

**THE HIGH COURT
JUDICIAL REVIEW**

[2021] IEHC 678
[2020 No. 54 JR]

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

BETWEEN

THOMAS REID

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

AND

INTEL IRELAND LIMITED

NOTICE PARTY

(NO. 4)

JUDGMENT of Humphreys J. delivered on Tuesday the 2nd day of November, 2021

1. In *Reid v. An Bord Pleanála (No. 1)* [2021] IEHC 230, [2021] 4 JIC 1204 (Unreported, High Court, 12th April, 2021), I excluded certain evidence prior to the trial on the application of the developer here, Intel. The applicant subsequently applied to re-open that order, but I didn't see a basis to do so.
2. In *Reid v. An Bord Pleanála (No. 2)* [2021] IEHC 362, [2021] 5 JIC 2705 (Unreported, High Court, 27th May, 2021), I dismissed the substantive proceedings and made no order as to the costs of the exclusion of evidence motion.
3. In *Reid v. An Bord Pleanála (No. 3)* [2021] IEHC 593, [2021] 10 JIC 0606 (Unreported, High Court, 6th October, 2021), I refused leave to appeal and made no order as to costs overall.
4. The applicant then contended that I hadn't dealt with one argument regarding costs against Intel and (again) applied to re-open a judgment in this case, although in this instance, I did agree to re-open the costs hearing, and I am now addressing his renewed submissions on costs.

Procedural history

5. The planning application giving rise to the present proceedings was lodged on 1st February, 2019.
6. On 17th May, 2019, Kildare County Council granted permission subject to 34 conditions.
7. There was then a limited appeal to the board by Intel and a third party appeal by the applicant.
8. On 8th October, 2019, the inspector recommended a grant of permission on 17 conditions.
9. On 21st November, 2019, the board granted permission.

10. A statement of grounds seeking *certiorari* of the permission was filed on 23rd January, 2020 grounded on an affidavit of the applicant. That included a tab 19, exhibiting a UNECE document: '*Review of the 1999 Gothenburg Protocol*', Executive Body for the Convention on Long-range Transboundary Air Pollution (2007), ECE/EB.AIR/2007/13, ECE/EB.AIR/WG.1/2007/14/Rev.1.
11. Meenan J. granted leave by order perfected on 12th February, 2020.
12. A statement of opposition of the board was filed on 5th August, 2020 and by Intel on 13th August, 2020.
13. Legal submissions were filed by the applicant on 9th November, 2020 and by the respondent and notice party on 30th November, 2020.
14. On 21st December, 2020, Intel issued a motion seeking to exclude a number of items of evidence sought to be adduced by the applicant including the UNECE document referred to above, which was included at para. 6 of the schedule of materials objected to attached to the notice of motion. That was grounded on an affidavit of the Solicitor acting in the matter for the notice party. At para. 12 she made the point that the applicant was seeking to adduce material not before the board. At para. 17 she objected to the analysis of the $3\mu\text{g NH}_3/\text{m}^3$ emissions limit level that was introduced by the applicant's expert, Ms. Maria Cullen, on the basis that this objection was not before the board. And at para. 32 she objects to the applicant's attempt to refer to the UNECE document on the basis that this "related to the evidence which Ms. Cullen sought to introduce in her first affidavit".
15. The exclusion motion was heard on 10th February, 2021 and judgment on that motion (the No. 1 judgment) was given on 12th April, 2021. I said at para. 46 that the UNECE documentation could be exhibited in the proceedings because it was referred to in the developer's Natura Impact Statement and was a form of clarification as to what the materials before the decision-maker in fact meant.
16. The substantive hearing then followed in the week of 11th May, 2021 with the first bloc of time on the hearing date being devoted to the costs of the exclusion motion.
17. The substantive judgment (the No. 2 judgment) was delivered shortly thereafter on 27th May, 2021. In that judgment (at paras. 8 - 10), I dealt with the costs of the exclusion motion and decided to make no order as to costs.
18. A leave to appeal hearing took place on 27th July, 2021 and a costs hearing on 29th July, 2021. The long vacation then intervened and I gave a judgment dealing with both issues on 6th October, 2021 (the No. 3 judgment).
19. On 8th October, 2021, the applicant notified the court that he intended to seek to re-open the costs order, and I agreed to that. The reopened hearing took place on 21st October, 2021.

