[2020] IEHC 128

THE HIGH COURT
JUDICIAL REVIEW

2019 No. 395 J.R.

IN THE MATTER OF SECTIONS 50 AND 50A OF THE PLANNING AND DEVELOPMENT ACT 2000 (AS AMENDED)

BETWEEN

MOUNT JULIET ESTATES RESIDENTS GROUP

APPLICANT

AND

KILKENNY COUNTY COUNCIL

RESPONDENT

MJBE INVESTMENTS 3 LIMITED
AN BORD PLEANÁLA

NOTICE PARTIES

JUDGMENT of Mr. Justice Garrett Simons delivered on 10 March 2020

INTRODUCTION

1. The within proceedings are judicial review proceedings taken pursuant to the statutory procedure provided for under the Planning and Development Act 2000 *("PDA 2000").* The principal complaint made in the proceedings is that Kilkenny County Council ("*the planning authority*") acted without jurisdiction in purporting to grant *retention* planning permission for a particular development. It is said that the development sought to be retained had been carried out in breach of the requirements of the Environmental Impact Assessment Directive and the Habitats Directive, and, consequently, cannot benefit from a retention planning permission. The planning status of the development, it is said, can only be regulated by way of an application for "substitute consent" pursuant to Part XA of the PDA 2000.

2. The resolution of these legal issues must await the hearing of the substantive application for judicial review. This judgment is concerned solely with two interlocutory applications which have been brought by the planning authority and the beneficiary of the planning permission, respectively. The precise basis upon which these interlocutory applications come to be made is itself an issue of some complexity, but, for introductory purposes, the gist of the applications might be summarised as follows. Those parties seek to have these judicial review proceedings stayed pending the determination of an appeal which has been brought to An Bord Pleanála. More specifically, the planning authority's decision to grant retention planning permission is currently the subject of a third-party appeal to An Bord Pleanála. The suggestion is that this appeal to An Bord Pleanála should be determined first, in priority to the judicial review proceedings. (It should be explained that the appeal has been brought by the applicant for judicial review, i.e. Mount Juliet Estates Residents Group. The residents group are thus pursuing an application for judicial review and a statutory appeal in parallel).

3. The two interlocutory applications present an important issue of principle as to which is the more appropriate forum in which the complaint, i.e. that the planning authority has acted *ultra vires* in granting retention planning permission, should be determined. Put shortly, is it a matter for An Bord Pleanála or for the High Court. To answer this question,

it will be necessary to consider the statutory regime, and, more generally, the public interest in the rule of law.

STATUTORY STAY ON JUDICIAL REVIEW PROCEEDINGS

4. There are, in principle at least, two avenues by which a person, who is aggrieved with a decision of a planning authority to grant planning permission, might seek to challenge that decision. First, by way of appeal to An Bord Pleanála; and, secondly, by way of an application for judicial review to the High Court.

5. The planning legislation addresses the priority as between parallel appeal proceedings and judicial review proceedings as follows. See sections 50(4) and (5) of the PDA 2000.

> (4) A planning authority, a local authority or the Board may, at any time after the bringing of an application for leave to apply for judicial review of any decision or other act to which subsection (2) applies and which relates to a matter for the time being before the authority or the Board, as the case may be, apply to the High Court to stay the proceedings pending the making of a decision by the authority or the Board in relation to the matter concerned.
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> (5) On the making of such an application, the High Court may, where it considers that the matter before the authority or the Board is within the jurisdiction of the authority or the Board, make an order staying the proceedings concerned on such terms as it thinks fit.

6. As appears, the legal test to be applied is whether or not the "matter" before the planning authority or An Bord Pleanála is "within the jurisdiction of" the relevant decision-maker. Where these criteria are met, the legislative preference is that challenges be dealt with by way of appeal rather than by judicial review.

7. This preference for an appeal reflects a general principle of administrative law, namely, that an applicant should first exhaust his or her right of appeal before having recourse to the courts. Indeed, as discussed presently, certain of the case law in respect of this general principle has been called in aid in judgments addressing the interpretation of section 50(4) and (5) of the PDA 2000.

