[2023] IEHC 112

THE HIGH COURT

JUDICIAL REVIEW

[2021 No. 1009 JR]

BETWEEN

CONCERNED RESIDENTS OF TREASCON AND CLONDOOLUSK

APPLICANT

AND

AN BORD PLEANÁLA, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

ELGIN ENERGY SERVICES LIMITED

NOTICE PARTY

(No. 2)

JUDGMENT of Humphreys J. delivered on the 10th day of March, 2023

1. In *Concerned Residents of Treascon and Clondoolusk v. An Bord Pleanála, Ireland and the Attorney General (No. 1)* [2022] IEHC 700 (Unreported, High Court, 16th December, 2022), I dismissed the applicant's proceedings which challenged a permission for a solar farm granted by the board. The principal facts are set out at more length in that judgment. Following the No. 1 judgment, the notice party informed the applicant that it now intends to apply to the Minister for Agriculture, Food and the Marine for an environmental impact assessment (EIA) screening decision in relation to the hedgerow removal element of the project. The applicant has now sought some form of substantive relief on foot of the No. 1 judgment, as well as leave to appeal, a reference to the CJEU and an order for costs. I will deal with each of these in turn.

Whether there should be substantive relief

2. Very unusually, after the substantive judgment, the applicant complains about the proposed dismissal of its proceedings and argues that it should be granted declaratory relief along the following lines: "A Declaration that the development consent given for, and the execution of, solar farm developments and associated works at Treascon and Clondoolusk, Portarlington, Co. Offaly involving land restructuring in excess of 50 hectares and field boundary removal in excess of 500 metres must be preceded by an assessment with regard to their environmental effects, in accordance with

Directive 2011/92 EU as amended". In oral submissions, the applicant went further to ask the Court to revisit the decision to refuse *certiorari.*

3. In the statement of grounds, the applicant did not seek an order compelling the developer to apply to the Minister or a declaration that it would be unlawful to remove hedgerows without such a successful application. If the problem were just one of unpleaded reliefs, the court could legitimately draw on the claim for further and other relief, or the general declaratory relief sought in accordance with Practice Direction HC107 applicable in the List, or the wide jurisdiction under O. 84 r. 19 RSC. But the problem goes beyond that - there are no grounds pleaded that would allow such reliefs to be granted. Nor was the Minister ever joined as a party to the proceedings.

4. I accept that an applicant can supplement a deficiency in the reliefs, even at a late stage in the proceedings, by reference to the procedures just referred to, but flexibility regarding the court's entitlement to grant reliefs not specifically claimed has to be within the contours of the case as defined by the grounds. A failure to plead the necessary supporting grounds or to join the necessary parties or both precludes the grant of unpleaded relief. I do not see how a declaration as sought by the applicant could properly be granted at this or any stage in these proceedings given the lack of a ground to this effect, and indeed given that the Minister is not a party. The issue of the EIA screening process by the Minister will have to be one for some other set of proceedings.

5. To put it another way, the issue is hypothetical for the purposes of these particular proceedings because it is "not in furtherance of the resolution of a dispute" to which the proceedings relate: see *Conway v. An Bord Pleanála & Clonres v. An Bord Pleanála* [2022] IESCDET 71, *Lofinmakin & Ors v. Minister for Justice, Equality and Law Reform & Ors* [2013] IESC 49, [2013] 4 I.R. 274, [2013] 11 JIC 2001, *E.L.G. v. H.S.E.* [2021] IESC 82, [2022] 1 I.L.R.M. 213, [2021] 12 JIC 2001.

6. Overall, the applicant's submissions look quite impressive at first reading, but only if you ignore the impermissible recalibration of the pleaded case and the consequent mischaracterisation of the No. 1 judgment. That judgment does not have the sweeping implications alleged and nor does it result from an unprecedented procedure. The points now complained of arose from a fairly basic application of established pleading rules to the particular challenge.

7. The applicant dramatically claimed that the statements in the No. 1 judgment about rural land restructuring meant that the court came up with something that none of the parties had argued. That sounds alarming, but the drama is contrived. In every case where a court does not find 100% for one party but identifies something of merit in the losing party's submissions (this happens quite

often), it can be said that the court has "come up with something that none of the parties argued for". But that is only true in the trivial sense that each party argues for 100% success for itself, so anything short of that for the winning side is perhaps just about literally "something nobody argued for". But each element of the result is something that at least one of the parties argued for. There is nothing to see in that everyday procedure, despite the applicant's overhyped characterisation.

