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THE HIGH COURT
JUDICIAL REVIEW

2004 No. 191 J.R.

BETWEEN

MARY O'LEARY, KATE CORCORAN, MARY HURLEY, RINGASKIDDY AND DISTRICT RESIDENTS ASSOCIATION LIMITED, ANN DALY, OLIVIA O'SULLIVAN, SUSAN GIBSON, NICHOLAS LOUGHNAN, AILÍS NÍ BHROIN, PAULA DONNACHIE, NATASHA HARTY AND KEVIN BARRY

APPLICANTS

AND

AN BORD PLEANÁLA, IRELAND, AND THE ATTORNEY GENERAL

RESPONDENTS

AND

INDAVER N.V. TRADING AS INDAVER IRELAND, CORK COUNTY COUNCIL, CARRIGALINE IFA, CORK ENVIRONMENT ALLIANCE, COBH ACTION FOR CLEAN AIR, CHASE, CHASE (BISHOPSTOWN), MONKSTOWN/PASSAGE/GLENBROOK/RATHEEN GROUP OF CHASE, MYRTLE ALLEN, DARINA ALLEN, GROWING AWARENESS, IRISH DOCTORS ENVIRONMENTAL ASSOCIATION, CARRIGALINE COMMUNITY FOR A SAFE ENVIRONMENT, CROSSHAVEN FOR A SAFE ENVIRONMENT, KINSALE ENVIRONMENT WATCH, AN TAÍSCE, THE OYSTER HAVEN CENTRE, THE HOPE PROJECT, WEST CORK GREEN PARTY, ALLAN NAVRATIL, BERTIE CRONIN, JOHN MASSON, JOAN MASSON, DAN BOYLE, T.D., SUE HACKETT, MICHAEL HARTY, ANNE MARIA RUSSELL, AND EAST CORK FOR A SAFE ENVIRONMENT

NOTICE PARTIES

JUDICIAL REVIEW

[2006 No. 69 J.R.]

BETWEEN

RINGASKIDDY AND DISTRICT RESIDENTS ASSOCIATION LIMITED

APPLICANTS

AND

ENVIRONMENTAL PROTECTION AGENCY, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

INDAVIR N.V. TRADING AS INDAVIR IRELAND

NOTICE PARIES

Judgment of The Honourable Mr Justice McCarthy delivered on the 18th day of February, 2008

1. The first mentioned proceedings were commenced by Originating Notice of Motion of the 19th April, 2004, to seek leave to apply for twenty-five orders, many of which are overlapping. For the purpose of the outcome of the present application, being an order staying or adjourning generally them pending a decision of the European Court of Justice in contemplated or pending proceedings, the relevant leave (and the grounds upon which it is based), turns upon the issue of whether or not our national legislative provisions are compatible with the obligations imposed on the State by Council Directive 85/337/EEC of the 27th June, 1985, on the assessment of the effect of certain public and private projects on the environment, and as amended by Directive 97/11/EC of the 3rd March, 1997 (hereinafter collectively referred to as "*The Directive*"). The Directive has been further amended by Council Directive 2003/35/EC, but since the applications for the particular permission and licence pre-dated it, (referred to below), I am not concerned with the amendment.

2. By the second mentioned proceedings, commenced by Originating Notice of Motion of the 13th February, 2006, certain substantive relief, similarly hinging upon the issue of whether or not the Directive was incompatible with those obligations, is sought.

3. In the first mentioned proceedings, it is sought to impugn the decision of the first named respondents therein (An Bord Pleanála) to grant planning permission for a development comprising *inter alia* the construction of a waste management facility (comprising a waste to energy facility, a waste transfer station and a community recycling park) at Ringaskiddy, and in the second mentioned proceedings, it is sought to impugn a decision of first named respondents therein (the Environment Protection Agency, otherwise the EPA) to grant a waste licence for the same development project.