8. It should be noted, however, that the operation of the statutory regime differs from the general principle in two respects. First, an application to stay judicial review proceedings may be made *at any time* after the bringing of an application for leave to apply for judicial review. By contrast, in conventional judicial review proceedings, the existence of adequate alternative remedies will normally only be considered at the commencement of the proceedings (application for leave), or at the conclusion (relief may be refused as a matter of discretion).

9. Secondly, a stay application may only be brought by a planning authority, a local authority or An Bord Pleanála. The party most immediately affected by a challenge to the validity of a decision to grant planning permission, i.e. the beneficiary of the planning permission, is not entitled to apply for a stay. The developer in the present case has had

to resort to a different form of application, namely an application to vacate the stay which has been imposed on An Bord Pleanála determining the appeal. (The developer's application is addressed at paragraphs 60 to 63 below).

10. It must be doubtful whether a planning authority can apply for a stay on judicial review proceedings in favour of an appeal which is pending before a different decision-maker, i.e. An Bord Pleanála. The right of a planning authority to apply for a stay would appear only to arise in the context of an *interim decision* made by the authority itself during the course of a longer decision-making process. In the present case, of course, the planning authority is *functus officio* in that it has now issued its decision to grant planning permission. That decision is under appeal before An Bord Pleanála, and the decision of An Bord Pleanála will operate to *annul* the planning authority's decision (section 37(1)(b) of the PDA 2000).

11. It seems from the wording of section 50(4) that it is only the decision-maker, before whom a matter, such as a planning application, is pending, who can apply for a stay on the judicial review proceedings. Such a decision-maker would, in effect, be asking the court to allow it (the decision-maker) to determine the matter before it in priority to the judicial review proceedings. It is obvious that An Bord Pleanála would be better placed to offer a view on whether the matter is within its jurisdiction than would the planning authority. The wisdom of confining the right to apply for a stay to the relevant decision-maker is illustrated by the facts of the present case. As discussed at paragraphs 52 to 59 below, the planning authority has sought to suggest that An Bord Pleanála might adopt a particular approach to the appeal. It is doubtful that An Bord Pleanála would have made a similar submission in that the contended for approach would be *ultra vires*.

12. None of the parties have invited the court to dispose of the application on the basis that the planning authority may not have had standing to invoke the sections. Accordingly, I propose to address the substance of the application. The comments above should be regarded as *obiter dicta* only.

13. The legal test to be applied in the present case is whether or not the "matter" before An Bord Pleanála is "within the jurisdiction of" the board. The parties are all agreed that the term "matter" is to be understood in this context as the "appeal" to An Bord Pleanála.

14. The correct interpretation of the sections has been considered in a number of recent judgments of the High Court. The first approved judgment is that of Binchy J. in *Sweetman v. Clare County Council* [2018] IEHC 517. It is apparent from the judgment that the court derived much assistance, by analogy, from an earlier judgment of the High Court (Clarke J.) in *Harding v. Cork County Council* [2006] IEHC 295.

15. The judgment in *Harding* was delivered in the context of a leave application in respect of a decision of a planning authority to grant planning permission. Under the then statutory regime, an application for leave to apply for judicial review had to be heard inter *partes*. The planning authority and notice party developer had invited the High Court to refuse

leave on the basis that there was an adequate alternative remedy by way of appeal to An Bord Pleanála. Clarke J. addressed this issue as follows.

> "It should, however, be noted there may be cases where, even though there be a full rehearing or even (as here in the planning process) a wider hearing on appeal, the second stage is, in unusual circumstances, tainted by what occurred in the first stage. For example in *Jerry Beades Construction Ltd v. Dublin Corporation* (Unreported, High Court, McKechnie J., 7th September, 2005) McKechnie J. noted, at p. 73, that the Board in that case, though blameless, was under a misapprehension as to material matters by virtue of the issue complained of (successfully) in relation to the process engaged in while the matter was being dealt with by Dublin Corporation. Similarly a failure in the first stage process may be such as effects the jurisdiction of the whole process including the decision taken at the second stage.
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> It seems to me likely, therefore, that an appeal will be regarded as an adequate remedy in a two stage statutory or administrative process unless either:-
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> (a) The matters complained of in respect of the first stage of the process are such that they can taint the second stage of the process or effect the overall jurisdiction; or
> (b) the process at the first stage is so flawed that it can reasonably be said that the person concerned had not been afforded their entitlement to a proper first stage of the process in any meaningful sense."

