

**THE HIGH COURT  
JUDICIAL REVIEW**

[2022 No. 983 JR]

**IN THE MATTER OF AN APPLICATION PURSUANT TO SECTIONS 50, 50A AND 50B OF THE  
PLANNING AND DEVELOPMENT ACT 2000 AND IN THE MATTER OF SECTION 78 OF THE  
HOUSING ACT 1966, AS AMENDED**

**BETWEEN:**

**JOHN CLANCY AND SHEENA CLANCY**

**APPLICANTS**

**AND**

**AN BORD PLEANÁLA, CLARE COUNTY COUNCIL, IRELAND AND THE ATTORNEY GENERAL**

**RESPONDENTS**

**JUDGMENT of Humphreys J. delivered on the 5<sup>th</sup> day of May, 2023**

- 1.** In or about August, 2016, the council in this case proposed to carry out a road development under Part XI of the Planning and Development Act 2000 and Part 8 of the Planning and Development Regulations 2001 for a road in Ennistymon, Co. Clare. The road is to be an inner relief road for Ennistymon, including a new vehicular bridge crossing the Inagh/Cullenagh River. The route is located centrally in Ennistymon from approximately 180 metres west of Blake's Corner on the N85 national road to a point approximately 180 metres east of Blake's Corner on the N67 national road.
- 2.** The board decided that a Natura Impact Statement (NIS) was not required and further decided on 5th October, 2016 that an environmental impact assessment (EIA) report was not required.
- 3.** The development was advertised in early 2018 and the applicants made submissions on 23rd February, 2018.
- 4.** The elected members decided to approve the development in or about April, 2018, or perhaps more formally they decided not to veto the development pursuant to s. 179(4) of the 2000 Act. The Chief Executive's decision on foot of that constitutes the development consent; and it is clearly far too late to challenge that now.
- 5.** A compulsory purchase order (CPO) was made in light of that consent on 12<sup>th</sup> June, 2020, entitled "Clare County Council Compulsory Purchase Order 2020 N67/N85 Inner Relief Road Ennistymon (Blake's Corner) N5", providing for the acquisition of land on both sides of the Lahinch Road, Bogbere Street, New Road, covering specified properties on Bridge Street including the applicants' dwelling house and business premises. The CPO was submitted to the board for approval.
- 6.** In June, 2021, an oral hearing took place. The applicants argued that the members' decision wasn't a development consent and that the decision didn't comply with the EIA or habitats directives.
- 7.** On 20th September, 2022, the board approved the CPO, and that decision is now challenged.

**Relief sought**

- 8.** In the Amended Statement of Grounds, the applicants seek the following reliefs:
  - 1.** An Order of Certiorari quashing the decision of the First Named Respondent to confirm a Compulsory Purchase Order authorising the compulsory acquisition of the Applicants' lands entitled "N67/N85 Inner Relief Road Ennistymon (Blake's Corner) Compulsory Purchase Order 2020" which confirmation of the CPO was purported to be made by decision dated 20<sup>th</sup> September 2022 and signed by Patricia Calleary, Board Member under An Bord Pleanála reference ABP-307413-20 (the impugned decision).
  - 2.** Such Declaration(s) of the legal rights and/or legal position of the Applicant and/or Respondents and/or persons similarly situated as the Court considers appropriate.
  - 3.** A Declaration, as against the Third and Fourth Named Respondents that insofar as the procedures and test that was applied by the First Named Respondent complies with the statutory provisions required to be complied with in a Compulsory Acquisition of land and the confirmation of the impugned decision the said provisions are, in circumstances where the Applicants' property, family home and its business are the subject matter of a Compulsory Acquisition, the said provisions and procedures are inconsistent with and contrary to Articles 40.3, 41, 43 and 40.5 of the Constitution of Ireland.
  - 4.** A Declaration that the provisions of Section 76 of the Third Schedule of the Housing Act 1966 as extended by Section 10 of The Local Government (No.2) Act 1960 as substituted by Section 86 of the Housing Act 1966 and as amended and extended by Section 6 and the Second Schedule of the Roads Act 1993-2005 and Section 213 of the Planning and Development Act 2000-2019 and all other Acts thereby enabling which statutory scheme formed the basis of, making of and confirmation of a Compulsory Purchase Order underlying Compulsory Purchase Order 2020 N67/N85 Inner Relief Road Ennistymon (Blake's Corner) N5, and the tests therein have not been satisfied, and that such decision is contrary to and inconsistent with Articles 43, 40.3, 40.5 and 41

