THE HIGH COURT

JUDICIAL REVIEW

[2011 No. 650JR]

BETWEEN

INDAVER NV T/A INDAVER IRELAND

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

AND

CORK COUNTY COUNCIL AND CORK HARBOUR ALLIANCE FOR A SAFE ENVIRONMENT

NOTICE PARTIES

JUDGMENT of Kearns P. delivered the 21st day of January, 2013

1. This case concerns an application for costs by the respondent and notice party in judicial review proceedings which were withdrawn on the eve of trial by the applicant. Notwithstanding the existence of a special statutory provision contained in section 50B of the Planning and Development Act 2000, as amended, which in the ordinary way would protect the applicant

from the making of a costs order against it, costs are in fact being sought against the applicant on the basis of the manner in which it conducted the proceedings. It is effectively contended by and on behalf of the respondent and third party that the manner in which the applicant conducted and then abandoned the proceedings amounts to an abuse of process such as to warrant the making of the order sought.

BACKGROUND

2. On 9th June, 2011 the respondent ("the Board") refused an application by the applicant (Indaver NV) for permission to develop a waste to energy facility for hazardous and non-hazardous waste and a transfer station facility on a 12 hectare site located on lands opposite the National Maratime College at Ringaskiddy, County Cork (the "decision").

3. The applicant was granted leave to bring judicial review proceedings by order of Mr. Justice Peart dated 25th July 2011. The proceedings were ultimately listed for hearing on Tuesday 23rd October, 2012. On 14th October, 2011 it was ordered by the High Court that Cork Harbour Alliance for a Safe Environment ("CHASE") care of Mary O'Leary be joined as a notice party.

4. Indaver NV's solicitors sent an open letter to the Board's solicitors on 12th October, 2012 referring to new evidence that the applicant contended was relevant to the proceedings, namely the minutes of a meeting of the Cork County Council on 10th September 2012, including a report on an evaluation of the waste management plan for the Cork region. The letter indicated that it was relevant and necessary for the court to be informed of these matters. However, it appears that the applicant did not believe that the minutes and report which it had cited were sufficient and indicated that it was also seeking the Council's evaluation document. The applicant indicated that it would seek to vacate the scheduled hearing date in order to obtain a copy of the evaluation.

5. The Board's solicitors responded on 15th October, 2012 indicating that it did not accept that the minutes were relevant as they post-dated the Board's decision. The Board indicated that it would oppose any adjournment. The Board requested that the adjournment application be made the following morning so that the Court and parties could know whether the proceedings would be going ahead the following week. The Board noted that if the applicant believed that the recent changes to which it averred would merit a different outcome it was open to it to make a further application and pointed out that the applicant had in fact requested pre-

application consultations with the Board in respect of a revised application. The Board indicated that the appropriate course of action would seem to be for Indaver NV to withdraw the proceedings. The applicant's solicitors responded the same day asserting that the letter of the Board's solicitors was confused. The applicant's solicitors also indicated that they would not make the adjournment application until 18th October, 2012. The Board responded to this on the same day, again requesting that that the adjournment application be made on 16th October and indicating that if the application was not made until the 18th and the case was adjourned, the Board would reserve the right to apply for costs in respect of legal work carried out between the 15th October, 2012 and that date.

6. The Board's solicitor's heard nothing further until the evening of 17th October, 2012 when they received an email from the applicant's solicitors advising that they still had not received any response from the Council to their request for a copy of the evaluation document and that they believed it was important for the Court to be aware of the evaluation and would therefore be seeking an adjournment the following day. An application for adjournment was made on 18th October, 2012. The application was duly heard and refused by the Registrar sitting as Deputy Master.