4. The issue of whether or not the national legislative provisions in question are incompatible with the obligations of the relevant respondents (Ireland, otherwise, the State) under the Directive was conclusively disposed of in this State in *Martin v. An Bord Pleanála & Ors.* [2007] 2 I.L.R.M. 401. In addition to the fact that the Supreme Court held that there was no incompatibility in national law with the State's obligations aforesaid the Court also, however, considered that the meaning of the Directive was "clear", such that the applicant (and the grounds advanced by him) was "clutching at straws in his opposition to the decision" and the learned Chief Justice did not see "any reasonable scope for doubt on these issues" and, further such that having regard to the decision of the Court of Justice in *Cilfit v. Minister Della Sanita* [1982] E.C.R. 3415 and the criteria which it sets out in that regard there was no necessity to make a reference to the Court of Justice ("the E.C.J.") pursuant to Article 234 of the Treaty.

5. I need not, I think, in the nature of the application before me, need to consider the decision in *Martin* in detail in as much as it is common case that the point giving rise to the present proceedings has been determined in it. To put the matter shortly, however, Article 2(1) of the Directive imposes an obligation on the State to:-

> "adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment … are made subject to a requirement for development consent and an assessment with regard to their effects."

The phrase "development consent" is defined in Article 1(2) as:-

> "the decision of the competent Authority or Authorities which entitles the developer to proceed with the project."

Article 3 requires that the assessment take account of the effects on

> "human beings, fauna and flora; soil, water, air, climate and the landscape; material assets and cultural heritage."

and

> "the interaction between" those factors."

6. An Bord Pleanála has an obligation to carry out what is known as an environmental impact assessment ("an E.I.A.") in certain cases, pursuant to s. 26(5) (d) of the Local Government (Planning and Development) Act, 1963 but in relation to developments requiring a waste licence from the E.P.A. pursuant to s. 54(3) of the Waste Management Act 1966, the Bord cannot, in its environmental impact assessment, consider the risk of environmental pollution from the particular activity as this is to be assessed by the E.P.A. in a separate E.I.A. The matter came before the Supreme Court on a point of law certified by this Court (Smyth J.) after he had dismissed the application therein seeking judicial review inter alia on the issue of the lawfulness of An Bord Pleanála's decision on the basis that the legislative provisions on foot of which that decision was made were incompatible with the Directive, focusing, in particular, on the division of responsibility between An Bord Pleanála and the E.P.A.

7. The first issue of law so certified was whether or not the Directive had been properly transposed onto our law and three issues arose from the point certified namely, whether the grant of permission alone constituted a "development consent" within the meaning of Article 2(1) of the Directive, secondly, whether or not a full E.I.A. should have taken place before the grant of permission and, thirdly, whether or not the division of responsibilities between An Bord Pleanála and the E.P.A. did not allow for an integrated assessment of all factors as required by Article 3 of the Directive.

8. It was held by the Supreme Court (Murray, C.J., Denham and Geoghegan J.J. concurring) that "development consent" on the meaning of Article 2(1) of the Directive was comprised of both decisions since both a permission and a licence were necessary to permit a developer to proceed, that there was no rational basis for separating the development scheme into two projects consisting of the construction of (in that case) a certain plant and its operation, that once the competent authorities carried out their assessment before development consent had been given the terms of Article 2(1) of the Directive were complied with, that the Directive allowed for successive stages of decisions in the process leading to development consent whereby the competent authorities were able to take into account environmental effects at the earliest stage, that all of the relevant factors referred to in Article 3 of the Directive and the interaction between them were examined as required by the Directive at each stage of the consent process by the competent authorities and that An Bord Pleanála carried out an "integrated assessment" insofar as the construction of the project was concerned and the E.P.A. carried out an "integrated assessment" in relation to the operation of the plant. Further, it was held that that Directive did not envisage that the integrated assessment could only be carried out by one competent authority with global responsibility for it – two or more authorities might be competent for the purpose of fulfilling its requirements.

In *Cilfit* it was held that a national Court of final instance is required to interpret a question of community law raised before it but is not necessarily required under community law to refer it to the E.C.J.

> "If it has been established that the question raised is irrelevant or that the community provision in question has already been interpreted by the Court of Justice or that the correct application of community law is so obvious as to leave no scope for any reasonable doubt. The existence of such a possibility must be assessed in the light of the specific characteristics of community law, the particular difficulties to which its interpretation gives rise and the risk of divergencies in judicial decisions within the community."