8. In any event, even if I am wrong about anything else, there is no need for a declaration that the notice party should apply for EIA screening because it has already stated that it will do so. Subject therefore to what follows below regarding a CJEU reference, there isn't any basis for granting a declaration or otherwise revisiting the order proposed in the No. 1 judgment dismissing the proceedings.

Leave to appeal

9. The applicant seeks certification of the following questions:

(i). Given that that the principle of primacy of EU law requires not only the courts but all the bodies of the Member States to give full effect to EU rules; and where the EU law requires the competent authority in a consent application process to take account of the effects on the environment at the earliest possible stage in all the technical planning and decision-making processes; and where the EIA Directive expressly provides that the public concerned is entitled to express comments and opinions when all options are open to the competent authority or authorities before the decision on the request for development consent is taken; does An Bord Pleanála have jurisdiction to conduct an Environmental Impact Assessment of a solar farm, the construction of which is functionally or legally interdependent with rural land restructuring?

(ii). If the answer to the above is no, then does An Bord Pleanála have jurisdiction to grant planning permission for the said development <u>without</u> conducting such an EIA?

(iii). Is the grant of planning permission for the said solar farm a 'development consent' for the purposes of the EIA Directive?

(iv). In circumstances where a project that does not come within the classes of development for which EIA is required contains a separate smaller project for which screening/EIA is required, is the entire development to be the subject of such a screening/EIA or can it be divided and a separate consent be sought in respect of the smaller development alone?

(v). Under domestic law (S.I. No. 456/2011), land restructuring can by itself be made subject to EIA in a separate consent process which, if initiated by the developer, would require mandatory EIA of the activity of restructuring an area in excess of 50 hectares of land by removal of field boundaries, and at a minimum screening for EIA due to the removal of more than 500 metres of field boundary, in circumstances where the extent of boundary removal and land restructuring is to be decided by An Bord Pleanála itself as an intrinsic part of the solar farm development consent application, can an EIA of a different development be deferred?

(vi). Can a later EIA on a smaller part of the overall development be properly conducted in such an assessment without the full project being open for assessment/ alteration/ review?

(vii). Given that the Court of Justice of the European Union has held in Case C-72/95 *Kraaijeveld and Others v. Gedeputeerde Staten van Zuid-Holland* (Court of Justice of the European Union, 24th October, 1996, ECLI:EU:C:1996:404) that the wording of the EIA Directive indicates that its scope is wide and its purpose very broad, was it valid for the High Court to conclude that solar farms are, in and of themselves, not projects that require EIA simply because they are not named in Annex I or Annex II of the EIA Directive, or can the fact that a solar farm development is also a project for the restructuring of rural landholdings and likely to have significant effects on the environment by virtue, *inter alia*, of its nature, size or location, result in a requirement for EIA for the whole solar farm project? and

(viii). Does the Applicant have a remedy under s. 160 of the Planning and Development Act 2000, as amended (or any other remedy), in the event that the developer fails to make an application to the Minister for Agriculture for consent, or fails to acknowledge an obligation to do so prior to removing any hedgerows, in circumstances where planning permission has been granted for the solar farm including its construction and land clearance, and work consisting of the removal of field boundaries for the purposes of agriculture is classed as exempted development pursuant to s. 4(4A) of the Planning and Development Act 2000, as amended, and S.I. No. 454/2011 - Planning and Development (Amendment) (No. 2) Regulations 2011, or is there any other domestic law remedy that will ensure compliance with the EIA Directive?

10. The basic problem with these questions individually and collectively is that they go beyond the limited grounds set out in the pleaded case, for the reasons explained in the No. 1 judgment. Repetition would add little to that. Leave to appeal is not a mechanism to transcend what was pleaded in the High Court, and at the level of broad theory it is, in principle, constitutionally undesirable for an appellate court to decide a new point that was never pleaded or argued at first instance level, without a solid basis for doing so, even bearing in mind the spectrum of situations that can arise in that regard, such as lack of objection to the new point being considered, for example. But lack of objection is not something we are suffering from here. The applicant inevitably seeks to retro-fit the points now made into its original case having had sight of the No. 1 judgment. But that square-peg-insertion procedure wrenches the issues from their original context, which was the alleged failure *by the board* to carry out EIA *under the planning code* in relation to the application made to it, and the State's alleged failure to implement the EIA obligation *in the planning code*.

