed, it is a role that is not just recognised, but is encouraged. In the words of recital (17) above "the participation … in particular [of] non-governmental organisations … should be fostered …".

20. It is clear that s. 50A of the Act, and the Directives referred to, have no direct application to a situation such as the present where an unincorporated body wishes to participate by being joined in a developer's proceedings as a notice party so that it can support the defence of those proceedings by An Bord Pleanála. The exception to the general rule at common law which is provided for in the section is confined to such bodies who seek to challenge a planning decision. If the Oireachtas had wished to provide for a wider exception it could have done so. But it did not do so. I would add that while Council Directive 2011/92/EU refers to need to foster participation by the public in the decision-making process in matters affecting the environment, such as by promoting environmental education, and by ensuring that individuals and bodies, including unincorporated bodies, may express opinions and make submissions to the decision-maker, the Group and Mr O'Callaghan have demonstrably been able to do so. But does the Directive go further and require that the State ensures by its laws that the Group's wish to be joined as a notice party to another party's judicial review challenge to a decision be facilitated? I think not. Article 11 of the Directive provides that members of the public (and for this purpose I would include an unincorporated body such as the Group) having a sufficient interest "have access to a review procedure before a court of law …… *to challenge the substantive or procedural legality of decisions*, acts, or omissions subject to the public participation provisions of this Directive". In the present case the Group is not seeking to challenge any such decision. The decision made is one with which they take no issue. They are in full agreement with it. Seeking to be joined to the developer's proceedings so that they can add their voice to the resistance to the developer's application to quash its decision is not something embraced by Article 11.

21. This Court has not been provided with a note (approved or otherwise) of the reasons given by the trial judge for his refusal of the appellants' application to be joined. However, both parties to this appeal have proceeded in the basis that one reason for his refusal was that the Group lacks legal capacity as an unincorporated body, for the purpose of being joined. In so far as that was indeed one of the reasons on which his decision was based, I would uphold the trial judge's conclusion.

22. The second issue on this appeal is stated in the grounds of appeal as follows:

> "The Learned High Court Judge erred in refusing the said reliefs and in finding that the Second Named Appellant [Mr Callaghan] was not affected or substantially affected by the set proceedings or that he had the necessary *locus standi* to be joined as a notice party to the within proceedings, notwithstanding the extent to which he is affected by and participated in the development consent procedure pursuant to Council Directive 2011/92/EU."

23. The appellants' notice of motion sought two reliefs:

> (a) an order pursuant to the provisions of Ord.84, r. 22(2) of the Rules of the Superior Courts directing that they be served with the developer's notice of motion seeking judicial review, together with the statement of grounds, verifying affidavit and the exhibits thereto; and
>
> (b) an order directing that they be entitled to be heard in relation to the developer's notice of motion for judicial review, and that they be permitted also to file opposition papers.

24. Order 84, r, 22(2) of the Rules of the Superior Courts provides:

> "The notice of motion or summons shall be served on all persons directly affected."

25. Taking a simple and straightforward example, it is commonplace where a person seeks leave to quash a development consent decision made by a planning authority, the Court if granting leave will ensure that the party in whose favour the impugned decision was made is a notice party to the proceedings and is served with the papers relating to the application, since that party quite

obviously stands to be "directly affected" if indeed the decision in its favour is quashed.

26. The present case is very different. Here, the impugned decision is one refusing the developer's application for development consent, and the respondent to the challenge is the decision-maker, An Bord Pleanála. The trial judge concluded that the Group and Mr Callaghan, though clearly 'interested' in the ordinary sense of that word, given their active involvement in the planning process where they strongly urged the Board to refuse the application, nevertheless they are not "directly affected" by any decision the Court might make, as that phrase is to be properly understood, and therefore were not entitled under the rule to be joined as notice parties top the litigation. In other words, while they would be concerned if the refusal decision was quashed, leading to a re-consideration by the Board of the developer's application, no right or interest of theirs is *directly* affected.

27. The disposal of this appeal turns on what is the correct meaning to be given to the words "directly affected" in Ord.84, r.22(2) of the Rules of the Superior Courts.

28. The appellant, Mr Callaghan has sworn in his affidavit that not only is he a person who is directly affected by the decision, but also that he is very knowledgeable in respect of the issues and wishes to be in a position to address issues that the developer may raise on the hearing of the proceedings. He goes on to say that the Group was formed for the single purpose of opposing this developer's proposals to build a windfarm in County Meath, and that it a matter of basis fairness that he and the Group be permitted to be joined as notice parties.

29. Mr Ryan, another member of the Group has sworn an affidavit. He also considers that the Group is directly affected since a successful challenge by the developer will result in a reconsideration of the application by the Board, which will directly impact upon the Group because they will once again have to get involved in the planning process, which, he says, is an onerous and costly exercise which they have already gone through. He believes that the views that the Group can express will be of use to the trial judge. He expresses the view that he is "vitally affected" by the litigation, and its outcome.

