

**THE HIGH COURT
JUDICIAL REVIEW**

2006 No. 243 J.R.

BETWEEN

CÓRAS IOMPAIR ÉIREANN AND IARNRÓD ÉIREANN – IRISH RAIL

APPLICANTS

**AND
AN BORD PLEANÁLA**

RESPONDENT

**AND
SLIGO COUNTY COUNCIL**

NOTICE PARTY

Judgment of Mr. Justice Clarke delivered on the 19th day of June, 2008

1. Introduction

1.1 Ballymote Railway Station is situated in County Sligo on the Dublin to Sligo railway line. The applicants ("Irish Rail") have undertaken major works in the upgrading of the track and signalling along this line which is designed towards improving both safety and capacity. Amongst the works undertaken in that context were the erection of several masts for signalling purposes which are designed to ensure communication at all times between the central train control in Dublin and all locomotive drivers along the line. It is said that such communication is an integral part of the signalling system designed to ensure the orderly and safe running of trains along the route. It is also said that Ballymote Station was chosen for one such mast because it gave the necessary coverage for the operation of the signalling system.

1.2 In general terms the dispute which has now arisen is as to the planning status of the erection of the mast in question. That issue, in turn, involves the interaction of certain of the provisions of the Planning and Development Act 2000, ("the 2000 Act") concerning, on the one hand, exempted development and on the other hand protected structures. In circumstances which it will be necessary to set out in more detail in the course of this judgment, Irish Rail had embarked on a development involving the erection of the relevant mast when a process was put in train to have Ballymote Station declared a protected structure for the purposes of the 2000 Act. It will be necessary to refer to the relevant legalisation in some detail in due course. However, in general terms there are, as might be expected, limitations on the manner in which works can be carried out in or near protected structures. At the same time there are equally understandable provisions contained within the 2000 Act, and the regulations made under it, which exempt certain works from the need for planning permission. One such category of exempted development relates to works carried out in connection with the proper running of railway lines.

1.3 The issues in this case largely centre around the requirements for the protection of protected structures on the one hand and the exemptions given in respect of developments connected with railway lines on the other. A dispute arose between Irish Rail and the notice party ("Sligo County Council") as to the planning status of the works in question. Sligo County Council, in that context, referred the matter under s. 5 of the 2000 Act to the respondent ("the Board") for the purposes of seeking a declaration under that s. as to whether or not the works were exempted development. The Board came to the view that the works were not exempted development and declared accordingly. In these proceedings Irish Rail seek to challenge that decision of the Board. Against that general background it is necessary to turn now to the specific issues which arise.

2. The Issues

2.1 In essence Irish Rail put forward three sets of grounds as the basis for its challenge to the decision of the Board.

2.2 The first set of grounds concerns the proper interpretation of the 2000 Act, and in particular s. 57 of that Act. I will refer in due course to the relevant provisions of the section. However for these purposes it is sufficient to note that s. 57(1), in general terms, seeks to limit the extent to which the carrying out of works to a protected structure or a proposed protected structure can be exempted development. It is common case that, were it not for the fact that Ballymote Station became proposed as a protected structure, the works sought to be carried out by Irish Rail would be exempted development. The first issue, therefore, concerns the question of whether s. 57 has the effect of "de-exempting" works which would otherwise be exempted development when those works are carried out to a protected structure or a proposed protected structure. That issue turns on the proper construction of the relevant legislation to which I will turn in early course.

2.3 The second issue which arises concerns the fact that Ballymote Station became proposed as a protected structure after work on the development had been commenced but before such works were completed. In those circumstances it is argued on behalf of Irish Rail that, even if the construction which Irish Rail seeks to place on the legislation as a whole is incorrect (and that, therefore, works of the type involved, even though normally exempted, would not be exempted if carried out to a protected structure or a proposed protected structure) nonetheless, on the facts of this case, the works must be regarded as remaining exempted because the development had been commenced at a time when Ballymote Station was not proposed as a protected structure.

2.4 Finally, a third issue was raised both in the statement of grounds relied on by Irish Rail and in the written submissions filed, which suggests that the decision of the Board on the merits is open to challenge. In fairness to counsel for Irish Rail that aspect of the case was not pressed at the hearing. I will, therefore, deal with that matter very briefly at the close of this judgment.

2.5 There was no significant controversy between the parties as to the underlying facts which are relevant to these proceedings. In that context I turn first to those undisputed facts.

