APPROVED **[2024] IEHC 6**

THE HIGH COURT
JUDICIAL REVIEW

2022 330 JR

BETWEEN

ANNE KING

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

UISCE ÉIREANN
(FORMERLY IRISH WATER)

NOTICE PARTY

JUDGMENT of Mr. Justice Garrett Simons delivered on 22 January 2024

INTRODUCTION

1. This judgment is delivered in respect of an application for a pre-emptive costs order. More specifically, the applicant seeks an advance ruling that these judicial review proceedings attract the special costs rules which apply to

certain types of environmental litigation. The special costs rules are prescribed, principally, under Section 50B of the Planning and Development Act 2000 and Part 2 of the Environment (Miscellaneous Provisions) Act 2011.

2. The parties are in disagreement as to whether the decision impugned in these proceedings is one which attracts the special costs rules. The impugned decision comprises a decision to confirm a compulsory purchase order in respect of a proposed waste water treatment plant. The dispute between the parties centres, largely, on whether a decision of this type constitutes part of the "*development consent*" for the proposed waste water treatment plant for the purposes of the Environmental Impact Assessment Directive (Directive 2011/92/EU). There is a similar dispute as to whether the decision constitutes the approval of a project for the purposes of the Habitats Directive (Directive 92/43/EEC).

PROCEDURAL HISTORY

3. Uisce Éireann (formerly Irish Water) proposes to develop a waste water treatment plant (and associated infrastructure) adjacent to the village of Roundstone in County Galway ("*the proposed development project*").

4. Uisce Éireann intends to apply, in due course, for planning permission for the proposed development project. The application will be for a conventional planning permission, rather than for a strategic infrastructure development permission. Prior to the making of the intended planning application, Uisce Éireann put in train the process for the compulsory acquisition of land to facilitate the proposed development project. The rationale for pursuing compulsory acquisition in advance of the planning application was that Uisce

Éireann might lack the requisite interest to seek planning permission for the land without such a compulsory purchase order.

5. Counsel for Uisce Éireann has explained that the legal position has since changed as the result of an amendment introduced by the Planning and Development (Amendment) (No. 2) Regulations 2022. More specifically, Uisce Éireann may now make an application for planning permission for proposed development on production of written confirmation that it intends to compulsorily acquire the land in question should planning permission be granted. See Article 22(2)(g) of the Planning and Development Regulations 2001 (as amended). This legislative amendment is not directly relevant to the impugned decision, but it does indicate that for all future applications, it will be possible to adopt a different sequence or to apply for confirmation of the compulsory purchase order and a planning permission in parallel.

6. Uisce Éireann made a compulsory purchase order ("*CPO*") on 5 December 2019, namely, the Irish Water Compulsory Purchase (Roundstone Sewerage Scheme) Order 2019. In circumstances where there were objections made to the compulsory purchase order, it was necessary for Uisce Éireann to apply to An Bord Pleanála to confirm the CPO. The application for confirmation was accompanied by two detailed site selection reports.

7. An Bord Pleanála convened an oral hearing. The inspector who conducted the oral hearing subsequently prepared a report and recommendation for the board. The inspector rejected an argument, advanced on behalf of the applicant at the oral hearing, that the decision-making process was subject to the EIA Directive and the Habitats Directive. See §7.7 of the inspector's first report as follows:

> "The application before the Board is not a plan or project as defined under the provisions of the either the Habitats

> Directive or EIA Directive therefore neither of these Directives would apply in the case of the CPO application before the Board. Should the Board confirm the acquisition of lands, it will be the subject of a future planning application and the project would be scrutinised under these various consent requirements."

8. The inspector recommended that An Bord Pleanála should not confirm the compulsory purchase order. This recommendation was predicated on the inspector's opinion that there are "*demonstrably more suitable sites*" within the village of Roundstone which would not compromise the future development of the village and which would have a lesser impact on sensitive receptors in the vicinity.

9. An Bord Pleanála served a request for further information on 26 May 2021. This request sought to interrogate Uisce Éireann's rationale for selecting its preferred site. The inspector was asked to prepare a supplemental report addressing the response made by Uisce Éireann to the request for further information. Whereas the further information resolved some of the concerns raised by the inspector, he again recommended that An Bord Pleanála should not confirm the compulsory purchase order on the basis that there were more suitable sites available.

10. An Bord Pleanála made a decision on 3 March 2022 to confirm the compulsory purchase order (ABP 306355). The reasons and considerations for the decision are stated as follows:

> "Having regard to the purpose of the Compulsory Purchase Order, the community need that is to be met by the acquisition of the lands in question, the suitability of those lands to serve the community need, the consideration of alternative methods of meeting the community need which are not demonstrably preferable, the compliance of the works to be carried out with the Northern and Western Regional Spatial and Economic Strategy 2020-2032 and the policy and objectives of the Galway County Development

