[2023] IEHC 73

THE HIGH COURT
JUDICIAL REVIEW

[2022 No. 293 JR]

BETWEEN

ANN MARSHALL, RODERICK RYAN AND PETER WALSH (AS EXECUTORS OF THE ESTATE OF FRANK DUNNE DECEASED) (BY ORDER), ANN MARSHALL AND HAMWOOD STUD UNLIMITED COMPANY

APPLICANTS

AND

KILDARE COUNTY COUNCIL, MEATH COUNTY COUNCIL, EIRGRID PLC, IRELAND, AND THE ATTORNEY GENERAL

RESPONDENTS

AND

ELECTRICITY SUPPLY BOARD (BY ORDER)

NOTICE PARTY

JUDGMENT of Humphreys J. delivered on the 17th day of February, 2023

1. The first to fourth-named applicants are the legal owners of Hamwood Stud in Dunboyne, County Meath. (Ms Marshall is named twice, as first-named applicant in her capacity as one of the executors, and as fourth-named applicant in her own right.) The fifth-named applicant is a company carrying on business as the stud.

2. ESB/Eirgrid's existing Maynooth-Woodland 220 kV line crosses the applicants' lands. It is 22.5 km long in total and involves 71 steel tower structures. Structures numbers 1 to 45 were constructed in 1968. Numbers 46 to 71 were added in 1985. Only one pylon, number 47, affects the applicants' lands.

3. On 2nd March, 2020, EirGrid submitted an application under s. 5 of the Planning and Development Act 2000 seeking to ascertain whether proposed works to the line were exempted development. A similar letter was written on the same date to Kildare County Council.

4. The latter council decided on 20th March, 2020 that the project was exempted development. The reasoning in that decision states that the works come within s. 4(1)(g) of the 2000 Act. That is closer to asserting a conclusion than setting out reasoning, but it is

certainly better than nothing. On 23rd July, 2020, Meath County Council also declared the works to be exempted development. However, the form of that decision doesn't have any meaningful reasons at all that are immediately apparent.

5. Pursuant to s. 5(7B)(a) of the 2000 Act (as inserted by the European Union (Planning and Development) (Environmental Impact Assessment) Regulations 2018 (S.I. No. 296 of 2018)), details of and documents relating to a s. 5 request must be published on the local authority's website. This was not done by either council

6. The applicants have suggested that non-compliance with the terms of s. 5(7B) is relatively widespread. While that is not something that needs to be decided and therefore not something that needs to be established evidentially in the present case, such a suggestion is naturally of concern, as it would no doubt be to the European Commission. Furthermore, the statutory procedure involves no requirement for notice to affected landowners. Consequently these applicants were not given either actual or constructive notice of the application or its outcome or allowed any specific role in that regard.

7. ESB/EirGrid engaged with the applicants since March 2020 in relation to possible works on the line project. An initial drone inspection of the lands took place in September 2020. Works commenced on the line project on 11th October, 2021, although the works carried out so far do not affect the applicants' land. On 21st January, 2022 the applicants' solicitors wrote querying the status of the project, the applicants having had the benefit of legal advice and expert advice since November 2021. On 10th February, 2022, the ESB for the first time expressly informed the applicants that s. 5 declarations had been made although that letter did not enclose copies of these declarations. Nor did the applicants seek copies in their reply.

8. The applicants' advisers obtained a copy of the Kildare County Council declaration on 15th February, 2022 and obtained access to the planning file on 9th March, 2022, although the applicants' planning adviser did not contact Kildare County Council for this purpose until two or three days beforehand. While the applicants' adviser had a medical difficulty, it had not been explained why somebody else did not attend for that purpose. The applicants' planning adviser obtained a copy of the Meath County Council decision on 25th March, 2022 and a copy of the file on 5th April, 2022.

Procedural history

9. It is apparent inferentially from para. 4 of the affidavit of the applicants' solicitor of 20th January, 2023 that the applicants were aware on 5th April, 2022 that in the normal course of events the grounding affidavit for the present proceedings should be sworn by the applicants or one of them. On 5th April, 2022, the applicants' solicitors contacted the registrar assigned to the Non-Jury/Judicial Review List to request that the court facilitate an application on 6th April, 2022 to the effect that someone else be permitted to swear the grounding affidavit.