3. The Facts

3.1 Irish Rail commenced work on the development in early July, 2004. The overall development involved the erection of a radio mast and associated work approximately 82 metres from Ballymote Railway Station. The ancillary works involved the construction of a compound with palisade fencing measuring 29.6m x 6.9m x 2.3m together with the erection within that compound of a concrete control house measuring 5.5m x 3.5m x 2.6m. The radio mast of some 29 metres height and a cabin measuring 6.1m x 2.5m x 2.7m were also intended for erection within the compound.

3.2 It would appear that on 30th July, 2004, Sligo County Council decided to issue a notice under s. 12(3)(a) of the 2000 Act, proposing the addition of certain structures to the record of protected structures in the Sligo Draft County Development Plan 2005-2011. One of the structures proposed for addition was Ballymote Railway Station. It does not appear that Irish Rail were informed of

the relevant decision by the Council until a letter dated 30th August, 2004. That letter referred to the fact that works had already been carried out at Ballymote Railway Station involving the construction of a base to accommodate an aerial fencing, and a structure to accommodate machinery. The letter asserted that as a result of the provisions of s. 57 of the 2000 Act, the carrying out of any works at the station were no longer exempted development and requested, therefore, that no further works be completed in the absence of planning permission.

3.3 As of the time of the decision of Sligo County Council on the 30th July, 2004, Irish Rail had completed the mast base, the foundations for the telecoms equipment room and blockwork for the generator room. Between the 30th July and the receipt of the letter of 30th August, Irish Rail had carried out further works which involved placing the roof and door on the generator room and the erection of posts for the palisade security fence around the equipment compound. All that was left to be completed of the proposed development as of that stage was the construction of the roof of the generator room, the completion of the palisade fence, and the erection of the mast itself.

3.4 It was at all times accepted, quite properly, by Sligo County Council that works carried out prior to the inclusion of Ballymote Station in the list of proposed exempted structures remained exempted development. The issue between the parties concerns whether works after that time retained the protection conferred on such exempted development.

3.5 The notification of 30th August, 2004, set a closing date for submissions and observations of 11th October, 2004. Prior to that date, on 4th October, 2004, Irish Rail made observations referring to the development in the context of the major works and the upgrading of the Sligo to Dublin line and noting that the works had commenced as exempted development prior to any notification of the proposal to add Ballymote Station to the list of protected structures. The response also drew attention to Class 23 of the Planning and Development Regulations 2001 ("the Regulations") which confers exempted status on "works required in connection with the movement of traffic by rail on, in, over or under the operational land..." of a railway entity such as Irish Rail. On that basis it was asserted that the works remained exempted development and the position of Irish Rail was stated to be that the works would, therefore, continue, although a desire was expressed to co-operate with Sligo County Council in regard to the issue generally. Certain correspondence followed but on 30th March, 2005, no agreement between the parties had been reached and Sligo County Council issued an enforcement notice which required the removal of what was said to be an "unauthorised telemast". Further attempts were made to resolve matters which came to no avail and by letter of 5th May, 2005, Sligo County Council indicated that before issuing legal proceedings in relation to enforcement it had decided to refer the matter to the Board in order to seek a declaration under s. 5 of the 2000 Act as to whether or not the works were exempted development. In its submissions to the Board of 19th July, 2005, Irish Rail placed reliance on an assertion that the mast constituted exempted development within Class 23 of the Regulations. The issue concerning the interaction between the exempted development provisions of the 2000 Act, and the protected structure provisions of the same Act was explored in some detail. In passing it should be noted that on 19th July, 2005, Sligo County Council notified Irish Rail that Ballymote Station had, in fact, been added to the list of protected structures. However for the purposes of the issues which arise in this case there is no difference in substance between the status of a proposed protected structure or an actual protected structure. It should also be said that Irish Rail did, in fact, complete the works which are, as I understand it, now in place.

3.6 The relevant decision of An Bord Pleanála was made on 13th January, 2006. In that decision the Board determined as follows:-

"(a) The mast would generally come within the exemption under Class 23 of part 1 of schedule 2 of the Regulations of 2001.

(b) The mast is in the curtilage of the railway station.

(c) The mast materially affects the character of the railway station – a proposed protected structure.

