APPROVED **[2020] IEHC 462**

THE HIGH COURT
JUDICIAL REVIEW

2019 No. 825 J.R.

BETWEEN

MICHAEL DEMPSEY
EVA DEMPSEY
EAMONN COURTNEY
JACINTA COURTNEY

APPLICANTS

AND

AN BORD PLEANÁLA

RESPONDENT

ARDSTONE HOMES LTD

NOTICE PARTY

JUDGMENT of Mr. Justice Garrett Simons delivered electronically on 9 October 2020

INTRODUCTION

1. A judgment was delivered in these proceedings electronically on 24 April 2020 ("***the initial judgment***"). The judgment bears the neutral citation [2020] IEHC 188. As appears from the initial judgment, this court had decided to seek the guidance of the Court of Justice of the European Union, by way of a reference for a preliminary ruling under Article 267 of the TFEU, as to this court's obligations under the Environmental Impact Assessment Directive (2011/92/EU) ("***the EIA Directive***"). In particular, guidance was to be sought as to whether the High Court might be obliged to rule upon the validity of the impugned planning permission notwithstanding that the Applicants now wish to withdraw their proceedings.

NO REDACTION REQUIRED

2. A draft of the intended reference to the Court of Justice had been included as an appendix to the initial judgment. It was explained that the formal order for a reference would not be drawn up for twenty-one days. The parties were invited, in the interim, to bring to the attention of the court any error in the draft reference by emailing the Registrar assigned to this case.

3. This approach had been in accordance with the protocol of 24 March 2020 on the delivery of judgments electronically, which indicates that issues arising from a judgment should generally be dealt with without the necessity for a further oral hearing.

> "The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of delivery subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the Court is required to make will also be published on the website and will include a synopsis of the relevant submissions made, where appropriate."

4. The Attorney General, by way of a letter from the Chief State Solicitor's Office dated 14 May 2020, wrote to the Registrar and requested that the drawing up of the order for reference be adjourned for a *further* twenty-one days, i.e. until 5 June 2020. The reason for this request was that the Attorney General wished to consider the advice of counsel, and, if appropriate, to issue an application to the court to be joined to the proceedings as a notice party.

5. By ruling published on the courts.ie website on 15 May 2020, this court confirmed that the formal order for a reference would not be drawn up until the issue of the Attorney General's participation in the proceedings before the High Court had been resolved. The Attorney General was given liberty to issue a motion seeking to be joined in the proceedings returnable for 19 June 2020.

6. On that date, an order was made, with the consent of all of the parties, joining the Attorney General to the proceedings. Directions were also given as to the exchange of written submissions. This exchange concluded with the filing of submissions on behalf of the Developer on 23 July 2020. The parties had been advised that the court would deliver its reserved judgment on the first Friday of the new legal term, 9 October 2020.

7. The Developer, in its submission, had requested that, given the urgency of the matter from the Developer's perspective, this court should announce its decision, i.e. on whether the preliminary reference is to proceed, at the soonest possible opportunity, and, if necessary, in advance of the publication of its reasoned decision.

8. By direction of the court, the Registrar wrote to the parties as follows on 18 August 2020.

> "In circumstances where the notice party developer has requested, in its submission of 23 July 2020, that the court give its ruling on whether it intends to proceed with a reference to the Court of Justice as a matter of urgency, and, if necessary, in advance of publishing its reasoned decision, Mr Justice Simons has directed me to inform you that no preliminary reference will now be made. Mr Justice Simons is persuaded, for the reasons set out in the initial parts of the Attorney General's written submission, that he has no jurisdiction, as a matter of national constitutional law, to make a reference. Accordingly, an order will now be drawn up granting the Applicants leave to withdraw their proceedings, and, in consequence thereof, an order will be made striking out the proceedings in their entirety without any order as to costs. If there is any difficulty with the proposed form of order, the parties have liberty to write to me, as the Registrar, by lunchtime on Monday, 24 August 2020, setting out their concerns.
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> The reasoned decision of the court will be published on Friday 9 October 2020 as previously advised."

9. In the event, none of the parties raised any issue in respect of the proposed order, and the formal order of the court has since been perfected on 25 August 2020.

10. The purpose of the within judgment is, first, to set out the reasons for joining the Attorney General to the proceedings, and, secondly, to set out the reasons for the decision not to make a reference to the Court of Justice.

(1). JOINDER OF THE ATTORNEY GENERAL

11. The Attorney General has a well-established role of defending the public interest, and, relevantly, has on a number of occasions intervened in planning and environmental law proceedings to ensure compliance with EU law. A recent example of such an intervention is provided by the proceedings challenging the grant of planning permission for the Apple data centre in Galway, *Fitzpatrick v. An Bord Pleanála* [2018] IESC 60. On the facts of that case, the Attorney General and the Minister for Housing, Planning and Local Government, who had not participated in the proceedings before the High Court, successfully applied to be heard on the appeal to the Supreme Court as *amici curiae*.

