THE HIGH COURT

JUDICIAL REVIEW

COMMERCIAL

[2017 No. 145 J.R.]

[2017 No. 42 COM]

IN THE MATTER OF AN APPLICATION PURSUANT

TO SECTION 50 AND SECTION 50B OF THE

PLANNING AND DEVELOPMENT ACT

AND

IN THE MATTER OF AN APPLICATION

BETWEEN

MICHAEL ALEN-BUCKLEY

AND

GIANCARLA ALEN-BUCKLEY

APPLICANTS

AND

AN BORD PLEANÁLA

FIRST NAMED RESPONDENT

AND

IRELAND AND THE ATTORNEY GENERAL

SECOND NAMED RESPONDENT

AND

WATERFORD COUNTY COUNCIL

AND

ECO POWER DEVELOPMENT LIMITED

NOTICE PARTIES

JUDGMENT of Ms. Justice Costello delivered on the 12th day of May, 2017

1. This is an application brought by the second named respondent ("the State defendants") for: -

> *"An Order seeking the dismissal and/or striking out of the Applicant's proceedings and/or the pleas and claims made herein sought against the Second Named Respondent pursuant to Order. 19 rules. 27 and/or 28 RSC and/or the inherent jurisdiction of his Honourable Court insofar as the same discloses no reasonable cause of action against the Second Named Respondent and/or is frivolous and/or vexatious and/or an abuse of process and/or is bound to fail".*

2. The applicants brought an application for leave to seek judicial review to quash a decision of An Bord Pleanála ("the Board") of the 14th December, 2016, granting the second named notice party planning permission (Reg. REF. PL 93.244006) for a development comprising inter alia eight no. wind turbines with an overall height of up to 126.6 metres, one no. meteorological mast with wind measuring equipment attached, access roads, electrical substation compound, equipment and control building and ancillary site works at Knocknamona, and other town lands, Co. Waterford.

3. On 16th February, 2017, the applicants applied ex parte for leave to seek judicial review of the decision. The application was adjourned to 20th February, 2017, and on 20th February, 2017, Noonan J. granted the applicants leave to seek the judicial review as sought. In the usual way, the order recites that leave to apply by way of application for judicial review for the reliefs set out at para. 4 of the statement of grounds is granted on the grounds set forth in para. 5. The reliefs at para. 4 of the statement of grounds are as follows: -

> *"(i) an order of certiorari quashing the decision of An Bord Pleanála to grant planning permission for a proposed development and construction of eight no. wind turbines of up to a height of 126.6 metres together with ancillary equipment of Knocknalogh, Lower/Earanctok, Upper/Knocknamona, Woodhouse/Tinakilly/Monageela/Killatar, Dungarvan, Co. Waterford which application planning register reference no. 4/600109 An Bord Pleanála reference PL 93/244006 was made on 14 day of December 2016;*
>
> *(ii) A declaration that the application made and in particular the public notice failed to comply with the requirements of Environmental Impact Assessment Directive 2011/92 EU and in respect of the project the subject matter of that Environmental Impact Assessment failed to properly notify the public as is required under the Directive about the true*

nature and extent of the Development.

(iii) A Declaration that by virtue of the nature and extent of the application and in particular the failure to identify as part of the application the grid connection works, the Respondent Planning Appeals Board was not capable of adequately conducting an Environmental Impact Assessment in respect of that development and in particular from imposing mitigation measures in respect of that part of the grid connection which was not included in the application.

(iv) A Declaration that in seeking to impose conditions in respect of a part of a development, namely the connection of a proposed windfarm by way of a grid connection to the network, the Respondent could not impose conditions on land which lay outside the control of the developer and/or impose conditions on lands did not form part of the application and/or in respect of part of the development which is not the subject matter of a planning application.

(v) A Declaration that a planning application for a wind turbine development which requires as part of the project a connection to the national grid must contain the totality of the application to the relevant Planning Authority and must insofar as development is described in the Environmental Impact Statement must (sic) be consistent with development for which planning permission is sought and it is ultra-vires to determine an application and purport to include conditions relating (sic) a development which did not form part of the application.

