

## THE HIGH COURT

RECORD No. 2004 1019 P

BETWEEN

FRIENDS OF THE IRISH ENVIRONMENT LIMITED AND TONY LOWES

PLAINTIFFS

AND

THE MINISTER FOR THE ENVIRONMENT, HERITAGE AND LOCAL GOVERNMENT, IRELAND, THE ATTORNEY GENERAL AND  
GALWAY COUNTY COUNCIL

DEFENDANTS

**Judgment of Mr. Justice Murphy dated the 15th day of April, 2005**

1. This is an application by the first, second and third named defendants (the State)(proceedings having been discontinued against the fourth named defendant) for an order staying the within proceedings pending the resolution of matters raised in the European Commission reasoned opinion of 21st January, 2003, by the Commission which the State considers to be similar to the plaintiff's claim herein.

2. The reasoned opinion, under the first paragraph of Article 22.6 of the Treaty, is that Ireland, by making the full and effective participation of the public in certain environmental impact assessments subject to prior payment of participation fees, has failed to comply with its obligation under Articles 6 and 7 of Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment.

The plaintiff's claim is for a declaration that s. 33(2)(c) of the Planning and Development Act, 2000 and the regulations made thereunder are null and void and invalid having regard to the provisions of the law of the European Union insofar as they purport to charge a fee in the context of planning applications or appeals to An Bord Pleanála accompanied by an environmental impact statement.

The grounding affidavit of Oonagh Buckley, principal officer of the first named defendant, sworn 16th May, 2003, referred to that reasoned opinion and to correspondence between Ireland and the European Commission requesting Ireland to comment on the complaint. The State had responded thereto on 6th December, 2000 and on 7th March, 2002.

The Commission had raised concerns about the compatibility with Community law of the fee requirement under the Planning and Development Act, 2000 and the regulations made thereunder. A third party wishing to make a submission in respect of an application for planning permission and, in particular, in respect of environmental impact assessments (EIA), was required to pay a fee. This did not appear to be compatible with directive 85/337 as amended by directive 97/11.

The reasoned opinion of the Commission was replied to on 16th May, 2003. The reply, having analysed the provisions of the directive, put forward reasons justifying the fees by reference to the level of participation of the public in environmental impact assessment processes and believed it to be in conformity with directive 85/337.

By supplemental affidavit, sworn 21st February, 2005, Ms. Buckley referred to advices received on 26th January, 2005, that the Commission intended to issue Article 226 proceedings against Ireland before the Court of Justice aforesaid following the reasoned opinion. She averred that, notwithstanding, Ireland had not yet been formally notified of the institution of those proceedings.

The State defendants consider that since the compatibility of the legislation with the directive 85/337 (the EIA directive) will be determined in the course of the Article 226 reference, it is appropriate that the present proceedings be stayed.

The compatibility of the Irish legislation with the EIA Directive will be determined by the Court of Justice in the context of the infringement proceedings. The State submits that it would be incompatible with Ireland's obligations under Article 10 EC Treaty for an Irish court to proceed to determine the issue of the compatibility of the Irish legislation with the EIA Directive. (Such obligation extends to the courts of Member States - see case 224/01 *Kobler*, decision of 30th September, 2003) Article 10 EC Treaty obliges Member States to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out to the Treaty and to facilitate the achievement of the Community's tasks and to abstain from any measure which could jeopardise the attainment of the objectives of the Treaty.

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 (will 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.

**3. State submissions**

3.1 The plaintiffs argue that, if the proceedings are not stayed, then they will seek to make a reference to the Court of Justice under Article 234. They argue that they are in some way entitled to a reference and that to stay the proceedings would deprive them of this entitlement.

The State submits that this approach to a reference is entirely misconceived.

The purpose of a reference is not ask the court of Justice to decide upon facts or the application of Community law to a particular factual situation. Rather it is to seek the assistance of the court in the interpretation of Community law. In the Note for Guidance on references by National Courts for Preliminary Rulings issued by the Court of Justice, it is provided at paragraph 7 that:

"A national court may refer a question to the Court of Justice as soon as it finds that a ruling on a point or point of interpretation or validity is necessary to enable it to give Judgment. It must be stressed however, that it is not for the Court of Justice to decide issues of fact or to resolve disputes as to the interpretation or application of rules of national law. It is therefore desirable that a decision to refer should not be taken until the national proceedings have reached a stage where the national court is able to define, if only as a working hypothesis, the factual and legal context of the question."

