THE HIGH COURT

JUDICIAL REVIEW

RECORD NUMBER: 2011 No. 863 JR

IN THE MATTER OF SECTION 50 OF THE PLANNING AND DEVELOPMENT ACT 1950, AS AMENDED

BETWEEN:

TESCO IRELAND LIMITED

APPLICANT

AND

CORK COUNTY COUNCIL, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

DECISION ON COSTS OF MR JUSTICE MICHAEL PEART GIVEN ON THE 11TH DAY OF DECEMBER 2013:

1. I refer to my earlier judgment in this matter. Having heard submissions in relation to costs, I reserved my decision in relation to same, and gave an ex tempore decision in which I awarded costs to the successful applicant for the reasons which I stated at the time. In case my reasons are of benefit in the future, I agreed that I would set them out in written form.

2. These are proceedings to which the provisions as to costs contained in Section 50B of the Planning and Development Act, 2000, as amended, apply. Subsection (1) need not be set forth. The remaining subsections provide:

"(2) Notwithstanding anything contained in Order 99 of the Rules of the Superior Courts (S.I. No.15 of 1986) and subject to subsections (2A), (3) and (4), in proceedings to which this section applies, each party to the proceedings (including any notice party) shall bear its own costs.

(2A) The costs of proceedings, or a portion of such costs, as are appropriate, may be awarded to the applicant to the extent that the applicant succeeds in obtaining relief and any of those costs shall be borne by the respondent or notice party, or both of them, to the extent that the actions or omissions of the respondent or notice party, or both of them, contributed to the applicant obtaining relief.

(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 award costs in favour of a party in a matter of exceptional 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 the section applies, a reference to the High Court or the Supreme Court, as may be appropriate." [emphasis added]

3. The effect of these provisions, as relevant herein, is that the general rule is that in cases coming within the section the Court shall not make any order as to costs. That was the provision as originally enacted. But the general rule was

ameliorated in the interests of a successful applicant by the insertion of subsection 2A above, so that the Court retains a discretion to award such costs to the applicant. But such costs are firstly only those costs which reflect the extent to which the applicant succeeded, and, secondly, "those costs" (i.e. those which relate to the extent to which the applicant succeeded) shall be awarded "*to the extent that the actions or omissions of the respondent or notice party, or both of them, contributed to the applicant obtaining relief*".

4. As I have said, these proceedings come within section 50B of the Act of 2000 as amended. The applicant certainly succeeded in the proceedings. It obtained the relief which it sought, albeit on one only of the grounds argued. However, it must be pointed out that having found that the applicant succeeded on the *ultra vires* ground, I considered it unnecessary to reach conclusions on the other grounds argued. So it cannot be fairly said that the applicant failed on those other grounds.

5. It seems clear that section 50B(2A) was inserted into the Act of 2000 in order to address the apparent injustice done to a successful applicant by the original section 50B, under which, despite Order 99 of the Rules of the Superior Courts, the Court was required in these cases to make no order as to costs to a successful applicant. The terms of section 50B(2A) seem very precisely drafted. The Court may award costs or a portion of costs as are appropriate, to the extent that the applicant succeeds. Taking that part of the section first, it seems to me that it gives the Court a discretion first of all to depart from the otherwise general rule in subsection (1) that no order be made. Secondly, the discretion is confined to awarding costs or a portion of costs, limited to those related "*to the extent that the applicant succeeds*".

6. This suggests that if for example an applicant raises four grounds of challenge or argument, or four issues, and succeeds on one ground or issue only, and loses on the other three, the Court may make an order for costs in the applicant's favour but of less than 100% of the applicant's costs, depending on the extent to which the three failed grounds contributed to the length of the case, and the documentation and submissions generated.

7. In the present case, the applicant was found to have been successful on one ground. But, as I have said, the Court did not reach any conclusion on the remaining grounds. The applicant cannot be considered therefore to have failed on the latter.

8. In such circumstances, it would seem unjust, where the Court decides to exercise its discretion to award costs to the successful applicant, to award costs but limited to those attributable to the successful ground alone. There is no question of the other grounds being considered to come within the frivolous or vexatious provision in section 50B (3)(a) of the Act of 2000,or indeed paragraph (b) or (c) of that subsection. They do not. I am also satisfied that in any event those additional grounds did not materially add to the length of the proceedings, or the documentation in the case.

9. First of all, I am satisfied that this is a case where the Court should make an order for costs in favour of the successful applicant. I can see no reason for not doing so. The applicant has succeeded on the merits of the case.

10. However, given the wording of the section, that is not an end of the matter. Even though I have decided that the applicant should be regarded as having fully succeeded in the proceedings, the Court may only award costs "*to the extent that the actions or omissions of the respondent or notice party, or both of them, contributed to the applicant obtaining relief*".

11. In another case, it may be necessary for the Court to reach some conclusion on, or make some calculation in relation to, what deduction or discount should be made in order to reflect the degree of culpability on the part of the respondent or notice party, or both, for the situation which arise and which entitled the applicant to the reliefs obtained. I could foresee that in some case there could be less than full blame attaching to the respondent, or there may be an apportionment of responsibility found between a respondent and notice party for the factual situation which entitled the applicant to succeed. It would seem that under the section the Curt has a wide discretion to reflect such an apportionment of responsibility in any costs order it makes. The Court's discretion is couched in sufficiently broad terms to enable the Court to take

into account all relevant circumstances, and do justice between all the parties in relation to costs.

12. In the present case, however, such difficulties do not arise. It is clear from my judgment in the substantive proceedings that the reason the applicant succeeded is because of the *ultra vires* decision of the elected members of the respondent council, contrary to section 20(3)(q) of the Planning & Development Act, 2000.

13. Accordingly, the applicant should suffer no deduction or discount on the order for costs.

14. I therefore will order that the applicant do recover from the first named respondent its costs of these proceedings, including any reserved costs, and the costs related to this application for costs, those costs to be taxed and ascertained in default of agreement.