> Plan 2015-2021, and the proportionality and necessity of the level of acquisition proposed, it is considered that the permanent acquisition by Irish Water of lands, wayleaves over lands, and rights of way over lands, and the temporary acquisition of rights over lands, as set out in the Compulsory Purchase Order and on the deposited maps, is necessary for the purpose stated, and that the objections cannot be sustained having regard to the said necessity.
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> In deciding not to accept the Inspector's recommendation to annul the Compulsory Purchase Order, the Board considered that it had not been demonstrated that there are other sites within the village of Roundstone which are more suitable to accommodate a wastewater treatment plant and associated infrastructure including the location of pumping stations, or that there are alternative methods of meeting the community need which are demonstrably preferable. In particular, it is considered that the preferred site for the wastewater treatment plant is demonstrably preferable on the basis that it facilitates the sustainable reuse of the existing Irish Water outfall, avoids significant disturbances along Main Street during the construction period, provides for better connectivity with Irish Water's existing sewer Network 1 which discharges to the north of the village and has been found to be intact and fit for reuse as part of the proposed scheme, and significantly lowers the risk of encountering archaeology. In addition, the Board was satisfied that the works to be carried out would comply with the Northern and Western Regional Spatial and Economic Strategy 2020-2032 and the policy and objectives of the Galway County Development Plan 2015-2021."

11. These judicial review proceedings seek to challenge the validity of An Bord Pleanála's decision to confirm the compulsory purchase order. The applicant is a landowner affected by the compulsory purchase order and had been one of the objectors before An Bord Pleanála.

12. The judicial review proceedings were opened for the purpose of stopping the clock running on 26 April 2022. Thereafter, leave to apply for judicial review was granted *ex parte* on 25 May 2022. Opposition papers have since been filed.

13. The applicant issued a motion seeking a pre-emptive costs order on 25 October 2023. The motion ultimately came on for hearing before me on 15 December 2023. Judgment was reserved until today's date.

STATUTORY POWER OF COMPULSORY ACQUISITION

14. Uisce Éireann is empowered to acquire land compulsorily for the purpose of performing its statutory functions. This power is conferred, principally, by the Water Services Act 2007. The legislation is cumbersome: rather than directly conferring a power of compulsory acquisition upon Uisce Éireann, the Water Services Act 2007 instead extends the power of compulsory acquisition conferred on local authorities by the Planning and Development Act 2000 to Uisce Éireann. More specifically, Section 93 of the Water Services Act 2007 provides that Part XIV of the Planning and Development Act 2000 shall apply to a water services authority as it applies to a local authority.

15. The domestic legislation thus facilitates the carrying out of development projects such as, relevantly, the construction of waste water treatment works, by empowering Uisce Éireann to acquire land compulsorily.

16. The procedure for the confirmation of the proposed compulsory acquisition of land is prescribed under Part XIV of the Planning and Development Act 2000 and the Third Schedule of the Housing Act 1966. The first step in the procedure requires the acquiring authority to give notice of its intention to acquire land compulsorily. Two forms of notice are prescribed: (i) public notice by way of publication in one or more newspapers circulating in the local authority's functional area, and (ii) individual notice by way of the service of a written notice on every owner, lessee and occupier of the land.

17. The next procedural step depends on whether or not an "*objection*" to the proposed compulsory acquisition is submitted. If no objection is submitted, then the acquiring authority may itself confirm the proposed compulsory acquisition. If, conversely, an objection is submitted, then the proposed compulsory acquisition may only be confirmed by An Bord Pleanála. Put otherwise, the making of an objection triggers a requirement for Uisce Éireann, as acquiring authority, to apply to An Bord Pleanála for consent. This ensures that, in the case of objection, the decision on whether to authorise the compulsory acquisition is made by a tribunal independent of the acquiring authority.

18. Crucially, the right to object to the proposed compulsory acquisition is confined to those with an interest in the lands to be acquired. There is no general right of public participation in the process.

19. One of the unusual features of the legislation is that the criteria by which An Bord Pleanála is to decide whether or not to confirm a compulsory purchase order are not expressly prescribed. The approach adopted by An Bord Pleanála, in practice, appears to be to carry out a form of proportionality exercise. In many instances, An Bord Pleanála applies the four-stage test identified in Galligan and McGrath, *Compulsory Purchase and Compensation in Ireland: Law and Practice* (Bloomsbury Professional, 2013) (at §3.26) as follows (footnotes omitted):

> "(i) there is a community need that is to be met by the acquisition of the property in question;
>
> (ii) the particular property is suitable to meet that community need;
>
> (iii) any alternative methods of meeting the community needs have been considered but are not demonstrably preferable

(taking into account environmental effects, where appropriate);

(iv) the works to be carried out should accord with or at least not be in material contravention of the provisions of the statutory development plan."

20. These were the criteria adopted by the inspector in the present case: see, in particular, §7.1 of his first report.

21. The principal legal effect of a compulsory purchase order is to allow for the transfer of ownership of the lands to the acquiring authority. The acquiring authority is not entitled to carry out the proposed development by reliance *solely* on the compulsory purchase order. Rather, it will normally be necessary for the acquiring authority to obtain an additional "*authorisation*" (to use a neutral term). In some instances, the authorisation will take the form of a conventional planning permission. In other instances, the authorisation will derive from the carrying out of a public consultation procedure pursuant to Section 179 of the Planning and Development Act 2000 and Part 8 of the Planning and Development Regulations 2001. This will often be the position in respect of small-scale road development. (Large-scale road development is subject to a special procedure pursuant to Part IV of the Roads Act 1993).

