APPROVED **[2021] IEHC 234**

THE HIGH COURT
JUDICIAL REVIEW

2020 No.'s 485 to 491 J.R.
2020 No. 418 J.R.
2020 No.'s 539 & 540 J.R.

BETWEEN

FRIENDS OF THE IRISH ENVIRONMENT CLG
AN TAISCE
PETER SWEETMAN
ALICE HAYES

APPLICANTS

AND

AN BORD PLEANÁLA
IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

BORD NA MONA
WESTLAND HORTICULTURE
McTIGUE QUARRIES

NOTICE PARTIES

JUDGMENT of Mr. Justice Garrett Simons delivered *ex tempore* on 23 April 2021

INTRODUCTION

1. This is my ruling in relation to eleven applications for judicial review. The only issue outstanding in these proceedings concerns the form of relief to be granted. The disagreement between the parties turns on a nuance between (i) an order setting aside the impugned decisions, and (ii) one declaring, in essence, that the impugned decisions have

no legal effect. The subtlety and sophistication of this distinction is one which would be lost on all save the most pedantic of administrative lawyers.

PROCEDURAL HISTORY

2. The circumstances giving rise to the dispute can be shortly stated. The impugned decisions are ones which on their face purport to allow an application to be made *retrospectively* for development consent in respect of projects, all of which are subject to the Environmental Impact Assessment Directive (Directive 2011/92/EU) ("***EIA Directive***"). The impugned decisions find, in essence, that the respective developers had demonstrated "exceptional circumstances" (as defined under the planning legislation) which justified their making a planning application *ex post facto* to regularise the planning status of the individual project in each instance.

3. The scheme of the planning legislation, at the relevant time, had been that the question of the entitlement, if any, of a developer to apply for development consent *retrospectively* had to be dealt with as a threshold issue, in advance of the making of an application for development consent (assuming, of course, that leave to apply was granted). The decisions which are impugned in these proceedings might be described as "stage-one" decisions, i.e. they all address the entitlement of the respective developers to make applications for development consent *ex post facto*.

4. The scheme of the planning legislation in force at the time the decisions impugned in these proceedings were made has since been found by the Supreme Court to be inconsistent with the requirements of the EIA Directive in *An Taisce v. An Bord Pleanála* [2020] IESC 39. This judgment was delivered on 1 July 2020.

5. It should be explained that the Court of Justice has consistently held that whereas a Member State has discretion to allow the regularisation of development projects carried

out in breach of the EIA Directive, such regularisation would have to be subject to the condition that it does not offer the persons concerned the opportunity to circumvent the rules of EU law or to dispense with their application, and that it should remain the exception. (See, for example, Case C-196/16, *Comune di Corridonia*). This finds expression under the domestic planning legislation in the concept of "exceptional circumstances" (as described under section 177D of the Planning and Development Act 2000).

6. The Supreme Court held in *An Taisce v. An Bord Pleanála* that the public participation rights under the EIA Directive extend to a right to participate prior to the making of a final and conclusive determination on the question of whether a developer should be allowed to regularise the planning status of their project. See paragraphs 128 and 132 of the judgment as follows.

> "It must be remembered that the underlying purpose of public participation in environmental matters is to facilitate good, fully informed decision making, it being acknowledged that the public as a whole is one of the greatest repositories of environmental information. The EIA Directive recognises that without the opportunity to participate, it will be more difficult for the competent authority to reach the kind of decision as is envisaged. Good decision-making can take place where the decision-maker has the relevant information before it. As the appellants have demonstrated, the matters which fall to be considered at the leave stage are matters in respect of which the public may have highly relevant information. It seems to me that, as a result of the restrictions imposed, Part XA of [the Planning and Development Act 2000] fails to provide for effective participation at a stage when all solutions remain open: quite clearly, the option of refusing to grant leave is off the table by the time the public have any opportunity to make submissions which may be of relevance to that decision.
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> […]
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> Given that the granting of leave cannot be revisited at a later stage, it appears to me that by the time public participation is provided for under [the Planning and Development Act 2000], all options, including refusing the leave, or determining the scope of the leave or of the remedial statements to be provided, are no longer open to the Board. This, in my view, is inconsistent with the requirement that the

> public be given early and effective opportunities to participation at a time when it is capable of influencing all issues. It seems to me, therefore, that in failing to provide in any meaningful way for public participation on a crucial issue, such as 'exceptionality and circumvention', at such time, the State has failed to properly transpose the EIA Directive in this respect."

