Neutral Citation Number: [2007] IEHC 296

THE HIGH COURT

DUBLIN

2007/1269P

BETWEEN

MICHAEL KAVANAGH

PLAINTIFF

AND

THE GOVERNMENT OF IRELAND, THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, THE MINISTER FOR HEALTH AND CHILDREN, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

Approved Judgment of Mr. Justice T.C. Smyth delivered on Tuesday, 31st Day of July 2007

1. Introduction

The reliefs sought by the Plaintiff in this action are predominantly declarations (reliefs 1 - 13 inclusive): declaratory reliefs arise from consideration of matters of law. The Plaintiff seeks to have a determination of matters of EU law (relief No. 16) and a form of injunctive relief (relief No. 15). The decisions which the Plaintiff seeks to impugn are identified in paragraph 8 of the Statement of Claim as decisions of the first three named Defendants announced on 26th January 2005 and allegedly adopted in the period between November, 2004 and January, 2005 to develop on an agriculturally zoned 150 acre rural site at Thornton Hall farm i.e. across the road from his (the Plaintiff's) family residence, a new major prison development, a new CMH for the State and/or both, without prior public consultation, without carrying out any and/or any proper environmental assessment in accordance with EC law of their likely significant effects on the environment.

2. The Reliefs Claimed

In addition to those identified above, relief is also sought in respect of "subsequent modifications" to the foregoing, and these are identified at paragraphs 68, 69 and 70 of the Statement of Claim and specifically as:-

> "(a) an agreement to sanction in April, 2007 the purchase of additional lands adjacent to the site for the purpose of using the said lands to build a new access road into the site."

(I pause parenthetically to observe, that it is one of the several tangential matters that arose. It was said by the Plaintiff to be a plan or programme or part thereof for the purposes of the Directive, to which I will refer, and this acquisition (by option on 3 April 2007 and by final decision of 18 July 2007) of 8.7 acres to facilitate access to the site of the intended prison other than by the existing R130 which was originally considered suitable for the prison project. I am satisfied and find as a fact on the undisputed or unchallenged evidence of Mr. John Boyle (T2 p176 Q139) that this has been done to alleviate the concerns of the local community. It is expected that it will also facilitate the construction of the prison project. The clear intendment is to diminish the impact of the prison project if and when it passes through the several stages of Part 4 of the Prisons Act 2007 and comes to be implemented.)

> "(b) what is described in paragraph 70 as "a variation of the precise location of the CMH on the Thornton Hall farm site."

The impugned decisions are further described in paragraphs 73 to 76 of the Statement of Claim as:-

> (1) The decision to close and sell Mountjoy Prison and to build a new prison at Thornton Hall during the period November 2004 to January 2005.
>
> (2) The decision to close and sell the CMH in Dundrum for development and to build a new CMH at Thornton Hall and any modification thereof.
>
> (3) A combination of both decisions.
>
> (4) The inclusion of the decision to close and sell Mountjoy Prison and to build a new prison at Thornton Hall in the National Development Plan 2007 to 2013 adopted in January 2007.

The manner in which the impugned decisions allegedly contravene the provisions of Directive 2001/42/EC and Directive 85/337/EC are set out in detail in paragraphs 82 to 93 of the Statement of Claim.

3. The issues

In my judgment the issues which fall to be determined in this action are the following:-

> (1) Time limits - has the Plaintiff moved in time in respect of the challenge of any of the impugned decisions?
>
> (2) Directive 2001/42/EC:
>
> > (a) are any of the impugned decisions plans or programmes for the purpose of Directive 2001/42/EC.
> >
> > (b) If so, are they concerned with "town and country planning" or "land use"?
> >
> > (c) Do they set the framework for future development consent of projects listed in annexes 1 and/or 2 to Directive 85/337/EEC?
>
> (C) Directive 85/337:-
>
> > (1) Was an EIA necessary in advance of any of the impugned decisions?

(2) Is an EI necessary at any stage?

(3) In respect of the prison, is the application of Directive 85/337 excluded by virtue of Article 1(5) thereof and Part 4 of the Prisons Act, 2007.

(4) If not, do any of the impugned decisions constitute projects within annex 1 or 2 of the Directive 85/337/EC?

The action arises from a decision of the Government of 3rd February 2004 to replace the facilities at the Mountjoy complex in Dublin City with a new prison facility on a greenfield site in the greater Dublin area. That decision was made public at the time. The inadequacies of Mountjoy are not in dispute.

4. The trial procedure

At the outset of the hearing the Court was given by the Defendant's counsel a note of an unsuccessful appeal taken by the Plaintiff to the Supreme Court seeking to vacate the trial date. From this it appears that the Court considered the discovery and concluded that the date ought not to be vacated and that the discovery was adequate in the terms of the Court order. Just before the hearing of this action began counsel for the Defendants learned from Plaintiff's counsel that the Plaintiff was not calling any witnesses and had no witnesses available in court. Mr. Connolly SC the Defendants suggested that notwithstanding the case was one of plenary hearing that as:

1. The issues for determination were really matters of law.

2. That the issues were public law issues normally dealt with by way of judicial review. The Court should proceed to receive all the affidavits filed as evidence-in-chief from both sides.

3. For fairness of procedure in the case to the Plaintiff, he elected not to insist on cross-examining the Plaintiff or any of the Plaintiff's witnesses.

This first concession was on the basis that his own evidence-in-chief was contained in the replying affidavits but coupled with the right of the Plaintiff's counsel to cross-examine any such witnesses. [In fact all such witnesses were available and proffered for cross-examination, but the invitation was not availed of by counsel for the Plaintiff.]

4. In addition it was indicated that a witness from the Department of Finance would be called to deal with the National Development Plan (hereinafter referred to as the NDP), a witness from the Department of Health to deal with the CMH (hereinafter referred to as CMH).

5. Later a further concession was made to call Mr. Joseph Boyle of the Estate and Prison Service of the Department of Justice - the source of the information and belief of many of the matters in the affidavits of James Martin, an Assistant Secretary of the Department of Justice, to answer at first hand matters referred to in the affidavits - who was involved in the Thornton project since its inception.

Order 39 rule 1 of the Rules of the Superior Courts 1986 provides:

"In the absence of any agreement in writing between the solicitors of all parties and subject to the these rules the witnesses at the trial of any action or at any assessment of damages shall be examined viva voce and in open court, but the Court may, at any time for sufficient reason, order that any particular fact or facts may be proved by affidavit or that the affidavit of any witness may be read at the hearing of the trial on such conditions as the Court may think reasonable, or that any witness whose attendance at the Courts ought for some reason for some sufficient cause to be dispensed with be examined by interrogatories or otherwise before a commissioner or examiner provided that, where it appears to the Court that the other party bona fide desires the production of a witness for cross-examination, that such witness can be produced, an order shall not made authorising the evidence of such witness to be given by affidavit."

In the instant case as in all others the primary, fundamental and constant concern of the Court must always be the administration of justice. In support of his application Mr. Connolly referred to the differing views between Keane, J. (as he then was) in the High Court and the views of the Murphy, J. in the Supreme Court with whom Hamilton CJ and Lynch J agreed in *Phonographic Performance (Ireland) Ltd. -v- Cody* [1998] 4 IR 505. From it may be deduced the following guidance:

(a) That an order under the rule permitting any particular fact to be proved by affidavit was a discretionary order which could only be made for sufficient reason and in the interests of justice.

(b) In seeking to persuade a judge to exercise the discretion conferred on him by the rule the onus lay on the party making the application to persuade the Court to exercise its discretion in its favour and if the case of the application being resisted, the onus lies on the other party to establish a bona fide desire for the production of the witnesses.

In the instant case there is very little, if any, dispute on the facts relevant to the issues requiring adjudication. There are some differences of opinion as to how the facts are to be viewed or interpreted at a later date when a plan is fully formulated and submitted to the competent authorities for a development consent.