including all unspecified rights and including the to earn a livelihood, right to bodily integrity and endangerment to health, both physical and psychological and to a clean environment in the particular circumstances of this case.

5. A Declaration that the Applicants are entitled to costs protection in respect of the reliefs set out at Paragraph D on the grounds set out at Paragraph E pursuant to Section 50B of the Planning and Development Act 2000, the Environmental (Miscellaneous Provisions) Act 2011 and the Aarhus Convention.
6. A Declaration that the policy in relation to a claim for costs as relied on by the First Named Respondent in the consideration and determination of the Applicants' claim for costs is inconsistent with and contrary to with Articles 40.3, 43 and 40.5 of the 1937 Constitution and Council Directive 2011/92 EU (as amended).
7. An Order of Certiorari quashing the decision of the First Named Respondent not to award the Applicants' costs pursuant to a policy described as "An Bord Pleanala Policy in relation to Costs 2016" and requiring that the matter be remitted to the First Named Respondent so as to determine whether the Applicants are entitled to and the quantum of costs in respect of their participation in the Application of the Compulsory Acquisition the subject matter of application ABP307413/20.
8. A stay on the implementation of the said decision subject to application 307413/20, or the taking of any steps in respect of the compulsory purchase of the Applicants' lands pending the determination of the proceedings.
9. Interim and/or interlocutory reliefs.
10. Further and other relief.
11. The costs of the application.

#### **Procedural history**

**9.** On 14<sup>th</sup> November, 2022 the matter was first mentioned in the List and adjourned for an amended statement of grounds.

**10.** As papers were not in order it was adjourned again until 19<sup>th</sup> December, 2022.

**11.** There were further issues with the amendments as no MS Word version had been uploaded to ShareFile.

**12.** In January, 2023, the List Registrar wrote to the applicants' solicitor in this regard but there was no immediate reply. The net result was that there were two unperfected orders on the system (of 14<sup>th</sup> and 21<sup>st</sup> November, 2022, the principle being that an order allowing an amendment is not perfected until the MS Word version of the amendment is submitted).

**13.** It emerged that an amended statement had been filed on 18<sup>th</sup> January, 2023 but was not on ShareFile. It was eventually emailed to the court on the evening of 30<sup>th</sup> January, 2023. On foot of that and of answers to the court's checklist indicating that the matter was appropriate for automatic admission to the list, leave was granted.

**14.** On 20<sup>th</sup> February, 2023 it emerged that the matter was not in fact one that could qualify for automatic admission and so a motion to admit would have been required.

**15.** On that basis, on 27<sup>th</sup> February, 2023 I set aside the leave order by consent, allowed the orders for amendment of pleadings to stand, without objection from the opposing parties, and adjourned the matter for a motion to admit the case to the list.

**16.** On 13<sup>th</sup> March, 2023 on foot of such a motion I admitted the case to the List without objection.

**17.** The council then applied for an order that leave be on notice. It submitted that the road was important to the community and to the local authority, and that it would be submitting that there were no substantial grounds for the proceedings. The action related to a function transferred by Part XIV of the 2000 Act and so comes within s. 50(2)(b) of that Act. The respondents did not apply for such an order.

**18.** I decided that the notice party council was entitled to make the application even though the respondents were not seeking leave on notice. I stated that while one could be sceptical about leave on notice as a generality, on balance it was appropriate here given all of the circumstances including the history of the matter. However I stated that the position regarding costs protection would have to be clarified first. The matter was adjourned for that purpose for a week, and then again by consent on 20<sup>th</sup> March, 2023.