In case 283/81 *Cilfit v. Ministry of Health*, the court was asked to consider the circumstances in which a court which has an obligation to refer should abstain from making a reference. It noted at para. 13 that where a question raised is materially identical

with a question which has already been the subject of a preliminary ruling in a similar case, that obligation may not have the same weight. At para. 14 it was noted that this was so, even where the questions at issue were not strictly identical, provided that previous decisions of the court had already dealt with the point of law in question.

While a national court is always free to make a reference. However, where the Court of Justice had already interpreted a provision of Community law references raising a similar point were not appropriate.

It is submitted that a similar principle applies with equal force where it is known in advance that the Court of Justice will be interpreting a provision of Community law. Thus in the submission of the defendants, any application to the national court for a reference will be met with the response that a reference is not necessary given that precisely the same matter is before the Court of Justice.

It is quite clear from the case law of the court of Justice that there is no entitlement on the part of plaintiffs to have a matter referred. This is entirely a matter for the discretion of the trial judge to be exercised in accordance with the well established jurisprudence of the Court of justice on references as set out above. The referring court is not a mere conduit to facilitate the parties in bringing issues of Community law before the Court of Justice –see case C-44/65 *Singer* [1965] ECR 965.

Moreover, there are compelling practical reasons for resisting any application for a reference. The public purse, as represented by the defendants, will be put to entirely unnecessary expense in circumstances where the Court of Justice would be asked to decide *precisely* the same question as that before it in the infringement proceedings. The time of the Court of Justice will also be taken up unnecessarily.

Thus to grant a stay would not deprive the plaintiff of a personal or juridical advantage available to it in the Irish courts. On the other hand, to permit the plaintiff to make a reference would prejudice the State insofar as the costs are concerned and possibly in relation to the time that it would take to have this matter resolved.

3.2 It was submitted that the law in relation to the criteria for a stay was laid down in *In Re: An Irish Patent* (High Court 14th March, 2001, McCracken J.). However it is submitted that the existing jurisprudence of the courts on this issue is not particularly helpful given that it tends to examine the question of whether proceedings should be stayed where two competing jurisdictions are at issue. If no application for a reference is made, then the question of two competing jurisdictions simply does not arise. The Court of Justice decision will override any decision of an Irish court and in those circumstances that is in the submission of the defendants a conclusive reason for granting a stay. The court should consider what the most appropriate form should be.

#### **4. Respondents' submissions**

The respondents, the plaintiffs in the action, submit that, as admitted by the applicant, no papers have been lodged with the Court of Justice and that the advices referred to in the supplemental affidavit are of hearsay nature. The plaintiff submits that the application was entirely premature as to the whether the Commission might or might not refer the matter to the Court of Justice. Moreover, in the event that the matter were referred to the Court of Justice, this would not operate to oust the jurisdiction of this court to determine the matter.

Under Article 226 EC, the Commission has complete discretion as to whether or not to institute any proceedings.

The plaintiff submits that the defendants' application should be rejected by reason of prematurity. The application can be renewed if or when the Commission issue proceedings.

The plaintiff submits that if the matter is referred by the Commission to the Court of Justice, this will not preclude this Court proceeding to determine the matter itself or referring the matter to the Court of Justice itself under Article 234EC.

The Court has the power, under Article 234 EC, to refer the directly to the Court of Justice and need not await any potential reference by the Commission.

It is submitted that the court is being asked to defer its determination of the matter, perhaps indefinitely, pending the decision of the Commission on whether or not to exercise a referral power that is equally exercisable by this Court.

It is submitted that a determination by this Court or a reference to the Court of Justice arising out of these proceedings will better deal with the specific complaints raised by the plaintiff in the within proceedings. The Article 226 procedure is not so designed. A determination in favour of the plaintiff will be directly enforceable by the plaintiff and will not need any further action or implementation procedures.

The Commission has remarked on the inadequacy of the Article 226 procedure as a means of solving individual problems. This has been stated in the annual reports on a number of occasions, most recently in 2001 when the Commission stated as follows:-

"The primary objective of the infringement procedure is still, as before, to cause the offending Member State to come into line with Community law. Nor does it have any effect on the discretionary power that the Commission is acknowledged to have by the ECJ as regards commencing infringement proceedings.

This is all the more important as the nature of the procedure may sometimes leave complainants feeling frustrated; they are of course hoping for a different result – the satisfaction of their individual interests which they see as threatened by the Member State's alleged unlawful conduct."