The gist of the action is: Do any of the decisions from 2004 onwards separately or cumulatively amount to or consist of a plan or programme within the meaning of the Directives, invoked by the Plaintiffs, such that such Directives are applicable to such work or works as the Defendants or any of them have carried out at Thornton. The instant case is clearly distinguishable from the Phonographic case where the Defendant was putting the Plaintiff on full proof of its case. In the instant case the Defendant in acknowledging the stated difficulties of the Plaintiff in producing witnesses not only makes a variety of concessions to the Plaintiff, but assumes the full burdens of the defence having foregone the opportunity of testing the Plaintiff's evidence by way of cross-examination. The elements to which the evidence is directed are of formal or peripheral matters and do not go to the gist of the case which is a matter of law. In the instant case there was no written agreement as to how to proceed, but the matter was debated at length and the procedure indicated by Mr. Connolly was expressed to be acceptable by Mr. Giblin SC on behalf of the Plaintiff (T1 24/7/07 p46 L19-20). In these circumstances it became unnecessary to make any express order under order 39 rule 1, but had such a necessity arisen I would unhesitatingly have exercised my discretion in making an order in the terms of the proposals put before the Court by Mr. Connolly which are based on reason, common sense and consonant with the interests of justice and in ease of the Plaintiff.

5. The Evidence
I am satisfied and find the following facts are either agreed or sustained and established by the evidence. That the decision to replace Mountjoy was a stand alone decision and was not part of or contingent on a plan or programme of general prison development. It was a decision in principle and did not purport to exempt the proposal from the normal administrative, financial and legislative procedures that would be appropriate. The proposal was to develop the new prison facility by means of a Public Private Partnership. Once the proposal to replace Mountjoy was accepted by the Government, reference to it was included in various documentation for financial planning and budgetary purposes, including aggregate financial plans such as the NDP. The first task in implementing the Government decision was to acquire a suitable site. To this end advertisements were placed in national newspapers by the Irish Prison Service in February 2004 seeking expressions of interest from parties who might be interested in making sites available for a new prison complex with a capacity for a thousand prisoners to replace Mountjoy. An approximate acreage and within a radius of Dublin City Centre was indicated. The responses from the advertisement were subjected to review or scrutiny by a Committee set up in May 2004 by the Minister for Justice, Equality and Law Reform ("the Minister"). On 30th November 2004 just as it seemed matters could be concluded with the owner of the preferred site - the owner of the site suddenly indicated he was not willing to go ahead with the sale. On the same date the Government approved in principle the purchase of a site subject to a final decision by the Minister and the location was to be confirmed with the Government. On 20th December 2004 another site - at the centre of the litigation - Thornton Hall was offered to the Irish Prison Service. It was assessed under the criteria first applied to the other sites, earlier referred to, it received the second highest marks (ahead of the site withdrawn on the 30th November 2004) and was considerably cheaper than the site which had been awarded the highest marks. On 18th January 2005, the Committee recommended that it be purchased. On 26th January 2005 the Government were informed that the Minister intended to purchase the site at Thornton Hall and a contract was signed the same day for 150 acres at a total cost of 29.9 million euro. That day a press release was issued which stated that the site had been purchased stating its size and location, and stating that "full details of the new prison complex have not yet been finalised" but giving an outline of the facilities that would be on the site and indicated that the capacity would be upwards of 1,000 prisoners and up to 1,000 prison officers and other staff would be employed there. A letter of the 27th January 2005 with enclosure informed the Plaintiff of the purchase. Exhibit "MK5" to the Plaintiff's original affidavit indicates (*inter alia*) that the CMH might well (it was to be the subject of further study) be transferred to Thornton.

On 3rd February 2005 the minutes of the Committee which evaluated the sites were published on the website of the Minister's Department. The Minister met with a delegation from the local community shortly after the and announcement was made.

I am satisfied and find as a fact that the Plaintiff knew of the decisions aforesaid in the public domain: what he did not have was the documentation that lead to the formulation of these individuals and separate (if interrelated) decisions. In early March 2005 a Ms. Teresa McDonnell, who is a neighbour of the Plaintiff and swore supporting affidavits in his interest, sought information under the Freedom of Information Acts 1997-2003 and requests for access to Environmental Information under S.I. No. 125 of 1998 (Directive 90/313/EEC). Severe criticism was levelled at the stated dilatory and poor response to inquiries made under the Freedom of Information Acts. In the context of this litigation I refrain totally from usurping functions at yet unexercised by those first entrusted by law to make determinations on such criticism.

What was first requisitioned was-

> "All records held by the Department of Justice, Equality and Law Reform and the Irish Prison Service in relation to the replacement of Mountjoy Prison with a new prison on a greenfield site, including all records relating to sites submitted for consideration. All records pertaining to the Mountjoy Complex Replacement Site Committee, its membership and deliberations."

There is a statutory mechanism for dealing with any inadequacies or failures to supply information under the Freedom of Information Acts and under the Directive and Ms. McDonnell has pursued her rights under both to the extent of an appeal to the office of the Ombudsman on 15th November 2006, in the case of the Freedom of Information Act and by letter of 17th November 2006 to the European Commission in the case of the Directive.

On 22nd April 2005 a Mr. Richard Merne (a neighbour of the Plaintiff and a fellow member of the local residents association) issued proceedings against the Minister for the Environment seeking a declaration that certain areas of the Thornton site were a national monument. On 25th April 2005 Mr. Merne was granted leave to seek judicial review of the decision of 26th January 2005. The reference here to these proceedings is to record a step in the chronology of events - referable to the site at Thornton. It is clear the Minister in effect declined to meet with local residents while those proceedings were extant. The sale of Thornton Hall closed on 1st October 2005. In the year 2006 a number of meetings took place, one of which took place on 3rd March and others on 13th March and 3rd and 7th April with various local residents or groups of residents (paragraphs 8 to 11 of the affidavit of Maeve Hogan sworn on behalf of the Defendants in these proceedings). The Government decided on 12th May 2006 that a new CMH will be built in part of the Thornton Hall land set aside for that purpose. On 7th July 2006 the Government approved proposals by the Minister that a special development approval procedure was appropriate that would meet the environmental protection standards of the European Union, and that assigned to the Houses of the Oireachtas the final say or determination as to whether the specific details of the intended project should be approved. The relevant provisions, applicable to this very significant project of national importance are to be found in Part 4 of the Prisons Act, 2007.

The Prisons Bill, 2006 was presented to Seanad Éireann on 10th November 2006. In January 2007 the NDP was launched. Unlike previous Development Plans, which were required by EU regulations to drawdown EU structural funds - the 2007 NDP is not required by any legislative, regulatory or administrative requirement. The NDP is essentially a financial plan or framework setting out what the Government sees as the investment priorities for the next seven years, and how resources can be invested amongst different investment priorities. It is not designed or intended to set any kind of framework for the granting or refusing of permissions for the carrying out of projects or to have any influence on the physical planning process (even if planning authorities or An Bord Pleanála may note it or do have regard to it i.e. the NDP) in their decisions. I am satisfied and find as a fact that it is essentially a financial or budgetary plan and even if, as is the case, a project of national significance is mentioned in the NDP such is for administrative purposes as indicative of the type of project that would be financed out of a particular financial "envelope". In the context of this litigation I cannot be concerned to determine any differences of opinion that may exist or be said to exist in respect of whole or part of the NDP between the European Commission and the Government of Ireland and what influence and effect (if any and to what degree, if at all) the NDP may have on those charged in law with making decisions under the Planning Acts and Regulations.

In the context of the NDP, reference was made by the Plaintiff to a decision of An Bord Pleanála concerning Lansdowne Road rugby grounds and to a letter from the European Commission to the Government of Ireland - neither were put in evidence or before the Court or put to the witness in written form who appeared for the Department of Finance. I draw no adverse inference of finding against the Plaintiff attributable to such omissions. Essentially the debate on NDP came down to one of intendment and possible effect. I am satisfied and find as a matter of fact that the NDP was and is not intended to set a framework for development consent

or planning permission but in the application or determinations of those empowered by law to so determine on some occasions the NDP may be noted and may or may not weigh in favour or against such consent or permission which fundamentally would have to rest on strict planning grounds and reasons. On 20th February 2007 the Plenary Summons issued in this case. The Prisons Act, 2007 was signed by the President on the 31st March 2007 and Part 4 thereof came into force on 1st May 2007, pursuant to the Prisons Act, 2007 (Commencement) Order 2007, S.I. No. 180 of 2007 (having been duly signed by the Minister on 27th April 2007). Part 4 applies to larger prison developments (e.g. involving more than five acres or a capacity for 250 prisoners) but only if the Minister so directs in writing.