**19.** Normally, there would simply be a hearing on costs protection but that didn't happen here, because an issue broke out regarding the costs of the costs protection issue. On 27<sup>th</sup> March, 2023, the board and the State accepted that there would be no order as to the costs of the costs protection application. The council maintained its hard line on the application and would not so agree.

**20.** On 17<sup>th</sup> April 2023, the various options were discussed, specifically that there be a summary hearing on costs protection for the costs protection motion; that the issue about costs of the costs would be rolled into a single hearing, possibly together with the leave hearing, or that the applicants

would withdraw the proceedings without incurring further costs. The applicants stated a preference for dealing with costs protection for the costs protection on a summary basis.

21. That issue was then heard (in as summary a manner as circumstances permitted, although not as summarily as I might ideally have liked) across two short hearings on 24<sup>th</sup> and 25<sup>th</sup> April, 2023.

**Are costs protection applications themselves costs-protected?**

22. In *An Taisce – The National Trust for Ireland v. Minister for Agriculture Food and Marine Ireland and The Attorney General* [2022] IEHC 96, [2022] 2 JIC 2801 (Unreported, High Court, 28<sup>th</sup> February, 2022) Simons J. said as follows at para. 31:

“I am satisfied, therefore, that on its correct interpretation section 7 of the Environment (Miscellaneous Provisions) Act 2011 does not envisage that a costs order would be made against an unsuccessful applicant under that section. The ordinary rule will be that each party bears its own costs of the application. In an exceptional case, where an applicant has demonstrated bad faith or has otherwise engaged in litigation misconduct, then it might be open to the court to mark its disapproval by the making of a costs order. This would, however, be very much the exception.”

23. While that was a case under the 2011 Act, a similar logic could apply to s. 50B of the 2000 Act.

24. Simons J. went on to say at para. 33:

“I am fortified in my interpretation by reference to the judgment of the High Court (Humphreys J.) in *Enniskerry Alliance v. An Bord Pleanála* [2022] IEHC 6. There, the court held that the right to an effective remedy implies that a party seeking to assert a right to costs protection must be entitled to rely on costs protection in making that assertion. The matter is put as follows (at paragraph 76 of the judgment):

‘Following this issue being raised in the applicants’ submissions, it was accepted by the board and agreed to by the notice parties that the applicants having raised an arguable point as to their entitlement in each case to not prohibitively expensive costs, should, therefore, be entitled to the application of the not-prohibitively-expensive costs rule in relation to the costs of the costs argument, even if the applicants are ultimately unsuccessful in that argument. That is an illustration in its own way of the point that the right to an effective remedy is really the most fundamental of all rights. Rights are meaningless unless they can be enforced, so to enforce the right to argue for not-prohibitively-expensive costs, one needs the protection of a not-prohibitively-expensive procedure in order to even make the argument’.”

25. The potential clarification or nuance here is that, in *Enniskerry*, I did envisage that an applicant’s point regarding costs protection would have to be “arguable” for the costs protection issue to be itself costs-protected. However there cannot be an infinite regress – hence if an applicant sought a summary determination of whether there was an arguable basis for costs protection then that should be costs-protected irrespective of the outcome. The council (again in keeping with its hardline approach to these applicants, an approach it is perfectly entitled to take whether rightly or wrongly) objected to anything going an inch further than the strict literal wording of s. 50B; but this narrow approach ignores the point that costs protection is there for a purpose, namely to provide special safeguards for the right of access to justice. That could be defeated if a party did not have a route into court, however narrow, that it could exercise without running a costs risk.

26. Thus the correct sequence is as follows:

- (i) The parties should endeavour to agree whether costs protection applies.
- (ii) If there is no agreement, the parties should endeavour to agree on whether there should be costs protection to argue the costs protection issue.
- (iii) If that point isn’t agreed, the applicant should be required to summarily demonstrate that she has an “arguable” point to advance in the costs protection context. She doesn’t need to demonstrate an actual *entitlement* to costs protection but merely that has an *arguable claim* to such protection.
- (iv) If no arguable point can be identified, then the costs protection claim is going no further, but there would be no order as to costs of the summary hearing (absent abuse of process and the like).
- (v) If an arguable point *can* be identified, then the applicant gets full costs protection for the hearing of whether cost protection applies to the proceedings. However in that hearing, the applicant would have to demonstrate a legal *entitlement* to such protection rather than just arguable grounds for that. If she failed to do that, there would be no order as to costs in general on this scenario (again, absent factors such as abuse of process).