(vi) A Declaration that the application lodged pursuant to An Bord Pleanála ref. PL 92.244006 did not comply with the provisions of the Planning and Development Regulations 2001 and in particular Part 4 of the Planning and Development Regulations 2001 (as amended).

(vii) A stay on the implantation of planning permission PL 92.244006.

(viii) Interim and interlocutory relief.

(ix) Further and other relief.

(x) The costs of this application".

4. On the 23rd February, 2017, the proceedings were served on the State defendants. The second named notice party applied to have the proceedings admitted into the commercial list of the High Court. On the 13th March, 2017, by order of the High Court (McGovern J.), the proceedings were entered into the commercial list and a timetable for a trial on the 11th July, 2017, established. On the 15th March, 2017, the State defendants' solicitors wrote to the applicants' solicitors pointing out that as no express relief had been sought against the State defendants if they would confirm that they would permit the State defendants to be released from the proceedings and discontinue the proceedings as against them, in that event they undertook that they would not seek costs to date as against the applicants.

5. On the 20th March, 2017, the applicants' solicitors replied to the letter of the 15th March, 2017 in the following terms: -

"These proceedings relate in part to issues relating to the transposition of Council Directives 92/43/EU and 2011/92 EU.

We refer you in particular to the granted (sic) at paragraphs. 4 and (ii), (iii) and (iv) of the Statement required to ground the application for judicial review based on the grounds set out at paras. 5 xvii, xviii, xxv, xxvi, xxvii, xxviii and xxxiv in this regard.

The primary respondent is the Board of (An Bord Pleanála) as the entity who made the decision and to the extent that it acted ultra vires due to the manner it determined the application.

We are however concerned lest the Board may rely on the domestic law provisions to authorise and justify the manner in which it determined the application. In the event that it does so then the extent to which any such domestic law provision appropriately transposes the requirements of the Directives must be reviewed and accordingly clearly Ireland and the Attorney General are appropriate respondents.

It may be that these issues will become clearer when the respective Statements of Opposition and replying affidavits are filed and we have no objection if the State wishes to reserve it's (sic) position pending the extent to which the Board seeks to raise transposition issues and the extent of the State's involvement that will be required in those circumstances can be reviewed at that stage."

6. In light of that letter, the State defendants brought the motion which came on for hearing before me on the 4th May, 2017.

The Case of the State Defendants

7. The State defendants argue that the applicants seek no relief against the State defendants and accordingly these judicial review proceedings should be dismissed as against the State defendant.

8. Secondly, they state that only three of the 37 grounds set out in the statement of grounds in anyway concern the State defendants. These are (xxv), (xxvi) and (xxvii). They read as follows: -

"(xxv) the Respondent erred in law and in fact in the assessment of the visual impact of the development which assessment was based not on Development Plan policies as is required under the Planning & Development Act but on the guidance set out in the Wind Energy Guidelines 2006. The Respondent failed to have regard to relevant considerations in it's (sic) determination of the application. Insofar as the Respondent Planning Appeals Board acted without jurisdiction in determining an application where the development the subject matter of the planning application is materially different than (sic) the development the subject matter of the Environmental Impact Statement, Second Named Respondent has failed to transpose the requirements of Council Directive 2011/92/EU.

(xxvi) The Second Named Respondent has failed to transpose Council Directive 2011/92/EU in providing for a process which fails to adequately notify the public and to allow appropriate and/or effective notification of the public which is expressly provided for in the Environmental Impact Assessment by the publication of notices which failed to disclose to the public the true nature and extent of a development the subject matter of the Environmental Impact Assessment.

(xxvii) The determination of planning application 14/600109 An Bord Pleanála Reference PL93.2440006 if made in a manner consistent with the Planning & Development Act and Planning & Development Regulations 2001 (as amended) made thereunder, renders the statutory scheme inconsistent with and incompatible to Council Directive 2011/92/EU and the Second Named Respondent failed to appropriately transpose the requirements of the Directive."

9. In relation to ground (xxv), the State defendants submit that they cannot understand what is meant, but that whatever it means, it does not give rise to a transposition point.