On 29th May 2007 the Minister in exercising the powers conferred on him by section 18(1) of the Prisons Act 2007 directed that Part 4 of the Prisons Act, 2007 applies to the proposed construction of a prison on a site not previously used for that purpose in the Electoral Division of Kilsallaghan in the County of Fingal (Thornton Hall site) by S.I. No. 251 of 2007. The effect of this empowered decision is that what I will call the Thornton Hall project or prison, the prison project is an exempted development for the purpose of the Planning and Development Acts, 2000-2006, and no longer subject to regulation under section 181 of the Planning and Development Act, 2000, the European Communities (Environmental Impact Assessment) Regulations 1989-2005, or the provisions of the Planning Acts and Regulations relating to Environmental Impact Assessment. That is not to say that the building of the intended prison is free of control or regulation. Indeed the provisions of Part 4 of the Prisons Act, 2007 are extremely elaborate and complex and provide for a number of steps protective of those who may be concerned considerably in excess of those provided for under any of the provisions of the Planning Acts as they exist in this country and furthermore directly take into account Council Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, as amended by Council Directive 97/11/EEC and envisage a special sanctioning by the Oireachtas before building of the prison can commence.

6. Delay

In this context the narrative of the chronology of events earlier recorded in this judgment between the formal decision of 3rd February 2004 (see paragraph 4 of the Plaintiff's original affidavit) and much more particularly when notified by letter of 27th January 2005 (Exhibit "MK5" to the same affidavit) of the decision of the actual purchase of Thornton at €29.9 million to serve as a location for a new prison is of importance. The Plaintiff says he was in a state of consternation when he heard of this prison project. Furthermore it is clear that there was considerable concern and/or opposition amongst local residents to the planned development (per paragraph (13) of the Plaintiff's original affidavit). Proceedings issued on 20th February 2007. In effect the Plaintiff permitted almost two full years to elapse before bringing these proceedings. During this period the Merne judicial review proceedings were widely publicised and Mr. Merne has in these proceedings sworn an affidavit in support of the Plaintiff herein and he swore an affidavit in Mr. Merne's proceedings, (see paragraph 3 of Mr. Merne's affidavit herein sworn on 4 July 2007) and same was brought with the knowledge or assistance, certainly with the knowledge, of the Kilsallaghan Residents Association (formed in 2003) of which the Plaintiff was aware and had approved. The Defendants entered an Appearance on 1st March 2007 and called on the Plaintiff to deliver a Statement of Claim. Not only was this not done within the time prescribed by the Rules of the Superior Courts, but it was only done on the insistence of the Defendants. Almost three months then elapsed before the Plaintiff issued a motion dated 16th April 2007 returnable for 18th April 2007 seeking interlocutory relief. It was submitted by Mr. James Connolly S.C. for the Defendants - and uncontradicted, that a Statement of Claim was only delivered (on the insistence of the Defendants) on 28th May 2007, to which the Defendants delivered a defence on 6th June 2007. The inference I was asked to draw from the signing by the Minister of his Order of 29th May that it was merely a response to the delivery of the Statement of Claim. No evidence has been adduced to substantiate that and I am satisfied that the Minister proceeded with all dispatch once the Act was passed to give effect to the intendment of the replacement of Mountjoy Prison. The reliefs sought in this action are public law reliefs. The fact that the Plaintiff has proceeded by way of plenary summons does not change this from being in essence, a judicial review application. Since 26th/27th January 2005 to adopt Mr. Connolly's expression 'the clock was running'. I am satisfied and find as a fact that as of the 26th/27th January 2005 the Plaintiff had notice of the decision and intention of the Defendants - (in particular the Minister) to proceed with the prison project, of which it is clear from the evidence the Plaintiff was strongly opposed. In affidavits sworn in these proceedings directed to this issue the Plaintiff avers that until the document evidencing the decision of 4th February 2004 is discovered neither can he (the Plaintiff) or the Court know whether such a decision was in fact taken. Altogether from the clear imputation as to the veracity of the oath of Mr. Martin as Assistant Secretary in the Minister's Department, when all decisions made referable to the prison project were discovered and the document was disclosed (but not put in evidence) the imputation was not withdrawn. This unwarranted unfairness is not limited to this document. Even if this were a minor issue, and even if the criticism of the Plaintiff was correct, it was irrelevant because the Defendants do not necessarily have to rely on that decision and clearly exhibited the decision of 30th November 2004. That decision in any event was made public at the time it was made. In paragraph (5) of the Plaintiff's affidavit he raises the question that there was no record or minute of any Government decision confirming the purchase of Thornton Hall as a location for the development approved in principle on a site for a location on 30th November 2004 (Exhibit "JM1"). Exhibit "JM2" dated 26th January 2005 identifies the site as Thornton - I am satisfied that it adequately covers the averment of Mr. Martin and reject this submission as unsustainable in the light of the uncontradicted averment of Mr. Martin - and again from the unattended discovery (which I do not rely upon as evidence for it was not formally put). It is clear from the documents (before any discovery was made) that the Government decision to purchase was on 30th November 2004, but it was subject to the final decision of the Minister for Justice - the location of which was confirmed to the Government on 26th January 2005.

In this regard I express my incredulity that all of the averments in the Plaintiff's original and supporting affidavit prior to that sworn on the 4th July 2007 were based on suppositions or non existing decisions. In fact the reliefs sought in the originating summons was on the basis that the decisions were real and did exist. The point is only made for the first time on the 4th July 2007 in response to the averments by Mr. Martin sworn in his affidavit (on behalf of the Defendants) on 20th June 2007. The issue of delay is raised in paragraph 55 of the defence and again in a specific motion by the Defendant to have the Plaintiffs claim dismissed on either of the following grounds:-

> (a) under the inherent jurisdiction of the Court, and/or
>
> (b) as being frivolous and vexatious and being bound to fail having regard to the unexplained failure to move promptly to seek judicial review of the decisions being challenged under Order 84 Rule 21 of the Rules of the Superior Courts, 1986 or within the time limit therein specified.

Insofar as the Plaintiff avers that the Minister in the period 22nd April 2005 to February 2006 (the duration of the Merne litigation) (Record Nos 1454P/2005 and Judicial Review No ..../2005) did not agree to meet the Rolestown residents and St. Margaret's residents group he is correct. The Minister did meet the residents group on 3rd March 2006 when there was no litigation extant not as averred by the Plaintiff because of the Merne proceedings. Indeed at the meeting of the Minister with local residents, their minute of which is Exhibit "MK23" the Minister is recorded thus –

> "....he could not meet when there was litigation in progress and this legal process had taken up time that could have been used more constructively."

The Plaintiff does not state how soon after the meeting of early March that he became aware of the nature of the discussions. From this minute the following can be noted:-

> (i) the development would be screened and isolated as much as possible to ensure minimum impact on the lives of local people.
>
> (ii) no detailed plans had been drawn up at that time.
>
> (iii) the possibility of relocating the CMH had been considered but no final decision on relocating it to Thornton had been made - but if it came to pass, the 'Kilsallaghan' end of the site was its likely location. (A formal Government decision to relocate was made in May 2006) [T3 p169 Q115]
>
> (iv) there was a possibility of a courthouse being located on the site [I find as a fact on the evidence (T2 p175/6 Q138) that there is no proposal for any public courthouse on the site].
>
> (v) a full archaeological survey had been completed.
>
> (vi) The local community will have an opportunity to engage with the Irish Prison Service in relation to the specification for tender and some of the criteria in the specification would include such things as the maximum height of the facility, and the limiting of any environmental impact.
>
> (vii) two thirds of the outer boundary had been planted with trees and more work would be done in this regard over the year ahead.
>
> (viii) statutory consultation would begin when plans were in place - the end of Summer, perhaps June or July. [This time anticipation was very optimistic as the undisputed evidence of Mr. Boyle at the hearing of the action was that as yet there was no final design for the prison - there is an outline design for the prison which as of July 2007 was and is the subject of detailed negotiations with the commercial entities involved (T3 p176/7 Q141). As of July 2007 the design stage is evolving (T2 p190 Q212). It is accepted that when a design is chosen that there will be public consultation and an Environmental Impact Assessment (T3 p177 Q146). Mr. Boyle's evidence was that it was hoped - if it was possible - in the next few months to commence the planning process under Part 4 of the Prisons Act (T3 p178 Q149). [This evidence was not challenged in cross-examination and I find the facts to be in accordance with this evidence].
>
> (ix) the Minister said he was committed to proceed with his plans and would engage in due course with "anyone who wants to engage with us."