22. Save in the case of local authority development which is subject to environmental impact assessment by An Bord Pleanála, the Planning and Development Act 2000 is not prescriptive as to the sequence in which the confirmation of the compulsory purchase and the additional authorisation should be obtained. On the facts of the present case, for example, Uisce Éireann has applied for and obtained confirmation of the proposed compulsory acquisition in advance of the making of an application for planning permission. The reverse sequence is often adopted in respect of small-scale road projects,

with the application for confirmation of the compulsory purchase order being made *after* the public consultation process has been completed.

23. The position in respect of local authority development which is subject to environmental impact assessment by An Bord Pleanála is addressed as follows under Section 220 of the Planning and Development Act 2000:

> "(1) The person holding an oral hearing in relation to the compulsory acquisition of land, which relates wholly or in part to proposed development by a local authority which is required to comply with section 175 *or any other statutory provision to comply with procedures for giving effect to the Environmental Impact Assessment Directive*,* shall be entitled to hear evidence in relation to the likely effects on the environment of such development.
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> (2) Where an application for the approval of a proposed development which is required to comply with section 175 is made to the Board and a compulsory purchase order or provisional order has been submitted to the Board for confirmation and where the proposed development relates wholly or in part to the same proposed development, the Board shall, where objections have been received in relation to the compulsory purchase order, make a decision on the confirmation of the compulsory purchase order at the same time."
>
> *Emphasis added

24. These provisions envisage that where local authority development is subject to both a compulsory purchase process and environmental impact assessment, the two procedures should run in parallel. The person holding the oral hearing will be entitled to hear evidence in relation to environmental effects and the two decisions should be made at the same time.

25. These provisions were not invoked in respect of the proposed waste water treatment plant. Instead, the application to confirm the compulsory purchase order has been determined first, prior to an intended application for planning permission. Presumably, this is because Uisce Éireann does not regard itself as

subject to the procedure under Section 175 of the Planning and Development Act 2000. Whereas Uisce Éireann is treated as a "*local authority*" for the purposes of Part XIV of the Planning and Development Act 2000, it has not been suggested in these proceedings that it enjoys the benefit of exempted development which applies to a local authority under Section 4 of the Act nor that it is subject to the complementary consent procedure prescribed under Section 175.

26. The court has not yet been addressed on the question of whether the requirement to apply for conventional planning permission means that Uisce Éireann should be regarded, for the purposes of Section 220(1), as being required to comply with a "*statutory provision to comply with procedures for giving effect to*" the EIA Directive.

EIA DIRECTIVE

27. A "*development consent*" is defined, under Article 1 of the EIA Directive, as meaning the decision of the competent authority or authorities which entitles the developer to proceed with the project. It follows from this definition that a "*development consent*" may consist of more than one decision issued by more than one competent authority.

28. The Supreme Court has explained in *Dunne v. Minister for the Environment Heritage and Local Government* [2006] IESC 49, [2007] 1 I.R. 194 (at paragraph 44) that the question as to whether or not a particular decision constitutes a "*development consent*" cannot be determined simply by the application of a "*but for*" test; in other words, the fact that the development

might not be permitted to proceed "*but for*" the particular decision in issue cannot *per se* be conclusive.

29. Criteria relevant to the determination of whether a particular decision constitutes part of a multi-stage "*development consent*" include whether the decision-maker is empowered to consider the environmental impact of the development project or empowered to modify the development project. On the facts of *Dunne*, the Supreme Court held that a decision to authorise the carrying out of archaeological works affecting a national monument did not constitute a "*development consent*" in circumstances where the decision-maker was empowered neither to embark upon a reconsideration of the environmental issues arising from the underlying development project nor to modify the development project.

30. Article 6(4) of the EIA Directive provides as follows:

> "The public concerned shall be given early and effective opportunities to participate in the environmental decision-making procedures referred to in Article 2(2) and shall, for that purpose, be entitled to express comments and opinions when all options are open to the competent authority or authorities before the decision on the request for development consent is taken."

31. The Court of Justice of the European Union ("*CJEU*") has held that where national law provides that the consent procedure is to be carried out in several stages, one involving a principal decision and the other involving an implementing decision which cannot extend beyond the parameters set by the principal decision, the effects which the project may have on the environment must be identified and assessed at the time of the procedure relating to the principal decision. It is only if those effects are not identifiable until the time of the procedure relating to the implementing decision that the assessment

should be carried out in the course of that procedure. (*Wells*, Case C-201/02, EU:C:2004:12).

32. The concept of multi-stage development consents has been most recently considered by the CJEU in *Namur-Est Environnement*, Case C-463/20, EU:C:2022:121. The CJEU held (at paragraphs 70 to 79) that the EIA Directive did not require that a *preliminary decision* in respect of the environmental impacts of a project must be preceded by public participation, provided that effective public participation is available at an early stage and, in any event, before a decision is taken on whether to grant development consent for the project. The CJEU further held that effective public participation implies, *inter alia*, that the public should be able to express views on the project concerned and its environmental impact not only in a useful and comprehensive manner, but also at a juncture when all options are open.