16. The judgment in *Harding* recognised that there are certain defects which are capable of subsisting at the appeal stage, and can taint the second stage of the process or affect the overall jurisdiction. In the event of a challenge grounded on such defects an appeal may not be an adequate alternative remedy. For ease of exposition, I propose to refer to defects of this type by the shorthand "*subsisting defects".*

17. The principles in *Harding* were applied by Binchy J. in *Sweetman*. On the facts, the judge found that a complaint that the planning authority had failed to carry out an appropriate assessment for the purposes of the Habitats Directive, as part of its first-instance decision-making, did not taint An Bord Pleanála's appellate jurisdiction. The court held that the error alleged against the planning authority was of a kind that can be corrected by the board on appeal in circumstances where the board must conduct its own appropriate assessment. Binchy J. ordered that the judicial review proceedings be stayed pending the making of a decision by An Bord Pleanála on the appeals before it. (A stay which had been imposed as part of the leave-order, which restrained the board from considering or determining the appeals, was vacated).

18. Similarly, Burns J. held in an *ex tempore* ruling in *Derivan v. Waterford City and County Council*, unreported, 20 July 2018, that the complaints made in the judicial review proceedings before her, e.g. in terms of environmental impact assessment; appropriate

assessment; and an alleged material contravention of the development plan, were ones capable of being dealt with in the course of an appeal to An Bord Pleanála.

19. The grounds of challenge raised in the third of the judgments, *Dunnes Stores (Limerick) Ltd v. Limerick City and County Council* [2019] IEHC 59 were, by contrast, ones which were better dealt with by judicial review. I will return to discuss this judgment further at paragraph 50 below.

20. This line of case law indicates that the question of whether or not the "matter", i.e. the appeal, is "within the jurisdiction of" An Bord Pleanála should be approached as follows. The court hearing the application for a stay must consider whether the defect alleged as against the planning authority's decision of first-instance is one which operates to taint or affect the jurisdiction of An Bord Pleanála. An appeal to An Bord Pleanála should be allowed to proceed in preference to judicial review proceedings unless the grounds of judicial review—if well founded—would deprive An Bord Pleanála of jurisdiction.

21. Put otherwise, if the grounds allege a *subsisting defect*, which applies equally to An Bord Pleanála as to the planning authority, then the judicial review proceedings should be heard and determined.

22. To elaborate: the grounds upon which a planning authority's decision might be challenged can be thought of as falling within three categories, as follows. The first category consists of grounds which concern statutory constraints unique to a planning authority. An example of a ground of this type is provided by the judgment of the High Court in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39. It had been alleged that the manager of the local authority had acted *ultra vires* in granting planning permission in breach of a resolution of the elected members. As explained by Costello J. (at pages 52/53 of the reported judgment), this alleged defect in the proceedings before the planning authority did not have any bearing, or impose legal constraints, on the appellate proceedings before An Bord Pleanála.

23. The second category consists of grounds which might *potentially* affect An Bord Pleanála's jurisdiction, but which An Bord Pleanála has power to correct. The most obvious example is where it is alleged that the planning authority failed to carry out a proper assessment as required under either or both of the EIA Directive and the Habitats Directive. Even if this ground is well-founded, it does not inevitably follow that An Bord Pleanála will commit the same error of law. An Bord Pleanála is required to determine the planning application *de novo*, as if the application had been made to it in the first instance (section 37(1)(b) of the PDA 2000). As part of this exercise, An Bord Pleanála must, for example, make its own screening determination. An Bord Pleanála has power to conduct an environmental impact assessment ("*EIA*") or appropriate assessment ("*AA*") even were the planning authority decided that same were not required. The board can thus remedy a failure on the part of the planning authority to carry out an EIA or an AA under the Directives. It was precisely this type of ground of challenge which had been considered by the High Court in *Sweetman v. Clare County Council* [2018] IEHC 517. It will be recalled that

Binchy J. ordered that the judicial review proceedings be stayed pending the making of a decision by An Bord Pleanála.

