Costs protection in planning judicial review cases finally clarified by the Irish Supreme Court

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The Supreme Court in Ireland has now confirmed that if any of an applicant's planning judicial review grounds includes just one ground invoking EIA/SEA/IPPC/Habitats Directives, then the applicant benefits from costs protection under the special costs rules Section 50B of the Planning and Development Acts 2000, whereby all grounds cited benefit from the cost protection.

Background

The usual rule as to costs is that 'costs follow the event', i.e. the losing party pays the winning party's costs. However, the Heather Hill decision means that planning judicial review applicants can list as many grounds challenging a permission granted and just include one ground relating to EU environmental protection Directive but never risk having an adverse costs order made against them, even if they lose on any or all grounds.

The justification is based on an EU wide judicial endorsement that the environment cannot protect itself. Under the Aarhus Convention, a person who commences legal proceedings to protect the environment should not be penalised if they lose by way of adverse costs orders.

It is now commonplace for applicants to include a standard invocation of EU environmental Directives amongst their statement of grounds, which in reality, are less about the protection of the environment and more about protection of the status quo in the locally built environment, the resistance to high rise residential units, the resistance to change and a disregard to the need for more housing.

Whereas the Planning and Development Bill 2023 is designed to limit the proliferation of planning judicial review actions, the Heather Hill decision from the Supreme Court is sure to encourage more judicial review proceedings against planning permissions.

The Supreme Court decision in Heather Hill

In the recent case of *Heather Hill Management Company CLG & McGoldrick -v- An Bord Pleanála, Burkeway Homes Limited and the Attorney General* the Supreme Court was asked to considered the correct interpretation of Section 50B of the Planning and Development Act 2000 .

The Supreme Court overturned the Court of Appeal ruling and reinstated the earlier decision of Simons J. in the High Court. The Court determined that protective costs orders, provided for pursuant to Section 50B, are applicable to all challenges against decisions made under statutory provisions that implement the Directives listed in the provision. The Court held that there was no justification, either under Section 50B or the Aarhus Convention, for dividing the costs when some grounds raised in the proceedings relate to those Directives and others did not.

The Court of Appeal had held that cost protection ought only apply to the specific environmental grounds of challenge covered by the Directives, and not to the entirely or other so called domestic law grounds raised in such proceedings. However, the Supreme Court was concerned that adopting such a narrow interpretation of Section 50B, could undermine the Oireachtas' intention to implement non-prohibitively expensive rules into the Irish law in compliance with our obligations under the Aarhus Convention.

The Aarhus Convention is an international multi-lateral environmental agreement which came into force in 2001, with the aim of enhancing access to environmental information, participation in the decision-making process and the right to review administrative decisions. The Convention is based on three pillars and requires Parties to the Convention to guarantee rights of access to information, public participation in decision-making and access to justice in environmental matters

Article 9(4) of the Convention, requires that Member States must provide adequate and effective remedies, including injunctive relief as appropriate, and should be fair, equitable, timely and not prohibitively expensive (NPE).

Conclusion

Whilst this decision in Heather Hill has been welcomed by public interest groups and individuals seeking to rely on these special costs rules in challenging decisions which relate to environmental law, it presents a real challenge to developers and stakeholders who are seeking to progress large scale development in circumstances where there is now no legal costs risk to applicants in instituting judicial review proceedings.

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