It was further submitted that this is a view that has been shared by the Court of Justice in its judgment in *Van Gend En Loos -v- Nederlandse administratie der belastingen* Case 26/62 [1963] E.C.R. 1.. In that case, the Court of Justice stated in its grounds of judgment that:-

"In addition, the argument based on Articles 169 and 170 of the Treaty put forward by the three Governments which have submitted observations to the Court in their statements of case is misconceived. The fact that these Articles of the Treaty enable the Commission and the Member States to bring before the Court a State which has not fulfilled its obligations does not mean that individuals cannot plead these obligations, should the occasion arise, before a national court, any more than the fact that the Treaty places at the disposal of the Commission ways of ensuring that obligations imposed upon those subject to the Treaty are observed, precludes the possibility, in actions between individuals before a national court, of pleading infringements of these obligations.

A restriction of the guarantees against and infringement of Article 12 by Member States to the procedures under Article 169 and 170 would remove all direct legal protection of the individual rights of their nationals. There is the risk that recourse to the procedure under these Articles would be ineffective if it were to occur after the implementation of a national decision taken contrary to the provisions of the Treaty.

The vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by Articles 169 and 170 to the diligence of the Commission and of Member States."

It is clear therefore that it is the view of the court that Article 234 of the Treaty operates in addition to the Article 226 procedure to ensure the proper supervision of the rights of individuals under the Treaty. Given that the Article 234 procedure is commenced before a national court, an application seeking to stay such proceedings pending the determination of Article 226 proceedings must operate to frustrate this additional supervision.

It would, therefore be at variance with the purpose of the Article 234 procedure if a domestic court could postpone or refuse to determine proceedings before it on the basis that Article 226 proceedings were threatened or pending given that such proceedings are the source of references until Article 234. To so do would operate to stifle completely the operation of Article 234.

Furthermore, there is precedent in *R. -v- Secretary of State for Transport, ex p. Factortame Ltd* Case C-221/89 [1991] ECR I-3905 for the court joining Article 234 and Article 226 proceedings for the purposes of the oral hearing. That being the case, rather than staying the within proceedings, if the court were to make a reference directly, it could be joined with any subsequent proceedings issued by the Commission.

Finally, the plaintiff seeks to rely on the comments of Gavan Duffy J. in the *Sinn Fein Funds* Case regarding the obligation of the court to determine matters of which it is seized. While in the case involved domestic legislation, the *Sinn Fein Funds* Act the effect is similar where an application is being made to the court in respect of procedures under the Community law. In the case Gavan Duffy held:-

"This Court cannot, in deference to an Act of the Oireachtas, abdicate its proper jurisdiction to administer justice in a cause whereof it is duly seized."

On appeal, the Supreme Court through O'Byrne J. held that the provisions of the Constitution impose a specific function on the courts and that this function was exclusive. In his judgment, he stated:-

"The effect of this Article [6] and of Articles 34 to 37 inclusive is to vest in the Courts the exclusive right to determine justiciable controversies between citizens and between a citizen or citizens as the case may be and the State."

While it is a stay that is sought in this case, given that the stay might be indefinite, it is submitted that the effect is the same as an abdication of the court's jurisdiction.

Given that the instant proceedings involve such a justiciable controversy between a citizen and the State itself, and that the court is exclusively seized with such a controversy, the plaintiff submits that the court cannot abdicate its function to determine such a controversy in the absence of compelling reasons and authority for so doing. Given that no such compelling reason or authority exist in the instant case, the plaintiff submits that the defendant's application must be refused.

## **5. Decision of the Court**

There would appear to be a difference between the pre-litigation procedure of the Commission and proceedings before the European Court of Justice. Such procedure has been pursued by the Commission with regard to the compatibility of the legislation with the EIA Directive. Ireland has formally responded. A decision of the commission is awaited. There is an indication, albeit of hearsay nature, that the Commission intend to refer the matter to the European Court of Justice by way of institution of infringement proceedings against Ireland under Article 226 of the EC Treaty.

It is unclear, at this stage, that legal proceedings will ensue under Article 226 of the Treaty.

The court finds that the subject matter of the present proceedings are similar, to the process initiated by the Commission prior to the issue of the present proceedings.

The respondent is, of course, entitled to seek a declaration of the court. The applicant, in the present motion, seeks a stay on those proceedings.

The proceedings initiated by the plaintiffs on 27th January, 2004, over a year after the date of the reasoned opinion of 21st January, 2003, is for a declaration that s. 33(2)(c) of the Planning and Development Act, 2000 and the regulations made thereunder are null and void and invalid, having regard to the provisions of the law of the European Union, insofar as they purport to charge a fee in respect of submissions made by members of the public in the context of planning applications or appeals to An Bord Pleanála accompanied by an environmental impact statement. The plaintiffs also seek a declaration that the plaintiffs are entitled to make submissions in respect of an environmental impact statement in the context of an application for planning permission or of an appeal to An Bord Pleanála requiring an environmental impact assessment, without having to pay a fee.