10. In relation to ground (xxvi) they submit that the court must first determine that the procedure followed by the Board was lawful and authorised by either the Act or the Regulations. If the actions of the Board were not lawful, then that is the end of the matter. If, on the other hand, the court holds that the actions of the Board were lawful, in the sense that they were authorised by the Act or the Regulations, it is only then that the court will have to consider whether the legislation or the Regulations fails properly to transpose the Directive into Irish law as alleged by the applicants. It is only at this point that there could be a case to answer. However, even if a court were to proceed to conclude that the Directive had not been properly transposed into Irish law, the fact remains that the applicants have neither sought nor obtained leave to seek any relief against the State defendants and in particular have not sought a declaration that any provision of the Directive has not been properly transposed into Irish law or that any provision of Irish law is inconsistent with the requirements of the Directive. It follows therefore that there is no issue for the court in fact to determine.

11. They make a similar argument with regard to ground (xxvii). They say that the court must first determine whether the actions of the Board were lawful or otherwise permitted by the Irish domestic legislation before any issue regarding transposition of the Directive can arise.

12. The State defendants submit that the applicants have failed to identify any provision of the Directive upon which they rely. They have failed to identify any provision of either the Planning and Development Act 2000 or the Regulations which they say was relied upon by the Board in this case, and which the applicants say did not properly transpose any provisions of the Directive which they have identified as having direct effect. In essence they say the applicants have failed to identify in their pleadings what Ireland is alleged to have done wrong. The pleadings do not therefore disclose a cause of action against the State defendants.

13. They say that the applicants have not complied with the requirements of the rules of court. Order 84, r. 18 requires that an application for leave to seek judicial review must be made in accordance with O. 84. Order 84, r. 20 (3) provides: -

"It shall not be sufficient for an applicant to give as any of his grounds for the purposes of paragraphs. (ii) or (iii) of sub rule (2) (a) in assertion in general terms of the ground concerned, but the applicant should state precisely each such ground, giving particulars where appropriate, and identify in respect of each ground the facts or matters relied upon as supporting that ground".

14. The State defendants say that the applicants' proceedings clearly do not satisfy this requirement. Grounds (xxv), (xxvi) and (xxvii) quoted above are vague and not precise. They do not identify in respect of each ground the facts or matters relied upon as supporting that ground as required by r 20 (3).

15. The State defendants also point to the provisions of O. 84, r. 22 (5) which imposes a mirror obligation upon a respondent. It states: -

"It shall not be sufficient for a respondent in his statement of opposition to deny generally the grounds alleged by the statement granting the application, but the respondent should state precisely each ground of opposition, giving particulars where appropriate, identify in respect of each such ground the facts or matters relied upon as supporting that ground, and deal specifically with each fact or matter relied upon in the statement grounding the application of which he does not admit the truth (accept damages, where claimed)."

16. The State defendants submit that the applicants' pleadings do not permit them to comply with their obligations under r 22 (5).

17. The State defendants refer to the affidavit of Ms. Deirdre Courtney, the applicants' solicitor, sworn in opposition to the motion on the 2nd May, 2017, and in particular to para. 25 where she avers:

"In the event that the First Named Respondent succeeds and says that it has acted in a manner consistent with Irish Domestic law the applicants may be significantly prejudiced by failing to have the appropriate entity before the Court, namely the Second Named Respondent, who is responsible for and the appropriate person answerable in respect of issues of transposition".

18. The State defendants argue that it is not appropriate for an applicant for judicial review to seek in effect to hold a party in reserve. An applicant seeking judicial review must bring forward the whole of his case within the time limited by O. 84, r. 23 (1). The conduct of the applicants in this regard effectively circumvents this requirement and amounts to an abuse of the process of the court.

19. The State defendants move the motion on the basis of the provisions of O. 19, r. 28 of the Rules of the Superior Courts and the inherent jurisdiction of the court. Rule 28 provides as follows: -

"The Court may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer and in any such case or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the court may order the action to be stayed or dismissed, or judgment to be entered accordingly as may be just."

20. Insofar as the State defendants rely upon the provisions of O. 19, r. 28, they submit that the pleadings disclose no cause of action against the State defendants. No relief has been sought against them. It is not possible to discern any precise allegation of wrongdoing maintained against them in the proceedings. They rely upon the well known decision of *Barry v. Buckley* [1981] I.R. 306 as authority that if the pleadings do not disclose a cause of action, then the court may dismiss the proceedings.