7. On the evening of 18th October, 2012, the applicant's solicitors emailed to the Board's solicitors an unsworn version of an affidavit exhibiting the Cork County Council minutes and the evaluation document which they appeared to have received after the adjournment application that morning. At 7.20 p.m. the email regarding the affidavit, in draft form, was received by CHASE. Further emails followed on Friday 19th October, 2012 in relation to the exhibits and indices for the hearing. Shortly after noon on Friday 19th October the applicant's solicitors emailed the index to the book of pleadings which was to be put before the Court for the hearing. This was followed by an email at 12.17 p.m. referring to certain exhibits filed with the applicant's grounding affidavit. At 5.15 p.m. on Friday 19th October the applicant's solicitors wrote to the respondents' solicitors informing them that the evaluation of Cork County Council's waste plan vindicated the applicant's views that the plan was no longer relevant and had not been relevant for two years. It concluded that it was no longer necessary to force the State and third parties to defend expensive litigation in order to demonstrate same. The letter indicated that the applicant would inform the Court on Monday 22nd October, 2012 that the proceedings were not going on and could be struck out. The letter also indicated the belief that section 50B protected the applicant from any order as to costs.

8. The Board and CHASE applied for an order directing that the applicant pay the Board its costs of the proceedings.

AFFIDAVIT OF CONOR JONES

9. The applicant's affidavit is unsworn and was received on the 18th October, 2012. In it Mr. Jones claims that the necessary evaluation of the Waste Management Plan for Cork County was completed and subsequently reported at a meeting of Cork County Council on 10th September, 2012. Cork County Council provided a copy of an evaluation to the applicant on 18th October, 2012. The evaluation concluded that the current waste management strategy is no longer relevant at a local level and that Cork County Council needs to review its policy objectives. The applicant claims that each of the material changes had occurred before the respondent made the decision under challenge.

AFFIDAVIT OF CHRIS CLARKE

10. In the respondent's affidavit sworn on 26th October, 2012 he avers that by instituting judicial review proceedings the applicant was seeking an opportunity to make further submissions to the Board in order to persuade the Board that the policy context counted in favour of the Board granting

planning permission for the proposed development. He avers that the applicant could have achieved the same outcome by applying afresh for planning permission, but this would have required additional expense in terms of paying to make the application and doing the preparatory work. The Board's objection is to the manner in which the proceedings were conducted subsequent to being instituted.

11. In his affidavit he brings the attention of the Court to the following points:

a) The Board asserts that the applicant changed its rationale in relation to the proceedings. The original rationale was to reopen the Board's oral hearing but then it became the vindication of the applicant's position as to the issues that were before the Board.

b) There is shifting emphasis placed by the applicant on the existence of the evaluation. On 18th October, 2012 counsel for the applicant argued in court that the existence of the evaluation required an adjournment so that it could be obtained and placed before the Court. Once the applicant obtained the evaluation, that same day, it claimed that the evaluation vindicated its position and withdrew its proceedings. The logic of this is difficult to understand.

c) It is submitted that there is a lack of any material difference between the substantive content of the evaluation and the minutes of the report of the Director of Services to Cork County Council at the meeting of 10th September, 2012, save that the evaluation is a more detailed document. The substance of the evaluation was known to the applicant from the time it received the minutes of the meeting.

d) The decision of the applicant not to engage in the merits of the case before the Court, through filing a replying affidavit to the Board's statement of opposition, contrasted with its engagement in the merits of the case in direct correspondence between the applicant itself and the Board.

e) The applicant has confirmed that it intends to lodge a new application with the Board for the development. The applicant had already requested pre-application consultations with the Board on 30th August, 2012 and furnished further information to the Board in this respect by letter dated 19th September, 2012. The Board's solicitors indicated to the applicant's solicitors in correspondence that the appropriate course was for the applicant to lodge a new application, if it considered that the policy framework had now

changed. The applicant did not do so at the time and instead chose to withdraw the proceedings with one working day left prior to the hearing.