24. The third category consists of grounds which affect the planning authority and An Bord Pleanála equally, and which the board is incapable of correcting.

25. For the reasons elaborated upon under the next heading below, I have concluded that the grounds of challenge in these judicial review proceedings fall into the third of these categories. The principal ground of challenge is that there is a statutory prohibition on a planning authority entertaining an application for retention planning permission in circumstances where the underlying development has been carried out in breach of the requirements of the EIA Directive and/or the Habitats Directive. If the residents group can establish at the full hearing that the underlying development is caught by this prohibition, then it follows that neither the planning authority nor An Bord Pleanála have jurisdiction to entertain the application/appeal. The prohibition applies equally to the first-instance decision-maker as it does to the appellate body.

26. Of course, the position adopted by the planning authority and the developer in these proceedings is to say that no such breach has occurred, and that the prohibition is not triggered on the facts. The determination of this issue is, ultimately, a matter for the substantive hearing of the judicial review proceedings. It is not something which can be determined on an *interlocutory application* such as the one currently before the court. Save in a case where the grounds of challenge are insubstantial, the judge hearing an interlocutory application to stay the judicial review proceedings must work on the assumption that the grounds of challenge might be made out at the full hearing, and to consider the implications of same for An Bord Pleanála's jurisdiction to entertain the planning appeal.

27. (In the present case, the High Court (Noonan J.) has already ruled at the leave stage that the grounds of challenge meet the "substantial grounds" test).

THE GROUNDS OF CHALLENGE

28. As has been discussed in detail under the previous heading, the decision as to whether judicial review proceedings should be stayed pending the determination of a statutory appeal depends on the grounds of challenge advanced against the decision of first-instance. In particular, it is necessary to consider whether the grounds of challenge—if ultimately made out at the substantive hearing—are such that they also affect the jurisdiction of the appellate body.

29. Accordingly, it is necessary to rehearse briefly the principal grounds of challenge advanced in these judicial review proceedings. It should be emphasised that this exercise is carried out solely for the purpose of resolving the stay application, and the court is not attempting to determine the underlying merits of the judicial review proceedings.

30. The judicial review proceedings seek to challenge a decision to grant retention planning permission. It seems that the developer, during 2016, had carried out development

works consisting of the removal of what has been described as a "putting course" from a golf course at Mount Juliet Estate. It is common case that no planning permission was applied for or obtained in advance of the carrying out of these development works. It seems that the developer may have, mistakenly, thought that the works constituted "exempted development".

31. The question of whether or not planning permission was required was subsequently referred to the planning authority, and onwards to An Bord Pleanála, pursuant to section 5 of the PDA 2000. Ultimately, An Bord Pleanála made a declaration in August 2018 to the effect that the works involved constituted "development" and were not "exempted development".

32. In consequence of this declaration, the developer submitted an application for retention planning permission to the planning authority. A decision to grant retention planning permission was made by the planning authority on 29 April 2019. This decision has since been appealed to An Bord Pleanála by Mount Juliet Estates Residents Group *("the residents group"*) albeit on a "without prejudice" basis.

33. The gravamen of the complaint made by the residents group in these judicial review proceedings is that the grant of retention planning permission is prohibited in circumstances where, or so it is alleged, the development works were of a type which were subject to the requirements of the Environmental Impact Assessment Directive (2011/92/EU) ("*the EIA Directive*") and the Habitats Directive (92/43/EC).

34. In order to understand this complaint, it is necessary to examine the relevant provisions of the PDA 2000 which govern the circumstances in which an application for retention planning permission can lawfully be made. These are to be found at sections 34(12) to (12C) of the PDA 2000, as follows.

