THE HIGH COURT
JUDICIAL REVIEW

[2021] IEHC 143
[2020 No. 375 JR]

BETWEEN

BALSCADDEN ROAD SAA RESIDENTS ASSOCIATION LIMITED

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

AND

CREKAV TRADING G.P. LIMITED

NOTICE PARTY

AND

THE HIGH COURT
JUDICIAL REVIEW

[2020 No. 293 JR]

BETWEEN

CHRISTIAN MORRIS

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

AND

CREKAV TRADING G.P. LIMITED

NOTICE PARTY

(NO. 2)

Judgment of Humphreys J. delivered on Friday the 12th day of March, 2021

1. In broad terms, and subject to argument in any individual case, one can frequently envisage that issues in multi-layered litigation that blends domestic, European and constitutional-type challenges (or in other words, the typical major planning case nowadays) could be addressed in a rough order as follows:

   (i). firstly, domestic law issues (which may be enough);

   (ii). EU law points not appropriate for a reference (and if one of these is decisive, probably it's enough to stop there);

   (iii). then if needs be, EU law points that warrant a reference under art. 267 TFEU (because only at that point are such issues fully "necessary" for the decision); and

   (iv). finally, but only if there is no other determinative issue, points regarding the validity or ECHR compatibility of primary or secondary legislation or measures of a general character like ministerial guidelines, based on the principle of deciding constitutional-type issues last and on the principle that only when all else fails is there "no other remedy" available for the purposes of s. 5(1) of the European Convention on Human Rights Act 2003.

2. In *Balscadden Road SAA Residents Association Ltd. v. An Bord Pleanála (No. 1)* [2020] IEHC 586 (Unreported, High Court, 25th November, 2020), I got as far as category (i), found two of the domestic points determinative but decided them all anyway, and stopped there.

3. Following that hearing and judgment, the notice party has now returned to court with an innovative motion asking that I now also decide the European law grounds.

Jurisdiction to make the order sought

4. A case that stands or falls on a single question does not give rise to problems of the kind that confront us here. But in cases that can be disposed of on more than one ground, issues arise about the extent to which the court can or should express views on all issues, as well as the distinction between a positive decision that, taken with the material facts, forms part of the *ratio* on the one hand, and an *obiter* view, which is something less than a positive statement that the court is upholding or quashing a decision on a particular ground, on the other.

5. There is some asymmetry as between applicants and respondents in judicial review in the sense that an applicant only has to find one good point in order to win, whereas the respondent has to win on all points. This seems to incentivise the scattergun approach of launching dozens of grounds in the hope that there might be at least some fragment somewhere that takes the court's fancy. Taking that too far can be counterproductive - better for everybody to do the deep thinking early in the case and plead with precision accordingly.

6. Admittedly, the boundary between *ratio* and *obiter* is not absolutely self-evident where a decision could be made on more than one ground. Sometimes the court indicates this expressly, such as saying that it is basing its decision on point A, but is also offering a view on point B. Sometimes this may be implicit, such as where for example the court offers a view on an "if I am wrong" basis. Thus, if the judge says, in effect, I am deciding the case on point A, but assuming *arguendo* that I am wrong about that, I am deciding it on point B. The decision on point B is strictly speaking *obiter*, although if an appellate court found that the original court was wrong on point A, but correct on point B, point B would then become the *ratio* of the appellate decision.

7. Furthermore, even if the court making the decision adopts a particular characterisation, our system allows a later court to view a decision in narrower terms or indeed occasionally in broader terms, particularly by viewing some fact as material or non-material in terms different to those perceived by the original court. So where the court (as I did in the present case) finds in favour of a particular party based on two grounds, a later court could narrow the decision categorising one finding as the *ratio* and another as *obiter*, a point made by Professor Glanville Williams in *Learning the Law,* 11th ed. (London, Stevens & Sons, 1982), p. 75. However, for the purposes of the present discussion, I am speaking of the distinction as it is understood by the court itself. In that sense, both of the points were part of the *ratio*.

8. Where multiple points arise, the court has some choice as to how the matter should be dealt with. Ranging from deciding the least number of issues to deciding the greatest number of issues, the court's options include:

   (i). to positively decide one (or perhaps more than one), dispositive ground and say nothing about the other grounds;

   (ii). to positively decide one (or more than one), dispositive ground, offer *obiter* views on one or some (but not all) of the other issues and say nothing about any remaining issues;

   (iii). to positively decide one (or more than one), dispositive ground and offer *obiter* views on all other grounds; or

   (iv). to positively decide all issues.

