THE HIGH COURT
JUDICIAL REVIEW

[2022] IEHC 172
[2021 No. 304 JR]

BETWEEN

PAUL WALSH

APPLICANT

AND

AN BORD PLEANÁLA, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

ST. CLARE'S GP3 LIMITED

NOTICE PARTY

JUDGMENT of Humphreys J. delivered on Friday the 1st day of April, 2022

1. The housing development at issue here, located at St. Clare's Park, Harold's Cross Road in Dublin 6W, has involved eight planning permissions so far and three judicial reviews.

2. One of the previous judicial reviews was settled on terms that were not only not carried out, but currently can't be carried out. The developer settled the case on the basis of agreeing to tree-planting works in order to protect the applicant's privacy. But the developer was a subsidiary company in the Marlet Property Group, and the parent company later dissolved the particular subsidiary without the tree planting works having been carried out.

3. Other unusual features of the case include the hybrid nature of the permissions - previous permissions were granted under the normal planning process, but the application for an additional height increase with which we are now concerned was made under the strategic housing development (SHD) process.

4. That application was made at a time when the original apartment blocks were under construction although they have now been completed without the top-up envisaged by the present permission. It is thus not entirely clear whether the notice party developer is actually going to carry out the development to which these proceedings relate and indeed the developer did not get involved in the proceedings.

5. The applicant resides adjacent to the development and the rear of his house has a boundary with the development site. He has considerable concerns regarding privacy and the overlooking of his property.

6. The first judicial review, *Walsh v. An Bord Pleanála* [2018 No. 1083 JR], challenged a decision to grant permission for an earlier stage within the scheme. That case was settled as noted above on terms that required the planting of mature trees behind the boundary to the applicant's house to provide the necessary privacy in circumstances where pre-existing mature trees had been removed unlawfully, according to the applicant.

7. The applicant states that the settlement terms were not implemented and the parent company has wound up the subsidiary concerned. The consequence is that the side and

rear of the applicant's house is now directly overlooked by apartments in Block J2 of the development contrary to what was agreed, according to what the applicant submits here.

8. Assuming *arguendo* that the applicant's complaints are valid (and fully bearing in mind that I haven't heard the developer's side of the story because they decided not to appear), one assumes that the options for addressing this would include the following:

   (i). If the removal of trees was a substantial unauthorised development (see *Doorly v. Corrigan* [2022] IECA 6, [2022] 1 JIC 2104 (Unreported, Court of Appeal, 21st January, 2022), for an example), the council or board would be entitled to refuse a future permission applied for by the developer's group under s. 35(1) of the Planning and Development Act 2000. That power doesn't depend on a court finding of unauthorised development, and can't be limited to the acts of a particular corporate entity within a group, since that would render the legislation totally ineffective, contrary to national and European principles of environmental protection: see *Eco Advocacy CLG v. An Bord Pleanála (No. 1)* [2021] IEHC 265, [2021] 5 JIC 2704 (Unreported, High Court, 27th May, 2021). One might speculate that if this power was to be proposed against any particular developer in this kind of situation, the required trees might well materialise overnight.

   (ii). In terms of action by the applicant directly, where a party does not comply with a settlement agreement, the normal solution is to sue on the agreement rather than to reactivate the original proceedings. As the disappointed beneficiary of an unsatisfied contractual term, he would in principle seem to have a right of action for damages, thus making him a "creditor" with the consequential right to apply to reinstate the company to the register for the purposes of suing it, under s. 738(2) of the Companies Act 2014. Any divestment of assets in favour of the parent company is unlikely to be an issue given that the application would be by way of equitable proceedings and thus assets could be traced to the parent company and orders could be made *in personam* against individual directors or officers.

9. Hopefully none of that would be necessary and the applicant can simply resolve the matter by agreement with the parent company, but if not there must be a legal avenue available to the court to resolve matters. If the foregoing conventional possibilities are not availed of there are presumably other options for discussion, such as whether dissolving a company with an outstanding liability under a settlement agreement without addressing that amounts to some other form of legal breach. Presumably it won't be necessary to explore those questions.