9. As has been referred to above the learned Chief Justice applied those criteria: it must follow from *Martin* that the question of community law raised was not irrelevant nor had it been interpreted by the Court of Justice but the learned Chief Justice, in his judgment, concluded that:-

> "The correct application of community law (was) so obvious as to leave no scope for any reasonable doubt" (being their third "leg" or criterion relevant.)

and perhaps of particular relevance here, that conclusion must be assessed in the light, *inter alia*, of

> "the risk of divergences in judicial decisions within the community".

10. Thus, irrespective of any question which might arise as to whether or not this Court can effectively avoid its obligation to follow and apply the decision of the Supreme Court on the substantive matter pertaining to the Directive, I am bound by the decision of the Supreme Court which, by definition, having regard to its decision not to refer the matter to the European Court of Justice, leaves no scope for any reasonable doubt as to the correct interpretation of the Directive, and, in particular, no reasonable doubt as to whether or not the Supreme Court is correct.

11. It is accordingly in circumstances where as a matter of domestic law there is no reasonable doubt as to whether or not the Supreme Court's interpretation is correct, that I must consider these applications. For my purposes, accordingly, the decision, is an "*acte clair*". I am bound for every purpose in domestic law by the Supreme Court decision, as otherwise I would be in breach of a fundamental principle of our law namely to act, in accordance with the rule of *stare decisis*, and, as an inferior court, to follow and apply decisions of the Supreme Court.

12. Counsel for the applicants both orally and in writing have referred me to certain fundamental propositions pertaining to the primacy of community law in the light of alleged confusion, at least by the State respondents, in relation to that issue, in particular that community law has primacy over the domestic legal order of the Member State, that such primacy extends to national constitutional law, that national Courts are under an obligation to give effect to the primacy of community law and that decisions of the Courts of the Union and, in particular, the E.C.J., take precedence over decisions of the Courts of the Member States; it was helpful to draw my attention to these principles but I do not accept that anything said by or on behalf of the State respondents imply any confusion in that regard. I do not accept that it is relevant for the State, if it be so, to adopt, in this case a position which "flatly contradicts" the position "evidently" adopted by the State in *Friends of the Irish Environment Limited v. Ireland* [2005] I.E.H.C. 123 having regard to the fact of the application of the "*acte clair*" principle here, so far as this inferior domestic Court is

concerned; Martin, of course, had not been decided at that time.

13. No one would doubt the proposition that Article 10 of the Treaty establishes the principle of "loyal co-operation" between Member States including a duty to abstain from any measure which could "jeopardise the attainment of the objectives of the Treaty". Obviously *Cilfit* is in no way at variance with these fundamental principles and that duty under Article 10, of the Treaty, since the approach to be adopted in the case of an "*acte clair*" forms an intrinsic part of the jurisprudence of the E.C.J.

14. The applicants rely *inter alia* on *Masterfoods Limited v. H.B. Ice Cream Limited* and *H.B. Ice Cream Limited v. Masterfoods Limited*, trading as "*Mars Ireland*" (Case C – 344/98) [2002] E.C.R. I. 11415 (the opinion of the advocate general, delivered on the 16th May, 2000 being reported at I – 11371). In that case H.B. supplied ice cream to retailers and provided freezer cabinets free of charge or at a nominal rent provided that they were used exclusively for their products; subsequently *Masterfoods* sought to enter the market for ice cream in Ireland and certain retailers began to stock and display their products in H.B.'s freezer cabinets. *Masterfoods* sued in this jurisdiction *inter alia* for a declaration that the exclusivity clause was null and void in domestic law and under Articles 85 and 86 of the Treaty and, *H.B.*, in their turn, sued for an injunction to restrain *Masterfoods* from inducing retailers to breach the exclusivity clause. Ultimately *Masterfoods* claim was dismissed in the High Court and a permanent injunction restraining them from inducing retailers to store their products in freezers belonging to H.B. was granted. On the 4th September, 1992 *Masterfoods* appealed to the Supreme Court but in parallel to those proceedings, on the 18th September, 1991, *Masterfoods* lodged with the Commission a complaint under a certain Council regulation implementing Articles 85 and 86 of the Treaty on the same grounds as those as that pursued in their domestic proceedings. Ultimately, on the 11th March, 1998 the Commission made a Decision in a proceeding under Articles 85 and 86 of the Treaty (in effect) condemning the exclusivity agreement. *H.B.* sued in the Court of First Instance on the 21st April, 1998 for the annulment of the decision (including an application to stay the decision)