In May 2006 the decision of the Government was to relocate the CMH to Thornton. This is an entirely stand alone project (T2 p163 Q80). It has at all times been clear that a distinction exists between the prison (with its security and like concerns) which is now governed by the Prisons Act, 2007 and intended relocation of the CMH which is the concern of the Minister for Health and Children. In paragraph (8) of his affidavit sworn on 4th July 2007 the Plaintiff seeks to point out an apparent inconsistency between an answer made on 1st February 2005 in the Dáil by the Minister for Health (the context of the inquiry is uncertain - for the question to which the answer is a response is not given). However I am satisfied and find as a fact that there was an informal Government decision in February 2004 (T2 p165 Q89 L8-9) and in substance there was no inconsistency as such as was suggested by the Plaintiff. The Plaintiff on the other hand in paragraph (39) of his affidavit sworn on 16th April 2007 must have overlooked some facts (insofar as the issue of the CMH is relevant at all) for the Plaintiff quotes the Minister of State as saying:-

> "The redevelopment of the CMH will take account of best practice both in terms of infrastructural and operational policies. The project will be subject to normal planning and Government procurement processes." (My emphasis)

The Plaintiff is correct in noting but not quoting that the Government decision of 16th May 2006 "noted that an Environmental Impact Statement system would be sought". Whatever about the infelicity of diction by including the word "system" in the item, what is clear is that an Environmental Impact Statement would be required. Furthermore even if the Plaintiff is correct (and in different jurisdictions the expressions EIS and EIA are used as either preceding or succeeding the other), what is of importance is that environmental concerns must be, and will be specifically considered.

I am satisfied and find as a fact that at no stage of events relevant to the proceedings was it ever suggested by the Defendants or any of them or their advisors that the building or replacement of the CMH on whatever part of the Thornton site it may be located would be exempt or free from the requirements of the Planning Acts. Furthermore I am satisfied and find as a fact that there were different locations within the site considered at different times and the relevant acreages differed from 20 acres to 17.5 acres. Furthermore that the possible building of the to be relocated CMH is nowhere near the design stage (T2 p164 Q84 L8-9), and that planning permission will be sought at that stage (T2 p168 Q109 L22-23). Not withstanding that the Plaintiff sought and obtained discovery and that the additional witnesses were called and available to be cross-examined as to the intended location of the to be relocated CMH - when such a witness (Mr. Lynch) was called it was the Defendant's Counsel who introduced a map that earmarked the location of the site (T2 p163-164 Q82-84). The matter, if of moment or concern, was not the subject of any cross-examination by the Plaintiff.

The Plaintiff in paragraph (9) of his affidavit seeks in some way to explain delay by stating that the mere introduction of a Bill into the Oireachtas has no legal effect. This however is to avoid the fact that the prison project was real, stated to be of great concern to the Plaintiff and other local residents. Whatever shortcomings may have attended the Freedom of Information Act enquiries, the business of the Oireachtas in legislative matters is in the public domain. I am satisfied and find as a fact on the undisputed evidence set out in paragraph (11) of the affidavit of James Martin sworn on the 20th June 2007 that -

> "(11) the Prisons Act, 2007 provides a special procedure for the approval of prisons. The original Prisons Bill was published on 4th April 2005. This was ultimately replaced by the Prisons Bill, 2006, which was first presented to Seanad Éireann on 10th November 2006. As is apparent from paragraph 64 of the Plaintiff's grounding affidavit the application for an interlocutory injunction herein, the Plaintiff was aware in or about 24th November 2006 of the Prisons Bill, 2006."

I note with particularity that at that time (November 2006) the Plaintiff was represented in correspondence by his solicitors and it was to such that the Minister's letter of the 20th November 2006 was addressed. While I am satisfied that by then the Plaintiff was already very much out of time to bring these proceedings - even in November 2006 he still did not bring them promptly.

Paragraph (10) of the Plaintiff's affidavit of 4th July 2007 was ultimately relied upon by Mr. Travers, Counsel for the Plaintiff, as both explaining the delay and providing good reasons for the delay in bringing the proceedings. While appreciating the personal circumstances of the Plaintiff and his stated reluctance to take these proceedings and apprehension about the intended development of the prison project, nonetheless if he was as shocked as he avers he was on 26th January 2005 on hearing the 1 o'clock news that day and later receiving the letter of the 27th January 2005, I think it not unreasonable that he should have acted promptly to challenge a decision with which he so profoundly and seriously disagreed and to which he was, on his own evidence, opposed and which had caused him fear shock and "obliged to shield his family from its extent as to the devastation which the proposed project was likely to inflict on us all" (paragraph (12) of the Plaintiff's affidavit sworn on 16th April 2007). In my judgment not only did he not act promptly, but he did not act within time. He engaged, as was his entitlement, with his neighbours directly or indirectly in various residents groups or meetings. Mr. Merne brought his proceedings within three months of the January notification - that he acted independently of the Plaintiff in this action and sought some like reliefs as the Plaintiff in the instant case touching upon Directives 85/337/EEC (as amended) and 2001/42/EC is not the issue here considered. The fact is that Mr. Merne acted within time, the Plaintiff could have done likewise but chose another route.

The issue of delay in bringing the proceedings and in prosecuting was raised both in the defence, at the interlocutory hearing in June and at the hearing earlier this month in July. Both parties expressed a sense of urgency in having the issues in the action determined with expedition. The procedural delays in the action in bringing a motion for interlocutory injunction between the Plenary Summons of 20th February and Notice of Motion 16th April i.e. two months, and again before delivering a Statement of Claim on 28th May another six weeks later does not in my judgment show any commitment to urgency. The disposition of the Plaintiff to any delay that might result from the grant of injunctive relief to the Plaintiff was expressed as follows at the interlocutory hearing as follows:

> "The Defendants, if they were restrained by injunction, the damages they will suffer will be remediable insofar as what they would face would be delay, even a delay perhaps as long as two years, but in the meantime they could be designing their project. The Plaintiff would not have any difficulty with that."

The attitude that betokens is consistent with the delay in bringing the proceedings, and having brought them, in prosecuting them, though I do accept and realise that the case law draws a distinction in judicial review proceedings between the delay and the prosecution of the same.

In the overall context of the opposition of some local residents to the building of the prison, exception was taken by Mr. Merne in his affidavit sworn on 4th July 2007 at paragraph (2) to the purported inference that he and Mr. Kavanagh were "serial litigants". The context of the concern which is not an issue in the case was of "serial litigation" [T 15/6/07 p80/81] and quite emphatically did not suggest that the Plaintiff was a "serial litigant". [T 15/6/07 p139 L8-9]

The Plaintiff in his presentation of the facts and during the course of his deliberations or submissions concerning the Directives referred on numerous occasions to screening. There is a distinction between the screening of the site by trees and the screening as put by the Plaintiff of an application for some form of consent. The Plaintiff was making an assumption that no screening of the projects, plans or programmes took place. [T2 p47 L5/6] There was no evidence one way or the other as to whether it occurred and when the witness was called who might have dealt with this no question of screening was ever put to such witness.

Other than the NDP which was published in January 2007, which I found to be a financial and budgetary programme or framework to which Directive 2001/42/EC has no application by reason of Article 3.8 thereof, the Plaintiff is out of time in raising the challenges he makes in these proceedings. Notwithstanding that this issue of delay or failing to act promptly or being otherwise statute barred being pleaded in the defence, and the affidavits referable to the interlocutory application, and before and specifically in relation to a Motion brought by the Defendants in this regard, no case law was advanced in support or to assist the Court on the Plaintiff's behalf in coming to a view that the Plaintiff ought to be excused for such delay as has occurred. On the other hand Mr. Connolly SC on behalf of the Defendants did (as he had already signaled in earlier documentation i.e. his legal submissions at the time of the interlocutory application and during this hearing) relied on a number of cases he submitted should inform the Court in approaching this issue.