11. As noted by the Supreme Court in *Moore v. An Bord Pleanála* [2021] IESCDET 124 at para. 26: "Having regard to the absence of a claim in the High Court judicial review in relation to the two stage process, leave to appeal is not warranted, in the light of the importance of pleadings and the well-established principles and authorities in regard to the identification of the grounds of challenge in a judicial review, see for example the recent decision of this Court in *Casey v. Minister for Housing, Planning and Local Government & Ors.* [2021] IESC 42". That principle is also applicable by analogy to the grant of leave to appeal to the Court of Appeal.

12. Noonan J. made the point in that context in *Ross v. An Bord Pleanála (No. 2)* [2015] IEHC 484, [2015] JIC 2107 (Unreported, High Court, 21st July, 2015): it is generally inappropriate to grant leave to appeal on the basis of a point which has not been properly pleaded. Requiring an applicant to stick to its pleaded case is merely the application of well-settled law to particular proceedings, and the closer one comes on the spectrum to the application of established legal principles to the facts of an individual case, the further one gets away from there being a point of law of exceptional importance (see *B.S. v. D.P.P.* [2017] IESCDET 134, [2017] 12 JIC 0605, *Quinn Insurance Ltd v. Price Waterhouse Cooper* [2017] IESC 73, [2017] 3 I.R. 812, [2017] 12 JIC 1204, *Fitzpatrick v. An Bord Pleanála* [2018] IESCDET 61, [2018] 4 JIC 2606).

13. The applicant makes no real attempt to engage with the logic of the No. 1 judgment and indeed professes an incomprehension of it. I respect anybody's right to disagree with any given judgment (there are so many judgments out there that some inconsistency or debatability is inevitable, and in any event freedom of thought and expression has to apply to one's views on

judgments as well), and depending on the circumstances I would, in principle, accept a party's right to assert incomprehension of any given judgment (again given the volume of jurisprudence it is not surprising that one occasionally sees a pronouncement the meaning of which is not absolutely self-evident). But in this particular case, the meaning seems reasonably clear to me and to the opposing parties (who made a point of saying so repeatedly), so it can't be that bad.

14. As regards the proposed question 8, this does raise a delicate issue in that, on the one hand, the court is not generally obliged to spell out for parties what their options are, or otherwise advise their proofs. On the other hand, the fundamental right to an effective remedy and of access to the court requires that the law should be reasonably clear in relation to what is the appropriate route into court, in order to ensure that one's complaint is heard. The right to an effective remedy is in a way the most fundamental of all rights, because without it all other rights are meaningless.

15. It is not always obvious how the court should balance the undesirability of advising proofs with its mission to facilitate access to justice, and that might not be entirely obvious here to the level of total certainty that might be desirable. I did raise a question (not a statement) with counsel as to whether s. 160 of the 2000 Act applies, as part of the usual devil's advocacy at the hearing (the court in such situations representing the devil *pro bono*, to use a phrase from Christopher Hitchens in another context), but for clarification I should record that the outcome of that exchange is that nobody now seems to be suggesting that the section would apply to the hedgerow removal if ministerial screening wasn't applied for, or if the Minister's decision was in dispute. So it may well be that the applicant's remedy is not s. 160; but that does not mean that there is no remedy.

16. Confoundingly, the applicant contended that it did not have a remedy in relation to the EIA screening process. Part of the basis for this seemed to be a contention that the legislation was defective in that it did not provide for public participation and did not require the Minister to conduct EIA screening of the overall project. It is not for me to set out what remedy the applicant has but self-evidently there is a route into court to complain about the legislation, the process, any specific decision and the right to be notified of the decision so that it can be challenged. But that is a separate case against the Minister and the State, not this case.

17. In this case the applicant did not challenge the European Communities (Environmental Impact Assessment) (Agriculture) Regulations 2011 (S.I. No. 456 of 2011). It only challenged Article 109(2) of the Planning and Development Regulations 2001 (S.I. No. 600 of 2001). The applicant now claims that a dual consent procedure would create anomalies given the fact that the existing planning permission has been upheld, but the upholding of the existing permission is to some extent

a function of the grounds of challenge that were specifically pleaded. The court's role generally is not to engage in an inquisitorial overview, but to deal with the points that properly arise in any given set of proceedings. Any unsuccessful litigant can potentially think of new and better points once armed with an adverse decision, what O'Donnell J. referred to as "the principle of delayed eloquence" (*The People (D.P.P.) v. Rattigan* [2013] IECCA 3, [2013] IECCA 13, [2013] 2 I.R. 221, [2013] 2 JIC 1901, [2013] 2 JIC 1905, at p. 245; see also *Re Lennon* [2021] IEHC 594, [2021] 9 JIC 3003 (Unreported, High Court, 30th September, 2021), *Hellfire Massy Residents Association v. An Bord Pleanála, The Minister for Housing, Planning and Local Government, Ireland and The Attorney General* [2021] IEHC 636, [2021] 10 JIC 1302 (Unreported, High Court, 13th October, 2021)).