12. More recently, in *Friends of the Irish Environment clg v. Legal Aid Board* [2020] IEHC 347, the High Court (Hyland J.) directed that the Attorney General be put on notice of proceedings raising issues under the Aarhus Convention on access to justice in environmental matters.

13. The circumstances in which the Attorney General might be allowed to intervene in judicial review proceedings under the planning legislation had been the subject of some debate in *Usk and District Residents Association Ltd v. An Bord Pleanála* [2009] IEHC 346; [2010] 4 I.R. 113 ("***Usk***"). The facts of *Usk* were unusual. The applicant had initially sought relief as against the State for its alleged failure to transpose properly certain EU environmental law directives. Ireland and the Attorney General had, accordingly, been joined as respondents to the proceedings. However, at the hearing, the applicant for judicial review withdrew its claim as against the State respondents. The Attorney General then indicated, through counsel, that he wished to continue to participate in the proceedings, and to support certain of the arguments made by the applicant. An Bord Pleanála objected that the State had no legal standing to intervene on

the issues between the applicant and the board, and further submitted that once the reliefs claimed against the State had been withdrawn, it was no longer properly a party to the proceedings. MacMenamin J. overruled this objection.

> "My conclusion was that, in the words in O. 84 of the Rules of the Superior Courts, the Attorney and the State had such a legitimate interest in pursuance of the points identified, as being of general public concern. That interest derived from the Attorney's position as guardian of the public interest, and by reason that the issues raised a question of public policy in which the Executive had a legitimate view and a desire to be heard thereon. This arose in particular because of the obligation of the State (and this Court) to observe and implement the precepts of EC law in its considerations. Any issue of some other statutory *locus standi* derived simply from the planning statutes, was to my mind, subservient to these overarching considerations.
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> By way of illustration, [*TDI Metro Ltd v. Delap (No. 1)*[2000] 4 I.R. 337] was a case where the Attorney sought actually to be joined as a party even at the appeal stage, clearly a much more extreme situation than here. Even then the Supreme Court was prepared to exercise its discretion so as to countenance such intervention, as the issue was one of public concern, whether a County Council had a statutory power to prosecute indictable offences. While, as *TDI* points out, the Attorney is not entitled, to intervene as of right, a court has discretion to allow a party to be joined therein if it is necessary in the interests of justice, and where there is no specific rule of law excluding the addition of the parties at that stage of the proceedings.
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> The State had already been joined in these proceedings. There could be no question here of having to join or add a party therefore. Instead I formed the view that the position was analogous to a defendant in civil proceedings making a case adverse to the interests of another defendant, albeit in the absence of any procedure in the rules regarding judicial review procedure, for the service of a notice of indemnity or contribution. A respondent and notice party frequently found themselves in adversarial positions in judicial review matters. Applying these considerations, I ruled that the appropriate course should be that the Attorney General and the State should instead be joined as a notice party rather than as respondent, having tendered certain undertakings in relation to any cost issues, and that those submissions should then precede those of counsel for the Board."

14. MacMenamin J. indicated, *obiter dicta*, that the Attorney General, on behalf of the State, might well have a wide entitlement to participate in proceedings where it is alleged that a national competent authority has acted in breach of EU law.

> "This ruling, on these facts, is not to say that there may not now exist a far wider entitlement for the Attorney to participate in proceedings if there has been a serious breach by a public authority of its obligation to comply with the requirements of an EC Directive. Such an entitlement could well again be based on Article 10 EC and Article 249 EC, and the undoubted fact that the State is the entity ultimately responsible for any failure in the transposition or application of an EC Directive. A serious breach by a public authority of obligations under a Directive may expose the State to the risk of infringement proceedings under Article 226 EC and also to possible fines. As the judgment of the European Court of Justice in Case C-215/06 *Commission v. Ireland* demonstrates, infringement proceedings may be based on a breach in respect of even one single development project."

15. On the particular facts of *Usk*, however, the Attorney General had been joined in the proceedings from the outset, and thus it was not necessary for the court to rule on whether the Attorney General would have been entitled to intervene in existing proceedings to which he or she was not a party.