10. In relation to the present phase of the development, consultations with Dublin City Council took place on 15th March, 2019 and a statutory pre-application consultation with the board was requested on 2nd August, 2019.

11. The inspector conducted a site visit on 30th August, 2019, and the board, the city council and the developer had a meeting on 12th September, 2019. The inspector reported on the

pre-application consultation on 3rd October, 2019, and an opinion that the development was SHD was issued in October 2019.

12. On 21st October, 2019, the developer applied for permission under the SHD procedure.

13. The applicant made a submission on 25th November, 2019.

14. The inspector carried out a site inspection on 27th November, 2019.

15. On 6th December, 2019, the board invited further submissions on a landscape and visual appraisal report dated October 2019.

16. The applicant responded to that by a submission in January 2020.

17. On 27th January, 2020, the inspector reported on the application. The board decided to grant permission on foot of that, in a decision dated 14th February, 2020.

18. The applicant sought judicial review of that decision in the second set of proceedings in this matter: *Walsh v. An Bord Pleanála* [2020 No. 266 JR].

19. Leave was granted on 16th April, 2020 and *certiorari* was conceded by the board on 17th July, 2020.

20. The developer applied for remittal of the matter back to the board and after a contested hearing, McDonald J. granted that order on 17th September, 2020. The order for remittal was perfected on 27th October, 2020.

21. The board then issued a direction on 12th November, 2021 concerning an oral hearing in the remitted application.

22. Section 135(2AB) of the Planning and Development Act 2000 allows the board to limit the agenda for an oral hearing, but only on foot of a recommendation of the inspector. However, the board's direction in the present case simultaneously proposed the appointment of a new inspector and the limitation of the agenda. This is manifestly contrary to the statutory procedure, something that didn't seem to me to be vigorously disputed by the board. Fortunately for the board, the applicant didn't make that point, so what would otherwise have been a completely null and void procedure thereafter becomes effectively valid because it wasn't challenged, at least as far as the order of *certiorari* itself is concerned.

23. On 10th December, 2020, the board notified the applicant's planning consultants that there would be an oral hearing.

24. On 14th December, 2020, the applicant requested that the board would communicate with him and his solicitor rather than his former planning consultant. The board agreed to do that, but failed to implement that agreement, and sent a notice of the oral hearing to his former planning consultant on 21st December, 2020, setting out the limited agenda for that

hearing dealing with the landscape and visual assessment and the sunlight and daylight analysis.

25. A site inspection by the inspector took place on 12th January, 2021 albeit that the applicant was not made aware of that at the time.

26. On 19th January, 2021, the developer uploaded approximately 300 pages of new documentation to the development project website. The applicant was not specifically informed of that as it happened, although he became aware of it later in the day.

27. The oral hearing by video conference took place the following day on 20th January, 2021. Further additional information was provided by the developer on that date in the course of the hearing.

28. On that date, the inspector refused the applicant's application to adjourn the oral hearing.

29. Following the oral hearing, the applicant made a further submission on 22nd January, 2021 within the additional period of two days that had been allowed by the board for observers to make replying submissions.

30. The inspector's report was completed on 1st February, 2021.

31. On 3rd February, 2021, the board decided to grant permission. The decision was formally made on 15th February, 2021.

32. On 12th April, 2021, a statement of grounds seeking *certiorari* of that decision was filed – the third and present judicial review - and leave was granted.

33. When the hearing opened on 1st March, 2022, I struck out relief D3 against the State by consent and released the State from further participation in the proceedings. Thus the case proceeded as between the applicant and the board alone.