9. As a matter of empirical observation, courts generally err on the side of deciding less rather than more. But the court has a choice in that regard. The court can and may decide only such limited issues as are necessary to dispose of the case; or alternatively may decide all issues that arise on the pleadings, even if a decision on just a single issue would be dispositive.

10. I call this a "choice" rather than a "discretion" because this has never been viewed as in any way like a reviewable discretion (in relation to costs for example) that is subject to scrutiny and reversal on appeal. Judges in our system have never been legally compelled to decide *obiter* points any more than they are precluded from say sitting at 10.30 am rather than 11.00 am, or writing judgments with the conclusion announced first followed by reasons or *vice versa*. Whether a particular court in a particular case goes on to offer an *obiter* view on one of the issues that arises on the pleadings but is not decisive is not the sort of thing that our system has ever sought to rigidly regulate. It falls into the category of practices that can legitimately vary from judge to judge and from case to case, and for there to be an inflexible rule or even a strong institutional preference one way or the other in relation to such matters would, particularly for first instance judges, diminish the art and profession of judging to the level of an almost mechanical process.

11. Of course there are cases where courts have decided all of the issues even where this was not necessary. During the hearing in the present case I suggested that the parties focus on the domestic issues first and leave argument as to the European issues over for the time being. Counsel for the notice party developer calls that "happenstance". But it wasn't happenstance - it was an approach on a principled basis. If European issues on which the proceedings turn are not *acte clair*, the question of recourse to Luxembourg falls for consideration. That can only be done if a decision on the European issues is "necessary" for disposition of the case. If the matter can be disposed of on domestic law points then, at least in principle, the determination of the matter on European law points is no longer "necessary". That was the basis on which I attempted to encourage the parties to deal with submissions on the domestic law issues first.

12. That is not meant to be a rigid or inflexible position. If for example the core issue in a particular case is one of European law and any domestic points are genuinely peripheral, then it may make more sense to simply cut to the chase. But as a general rule, a court might feel there is something to be said for deciding the domestic law issues first if that is an available option which potentially could be dispositive. Hence the four-step running order outlined at para. 1 above.

13. Given that I have already indicated the decision arrived at (namely that the development consent is being quashed), there is a strong element of the hypothetical and advisory to deciding any further matters. In *Lofinmakin v. Minister for Justice, Equality and Law Reform* [2013] IESC 49, [2013] 4 I.R. 274, McKechnie J. said that "that the court will not - save pursuant to some special jurisdiction - offer purely advisory opinions or opinions based on hypothetical or abstract questions" (para. 51(iv)). Admittedly, here the order has not been perfected, so the proceedings are as counsel for the notice party developer has put it "pending and live". And it is true that a court can simply change its mind before an order is perfected (*Re L* [2013] 1 W.L.R. 634; *Lavery v. DPP No. 3; Lavery v. A Judge of the District Court* [2018] IEHC 185, [2018] 3 JIC 1310 (Unreported, High Court, 13th March, 2018*); Shao v. Minister for Justice and Equality (No. 2)* [2020] IEHC 68, [2020] 2 JIC 0307 (Unreported, High Court, 3rd February, 2020)). But even that must be viewed as something that should only properly happen on a limited basis. Whether one describes the circumstances in which such *obiter* points could be decided after the judgment as having to be exceptional, special or merely limited (my preferred phrasing), I do not think there are such sufficient circumstances here. The essence of the argument made by the losing party here could be made by any losing party in any context where there is a potential further process to be gone through. If I am wrong about that I will proceed to endeavour to weigh up the arguments for and against acceding to the motion.

Pros of deciding further issues

14. I will try to summarise the notice party's suggested arguments in favour of deciding the additional points, and my assessment of those arguments, as follows:

    (i). Counsel for the notice party developer says that there is a sense of frustration on the part of the developer who has twice got permission and twice had that quashed and now faces running the gauntlet of the applicant's points again. That is understandable. But the fact that I may express views on European law points if I accede to the motion does not altogether resolve that issue for several reasons. A new applicant (not in any way bound by what has happened to date) may join the proceedings, in which case they may wish to reargue some of the points, maybe based on new arguments. Any decision now could not be binding on an appellate court in the future proceedings by definition (there is simply no prospect that estoppel could be held to go anything like that far). And maybe even these applicants may well raise new points of law raised in any hypothetical further challenge they could bring that are not part of the present case.