> (12) A planning authority shall refuse to consider an application to retain unauthorised development of land where the authority decides that if an application for permission had been made in respect of the development concerned before it was commenced the application would have required that one or more than one of the following was carried out—
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> (a) an environmental impact assessment,
> (b) a determination as to whether an environmental impact assessment is required, or
> (c) an appropriate assessment.
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> (12A) For the purposes of subsection (12), if an application for permission had been made in respect of the following development before it was commenced, the application shall be deemed not to have required a determination referred to at subsection (12)(b):
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> (a) development within the curtilage of a dwelling house, for any purpose incidental to the enjoyment of the dwelling house as a dwelling house;

(b) modifications to the exterior of a building.

(12B) Where a planning authority refuses to consider an application for permission under subsection (12) it shall return the application to the applicant, together with any fee received from the applicant in respect of the application, and shall give reasons for its decision to the applicant.

(12C) Subject to subsections (12) and (12A), an application for development of land in accordance with the permission regulations may be made for the retention of unauthorised development, and this section shall apply to such an application, subject to any necessary modifications.

35. The effect of these provisions is to impose a prohibition on the making of an application for planning permission to retain unauthorised development, i.e. development which has been carried out without a prior grant of planning permission, in certain circumstances. Those circumstances are defined by reference to the requirements of the EIA Directive and the Habitats Directive. In brief, an application for retention permission cannot be made if there has been a breach of particular requirements of either of the two Directives.

36. This prohibition is intended to give effect to a judgment of the Court of Justice of the European Union ("*the CJEU*") in infringement proceedings taken against Ireland. In Case C-215/06, *Commission v. Ireland*, the blanket provision then made for retention planning permission under domestic law was condemned by the CJEU as being contrary to the EIA Directive. The PDA 2000 was subsequently amended by the Planning and Development (Amendment) Act 2010 to greatly restrict the circumstances in which retention planning permission may be obtained. The 2010 Act also introduced a special form of retrospective development consent, known as "substitute consent".

37. As appears from the wording of section 34(12) of the PDA 2000 (above), the prohibition on applying for retention planning permission is contingent on there having been a breach of the requirements of one or both of the EU Directives. It may assist the reader in understanding the extent of the prohibition to pause briefly, and to explain the following feature of the EU Directives. Both the EIA Directive and the Habitats Directive provide for the making of what is described informally as a "screening determination". This is a preliminary decision as to whether or not a particular development project must be subject to a "full" assessment. If the screening determination indicates that the development is likely to have a significant effect on the environment or on a European Site, then it is necessary to carry out a "full" assessment.

38. The making of a screening determination is, generally, done as part of the consideration of a planning application. (The carrying out of EIA is mandatory in the case of projects which exceed certain prescribed thresholds, but this is not immediately relevant to the issues to be addressed in this judgment). Almost by definition, development which has been carried out without a prior grant of planning permission will not have been subject to a screening determination.

39. An understanding of the concept of a screening determination is essential to a proper understanding of the extent of the prohibition under section 34(12) of the PDA 2000. This is because one of the circumstances in which the prohibition will bite is where the failure to apply for planning permission prior to the commencement of development had the consequence that the developer avoided a screening determination.

40. An application for retention planning permission will, by definition, be made subsequent to the commencement of development. The precise purpose of a retention application is to regularise *unauthorised* development. In order to decide whether the prohibition under section 34(12) bites, a planning authority in receipt of an application for retention planning permission must perform the following hypothetical exercise. The authority must extrapolate as to what would have happened had the developer applied for planning permission prior to the commencement of development. (On the facts of the present case, Kilkenny County Council, having received the retention application in March 2019, would have had to consider whether screening for EIA would have been required in 2016 had an application been made then).

41. To elaborate: the planning authority must consider whether, in the event that a hypothetical planning application had been made in advance of the commencement of development works, it would have required a determination as to whether an environmental impact assessment is required, i.e. a screening determination. If it did, then the developer cannot apply for retention planning permission. The developer would have to seek "substitute consent" instead. Crucially, this is so even if the (hypothetical) screening determination would have been negative, i.e. a full assessment would not have been required. It is enough to trigger the prohibition under section 34(12) that the developer avoided having to submit to a screening exercise, irrespective of what the outcome of that exercise would have been. Put otherwise, the procedural misstep of avoiding a screening exercise precludes the making of a retention planning permission.