34. The applicant also dropped reliance on art. 47 of the EU Charter of Fundamental Rights as pleaded in grounds 1 and 3, so the case became purely one of domestic law. It also turned out that the applicant's amended statement of grounds and the board's statement of opposition and replying affidavit had not been filed, so I gave liberty to file those as well as an updated affidavit of verification as requested by the board. The fact that both sides had failed to file papers demonstrates (yet again) the endless relevance of the point made by O'Donnell J. in *O'Neill v. Applebe* [2014] IESC 31, [2014] 4 JIC 1003 (Unreported, Supreme Court, 10th April, 2014) at para. 18, that errors in legal procedure are rarely the exclusive province of one of the parties. I also gave the applicant liberty to file documents which were referred to but not exhibited, and on 2nd March, 2022 I gave similar liberty to the board.

Matters not pursued

35. The grounds involve seven headings and I will refer to these headings as "grounds" 1 to 7, although the numbering and terminology used in the amended statement of grounds is neither entirely consistent nor entirely user-friendly. On the numbering system I propose

to employ, grounds 2 (that the State had failed to vindicate the applicant's public participation rights) and 7 (that the decision was not made within the statutory time limit) were not pursued. That leaves five grounds which in turn can be reduced to three essential headings:

(i). breach of fair procedures;

(ii). error on the face of the record; and

(iii). erroneous daylight analysis.

Fair procedures

36. The applicant complains that he only received the developer's additional material, which was quite lengthy and technical, on the afternoon before the oral hearing and during the course of the oral hearing, and that he then had only two days to deal with it by way of a responding submission.

37. Admittedly, the board's notice of the oral hearing was ambiguous and did not purport to confer any rights on observers to make submissions *before* the hearing. Thus insofar as the board now seems to be saying that the applicant could have also submitted further information prior to the oral hearing, there was nothing making this clear to him at the time. One might also possibly question whether it was ideal that further information could be submitted by the developer right up to 11 am on the morning before the oral hearing or whether in fact matters might have run more smoothly if the developer was required to give slightly more notice of additional material. One might also possibly wonder whether the two days post the oral hearing for additional responses is really the maximum that can be permitted.

38. However, one has to hesitate about moving too far into the space of *desiderata*. The court can only police the basic minimum legal requirements, not add bells and whistles. Here the applicant did have an opportunity, albeit limited, to respond to the developer's new material, and if an applicant wants to show that such an opportunity was inadequate he does have some onus to point to something determinative that he would have said if he had had longer.

39. He submitted firstly that he could not have put in an affidavit indicating what he would have said if he had more of an opportunity because one cannot add additional evidence in a judicial review. However, that is incorrect because there are a number of identified situations where additional evidence is perfectly permissible and appropriate in a judicial review context, and an affidavit to aver that you would have had something to say if you had been given fair procedures has already been identified as one of those situations: see *Reid v. An Bord Pleanála (No. 1)* [2021] IEHC 230, [2021] 4 JIC 1204 (Unreported, High Court, 12th April, 2021) at para. 35.

40. Secondly, the applicant says that if he had had a proper opportunity to consider the matter he would have said that the developer had not done the correct analysis.

41. Unfortunately, on the facts there is no basis for that complaint because the applicant actually made that exact point at p. 5 of his submission of 22nd January, 2021 within the two days. He asked "are the compliance percentages quoted in the 90s actually then accurate? What would they be if the correct 2% factor had been used?"

42. Admittedly, the point is made in fairly condensed terms, but it is all the more powerful for that. An excess of detail can cloud the mind. In the world of ideas, nothing is more powerful than an aphoristic phrase that gets to the heart of the issue by simplifying without distorting. The applicant did that by his own efforts, unaided by experts, and without extra time. Under those circumstances I do not think any unfairness warranting the grant of *certiorari* has been made out. The fact that the board may have sailed close to the wind in terms of the fairness of the procedure isn't a ground for relief if no unfairness actually occurred. The fact that the board didn't heed the point thus made, however, is a distinct ground and we will come back to that.

Alleged error on the face of the record

43. The board decided to grant permission notwithstanding material contravention of the development plan in regard to building heights. The drawings show the development height as 19.615 m, whereas the development plan indicates a maximum building height of 16 m.