18. Speaking about administrative processes generally rather than this matter specifically, the basic procedure to set up litigation is to write to the putative responding party setting out one's requirements, to consider any reply received within whatever reasonable timescale is set for that, and then to either await a formal decision and challenge it if adverse, or if necessary to seek declaratory and injunctive relief insofar as legally appropriate and actually necessary. On that point, the Court will normally not dictate administrative procedures in advance, or interrupt an ongoing process, on the premise that it will review the procedures actually adopted once the decision is made and challenged. That does however imply an enforceable right on the part of an interested party to be assured of the entitlement to be notified of the final decision in order to enable that challenge to be brought within time. But presumably any rational and fair decision-maker will agree to give such notice if called on to do so. Maybe I am wrong, but litigation should in principle be unnecessary to clarify that.

19. Insofar as concerns any fear of works being carried out prior to the bringing of a challenge, the same principle applies. Any given would-be applicant can write to the developer to seek an assurance that works will not be carried out until the applicant has had notice of the decision, a reasonable specified time to institute proceedings if adverse to its position, and a reasonable specified time to seek a stay from the court. In default of such an assurance being promptly provided, the court's injunctive jurisdiction must be available, but again ideally it should not be necessary for that jurisdiction to have to be actually invoked. Nonetheless, in the absence of sufficient assurances, the court is not obliged to wait for actual damage to the environment before making an order, if for no other reason that any such requirement would contravene EU law in multiple dimensions (although ideally one shouldn't need Europe to enable appreciation of that point).

20. For the reasons outlined, and subject to what follows regarding the CJEU, there is no basis for leave to appeal.

Proposed reference to the CJEU

21. The applicant submits as follows in relation to seeking recourse to Luxembourg: "If it is not *acte clair* that an Environmental Impact Assessment or screening for same is required for a solar farm in circumstances where its construction both requires and results in the restructuring of rural land holdings and as such the whole project is likely to have significant effects on the environment by virtue, inter alia, of its nature, size or location, then the question should be the subject of a preliminary reference to the CJEU under Article 267 of the TFEU".

22. Insofar as the applicant complains that some of the ramifications of EU law points touched on in oral submissions are not *acte clair,* I would have some sympathy for that proposition subject to hearing contrary argument in a case in which the question properly arises. The problem for the applicant is not so much that it did not ultimately come up in argument with some kind of a potentially viable EU law point that was not *acte clair* (not necessarily the exact point that is now identified in the proposed question to be referred), but that the specific points elaborated at the hearing in this regard did not properly arise from the pleadings in these particular proceedings. The pleadings were focused on the board's duties rather than those of other organs of the State or the State generally (other than in respect of the misconceived and narrowly pleaded transposition complaint). Insofar as the No. 1 judgment decides the points made by the applicant, that process is confined to the points that were properly grounded in the pleadings.

23. So I do not think that this is an appropriate case for reference to the CJEU of the kind sought, even leaving aside the problem that by deciding the case already (albeit that we are still awaiting the perfection of the order), I impliedly declined to go that route in the No. 1 judgment. Reference to Luxembourg is not an appeal mechanism, and art. 267 TFEU makes clear that a preliminary ruling only arises if it is necessary to enable the court to give judgment. Thus, unless I were to reopen the case (as in *Sweetman v. An Bord Pleanála, Ireland and the Attorney General* [2021] IEHC 777, [2021] 12 JIC 0606 (Unreported, Hyland J., 6th December, 2022) ("Sweetman XIV")), which I am not otherwise minded to do, I do not have jurisdiction to refer a question to Luxembourg insofar as the substantive element of the case is concerned. As the State quite correctly puts it in its submissions (and while all submissions in the case were very helpful, it's no reflection on the other parties if I can be forgiven for saying that the State's submissions were particularly compelling in their clear and logical presentation of the issues): "the Court has *already* determined every issue

that was put before it. The Court has not deferred consideration of any pleaded point and so no matter in controversy remains for determination" (para. 92).

24. As regards a reference to the CJEU for the purposes of leave to appeal, that is not normally a desirable procedure, even assuming it to be permissible. If these proceedings come substantively before an appellate court, and if such court thinks that there is a good case for a reference, then it will no doubt act accordingly.