(d) As the station is a proposed protected structure, s. 57 of the Planning and Development Act 2000, removes the exemptions normally available to Iarnród Éireann at the station under Class 23 of part 1 of schedule 2 of the Regulations of 2001."

It is as against that decision that this challenge is brought.

3.7 Against that factual background it is necessary now to turn to the construction question.

4. The Construction Issue

4.1 It should firstly be noted that both parties accepted that, insofar as the question of the proper construction of the 2000 Act is concerned, it is for this Court to determine same. On that basis it was, in my view quite properly, accepted by counsel on behalf of the Board that if I were to come to the view that the Board had misconstrued the relevant provisions of the Act in a manner which materially effected its decision, then it would follow that the determination of the Board must be quashed. While the established jurisprudence of the courts confers a very significant margin of deference to the planning judgments of the Board, a different situation applies where it is alleged that the Board has misconstrued any relevant statutory provisions. In such circumstances a decision of the Board is liable to be quashed by the court in the event that the court is satisfied that, in some material respect, the decision of the Board was affected by an erroneous view of the relevant statute.

4.2 Section 57(1) of the 2000 Act, provides as follows:-

"Notwithstanding s. 4(1)(h), the carrying out of works to a protected structure or a proposed protected structure shall be exempted development only if those works would not materially affect the character of;

(a) the structure, or

(b) any element of the structure which contributes to its special architectural, historical, archaeological, artistic, cultural, scientific, social or technical interest"

The provision needs to be seen in the context of s. 4 of the 2000 Act, which sets out various categories of exempted development. Included in those categories is s. 4(1)(h) which is in the following terms:-

"Development consisting of the carrying out of works for the maintenance, improvement or other alteration of any structure, being works which affect only the interior of the structure or which do not materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of the structure or of neighbouring structures."

4.3 Section 4(2) permits the relevant Minister to make regulations providing for any class of development to be exempted development for the purposes of the Act. It is under that section that the Regulations are made and the general exemption provided to railway undertakings in Class 23 is, therefore, exempted development under s. 4(2). There are, thus, certain types of development which are directly exempted by statute under one or other of the various sub-clauses of s. 4(1). There are also other categories of development which are exempted by reason of regulations made by the Minister under s. 4(2). It is also relevant to consider the provisions of the 2000 Act concerning protected structures. Part IV, Chap. 1, of the 2000 Act sets out the development controls for protected structures and proposed protected structures. The structures concerned are those which have been included (or are proposed to be included) in a development plan of a planning authority.

4.4 It should also be noted that s. 58(1) of the 2000 Act, imposes a positive duty on the owner and occupier of a protected structure to ensure that such structure is free from endangerment while s. 58(2) imposes similar obligations in respect of structures proposed for protection.

4.5 A number of other provisions of the 2000 Act are either directly or indirectly relevant to the issues which I have to decide. In particular, counsel for the Board places reliance on a series of sections which, it is said, show that the legislation as a whole was intended to put in place a regime that would ensure that protected structures or proposed protected structures were, in fact, afforded a high degree of protection.

4.6 Section 59 entitles a planning authority to issue a notice to require works to be carried out in relation to the endangerment of a protected structure or a proposed protected structure. Section 60 entitles a planning authority to issue a notice to require restoration of the character of such structures. Section 69 entitles a planning authority to carry out such works to a protected structure as are reasonable and necessary to give effect to the terms of a notice issued under s. 60, while s. 70 entitles the planning authority concerned to recover any expenses incurred in carrying out such works. Section 71 entitles a planning authority to acquire a protected structure, whether by agreement or compulsorily, and s. 80 provides for grants for the assistance of persons carrying out works to protected structures.

4.7 There can be little doubt but that counsel for the Board was correct when stating that the legislation, taken as a whole, provides for a very significant support for protected structures.