15. In due course the Supreme Court decided to stay the Irish proceedings for the purpose of seeking a preliminary ruling *inter alia*:-

> as to whether or not the obligation of sincere co-operation (referred to above and in Article 10 of the Treaty) with the Commission as expounded by the Court of Justice required the Supreme Court to stay the proceedings pending the disposal of the appeal to the Court of first instance, and any subsequent appeal to the Court of Justice,

and

> whether or not a Decision of the Commission addressed to an individual (itself the subject of an application for annulment and suspension) condemning, in that case, the exclusivity agreement as contrary to Articles 85(1) and/or Article 86 of the Treaty prevented that party from seeking to uphold a contrary judgment of the national Court in his favour on the same or similar issues, where that decision is appealed to the national Court of final appeal. A stay was, in fact, granted by the Court of first instance pending the judgment of the Court of Justice on the issues raised in the reference.

16. In the first instance it was held *inter alia* that it was for national Courts to decide whether to stay proceedings pending final judgment in an action for annulment or in order to refer a question to the Court for a preliminary ruling but that when a national Court is ruling on an agreement or practice the compatibility of which with Articles 85(1) and 86 of the Treaty which is:-

> "already the subject of a Commission decision it cannot take a decision running counter to that of the Commission, even if the latter's decision conflicts with the decision given by a national Court of first instance."

The Court, of course, stated that it was clear from its case law that Member States had a duty under Article 5 of the Treaty to take:-

> "all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising from community law and to abstain from any measure which could jeopardise the attainment of the objectives of the Treaty if binding on all the authorities of Member States, including, for matters within their jurisdiction, the Courts."

Furthermore, the Court pointed out that it:-

> "should be borne in mind …that application of the community competition rules is based on an obligation of sincere co-operation between the national courts, on the one hand, the Commission and the community Courts, on the other, in the context of which each acts on the basis of the role assigned to it by the Treaty",

and:-

> "when the outcome of the dispute before the national Court depends on the validity of the Commission's decision, it follows from the obligation of sincere co-operation that the national Court should, in order to avoid reaching a decision that runs counter to that of the Commission, stay its proceedings pending final judgment in the action…..unless it considers that, in the circumstances of the case, a reference to the court of justice for a preliminary ruling on the validity of the Commission decision is warranted."

There is, of course, a fundamental difference between *Masterfoods* and the present case; in discharge of its obligations to enforce community law in respect of competition the Commission had issued a Decision which had binding legal consequences or effect, analogous to the decision of a Court, such that, as a fact, there were two conflicting decisions which, ultimately, might be resolved by the E.C.J., that in Ireland, in any event, being that merely of the High Court.

17. In *Merck v. Serle* [2002] 3 I.R. 614 this Court stayed proceedings to revoke a patent in circumstances where proceedings pertaining to the same patent were pending before the European Patent Office. McCracken J., in the course of his judgment said that:-

> "From the authorities I am quite satisfied that, *prima facie*, a stay should be granted in cases such as this …as the State has recognised the right of the European Patent Office to determine applications for the grant of a patent which will extend to this jurisdiction, including the right to allow amendments to and hear objections in relation to such patent, it would seem somewhat illogical, unless there was very good reason, for revocation proceedings to be heard in this country before the final determination of the existence and form of the patent by the European Patent Office."

He went on to say, however, that:-

> "In considering whether to grant a stay, therefore, the Court must start with the premise that, if possible, it should be granted, and then consider whether their reasons why it should be refused."