In particular he relied on the authority of *O'Donnell -V- Dun Laoghaire Corporation* [1991] ILRM 301 by Costello J (as he then was) that the time limits applicable for judicial review remained applicable to actions commenced by plenary summons in a given context. In particular Costello J stated at p314 as follows:

> "A Declaratory Order is a discretionary order arising from the wording of statute which conferred jurisdiction on the courts to make such orders. (See Wade, Administrative Law 5th Ed. p523) and it is well established that a plaintiff's delay in instituting plenary proceedings may, in the opinion of the court, disentitle the plaintiff to relief. It seems to me that in considering the effects of delay in a plenary action there are now persuasive reasons for adopting the principles enshrined in O.84 r.21 relating to delay in applications for judicial review, so that if the plenary action is not brought within three months from the date on which the cause of action arose the Court would normally refuse relief unless it is satisfied that had the claim been brought under O.84 the time would have been extended. The Rules Committee considered that there were good reasons why public authorities should be protected in the manner afforded by 0.84 r.21 when claims for declaratory relief were made in applications for judicial review. I think exactly the same considerations apply when the same form of relief is sought in a plenary action. Furthermore, it is not desirable that the form of action should determine the relief to be granted and this might well result in a significant number of cases if one set of principles on the question of delay was applied in applications for judicial review and another in plenary actions claiming the same remedy. In plenary actions the effect of delay can in many cases be determined on the trial of a preliminary issue, and as speedily as if the issue fell to be determined in an application for judicial review. For these reasons it seems to me that the apprehended use of plenary actions as a device to defeat the protections given by O.84 is not a real danger and does not justify the Court in concluding that proceedings by plenary action for declaratory relief against public authorities must be an abuse of process".

In the course of his Judgment Costello J described the time limits in Order 84 as one of a number of:

> "Significant safeguards in favour of public authorities."

contained in that Order.

Furthermore he noted that although an aggrieved Plaintiff may be able to establish a reasonable explanation for the delay, the Court might well conclude that this explanation did not afford a good reason for extending the time because to do so would interfere unfairly with the acquired rights, (*State (Cussen) -v- Brennan* [1981] IR181), or again the delay may unfairly prejudice the rights and interests of the public authority which had made the *ultra vires* decision in which event there would be a good reason for extending the time or

a Plaintiff may acquiesce in the situation arising from *ultra vires* decisions he later challenges, or the delay may have amounted to a waiver of his right to challenge it and so the Court could not conclude that there were good reasons for excusing the delay in instituting the proceedings. The principles were again reiterated and considered in *DeRóiste -v- Minister for Defence* [2001] 1 I.R. 190 where the Supreme Court held that in analysing the facts of a case to determine if there was no good reason to extend time or to allow judicial review, the Court may take into account the following factors:

> 1. The nature of the Order or actions the subject of the application.
>
> 2. The conduct of the Applicant.
>
> 3. The conduct of the Respondents.
>
> 4. The effect of the order under review on the parties subsequent to the order being made and any steps taken by the parties subsequent to the order to be reviewed.
>
> 5. Any effect which may have taken place on third parties by the order to be reviewed.
>
> 6. Public policy that proceedings relating to the public law domain take place promptly except when good reason is furnished.

In the course of her judgment Denham J, with whom other members of the Court agreed, although they expressed themselves differently, stated at p.208:

> "such list is not exclusive. It is clear from precedent that the discretion of the Court has ever been to protect justice. When criminal convictions are at issue the matter of justice may be very clear. However, it is the circumstances of each case which have to be considered."

In the instant case the prison project is a project for the benefit of the community at large and the Court has to be particularly alert and astute to avoid unnecessary delays from legal challenges where the delays can give rise to substantial extra cost in the carrying out of public projects. The point was again considered and dealt with by Kearns J in the unreported judgment of 15th February 2005 in Noonan Services Ltd. -v- the Labour Court where the Court added that it is particularly in cases where public servant contracts are at issue, especially those relating to major infrastructural projects where great expense and inconvenience may be expected to arise that delay is of prime importance. Kearns J added that this approach reflected a growing awareness of an overriding necessity to provide for some reasonable cut-off point for legal challenges to decisions which may have significant effects for the public. He concluded that a delay of almost five months in that case favoured the Applicant's claim and pointed out that the decision being challenged regulated the conditions of employment of some 18,000 workers in the contract cleaning industry.

The matter was also considered by Barr J in *Solan -v- DPP* [1989] ILRM 491 when it was held that:

> "In the absence of evidence explaining delay, there is no basis upon which the Court can exercise its discretion to grant an extension of time for the making of applications."

In this case the Plaintiff does not really accept that he has delayed in instituting or prosecuting the proceedings and did not invite the Court, except at the very conclusion of his submissions, to extend the time.

The issue to be determined is the date upon which time started to run and the chronology earlier referred to in this judgment is in point. The inclusion of the prison project in particular (and to a lesser extent the CMH) are projects in the NDP but this does not affect the question of the 'clock beginning to tick' to use Mr. Connolly's analogy. More recently in the unreported decision of 7 March 2003 Kearns J in *Sloan -v- Louth County Council* considered the question of delay in the context of judicial review and on page 18 of the transcript of his judgment observed said as follows.

> "Finally, on behalf of the third parties, it was submitted that this application should fail on grounds of delay. While the present application had been brought just within the eight week time limit provide by statute, the issue itself had crystallised on 6th September 2000 when Mr. McCann, as counsel on behalf of the residents, had raised precisely the point in issue before the planning inspector in the course of the hearing. The decision complained of at all times was given by the inspector in September 2000. Alternatively, time should be seen as running from the date upon which the Minister declined to intervene to revise the inspector's terms of reference. It was no excuse or explanation to argue that the Applicants were awaiting the decision of the Respondent before deciding upon legal action. The Applicants had failed to move promptly and no adequate explanation had been offered to show why the present application had not been brought at an earlier time."

In the course of his judgment then went on to consider *O'Connell -v- Environmental Protection Agency* [2002] 1ILRM 1 and *Max Development Ltd. -v- An Bord Pleanála* [1994] 2IR 121.

Kearns J concluded as follows:

> "I feel that this whole application must fail by reason of delay. In reality, the Applicant's challenge is not so much a decision of the Respondent, but to the refusal of the planning inspector to broaden the terms of the inquiry during the course of same in Dundalk in September 2000. As the grounding affidavits and written submissions lodged on behalf of the Applicants made clear it was that refusal to broaden the scope of the inquiry so as to take into consideration the various alternative routes to Northern Ireland which lies at the heart of this case. The decision not to broaden the inquiry started the clock ticking insofar as an application of this nature is concerned. In my view there are no grounds whatsoever for letting matters drift on, purely because other residents had commenced other judicial review proceedings or because the Applicants in some vague way had hoped that the Respondent might come to some conclusion which favoured their position. I accept all the third parties submissions on this important aspect of the case. It seems to me where major infrastructural projects are concerned, applications which may have the effect of delaying or stalling such works must be brought as quickly as possible. The present Applicants failed that test in every conceivable way."

He dismissed that application.

In my judgment the Courts should no more fail to protect the weak against the strong and to ensure that they are no less favourably

treated in having their cases heard and determined with the same urgency as large commercial cases, then that they must be acute to ensure that they and their procedures are not used or permitted to be used to unfairly frustrate or delay the legitimate objective of the implementation of large infrastructural projects required as a matter of public policy as ascertained by the legislature or the several bodies to whom or which the implementation of such projects is entrusted. To fail to maintain such balance is to favour in one instance, the rich, and the other those who, however honestly and sincerely object to the implementation of such projects against those, many of whom may also be financially or economically weak, whose own taxes are as a matter of probability being applied directly or indirectly to remedy a deficiency perceived to exist by the legislature or the body responsible under the law for the works for public benefit.

In the instant case I am quite satisfied that there has been inordinate and inexcusable delay in respect of which no good sufficient or substantial reasonable explanation has been tendered to the Court. In my judgment the Plaintiff's case can be dismissed on the grounds of delay alone. I think in fairness and deference to the submissions of the parties and for the sake of completeness I intend to proceed further.

