

THE HIGH COURT

[2021] IEHC 777

RECORD NO. 2018/740JR

BETWEEN

PETER SWEETMAN

APPLICANT

AND

AN BORD PLEANÁLA

FIRST NAMED RESPONDENT

AND

IRELAND AND THE ATTORNEY GENERAL

SECOND NAMED RESPONDENT

AND

**BRADÁN BEO TEORANTA
GALWAY COUNTY COUNCIL**

NOTICE PARTIES

JUDGMENT of Ms. Justice Niamh Hyland delivered on 6 December 2021

Summary

1. In *Sweetman v An Bord Pleanála & Ors* [2021] IEHC 16, delivered on 15 January 2021, I quashed a decision of An Bord Pleanála (“the Board”) granting permission to a proposed development for the abstraction of freshwater from Loch an Mhuilinn, Gorumna Island, Co. Galway, solely on the basis of its failure to comply with the requirements of the Water Framework Directive, (“the WFD”). In reaching that decision, before accepting the argument in relation to the WFD, I rejected three alternative arguments proposed by the applicant.
2. Following delivery of that decision but before any Orders were made in this matter, correspondence ensued between the first notice party and the Environmental Protection Agency (“the EPA”). The EPA were not a notice party to these proceedings or involved in any way in the substantive hearing prior to delivery of my judgment and no party suggested at that time that they should be involved.
3. The response of the EPA was circulated to all parties and following this, the first named respondent brought an application to have the case reopened. In the context of that application, it was suggested by the applicant that, if I was minded to re-open the proceedings, I should make a preliminary reference to the Court of Justice of the European Union (“the CJEU”), pursuant to Article 267 TFEU.
4. Having considered the arguments raised by the parties, I have decided that a preliminary reference is warranted. In this judgment I:
 - (i) Briefly describe the factual background to the permission under challenge;
 - (ii) Summarise the judgment I delivered on 15 January 2021, including the basis upon which I concluded that the permission ought to be quashed for failure to meet the requirements of the WFD;
 - (iii) Explain why I have decided to re-open the judgment;

- (iv) In the context of the request for a preliminary ruling, as identified in the recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (2019/C 380/01) (the “Recommendations”), summarise the subject matter of the dispute and the relevant findings of fact, identify any relevant national provisions or case law, and explain why I consider it necessary to make a reference;
- (v) Set out the questions to be referred.

Nature of Dispute

5. The planning application in question sought permission to abstract a maximum of 4,680m³ of freshwater per week from Loch an Mhuilinn, a privately owned non-tidal inland lake (characterised as a body of surface water under the WFD) for up to 22 weeks annually from May-September. The abstraction would take place 4 hours a day for a maximum of 4 days a week. The abstracted freshwater would be used to bathe diseased salmon to rid them of Amoebic Gill Disease and sea lice. These salmon are located in four licenced sites operated by the first notice party, Bradán Beo Teoranta in Kilkieran Bay, Co. Galway. The freshwater would be pumped from the lake via a pipeline to a proposed headwall at the coast road where another pipeline would convey the freshwater to tarpaulins which would be towed by boat to the sites where the fish would be treated.

Judgment of 15 January 2021

6. The applicant did not succeed in three of the four arguments raised. However it was successful in its argument that, in granting permission for the development, the Board had breached its obligation under Article 4(1) of Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000, establishing a framework for Community action in the field of water policy – the Water Framework Directive - to ensure non-deterioration and the achievement of good surface water status when granting approval for a development affecting a surface water body. I found that the proposed development will affect Loch an Mhuilinn, a surface water body. However, Loch an Mhuilinn had not been granted a status by the EPA following precise evaluation and monitoring, as required by the WFD and Ireland’s implementing legislation. The concepts of deterioration and good surface water status are inextricably tied to the complex evaluation framework identified in the WFD. Given the failure by the EPA to assign a status to Loch an Mhuilinn, I concluded it was impossible for the Board to evaluate whether the proposed works were compliant with Article 4(1) of the WFD. The reliance by the Inspector and the Board on some type of proxy evaluation that referred to concepts said to stem from the WFD was not, in my view, sufficient to establish compliance with the WFD. In those circumstances, I quashed the decision of the Board solely on this ground.