Whether the notice party's motion warrants an adverse costs order now

20. The applicant says that Intel's position in seeking to exclude the UNECE document was inappropriate, and that seemed to involve two broad headings, for seeking its exclusion at all and also for the way they went about it.
21. As regards seeking the exclusion of the document at all, the applicant contends that Intel themselves introduced the UNECE document before the board by referring to it, so they should not have tried to exclude that document in the judicial review. The fact that it was before the board, however, is the basis on which the applicant won the exclusion motion in relation to that document. While the boundary line between the zone of acceptable legal fisticuffs on the one hand and sharp practice on the other can occasionally be hard to define in the abstract, this definitely falls into the former category, and in itself was not particularly remarkable.
22. As regards how Intel went about things, the applicant interprets para. 12 of the affidavit grounding the motion as implying that the UNECE document was not before the board. Unfortunately, I do not share that interpretation. The applicant's solicitor makes in that paragraph the general point that the applicant "has sought to put before the Court substantial amounts of new information which was not put before the Board". I agree. And I broadly upheld that point in the No. 1 judgment. It does not follow that Intel in general or their solicitor in particular were saying that *all* of the material objected to was not referred to before the board.
23. Finally, the applicant contends that Intel should have checked the matter properly before trying to exclude the document, and should have advised the court of the relevance and status of the UNECE document, and indeed of its correct title, which was misdescribed. There is admittedly some support for aspects of that argument in the No. 2 judgment.
24. However, as far as concerns the contention that the court should somehow disapprove of Intel's conduct for not being more vocal about drawing attention to the document having been referred to before the board, even though the applicant addressed that point immediately in reply and won on that basis under this heading, or for not having taken any other steps, maybe that argument might work at a moral-theological level. But it doesn't work at a pragmatic forensic level for at least three reasons. First of all, court disputes take time, resources and energy, and courts owe it to litigants generally to not encourage unnecessary disputes. The principle of "no harm, no foul" is surely one of legal significance here. Secondly, it would dilute the value of the whole concept of "marking disapproval" to apply it to such minor issues. Samuel Johnson was undoubtedly correct to say that "[r]eproof should not exhaust its powers upon petty failings" (*The Idler* N° 25. Saturday, October 7, 1758, in *The Works of Samuel Johnson, LL.D.: With Murphy's Essay* (Robert Lynam Ed.) (London, George Cowie & Co., 1825) vol. II, p. 460). And thirdly, there is an analogy with the point made by O'Donnell J. (McKechnie and Laffoy JJ. concurring) in *O'Neill v. Appelbe* [2014] IESC 31, [2014] 4 JIC 1003 (Unreported, Supreme Court, 10th April, 2014), at para. 18, "[e]rrors in legal procedure are rarely the exclusive province of one of the parties". Applying that to the question of making things

absolutely clear, can it be said with complete confidence that the applicant's affidavits fully highlighted which bits of evidence were necessary to explain what was before the decision-maker, and which were attempts to introduce new matters? On my view of the case, it would have been not just clearer, but better tactically, if the applicant hadn't confused the issue by trying to introduce wholly new scientific material not put before the board that didn't come within a recognised permissible category. That isn't criticism of course, just my assessment of the situation for reasons already explained in earlier judgments.

25. The only real basis for an adverse award of costs against a party in this kind of situation would be if one wanted to put down a marker. But for the reasons listed above, I don't think that Intel's motion falls into the category of conduct warranting putting down any such marker.
26. This isn't a case of suppressing relevant information in the sense of keeping it secret from the court or other parties, which might well merit an exemplary costs order irrespective of the result. We are far removed from that here because everybody knew about the UNECE document. The issue was whether it should be part of the evidence in a particular judicial review.
27. A penultimate problem with the application is that no major additional costs were incurred as a result of the notice party objecting to this particular document because it was only one issue among a large number of issues dealt with in the exclusion motion. The UNECE document is dealt with in two paragraphs (paras. 46 and 60) out of 68 paragraphs in the No. 1 judgment.
28. And finally, it doesn't particularly help the applicant that the basis for the costs application now is Intel's exclusion motion, but the costs of that motion have already been dealt with, not in the re-opened No. 3 judgment, but in the earlier No. 2 judgment. Ideally that was the time to make one's pitch for costs. And while it is true that certain matters have been clarified since then, and that Intel undertook certain inquiries at the hearing which they could have checked at an earlier point, the applicant could have checked out the position on day one and did not do so either. Insofar as the applicant says that Intel should have drawn more attention to the fact that the document was referred to before the board, that point was open to him when costs were dealt with in the No. 2 judgment. I really don't think that any sufficient reason has been advanced to warrant a changed position now.

Order

29. In all the circumstances the appropriate order is as follows:

- (i). there will be no order as to costs of the proceedings overall as between the applicant and the notice party; and
- (ii). I will direct that the matter be listed on 8th November, 2021, being the next Monday list following delivery of this judgment, for consideration of any application

for leave to appeal in relation to the costs order, and the applicant should, if he intends to seek such leave, circulate any proposed question(s) to the other parties in advance of that date.