33. An important element of the EIA process consists of the consideration of *alternatives*. More specifically, the developer is required to provide, as part of the environmental impact assessment report, a description of the reasonable alternatives studied by the developer, which are relevant to the project and its specific characteristics, and an indication of the main reasons for the option chosen, taking into account the effects of the project on the environment (Article 5(1)(d)). This requirement is elaborated upon as follows at Annex IV, point 2:

> "A description of the reasonable alternatives (for example in terms of project design, technology, location, size and scale) studied by the developer, which are relevant to the proposed project and its specific characteristics, and an indication of the main reasons for selecting the chosen option, including a comparison of the environmental effects."

34. As appears, the reasonable alternatives to be described may include alternative locations for the proposed project. The CJEU has explained, albeit by reference to the previous version of the EIA Directive, that alternatives are of interest first and foremost if they are capable of influencing the environmental effects of the project concerned (*Holohan*, Case C-461/17, EU:C:2018:883).

35. The consideration of alternative locations will be of especial importance in the context of public infrastructure projects which are being facilitated by the use of statutory powers of compulsory acquisition. This is because the range of sites which are potentially available will be greater and are not confined to those that are "*on the market*".

36. Finally, a waste water treatment plant is a prescribed class of development project for the purposes of the EIA Directive. Under the domestic implementing regulations, an EIA is *mandatory* in respect of any application for development consent in respect of a waste water treatment plant with a capacity greater than 10,000 population equivalent. In the case of a subthreshold development project, an EIA is mandatory where the project is likely to have a significant effect on the environment.

DETAILED DISCUSSION

JURISDICTION TO MAKE PRE-EMPTIVE COSTS ORDER

37. Under Section 50B of the Planning and Development Act 2000, a special costs regime applies in respect of particular types of environmental litigation. The regime affords a form of costs protection to applicants, whereby they are generally shielded from having to pay the winning side's costs in the event that the proceedings are unsuccessful. The special costs rules implement the

requirement under Article 11 of the EIA Directive that the costs of the review procedure are "*not prohibitively expensive*".

38. The applicability of the special costs rules is determined, principally, by reference to the nature of the decision being challenged. As explained by the Supreme Court in *Heather Hill Management Company v. An Bord Pleanála* [2022] IESC 43, [2022] 2 I.L.R.M. 313, the operation of Section 50B of the Planning and Development Act 2000 in relation to any given set of proceedings is defined by three conditions. The conditions are (a) that the proceedings comprise an application for judicial review or for leave to seek judicial review, (b) that the decision of which judicial review is sought is made pursuant to a statutory provision, and (c) that the statutory provision is one which gives effect to one of four named EU Directives.

39. Put otherwise, costs protection applies where the impugned decision has been made pursuant to a "*statutory provision*" which gives effect to one or more of the four EU Directives specified under Section 50B. This is so even if in the particular circumstances of the case, there is no issue of EU law raised. It is sufficient that the impugned decision has been made pursuant to one of the relevant statutory provisions.

40. The advantage of this legislative approach to the conferral of costs protection is that it will, generally, be straightforward to identify whether any particular set of proceedings benefits from the special costs rules. The focus will be on the character of the decision being challenged, rather than on the grounds of challenge. There will, however, be cases at the margin where it is unclear as to whether the special costs rules apply. The present proceedings represent one

such case. An applicant, in such a borderline case, may wish to achieve certainty by making an application for a pre-emptive costs order.

41. The parties in the present proceedings are in broad agreement that the High Court has jurisdiction to give such an advance ruling on whether the special costs rules apply. The existence of such a jurisdiction is essential to ensure compliance with EU law. In this regard, the approach of the Advocate General in *North East Pylon Pressure Campaign*, Case C-470/16, EU:C:2017:781 is instructive. The Advocate General suggested that the failure of a Member State to put in place clear and unambiguous rules in respect of the "*not prohibitively expensive*" requirement under Article 11 of the EIA Directive should not be visited upon applicants. These observations were made in the context of an uncertainty as to the stage in judicial review proceedings at which costs protection is available under domestic law. The Advocate General stated that the fundamental objective of Article 11 of the EIA Directive would be undermined if an applicant would only know whether or not the action was taken at a correct stage, and whether or not he or she would be exposed to prohibitive costs, *after* the case was instituted and the costs incurred, as a result of a failure by the Member State to determine, in advance, clearly and unambiguously the stage at which a procedure may be initiated.

42. The same logic extends to an application for a pre-emptive costs order. The existence of a mechanism whereby an applicant can obtain a prior determination on the question of whether costs protection applies represents an essential safeguard. It would be contrary to the Irish State's obligations under the EIA Directive if there were no mechanism available whereby an applicant could seek clarification in case of doubt. It would be unsatisfactory if an

applicant could only know whether or not they are entitled to costs protection by first exposing themselves to the risk of having to pay the potentially prohibitive costs of the substantive judicial review.