10. That application was facilitated to the extent that on the morning of 6th April, 2022, an application was made to the List Judge for that purpose. Meenan J. gave leave for the applicants' solicitor to swear the affidavit and envisaged that the applicants' lawyers could return to court later in the day to formally move the application for leave to seek judicial review.

11. The papers were not apparently ready to go at that point and were worked on during the day. The applicants' solicitors then attended the Central Office at 15.48 and simultaneously informed the registrar by email that they were in the process of filing papers to obtain a record number and hoped to make an application to open the matter imminently.

12. Unfortunately, the Central Office then informed the applicants' solicitors that they would not provide a record number because the statement of grounds was not stamped. The Stamping Office in Áras Uí Dhálaigh closes at 16.00 "and would have been closed by the time we attended" (para. 12 of the affidavit of the applicants' solicitor of 20th January, 2023).

13. At 16.01 counsel appeared again before Meenan J. and the position was explained. He noted that the matter was mentioned and matters were left over until the following morning. On 7th April, 2022, papers were duly filed and the matter was then opened to the court. Meenan J. adjourned the matter and later granted leave on 1st June, 2022. The order doesn't extend time for the bringing of the proceedings.

14. Leave was granted in separate proceedings on the same date [2022 No. 424 JR] challenging the validity of related wayleave notices, along with a stay on the notices preventing the ESB from entering on the applicants' lands pending further order.

15. The substantive notice of motion in the present proceedings was issued on 3rd June, 2022. On 18th July, 2022, a notice of motion was issued to enter the matter in the Commercial List. On 19th July, 2022, the ESB were joined as a notice party. On 25th July,

2022, the matter was entered into the Commercial List and transferred to the Commercial Planning and Strategic Infrastructure Development List.

16. On 29th July, 2022, directions were given and a hearing date for a proposed motion to set aside leave was fixed for 20th December, 2022. The formal motion to set aside leave was issued by EirGrid on 9th September, 2022 and is now before the court, being supported by the other opposing parties. Directions were amended on 10th October, 2022. The applicants issued a notice of motion seeking an extension of time if necessary on 21st October, 2022. On 12th December, 2022 the title of proceedings was amended to refer to the executors of the first named applicant, following his unfortunate recent passing. The matter was heard on 20th and 21st December, 2022. At the end of the hearing I gave liberty to the applicants to put further details on affidavit regarding the events of 6th April, 2022. It was also agreed or at least wasn't objected to that the applicants would seek the DAR of the events of that date from Meenan J. and the matter was adjourned for that purpose. The DAR has now been exhibited.

Materials before the court

17. Materials placed before the court by being uploaded to the ShareFile platform for this case included pleadings, exhibits, authorities, correspondence, a core book and submissions running to a total of 5,671 pages.

Reliefs sought in the proceedings

18. The substantive reliefs sought in the proceedings are as follows:

(i) An order of *certiorari* quashing the Declaration of Development & Exempted Development under s.5 of the Planning and Development Act 2000 (as amended) ("the PDA 2000") of Kildare County Council declaring the works the subject of the application by EirGrid plc (Ref. No. ED/00786) to be exempted development, being made on or around 20 March 2020 ("the Kildare County Council Section 5 Declaration").

(ii) An order of *certiorari* quashing the Declaration of Meath County Council declaring the works the subject of the application by EirGrid plc (Ref. No. RA/S52021) to be exempted development, being made on 23 July 2020 ("the Meath County Council Section 5 Declaration").

(iii) Such declaration(s) of the legal rights and/or legal position of the applicant[s] and (if and insofar as legally permissible and appropriate)

persons similarly situated and/or the legal duties and/or legal position of the Respondents as the Court considers appropriate.

(iv) A declaration that each of the Kildare County Council Section 5 Declaration and the Meath County Council Section 5 Declaration is invalid and *ultra vires.*

(v) A declaration that s.5 PDA 2000 is an unjustified interference with the Applicants' property rights as protected by Articles 40.3.2 and 43 of, and repugnant to the right to be heard under, the Constitution of Ireland.