4.8 The argument put forward on behalf of Irish Rail is quite straightforward. Section 57(1) of the 2000 Act, starts with words "notwithstanding s. 4(1)(h)". It is clear that the use of language such as "notwithstanding" in legislation in the manner in which it is used in s. 57 is normally designed for the purposes of removing doubt as to which of two potentially conflicting provisions are to prevail. In this case the potentially conflicting provisions are those concerning exempted development on the one hand, and those concerning protected structures on the other hand. In general terms the legislation makes clear that exempted development does not require planning permission. As pointed out earlier the definition of exempted development encompasses both those types of development which are designated as exempted in the legislation itself and those designated in regulations made under the legislation. In general terms the purpose of s. 57 would appear to be to seek to delimit the extent to which works to a protected structure or a proposed protected structure can be regarded as exempted development unless the works concerned do not materially affect the character of the structure or a relevant element of the structure which contributes to its status. If the phrase "notwithstanding s. 4(1)(h)" was not present then there would not seem to me to be really any great difficulty in construing the relevant statutory provisions. Section 4 would confer exempted status on certain types of development, but that exempted status would be removed in relation to a protected structure or proposed protected structure unless the works were immaterial in the sense in which that term is used in s. 57(1). It is the presence of the phrase "notwithstanding s. 4(1)(h)" that creates the difficulty.

4.9 That difficulty is, in my view, aptly noted at para. 8 – 22 of Simons – *Planning and Development Law* (2nd Ed.) where the author states the following:-

"On a literal reading of the section, it is submitted that the opening words 'notwithstanding s. 4(1)(h)' govern the entire of what follows and, accordingly, the qualification on the availability of exempted development is confined to that class of exempted development. If this literal interpretation is correct, then it produces the anomalous result that, whereas one particular form of exempted development is highly qualified, the full gamut of the classes of exempted development under the Planning and Development Regulations 2001, is nevertheless open. This is because, unlike the position obtaining in relation to a structure located in an architectural conservation area, there is no qualification imposed under the Regulations themselves in respect of works to a protected structure or a proposed protected structure."

4.10 In reality that para. encapsulates the position on both sides to this argument. Irish Rail argue that the presence of the words "notwithstanding s. 4(1)(h)" must be given some meaning and must have been included for some purpose. Thus, it is said, Simons is correct in interpreting the literal meaning as confining the qualification on the availability of exempted development to the limited cases where exempted status is derived from s. 4(1)(h) only. If that be the correct interpretation of the section, then it would follow that a developer who wished to rely on the category of exempted development set out in s. 4(1)(h) so as to develop a protected structure could only do so if the development concerned met the criteria set out in s. 57 of not materially affecting the character of the structure or any part of it which contributed to its special interest. However, a developer wishing to rely on any other category of exempted development (whether found in the 2000 Act itself or in the Regulations) would not face that limitation. The Board disagrees with the construction placed on the section by Irish Rail. In addition the Board argue that confining the "de-exemption" to s. 4(1)(h) would produce an absurd result which, it is said, can be overridden by the provisions of the Interpretation Act 2005.

4.11 In support of its argument in favour of what is, in my view correctly, described by Simons as the proper literal interpretation of the section, Irish Rail also draws attention to s. 87(1) of the 2000 Act, which is designed to de-exempt development which contravenes an approved scheme within an area of special planning control. That s. provides as follows:-

"Notwithstanding s. 4 and any regulations made thereunder, any development within an area of special planning control shall not be exempted development where it contravenes an approved scheme applying to that area."

4.12 The point is well made that it is surprising in the extreme that the Oireachtas should, in s. 87, have chosen to use the words "notwithstanding s. 4" while using in s. 57 the words "notwithstanding s. 4(1)(h)", without there being intended to be some difference between the respective uses. Both sections are, after all, dealing with the same sort of issue. Both sections involve a de-exemption in cases where there is perceived to be some overriding obligation whether to a protected or proposed protected structure or to the contents of an approved scheme applying to an area of special planning control.

4.13 I have to confess that this is by no means the first time when legislation in the planning and environmental field which I have had to consider has been drafted in a way which gives rise to very significant difficulties of interpretation. See, for example, *Maye v.*

Sligo Borough Council [2007] IEHC 146, *Cork County Council v. Shackleton* [2007] IEHC 241 and *Glenkerrin Homes v. Dun Laoghaire Rathdown County Council* [2007] IEHC 241, which list only relates to cases which have happened to fall for decision by me.

4.14 It is regrettable that often important provisions of legislation designed to protect the environment are produced in a way which gives rise to such a difficulty of interpretation that a significant risk of the legislation not achieving its end is created. Be that as it may courts, when faced with the product of such draughtsmanship, have to do the best they can.

4.15 I am satisfied that Irish Rail are correct as to the literal interpretation of the section. I can see no real basis for the distinction between the words used in s. 57 on the one hand and s. 87 on the other hand unless, on a literal meaning, different ends are to result.