44. Pursuant to s. 9(6) of the Planning and Development (Housing) and Residential Tenancies Act 2016, the board can grant permission notwithstanding a material contravention, except in relation to zoning, provided that the criteria in s. 37(2)(b) of the 2000 Act are complied with. The issue raised by the applicant here is that the board refers to s. 37 of the 2000 Act, but not to s. 9 of the 2016 Act.

45. Insofar as that is alleged to be a failure to consider s. 9, that argument involves the classic applicant's confusion between failure to mention something narratively and failure to consider it. There isn't any basis for saying that the board did not consider the legislation under which the application was made. Insofar as failure to mention s. 9 is concerned, that is claimed to be an error of law, but it is not an error - it is simply an omission, and moreover an omission of something that doesn't have to be referred to.

46. Insofar as the inspector refers to s. 37 of the 2000 Act, that is not an error as such. She just omits reference to the gateway through which s. 37 becomes relevant, in particular s. 9(6)(c) of the 2016 Act which in effect requires compliance with s. 37. It has not to date been a requirement that an administrative decision-maker has to expressly refer to all of the legislative provisions relied on. That said, I would applaud such a development in the law which would promote transparency and better decision-making, but it doesn't seem to me that either existing caselaw or constitutional imperatives compel the enforcement of such an outcome at the present time – at least by a court of first instance (if I can be forgiven for momentarily lapsing into the realist school of jurisprudence). There is a somewhat stronger tradition of referring expressly to all applicable legislation in the European context, but this applicant is not relying on European law.

Non-compliance with prerequisites for material contravention

47. The prerequisites for material contravention in the context of development management criteria and particularly daylight and sunlight analysis are discussed in *Atlantic Diamond Ltd. v. An Bord Pleanála* [2021] IEHC 322, [2021] 5 JIC 1403 (Unreported, High Court, 14th May, 2021), and there is no point in repeating that analysis here. That decision discusses in particular the BRE guidelines, P.J. Littlefair, *Site Layout Planning for Daylight and Sunlight: A Guide to Good Practice* 2nd ed. (Watford, BRE Press, 2011), and the British Standards Document BS 8206-2, *Lighting for buildings: Code of practice for daylighting in 2008,* and their relevance to the policy document *Urban Development and Building Heights Guidelines* 2018 (the Building Height Guidelines).

48. The drafting of grounds 5 and 6 of the applicant's amended statement of grounds is somewhat opaque and involves a degree of overlap. Varying attempts to condense the points to the format of the *ratio* of a hypothetical decision were offered at various stages, but ultimately I think the various formulations offered on behalf of the applicant are best summarised as being covered by the following three points:

    (i). The developer failed to provide the board with material from which the board could come to a conclusion of compliance with the development management criteria and misconstrued the Building Height Guidelines, therefore failing to provide a basis for material contravention. But a failure by a developer to provide material, in and of itself, is not generally a basis for *certiorari*. It is true that in certain contexts such as a defect in the application form itself or some other document essential to jurisdiction, any failing by the developer or applicant in a process might be a ground for *certiorari* as such, but in the context here, any shortcomings in the developer's material would only become a problem if they flow through into the decision-maker's analysis. Thus it is the approval of the application by the decision-maker without adequate material, not a failure by the developer to furnish material, that is a ground for *certiorari* (see *Conway v. An Bord Pleanála* [2022] IEHC 136 (Unreported, High Court, 25th March, 2022). Applicants seem to misunderstand this conceptual point with almost predictable regularity, and the present case furnishes no exception.

    (ii). Insofar as it was suggested that it is impermissible in principle not to apply an Average Daylight Factor (ADF) of 2%, that is clearly incorrect. The development criteria do allow for a departure from that in certain circumstances provided certain procedures and criteria are complied with.

    (iii). It was submitted that the inspector failed to clearly identify non-compliance with the relevant standards in accordance with the Building Heights Guidelines. That point needs more detailed discussion.