(vi) A declaration that s.5 PDA 2000, read together with s.50 PDA 2000, is contrary to the right to be heard and to the right to an effective hearing and/or is contrary to the right to public participation under Article 6 of Directive 2011/92 ("the EIA Directive") and the analogous provisions requiring public participation under Directive 92/43 ("the Habitats Directive") giving effect to Articles 6 of the Aarhus Convention and/or is contrary to Articles 6 and 9 of the Aarhus Convention itself and is contrary to Article 11(1) of the EIA Directive and/or Articles 17 and 47 of the EU Charter of Fundamental Rights.

(vii) An injunction preventing the taking of any steps, including any works, on foot of each and either of the Kildare County Council Section 5 Declaration and the Meath County Council Section 5 Declaration.

(viii) An injunction or in the alternative a stay preventing the taking of any steps, including any works, on foot of each and either of the Kildare County Council Section 5 Declaration and the Meath County Council Section 5 Declaration pending the determination of the within proceedings.

(ix) An Order providing that s.50B of the Planning and Development Act 2000 (as amended) and/or ss.3 and 4 of the Environmental (Miscellaneous Provisions) Act, 2011, and/or Article 9 of the Aarhus Convention apply to the present proceedings.

(x) An application to extend time for making this application for judicial review.

(xi) An Order providing for the costs of the within application.

(xii) Such further and other Order as this Honourable Court may deem fit."

Issues on the motions

19. As follows from the procedural history above, the two options presented to the court by the respective motions are:

(i) an order setting aside leave; or

(ii) an order extending time insofar as necessary.

20. Essentially the two motions are the opposite sides of the same coin and raise the same issue.

21. The parties were agreed on a number of things. The facts were not seriously contested as set out above. It was also agreed that subject to the applicants' interpretation of EU law, an extension of time for the purposes of s. 50(8) of the 2000 Act was required. It was also agreed or perhaps it might be more accurate to say conceded, that on the opposing parties' interpretation of EU law, if the date on which the applicants knew or ought to have known of the decisions was 10th February, 2022, then the applicants had eight weeks from that date to bring the proceedings. Finally, it was agreed by the applicants that the application was "made" for the purposes of s. 50(6) of the 2000 Act on 7th April, 2022. Leaving aside the applicants' interpretation of European law, the issue then turns really on two things:

(i) whether the applicants ought to have known of the contested decisions prior to 10th February 2022; and

(ii) whether there is good and sufficient reason to extend the time up to 7th April 2022.

22. I can deal with those issues and then turn to the applicants' interpretation of EU law if necessary.

Whether the applicants ought to have known of the decision prior to 10th February, 2022

23. Insofar as it is suggested that the applicants ought to have known of the decisions on a date prior to 10th February, 2022 I am afraid that I don't agree. While they knew of various activities, drone surveys and interactions with ESB/EirGrid, those steps didn't in and of themselves create the consequence in the mind of a reasonable person that it was more likely than not that EirGrid had already obtained any s. 5 decisions. At most that was a possibility, but not a likelihood.

24. Also of relevance is that those decisions were not published, contrary to the councils' statutory obligation. While ESB/EirGrid did have various contacts with the applicants indicating that access to the lands was required, the general response on behalf of the

applicants was that this was not agreed. ESB/EirGrid then indicated that wayleave notices would be served. That didn't happen until 25th February, 2022, after the applicants learned of the s. 5 declarations.

25. With the benefit of hindsight and knowing that such declarations existed, then of course it looks like the applicants should have acted earlier. But hindsight can be a misleading perspective. Putting oneself in the position of the applicants prior to such actual knowledge, all that was clear at the time was that ESB/EirGrid wanted access to the lands. There was no assertion that this was of right pursuant to a s. 5 declaration, and there wasn't anything specific to make it more likely than not that s. 5 declarations had been granted. Indeed there was no reference to s. 5 at all.

26. The other relevant aspect is that ESB/EirGrid could easily, and at no cost to themselves, have given that information during all the various engagements. Albeit that they were not obliged to do otherwise, they chose to keep that crucial piece of information under their collective hat until there was no avoiding it.

27. There is of course a point at which a potential plaintiff has enough information to show that there is probably a claim, and thus enough information to go to court, even where she could always benefit from more evidence to bolster her case. This crucial distinction is illustrated by *McBain v McDonald* [1991] 1 I.R. 284, [1991] I.L.R.M. 764, where Morris P. noted that a plaintiff, within the limitation period, had access to evidence which "was already available to the plaintiff upon which she could rely in an attempt to persuade the court that on the balance of probabilities the defendant was responsible". The fact that further information became available later "which she believes will copper fasten the matter in her favour" was not a basis to extend the limitation period.