16. In the subsequent case of *Sweetman v. An Bord Pleanála* [2009] IEHC 599, the Attorney General was again allowed to support an application for judicial review. The case concerned the interpretation of Article 6(3) of the Habitats Directive (Directive 92/43/EC) and the domestic Natural Habitats Regulations 1997 (S.I. No. 94 of 1997). The High Court (Birmingham J.) stated that there was "a very substantial public dimension at issue in relation to the interpretation of the Habitats Directive and the Regulations of 1997", and that it was understandable that the State would wish to be heard on the issue. The High Court went on to say that the fact that the State did not seek to launch judicial review proceedings when unhappy with the approach taken by An Bord Pleanála in deciding to grant development consent, did not mean that the State would not have a "keen interest" in contributing and advancing views in the judicial review

proceedings. The High Court also emphasised the role of the Attorney General in protecting the public interest.

17. The State in *Sweetman* supported the applicant's request for a preliminary reference to the Court of Justice, and, in the event, the decision to grant planning permission was ultimately set aside as having been reached in breach of the requirements of the Habitats Directive. (See Case C-258/11, *Sweetman*, EU:C:2013:220).

18. Having regard to the judgments in *Usk* and *Sweetman*, I made an order joining the Attorney General to these proceedings on 19 June 2020. There is an obvious public interest in the issues canvassed in—and presented by—the proposed reference to the Court of Justice. As appears from the draft reference, it sought the guidance of the Court of Justice on how to reconcile (i) the principle that a national court normally adopts a passive role to proceedings, with (ii) the proper discharge of its obligations under Article 11 of the EIA Directive and/or the remedial obligation identified in Case C-201/02, *Wells*, EU:C:2004:12. The Attorney General wished to be heard on the logically anterior question as to whether this court has jurisdiction to determine proceedings in circumstances where all of the parties are consenting to an order striking out the proceedings *simpliciter*. In particular, the Attorney wished to advance the argument that—as a matter of domestic constitutional law—a court simply does not have jurisdiction to determine issues in the absence of a live controversy, save in limited and defined circumstances.

19. Put shortly, the Attorney General wished to make a submission on an important issue of constitutional law concerning the nature and extent of the judicial power. The Attorney, as the guardian of the public interest, is a proper party to be heard in respect of these matters.

20. For the sake of completeness, it should be noted that the mere fact that a court is considering making a reference for a preliminary ruling pursuant to Article 267 TFEU does not, of and in itself, necessitate that the Attorney General must be put on notice of the relevant proceedings. This is because the decision on whether to make a reference is, ultimately, a matter for the court. See, for example, Case C-416/10, *Krizan*, EU:C:2013:8 (at paragraphs 64 to 67). The court will, of course, invite and give careful consideration to the submissions of the parties to the proceedings on whether a reference is appropriate. It will not normally be necessary, however, to hear from the Attorney General at this point in the process. Rather, it will generally be sufficient that the State is afforded an opportunity *subsequently* to make observations to the Court of Justice in the context of a pending reference. The Statute of the Court of Justice of the European Union requires that all Member States be notified of the making of an Article 267 reference, and that they shall be entitled to submit statements of case or written observations to the Court of Justice.

(2). DECISION NOT TO MAKE A REFERENCE TO COURT OF JUSTICE

21. As appears from the initial judgment, both the court and the parties had approached the matter on the basis that, as a matter of domestic law, the court has a limited *discretion* in ruling on an application to withdraw proceedings. It should be emphasised that, whereas the parties accepted that such a discretion existed in principle, they submitted that it should properly be exercised in favour of allowing the compromise of proceedings.

22. The Attorney General has adopted a different approach, submitting that, as a matter of domestic constitutional law, the court does not have any *jurisdiction* to determine the proceedings in circumstances where the parties no longer wish to have any issue resolved. The fact that the court had originally been seised of a dispute does not mean that it

continues to have jurisdiction. Crucially, it is said that there is nothing under EU law which confers jurisdiction where same is lacking as a matter of domestic constitutional law. EU law does not require national courts to exceed their sphere of competence to achieve the objectives of the EIA Directive (or indeed any EU legislation). If this is correct, then it follows that the court does not have jurisdiction to make a reference to the Court of Justice in circumstances where all of the parties wish the proceedings to be struck out with no order.

23. Attention is drawn by the Attorney General to the judgment in Case C-470/12, *Pohotovost*, EU:C:2014:101. There, the Court of Justice appears to expressly contemplate that the refusal of a national court to take note of the withdrawal of the main proceedings might result in the Court of Justice removing the case from its own register.

24. The written submissions on behalf of the Attorney General make extensive reference to the case law in respect of (i) the definition of the concept of the administration of justice, and (ii) the principle that a court will not normally determine proceedings which are moot, in support of the proposition that—as a matter of domestic constitutional law—a court simply does not have jurisdiction to determine issues in the absence of a live controversy, save in limited and defined circumstances (such as fraud).