**Headings of costs protection**

**27.** There are only a finite number of potential bases for costs protection that could apply in a case like this:

- (i) Some alleged constitutional right – but no such right was identified here.
- (ii) Some possible ECHR right – but again no such right was identified.
- (iii) Section 50B of the 2000 Act – that doesn't apply because this isn't a decision under a law giving effect to the EIA, habitats or strategic infrastructure assessment (SEA) directives.
- (iv) The Environment (Miscellaneous Provisions) Act 2011 – but no particular argument was advanced in that regard.
- (v) The EIA directive 2011/92/EU – that only applies to "decisions acts or omissions subject to public participation" under the directive. This isn't such a decision.
- (vi) The habitats directive 92/43/EEC – that doesn't have a similar express clause but costs protection applies under the directive as read in the light of the Aarhus convention (see generally *Case C-432/21 European Commission v Republic of Poland*, Judgment of the CJEU (Second Chamber) of 2<sup>nd</sup> March, 2023, ECLI:EU:C:2023:139) and is therefore best considered under that heading.
- (vii) The Aarhus convention as part of EU law. However, the requirement that proceedings not be prohibitively expensive (art. 9(4)) applies to challenges to decisions subject to public participation, other articles of the convention where provided for under national law, and "administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of ... national law relating to the environment". A procedure to compulsorily acquire land doesn't become part of national law relating to the environment merely because a particular participant in the process makes a submission relying (relevantly or otherwise) on environmental points. On that logic any part of domestic law could become law relating to the environment, which is unlikely to be what the Aarhus convention was intended to mean.

#### **The EU law grounds**

**28.** The relevant EU law grounds pleaded by the applicants are:

1. The First Named Respondent erred in law in relying on Section 179 of the Planning and Development Act 2000 and Part 8 of the Planning and Development Regulations 2001 in excluding the Applicants from raising submissions in respect of Directive 92/43/EEC, predetermined the issue and where part of the scheme was located adjoining and/or within a European site.
2. Section 78 of the Housing Act 1966 (as amended) is inconsistent with and/or fails to transpose Council Directive 92/43/EEC and/or with Section 50, 50A, 50B of the Planning and Development Act 2000.
3. Section 50(1) of the 1993 Roads Act is inconsistent with the Statutory Scheme underlying the making of a Compulsory Purchase Order insofar as it excludes, and did in fact exclude the making of and the consideration of a scheme which is a specified and/or sub threshold development for matters relevant to Council Directive 2011/92/EU.
4. The Third and Fourth Named Respondents failed to transpose their requirements of Council Directives 92/43/EEC and/or 2011/92/EU into the Statutory Scheme underlying the making of a Compulsory Purchase Order and as applied in application number ABP/307413-20 whereby Council Directive 92/43/EEC and/or 2011/92/EU were excluded in the determination made of application 307413/20.
5. The Statutory Scheme underlying the making of and determination of a Compulsory Purchase Order and/or in application 307413-20 which excluded any consideration of environmental issues either under Council Directive 92/43/EEC, 2001/42/EU or 2011/92/EU is inconsistent with and contrary to and/or fails to transpose the provisions of the aforesaid Directives.

**29.** The problem for the applicants is that legislation allowing for compulsory acquisition is not legislation giving effect to EIA, appropriate assessment (AA) or SEA (therefore s. 50B doesn't apply) and nor is it national law relating to the environment (therefore Aarhus doesn't apply). The applicants haven't shown anything arguable to the contrary. The claim that in deciding on compulsory acquisition the decision-maker should (if that be the case) as a matter of domestic law consider the suitability of the land for particular works, doesn't in itself make the decision one giving effect to EU law, and certainly not where the development consent is a done deal already and was never challenged. Any given process has to be allowed to move on to the next stage. The fact that a further procedure is commenced following a previous substantive final decision is not a basis to re-open that earlier substantive decision or to extend time for doing so (obviously that doesn't apply if the earlier decision is a potentially amendable one made at a preliminary stage of an ongoing single process).