42. The position in respect of the Habitats Directive is more lenient. The prohibition on the making of a retention application will only arise where a (full) appropriate assessment would actually have been required. A failure to submit to screening is not fatal.

43. The rationale for the strict approach taken in respect of screening determinations under the EIA Directive is that it is intended to serve a deterrent purpose. One of the criticisms made by the CJEU in its judgment in Case C-215/06, *Commission v. Ireland*, had been that a lenient approach might encourage circumvention of the requirement to submit to screening determinations. See paragraph [58] of the judgment.

> "A system of regularisation, such as that in force in Ireland, may have the effect of encouraging developers to forgo ascertaining whether intended projects satisfy the criteria of Article 2(1) of Directive 85/337 as amended, and consequently, not to undertake the action required for identification of the effects of those projects on the environment and for their prior assessment. The first recital of the preamble to Directive 85/337 however states that it is necessary for the competent authority to take effects on the environment into account at the earliest possible stage in all the

technical planning and decision-making processes, the objective being to prevent the creation of pollution or nuisances at source rather than subsequently trying to counteract their effects."

44. The importance of the deterrent effect has been reiterated in the more recent case law, such as Case C-196/16, *Comune di Corridonia* and Case C-261/18, *Commission v. Ireland (Derrybrien Windfarm).*

45. It has been necessary to address this issue at some length as it is directly relevant to one of the arguments which the planning authority has made in support of its application to stay the judicial review proceedings. The planning authority has argued that any breach of the EIA Directive might be remedied now by An Bord Pleanála carrying out an EIA as part of its determination of the appeal. With respect, this argument overlooks the importance of the deterrent effect. I return to this issue at paragraphs 52 to 59 below.

ALTERNATIVE INTERPRETATION OF "JURISDICTION"

46. For the sake of completeness, it should be noted that there is a second, alternative interpretation of the phrase "matter … within the jurisdiction of". On this interpretation, not only would An Bord Pleanála have to have jurisdiction to embark upon the appeal, the board would also need to have competence to address the merits of the grounds of challenge sought to be advanced in the judicial review proceedings. Put otherwise, the "matter" would not refer simply to the appeal, but would also refer to the grounds of challenge. The question would then become whether An Bord Pleanála had jurisdiction to address the grounds of challenge.

47. This point can be illustrated by reference to the complaints made in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39. One of the grounds of challenge raised in those judicial review proceedings had involved an allegation that the manager of the local authority had acted unlawfully in not complying with a resolution of the elected members. The High Court held that this complaint, even if well founded, would not affect An Bord Pleanála's jurisdiction to determine the appeal on its merits. It could be argued that this approach would be to leave the applicant without a remedy in respect of the (allegedly) *ultra vires* conduct of the manager. The applicant would be denied the right to pursue judicial review proceedings because an appeal to the board exists; yet the board could not address the allegation that the local authority (through its manager) had acted unlawfully.

48. The planning legislation, in its current form at least, envisages that there will be circumstances in which it is appropriate to challenge a decision of a planning authority by way of judicial review. (cf. the recent Heads of Bill published by the Department of Housing, Planning and Local Government. The Heads of Bill appear to confine the right to seek judicial review to decisions of An Bord Pleanála).

49. It might be argued that the public interest in vindicating the rule of law requires that a person with a "sufficient interest" should be entitled to question the legal validity of a decision of a planning authority, and should not be confined to an appeal to An Bord Pleanála wherein only the planning merits can be considered.

50. Some support for this proposition might be taken from the judgment of the High Court (Ní Raifeartaigh J.) in *Dunnes Stores (Limerick) Ltd v. Limerick City and County Council* [2019] IEHC 59. There, the High Court refused to stay the judicial review proceedings in circumstances where the issues raised—which involved allegations of a breach of fair procedures and bad faith—were ones which could only properly be determined by the High Court.

> "As matters stand, the High Court has granted leave on the basis of 'substantial grounds'. One of these points relates to an allegation of bad faith on the part of the Council. This is not a matter which could be litigated in the appeal before the Board and therefore even if the Board decides in favour of the applicants on the legal grounds raised in the appeal, that particular issue will be left undetermined.
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> […]
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> I accept that the Board has the expertise particularly appropriate to determining the merits of the substantive planning issues arising on the appeal, but the two particular points I have referred to (the bad faith allegation and the notice point) do not fall within those parameters and are matters which can only be determined by way of judicial review."