4.16 Utilising the traditional approach to statutory interpretation I would, therefore, be satisfied that Irish Rail's contended for construction is correct. The real question seems to me to turn on whether a different construction may be mandated by s. 5 of the Interpretation Act 2005.

4.17 That s. provides as follows:-

"5.—(1) In construing a provision of any Act (other than a provision that relates to the imposition of a penal or other sanction)—

(a) that is obscure or ambiguous, or

(b) that on a literal interpretation would be absurd or would fail to reflect the plain intention of—

(i) in the case of an Act to which paragraph (a) of the definition of "Act" in section 2 (1) relates, the Oireachtas, or

(ii) in the case of an Act to which paragraph (b) of that definition relates, the parliament concerned,

the provision shall be given a construction that reflects the plain intention of the Oireachtas or parliament concerned, as the case may be, where that intention can be ascertained from the Act as a whole.

(2) In construing a provision of a statutory instrument (other than a provision that relates to the imposition of a penal or other sanction)—

(a) that is obscure or ambiguous, or

(b) that on a literal interpretation would be absurd or would fail to reflect the plain intention of the instrument as a whole in the context of the enactment (including the Act) under which it was made,

the provision shall be given a construction that reflects the plain intention of the maker of the instrument where that intention can be ascertained from the instrument as a whole in the context of that enactment."

4.18 It does not seem to me that it can be said that the section is obscure or ambiguous. Indeed the very problem with the section is the clear use of the reference to s. 4(1)(h). Having determined what is, in my view, the literal interpretation of the section is it seems to me that I then must ask whether a construction based on that literal interpretation would, in the words of s. 5(1)(b) of the Interpretation Act 2005, "be absurd or would fail to reflect the plain intention of" (in the context of this case) the Oireachtas.

4.19 The consequences of the literal interpretation are, in my view, correctly described by Simons as "anomalous". The range of exempted development permitted both under the direct statutory provisions and the Regulation are very wide indeed. It would provide scant protection for a protected structure or a proposed protected structure if it could be interfered with in a way which altered the features of that structure which gave it its special character by relying on any form of exempted development with one narrow exception. Such a result would, in my view, be absurd and would fail to reflect the plain intention of the Oireachtas as ascertained from the 2000 Act as a whole which is to provide a wide degree of protection to protected structures.

4.20 In the circumstances it seems to me that s. 5 of the Interpretation Act 2005, mandates a departure from the literal meaning. I am, therefore, satisfied that the view taken by the Board as to the proper construction of the section was correct and that, therefore, s. 57 has the effect of de-exempting any development which would otherwise be exempted unless the development concerned meets the criteria for not materially affecting relevant features of the protected structure as set out in that section. On that basis I am satisfied that the Board came to a correct view as to the interpretation of section 57.

4.21 Against the background of that finding it is now necessary to turn to the second issue raised on behalf of Irish Rail which relies on the fact that the development had made significant progress both before the decision of Sligo County Council to propose Ballymote Station as a protected structure and, to an even greater extent, before the notification of that decision to Irish Rail. This raises the question of the status of commenced exempted development. I now turn to that issue.

5. Commenced Exempted Development

5.1 The first question which needs to be addressed under this heading is the status of a development which commences, legitimately, as exempted development but where, in the course of that development, the exempted status of the development changes. Such a situation could, in principle, arise in one of two ways. Firstly there could be a material change in the categories of exempted development or in the parameters by reference to which exempted development is to be judged. For example the current regulations permit, in appropriate circumstances, extensions to be built to houses within certain parameters without the necessity of planning permission, such development having exempted status conferred on it. It might be possible that a policy change might occur which would lead to a reduction in (say) the size of a development which might have such a status conferred on it. What is the position in relation to a development which was commenced under one regime but where, before the development concerned was completed, same became inconsistent with a revised regime introduced during the course of the development.

5.2 Secondly, as this case illustrates, an exempted status may be altered by, for example, the inclusion of a property in a list of protected structures or, indeed, by the creation of an area of special planning control. These and other circumstances may lead, also,

to a development being commenced at a time when the intended development would be exempted but where an alteration in exempted status is brought about by virtue of an independent event which occurs during the currency of the development.