7. The judgment in *An Taisce v. An Bord Pleanála* is careful to explain that a two-stage process is not necessarily inconsistent with the EIA Directive, and, indeed, might have merit in terms of administrative efficiency. Rather, the fatal flaw in the then planning legislation had been that "once leave has been granted, the decision to grant leave cannot be revisited: that decision is ring-fenced and the option not to grant leave is off the table" (paragraph 131 of the judgment).

8. The planning legislation has since been amended, in an attempt to address the deficiencies identified in the Supreme Court judgment. The revised legislation was enacted on 19 December 2020.

9. Eleven sets of judicial review proceedings were assigned to me for case management. In each instance, the applicant for judicial review seeks to challenge a stage-one decision granting leave to apply for development consent retrospectively. Crucially, the proceedings were all instituted in the interregnum between the delivery of the Supreme Court's judgment on 1 July 2020, and the enactment of the revised legislation on 19 December 2020. Had the judicial review proceedings been heard and determined prior to the enactment of the revised legislation, it is inevitable that each of the impugned decisions would have had to be set aside, as having been made pursuant to a legislative regime which had been found to be inconsistent with the EIA Directive.

10. I granted leave to apply for judicial review in all eleven proceedings on 10 November 2020. Thereafter, I acceded to an application on the part of the State respondents to defer making directions on the filing of opposition papers until January 2021. This was done in circumstances where the enactment of revised legislation was then imminent. I took

the view that the enactment of new legislation had the potential to obviate the necessity for a full hearing. It would be in the interests of the parties, and of judicial economy, to avoid the time and costs involved in a full hearing if one proved to be unneeded. The revised legislation was subsequently enacted on 19 December 2020.

11. There has been a further advance in the proceedings in that all but two of the developers have now confirmed that they do not intend to avail of the leave to apply for development consent. Put otherwise, these developers will not now be relying on the stage-one decisions impugned in these proceedings.

12. The parties have, however, been unable to reach agreement as to what the appropriate form of order in these proceedings should now be.

AMENDED PLANNING LEGISLATION

13. The procedure for obtaining development consent retrospectively in respect of EIA projects has been amended by the Planning and Development and Residential Tenancies Act 2020 ("***PDA 2020***"). These amendments took effect on 19 December 2020. The PDA 2020 makes a number of significant amendments to Part XA of the Planning and Development Act 2000 ("***PDA 2000***").

14. The approach taken under the amended planning legislation is to maintain a two-stage process, i.e. it is still necessary for a developer first to seek "leave to apply" for retrospective development consent, prior to making its substantive application for development consent. There continues to be no public participation at stage-one, i.e. the decision on whether to grant leave to apply for development consent retrospectively. The crucial change, however, is that the question of "exceptional circumstances" can be reconsidered at stage-two. Section 177K of the PDA 2000 now provides that An Bord

Pleanála shall not grant development consent retrospectively unless it is satisfied that exceptional circumstances exist that would justify the grant of such consent.

15. The status of An Bord Pleanála's stage-one decision is addressed as follows (under an amended section 177K(1A)(b) of the PDA 2000).

> "When deciding whether or not to grant substitute consent, the Board shall not—
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> (i) be bound by,
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> (ii) take account of, or
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> (iii) otherwise have regard to,
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> any decision of the Board under section 177D as to the existence of exceptional circumstances in relation to an application under section 177C."

16. No member of the board who participated in the making of a stage-one decision is to participate in the consideration of, or the making of, the stage-two decision on the subsequent application for development consent.

DISCUSSION

17. Save with the exception of one of the notice party developers (Westland Horticulture), all of the parties represented at the hearing before me accept that the impugned decisions cannot be relied upon for any legal purpose. An Bord Pleanála and the State respondents have indicated that they would be agreeable to a form of declaration which provides as much. Moreover, the *amended* planning legislation contains a "disregard" rule which precludes An Bord Pleanála from attaching any weight to its earlier finding of exceptional circumstances.

18. The form of declaration which the State respondents and An Bord Pleanála have agreed to goes further than the amended legislation in that it would be applicable not only to An Bord Pleanála, but would, for example, preclude a planning authority from relying on the

board's finding of "exceptional circumstances" in the context of, say, enforcement proceedings.

19. Notwithstanding their agreement to drain all meaningful life from the decisions by way of this declaration, An Bord Pleanála and the State respondents are not prepared to accept the *coup de grâce* of an order setting aside the impugned decisions. I have to say that their coyness in this regard is difficult to understand. The distinction between the form of the two orders is razor thin. However, this court will have to rule on this matter now because the parties cannot agree.