    (ii). The developer says that further applications will involve additional expenditure and that clarity as to the legal position is at a premium. The developer wants an

answer to the EU law challenge in order to avoid the point being raised again, particularly in the context where it is inevitable that there would be another judicial review raising such points. At one level it is not inevitable: first of all because one cannot assume that the board will grant the permission the third time around - it could just as easily refuse it; and secondly, because it may be that the board may be persuaded by some of the applicant's points regarding environmental impact assessment and appropriate assessment and may engage in the additional procedures that the applicant is arguing for. Of course, I should not be taken as expressing any opinion on either of those matters. I am simply pointing out the hypothetical that a further process is not guaranteed to produce the same result. In that sense, there is an element of speculation to the argument that if the developer engages with the board without this clarification, it will be significantly disadvantaged or indeed to the argument that it would save significant time and cost to have these issues decided now.

(iii). The developer says that by resisting the application the applicant is "holding over" points and waiting in the "long grass". The developer submits that the EU law points should be decided and argues that if so, the applicant would then be precluded from raising those points again in any subsequent judicial review. In addition, the notice party raises the bogeyman of *Henderson v. Henderson* (1843) 3 Hare 100 by suggesting that because the applicant is now opposing the attempt to have the issues determined, that contravenes the doctrine that they must advance their full case and thus disqualifying them from making the points later. There is not much point getting into that in too much detail at this juncture, but suffice to say that a hypothetical decision by me on European law points at this stage could not have the alleged preclusive effect because if it did, that would compel the otherwise successful applicant to appeal any such hypothetical decision if negative from their point of view. That would pointlessly add to the workload of the appellate courts in the context of something that might not have to be decided at all. Subject to hearing any further argument at the appropriate time, I don't see how any decision I make in one judicial review creates any estoppel in the next judicial review following a first decision being quashed, especially since that case is a challenge to a different decision and different facts will to some extent apply. It may in practical terms be a waste of time to reargue the same point at length before the same court, without solid new legal arguments, but one could formally move that point with a view to preserving the position on appeal in the hypothetical second case. I don't accept that it would be just, fair or reasonable to say that an applicant is "precluded" from even making the point formally in a later case with a view to pursuing it at greater length on appeal.

15. Overall it seems to me that there is not a great deal that can be said for the notion of reopening the case at this juncture. I turn now to the cons.

Cons of deciding the EU law points

16. Kelly J. in *Usk v. An Bord Pleanála* [2007] IEHC 86, [2007] 2 I.L.R.M. 378 at para. 23, said that, "[j]udicial restraint dictates that the court should confine itself to facts and findings necessary to support the order of *certiorari*. It should not go beyond them." That principle of judicial restraint is of particular relevance here.

17. The attitude of the parties is a factor. Leaving aside the neutrality articulated by Mr. Morris, the applicant in the second judicial review, all of the other parties are opposed to the notice party's application. I also invited the Attorney General to assist the court by indicating his views and counsel on his behalf have helpfully set out their opposition to the notice party's motion.

18. Any further substantive step in the proceedings is now moot. There is simply no live controversy as to what order should be made, following the No. 1 judgement.

19. The decision sought is hypothetical and would not in itself affect the legal position of the parties. It could only assist the notice party in the context of a putative future application particularly if that application was successful. But a future decision would be premised on different facts and definitely on different plans and drawings assuming that the developer complies with the No. 1 judgment (which found existing plans inadequate). The notice party essentially assumes that the board will grant permission the next time, but that is not necessarily so. The points left over are significantly fact-dependent.

20. There is also something of a question mark as to whether a judgment on the remaining points would really be necessary for the determination of the proceedings in terms of the availability of recourse to the Luxembourg court. While it is true that there is some authority that the CJEU broadly defers to the referring court on the necessity issue (Case C-470/12 *Pohotovosť s.r.o. v. Vašuta* (Court of Justice of the European Union, 27th February, 2014)), it is also clear that the question cannot be hypothetical and ultimately the Court of Justice makes its own decision. In Case C-169/18 *Mahmood v. Minister for Justice, Equality and Law Reform*, (Court of Justice of the European Union, Order of the Court (First Chamber), 10th January, 2019), even where the Court of Appeal wanted to proceed with a reference, the CJEU struck it out. Counsel for the Attorney General pointed out that there was an application for declaratory relief in those proceedings as there is here. That did not deter the Luxembourg court from striking out the reference as moot. If Luxembourg refused to accept a hypothetical reference from any hypothetical further decision as sought by the notice party here, then the position would be that not only my decision, but if I may irreverently say so, even that of any appellate court on those points, would not have absolutely definitive status, because a later CJEU reference in another case could show the position to be otherwise. That is not entirely hypothetical. In *X.X. v. The Minister for Justice & Equality* [2018] IECA 124 (Unreported, Court of Appeal, 4th May, 2018), Hogan J., for the Court of Appeal, expressed the opinion (reversing my own analysis on that point) that "[o]ne can, I think, leave to one side the provisions of the recast Asylum Procedures Directive (2012/32/EU) since it does not apply to Ireland. It could not, therefore, be relied for any purpose in interpreting the relevant provisions of [Irish law implementing directive 2005/85/EC, which does apply to