5.3 There does not seem to me to be anything to be found in the express provisions of the legislation to indicate what is to occur in those circumstances. It is important to note that the only matter that was referred to the Board in this case was the question of the exempted status of the balance of the elements of the development at Ballymote Railway Station which were uncompleted as of the conferring of proposed protected status on the station. There is no doubt as a fact that the entire development was exempted development as of the date of the commencement of the works. There is equally no doubt but that by the time the development was completed none of it qualified as exempted development as such. While the Board was not invited to consider the status of the works that had been carried out prior to the alteration in the exempted status of the development as a whole, it seems to me to be clear that those works were exempted development. There is nothing in the legislation which could remotely justify the adoption of a retrospective view of the status of works which were undoubtedly exempted at the time when these works were carried out.

5.4 In the planning context McKechnie J. noted, in *Kenny v. An Bord Pleanála (No.1)* [2001] 1 I.R. 565, at pp. 581, 582, quoting with approval from the judgment of Henchy J. in *Hamilton v. Hamilton* [1982] I.R. 466, that there is a presumption that a statute does not intend to operate unfairly, unjustly or oppressively by entrenching on rights or obligations lawfully acquired or created before the statute came into force. On that basis it is clear that the statute should be construed as prospective in its application and not retrospective in the absence of clear and unambiguous wording to the contrary or necessarily implied.

5.5 There is no doubt but that McKechnie J., in *Kenny*, made clear that changes in planning legislation (in that case concerning obligations in respect of environmental impact assessment and statements) could not be deemed to be retrospective so as to impose an obligation in relation to a process which had commenced prior to the relevant legislation coming into force. It is, of course, correct to say, as was argued by counsel for the Board, that the specific issue with which McKechnie J. was concerned was one of process rather than one concerning the substance of the planning status of a particular development. *Kenny* is not, therefore, direct authority for the proposition that a project lawfully commenced can be completed even if there is a change in its exempted status during the currency of the development. Rather *Kenny* is direct authority for the proposition that, in the absence of clear statutory wording to the contrary, a planning process is presumed to be brought to a conclusion under the statutory regime under which it was commenced.

5.6 However, the rationale behind the judgment of McKechnie J. in *Kenny* seems to me to also have application to a case such as this. As pointed out by McKechnie J., in placing reliance on the judgment of Henchy J. in *Hamilton*, the presumption is that legislation will not operate in an unfair, unjust or oppressive manner by trenching on rights or obligations lawfully acquired or created before the statute came into force.

5.7 It, therefore, seems to me to follow that there should be presumed to be an intention behind the legislation that parties who have commenced works lawfully on foot of an exempted status should not have their rights unfairly or unjustly interfered with by a change in that protected status during the reasonable currency of the development concerned.

5.8 There is, of course, no such wording to be found in the legislation as would convey a contrary intention. It would, equally, have been helpful if the Oireachtas had thought to clarify this matter including, unless it was considered appropriate to declare all works subsequent to a change in exempted status to be unlawful, the parameters within which a party might legitimately be permitted to continue with a development which was lawfully commenced.

5.9 A simple example, undoubtedly quite divorced from the facts of this case, is, nonetheless, illustrative of the general principle. I return to the ordinary and oft relied on exemption in relation to certain extensions to domestic property. If such an extension was planned and commenced within the parameters of an existing exempted development regime and had been completed to (say) roof level, what would then be the status of such development if there were a change, such as one I postulated earlier, in the parameters applicable to such exempted development by (say) a reduction in the permitted size. The works already completed would be legitimate and could not be directed to be removed. Nonetheless, on the view adopted by the Board, the roof could not be put on because its erection would no longer be exempted development. Is it conceivable that the Oireachtas intended such a result? Would not such a result be unjust and oppressive? Equally to say that such a result accords with any view of proper planning and development and would be in the public interest, when it would permit the continued presence of a half completed structure which could not be directed to be removed but which could not either be completed, would border on the absurd. In the absence of wording in the relevant statute which made clear that such a result was intended, I would lean against such a construction. There is not, in my view, any such wording to be found in the relevant provisions. A change in exempted status which affects the balance of a development underway is not, in strict terms, retrospective, as it could only affect works not yet completed. However, it has the potential to operate in a manner which is very close, in substance, to retrospectivity.

5.10 In those circumstances it does seem to me that there must, at least in some cases, be circumstances where a development lawfully commenced as exempted development must be permitted to be completed. It would, of course, be open, and preferable, if the Oireachtas were to define the parameters within which it might be considered reasonable to allow such development to complete. However the Oireachtas has not so done and the courts must, in the absence of any such legislation, do the best that they can.