Events post Judgment

7. Following the delivery of my judgment, the first notice party decided to seek the views of the EPA on the issues raised. The response of the EPA, by letter dated 28 January 2021, was circulated to all parties on 19 February 2021.

8. The EPA's response of 28 January 2021 set out an overview of its own understanding of "the EPA's role in identifying waterbodies under the Water Framework Directive" in 13 numbered points. In summary, it indicated that there was no obligation to determine the status of all waterbodies in the State and that it was not and is not obliged to determine the status of Loch an Mhuillin. Given the importance of the letter from the EPA, I set out all the points made below;

- i. The purpose and provisions of the Water Framework Directive (WFD) apply to all waters including surface waters and groundwaters (Article 1 (Purpose) and Article 2 (Definitions)).*
- ii. The basic unit of reporting used in the Directive is known as a water body. Water bodies are used to report on compliance with the main environmental objectives of the Directive.*
- iii. The Directive requires member states to identify water bodies (defined in Article 2(10)) as part of the analysis of the characteristics of the river basin districts (Article 5 and Annex II).*
- iv. The EPA is the competent authority in Ireland for identifying water bodies under the WFD (Article 7, SI No. 722 of 2003. European Communities (Water Policy) Regulations).*
- v. The European Commission produces guidance to support member states in implementing the WFD requirements. Guidance Document No. 2 relates to the Identification of Water Bodies*

https://ec.europa.eu/environment/water/waterframework/facts_figures/guidance_docs_en.htm

- vi. Guidance Document No. 2 recognises that the identification of all surface waters as discrete water bodies would place a very significant burden on member states.*
- vii. The guidance states that member states have flexibility to decide whether the purposes of the Directive, which apply to all surface waters, can be achieved without having to identify as a water body every minor but discrete and significant element of surface water (Section 3.5 of Guidance Note 2).*
- viii. For lakes, the Directive requires all lakes larger than 50 hectares (0.5km²) in surface area to be identified as a WFD water body (Article 5, Annex 2 (1.2.2)).*
- ix. For lakes smaller than this threshold, member states may decide to include these as WFD water bodies if they are significant in the context of the Directive's purposes and provisions (e.g. ecologically important, important to the objectives of a protected area (as listed in Annex 5 of the Directive) or having a significant adverse impact on other surface waters).*

- x. *These principles were applied by the EPA and the River Basin District Coordinating Authorities to the selection of lake water bodies in Ireland (see Characterisation Report at link below). All lakes greater than 50 hectares in size and smaller lakes in protected areas (Special Areas of Conservation or areas used for drinking water abstraction) were identified as WFD water bodies.*

https://www.epa.ie/pubs/reports/water/other/wfd/EPA_water_WFD_monitoring_programme_analysis_of_river_basins.pdf

- xi. *There are an estimated 12,000 lakes in Ireland ranging in size from small ponds to our largest lakes such as Lough Conn and Lough Derg. The EPA has identified 800 lakes WFD lake water bodies.*
- xii. *Loch an Mhuilin is not an identified WFD water body as it does not meet the criteria in relation to surface area or being located in a protected area and therefore the EPA does not determine a status for it.*
- xiii. *For elements of surface water not identified as a WFD water body the basic protection measures listed in Article 11 of the Directive apply (Section 3.5 of Guidance Note 2).*
9. In short, the EPA identified that it did not believe that it was necessary that Loch an Mhuilin be identified as a WFD water body. This was not a view that had ever been communicated to me during the hearing of the matter prior to the judgment of 15 January 2020. As the Board observed in their submissions on the re-opening of the case of 30 April 2021, *"It is fair to say that all parties and the Court proceeded on the "common assumption" that the status of Loch an Mhuilin for the purposes of the WFD required to be and/or would be determined and that it now emerges that there is at least a possibility that that common assumption was mistaken"*.
10. On 16 April 2021 the matter was re-listed and I asked the parties to provide written submissions on the re-opening of a judgment after delivery. I received those submissions from the Board on 30 April 2021, and from both the applicant and the first notice party on 21 May 2021. At that stage, the notice party made clear it was not intending to take part in any further hearings or make any further submissions.
11. Subsequent to those submissions, I convened a hearing at which I indicated my intention to re-open the judgment and to make a reference to the CJEU and sought submissions on the form of questions to be referred. I indicated I would give reasons for my decision at a later stage. It was agreed at that hearing that the EPA should be permitted to participate and make submissions on any relevant matters, including questions to be referred and the EPA were duly contacted by the Board in this respect.
12. Submissions were filed by the applicant on 19 July 2021, by the EPA on 26 July 2021 and by the Board on 22 July 2021. Submissions were filed on behalf of the applicant in reply