28. It seems to me here that prior to 10th February, 2022, the applicants only had information regarding the intentions and wishes of ESB/EirGrid as opposed to anything making it likely on the balance of probabilities that s. 5 declarations had already been issued. They can't be faulted for a failure of speculation or imagination, or a failure to join dots that might seem obvious with the benefit of hindsight. At most, s. 5 declarations were a possibility rather than a probability and in my view the possibility of a decision existing is not a sufficient basis on which it can plausibly be held that an applicant ought to have known of the decision, so as to be debarred from challenging it upon becoming actually so aware.

Indeed, the very concept of "knowing" of a decision implies something more definite than thinking of the possibility that there might be such a decision.

Whether there is good and sufficient reason to extend time up to 7th April, 2022

29. In the light of my finding that the date on which the applicants knew or ought to have known of the decisions was 10th February, 2022, the concession on behalf of the opposing parties comes into play. Consequently the applicants should be allowed an eight-week period from that date, a period expiring on 6th April, 2022. The question then is whether there is good and sufficient reason to extend time for a further day.

30. It was common ground that the court should take an overall view of the circumstances for the purposes of this exercise: see the judgment of the Court of Appeal in *Heaney v. An Bord Pleanála* [2022] IECA 123, *per* Donnelly J. at para. 95: "In assessing good and sufficient reason, the Court is entitled to take a holistic view of all the relevant circumstances ...".

31. I have endeavoured to do that, and it seems to me that there are a large number of factors to be considered as part of the holistic overview of all relevant circumstances where the court is considering an extension of time, including:

(i) the legislative policy and the overall integrity of the process;

(ii) the length of the statutory limitation period;

(iii) the level of control by the applicant over the lapse of time, including delay or other blameworthy contact on behalf of the applicant;

(iv) any positive steps taken by the applicant to advance the matter;

(v) any other reasons contributing to the delay generally;

(vi) the level of explanation by the applicant;

(vii) the attitude of the opposing parties;

(viii) any blameworthy contact of the respondent or notice parties;

(ix) any demonstrated prejudice to the opposing parties, third parties or the public interest caused by the delay;

(x) the rights and interest of the applicant, the nature of the claim and the issues involved;

(xi) the rights and interests of third parties or the public interest insofar as such matters favour an extension;

(xii) the rights and interests of opposing parties, third parties or the public interest insofar as such matters militate against an extension;

(xiii) the merits of the case;

(xiv) the commerciality of the context or otherwise;

(xv) all other relevant circumstances;

32. Having considered all those factors, the weight to be assigned to the factors is a matter of judgement, assessment and balance on the particular facts of any given case – that is of course the problem with (or the advantage of, depending on your point of view) multi-factor tests.

33. Overall, while I have given thought to all of those headings, a couple of things stand out massively. As put by the notice party, the applicants "put themselves in the way of harm" by waiting until the last day of the eight week period from the date of knowledge to seek to file their papers. The analogous concept is *volenti non fit injuria,* and unfortunately that sentiment basically reflects the position that applies here. Indeed this was not merely figuratively, but bordering on literally, one minute to midnight, because the applicants presented themselves to the Central Office only twelve minutes before closing time of the stamping office on the final day of the statutory period (as duly extended by their non-culpable lack of knowledge). That left absolutely no margin for error if anything went wrong, which of course it did.

34. Admittedly, as seen by the applicants, they didn't "wait" until the last day because they only got all papers the day before. But that invokes the principle that "your emergency is not my emergency" – they could have mobilised themselves with far greater urgency so that the papers would have been accessed much earlier, and certainly at least a day earlier thereby giving rise to the safety net that they were prepared to do without. The court and the other parties don't have to be on standby to bail out a party in such a situation.