43. The legislature has, in one specific instance, put in place an express statutory mechanism whereby a pre-emptive costs order can be obtained. This is found under Section 7 of the Environment (Miscellaneous Provisions) Act 2011. There is no equivalent provision under the Planning and Development Act 2000. Nonetheless, the same result can be achieved by reliance upon the court's general discretion in relation to costs. The first written judgment which expressly recognises a jurisdiction to grant a pre-emptive costs order is that of the High Court (Laffoy J.) in *Village Residents Association Ltd v. An Bord Pleanála (No. 2)* [2000] IEHC 34, [2000] 4 I.R. 321. For the reasons explained by the High Court (Humphreys J.) in *Enniskerry Alliance and Enniskerry Demesne Management Company v. An Bord Pleanála* [2022] IEHC 6 (at paragraph 74), I am satisfied that this jurisdiction persists notwithstanding the enactment of the Legal Services Regulation Act 2015 which placed the court's costs jurisdiction on a statutory footing.

THRESHOLD / LEGAL TEST

44. The allocation of legal costs is, typically, only addressed at the conclusion of proceedings. In the present case, however, the court is being asked to rule in advance on the question of whether the proceedings attract the special costs rules applicable to certain types of environmental litigation. Put otherwise, the court is being invited to make an advance ruling on which costs regime applies to these proceedings, i.e. the conventional costs rules under Part 11 of the

Legal Services Regulation Act 2015, or, alternatively, the special costs rules under Section 50B of the Planning and Development Act 2000.

45. A pre-emptive costs order is final and conclusive in the sense that—absent an appeal—the finding as to which costs regime applies will be binding on the parties. Indeed, this is the precise point of an application for a pre-emptive costs order: the moving party is seeking certainty *now* as to whether or not the special costs rules will be applied at the conclusion of the proceedings. Thereafter, the judge hearing the substantive judicial review will be confined to allocating costs by reference to the terms of whichever costs regime has been found by this court to pertain to the proceedings. It would defeat the purpose of making a pre-emptive costs order were it open to the trial judge to revisit the question. See, by analogy, *McCoy v. Shillelagh Quarries Ltd* [2015] IECA 28, [2015] 1 I.R. 627 (at paragraphs 36 to 42).

46. The Court of Appeal has recognised, albeit in the context of an application under Section 7 of the Environment (Miscellaneous Provisions) Act 2011, that cases will occur in which the court cannot be confident, at the time of an interlocutory application, that the issue of whether costs protection applies is ripe for determination. In such circumstances, the court exercises a discretion on whether to grant costs protection, informed by considerations such as the strength of the case or the financial means of the particular applicant. (*O'Connor v. Offaly County Council* [2020] IECA 72, [2021] 1 I.R. 1 (at paragraphs 61 and 62 of the reported judgment)).

47. Given that a pre-emptive costs order has conclusive effect, such an order should, ideally, only be made on the basis of an adjudication on the merits on the question of which costs regime applies. The court, having heard full

argument, would reach a definitive view on whether the proceedings benefit from the special costs rules. It will not, however, be possible to achieve this ideal in all cases. This is because there is a tension between the principal purpose of a pre-emptive costs application, i.e. to allow a litigant to obtain an early and inexpensive ruling on the question of which costs regime applies, and the exigencies of an adjudication on the merits on the question. In a case, such as the present, where the question does not admit of an immediate answer, the costs of a fully argued hearing are likely to be significant. This is especially so where the question of which costs regime applies is inextricably linked with the underlying merits of the judicial review proceedings. Here, the proceedings present a difficult point of law, namely whether the decision to confirm a compulsory purchase order in respect of a proposed public infrastructure project constitutes part of a multi-stage development consent. The proper resolution of this point of law will necessitate a hearing of some two to three days. This is far in excess of the time appropriate for an application for a pre-emptive costs order. It would undermine the objective of a pre-emptive costs application if the moving party had to incur significant costs, which are inherent in a two-to-three-day hearing, to ascertain whether the proceedings are subject to the special costs rules.

48. The following is the appropriate course to adopt in a case where the question of which costs regime applies is complex and likely to necessitate a lengthy hearing. Rather than attempt to reach a definitive view on the question on a preliminary application, the court should, instead, consider whether the balance of justice lies in favour of or against making a pre-emptive costs order. The principal factors to be weighed in the balance are, first, the strength of the

argument in favour of saying that the special costs rules apply, and, secondly, the prejudice, if any, likely to be caused to the other parties if a pre-emptive costs order is made in error.

STRENGTH OF THE ARGUMENT ON COSTS

49. The applicant has established strong grounds for saying that the decision to confirm the compulsory purchase order constitutes part of a multi-stage development consent. If this is correct, then the decision is one which is, in principle, subject to the EIA Directive, i.e. one of the four EU Directives specified under Section 50B of the Planning and Development Act 2000.

50. Crucially, the decision to confirm the compulsory purchase order is one which has been reached following consideration of the environmental effects of the proposed development project. In particular, the decision involved a consideration of alternative locations by reference to the environmental effects of the proposed development project. The decision is predicated on an express finding by An Bord Pleanála that it had not been demonstrated that there are other sites within the relevant village which are more suitable to accommodate a waste water treatment plant.

51. The decision to confirm the compulsory purchase order thus traverses the same territory as would a formal environmental impact assessment. This factor distinguishes the present case from the decision-making at issue in *Dunne v. Minister for the Environment Heritage and Local Government*. As discussed at paragraphs 28 and 29 above, a decision to authorise the carrying out of archaeological works affecting a national monument was held not to constitute a "*development consent*" in circumstances where the decision-maker was

empowered neither to embark upon a reconsideration of the environmental issues arising from the underlying development project nor to modify the development project.