In deciding whether or not to grant a stay McCracken J. considered that he had to balance the arguments for and against the *prima facie* position and in that regard he quoted from the judgment of Aldous L.J. in *Kimberly-Clarke Worldwide v. Proctor and Gamble* [2002] F.S.R. 235 (at page 245) as follows:-

> "It is not sensible for a Court in this country to allow proceedings to be heard in this country which duplicate those in the European Patent Office unless justice requires that to happen. At the time that the 1977 Act (which dealt with the jurisdiction of the European Patent Office in England) it was envisaged that proceedings before the European Patent Office would be concluded with reasonable expedition. The consequences would be that any overlap between European Patent Office proceedings and national actions could be prevented by staying the proceedings in this country for a short period. In some cases the Patent Court has refused to stay proceedings in this country, despite the obvious desirability of taking that action, because of the injustice that a stay would cause."

and he also quoted from the judgment of Laddie J. in *Unilever Plc. v. Frisa N.V.* [2000] F.S.R. 708 to the effect that;-

> "It appears to me that the approach indicated by Aldous Lord Justice is one that has to apply here. I have to look at all the circumstances. I have to consider whether injustice would be caused by a stay and I have to bear in mind that there are at least some cases where the preferred option should be that duplication of proceedings should be avoided and so a stay should be granted."

18. In Merck & Co. the petitioners contended that if a stay was granted pending the decision of the European Patent Office there would be a patent in force in Ireland allowing claims which were far wider than those likely to be allowed by the European Patent Office if the patent in question was upheld. He said that this was "certainly a consideration" in as much as the respondents would have had the benefit of a monopoly for several years to which they almost certainly were not entitled. In this connection he stated:-

> "This is quite rightly put forward as being a matter of public interest rather than simply an inter-partes matter."

19. It will be seen, accordingly, that a variety of factors were relevant to the decision of Merck & Co; no one could doubt that, ideally, the *desideratum* to be achieved must be the avoidance of conflicting decisions by different Courts – a *desidratum*, of course, not confined to public law matters of the present kind. The case, if anything, imports into the equation, if and insofar as I have a discretion in the matter, something in the nature of the balance of convenience (to put the matter shortly) as well as, of course, most significantly, the application of the doctrine of *stare decisis* and my obligation to follow decisions of the Supreme Court, a failure to do which would, in my view, constitute a fundamental breach by me of my duty under the domestic legal order. I have been addressed as to the principle of legal certainty. This is not conclusive, of course, - the very point is that an element of uncertainty has now been imported which would be best resolved by awaiting the decision of the E.C.J. but equally, I think that my obligation is clear.

20. Furthermore it seems to me that McCracken J.'s reference to the public interest is of assistance for a number of reasons. Firstly it is obviously not in the public interest to occasion, by a stay or adjournment, an effective postponement of a major infrastructural projects of the present kind, and a stay or adjournment here would give rise, presumably, to a similar application in any other proceedings commenced in respect of an alleged breach in the case of any other such projects throwing all into uncertainty. Thirdly, of course, one would have thought that the application of the duty of an inferior court to follow a decision of the Supreme Court when the law has been conclusively settled by it, is similarly in accord with it.

Thus, if the matter was discretionary in accordance with the principles in that case I would have little hesitation refusing the application in this case.

21. I am also referred to *Friends of the Irish Environment Limited v. Minister for the Environment & Ors.* (Unreported, High Court, Murphy J., 15th April, 2005). That was a case which similarly concerned the directive, but in another aspect and the Commission, at the time of the application, had given notice that it intended to issue Article 226 proceedings against the State before the E.C.J., following a reasoned opinion. Ireland had not, at the date of hearing been formally notified of the institution of the proceedings. Murphy J. quite rightly pointed out that:-

> "The ruling of the Court of Justice on the matter would take precedence over any national ruling. For a national Court to proceed to a decision where it was aware that the Court of Justice would inevitably be ruling on precisely the same matter (with the risk of possible conflicting decisions that that would entail) would, in the submissions of the defendant, be contrary to a national Court's obligations under Article 10".

22. The key difference between the facts of that decision of Murphy J. and the present case is the absence of a decision of the Supreme Court in the two respects to which I have referred in the context of my obligations under the domestic legal order and is, accordingly, in no sense dispositive in the present case.