5.11 In my view the appropriate approach, in the absence of such legislation, is for the court to assess whether it would be unjust in all the circumstances of the case to regard the completion of a development legitimately commenced as being unlawful. In that context the question of whether all of the works sought to be completed form part of a single and materially indivisible project would be an important factor. Secondly, the extent to which the works had, in fact, been completed and whether the works were ongoing as of the time when the change in exempted status occurred would also be material.

5.12 In that context I would not agree with the submission made by counsel for Irish Rail that the metaphorical turning of the first sod would be sufficient. It could hardly be said to be unjust to prevent a person who had carried out very little work on a development from completing it simply because there was change in its planning status when little more than preliminary works had been carried out. Likewise it seems to me that the fact that a party might wish to carry out two or three largely separate elements of work at the same location, each of which might be exempted at the commencement of the works, would not necessarily entitle such a party to embark upon a second or subsequent independent element of the works simply because the first element had been started when the relevant change in planning status came into effect.

5.13 However, on the facts of this case, it seems to me clear that the entire development which I have earlier described is a single integrated development. None of the elements of that development make any sense without the rest. There was no need to have a palisaded area or plant buildings unless there was going to be a mast. Equally the mast could not be put up and become effective without those other elements. There is no basis, therefore, in my view, for considering the development undertaken by Irish Rail at

Ballymote to be anything other than a single integrated development.

5.14 Secondly, it is clear that significant works had been completed in relation to that development both by the time the relevant decision of Sligo County Council was made and, to an even greater extent, by the time that decision was communicated to Irish Rail.

5.15 In that context it is unnecessary to definitively determine which is the operative date but I would be inclined, without so finding, to the view that the date of notification is the more important. There are obviously good policy reasons why the protection conferred by s. 57 and other relevant provisions concerning protected structures are applied equally to a proposed protected structure as to a protected structure. If that were not to be the case then unfortunate developments could occur to a structure while its protected status was under consideration. However, a consequence of the fact that, for practical purposes, in this regard, the same status is accorded to proposed protected structures as protected structures themselves is that a structure may become a proposed protected structure without the owner or occupier of the relevant property becoming aware of it. Where a party *bona fide* carries out work in the reasonable belief that that work is exempted development because that party has not been notified by the relevant local authority of the proposal to include a structure in the register of protected structures, then it seems to me to be likely that a court would have to have regard to work carried out during the period up to the relevant notification in assessing the justice of the case. If the overall test is as to whether it would be unjust to prevent the party concerned from completing the development then it seems to me that significant weight may well have to be attached to work carried out prior to the time when the party concerned became aware (or ought to have been aware) of the relevant change in status.

5.16 In those circumstances I am satisfied that Irish Rail commenced a significant integrated development and had progressed it to a significant extent prior to becoming aware that the exempted status of the building had changed (and indeed, although to a lesser extent, when that change of status occurred). In those circumstances it seems to me that it would be unjust and oppressive to render the balance of the works necessary to complete the already commenced development unlawful and in the absence of clear wording in the relevant legislation requiring such a view, I would not be prepared to hold that the works were unlawful.

5.17 In those circumstances I am satisfied that Irish Rail are correct in their view that, on the facts of this case, the development concerned retained its exempted status as a development which was a single integrated development, *bona fide* commenced as exempted development and progressed to a significant and material stage prior to the change of status of the development concerned. In those circumstances it seems to me that the decision of the Board was materially effected by an incorrect, if understandable, view of the legislation and must, therefore, be quashed.

6. The Merits of the Boards Decision

6.1 As indicated earlier this aspect of Irish Rail's case was not pressed in any significant way at the hearing before me. I am satisfied that there was more than sufficient material before the Board to allow the Board to come to the planning decision which it did as to whether, if s. 57 applied, the relevant statutory criteria were met.

6.2 In my view counsel for Irish Rail was correct in not pursuing this matter as there was no basis for the courts intervention on the merits of the planning aspect of the decision.

7. Conclusions

7.1 It follows that the decision of the Board must be quashed but, for the reasons which I have set out, only on the grounds that the development had lawfully commenced and progressed to a significant extent during a time when it was exempted development such as would render it unjust to preclude its completion. On that basis I am satisfied that the Board was wrong in concluding that the development had lost its exempted status.