I bear in mind particularly the decision of the High and Supreme Court in *Mulcreevy -v- Minister for Environment, Heritage and Local Government and Dún Laoghaire Rathdown County Council* [2004] 1IR 72 and while accepting that the provisions of Part 4 of the Prisons Act differ considerably than the matters therein the subject of consideration, I nonetheless harken onto the underlying concern of the Supreme Court, that to leave such matters unexamined may not do justice to all the parties in a given set of circumstances. 23

7. The EU Directives

The Plaintiff's submissions were that the case begins and ends with the ongoing breaches by the Defendants of their obligations under European Community Law. The Plaintiff, *inter alia*, contested the compatibility with EC law, and in particular Directive 2001/42/EC of the European Parliament and of the Council of 27th June 2001 on the assessment of the effects of certain plans and programmes on the environment, and Council Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, of a series of decisions of the Government of Ireland and/or of the Minister for Justice, Equality and Law Reform and Health and Children to proceed to develop opposite the Plaintiff's family home, at Thornton Hall, Kilsallaghan, County Dublin, a prison project and a relocated CMH for the State without carrying out a prior Strategic Environmental Assessment (SEA) or an Environmental Impact Assessment (EIA) in accordance with the requirements of the Directives aforesaid.

The Plaintiff at the outset of his submissions under this general heading invited the Court to refer certain questions prepared in advance by the Plaintiff to the European Court for decision. In my judgment it is quite unnecessary to take this course, notwithstanding that it is discretionary in that (a) the matter can be determined reasonably without resort to such a referral and furthermore there is an appeal directly to the Supreme Court (with its own body of expertise and experience of the European Court of Justice). I think it unnecessary to recite in this judgment the provisions of the Treaty which obligates States to abstain from any measure which could jeopardise the attainment of the objectives of the Treaty, with a high level of protection and improvement in the quality of the environment that is the desideratum of the Treaty. Council Directive 2001/42/EC ("the SEA Directive"). Recital (1) Provides that:-

> "Article 174 of the Treaty provides that the community policy on the environment is to contribute to, *inter alia*, the preservation, protection and improvement of the quality of the environment, the protection of human health and the prudent and rational utilisation of natural resources and that it is to be based on the precautionary principle. Article 6 of the Treaty provides that environmental protection requirements are to be integrated into the definition of community policies and activities, in particular with a view to promoting sustainable development."

Recital (4) provides that:-

> "Environmental assessment is an important tool for integrating environmental considerations into the preparation and adoption of certain plans and programmes which are likely to have significant affects on the environment in the member states, because it ensures that such effects of implementing plans and programmes are taken into account during their preparation and before their adoption".

Recital (5) provides that:-

> "The adoption of environmental assessment procedures at the planning and programming level should benefit undertakings by providing a more consistent framework in which to operate by the inclusion of the relevant environmental information into decision making. The inclusion of a wider set of factors in decision making should contribute to more sustainable and effective solutions."

The Plaintiff relied with particular emphasis on Recital (8) which provides that:-

> "Action is therefore required at community level to lay down a minimal environmental assessment framework which would set out the broad principles of the Environmental Assessment System and to leave the details to the Member States, having regard to the principle of subsidiarity."

The Plaintiff was concerned that the provisions of Recital (10) were in point, it provides that:-

> "All plans and programmes which are prepared for a number of sectors which set out a framework for future development consent of projects listed in annexes 1 and 2 to Council Directive 85/337/EEC as a rule be made subject to systematic environmental assessment".

Furthermore Mr. Giblin SC on behalf of the Plaintiff was concerned with Recital (11) which provides that:-

> "Other plans and programmes which set the framework for future development consent of projects may not have significant effects on the environment in all cases and should be assessed only where Member States determine that they are likely to be." (My emphasis on Mr. Giblin's emphasis in submission)

Recital (17) provides:-

> "The environmental report and the opinions expressed by the relevant authorities and the public, as well as the results of any transboundary consultation, should be taken into account during the preparation of the plan or programme and before

its adoption or submission to the legislative procedure."

In the instant case I am satisfied and find as a fact that since the acquisition of Thornton, works and maintenance have been carried out on the house and the gates to the premises, trees have been planted around most the perimeter to a depth of approximately 10 metres and in all approximately 20,000 trees have been planted, but no security in the sense of prison security fencing has taken place. Such fencing as has taken place is to protect the saplings or new trees or plantation that has been place. Exploratory archaeological excavations have taken place to enable an archaeological survey to be completed. Trial holes have been dug primarily to ascertain the suitability of areas within the site for building purposes and incidentally to check elements of archaeology in the area. The Plaintiff states that all of the decisions separately or cumulatively that are in any way referable to Thornton Hall and the works carried out amount to a plan. No issue was raised by the Plaintiff that these works amount to unauthorised development, except in a most general and tangential way and the only relevance of the works is in deciding whether development is commenced. The objectives of the Directive are quite clear. Of importance are some of the definitions and the extent of the applicability of the Directive. Article 2 in its definitions defines environmental assessment for the purpose of the Directives as meaning "the preparation of an environmental reports, the carrying out of consultations, the taking into account of the environmental report and the results of the consultations and decision-making and the provision of information on the decision in accordance with Articles 4 to 9". The scope of the Directive is provided for in Article 3 which provides that:-

> (1) "An environmental assessment, in accordance with Article 4 to 9 shall be carried out for plans and programmes referred to in paragraphs 2 to 4 which are likely to have significant environmental affects."

Specifically Article 3.8 excludes from the plans and programmes the subject of Directives such as financial or budget plans and programmes. Accordingly, in my judgment the Directive has no application whatsoever to the NDP. The Directive is quite clear that in dealing with plans and programmes not all are subject to assessment, only those which meet the criteria set out in Article 3 require assessment.

Article 2 draws a distinction between "plans and programmes" in the ordinary meaning of the words and plans and programmes "for the purpose of the Directive. In other words "plans and programme" (in the ordinary sense) must possess certain characteristics if they are to constitute "plans and programmes" (in the Directive sense). The European Commission has provided guidelines (and they are no more) on the implementation of the Directive. Paragraph 3.3 of the Guidelines suggest that "the name alone ('plan', 'programme', 'strategy', 'guidelines', etc.) will not be a sufficiently reliable guide: Documents having all of the characteristics of a plan or programme as defined in the Directive may be found under a variety of names. Furthermore in the Directive itself Article 13 in dealing with the implementation of the Directive notes specifically in Article 13.1 as follows:-

> "Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 21st July 2004, they shall forthwith inform the Commission thereof".

Article 13.4 provides that:-

> "Before 21st July 2004 Member States shall communicate to the Commission, in addition to the measures referred to in paragraph 1, separate information on the types of plans and programme which, in accordance with Article 3, would be subject to then environmental assessment pursuant to this Directive."

The original decision made by the Government in February 2004 accordingly is not captured at all by the Directive. (Even if it were a plan or programme such as is contended for by the Plaintiff). In my judgment a plan is envisaged as a framework against which decisions are made concerning development consents: e.g. a development plan sets a framework against which individual planning permissions for specific projects are to be granted. There is no information before the Court which indicates that the proposed project for the development of a prison site at Thornton (or for that matter the proposed project for the Thornton Hall prison) when combined with the replacement of Mountjoy prison amount to a "plan". Even if they can amount to a plan "they did not amount to a plan" which constitutes a framework against which individual development consents for particular projects are to be granted, which is the requirement of Article 3.2(a) of the 2001 Directive. Even if the Plaintiff were correct that in some way the specific decision to develop a stand alone project in the way of a prison site at Thornton Hall or relocating the CMH to the site amounts to a "plan" within the 2001 Directive, it amounts at best to a financial or budgetary plan. Either were they "a plan or a programme" in the colloquial sense they are not "a plan" within the meaning of the Directive because they are not required by legislative, regulatory or administrative provisions. Decisions were of a political or commercial character to date and when the time comes for the seeking of a development consent (otherwise a planning permission) whether under the provisions of Part 4 of the Prisons Act, 2007 in respect of the prison or under the Planning Acts in respect of the CMH, then clearly different considerations do apply because in those circumstances there are provisions in appropriate cases for the preparation of an Environmental Impact Assessment which may be preceded by way of report or statement. None of the activities or decisions made to date set the framework for future development consent. I accept the Plaintiff's contention that many of the preliminary works carried out on the site and the investigative reports obtained thereon may, and will as a matter of probability form part of a plan to be submitted to the necessary and the appropriate legislative regulatory an administrative authorities of the State. I do not consider any of the decisions or reports or the NDP as containing criteria or conditions which guide the way the consenting authority (the planning authority or An Bord Pleanála in respect of the CMH, or under Part 4 of the Prisons Act, 2007) will decide the application for development consent as the expression is used or intended, but in the way the expression is used or intended in the Directive. The European Commission guidelines at paragraph 3.24, correctly in my opinion, note that the word sets a framework for projects and other activities aS used in Annex 2 with illustrations of how such a framework may be set (location, nature, size or operating conditions of projects and the allocation of resources).