to the EPA submissions on 29 July 2021. The applicant has declined to make any further submissions in relation to the submissions of the Board.

Reopening a Judgment of the High Court

13. In the light of my existing judgment on this matter, I must explain why I have decided to re-open the matter, as requested by both the Board and the applicant.
14. There is a significant volume of case law identifying the criteria that apply in respect of the re-opening of a decision of the High Court in a variety of circumstances (see the decision of Humphreys J. in *DPP v Lavery* (No. 3) [2018] IEHC 185). Here, I have delivered a written judgment but no order has been perfected. The position in these circumstances is therefore similar to that of the leading case of *In Re McInerney Homes* [2011] IEHC 25.
15. In that case, Clarke J. delivered judgment in an examinership. Shortly after the delivery of the judgment, an application was brought asking that the Court revisit its judgment as it was now highly likely that the interests of the two banks involved in the scheme of arrangement would be transferred to the National Asset Management Agency. In allowing the matter to be reopened, Clarke J. considered the decision of the English Court of Appeal in *Paulin v Paulin & anor* [2010] 1 WLR 1057 and its analysis of the English jurisprudence.
16. Following his consideration of the above, Clarke J. concluded that he was satisfied the analysis in *Paulin*, “*represents the law in this jurisdiction*” and noted:

“I also agree that the formulation suggested by Rix L.J. in Cie Noga D’Importation et D’Exportation SA (as approved by May L.J. in Robinson v. Fernsby) is a more appropriate description of the relevant test. In those circumstances, it seems to me that, in order for the court to exercise its jurisdiction to revisit a question after the delivery of either an oral or written judgment, it is necessary that there be “strong reasons” for so doing.”
17. Despite the preference expressed here for the “strong reasons” formulation, Clarke J. went on, later in his judgment, to use the original *Barrell* terminology, referring to the “*exceptional circumstances*” in which the Court would revisit a case. The Supreme Court affirmed the decision of Clarke J. on appeal, but in relation to this particular test, O’Donnell J. for the Court, stated at paragraph 62, “*it is not necessary to express any view on the criteria set out in Paulin v Paulin*”.
18. Beyond the requirement for either strong reasons or for exceptional circumstances, Clarke J. further set out that in cases where further materials or evidence are sought to be placed before the Court;

“3.12 ...the new materials must be such that same would probably have an important influence on the result of the case, even if not decisive, and be credible. In addition, such new evidence will not ordinarily be permitted to be relied on if the

relevant evidence could, with reasonable diligence, have been put before the court at the trial."

19. The ambiguity in relation to the test led the Court of Appeal in *Bailey v Commissioner of An Garda Síochána* [2018] IECA 63 to conclude that;

"27. ...it does not appear, with respect that it can be said that there is a clear determination in this jurisdiction as to whether the High Court if asked to revisit an issue already decided in a written judgment but before the relevant order is perfected must be satisfied that there are "exceptional circumstances" or "strong reasons" which warrant it doing so. It may be that nothing turns on either phraseology."

The jurisdiction exercised by the appellate courts in reopening cases, by virtue of their constitutional positions, may be closer to the stricter "exceptional circumstances" formulation of the *McInerney* test than to the alternative "strong reasons" test.