21. In addition, they rely upon *Barry v. Buckley* as authority for the proposition that apart from O. 19, the court has an inherent jurisdiction to stay or strike out proceedings to ensure that an abuse of the process of the courts does not take place. If proceedings are frivolous or vexatious, they will be stayed and if it is clear that the plaintiff's claim must fail they will also be stayed.

22. They state where no relief at all is sought against a party they are not necessary to the proceedings and in that sense the maintenance of the proceedings against the party constitutes an abuse of process or, in the language of the case law, the proceedings are frivolous or vexatious.

23. The State defendants relied upon the decision of *Lowes v. Coillte Teo* (Unreported High Court, Herbert J., 5th March 2003) as authority for the proposition that an application to dismiss a claim as an abuse of process may properly be brought in respect of an application for judicial review where leave to bring the proceedings has already been granted. At p. 28 of the judgment Herbert J. stated: -

> *"The fact that the leave to apply procedure provided by Order.84 Rule 20, "is designed so as to ensure that cases which are frivolous, vexatious or of no substance cannot begin", [per Kelly J. in O'Leary v. Minister for Transport Energy and Communications (2000) 1 ILRM., 391 at 397], does not apply because such leave has been granted an arguable case must be presumed to have been established by the Applicant so that an application to set aside the leave given and to dismiss or stay the proceedings could not thereafter be properly entertained. [Toma Adams & Ors v. Minister for Justice, Equality and Law Reform, Ireland and Attorney General (2001) 2 ILRM., 452, Supreme Court]. Other than in exceptional circumstances applications for leave to seek judicial review are made ex parte. Occasions will undoubtedly arise, particularly where issues of fact are concerned, where the basis for an application to set aside the leave given and to strike out or to stay the Judicial Review proceedings as an abuse of the processes of the Court will become apparent only when the Respondent has an opportunity of being heard, and without any suggestion of a failure on the part of the Applicant for leave to seek Judicial Review to make full and frank disclosure to the Court in the course of the ex parte application of all material facts and law. The fact that an Applicant has been given leave to seek Judicial Review does not in my judgment impose a standard of proof greater than the ordinary civil standard on a respondent seeking to have Judicial Review proceedings dismissed or stayed as an abuse of the process."*

They say it is clear form this passage that the court has jurisdiction to grant the relief sought by the State defendants despite the fact that these are judicial review proceedings and that the applicants have been granted leave to seek judicial review in terms of their statement of grounds and that this is an appropriate case in which to exercise that jurisdiction to avoid an abuse of the process of the court by continuing proceedings against a party in respect of whom no relief is sought.

The Submissions of the Applicants

24. The applicants submitted that the fact that leave to seek judicial review had been granted was a complete answer to the motion of the State defendants. They emphasised that leave had been granted not merely to seek judicial review but to seek judicial review pursuant to the provisions of ss. 50 and 50B of the Planning and Development Act 2000. This required the applicant to satisfy the High Court that it had raised substantial grounds and that the applicants had a substantial interest in the proceedings. This was a high threshold which the applicants had satisfied in this case.

25. It was submitted that in those circumstances, it could not be said that the pleadings failed to disclose a cause of action or that they were frivolous or vexatious or bound to fail. It was submitted it would be improper even to "engage with the findings of the court already made".

26. It was submitted that it was perfectly legitimate for the applicants to raise the issue of the transposition of the Directive into Irish law in the manner in which they did. They would be criticised if, at the hearing of the application for judicial review, they sought to challenge the proper transposition of the Directive into Irish law if the Sate defendants were not made parties to the proceedings.

27. They emphasised that the jurisdiction to strike out proceedings, whether pursuant to O.19 r. 28 or pursuant to the inherent jurisdiction of the court, should always be exercised very sparingly and with great caution and only when it was very clear that the proceedings were bound to fail. They referred to Mark De Blacam, *Judicial Review*, 2nd Ed. (Dublin, 2009) to the effect that relief under O. 19, r. 27 or 28 is less likely to be invoked in judicial review proceedings since the applicant must obtain leave before the making of his application. They noted that in *O'Connell v. the Environmental Protection Agency* [2001] 4 I.R. 494 the court refused to strike out proceedings against the Environmental Protection Agency citing the difference between judicial review proceedings and other proceedings which may be issued without obtaining the leave of the court.