**30.** Technically perhaps the application is not for costs protection for the proceedings themselves (just for the costs protection application), but the finding that there is no arguable grounds for such costs protection means that that issue just ends here. To say anything else would be pointless formalism.

**31.** However, all that still leaves us with the applicants' case against the respondents generally and the State specifically, in respect of which the respondents have accepted that there will be costs protection for the costs protection issue. While the council doesn't agree to that, I don't think that is determinative in the circumstances because apart from anything else there isn't otherwise any practicable way to resolve the costs protection issue as between the applicants and the respondents.

**32.** The interests of the council are potentially (albeit perhaps not necessarily) indirectly affected by an application for costs protection against the respondents, and the State in particular, but in the circumstances it would be unfair to the applicants to let that alone create a costs liability for the costs protection hearing where the respondents are not raising such an issue. Hence if the council wish to (and are permitted by the court to) get involved in that issue, that would have to be on a bearing-their-own-costs basis.

**33.** In the event that the applicants establish costs protection for the case against the respondents, we may have to return to the final part of the issue as between the applicants and the council, namely the case for relief against the council insofar as it is dependent on the case against the other parties, particularly the State. Again unless the parties change their positions in the meantime I would envisage doing that on a summary basis.

**34.** We then go on to the leave application at which point we can hear from the council again (and at that point the applicants will have to decide whether and to what extent to proceed given that there could be a potential liability for the council's costs from that point forward, to say nothing of the other parties, depending on what issues are pursued).

**35.** The case against the board seems to be in part independent of any conclusion as to the validity of the CPO (insofar as it relates to the costs of the CPO process).

**36.** If all of that seems elaborate, I agree that it is, but that is mainly a function of the stances adopted by the parties. Those polar opposite positions mean that in order for the court to facilitate a route to determine costs protection without incurring significant costs exposure in the process for parties claiming such protection, the issue must proceed in a series of small steps rather than in a single full hearing. People can like that or not; but to proceed in that step-wise manner seems to be the inevitable logic of the collision between the right to have costs protection determined inexpensively on the one hand and the not-an-inch posture that is (perfectly legitimately, whether it is fully upheld ultimately or not) adopted by the council on the other. In a more normal case there can simply be agreement on whether costs protection applies, or some equally pragmatic approach. But parties are entitled to their positions within reason.

#### **Order**

**37.** For the foregoing reasons, the order will be as follows:

- (i) there will be a declaration that the applicants' application for costs protection regarding proceedings against the council (save insofar as that is dependent on succeeding in the case against the respondents) is not covered by any rule of costs protection;
- (ii) the applicants will have liberty to issue a motion regarding costs protection against the respondents, returnable for a date to be notified by the List Registrar, which will be dealt with in advance of the hearing of the leave application on notice or of any other further costs-generating business in the case;
- (iii) any issue as to costs protection against the council insofar as that allegedly follows from the case against the respondents will be considered in a summary manner in the event that the applicants secure an order for costs protection on foot of the proposed motion against the respondents, forthwith following the determination of that motion and prior to the leave hearing or other further costs-generating business in the case; and
- (iv) unless any written legal submission is lodged to the contrary within the next 7 days (in which case the matter will be listed on the following convenient Monday), the foregoing order will be perfected on the basis of the following order as to costs:
  - (a) there will be no order as to costs of the present application against the council for costs protection regarding the costs protection issue;
  - (b) the applicant will enjoy costs protection for the proposed motion against the respondents; and
  - (c) if and insofar as the council chooses to get involved in the applicants' proposed motion against the respondents regarding costs protection (and if it is permitted by the court to do so, on a *de bene esse* approach or otherwise), it will do so on a bearing-its-own-costs basis.