52. There are also strong grounds for saying that an environmental impact assessment should have been carried out in the context of the procedure leading to the decision to confirm the compulsory purchase order, rather than being postponed to the intended planning application. This is because an important aspect of the proposed waste water treatment plant, namely, its optimal location, has been decided upon. This has been done without public participation and without there having been a formal environmental impact assessment. The effect of the confirmation of the compulsory purchase order is to determine the parameters of the subsequent application for planning permission. The application will be made in respect of the lands the subject of the compulsory purchase order.

53. The answer which An Bord Pleanála makes to all of this is to say that the decision on the location of the proposed development project is not "*binding*" in the context of the subsequent planning application. An Bord Pleanála submitted that the decision on the compulsory purchase order is merely a preliminary decision, and that the merits of the site selection can be revisited in the context of the subsequent planning application. It is further submitted that it would be open to the local planning authority and An Bord Pleanála to refuse planning permission on the grounds that there are more suitable alternative sites.

54. With respect, this analysis tends to downplay the status of the decision to confirm the compulsory purchase order. The decision to authorise the

compulsory purchase of land is a solemn one, involving an interference with the constitutionally protected property rights of the affected landowners (*Reid v. Industrial Development Agency* [2015] IESC 82, [2015] 4 I.R. 494). It is apparent that An Bord Pleanála carefully considered the merits of the proposed location as part of its decision-making process and concluded that there are no suitable alternative sites.

55. Whereas it is open, in principle, to An Bord Pleanála to reach a different decision in the context of the intended planning application, there is an expectation that there will be a level of consistency in decision-making. See, by analogy, *Grealish v. An Bord Pleanála* [2006] IEHC 310, [2007] 2 I.R. 536. The earlier decision will, at the very least, carry significant weight in the context of the subsequent planning application.

56. More fundamentally, the decision on the compulsory purchase order will have narrowed the options. An important determination, namely, to discount alternative locations, which could have been made available by the use of the statutory power of compulsory acquisition, has already been made. This has been done without a formal environmental impact assessment and without public participation. The planning application will now be confined to the lands identified in the compulsory purchase order. An Bord Pleanála will thus be left with the binary choice of granting or refusing planning permission for this particular site. It cannot find in favour of an alternative location for the waste water treatment plant.

57. The CJEU has emphasised that public participation for the purposes of the EIA Directive must be effective and that this means that the public should be able to express views on the project concerned and its environmental impact not only

in a useful and comprehensive manner, but also at a juncture when all options are open (*Namur-Est Environnement* (at paragraph 72)). There are strong grounds for saying that effective public participation requires that the public be heard at a time when site selection options are open, i.e. prior to the confirmation of the compulsory purchase order which endorses a particular location for the proposed development project.

58. Both An Bord Pleanála and Uisce Éireann have sought to characterise a compulsory purchase order as merely entailing the transfer of ownership of land and as not authorising a project. With respect, this characterisation is reductionist. The precise purpose of conferring a power of compulsory acquisition upon Uisce Éireann is to facilitate the carrying out of public infrastructure projects. The decision to confirm a compulsory purchase order can only be made in circumstances where the confirming authority is satisfied, having regard to environmental issues and the absence of suitable alternative sites, that the use of the coercive power of compulsory acquisition is appropriate.

59. Having regard to all of the foregoing, there are strong grounds for saying, first, that a compulsory purchase order is part of a multi-stage development consent, and, secondly, that where the decision to confirm the compulsory purchase order is made first, i.e. prior to a decision on a planning application, then the EIA procedure should be carried out in the context of the decision to confirm the compulsory purchase order.

60. It should be emphasised that the *sequence* of decision-making in the present case differs from that considered in the earlier case law. It is for this reason that the judgments of the High Court (Humphreys J.) in *Clancy v. An Bord*

Pleanála (No. 1) [2023] IEHC 233 and *Clancy v. An Bord Pleanála (No. 2)* [2023] IEHC 464 are not dispositive of the specific issue raised in the present proceedings. As appears from the narrative in those two judgments, the impugned development project had been authorised pursuant to Section 179 of the Planning and Development Act 2000 and Part 8 of the Planning and Development Regulations 2001 prior to the making of the compulsory purchase order. As put pithily in the first judgment, the development consent was a "*done deal*" by the time the application to confirm the compulsory purchase order came to be made and that development consent had never been challenged.

61. It is also apparent from the judgments that a formal screening exercise had been carried out for the purposes of the EIA Directive by An Bord Pleanála pursuant to Section 50(1)(b) of the Roads Act 1993. An Bord Pleanála decided that no environmental impact assessment was required in respect of the proposed development project. Thus by the time the compulsory purchase order came to be confirmed, there was an unchallenged decision by An Bord Pleanála that the development project did not trigger the requirement for environmental impact assessment.

62. By contrast, in the present proceedings there has been no formal screening exercise. This is because the application to confirm the compulsory purchase order has been determined prior to the making of the intended planning application. The question of whether the decision to confirm the compulsory purchase order is part of a multi-stage development consent for an EIA development project thus remains open.