Ireland]". But later in Joined Cases C 322/19 and C 385/19, K.S. & *M.H.K. v. Minister for Justice and Equality,* following a reference under art. 267 TFEU (which I had made to clarify the matter subsequent to *X.X.*, and which the court addressed notwithstanding a strangely defensive academic intercession that the question "would best not be answered by the CJEU" (Liam Thornton, "Clashing Interpretations of EU Rights in Domestic Courts", *European Public Law* 26, no. 2 (2020): 243–264, at 252)), the CJEU in a related context completely rejected the premise of Hogan J.'s view, saying that "[a] national court must take account of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, which, pursuant to Articles 1 and 2 and Article 4a(1) of Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, does not apply in the Member State of that court, in order to interpret the provisions of Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection, which is, by contrast, applicable in that Member State in accordance with Article 4 of that protocol." Thus a directive can't be "left to one side" merely because it doesn't apply to Ireland, if it's relevant to interpreting a directive that *does* so apply, or to domestic legislation implementing the latter. And that's only one case - an analogous situation could arise again any time a court, including on appeal, decides a debateable EU law point without a reference. So even an appellate court's analysis of EU law can turn out to be unfortunately mistaken in the light of later clarification from Luxembourg, and the same holds true in any member state. Thus if Luxembourg isn't available because the issue is *obiter*, then there is going to be a question mark over the EU-law definitiveness of an outcome from whatever domestic court in whatever country.

21. Turning to other disadvantages, it is stating the obvious perhaps but to allow the relief sought in the motion would also impose burdens in terms of cost and time on all parties, albeit that that could be compensated for.

22. Maybe the most important point for practical purposes is that time in the court is limited. Taking an expansive view of the circumstances in which one would reopen a judgment would not just require allocation of an additional day or days for a second leg of this case (assuming that the developer's suggestion of a hearing on the papers was not pursued), but it could also lead to a situation where other litigants would seek to have their cases dealt with likewise. The court could end up facing a situation where it was being asked to decide all issues in all cases. That would have a number of effects, leading to a possible lengthening of hearings generally, but also widespread endeavours to have a second round of hearings in the event that anything was left unsaid.

23. A request to decide all of the issues is not so much of a problem if the court is considering deciding all the domestic law points. But, as noted above, if the court is being asked to also decide the EU law points, that is only worth so much unless one has the option of recourse to Luxembourg.

24. Additional hearings have a downstream impact on other litigants in other cases not before the court in the immediate application, by pushing further out the waiting list to get a date. Courts generally are not great at factoring in the rights of persons who are not before the court, but the interests and rights such other litigants must be borne in mind.

25. I don't particularly regard it as a negative reason that the application is primarily for the commercial benefit of the notice party as such, but what is more pertinent is that there isn't any tangible exceptional overarching public interest dimension to the necessity for reopening the hearing.

26. Ultimately there must be some finality to proceedings. The board's quotation of Lord Simon of Glaisdale in *The Ampthill Peerage* [1977] A.C. 547 at 576 is apt: "Important though the issues may be, how extensive whatsoever the evidence, whatever the eagerness for further fray, society says: 'We have provided courts in which your rival contentions have been heard. We have provided a code of law by which they have been adjudged. Since judges and juries are fallible human beings, we have provided appellate courts which do their own fallible best to correct error. But in the end you must accept what has been decided. Enough is enough.'"

Order

27. In my view, this application doesn't meet the threshold warranting a reopening of the hearing to decide additional points, and in any event the factors against taking that course are more significant than those in favour. Accordingly, the order will be:

    (i). that the application be dismissed; and

    (ii). that the parties be directed to liaise with the List Registrar to have the matter re-listed in the next convenient Monday List with a view to finalising costs.