It seems clear that these reliefs are substantially the same as those being pursued by the Commission itself pursuant to Article 226 of the EC Treaty.

It is not necessary to enter into the provisions of the relevant section and regulations nor to enter into the merits of the plaintiff's claim at this stage. While the plaintiff/respondent argues that they are entitled to seek a reference under Article 234, such is not pleaded at this stage.

The court is not satisfied that such a reference would achieve anything different or be more expedient than the present procedure initiated by the Commission under Article 226.

Article 234 of the Treaty provides that where a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

Where a question raised is materially identical with the question that has already been the subject of a preliminary ruling in a similar

case, no such reference would appear to be necessary.

There is no entitlement on the part of plaintiffs to have a matter referred as it is entirely a matter for the discretion of the trial judge to refer.

The issue in the present motion is whether the possibility, or even probability, of a matter being dealt with by way of the Commission, in the circumstances is outlined in the process already initiated, is sufficient to justify a stay on the proceedings already initiated.

In relation to these proceedings the court notes that there have been no pleadings since the issue of the plenary summons and statement of claim in January, 2004. It is the defendants who have issued the present motion.

The criteria for a stay was considered in *In the Matter of the Patents Act, 1992 and In the Matter of an Irish Patent Number E77480, Merck and Company Inc. and Merck Sharpe and Dohme (Ireland Limited) Petitioners v. G.D. Searle and Company and Monsanto Company, Respondents* [2002] 3 I.R. 614 at 618. McCracken J. held:-

"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 there are reasons why it should be refused."

Key points considered by the petitioners and the respondents were then considered. The trial judge commented:-

"There is no doubt that if both proceedings continue in parallel, and the ultimate decision is the same in both proceedings, then there will have been a very considerable waste of time and money. Similarly, if the European Patent Office ultimately allows the opposition and rejects the patent, then the decision will be binding in this jurisdiction and the Irish proceedings will again have been a waste of time and money, whatever may have been the decision here. On the other hand, if the European Patent Office decides to grant the patent, and the Irish court revokes it, the effect is that the patent would not be enforced in Ireland, but would be enforced in the other nominated countries under the Convention. The respondents suggest that this in itself would be an undesirable outcome.

I am left in the unenviable position of having to try to balance these arguments one against the other and determine whether, on the facts of this particular case, the scales are sufficiently weighed in favour of the petitioners so as to outweigh the basic preference for granting a stay. On balance, I have come to the conclusion that the arguments put forward by the petitioners are not sufficient to achieve this, and accordingly, subject to the undertakings which is being proposed, I will grant a stay on these proceedings pending the ultimate decision of the European Patent Office. However, as this is dependant to some degree on an estimation of future events, I will expressly allow the petitioners liberty to apply to lift the stay in the event of some material alteration in the circumstances."

In that case the respondents were granted a European patent with Ireland as one of the designated countries, thus creating an Irish patent as a national patent. The petitioners had brought a petition to revoke the Irish patent. The petitioners also filed opposition proceedings in the European Patent Office seeking to revoke the European patent and these proceedings were determined by decision of the European Patent Office permitting certain amendments to the patent and refusing to revoke the patent, as amended. This decision was appealed, which appeal was still pending. The respondent sought an order staying the petition to revoke the Irish patent. It seemed likely that it would take possibly three to four years for the appeals in the European Patent Office to be heard.

Notwithstanding the court was satisfied that a stay should be granted.

I have been referred to and considered the judgment of the Court of Justice in *Van Gend En Loos v. Nederlandse administratie der belastingen* (case 26/62[1963] E.C.R. 1) and to *R. v. The Secretary for State for Transport, ex. P Factorame Ltd.* (case C – 221/89 [1991] E.C.R. I/3905. The applicant does not seek to exclude the plaintiff respondent from the court.

It seems to me that the patents case is the most apposite insofar as the process being followed by the European Patent Office is close to that process being initiated by the Commission. Both have competence within their respective spheres.

The court has seen no evidence of the respondent pressing the State parties for a defence which is clearly out of time.

I am satisfied that the pre-litigation procedure initiated and progressed by the commission has as its purpose the giving of an opportunity to the Member State to comply with its obligations under Community law and, on the other hand, to avail itself of its right to defend itself against the objections formulated by the Commission (see *Commission v. Ireland* Case C-392/96). It is a necessary step in the procedure laid down in Article 169 of the EC Treaty.

I will, accordingly, grant a stay pending the resolution of the matters raised by the European Commission.