30. The phrase "vital interest" is one used, albeit in a very different context, by Keane C.J in his ex tempore ruling given on the 14th April 2000 in *Spin Communications t/a Storm FM v. Independent Radio and TV Commission and NP*. The appellants have referred to this *ex tempore* ruling, and seek to draw support for their submission that the phrase "directly affected" in Ors.84, r. 22(2) of the Rules of the Superior Courts should be loosely construed so as to include persons who have a vital interest in the outcome of the proceedings. However, I do not consider that this Ruling can avail the appellants in this regard. Firstly, it is described as an *ex tempore* ruling, albeit from the then Chief Justice. But far more importantly, those proceedings were brought by way of judicial review by an unsuccessful under-bidder for a broadcasting licence which was awarded by the respondent authority. But significantly, the successful bidder who was awarded the licence was named by the applicant as a notice party. It is very similar to the simple example I gave above where in a challenge to a planning decision the person in whose favour the permission has been granted is named as a notice party as he/she clearly stands to be directly affected if the planning permission is quashed. In *Spin*, clearly the notice party who was awarded the licence stood to be directly affected if that award was quashed.

31. The appeal in *Spin* arose because in the High Court, while the first named respondent authority was given an order for security for its costs against the applicant which had no assets with which to meet a costs order if so required, the notice party was denied the same order. It was in that context that the Chief Justice stated the following by way of conclusion that the notice party was entitled to have an order for security for costs also:

> "… This is a case in which the notice party has a vital interest in the outcome of the matter. As Chief Justice Finlay said in the *O'Keeffe v. An Bord Pleanalá* case, where you have a party such as the notice party in the present case who is vitally interested in the outcome of the proceedings, they must be joined as a party and will be joined by the Court if the applicant does not join them. In those circumstances, it seems to me that once the notice party is there, once he is in the proceedings protecting his interests, he may find himself in precisely the same position as the respondent. He may find himself in the position that he has bee there, of necessity, to protect his interest, to advance arguments that may not have been advanced by the IRTC and to have had the benefit of his own counsel and solicitor to protect his interest. It would be quite unjust that he should have to pay his costs because the applicant company has no assets, where he has been brought there as a necessary party.
>
> There appears to be nothing in the present case to suggest that if the IRTC and the notice party are successful in these proceedings they would not both be awarded costs as both having a vital interest in the outcome."

32. It is clear in my view that the reference to having a "vital interest" when seen in the context of that case is not intended to mean something wider or different from "directly affected" in the rule. The notice party was clearly directly affected as it stood to lose a licence actually granted to him. That is very different to the present case where the Group and Mr Callaghan stand to lose nothing *directly* from any decision the Court might make. I emphasise the word "directly". If the judicial review challenge by the developer is unsuccessful, clearly they are not directly affected in any adverse sense. If the challenge is successful, again there is no direct affect upon them in the sense of losing any right they had before the challenge was brought. At worst the matter would be remitted to the Board for fresh consideration of the application. In the event that on such fresh consideration a decision to grant development consent is made, then they may have a sufficient interest to enable them to bring a challenge to the grant of consent. That is the point at which they are directly affected.

33. The developer in this appeal has referred to the judgment of Fennelly J. in *Dowling and others v. Minister for Finance, and others*, [2013] IESC 58. Indeed the appellants also sought to derive support for the submissions from this judgment also in so far as Fennelly J. used the phrase "an interested party" when speaking of a party "entitled to be represented so as to defend his or her interests. But one must beyond the use of that short phrase to see the full context of what Fennelly J. was stating in order to correctly understand phrase used. In my view it supports the developer's position and is against the submissions of the Group and Mr Callaghan. At para. 54 he stated:

> "54. At this point, I must pause to say that, with great respect, I do not agree with the view of Charleton J. that the question to be asked is whether the submissions of the party applying to be joined "are needed on any issue for the court to reach a just and complete adjudication". It follows that I also disagree with his conclusion that there was "no benefit to be gained by the Court from these parties attending the hearing and backing up the contention of the Minister that the direction order was correctly made in the first place". That is not the correct test. An interested party, i.e. a party directly affected, is, in my view, entitled to be represented to defend his or its interests, even if the decision-maker is there to advance the same arguments."

34. Thereafter, Fennelly J. referred to the same passage from the ruling given by Keane C.J. in *Spin* to which I have already referred. I

do not think it is necessary to set out the factual background to the decision in *Dowling*. Suffice to say that the party applying to be joined as notice party was, in the words of Fennelly J. "The body most likely to be directly affected by the setting aside of a direction order" being the "relevant institution" in respect of which the direction order under challenge had been made. Again, that institution can be considered in the same light as a party who has been granted planning permission, or the successful bidder for a broadcasting licence, where those awards are challenged.