35. Compounding matters, and of even greater importance, is the critical fact of having sent somebody to the Central Office to attempt to file an unstamped statement of grounds. The outcome of that pointless exercise was effectively determined well before the applicants' servant or agent reached the counter. It is also not without relevance that the applicants have not given any explanation whatsoever as to how and why this actually happened. Were adequate instructions as to stamping, plus funds for that purpose, given to the person who was supposed to be doing the filing, and was the omission a sort of unforeseeable frolic on

that person's part? Or was there a lack of instruction or funds being provided? The lack of explanation or clarification despite a further opportunity to do so, in a context where the applicants put themselves in harm's way by waiting until the last possible moment, reinforces the conclusion that it would be inappropriate to regard the self-inflicted difficulty arising from attempting to file an unstamped document as something that the applicants should not have anticipated or that constitutes good reason for an extension of time.

36. The problem for the applicants is that human error rarely qualifies as good and sufficient reason for the late commencement of proceedings in a context where certainty is particularly important. It normally cannot justify an extension of time *to commence the proceedings at all*, although, once commenced, human error can legitimately be a basis *for an amendment of pleadings* (that is what happened in *Keegan v. Garda Siochána Ombudsman Commission* [2012] 2 I.R. 580 [2012] IESC 29). That is because the test for what counts as a good and sufficient reason for an amendment is, quite logically and fairly, less demanding than the test for instituting the proceedings out of time. Most if not all of the public policy benefits of expedition are achieved if the action is commenced in time, and later refinement of pleadings inflicts much less if any harm on those benefits.

37. To put it another way, a strict approach to time limits for commencement of proceedings is proportionate and fair because late proceedings change the status of a decision from unchallenged to challenged. An equally strict approach to amendments would be disproportionate and unfair because amendments merely refine the detail but do not change the status of the decision, which is already challenged at that stage. Forbidding amendments that originate from human error would set an unfair and in any event an impossibly high standard and would give opposing parties a windfall benefit from an applicant's error that was disproportionate in terms of the interests of justice. But it is not disproportionate to be fairly rigorous in setting the bar high for demonstration of good and sufficient reason to extend the 8 week requirement to bring the proceedings at all.

38. Planning law is asymmetrical in various ways. At the risk of over-simplification, I might particularly highlight the following points favourable to applicants:

(i) Applicants have the benefit of certain favourable EU and domestic rules in certain areas, including generous costs protection rules.

(ii) Applicants normally are less affected by delay than notice party developers and thus have less incentive to keep proceedings continuing at pace.

(iii) In particular, where reference of the CJEU arises, the inherent timescale of the Luxembourg process means that it generally imposes more inconvenience on opposing parties than on applicants, albeit that that in itself is not a reason not to refer an appropriate question.

(iv) As with moving parties generally, applicants only have to win on one point whereas opposing parties have to win on all points.

39. The court has to counterbalance that in some way to achieve some degree of reasonable fairness for opposing parties. The asymmetries mentioned above are fairly fixed features of the system so they cannot be absolutely wished away. But what the court can do is to ensure that proceedings don't unnecessarily become even more one-sided. I might highlight the following ways in which the court specifically, and the law more generally, attempts to restore a balance:

(i) One way the court tries to balance matters is to move cases through the system as rapidly as is reasonably practicable, including by giving judgments within short time-frames. That is to some extent a work in progress, but something of which the court is actively seised. Parties have a role to play here, and a case generally can't move faster than the fastest speed urged on the court at any given time – any *idée fixe* that a case can progress on the basis of rigid predetermined timetables needs to accommodate the reality that it suits parties very often to consent to different arrangements during the course of proceedings.

(ii) Applicants also have to be held to their pleadings, and any interpretation not acceptably clear from the pleadings cannot be the basis of relief (see e.g. *Save Cork City v. An Bord Pleanála (No. 1)* [2021] IEHC 509, [2021] 7 JIC 2802 (Unreported, High Court, 28th July, 2021)).

(iii) Nor can applicants be allowed to reconfigure their case or their evidence from what it was before the decision-maker save where that is specifically allowed by the law (see e.g. *Reid v. An Bord Pleanála* (No. 1) [2021] IEHC 230 (Unreported, High Court, 12th April, 2021)).

(iv) Likewise the court can only deal with complaints based on breach of legal rules and not get involved in the merits of the decision (see e.g. *An Taisce*

v. An Bord Pleanála (No. 1) [2021] IEHC 254, [2021] 4 JIC 2003 (Unreported, High Court, 20th April, 2021)).