23. I have been referred to *Irish Trust Bank Limited v. Central Bank of Ireland* [1976/7] I.L.R.M. 50 and *Re: Worldport Ireland Limited*. In the former case Parke J. held that:-

> "The principle of *stare decisis* requires that a Court should not depart from a decision of another Court of equal jurisdiction unless it is established that the decision was based on insufficient authority or incorrect submissions, or that the judgment departed in some way from the proper standard to be adopted in judicial determination."

He did, of course, say that:-

> "Whatever may be the case in Courts final appellate jurisdiction a Court of first instance should be very slow to act on such a proposition (i.e. that an earlier decision suffered from the infirmity of the type referred to above) unless the arguments in favour of it were coercive. If a decision of a Court of first instance is to be challenged I consider that the appellate Court is the proper Tribunal to declare the law unless the decision in question manifestly displays some one or more of the infirmities to which I have referred. The principle of *stare decisis* is one of great importance to our law and few things can be more harmful to the proper administration of justice which requires that, as far as possible, lay men may be able to receive correct professional advice than the continual existence of inconsistent decisions of Courts of equal jurisdiction."

I am not, as I say, here departing from a previous decision of this Court but rather, however, I am applying a decision of the Supreme Court as to the existing law and as to the fact that at least for domestic legal purposes there is no risk of a conflicting decision.

24. In In the matter of *Worldport Ireland Limited (in Liquidation)* (Unreported, High Court, Clarke J., 16th June, 2005) it was sought before him to re-visit a decision of Kearns J. in *Re: Industrial Services Limited* [2001] 2 I.R. 118, which he declined to do but the reasons for which refusal are substantially the same as those of Parke J. and one has no difficulty with these principles since no question of departure from a prior decision of this court arises but rather the following of the Supreme Court.

25. The applicants also refer me to *Kingdom of Belgium v. Ryanair Limited* (Unreported, High Court, O'Neill J., 30th June, 2006). That case, of course, was what might shortly be described, as a case emanating from a decision of the Commission pertaining to certain State aids given by the plaintiff to the defendant which were held incompatible with Article 87(1) of the Treaty. I have already dealt with the status of such a Decision. The defendants sought to stay proceedings by the plaintiff for the recovery of sums which ought not to have been forewent (including discounts), marketing contributions, so called one shot incentives and other payments under the terms of the Anti Competitive State Aids Scheme condemned by the Commission. The defendant had instituted proceedings in the Court of first instance seeking an annulment of the decision in question and it was common case that if the defendants were successful there would be no basis for recovery of the sums claimed. O'Neill J. took the view that the principles for a stay on the proceedings were those elaborated by the E.C.J. in *Zuckerfabrik Suederdithmarschen A.G. Hauptzllamt Itzehoe* (1991) E.C.R. 415 applied in this jurisdiction and on the basis of which a stay was refused. No risk of conflicting decisions arose since the defendant could not impugn the Commission decision in a domestic Court whether collaterally in the proceedings to recover the money or directly and the continuance of the proceedings to judgment or the discharge of any judgment, something which it was sought to arrest by a stay, was, effectively, a different matter and, by definition, accordingly there is no want of comity on my part in omitting application of it, even absent any other factor.

26. *Zuckerfabrik* dealt with the principles applied by the E.C.J. to applications for stays on Commission decisions (which had binding legal/effects) I am of the view however that this is authority which supports the respondent's positions. This grant of a stay is under that decision a discretionary matter. Even if there would have been no direct potential conflict one might argue that even though the amount of any judgment recovered could be repaid and the defendants could bear what I might term the interim loss it would nevertheless be the case that judgement might be recovered on the basis of a decision held bad. If the principles confirming a discretion were applicable to the applications before me, the factors relevant in *Merck & Co.* might be relevant.

27. In any event, as a minimum I consider that my duty to consider this matter on the basis of the decision of the Supreme Court is not diluted or undermined by it.