12. Mr. Clarke concludes that since the filing of the Board's statement of opposition (filed on 14th February, 2012), the applicant has had no intention of continuing with these proceedings. He avers that the applicant did not seriously intend to contest the case and withdrew the case at the eleventh hour for reasons that make no sense. The effect of this has been to leave the Board in a position where it has incurred significant legal costs in preparation for a trial which did not take place.

AFFIDAVIT OF MARY O'LEARY, CHAIRPERSON OF CHASE

13. In the notice party's affidavit sworn 8th November, 2012 Ms. O'Leary avers that an evaluation published fifteen months after the Decision is irrelevant to the consideration of that ground in these proceedings. If the applicant believed it had a document that lent weight to the fifth ground it was relying on then the logical step would have been to proceed rather than abandon all five grounds of a claim and withdraw the entire application. The evaluation (of Cork County Council's waste management plan strategy)

document was a necessary reason for adjourning the hearing date but was later said to be the reason for withdrawing the proceedings.

14. CHASE is a representative organisation of community, residents and environmental organisations. It actively promoted and supported development for the betterment of the harbour and its residential, educational, commercial and industrial interests. It has led and coordinated the bulk of the public's participation in the planning process which gave rise to the decision under review. CHASE has participated in the planning process and judicial review action at very great personal and financial cost to its members and the communities who support it. Having depleted their remaining funds in order to participate in the judicial review application, Ms. O'Leary avers that CHASE does not have the financial resources to replicate this level of participation in the process for a third time. She continues that the effective participation of the public through the aegis of CHASE is thus now directly at stake. The applicant has opened pre-application consultations with the respondent for what would be its third planning application for this development at this location. Having been refused previously by the respondent on planning grounds CHASE now faces the prospect of having to make the same arguments again.

SUBMISSIONS ON BEHALF OF THE SECOND-NAMED NOTICE PARTY

15. It is submitted on behalf of CHASE that, if the applicant were desirous of seeking to have the proceedings either adjourned or withdrawn, it was under an obligation to do so at the earliest possible moment. In the circumstances, the applicant did not act promptly and instead it acted in such a way as to allow the legal costs on behalf of the Board and CHASE to escalate almost as if the proceedings had run. Having secured pre-application consultations in respect of a proposed planning application, Indaver NV withdrew the proceedings at the last moment.

16. If the applicant is not required to pay costs incurred by CHASE then the manner in which the applicant has conducted these proceedings will serve only to grind down the financial resources of its opponent. The applicant is asking the Court to interpret section 50B in a manner which would undermine the very reason for its insertion.

LAW

17. Generally the costs of proceedings are at the discretion of the Court and usually costs are said to "follow the event" - the losing side is liable to pay the costs of the other side. However, judicial discretion in judicial

review cases concerned with specific environmental matters has been limited by the s. 33 of the Planning and Development (Amendment) Act, 2010 Act (the "2012 Act") and further amended by s. 21 of the Environment (Miscellaneous Provisions) Act, 2011 (the "2011 Act").

18. The new rules are set out in s. 50B of the Planning and Development Act 2000, as inserted by s. 33 of the 2010 Act. This new section established special rules for costs in particular cases. Section 50B provides:

"50B.—(1) This section applies to proceedings of the following kinds:

(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,

(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

(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

(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);

(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).

(2) Notwithstanding anything contained in Order 99 of the Rules of the Superior Courts and subject to subsections (3) and (4), in proceedings to which this section applies, each party (including any notice party) shall bear its own costs.

(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 ward 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.

(5) In this section a reference to 'the Court' shall be construed as, in relation to particular proceedings to which this section applies, a reference to the High Court or the Supreme Court, as may be appropriate."

19. This provision was inserted following a decision of the European Court of Justice in case C-427/07 *Commission v. Ireland* dated 16th July, 2009. The Court found that Ireland had failed to fulfill certain 'access to justice' provisions under European law which were designed to prevent it being prohibitively expensive for members of the public to seek judicial review of decisions on major development projects which have the potential to seriously affect the environment.

