Neutral Citation: [2014] IEHC 354

THE HIGH COURT

JUDICIAL REVIEW

[2011 No. 291 J.R.]

IN THE MATTER OF AN APPLICATION PURSUANT TO S. 50 OF THE PLANNING AND DEVELOPMENT ACT 2000 (AS AMENDED) AND IN THE MATTER OF AN APPLICATION

BETWEEN

MARGARET McCALLIG

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

AND

DONEGAL COUNTY COUNCIL AND P.J. MOLLOY

NOTICE PARTIES

JUDGMENT of Mr. Justice Herbert delivered the 5th day of June, 2014.

1. In this application for *certiorari* by way of judicial review, the applicant was successful, but not to the full extent of her claim. The court determined that given the separate and discreet issues raised by the claim, costs should be awarded on an issue basis rather than on an overall effective success basis, sometimes referred to as the "winner takes all" basis. The court identified five such issues in the case: three exclusively planning and development law issues and, two environmental impact assessment issues arising from the same application for planning permission. The court awarded the applicant party and party costs of the three planning and development law issues. By reason of the provisions of s. 50B(2) of the Planning and Development Act 2000, (as inserted by s. 33 of the Planning and Development (Amendment) Act 2010), the court directed that the applicant, the respondent and the second notice party should each bear their own costs of the two environmental impact assessment issues. The first notice party did not participate in the application and no order as to costs was made for or against that notice party.

2. The applicant had claimed the costs of the entire judicial review application on two discreet grounds: that the provisions of s. 21 of the Environment (Miscellaneous) Provisions Act 2011, applied retroactively, or alternatively, that the matter was one of exceptional public importance so that the provisions of s. 50B(4) of the Planning and Development Act 2000, (as inserted by s. 33 of the Act of 2010), applied. She was unsuccessful in both these claims.

3. The respondent and the second notice party had claimed that the provisions of s. 50B(2) of the Planning and Development Act 2000, as inserted by s. 33 of the Act of 2010) applied to the entire judicial review application so that each party and the notice party should bear that party's own costs of the entire application. The applicant claimed that it applied, - if it applied at all, - only to that part of the application as related to environmental impact assessment issues. The respondent and the second notice party were unsuccessful and the applicant succeeded in this claim.

4. Comprehensive written submissions were delivered by the parties and all these matters were extensively argued before the court. The applicant now seeks to be awarded the costs of all these claims. The respondent and the second notice party submit that the court should make no order as to costs in relation to any of these claims.

5. The applicant did not succeed in her claim to be awarded the entire costs of the judicial review application. I find however, that her claim that the provision of s. 21 of the Act of 2011, applied retroactively to proceedings pending on the operative date and, her alternative claim based on the. "exceptional public importance" provision of s. 50B(4) of the Act of 2000, (as inserted by s. 33 of the Act of 2010), were neither improperly nor unreasonably made. They did, however, add considerably to the length and, therefore inescapably to the costs of the application.

6. The respondent and the second notice party claimed that the provisions of s. 50B(2) of the Act of 2000, (as inserted by s. 33 of the Act of 2010), applied to the entire judicial review application and, not just to that part of the application based on environmental impact assessment grounds. Therefore, they submitted that each party and the notice party should bear that party's own costs of the entire judicial review application. They were unsuccessful in this claim. I also find that this claim was neither improperly nor unreasonably made, but it also added to the length and, therefore, to the costs of the application, but not to the same extent as the claims made by the applicant. Neither the respondent nor the second notice party made a tender-style offer, following the judgment of the court delivered on the 24th January, 2013, to pay the applicant's costs of the planning and development law issues, when taxed or ascertained, having regard to the decision of the court at paras. 49 and 50 of that judgment. The respondent and the second notice party, very correctly in my view, do not seek to be awarded the costs of this claim. They submit that the applicant likewise should not be awarded the costs of this claim.

7. The applicant was successful in the three planning and development law issues and, in accordance with the general rule that costs follow the event was awarded the costs of these issues. Even if the provisions of s. 50B(2) of the Planning and Development Act 2000, (as inserted by s. 33 of the Act of 2010), did not apply the court would arguably have awarded no costs of the environmental impact assessment issues. A successful party is not, save in exceptional circumstances, to be deprived of all or some of that party's costs because of issues not improperly or unreasonably raised in which that party has failed: in the instant case the two environmental impact assessment issues.

8. However, where a successful party raises issues improperly or unreasonably which add significantly to the length or to the costs of proceedings, that party may be deprived of some or all of the costs and, depending upon the circumstances, may even be directed to pay a part or all of the other party's costs. I have found that the claim made by the applicant was neither unreasonably nor improperly made. The issue as to the retrospectivity of s. 21 of the Act of 2011, had not previously been considered by the courts and, as appears from the judgment of this Court delivered on the 9th April, 2014, was undoubtedly very arguable. In the light of some other decisions of the Superior Courts the applicant's claim that the matter was one of exceptional public importance and that it was in the interests of justice that she should be awarded the costs of the entire application was also very arguable.

9. In these circumstances, I am satisfied that even though the hearing and determination of these claims made by the applicant added considerably to the length and indubitably to the costs of the application, costs should not be awarded to the respondent and the second notice party against the applicant who was successful in her application for *certiorari* by way of judicial review. Neither, however, should the applicant be entitled to the costs of these claims.

10. I am unable to accept the argument made on behalf of the applicant that she should be awarded the costs of the claim that s. 21 of the Act of 2011, applied retroactively, because the intention of the Legislature in that regard was uncertain and required to be ascertained. When an issue of this nature arises in the course of ordinary *inter partes* litigation and, the determination of the issue will result in a benefit to the party contending for a retrospective application and, a detriment to the party arguing for a prospective application or a statutory provision if the former is successful, (or vice versa), in my judgment the costs of this issue, like every other contentious issue in the proceedings, should be determined in accordance with the ordinary general rules as to costs.

11. The respondent and the second notice party were not successful in the application for judicial review, even though the applicant did not obtain all the relief claimed by her. The effect of the claim made by them in the costs application, if successful, would have been to deprive the applicant of the costs of the planning and development law issues to which she would otherwise *prima facie* be entitled. In these circumstances, even though I find that the claim of the respondent and the second notice party was not unreasonably or improperly made, in my judgment the respondent and the second notice party, jointly and severally, should pay to the applicant her party and party costs (to include the costs of any relevant portions of submissions), of so much only of the application for costs determined by the judgment of this Court delivered on the 9th April, 2014, as relates to their unsuccessful claim. To provide against any misunderstanding, that is the claim by them that the term, "proceedings", was employed in s. 50B(1) of the Act of 2000, (as inserted by s. 33 of the Act of 2010), referred to the entire judicial review application and, not merely, to that part of the applicant's challenge to the decision of the respondent as was based on environmental impact assessment grounds. This claim is considered and determined at paras. 42 to 44 inclusive of the judgment of the court delivered on the 9th April, 2014. While it may reasonably be regarded as a somewhat minor element in the overall costs of the application as to costs determined by the judgment, it is nonetheless not entirely insignificant.