51. Happily, it is not necessary, for the purposes of the resolution of the present case, to determine whether the phrase "matter … within the jurisdiction of" should be given this wider interpretation, i.e. to require that An Bord Pleanála has jurisdiction to address the grounds of challenge. This is because, as explained under the previous heading, the ground of challenge advanced in this case is one which, if well-founded, goes to An Bord Pleanála's jurisdiction to even embark upon the appeal.

APPEAL MIGHT UNDERMINE STATUTORY PROHIBITION

52. There is an *additional* reason for saying that the judicial review proceedings should be allowed go to trial. It is that there is confusion as to whether the statutory prohibition on entertaining an application for retention planning permission in respect of development which had been carried out in breach of the relevant requirements of the EIA Directive and the Habitats Directive extends to An Bord Pleanála.

53. As a matter of EU law, development which has been carried out in breach of the relevant requirements of the two Directives cannot be subject to a conventional planning permission, without any requirement to demonstrate exceptional circumstances. It must follow, therefore, that the prohibition under section 34(12) should apply equally to An Bord Pleanála, as it does to a local planning authority.

54. The point was made at the hearing before me, however, that, on a literal interpretation, the prohibition under section 34(12) does not extend to An Bord Pleanála. An Bord Pleanála's jurisdiction to entertain an appeal is created under section 37 of the PDA 2000. Certain provisions of section 34, which is the principal section governing the determination of planning applications, are applied to An Bord Pleanála when exercising its appellate jurisdiction. Curiously, this is confined to sections 34(1) to (4), and does not

include section 34(12). (cf. *Ryanair v. An Bord Pleanála* [2004] 2 I.R. 334 in relation to section 34(5) of the PDA 2000).

55. Counsel on behalf of the developer accepted that, notwithstanding this possible shortcoming in domestic law, An Bord Pleanála would have to comply with the EIA Directive and/or the Habitats Directive. This concession is well made, having regard to the fact that in *Hayes v. An Bord Pleanála* [2018] IEHC 338, the High Court set aside a decision by the board which was found to be in breach of section 34(12).

56. The position adopted by counsel on behalf of the planning authority was more extreme. It was suggested that An Bord Pleanála might take a pragmatic view of the (alleged) breach of the EIA Directive and the Habitats Directive. More specifically, it was suggested that, if satisfied that a full assessment should have been carried out under either Directive in 2016, the board could perform that assessment *as part of* its determination of the appeal. In other words, rather than refuse to entertain the appeal by reference to section 34(12), the board would carry out a retrospective assessment in the context of the appeal. Any complaint that the assessments had not been carried out at an earlier stage (2016) would be a mere "technical point". Counsel submitted that the purpose of the implementation of the requirements of the two Directives is not to put in place an "obstacle course", but to protect the environment. An Bord Pleanála have a "catch all jurisdiction", and can determine on a *de novo* basis the need for an EIA or AA.

57. With respect, this line of argument is difficult to reconcile with the approach taken by the CJEU in Case C-215/06, *Commission v. Ireland*. As appears from that judgment, one of the concerns raised by the CJEU was that the blanket provision then made under domestic law for retention planning permission would have the practical effect of encouraging developers to forgo the requirement to submit to a screening exercise.

58. This concern has since been addressed by way of the amendments introduced under the Planning and Development (Amendment) Act 2010. First, there is a prohibition on the grant of retention planning permission in the case of a breach. Secondly, the only route by which a developer can seek to regularise development which has been carried out in breach of the relevant requirements of the EIA Directive or Habitats Directive is to apply for "substitute consent" under Part XA of the PDA 2000. The scheme of the legislation is such that whereas it does allow for an assessment to be carried out *retrospectively* in certain cases, it also has a deterrent effect in that a developer who carried out development in breach of the Directives runs the risk that he or she may not be given leave to apply for "substitute consent" . It would circumvent this aspect of the legislative scheme were it to be an answer to the residents group's complaint to say that an assessment would be carried out retrospectively in the context of a *conventional* planning appeal.