20. As discussed by Ní Raifeartaigh J. at paragraph forty in *MacFhlannchadha v Minister for Agriculture* [2021] IEHC 647, the decisions in both *McInerney* and *Nash* resulted from a situation where some error of fact had arisen. In *MacFhlannchadha*, Ní Raifeartaigh J. was asked to revisit a decision she had made as regards the direct effect of Directive 2001/82 in light of the ruling of Advocate General Bobek in the course of Article 267 proceedings. In those circumstances, she noted that the decision of the Supreme Court in *Abbeydrive Developments v Kildare County Council* [2010] 2 IR 397 was of particular "resonance" given it concerned the reopening of a decision on the basis of an interpretation of EU law. A similar situation pertains here.
21. In *Abbeydrive Developments*, the applicant sought to obtain planning permission in default of a decision being made within the correct timeframe by the Council. An Taisce had made a submission to the Council but was unaware of the proceedings. On appeal from the High Court, the Supreme Court held that the applicant was entitled to the permission by default. An Taisce applied to the Supreme Court to be heard prior to the making of an order by the Court. It submitted that granting tacit or default planning permission to a proposed development accompanied by an Environmental Impact Statement as required by Council Directive 85/337/EEC, as amended, was contrary to EU law, in light of the decision in Case C-230/00 *Commission v Belgium* [2001] ECR I-4591 and the principle that developments to which the EIA Directive applied could not be authorised by way of tacit permission or refusal. This point had never been raised before the High Court and accordingly was not addressed in its judgment.
22. In his Supreme Court judgment, Kearns P. held that no final order would be made until the EIS issue was determined by the High Court and as such he remitted that issue back to the High Court. He held that while in the ordinary course, a decision of the Supreme Court was final and conclusive, in special or unusual circumstances the Court will exercise its special jurisdiction to "*nonetheless intervene to interfere with its own order*". In coming to his decision, he made reference to the earlier decision of *In Re Greendale*

Developments Ltd. (No.3) [2000] 2 IR 514 where the Supreme Court made clear that it would, in appropriate circumstances, revisit its conclusions where to do otherwise would vitiate the constitutional protection of fair procedures. He further detailed that for the threshold for the exercise of the special jurisdiction to be met, the general importance of the point to be raised must be considered and, *"it must be a point which, if valid, would as a matter of probability have affected the outcome of the case"*. In the circumstances before him, Kearns P. was satisfied that the point raised by An Taisce went *"to the very heart of a decision to grant permission"* and was one which would have affected the outcome of the case if upheld.

Decision to Re-open

23. Applying the above principles, in this case, the issues raised by the EPA letter undoubtedly have the potential of affecting the outcome of the case. The applicant succeeded only on one ground: that there had been a breach of the WFD in circumstances where the lake in question had not been designated and therefore the impact of the proposed development could not be evaluated as required by the Directive. The EPA letter argues that there is no requirement to designate every single water body under the Directive, and indeed that the Directive envisages not all water bodies will be designated and that does not prevent the application of the Directive. The EPA adds that the European Commission adopts this position and no objection has ever been taken to Ireland's decision not to designate all water bodies.
24. That raises a fundamental issue going to the heart of the case, given my conclusion that there had been a breach of the WFD by authorising abstraction from a water body that had not been designated. Further, it is a point that potentially affects every water body throughout the member states and does not appear to have been determined by the CJEU. Applying the test identified by Kearns J., it is a point which if valid would very likely have affected the outcome of the case.
25. It arises in the context of new material being put before the Court. That material could in my view with reasonable diligence have been put before the Court at the original hearing as per the test identified by Clarke J. That points towards a refusal to re-open the case. Nonetheless, because of the particular importance of the point at issue, and its applicability well beyond the circumstances of this case, I have concluded I should not refuse to re-open the matter simply because this information ought to have been identified and put before the Court prior to the hearing.
26. In those circumstances, whether one uses the test of exceptional circumstances or strong reasons, I am satisfied the threshold for re-opening the case is comfortably met under Irish law. The point raised goes to the core of my decision. I turn now to the matters relevant to the making of a preliminary ruling.

Relevant Findings of Facts

27. Unusually, because I have already given a judgment in this matter, all the relevant findings of fact are set out in the judgment. Those relevant to this preliminary reference

may be found at paragraphs 7-8 and paragraphs 106- 135 of the judgment of 15 January 2021.