63. It is not apparent from the judgments in *Clancy v. An Bord Pleanála* whether the court was addressed on the implications of the decision of the CJEU in *Namur-Est Environnement*, Case C-463/20, EU:C:2022:121. To this extent, the judgments may have been decided *per incuriam*.

64. An Bord Pleanála's reliance on *Tobin v. Limerick City and County Council* [2023] IEHC 626 is misplaced. The legislative regime pursuant to which the compulsory acquisition was carried out in that case, i.e. the Derelict Sites Act 1990, is very different. The confirming authority is not entitled to consider alternative locations. This is because the power of compulsory acquisition under the Derelict Sites Act 1990 only arises in respect of the specific land which has been designated as a derelict site. The confirming authority cannot decide to authorise the compulsory acquisition of different lands.

65. I turn next to consider, as part of the balance of justice, the question of prejudice. The greater risk of unfairness arises in refusing to make a pre-emptive costs order. If the order is refused, only for it to subsequently transpire that the proceedings do attract the special costs rules, then the applicant will have been put to the hazard of having to pursue these proceedings without the benefit of costs protection. This risk might well deter her from continuing the proceedings.

66. If, conversely, the order is granted, only for it to transpire that the proceedings do not attract the special costs rules, then the respondent, An Bord Pleanála, will have been denied an opportunity to apply to recover its costs against the applicant. (It is unlikely that Uisce Éireann, as a mere notice party, would be entitled to recover its costs). This is a lesser prejudice than that potentially suffered by the applicant. Moreover, the court might refuse to make a costs

order against the applicant on the grounds that the proceedings raise a point of law of exceptional public importance in respect of the status of a decision to confirm a compulsory purchase order. Put otherwise, even if the proceedings are subject to the conventional costs rules under Part 11 of the Legal Services Regulation Act 2015, there is some prospect that a costs order would not be made against the applicant even if unsuccessful in the substantive judicial review.

"PURSUANT TO A STATUTORY PROVISION THAT GIVES EFFECT TO"

67. The costs protection under Section 50B of the Planning and Development Act 2000 applies where the challenge is to a decision made pursuant to a "*statutory provision*" which gives effect to one or more of four specified EU Directives. These include, relevantly, the EIA Directive and the Habitats Directive.

68. The term "*statutory provision*" is defined under Section 50B as a provision of an enactment or instrument under an enactment. It is necessary to identify the "*statutory provision*" pursuant to which the impugned decision to confirm the compulsory purchase order has been made. It follows from the definition of same that a "*statutory provision*" might, in principle, be confined to a single section of an Act. The position in respect of An Bord Pleanála's adjudicative function in relation to compulsory purchase orders is more complex. The power to confirm a compulsory purchase order is conferred by Section 214 of the Planning and Development Act 2000. However, the decision-making power is supplemented by other provisions, including, most relevantly, Section 217C(1) which confers upon An Bord Pleanála the power to confirm a compulsory acquisition or any part thereof, with or without conditions or

modifications, or to annul an acquisition or any part thereof. These are the "*statutory provisions*" which confer upon An Bord Pleanála the role of confirming authority. The impugned decision was made pursuant to Section 214 and Section 217C(1)of the Planning and Development Act 2000.

69. For the reasons explained under the previous heading, I am satisfied that there are strong grounds for saying that decision-making pursuant to these statutory provisions will, in certain circumstances, be "*subject to*" the requirements of the EIA Directive (to use deliberately neutral language). The question which arises under Section 50B of the Planning and Development Act 2000 is whether the statutory provisions can be said to "*give effect to*" the EIA Directive.

70. The position of An Bord Pleanála and Uisce Éireann is that the Oireachtas did not intend that there should be any environmental impact assessment carried out in the context of the confirmation of a compulsory purchase order. This is said to be apparent from the fact that no express legislative measures have been enacted which would allow for public participation, the submission of an environmental impact assessment report or the carrying out of an environmental impact assessment. Counsel for An Bord Pleanála suggested that the board had not been conferred with "*jurisdiction*" to carry out an environmental impact assessment. It is submitted that it follows that the statutory provisions cannot be said to "*give effect to*" the EIA Directive. Counsel on behalf of Uisce Éireann had initially suggested that a conforming interpretation might be *contra legem* but, very sensibly, did not pursue this point.

71. With respect, these various submissions tend to underplay the extent of the interpretative obligation under EU law and the obligation upon An Bord Pleanála to give effect to EU law. The CJEU has repeatedly held that a national court is required, when applying the provisions of domestic law adopted for the purpose of transposing obligations laid down by an EU Directive, to consider the whole body of rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of the Directive in order to achieve an outcome consistent with the objective pursued by that Directive.

72. As explained by the Supreme Court in *Heather Hill Management v. An Bord Pleanála* (at paragraph 198), the focus is not upon what the Oireachtas might have intended, but upon whether the words of a statute and the overall thrust of the legislation will bear the meaning demanded by the relevant EU Directive.

73. It follows that, in the event that the court hearing the substantive judicial review were to decide that a decision to confirm a compulsory purchase order is subject to the requirements of the EIA Directive, an issue would then arise as to whether the provisions of Part XIV of the Planning and Development Act 2000 are capable of an interpretation which would allow this to happen.