20. An Bord Pleanála and the State respondents accept, in principle, that a decision to grant "leave to apply" for development consent retrospectively, i.e. a stage-one decision which has not yet crystallised into a stage-two decision to grant development consent, which had been made *prior to* the enactment of the amended legislation on 19 December 2020, would have to be set aside as invalid in circumstances where the unamended version of the legislation has been condemned by the Supreme Court in *An Taisce v. An Bord Pleanála*. In reply to a direct question from the court, leading counsel for An Bord Pleanála and the State respondents each accepted that had the Supreme Court been confronted with facts involving a stage-one decision, then the logic of the judgment is that that decision would have to be set aside by an order of *certiorari*. (On the actual facts of *An Taisce v. An Bord Pleanála*, matters were further advanced, and a stage-two decision had been made refusing development consent).

21. This concession is inevitable given the robust terms of the Supreme Court judgment. It is evident—in particular, from paragraph 150 of the judgment—that the making of a final and conclusive decision, without public participation, on the threshold issue of "exceptional circumstances" represents a breach of the public participation provisions of

the EIA Directive. The breach crystallised then; it was not necessary to await the actual grant of development consent.

22. It follows that, as of the date these proceedings were instituted, the Applicants would have had a clear-cut right to an order setting aside the impugned decisions by way of *certiorari*. Any other result would have been inconsistent with the logic of the Supreme Court's judgment.

23. An Bord Pleanála and the State respondents maintain, however, that different considerations now apply. Two factors are put forward in this regard. The first is that the planning legislation has since been amended. The second is that—save in two instances—all of the developers have indicated that they will not now be pursuing an application for development consent on foot of the stage-one decisions impugned in these proceedings. In other words, in all save possibly two cases, there will now never be an application for development consent. Therefore, the "mischief", as it were, of a development consent being granted *retrospectively* in instances where the requirement for "exceptional circumstance" has been determined without public participation will not come to pass.

RELEVANCE, IF ANY, OF AMENDED LEGISLATION TO THESE PROCEEDINGS

24. It is common case that the stage-one decisions impugned in these proceedings were invalid as of the date the proceedings were commenced. This is because the question of whether the developer had demonstrated "exceptional circumstances", such as to justify their being entitled to apply for development consent retrospectively, had been conclusively decided, without public participation, in the context of a legislative regime which *precluded* the issue of exceptional circumstances being revisited at stage-two.

25. It is a nice question of law as to whether these invalid decisions became reanimated and valid again once the new legislation had been enacted on 19 December 2020. Under the amended legislative regime, the question of "exceptional circumstances" can now be revisited at stage-two. Were the new legislation to extend to existing stage-one decisions, then the impugned decisions would no longer be conclusive on the question of "exceptional circumstances". It would then be necessary to consider whether the new legislative regime is itself consistent with the EIA Directive. In particular, it would be necessary to consider whether the choice of the legislature in maintaining the two-stage process, whereby exceptionality is determined on a contingency basis without public participation, is consistent with the EIA Directive. It might well be appropriate to make a reference to the Court of Justice for a preliminary ruling pursuant to Article 267 of the Treaty on the Functioning of the European Union ("***TFEU***").

26. However, the one thing that the parties are agreed upon is that they do not want this court, in these proceedings, to embark upon such a consideration of the new legislative regime. The parties have been very clear in relation to that. They do not want a determination on that issue, and various pragmatic reasons have been offered for this. It is said, for example, that in circumstances where there will be no application for development consent in respect of most of the impugned decisions, this may ultimately result in the court deciding a moot. Even in the two instances where the making of an application for development consent pursuant to an impugned stage-one decision remains a possibility, An Bord Pleanála might refuse development consent.

27. I must respect the views of the parties in this regard. In circumstances where no one wants me to do otherwise, and where it does not form part of the pleadings before me, I will not rule on the validity of the new legislation. That is a matter for another day. As

explained under the next heading below, it is possible to resolve the proceedings before me on a narrower, fact-specific basis.

NO DEVELOPMENT CONSENT APPLICATIONS

28. As flagged earlier, save in two instances, there will not now be any applications for development consent made pursuant to the stage-one decisions impugned in these proceedings. The State respondents and An Bord Pleanála point to this as a factor which renders the proceedings moot, and tells against the grant of an order of *certiorari*.

29. With respect, I disagree. It seems to me that it has precisely the opposite effect. The fact that there will not now be a second-stage means that the only forum in which the invalidity of the stage-one decisions—and the breach of EU law—can be corrected is before this court in these proceedings. The logic of the new legislation—and as I say that legislation is untested and is not being tested in these proceedings—is that the lack of public participation at stage-one will be cured at stage-two. The question of "exceptional circumstances" can be revisited. An Bord Pleanála is directed to disregard its earlier decision, and to have regard to submissions made on the issue of exceptionality.