28. The applicants submitted that the fundamental error which arose in this case was that An Bord Pleanála conducted an Environmental Impact Assessment that was far greater in scope than the planning permission actually applied for. The applicant had applied to develop the wind farm and notices in respect of the development related to that application for planning permission. When considering the matter, the Board required the second notice party to submit further information in relation to the proposed options for connecting the wind farm to the grid and conducted an EIA in relation to those proposals in addition to the actual development in respect of which planning permission was sought.

29. The applicants argue that this was impermissible and ultra vires. The notices to members of the public including the applicants related to the application for planning permission and not to the wider subject matter of the EIA. If this was impermissible under domestic law, then the decision of the Board was ultra vires. If the approach was permitted by domestic law, then the applicants submit that this deprives them of the notice to which they are entitled under the provisions of the Directive and therefore it must follow that the State has failed properly to transpose the Directive into national law.

30. The applicants argue that these and other arguments which they say flow from the difference between the application for planning permission and the scope of the EIA conducted by the Board are substantial arguments and are not frivolous and vexatious and are not bound to fail.

31. The applicants submit that they have sought relief against the State defendants in paragraphs 4 (i) and (ii) of the Statement of Grounds and therefore the submissions of the State defendants are incorrect insofar as they say no relief has been sought.

32. The applicants deny that they have in their pleadings failed to comply with requirements of O. 84, r. 20 (3) or that the State defendants would not be able to plead their grounds of opposition in compliance with the requirements of O. 84, r. 22 (5).

33. Finally, the applicants submit that the State defendants, had they wished to pursue the argument advanced by this motion, ought properly to have brought an application to set aside the leave that was granted by Noonan J. They submit that had such an application been brought, then the State defendants would have had to satisfy the court that it was appropriate to set aside the leave that has been granted and it was not permissible to adopt the alternative approach of the State defendants in the circumstances.

Discussion

34. The applicants' fundamental argument that the order granting them leave to seek judicial review is determinative of this motion is not correct. If it is open to a party to seek to set aside a grant of leave to seek judicial review, as was submitted by the applicants, then it follows that it cannot be improper to "reengage with the findings of the court already made" as was submitted by the applicants. If it is permissible to do so – for the purposes of setting aside the grant of leave - it must likewise be permissible for the purpose of dismissing a claim that discloses no cause of action, is bound to fail, is frivolous or vexatious or an abuse of process.

35. Secondly, *Lowes v. Coillte Teo* is clearly authority for the proposition to the contrary. Further support for this authority is to be found in a book of authorities handed in to the court on behalf of the Sate defendants. Two cases were submitted to the court where Clarke J. and Irvine J. each in the High Court, dismissed judicial review proceedings brought pursuant to s. 50 of the Planning and Development Act, 2000 (as amended). In *Ryanair Ltd v. An Bord Pleanála* [2008] IEHC 1 Clarke J. held that the court had jurisdiction to entertain an application to dismiss or strike out the judicial review proceedings brought by the applicant seeking to quash a decision of the respondent to grant a planning permission for the development of a second terminal at Dublin Airport.

36. In *Connolly v. An Bord Pleanála* [2008] IEHC 224 the notice party brought an application to dismiss the judicial review proceedings. The applicant submitted that the procedure adopted by the notice party in this regard was irregular. He contended that the court did not enjoy the requisite jurisdiction to dismiss the judicial review proceedings. Irvine J. rejected this submission. At p. 15 of the judgment she stated: -

> *"Whilst applications which are brought seeking to invoke the court's inherent jurisdiction are normally brought by a defendant in the context of plenary proceedings issued by a plaintiff, there is no reason to believe that this fact in any way precludes a court considering a motion such as the present one brought by the notice party to dismiss judicial review proceedings which he states are an abuse of the court's jurisdiction ..."*

37. I am satisfied that each of these cases establishes that the court had jurisdiction to deal with the motion to dismiss judicial review proceedings even in circumstances where leave to seek judicial review has previously been granted. It follows logically that if a motion may properly be brought seeking to dismiss the proceedings, then the grant of leave in and of itself cannot be determinative of the issue. This was confirmed by Herbert J. in Lowes. In *O'Connell v The Environmental Protection Agency*, the court did not hold to the contrary, which is not surprising as the judge in that case was Herbert J. also.