49. The development management criteria are set out in the Building Height Guidelines. The one of most relevance is the third criterion at the scale of the site/building:

> "Where a proposal may not be able to fully meet all the requirements of the daylight provisions above, this must be clearly identified and a rationale for any alternative,

compensatory design solutions must be set out, in respect of which the planning authority or An Bord Pleanála should apply their discretion, having regard to local factors including specific site constraints and the balancing of that assessment against the desirability of achieving wider planning objectives. Such objectives might include securing comprehensive urban regeneration and or an effective urban design and streetscape solution."

50. Thus, any departure from the criteria, which includes a departure from the daylight standards, "must be clearly identified".

51. An argument that the board did not "clearly identify" a departure was not expressly pleaded in precisely those words, but the board did not strongly press any argument that such an argument did not come within the applicant's general complaints of failure to apply the guidelines, and did not argue that it was not able to deal with the point. In all the circumstances I see this point as adequately coming within the applicant's pleas as to non-compliance with the guidelines.

52. The inspector did understand that the BRE guidelines state a 2% ADF value: see para. 12.5.5. She also understood that the development did not comply with the 2% ADF. We then turn to whether the non-compliance was clearly identified and indeed whether the premises of the analysis were correctly applied in the way the guidelines require. That has to mean identifying the extent of the non-compliance. The concept of identifying the non-compliance is meaningless otherwise because the acceptability of a particular design hinges on its precise form and that of each of its parts. Thus, the impact and assessment of a design depends on the extent of non-compliance with design standards in precise terms. The mere fact that it can be said that some unquantified or not fully quantified part of a scheme does not comply with standards is totally inadequate information for the purposes of a proper and rational evaluation in planning terms or a logically watertight environmental assessment.

53. We then pose the question as to whether the board *via* the inspector did clearly identify the non-compliance. The board relies on her discussion at para. 12.5.10 in which she finds 97.3% of the development as "complying with standards". That is, superficially, an answer to the problem, but unfortunately it ceases to be so when one realises that her analysis is based on a false premise. Insofar as she assesses non-compliance, it is by reference to the debased standard proposed by the developer of 1.5% ADF: see para. 12.5.10.

54. That is not what the Building Height Guidelines require. She should have started with the applicable standard, which is 2%, then "clearly identified" the extent of the non-compliance, and only at that point interrogated the rationale for such non-compliance by reference to the objective planning considerations referred to in the guidelines. Instead at paras. 12.5.7 to 12.5.10 she accepted a basis for "defaulting to a 1.5% value" as a "target" (para. 12.5.10), and thus found the 97.3% "complying with standards". But 1.5% is not the standard, the standard is 2%. Essentially she asked the wrong question and fell into an error of law in doing so. That error occurred at the outset of the analysis – we never even got to whether a departure from standards was really justifiable having regard to the sort

of objective planning features envisaged by the guidelines, as opposed to being driven by an economic desire to maximise profit by building as many apartments as possible on the site.

55. The need to identify in precise and clear terms the extent if any of failure to meet standards is critical to the evaluation of the acceptability of a project. The extent to which an application falls short of building design standards, and why, is critical to whether a sub-standard design such as this one should be accepted. It can't be lawfully accepted without first clearly identifying the extent of non-compliance, which wasn't done. The board's figures of 97.3% compliance are a sleight of hand that erases the actual standard in favour of the developer's standard. The clear language of the ministerial guidelines sends the message that the reasonable exercise of planning judgement requires that an enthusiasm for quantity of housing has to be qualified by an integrity as to the quality of housing. Among other obvious reasons, and speaking about developments generally rather than this one particularly, such an approach reduces the prospect of any sub-standard, cramped, low-daylight apartments of today becoming the sink estates and tenements of tomorrow.

Order

56. Accordingly, the order will be:

(i). that there be an order of *certiorari* in the terms of relief D(i) of the applicant's amended statement of grounds removing for the purpose of being quashed the decision of the board of 15th February, 2021 under reference number ABP-308533-20; and

(ii). that the matter be listed on Monday the 9th day of May, 2022 for any consequential orders.