The provision in paragraph 3.25 of its Guidelines (which are not binding but are a reasonable pointer as to how in practical terms the Directive may be viewed) provides as follows:-

> "As annex 2 states, one way of setting the framework"

may be through the way resources are allocated but the exceptions in Article 3(8) should be borne in mind. The Directive does not define the meaning of "resources". In principle they may be financial or natural or (possibly even human). A generalised allocation of financial resources would not appear to be sufficient to 'set the framework', for example a broad allocation across the entire activity (such as the whole resource allocation for a country's housing programme). It would be necessary for the resource allocation to condition in a specific identifiable way how consent was to be granted (e.g. by setting out a future course of action or by limiting the types of solution.

In my judgment the mere provision of the funding envisaged by the NDP is indicative of how an activity could be financed. It in no way seeks to set a framework as to what decision or decisions should be made by the appropriate authority or authorities in relation

to the actual proposal or project to be so funded. Most development carried out under a planning permission or development consent has environmental effects. What the Directive is concerned about is a significant environmental affects and in that context Member States are afforded due latitude to make a determination as to what plans or programme (if such they be) are likely to have significant environmental affects and to make such provision in their legislative or in regulatory framework to deal with such. I am satisfied as a matter of fact and as of law that none of the impugned decisions are in fact "required by legislative regulatory or administrative provision."

Even if the impugned decisions were as contended for by the Plaintiff as "plans and programmes" for the purpose of the Directive a question arises as to whether they require Strategic Environmental Assessment and in this regard the provisions of Article 1 and the provisions of Article 3(1) and (2) are apposite.

With regard to those matters set out in Article 3.3(2)(a) the Plaintiff relies on the reference in Article 3(2)(a) to "town and country planning or land use". In my judgment this is to do violence to the language of the Directive for in no sense can the decision to acquire the lands for the purpose of building a prison or CMH or the NDP constitute a plan or programme prepared for "town and country planning or land use". A policy decision to build something in an urban or rural location does not amount to a plan or programme as contended for correctly in my judgment by the Defendant and I am prepared to accept that submission.

A policy decision to use a piece of land in a particular way does not amount to a plan or programme prepared for "land use". Use of the expressions "town and country planning or lands use" are more applicable to the Planning Acts and the zoning of land or the laying out of towns or the preparation of a draft development plan or of a development plan itself.

The Defendants submitted that the phrases "town and country planning" and "land use" refer to what is generally termed in Ireland as "planning". They do not comprise individual decisions relating to specific projects. If it was intended to cover matters such as these there would be no reason at all to confine the Directive to "authorities". It would have equal application to private projects, as Directive 85/337 does. I am satisfied that the NDP comes within the exemption provided for by Article 3(8) of the Directive that it has a budgetary or financial plan and sets out no environmental criteria as to what types of development are permissible within the general community. Some reliance is placed by the Plaintiff to the specific reference at page 48 to "the new prison complex at Thornton in North County Dublin" but it is to be emphasised that this is mentioned in a context where what is being discussed is capital investment not environmental considerations. I am satisfied that the NDP does not require a Strategic Environmental Assessment under the above Directive as:-

> (a) The NDP does not fall within the definition of plan or programme in that it is not required by legislative, regulatory or administrative provisions. (Article 2(a) of the Directive)
>
> (b) It is a financial or budgetary plan
>
> (c) It does not set the framework for future development consent.

Insofar as the inclusion of any of the other impugned decisions in the NDP are relevant it serves only to confer on them the exemption enjoyed by the NDP.

The Plaintiff laid considerable emphasis on the provisions of Article 4.1 of the Directive which provides that:-

> "The Environmental Impact Assessment referred to in Article 3 should be carried out during the preparation of a plan or programme and before its adoption or submission to the legislative procedure." [my emphasis on the emphasis of counsel for the Plaintiff]

Paragraph 4 of the Prisons Act, 2007 provides in section 17 that development means the proposed construction of a prison on a site not previously used for that purpose and that the expression "Environmental Impact Assessment" is to be construed in accordance with section 19. The Minister having applied the Prisons Act to the prison project under section 18, the Act proceeds then to provide for an Environmental Impact Assessment in accordance with section 19. Which provides that:-

> "Before proceeding with a development, the Director General of the Irish Prison Service shall appoint a person to prepare an Environmental Impact Assessment in respect of it."

Subsection 2 of the section provides and sets out the information that shall be contained in an Environmental Impact Assessment, which when prepared is to be submitted by the Director General of the Irish Prison Service, to the Minister.

Section 20 provides that:-

> On receipt of the documentation provided for in section 19(4) the Minister shall give notice of the development not only to the planning authority or authorities for the area where the development is to be situated but also to members of the public. Furthermore, the Minister is obliged to put or cause to be put a copy of the notice to be laid before each House of the Oireachtas.

and insofar as notice of the development being given to the members of the public, it provides that a notice or notices must be placed on the site so that they can be easily visible from the public highway and by placing a notice in a daily newspaper. An additional safeguard is provided that if the development is likely to have significant affects on the environment on another party to the ESPOO Convention the Minister shall give notice of the development in that context.

The contents of the notice are provided for in section 21, and section 22 obligates the Minister to make copies of the documents mentioned in section 19 available to any interested party in written form or electronically. That being done the Minister is then obliged under section 23 to appointment a rapporteur to receive written submissions or observations in relation to the development from interested parties. The rapporteur may only take account of written submissions or observations which are received within the period of six weeks provided for in the section. The obligation is then upon the rapporteur to prepare a report on the basis of those submissions and that report shall then be submitted to the Minister, who shall arrange for it to be published. If it is intended that there are to be substantive amendments by the Minister to the development section 24 takes care of this eventuality. Then the same safeguards as earlier provided for in sections 19 to 21 are to be followed in such event. In the consideration of that adjustment or amendment or alteration the rapporteur shall prepare a supplementary report on the basis of the written submissions or observations received within the given period. Again the rapporteur shall submit a report to the Minister who shall arrange to have it published.

The Minister shall then have regard under the provision by virtue of section 25 to:-

> (a) the Environmental Impact Assessment in respect of the development or the report of the rapporteur under section 23(5) and
>
> (b) any supplementary Environmental Impact Assessment and supplementary report

and may make a further alteration to the development. He may either decide to proceed with the development including any such alterations or decide not so to do.

However, the Minister if he decides to proceed with the development he shall move a draft resolution in both Houses of the Oireachtas containing given information as provided for in Section 26(1). However, before moving the draft resolution the Minister must cause a number of documents to be laid before each Houses of the Oireachtas. They include the following:-

> (a) a document stating -
>
> > (i) the location, purpose and size of the development
> >
> > (ii) its land use requirements during the construction and operational phases
> >
> > (iii) the estimated type and quantity of any residues and omissions expected to result from it;
>
> (b) the Environmental Impact Assessment and Supplementary Impact Assessment;
>
> (c) visual representation of the exterior of the completed development;
>
> (d) the report and any supplementary report of the Rapporteur.

The Minister is entitled before moving the draft resolution to cause a document containing his or her observations on any of the documents mentioned in subsection 2 of section 26 to be so made and if the draft resolution is approved by each House of the Oireachtas it must be confirmed by an Act of Oireachtas and the Minister may then proceed with the development.A specific manner of questioning any acts or deeds done pursuant to any part of the foregoing provisions of Part 4 is provided for in section 27, which provides that:-

> "A person shall not question the validity of any act done including any decision or direction given pursuant to Part 4 or whether and any Environmental Impact Assessment or report of a rapporteur complies with the Act otherwise than by way of an application to the High Court for judicial review under Order 84 of the Rules of Superior Courts".

Section 28 of Part 4 provides for exemptions relating to development. Accordingly I am satisfied and find as a fact as a matter of law that this is not a case, as was suggested by the Plaintiff, of presenting the Plaintiff with a fait accompli but of an elaborate mechanism provided for specifically by Part 4 of the Prisons Act for the provision of an environmental assessment before its adoption or submission to the legislative procedure. The legislative procedure is necessary to give any form of development consent or planning permission to entitle the Defendants to proceed with the construction of a prison at Thornton.