38. It seems to me that the applicants' submission is based on a misconception of effect of the grant of leave to seek judicial review. While of course it is necessary for the applicant to satisfy the court that he can advance substantial grounds and the court may only grant leave to seek judicial review where the court is satisfied that the applicant has made out such substantial grounds and that the applicant has a substantial interest in the proceedings, this does not amount to a finding of the court. On the contrary, the court is precluded from making any finding on an application for leave.

39. Insofar as the applicants were obliged to satisfy the court that they had a substantial interest in the application in order to obtain leave to seek judicial review, this does not assist the applicants in responding to this motion. The issue of a substantial interest does not go to the merits of the case, but to the standing of the applicant. It in no way addresses the question as to whether or not the pleadings fail to disclose a cause of action or are frivolous or vexatious or are bound to fail.

40. Even if it were the case that the court was somehow obliged to treat the order granting leave to seek judicial review as deciding that the proceedings were neither frivolous nor vexatious nor bound to fail, the order in this particular case does not assist the applicants. By reason of their own pleadings, Noonan J. did not in fact give the applicants leave to seek any relief against the State defendants. Therefore the argument that the order of the 20th February, 2017, precludes an argument that the pleadings disclose no cause of action or are frivolous or vexatious or are bound to fail is nihil ad rem.

41. It is noteworthy that the applicants advanced no explanation as to why they did not seek any relief expressly against the state defendants. It was open to them, had they so wished, to have sought declaratory relief to the effect that the Directive had not been properly transposed into Irish law, if that was the case which they wished to advance. Of course, such a case would have to be properly pleaded in accordance with the requirements of O. 84, r. 20 (3). In addition, it would have to be pleaded when the leave application was moved and to have been within the time limited for bringing judicial review proceedings. No explanation was provided to the court as to why the applicants did not seek to identify any provisions of either the Directive or Irish statute law or regulations upon which they wish to advance their case that Irish law had failed properly to transpose the Directive.

42. It appears that the applicants wished to reserve their position to see what position was adopted by the Board. Once the Board had clarified its position then the applicants would respond. This was made clear in the letter of the 20th March, 2017, which I have quoted above. They stated that "… the extent to which any such domestic law provision appropriately transposes the requirements of the Directives must be reviewed …" once the Board has made clear which if any provision of domestic law it may rely upon. It expressly stated that the issues will become clearer when these statements of opposition and replying affidavits are filed.

43. The implications of the letter are inescapable. The applicants wish to finalise their case in relation to the alleged or possible failure properly to transpose the Directive into national law when they have received opposition papers from the Board. This is clearly impermissible and contrary to the rules of court. The applicants are required to advance the case they wish to make in full in the statement of grounds. They must do so within time. Leave to amend their statement of grounds must be specifically sought and the permission granted pursuant to O. 84, r. 23 (2). The rules cannot be implicitly circumvented.

44. In my opinion, the proceedings in fact seek no relief whatsoever against the State defendants, notwithstanding the attempt of the applicants to argue to the contrary. Therefore, the continued maintenance of these proceedings against these respondents is vexatious and amounts to an abuse of process. On the pleadings as they stand, even if the applicants were to succeed entirely in the case they have advanced to date, no relief could be granted against the State defendants. It follows inescapably in my opinion that the proceedings fail to disclose a cause of action on their face within the meaning of O. 19, r. 28.

45. While it is not necessary for the purpose of my decision, I wish to record that I agree with the submissions of the State defendants based upon O. 84, r. 20 (3) and 22 (5), though this does not form part of my decision.

46. While I am of course aware that the jurisdiction to dismiss a case on the basis of O. 19, r. 28 or the inherent jurisdiction of the court should only be exercised sparingly and in the clearest of cases, this is a case where it is appropriate to exercise the jurisdiction. The continuance of these proceedings against the State defendants is an abuse of process for the reasons I have identified. Accordingly, I dismiss the proceedings against the State defendants on the basis of O. 19, r. 28 and separately on the basis of the inherent jurisdiction of the court.