28. I turn now to the submissions made on behalf of the first named notice party in each of the proceedings, namely, Indaver N. V. trading as Indaver Ireland (hereinafter referred to as "Indaver"). In *Kapferer v. Schlank* where an Austrian Court sought a preliminary ruling concerning the interpretation of Article 10 E.C. and Article 15 of Council Regulation (E.C.) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters the respondents were domiciled in Germany and the applicants sought an order requiring them to award her a certain prize and the case turned on a question of jurisdiction, in respect of which a final and conclusive judgment on international jurisdiction had been rendered where the judgment was ultimately held to be contrary to community law. The reference pertained in the issue of whether, and, where relevant, in what conditions, the principle of co-operation arising from Article 10 E.C. imposes on a national court an obligation to review and set aside a final judicial decision if that decision should infringe community law and the Court held that:-

> "in that regard, attention should be drawn to the importance, both for the community legal order and national legal systems, of the principle of *res judicata*. In order to ensure both stability of the law and legal relations and the sound administration of justice, it is important that judicial decisions which have become definitive after all rights have been exhausted or after expiry of the time limits provided for in that connection can no longer be called into question"

and

> "therefore, community law does not require a national court to disapply domestic rules of procedure conferring finality on a decision, even if to do so would enable it to remedy an infringement of community law by the decision at issue"

and, further:-

> "by laying down the procedural rules for proceedings designed to ensure protection of the rights which individuals acquire through the direct effect of community law, Member States must ensure that such rules are not less favourable than those governing similar domestic actions (principle of equivalencer) and are not framed in such a way as to render impossible in practice the exercise of rights conferred by community law (principle of effectiveness).

29. Of course it is arguable that an insistence that an action proceed (as in the present case in the face of contemplated or pending proceedings) which might result in conflicting decisions and a breach of community law being held to exist there is, of course, no right conferred by community law which, at this date, could be said to be breached or, indeed, potentially breached, so far as any domestic court is concerned, having regard to the decision of the Supreme Court and the principle of an "*acte clair*". The fundamental point, of course, which one derives from this decision is the acknowledgement of the principle of co-operation under Article 10 E.C. does not require a national court to disapply its internal rules of procedure, a fundamental element of which, in turn, is the rule of stare decisis, and the obligation to follow and apply a decision of the Supreme Court, on this Court. It seems to me that it cannot be that every potential finding of a breach of community law fundamentally undermines the autonomy of the law of procedure and, of course, that could never be the case where an "*acte clair*" is concerned.

30. I am referred also to *Rewe-Zentralfinanz & Oths. v. Landwrtschaftskammer* [1976] E.C.R. 1989 and *Van Schijndel & Another v. Stichting* (joined cases C-430/93 and C-431/93) which have only a narrow application and add little to the proceedings. The former case pertained to a regulation (regulation No. 159/66/EEC) which had direct effect and conferred on citizens rights which the national courts were required to protect and it was held that it was for the domestic legal system of each Member State to designate the Courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have in the case of direct effect and the plaintiffs relied upon the question of the compatibility of a certain compulsory pension fund with higher ranking rules of community law: primarily, the plaintiffs relied upon certain Articles of the Treaty which were of direct effect. The Court *inter alia* held that in the context of the procedural issues raised in the case:-

> "In each case which raises the question whether a national procedural provision renders an application of community law impossible or excessively difficult it must be analysed by reference to the role of that provision in the procedure, its

progress and its special features, viewed as a whole, before the various national instances. In the light of that analysis the basis principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure, must, where appropriate, be taken into consideration".

31. This proposition is subject to the qualifications that procedural autonomy does not extend to circumstances where the principles of effectiveness would be breached. However, as far as our courts are concerned, at the risk of repetition, no breach need be feared to say nothing about the vindication of rights later by damages.

32. The questions referred by the Dutch Court to the E.C.J. pertained to the issue of whether or not a domestic court, even when the party with an interest in the directly applicable community law provisions in question had not relied upon them, has an obligation to raise them where domestic law allows such application by the national court. It was held that community law does not require national courts to raise of their own motion an issue concerning such a breach where such examination would oblige them to abandon the passive role assigned to them by going beyond the ambit of the dispute defined by the parties themselves and relying on facts and circumstances other than those on which the party with an interest in (the application) of those provisions base his claim:-

> "in the absence of community rules on this subject, it is for the domestic legal system of each Member State to designate the Courts having jurisdiction (to give direct effect and confer on citizens rights which the national courts are required to protect) and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of community law, it being understood that such conditions cannot be less favourable than those relating to similar actions of a domestic nature. The position would be different only if the conditions made it impossible in practice to exercise the rights which the national courts are obliged to protect".