Directive 85/337/EEC 2
The Plaintiff's submissions centre on the suggestion that the proposed prison and proposed CMH constitute "urban development projects" for the purpose of annex 2 of the Directive, and that the development consent has in fact already been given. The Plaintiff prays in aid Directive 2000/60/EEC (the Water Framework Directive) and Directive 80/68/EEC (the Groundwater Directive) in support of a suggestion that an EIA is required as pleaded in paragraphs 90 and 91 of the Statement of Claim.

The submission of the Defendants is quite simple and concise and it is that the Directive does not apply by virtue of the provisions of Article 1(5) thereof which provides that the Directive:-

> "....shall not apply to projects the details of which are adopted by a specific act of national legislation, since the objectives of this Directive, including that of supplying information, are achieved through the legislative process."

The European Court of Justice in case C-278-98, the Linster case, considered whether the term "specific act of national legislation" was to be given a "community"meaning or whether it fell to be determined by domestic law. Having opted for the former the Court next considered whether the impugned Luxembourg law met the requirements of a "specific act of national legislation" for the purposes of Article 1(5) and determined as follows:-

> "On a proper construction of Article 1(5) of the Directive, a measure adopted by a parliament after a public parliamentary debate constitutes a specific act of national legislation within the meaning of that provision where the legislative process has enabled the objectives pursued by the Directive, including that of supplying information, to be achieved, and the information available to the parliament at the time when the details of the project were adopted was equivalent to that which would have been submitted to the competent authority in an ordinary procedure for granting consent for a project."

Directive 85 Article 1(2) makes it quite clear that a development consent means:-

> "The decision of the competent authority or authorities which entitles the developer to proceed with the project."

To date all that has occurred in regard to Thornton, the prison project, is that a good deal of preliminary, exploratory and investigative work have taken place. A number of consultations have taken place with intended partners in the Public Private Partnership, but as yet no plan is capable of being put before a competent authority. Even when such is done it will be such decision as provided for in one of the provisions of Part 4 of the Prisons Act that will enable the development to proceed with the project. In the course of the Judgment in the *Linster* case at paragraphs 54-58 the position is made quite clear in the following terms:-

> "It is the only record the legislator has available to it, the information equivalent to that which will be submitted to the competent authority in an ordinary procedure for authorising a project that the objectives of the directive may be regarded as having been achieved through the legislative process. It should be remembered that under Article 5(2) of the

> Directive and annex 2 thereof the minimum information to be supplied by the developer is to consist of a description of the project comprising information on the site, design and size of the project, a description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse affects, and the data required to identify and assess the main affects which the project is likely to have on the environment. As regards the degree of precision required of the Legislative Act, Article 1(5) of the Directive requires it to be a specific act adopting the details of the project. Its very wording must demonstrate the objectives of the Directive have been achieved with regard to the project in question. The Court has thus held that the details of a project cannot be considered to be adopted by a law for the purpose of Article 1(5) of the Directive, if the law does not include the elements necessary to assess the environmental impact of the project but, on the contrary, requires a study to be carried out for the purpose, which must be drawn up subsequently and if the adoption of other measures are needed in order for the developer to be entitled to proceed with the project. In certain specific circumstances, it is possible for the objectives of the Directive to have been met where the route of a planned motorway has not been laid down in the Legislative Act, for example, where several alternative routes were studied in detail, on the basis of information supplied by the developer and possibly supplemented by the authorities and members of the public liable to be concerned by the project, and those alternatives are recognised by the Legislator as having an equivalent environmental impact. It is for the national court to determine whether that was so in the present case."

I am satisfied that Part 4 of the Prisons Act, 2007 mirrors the requirements of Council Directive 85/337/EEC and once Part 4 is applied to a project, an Environmental Impact Assessment must be prepared meeting the same criteria as required under the Directive even if the proposed development is unlikely to have any significant affects on the environment. The prison project is a stand alone institutional use and in my judgment does not come within the concept of or intendment of annex 2(10)(b) i.e. "infrastructural projects - urban development projects" as contended for by the Plaintiff in these proceedings.

The Defendants properly concedes that the Oireachtas will be the ultimate determining body that will grant the 'development consent' to the prison and that in relation to the CMH it is accepted that it will require planning permission in due course, and that if an Environmental Impact Assessment is required it will be done in the course of the planning process.

The Plaintiff submitted that the works carried out to date are an infringement of the Directives and specifically that there was an obligation in the light of the first recital to this Directive (1985) that the works carried out to date of an exploratory nature and those pertaining to the screening of the site from the surrounding area amount to development such as required an environmental assessment, accordingly the Defendants had failed to do so "at the earliest possible date".

The timing of an EIA (if such is or was required) has been determined by the Supreme Court in *Martin -V- An Bord Pleanála* (unreported) 10th May 2007 and is very succinctly put in the following terms:-

> "Once the competent authorities have carried out an EIA before development consent is given the terms of Article 2(1) of the Directive are complied with. That is the plain meaning of the Directive."

The Defendants properly conceded that anything purporting to be an EIA which took place before the design of the prison or the CMH had been finalised would as a matter of probability be condemned as inadequate by the Courts. Much interesting arguments and case law was opened upon many aspects of the European law. I am satisfied that the submissions referable to Directive 2000/60/EEC (the Water Framework Directive) and Directive 80/68/EEC (the Groundwater Directive) add nothing to the case for an EIA and cannot alter the position concerning the timing of an EIA.

In the course of argument the Plaintiff sought to expand on the extent to which the meaning of the words in annex 2 could be given and I am satisfied that in the context which such expressions as the installation of the disposal of waste (projects not included in annex 1) and waste water treatment plants (projects not included in annex 1) and sludge - deposition sites and car parks are all referable to specific purposes. Such car parks are as provided or to be provided in the prison project are ancillary and incidental to the institutional use and not in an urban area or part of an urban development, and even if they were, they are not public car parks to the extent that members of public coming and going to the prison may have the use of them unregulated by the prison authority. They have specifically delimited use to the institutional use, and not to any form of private or commercial use.

The Plaintiff's submissions is that there is a combined plan made up of three stages. Stage one is the decision of 30th November 2004 to close Mountjoy and acquire a property elsewhere for the relocation of the prison, stage two the decision to purchase on the 26th January 2005 Thornton Hall, and stage three the decision on 16th May 2006 to relocate the CMH to part of the Thornton site. In my judgment while these are interrelated in a colloquial sense they are not "the plan or programme" envisaged by the Directive which is to be submitted for a "development consent". The development consent that is envisaged by Article 1 of the 85 Directive is quite clear and it is a decision of the competent authority or authorities which entitles the developer to proceed with the project.

The Plaintiff also raises concerns about archaeology. However, the 2007 Acts specifically disapplies any provisions of the National Monument Legislation except for section 25 which purely provides for criminal sanctions for damages to artifacts and in this regard the Plaintiff would have to show that he has in some way damnified or apprehend damages to a specified artifact. In my judgment it is not sufficient for the Plaintiff simply to speculate that some damage may occur on the site to some artifact in order to be able to obtain for the Court the form of injunctive relief sought in this case.

I have carefully considered case C-81/96 of the ECJ and in particular paragraphs 16, 17, 19, 20, 23, 24 and 28 thereof and case C-392/96 (the *Commission of the European Communities -v- Ireland*) and in particular paragraph 22, 26, 64 and 70 to 79 inclusive and case C-435/97 and in particular paragraphs 59 to 62 inclusive thereof, but remain unconvinced that there is any necessity for me to refer to the European Court of Justice any of the questions set out in the annex to the submissions of the Plaintiff's counsel. I have given particular attention to the decision of European Court of Justice in case 283/81 *Sri Cilfit and Lanficio de Gavardo -v- Ministry of Health* dealing with the obligation to seek a preliminary ruling of the court. I am of opinion that there is no warrant to submit the queries raised in the Annex to Plaintiff's submissions to the European court.

In my judgment the Court cannot in many action be concerned with what may or may happen at some day or date in the future to the land or premises of Mountjoy prison and any additional land that may have been purchased adjacent to it, no more than it should be concerned what may or may not happen to the lands or buildings known as the CMH. These decisions are matters of policy or of a commercial character and are not ad rem to the issues in the instant case.

Accordingly, I dismiss the Plaintiff's case in its entirety and order accordingly.