25. I am not sure whether I need to address the merits of the question further, but maybe I will just add that it doesn't make a whole lot of sense procedurally. The developer is now positively stating that it will make an EIA screening application. Given that fact, it is a waste of time to ask the CJEU whether screening is necessary, because it is happening anyway. The CJEU have better things to do than deal with such a question, which seems to me clearly inadmissible on these facts. Any complaints about the outcome of the EIA screening process can be addressed in due course.

26. The proposed reference to the CJEU is not appropriate on any view, and both procedurally and in terms of merits is not a basis to make an order other than the one I have indicated above, namely to dismiss the proceedings and refuse leave to appeal.

Costs

27. The applicant submits as follows in relation to costs: "In the event that a certificate to appeal is granted, costs should be reserved pending the outcome of the appeal. Further and in the alternative, to the extent that the Applicant has succeeded in its application to prevent the developer from proceeding with the project until such time as an EIA has been completed, costs should be awarded in its favour".

28. The written submissions did not specify against whom costs were sought by the applicant. In oral submissions, the applicant stated that it was seeking costs against the board and the State, not the notice party.

29. Insofar as the applicant now majors on the fact that the developer will be applying for EIA screening, that was not a relief sought in the proceedings.

30. Section 169(5) of the Legal Services Regulation Act, 2015 provides that "Nothing in this Part shall be construed as affecting section 50B of the Planning and Development Act 2000 or Part 2 of the Environment (Miscellaneous Provisions) Act 2011". The logic of that is to look at s. 50B of the 2000 Act or the 2011 Act, where applicable, as the sole or at least primary source of costs rules in environmental litigation, subject to EU law, including the Aarhus interpretative obligation. That is

reinforced by the disapplication of O. 99 RSC by s. 50B(2) of the 2000 Act, for at least some purposes.

31. Section 50B(2) to (4) provides as follows:-

> "(2) Notwithstanding anything contained in Order 99 of the Rules of the Superior Courts (S.I. No. 15 of 1986) and subject to subsections (2A), (3) and (4), in proceedings to which this section applies, each party to the proceedings (including any notice party) shall bear its own costs.
>
> (2A) The costs of proceedings, or a portion of such costs, as are appropriate, may be awarded to the applicant to the extent that the applicant succeeds in obtaining relief and any of those costs shall be borne by the respondent or notice party, or both of them, to the extent that the actions or omissions of the respondent or notice party, or both of them, contributed to the applicant obtaining relief.
>
> (3) The Court may award costs against a party in proceedings to which this section applies if the Court considers it appropriate to do so—
>
> (a) because the Court considers that a claim or counterclaim by the party is frivolous or vexatious,
>
> (b) because of the manner in which the party has conducted the proceedings, or
>
> (c) where the party is in contempt of the Court.
>
> (4) Subsection (2) does not affect the Court's entitlement to award costs in favour of a party in a matter of exceptional public importance and where in the special circumstances of the case it is in the interests of justice to do so."

32. As far as sub-s. (2A) is concerned, the applicant has not succeeded in obtaining relief so that provision is of no benefit.

33. Sub-section (3) is not relevant. While I didn't accept that the applicant was entitled to relief, and while some of the more claims advanced in the present application might strike one as having been on the melodramatic end of the spectrum, I would not propose to characterise these as frivolous. Frivolous in this context is not a synonym for the merely meritless, but connotes a point that is so wildly meritless, or so lacking in even the possibility of ever succeeding, for example by lack of compliance with basic procedural requirements, or motivated by improper purposes, such that it would be inappropriate even to seek to argue it.

34. Nor do I think that the applicant properly comes within sub-s. (4) given the limited nature of the case pleaded, as explained at greater length than the No. 1 judgment, and given the various

procedural misconceptions that the applicant has laboured under, which would somewhat undermine the necessary heroic narrative to sustain an application under that subsection.

35. No argument was addressed on the basis of the 2011 Act, although I don't think it would have changed the position anyway.

36. One then asks whether there is any residual discretion if sub-ss. (2A), (3) and (4) do not apply, or whether the default no order rule is automatic. I am inclined to the latter view, as making most sense of the section. In accordance with its own terms I see the 2015 Act as yielding to the approach set out in s. 50B, and I see O. 99 as having been disapplied for this purpose. If I am wrong about that I would exercise any such discretion by making the default order anyway in all the circumstances here.

37. The default position under s. 50B(2) of no order is the obvious and appropriate outcome.

Order

38. For the reasons set out above, the order will be as follows:

(i). the substantive order will be perfected on the basis of a dismissal of the proceedings *simpliciter*;

(ii). the application for a reference to the CJEU is refused;

(iii). leave to appeal is refused;

(iv). there will no order as to costs.