35. As I said, the appellants stand to be affected in some way by a possible decision to quash the refusal of development consent in this case, but they must be considered to be at risk only of being indirectly affected, and not directly affected for the reasons explained. In my view their interest in the proceedings represents a desire on their part to assist and support the opposition being mounted to the developer's challenge by An Bord Pleanála in the hope that the development consent will be upheld and that the matter is not remitted to the Board for further consideration and a fresh decision. The effect of a successful challenge to the refusal of development consent has no direct effect upon them.

36. It follows in my view that they do not come within the meaning of "directly affected" for the purposes of Ord.84, r.22(2) of the Rules of the Superior Courts, and are therefore not entitled to be joined as a notice party to these proceedings, and I would therefore dismiss the appeal on this ground.

The costs issue

37. In the High Court it was ordered that the appellants pay the developer's costs of their unsuccessful application to be joined as notice parties to these proceedings. The appellants submit that the trial judge erred in so ordering since these proceedings are of a kind that come within the provisions of s. 50B(1) of the Act, and therefore that as provided for in subs. (2) each party must bear its own costs. Section 50B(1) provides:

> "50B(1) This section applies to proceedings of the following kinds:
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> (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, or
>
> (iii) any failure to take any action,
>
> pursuant to a law of the State 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,
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> (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
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> (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
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> (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);
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> (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).

38. Counsel for the appellant has submitted that these proceedings are undoubtedly proceedings by way of judicial review which concern a challenge to a decision by An Bord Pleanála coming within the provisions of subs. (1). He submits therefore that the High Court could not award costs on the basis of the jurisdiction provided in that regard by Ord. 99 of the Rules of the Superior Courts in the light of the provisions of s. 50B (2) of the Act which provides:

> "(2) Notwithstanding anything contained in Order 99 of the Rules of the Superior Courts (S.I. No. 15 of 1986) and subject to subsections (2A), (3) and (4), in proceedings to which this section applies, each party to the proceedings (including any notice party) shall bear its own costs."

39. The developer makes the rather obvious point that the Group and Mr Callaghan are not parties to the proceedings, and that they are at best a body and person who would like to become notice parties to the proceedings, but whose application in that regard has been refused.

40. In my view these appellants cannot avail of the protection against a costs order which is provided for in s. 50B (2) in cases which come within s. 50(1) of the Act. While the proceedings are of a kind that are within the kinds of proceedings referred to in s. 50B (1) of the Act, Ord.99 of the Rules of the Superior Courts is disapplied only to the extent that "each *party to the proceedings* (including any notice party)" [emphasis provided] must bear their own costs. I appreciate that the developer in whose favour the costs order was made in the High Court is "a party" to the judicial review proceedings . The appellants urge a literal application of words used in subsection (2) which they submit means that the developer must bear its own costs. However the section must be read as a whole. In my view subsections (2A) and (3), and indeed (4) of the same section make clear that the section when read as a whole applies only to question of the costs, inter se, of persons and bodies who are parties to the proceedings, and not in relation to the costs as between a party to the proceedings and persons who are not parties, such as the appellants. Subsections (2A), (3) and (4) provide:

> "(2A) the costs of proceedings, or a portion of such costs, as are appropriate, may be awarded to the applicant to the extent that the applicant succeeds in obtaining relief and any of those costs shall be borne by the respondent or notice party, or both of them, to the extent that the actions or omissions of the respondent or notice party, or both of them, contributed to the applicant obtaining relief.

(3) the Court may award costs against a party in proceedings to which this section applies if the Court considers it appropriate to do so:

(a) because the Court considers that a claim or counterclaim by the party is frivolous or vexatious,

(b) because of the manner in which the party has conducted the proceedings, or

(c) where the party is in contempt of the Court.

(4) 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."

41. Nowhere in these provisions is there any reference to a party who is not a party or a notice party in proceedings to which subs. (1) applies. If such a non-party was intended to be included in the disapplication of Ord. 99 of the Rules of the Superior Courts provided by subs. (2) the Oireachtas would have said so. Given the clear context of s. 50B to which I have referred, the appellants may not avail of the protection provided to an unsuccessful party to such proceedings by subs. (2).

42. If the position were otherwise, there would be a manifest unfairness visited upon an applicant in judicial review proceedings such as the present applicant where there might be multiple persons or bodies who may wish to be joined as notice parties to proceedings, each of whom might at different times make separate applications to be so joined so that they might be served with the papers and be heard in the proceedings. Is it to be said that s. 50B of the Acct intended that in all such applications the applicant in the proceedings must bear its own costs of meeting each such unsuccessful application by a non-party seeking to be joined? I think not. A reading of the entire section makes clear that such a scenario is not envisaged by the Oireachtas. The words used in their plain and ordinary meaning make this clear.

43. It follows that the trial judge was entitled to make the order for costs in favour of the developer against the appellants on the basis that costs follow the event – that event being the refusal of the application to be joined as notice parties.

44. I would therefore dismiss the appeal.