(v) It is a reasonable further approach to achieve balance (exact symmetry being impossible given the nature of things as set out above) for the court to be reasonably strict with the eight-week time-limit in the planning context or other time limits in similar commercial contexts (see *per* Murray J. in *Arthropharm* (*Europe) Ltd v. The Health Products Regulatory Authority* [2022] IECA 109 (Unreported, Court of Appeal, 10th May, 2022)). Even exceeding the limitation period by a minimal amount is too much without good and sufficient reason being established (see *O'Riordan v. An Bord Pleanála* [2021] IEHC 1, [2021] 1 JIC 2102 (Unreported, High Court, 21st January, 2021)). At the same time, one must bear in mind that the time-limit only applies to the final decision not interim decisions, and that (unless captured by s. 50 of the 2000 Act) nor does it apply to challenges to measures of general application, or to ongoing wrongs such as failure to act, which can be challenged from time to time as they are applied to new fact-situations (see *M.R. (Albania) v. Minister for Justice* [2020] IEHC 402, [2020] 8 JIC 1702 (Unreported, High Court, 17th August 2020)).

40. Having regard to the voluntary assumption of risk by the applicants in waiting until the last day and until the final twelve minutes of that working day so far as the stamping office is concerned, and in not organising themselves in a correct manner to pay the stamp duty before attempting to file the statement of grounds, as well as to the public interest in certainty of the status of decisions in the planning context, and reinforced by gaps in the explanation provided, I do not consider, having regard to a holistic view of all relevant circumstances, that the applicants have made out good and sufficient reason for an extension of time on the basis of domestic law.

The applicants' European Law argument

41. That pretty much would be that - except for the applicants' EU law argument. They maintain that their interpretation of European law requires yet a further extension on top of the additional 8 weeks that was astutely conceded by the opposing parties.

42. In Case C-456/08 *Commission v. Ireland* (Court of Justice of the European Union, 28th January, 2010, ECLI:EU:C:2010:46), the Third Chamber declared as follows:

"— by reason of the fact that the National Roads Authority did not inform the unsuccessful tenderer of its decision to award the contract for the design, construction, financing and operation of the Dundalk Western Bypass, and

— by maintaining in force Order 84A(4) of the Rules of the Superior Courts, in the version resulting from Statutory Instrument N° 374 of 1998, in so far as it gives rise to uncertainty as to which decision must be challenged through legal proceedings and as to how periods for bringing an action are to be determined,

Ireland has failed – as regards the first head of claim – to fulfil its obligations under Article 1(1) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Council Directive 92/50/EEC of 18 June 1992, and Article 8(2) of Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts, as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997 and – as regards the second head of claim – to fulfil its obligations under Article 1(1) of Directive 89/665, as amended by Directive 92/50".

43. In Case C-406/08 *Uniplex (UK) Ltd v. NHS Business Services Authority* (Court of Justice of the European Union, 28th January, 2010, ECLI:EU:C:2010:45), in a judgment delivered on the same day as that in *Commission v. Ireland*, the Third Chamber ruled as follows:

"1. Article 1(1) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Council Directive 92/50/EEC of 18 June 1992, requires that the period for bringing proceedings seeking to have an infringement of the public procurement rules established or to obtain damages for the infringement of those rules should start to run from the date on which the claimant knew, or ought to have known, of that infringement.

2. Article 1(1) of Directive 89/665, as amended by Directive 92/50, precludes a national provision, such as that at issue in the main proceedings, which allows a national court to dismiss, as being out of time, proceedings seeking to have an

infringement of the public procurement rules established or to obtain damages for the infringement of those rules on the basis of the criterion, appraised in a discretionary manner, that such proceedings must be brought promptly.

3. Directive 89/665, as amended by Directive 92/50, requires the national court, by virtue of the discretion conferred on it, to extend the limitation period in such a manner as to ensure that the claimant has a period equivalent to that which it would have had if the period provided for by the applicable national legislation had run from the date on which the claimant knew, or ought to have known, of the infringement of the public procurement rules. If the national provisions do not lend themselves to an interpretation which accords with Directive 89/665, as amended by Directive 92/50, the national court must refrain from applying them, in order to apply Community law fully and to protect the rights conferred thereby on individuals."