74. An Bord Pleanála has extensive procedural powers under Part XIV. For example, An Bord Pleanála may request submissions or observations from any person who may, in the opinion of the board, have information which is relevant to its decision concerning the confirming or otherwise of such compulsory acquisition (and may have regard to any such submission or observation in the making of its decision) (Section 217A). An Bord Pleanála has an absolute discretion to hold an oral hearing (Section 218). The person

holding an oral hearing in relation to the compulsory acquisition of land, which relates wholly or in part to proposed development by a local authority which is required to comply with any statutory provision to comply with procedures for giving effect to the EIA Directive, shall be entitled to hear evidence in relation to the likely effects on the environment of such development (Section 220).

75. Having regard to these provisions, I am satisfied that there are strong grounds for saying that these procedural powers are capable, if necessary, of being interpreted in a manner which allows for the carrying out of an environmental impact assessment. It follows that there are strong grounds for saying that the decision to confirm a compulsory purchase order is made pursuant to a statutory provision which gives effect to the EIA Directive.

76. The fact that there may be no *express* provision made for the carrying out of an EIA is not fatal in this regard. It is salutary to note that the Supreme Court held in *Martin v. An Bord Pleanála* [2007] IESC 23, [2008] 1 I.R. 336 that the decision of the Environmental Protection Agency ("*EPA*") was part of a multi-stage development consent notwithstanding that, under the then applicable version of the legislation, the EPA had no express function in relation to the carrying out of an environmental impact assessment.

CONCLUSION AND PROPOSED FORM OF ORDER

77. There is an overlap between the legal issues which are relevant to the determination of whether the special costs rules apply and those legal issues which will fall for determination as part of the substantive application for judicial review. In each instance, the fundamental question is whether the

decision to confirm the compulsory purchase order constitutes part of a multi-stage development consent.

78. It would be inappropriate to attempt to reach a definitive view on this difficult question on the basis of a summary hearing. To do so would involve the court in determining what is the ultimate issue in the proceedings without the benefit of full argument. The hearing of an application for a pre-emptive costs order will, of necessity, only ever be in short form. It would defeat the precise purpose of such application were the parties to have to incur significant legal costs in respect of same.

79. Rather than attempt to reach a definitive view on the ultimate issue in the proceedings, this court has, instead, considered whether the balance of justice lies in favour of or against making a pre-emptive costs order. For the reasons explained, the applicant has established that there are strong grounds for saying, first, that a compulsory purchase order is part of a multi-stage development consent, and, secondly, that where the decision to confirm the compulsory purchase order is made first, i.e. prior to a decision on a planning application, then the EIA procedure should be carried out in the context of the decision to confirm the compulsory purchase order. There are also strong grounds for saying that the decision to confirm a compulsory purchase order is made pursuant to a statutory provision which "*gives effect to*" the EIA Directive.

80. It is unnecessary, for the resolution of the pre-emptive costs application, to go beyond the EIA Directive and to address the *additional* arguments which had been advanced by the applicant by reference to the Habitats Directive. It is sufficient to the purpose that the applicant has established strong grounds for

saying that the impugned decision was made pursuant to a statutory provision which gives effect to any one of the four EU Directives specified under Section 50B of the Planning and Development Act 2000.

81. Turning to the potential prejudice, the greater risk of unfairness arises in refusing to make a pre-emptive costs order (for the reasons explained at paragraphs 65 and 66).

82. Accordingly, the court will make a pre-emptive costs order to the effect that the costs of the proceedings are to be allocated in accordance with Section 50B of the Planning and Development Act 2000. Absent an appeal, this order is intended to be final and conclusive in the sense that it predetermines the basis upon which costs are to be allocated at the end of the proceedings. For the avoidance of any doubt, however, it should be explained that this does not affect the ultimate outcome of the proceedings. The trial judge might, for example, determine that the decision to confirm a compulsory purchase order is not subject to the EIA Directive at all. The implication of such a finding might be that Section 50B does not properly apply to the proceedings and that the pre-emptive costs order had been granted in error. Any such finding would have precedential value for other proceedings. However, it would not affect the allocation of the costs of the present proceedings. The precise purpose of the pre-emptive costs order is to lockdown, for once and for all, the question of which costs rules are to apply to these proceedings, even if it should subsequently transpire, following the full hearing, that the proceedings do not attract the special costs rules under Section 50B of the Planning and Development Act 2000.

83. As to the costs of the motion seeking the pre-emptive costs order, my *provisional* view is that the applicant, having been entirely successful in the motion, is entitled to recover the costs of same as against An Bord Pleanála.

84. The proceedings will be listed before me on 13 February 2024 at 10.45 o'clock. On that occasion, I will hear submissions on the costs of the motion. I will also give directions to ensure that the proceedings can be brought on for hearing expeditiously.

Appearances

Michael O'Donnell for the applicant instructed by Augustus Cullen Law LLP
Fintan Valentine SC and Sonja O'Connor for the respondent instructed by Philip Lee LLP
Stephen Dodd SC and Damien Keaney for the notice party instructed by Mason Hayes & Curran LLP

Approved