20. This new section was necessitated by Ireland's obligations under European Law. In particular, it was necessitated by Article 10a of Council Directive 85/337/EEC of 27th June, 1985 on the assessment of the effects of certain public and private projects on the environment as inserted by Article 3(7) of Directive 2003/35 of 26th 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. Article 10a provides:

> "Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned:
>
> (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.

Member States shall determine at what stage the decisions, acts or omissions may be challenged.

What constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice. To this end, the interest of any nongovernmental organisation meeting the requirements referred to in Article 1(2), shall be deemed sufficient for the purpose of subparagraph (a) of this Article. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) of this Article.

The provisions of this Article shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review

procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

Any such procedure shall be fair, equitable, timely and not prohibitively expensive.

In order to further the effectiveness of the provisions of this article, Member States shall ensure that practical information is made available to the public on access to administrative and judicial review procedures."

21. In *Shillelagh Quarries v. An Bord Pleanála* [2012] IEHC 402 (unreported High Court, Hedigan J., 31st July, 2012) Hedigan J. commented at paragraph 3 that:

"The obligation is that, in certain planning cases, in order to ensure access to Court to challenge decisions, the general public must have a cost effective way of doing so. Such review should be fair, equitable, timely and not prohibitively expensive. Section 50B attempts to do this by providing that in such cases, the default order that costs follow the event is set aside and save for certain limited exceptions, no order as to costs should be made."

22. In *JC Savage Supermarket Ltd. v. An Bord Pleanála* [2011] IEHC 488 (unreported High Court, Charleton J. 22nd November, 2012) Charleton J. says of s. 50B(2) at 4.1:

> "That special rule may exceptionally be overcome through the abuse by an applicant, or notice party supporting an applicant, of litigation as set out in s. 50B (3).

23. Also of note is the case of *McEvoy and Smith v. Meath County Council* ([2003] 1 IR 208). In that case Quirke J. ordered the successful respondent to pay the full costs associated with the transcript of the proceedings and half of the unsuccessful applicant's costs of and incidental to the proceedings. The High Court exercised its discretion in favour of the losing party in circumstances where a vast amount of documentation came to be analysed and a majority of the issues of fact within were determined in favour of the applicants. This analysis could have been determined by agreement between the parties and so had the effect of unnecessarily prolonging the trial proceedings.

DECISION

24. From the facts of the present case I am satisfied that it comes within the exceptions provided for at s. 50B(3)(b) of the Planning and Development

Act, 2000, as amended. The Court may award costs against a party due to manner in which it conducted the proceedings. This section encompasses the unnecessary prolonging of proceedings when the party no longer has a bona fide belief in its case.

25. The applicant delayed in applying for adjournment. The reason for delaying was that supposedly "new" evidence had come to light in the form of an evaluation document which was referred to in the minutes of the meeting of Cork County Council of 10th September, 2012. In becoming aware of the minutes it is clear that the applicant was aware of the content of the evaluation document as it is referred to within. These minutes which refer to the evaluation could have been presented to the Court. Further, when Indaver NV received the evaluation document it then became the reason for withdrawing the proceedings instead of providing new evidence to continue the proceedings.

26. It is clear from the background facts at paragraphs 4 – 7 that the applicant did not act promptly and instead it acted in such a way as to allow the legal costs on behalf of the Board and CHASE to escalate almost as if the proceedings were going to run to a full hearing and judgment. Indaver NV prolonged the case without intending to continue them and withdrew the proceedings at the last moment. From the facts it can be ascertained that the

applicant had no bona fide belief in the case after a certain point in time which the Court finds to be 10th September, 2012. Its conduct of the proceedings thereafter can only be seen as an abuse of the court process and the statutory exemption from liability for costs cannot be availed of on the findings of fact which I have made.

27. The Court will award the respondent and the notice party their costs as and from 10th September, 2012.

Approved

D.J.K.