44. In Case C-280/18 *Flausch v. Ypourgos Perivallontos kai Energeias* (Court of Justice of the European Union, 7th November, 2019, ECLI:EU:C:2019:928), the First Chamber declared as follows:

"1. Article 6 of Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment must be interpreted as precluding a Member State from carrying out the procedures for public participation in decision-making that relate to a project at the level of the headquarters of the competent regional administrative authority, and not at the level of the municipal unit within which the site of the project falls, where the specific arrangements implemented do not ensure that the rights of the public concerned are actually complied with, a matter which is for the national court to establish.

2. Articles 9 and 11 of Directive 2011/92 must be interpreted as precluding legislation, such as that at issue in the main proceedings, which results in a period for bringing proceedings that starts to run from the announcement of consent for a project on the internet being relied on against members of the public concerned where they did not previously have an adequate opportunity to find out about the consent procedure in accordance with Article 6(2) of that directive."

45. The applicants' essential argument is that by analogy with *Uniplex,* the EIA directive (Council Directive 2011/92/EU) and habitats directive (Council Directive 92/43/EEC) have the effect that national time-limits should only commence to run from the date on which an applicant knew of an infringement as opposed to of the mere fact of the decision.

46. As against that, the court in *Flausch* said as follows at para. 55: "In particular, the Court does not regard as an excessive difficulty the imposition of periods for bringing proceedings which start to run only from the date on which the person concerned was aware or at least ought to have been aware of the announcement (see, to that effect, judgments of 27 February 2003, *Santex,* C-327/00, EU:C:2003:109, paragraphs 55 and 57; of 6 October 2009, *Asturcom Telecomunicaciones,* C-40/08, EU:C:2009:615, paragraph 45; and of 8 September 2011, *Rosado Santana,* C-177/10, EU:C:2011:557, paragraph 96)". One then turns to those cases.

47. *Santex* is not precisely as represented in *Flausch,* because at para. 55 of the judgment in *Santex* the court said: "Second, it must be held that such a period, which runs from the date of notification of the act or the date on which it is apparent that the party concerned became fully aware of it, is also in accordance with the principle of effectiveness since it is not in itself likely to render virtually impossible or excessively difficult the exercise of any rights which the party concerned derives from Community law."

48. The word "fully" before the reference to awareness is not included in para. 55 of *Flausch.*

49. In *Asturcom Telecomunicaciones,* the court was dealing with a limitation period which it described as follows in paras. 45 and 46:

> "45. Moreover, it should be pointed out that Article 41(4) of Law 60/2003 provides that the time-limit starts to run from the date of notification of the arbitration award. Therefore, in the action in the main proceedings, it was not possible for the consumer to have found herself in a situation in which the limitation period had started to run, or had expired, without even being aware of the effects of the unfair arbitration clause upon her.
>
> 46. In such circumstances, such a time-limit is consistent with the principle of effectiveness, since it is not in itself likely to make it virtually impossible or excessively difficult to exercise any rights which the consumer derives from Directive

93/13 (see, to that effect, Case C-327/00 *Santex* [2003] ECR I-1877, paragraph 55)."

50. There the emphasis is on the plaintiff being aware of the effect of the impugned provision upon her. This could be contrasted with for example receiving full information about the decision. On such a distinction, a potential litigant is aware of the effect on being aware of the decision itself.

51. In *Rosado Santana,* the court was dealing with a limitation period which provided "that action must be brought within two months of the date of publication of the competition notice" (para. 85). The court held as follows at para. 96: "In those circumstances, it must be held that a time-limit such as the time-limit at issue in the main proceedings is not, in principle, liable to render practically impossible or excessively difficult the exercise of the rights conferred by the framework agreement." However special rules applied where a decision was later annulled. An applicant could not be shut out from challenging a process under the latter circumstances, and the court ultimately concluded as follows in para. 3 of the curial part of the judgment:

> "The primary law of the European Union, Directive 1999/70 and the framework agreement are to be interpreted as not precluding, in principle, national legislation which provides that, where an action brought by a career civil servant challenging a decision rejecting his candidature for a competition is based on the fact that the promotion procedure was contrary to clause 4 of the framework agreement, that action must be brought within two months of the publication of the competition notice. Nevertheless, such a time-limit could not be relied upon against a career civil servant, who has been a candidate in that competition, who has been admitted to the tests and whose name was placed on the definitive list of successful candidates for that competition, if that were liable to render practically impossible or excessively difficult the exercise of the rights conferred by the framework agreement. In those circumstances, time for the purposes of the two-month time-limit could run only from notification of the decision annulling the civil servant's admission to that competition and his appointment as a career civil servant in the higher group."