30. However, there will never be a second-stage in most of these cases before me. Therefore, the Applicants will have been denied an opportunity to be heard in relation to what is a very important decision, that is whether the developer has established "exceptional circumstances". Those decisions, as matters currently stand, are on the public record. They represent the findings of An Bord Pleanála that the developers in each instance had acted *bona fide* and that they should be allowed to apply for development consent retrospectively. The impugned decisions are capable of having adverse effects on the rights of the Applicants and other members of the public or environmental non-governmental organisations who are entitled to participate under the EIA Directive.

There is a risk, for example, that a local planning authority might, in the context of enforcement proceedings, mistakenly rely on the board's earlier conclusion, which was drawn without public participation, as to the *bona fides* of the developer. It does not appear to be seriously contended that such an approach would be anything but unlawful.

31. It is recognised, in principle, that these impugned decisions are capable of having adverse effects. The answer that is put forward by An Bord Pleanála and accepted by the State respondents is that the impugned decisions should be declared to have no legal effect, but not set aside. An Bord Pleanála's legal team, led by Emily Egan, SC, has very helpfully produced a draft form of declaration. I very much appreciate these efforts to reach an accommodation between the parties.

32. Ultimately, however, I cannot discern any logic to the overly nuanced approach adopted by the State respondents and An Bord Pleanála. It seems to me that the Applicants brought a case that was well founded, and they are entitled to an order of *certiorari*. At the time these proceedings were instituted, the impugned decisions were invalid as a matter of EU law and domestic law. Absent this court embarking upon a consideration of the new legislation, which I have been specifically asked not to do; and absent there being any second-stage, the breach of the EIA Directive inherent in the impugned decisions cannot be rectified other than by way of the court making an order of *certiorari*.

CONCLUSION AND FORM OF ORDER

33. In summary, this court as a national court is required to give effect to the EIA Directive. That is clearly established in the case law of the Court of Justice, commencing with Case C-201/01, *Wells*. It seems to me that the only way that that can properly be done in this case is to make an order of *certiorari*.

34. The importance of the national courts giving effect to EU environmental law has consistently been emphasised. This is expressly recognised in the judgment of the Supreme Court in *An Taisce v. An Bord Pleanála* (at paragraph 151).

> "The CJEU has said on a number of occasions, particularly in the context of the EIA Directive, that where a breach occurs, the Member State involved is obliged, first, to nullify the unlawful effects and secondly, to remedy the resulting harm (*Wells*: paras. 64 and 66: *Commission v. Ireland*; para. 59, and *Corridonia*; para. 35). […]"

35. In a very recent case cited by counsel for one of the Applicants (Peter Sweetman), the Court of Justice has reiterated the obligations of a national court which has found that there has been a failure on the part of the Member State to fulfil its obligation to transpose correctly an EU Directive. (Case C-64/20, *An tAire Talmhaíochta, Bia agus Mara*).

36. I will make an order of *certiorari* in all the proceedings before me, save in relation to the two cases where it is not yet apparent whether or not there will be an application for development consent. What I propose to do with those two cases is to adjourn them generally, with liberty to re-enter. It is open to any party—whether the developer or whether the applicant or indeed An Bord Pleanála itself—to re-enter those two cases before me. I retain seisin of same, and an appropriate order can be made in relation to those cases. If necessary, I will give leave to amend the pleadings to include a challenge to the new legislation.

37. It should be reiterated that the findings in this judgment are confined to the very special circumstances of the present case. Crucially, the proceedings were all instituted in the interregnum between the delivery of the Supreme Court's judgment on 1 July 2020, and the enactment of the revised legislation on 19 December 2020. The impugned decisions had been reached under the old legislative regime. This judgment does not stand as authority for the proposition that a stage-one decision, *which has been made under the*

new legislative regime, can be invalidated in circumstances where the developer does not pursue its application for development consent.

38. Insofar as costs are concerned, I understand that the parties had reached an accommodation whereby the State respondents had agreed to pay the Applicants' costs. If any change to this approach is caused by this *ex tempore* judgment, then the parties have liberty to apply and I will rule on costs if required. Otherwise, if the original agreement on costs remains good, I will simply make an order in favour of the Applicants in each of the cases against the State respondents, with the usual direction for adjudication under Part 10 of the Legal Services Regulation Act 2015.

39. The eleven sets of proceedings are listed, provisionally, before me on 7 May 2021 to address any outstanding issues.

Approved