59. The very fact that this argument was made on behalf of the planning authority highlights the importance of ensuring that an alleged breach of section 34(12) be addressed by the High Court.

APPLICATION TO LIFT STAY UPON AN BORD PLEANÁLA

60. An application for a stay upon judicial review proceedings may only be brought by a planning authority, a local authority or An Bord Pleanála. Perhaps surprisingly, the party most immediately affected by the judicial review proceedings, namely the beneficiary of the planning permission, does not have standing to make an application under section 50(4). (This is to be contrasted with the equivalent provision under the PDA 2000 as originally enacted).

61. The developer in the present case has, therefore, had to adopt a different tack. The developer has brought an application to have a stay, which had been imposed at the leave stage and restrains An Bord Pleanála from determining the appeal, vacated. To properly understand this application, it is necessary to consider the nature of the order made at the time of the application for leave to apply for judicial review. The High Court (Noonan J.) had imposed a stay on An Bord Pleanála which prevented it from determining the appeal pending the outcome of these judicial review proceedings. This stay remains in force. As matters currently stand, therefore, An Bord Pleanála cannot decide the appeal.

62. The developer seeks to have this restraint lifted, with the practical consequence that An Bord Pleanála could then proceed to decide the appeal. This would present the unattractive prospect of the High Court and An Bord Pleanála being engaged in a foot race to see which would determine the proceedings before it first. The decision in one set of proceedings will render the other proceedings moot. It would simply be a question of who reaches the finishing line first.

63. The application to vacate the stay is refused. It would be inappropriate to make such an order on the facts of the present case. The Oireachtas has put in place an express statutory provision which seeks to regulate the conduct of parallel appeal proceedings and judicial review proceedings. Priority is to be given to appeal proceedings only in circumstances where the "matter … is within the jurisdiction of" An Bord Pleanála. A similar principle must guide the determination of the application on behalf of the developer to have the stay on An Bord Pleanála determining the appeal vacated. To do otherwise would be to ignore the legislative intent.

64. For the reasons already outlined, the grounds of challenge, if well-founded, would have the consequence that the appeal is not within An Bord Pleanála's jurisdiction. For the same reasons as the application to stay the judicial review proceedings is refused, the mirror-image application to have the stay on the appeal proceedings vacated must also be refused.

CONCLUSION

65. The application to stay the within judicial review proceedings pursuant to section 50(4) and (5) of the PDA 2000 is refused. Priority is to be given to appeal proceedings only in circumstances where the "matter … is within the jurisdiction of" An Bord Pleanála. The grounds of challenge advanced in the judicial review proceedings are ones which, if well-

founded, taint the appeal and affect An Bord Pleanála's jurisdiction to embark upon the appeal. The statutory criteria for a stay are not, therefore, met.

66. It must be doubtful whether a planning authority can apply for a stay on judicial review proceedings in favour of an appeal which is pending before a different decision-maker, i.e. An Bord Pleanála. It seems from the wording of section 50(4) that what is contemplated is that it is only the decision-maker, before whom the matter is pending, who can apply for a stay.

67. The mirror-image application to vacate the stay, which restrains An Bord Pleanála from determining the appeal before it, is also refused. The Oireachtas has put in place an express statutory provision which seeks to regulate the conduct of parallel appeal proceedings and judicial review proceedings. Similar principles must guide the determination of the application on behalf of the developer to have the stay on An Bord Pleanála determining the appeal vacated.

68. The justice of the case is best served, not by denying the residents group an opportunity to challenge the legal validity of the planning authority's decision, but rather by ensuring that the judicial review proceedings receive an expeditious hearing. Accordingly, I propose to put in place arrangements to ensure that the substantive application for judicial review is heard in the next number of weeks.

Appearances

Emily Egan, SC and Stephen Hughes for the applicant instructed by Walter A. Smithwick & Son

James Connolly, SC and David Browne for the respondent instructed by James Harte & Sons Solicitors

Rory Mulcahy, SC and Aoife Carroll for the notice party developer instructed by Arthur Cox, Solicitors.