52. But all of that does not mean that the court either always or in circumstances such as those here has an obligation to treat the eight-week period as running from the date on which a planning judicial review applicant gets additional information (such as about the

content of a decision, or obtains a copy of it, or of the background files) as opposed to when she knew or ought to have been aware of the fact of such a decision, even if some detail follows later.

53. It is clear from the CJEU jurisprudence that the answer turns on whether the approach taken by the court in applying the national rules would make it impossible or excessively difficult to exercise rights conferred by European law.

54. In circumstances such as here, that is clearly not the case.

55. Once they were told of the decisions on 10th February, 2022, the applicants could easily have taken far more accelerated steps to acquaint themselves with those decisions, to seek information, and so on, and could easily have launched proceedings well within an eight-week period commencing on the date on which they were informed of the fact of those decisions. It is inherent in the concept of either a limitation period or any time parameter that individual applicants may find themselves on the wrong side of it. The fact that an individual plaintiff might end up not being able to bring a case does not mean that the exercise of European law rights has been made impossible or excessively difficult – provided that they had such an opportunity but did not in fact avail of it. The rule that exercise of EU rights should not be impossible does not have the consequence that every plaintiff must be allowed to proceed in disregard of procedural requirements. It is a general rule about the set-up of the system, not a guaranteed winning ticket for every forensic lottery.

56. In saying that, I want to emphasise two important caveats. Firstly, an applicant must have the full period of eight weeks and is under no separate obligation to act expeditiously within that period, commencing on the date on which they knew or ought to have been aware of the decision, as long as they ultimately end up instituting the proceedings within that period. Insofar as some decisions may have been open to an interpretation otherwise (see *Bracken v. Meath County Council* [2012] IEHC 196 (Unreported, High Court, Birmingham J., 27th April, 2012), *Sweetman v. An Bord Pleanála (No 1) (Sweetman IX)* [2017] IEHC 46 (Unreported, High Court, Haughton J., 20th February, 2017)) and *Corbett v. Louth County Council* [2018] IEHC 291 (Unreported, High Court, Faherty J., 13th April, 2018)), respectfully it seems to me that such an interpretation would not now pass muster having regard to the CJEU judgment in *Commission v. Ireland* and the judgment of Murray J. for the Court of Appeal in *Arthropharm*. This is also a point made with characteristic clarity by David Browne B.L. in *Simons on Planning Law* at para. 12-385.

That said, if the applicant fails to act with such expedition, and also fails to commence the proceedings within the 8 week period, that former failure then becomes highly relevant, as here.

57. The second important caveat is that, while I am satisfied that the exercise of European law rights for these particular applicants was not made impossible or excessively difficult, that does not mean that *all* applicants must automatically be taken as being capable of instituting their proceedings within eight weeks of the date of knowledge of the bare fact of the decision as opposed to any detail about it. Even leaving aside very exotic legal complications such as occurred in *Rosado Santana*, one can readily envisage a situation where an applicant attempts diligently to obtain copies of necessary documents but is stonewalled and is not provided with critical information through no fault or delay on her part until either after the statutory period of eight weeks (as judicially applied from the date of knowledge of the decision), or until so close to the expiry of that period as to render it impossible or excessively difficult to launch proceedings within that period. If such circumstances arise, then a court would be in breach of European law in failing to extend time for the bringing of proceedings. However, unfortunately for these applicants, nothing like that arises here. Yes, they only got some of the documents the day before the expiry of the period concerned, but they could have gone looking for them earlier; and anyway they had enough to go on for the purposes of instituting the proceedings at least in some basic form in the sense that they had one of the two files as well as both decisions, so there wasn't anything astonishingly and radically new in the additional material. In essence, the applicants' argument manifestly over-states what they are entitled to in European law. The position is *acte clair* or *acte éclairé* against the applicants, and no refence to Luxembourg is necessary or appropriate.

Order

58. For the reasons set out above:

(i) the applicants' motion to extend time is dismissed; and

(ii) the application by the notice party to set aside the order giving leave to seek judicial review is granted.