33. The most recent case opened to me on the question of procedural autonomy is that of *Unibet (London) Limited & Another v. Justitiekanslern* [2007] 2 C.M.L.R. 30 where the principle of procedural autonomy is addressed in the context of effective judicial protection of an individuals rights under community law. Of particular significance, however, in the present case is that the E.J.C. (at paragraph 72 and 73 of the report) stated that:-

> "Where it is uncertain under national law, applied in accordance with the requirements of community law, whether an action to safeguard respect for an individuals rights under community law is admissible, the principle of effective judicial protection requires the national court to be able, nonetheless, at that stage to grant the interim relief necessary to ensure those rights are respected".

and

> "however, the principle of effective judicial protection of an individuals rights under community law does not require it to be possible in the legal order of a Member State to obtain interim relief from the competent national court in the context of an application that is inadmissible under the law of that Member State, provided that community law, as interpreted in accordance with paragraph (71) above does not call into question that inadmissibility".

Paragraph 71 is to the effect:-

> "… the principle of effective judicial protection of an individuals right under community law does not require the national legal order of a Member State to provide for a free standing action for an examination of whether national provisions are compatible with community law, provided that other legal remedies make it possible for an issue of compatibility to be determined as a preliminary issue."

34. It seems to me that the latter provision merely pertains to the issue of whether or not a procedure actually permitted or afforded by domestic law protects such rights where the action is admissible. In the light of *Martin* it seems to me that it is not admissible in domestic law here.

35. Counsel for the applicants has elaborated upon the differentiation between proceedings under Article 226 of the Treaty by the Commission before the E.C.J. as to whether or not a State is in breach of its obligations under a Directive, namely, *Commission v. Italy* [1970] E.C.R. 32, *Commission v. Germany* [1995] E.C.R., I-2189 C*ommission v. United Kingdom* [C-508/03], *Commission v. Italy* [C-87/02] and *Commission v. Ireland* [C-392/96] . I appreciate that the reason why I have been asked to consider these decisions is for the purpose of showing such a distinction between infringement proceedings and proceedings of the present class before a national court and that the national court ought not, because of their different nature, adjourn generally the proceedings before it where a similar issue falls to be determined. I do not think these are of particular assistance: the cases of greater direct relevance have been cited sufficiently elaborating these various principles in debate. I am referred, also, to *Commission v. Germany* [1995] E.C.R. I-2189 where, of course, it was held that the issue of whether or not a Directive is to be construed as imposing an obligation on a Member State is a different question to that of whether or not it has direct effect: this is an unexceptional statement of principle.

A remedy in damages can be afforded to the applicants by virtue of *Kobler v. Austria* [C-224/01]. Of course that decision is supportive of the concept of the procedural autonomy of Member States. Damages would arise only in the case of a directive having direct effects.

36. I summarise my conclusions as follows:-

> (l) By virtue of the decision of the Supreme Court in *Martin v. An Bord Pleanála* [2007] 2 I.L.R.M.401, the domestic law is unambiguously to the effect that the Directive has been validly transposed into domestic law and that that conclusion, to put the matter shortly, falls into the doctrine of the "*acte clair*".
>
> (2) By virtue of that decision the court is bound by the principle of *stare decisis* as an inferior Court to apply it with the consequence that for every purpose connected with this application there is no breach by the State of its obligations under the Directive and no reason to believe that any contrary decision will be reached by the E.C.J.
>
> (3) The doctrine of the "*acte clair*" is an intrinsic part of community law and its application in no sense detracts from duties of loyal co-operation a rising pursuant to Articles 5 and 10 or otherwise.
>
> (4) The autonomy of national procedural law does not, under community law, extend to a case where such a law would mean that judicial protection of community rights would be lacking but in a case where a Court of final instance, as with

the core substantive issue here, has made a final determination there is no basis under our law for a court of first instance to fear that and in as much as the applicants contentions are inadmissible as that term is understood in community law.