25. The thrust of the submissions is illustrated by reference to the following passage cited from the recent judgment of the Supreme Court in *I.R.M. v. Minister for Justice and Equality* [2018] IESC 14; [2018] 1 I.R. 417 (at paragraph 162).

> "This case is undoubtedly important in its immediate legal context, and indeed more broadly. But it also raises important issues related to the function of the court when considering novel issues of law particularly in the field of constitutional interpretation. The first of those issues relates to what a court decides and how it decides it. If it is correct to say that a decision of the court can make law – and it can be said it does so not least because a decision of a superior court binds everyone in a similar position unless and until altered by legislation, the decision of the People in referendum, or subsequent judicial decision – then it is equally important to recognise that courts

> make law in a way which is significantly different from the manner in which legislation is made by the Oireachtas. *Courts may only decide cases brought before them by parties. The parties must themselves have a legitimate interest, grounded in the facts, in the resolution of their dispute. A court cannot itself initiate a legal issue, still less issue of its own accord a generally binding statement of law. Furthermore, a court may only decide (in the sense of giving a binding determination) those legal issues which are necessary and essential to resolve the legal dispute between the parties*.* While courts may and do say other things in the course of a judgment which may be of benefit both in the development of the law and in the assistance of the resolution of future disputes, it is only that portion of the judgment that contains what is considered to be essential and necessary for the actual decision in the case which can be said to be binding on subsequent courts. Furthermore, it is for later courts to determine what portion of the judgment meets that test. Finally, but not least importantly, when a court comes to decide even those legal issues which are necessary and essential for determination in order to decide the case, it must do so according to law, rather than any view, however wise, well informed, and astute, as to what is desirable."
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> *Emphasis (italics) added.

26. These submissions are well made. The case law cited does not directly address the question of whether a court, having embarked upon the hearing of a dispute or controversy, can effectively *lose* jurisdiction mid-hearing as a result of the parties all agreeing that the proceedings should be struck out without further order. It is reasonable, however, to extrapolate from this case law that—save in instances of fraud or collusion—where the parties are all agreed that proceedings should be struck out without any order, then the court's jurisdiction ceases. There is no issue remaining upon which the parties require the court to adjudicate.

27. It is important to emphasise, however, that different considerations would apply where not all of the parties are agreed that the proceedings are to be struck out, or where there is disagreement as to the precise terms on which the proceedings are to be struck out. In such circumstances, there would remain a "live" controversy before the court, and the court would have discretion as to what form of orders to make. The court would be entitled to impose terms in respect of costs, and, in extreme cases, might refuse to allow

an applicant to withdraw proceedings where the respondent objects. (See, for example, *Joint Stock Company Togliattiazot v. Eurotoaz Ltd* [2019] IEHC 342 where the High Court (Noonan J.) suggested, *obiter dicta*, that once a trial commences and evidence on oath is given publicly in open court by the plaintiff, the court may reasonably conclude that the only way of avoiding injustice to the defendant is by allowing the trial to continue).

28. My initial judgment of 24 April 2020 had been decided *per incuriam*. The initial judgment mistakenly approached the matter as one of *discretion*, rather than one of *jurisdiction*. In particular, the initial judgment failed to recognise that, if and insofar as the leave of the court is required for the withdrawal of proceedings, the court's jurisdiction is properly confined to the precise terms upon which the proceedings may be withdrawn. The court might, for example, regulate the issue of costs. The court does not normally have a broader jurisdiction to decline to allow proceedings to be withdrawn where *all* of the parties have expressly indicated their consent. There might be exceptional cases involving fraud or collusion where the court might, in order to protect its process from abuse, have to retain seisin of proceedings. Nothing of that nature arises here.

29. Having mistakenly found that domestic law afforded a broader discretion than it does, this court considered that the guidance of the Court of Justice was necessary to allow it to identify the factors to be taken into account in the exercise of this supposed discretion. Now that this mistake has been identified and acknowledged, the premise for the proposed preliminary reference falls away.

CONCLUSION AND FINAL ORDER

30. For the reasons set out above, this court made an order on 25 August 2020 that these proceedings be struck out in their entirety, with no order as to costs. This order brought the proceedings to an end, and there will be no Article 267 reference to the Court of Justice.

Appearances

Oisin Collins for the Applicants instructed by O'Connell Clarke Solicitors
Brian Kennedy, SC and Fintan Valentine for An Bord Pleanála instructed by Philip Lee Solicitors
Neil Steen, SC and Aoife Carroll for the notice party developer instructed by McCann Fitzgerald
Michael M. Collins, SC and Catherine Donnelly for the Attorney General instructed by the Chief State Solicitor

Approved
Garrett Simons