National Provisions/National Case Law

28. The relevant provisions of national law are the regulations that implement the WFD in Ireland, being S.I. No. 722/2003, the European Communities (Water Policy) Regulations 2003 and S.I. No. 350/2014, the European union (Water Policy) Regulations 2014.

Decision to Make a Preliminary Reference

29. Having heard the parties on the re-opening question, it became clear very quickly that in order to resolve this question, the assistance of the CJEU would be required, given (a) that it raises a question of the correct interpretation of the WFD, having regard in particular to the decision of the CJEU in Case C-461/13 *Bund für Umwelt und Naturschutz Deutschland* ECLI:EU:C:2015:433 (the *Weser* case), (b) the heavy reliance by the EPA upon guidance notes and the practice of the European Commission, thus making it desirable that the Commission would provide their observations on the issue and (c) the absence of any case law of the CJEU on the issue. In summary, this issue requires clarification from the CJEU in order that the proceedings can be properly determined, and judgment can be given on the core question of compliance with the WFD. In those circumstances, I have decided to make a reference under Article 267 TFEU.

30. In respect of the nature of the question of interpretation, as set out above and in more detail in my judgment of 15 January 2021, the water body the subject of this dispute, Loch an Mhuilinn, has not been designated pursuant to the WFD by the body responsible for designation in Ireland, i.e. the EPA, apparently because of its size. Therefore, it does not have an existing status under the WFD. I found that in those circumstances, there could be no analysis of deterioration having regard to the benchmark set by a status analysis and nor could there be an analysis of the impact of the proposed abstraction on the good surface water status/ecological potential/chemical status.

31. The EPA says this approach is incorrect. It argues that there is a 0.5km²/50ha threshold for identifying lakes for WFD purposes, to be found in Annex II, Section 1.2.2 which says that lake inclusions begin with those of 0.5 to 1km² producing the size threshold of 0.5km² (excluding protected areas under Article 6). It says that when implementing the WFD it provided a status to all water bodies above 0.5km² and in protected areas. It says the concept of significance is relevant when considering what bodies require designation. It explains that it made its approach quite clear to the European Commission in 2004 when it provided its submission in accordance with Article 5 of the WFD and that its approach has been reviewed by the Commission without adverse comment on the use of the 0.5km² criteria coupled with the inclusion of protected areas below that size. It points out no infringement action has been taken by the Commission. Indeed, it argues that the approach adopted by Ireland is reflected throughout Europe and the Commission has acknowledged this, citing by way of example the Commission report on Finland when reviewing the first cycle RBMP (Member State: Finland Com (2012) 670 Final) where it refers to the "*WFD limits of system A of 0.5km² for lakes and 10km² catchments for*

rivers". In those circumstances, the EPA submits the position is *acte clair* despite the absence of a judgment on this point.

32. My judgment is premised on an interpretation of the WFD, informed by the decision of the CJEU in *Weser*, that the concepts of deterioration and good surface water status are inextricably tied to the complex evaluation framework identified in the WFD. I found that without a status as determined in accordance with the WFD, it is not possible to evaluate whether there has been a deterioration in that status and therefore whether there has been compliance with Article 4(1) of the WFD.
33. There is therefore a key question on the interpretation of the WFD that in my view can only be answered by the CJEU i.e. whether all water bodies, irrespective of their size, require to be designated pursuant to the WFD so that in the context of an application for permission to carry out a development affecting a surface water body, a court can assess the proposed development by reference to deterioration and good surface water status. As noted above, it is a question that would benefit from, in particular, the intervention of the European Commission who have been tasked with monitoring the implementation of the WFD. Moreover, it is a question that is specifically about the correct interpretation of the WFD and it arises in particular having regard to the findings of the CJEU in *Weser*.
34. In my view, all of these factors make it a case appropriate to be determined by the CJEU rather than a national court, whether that be a court of last instance or an inferior court. Moreover, the answer to this question has implications well beyond the particular facts of this case, and as such is particularly suitable to be the subject of a preliminary reference.

Submissions of the Parties on Questions to be Referred

35. The submissions on the questions to be referred were very helpful and I have drawn on them in formulating the questions. However, some of the submissions made veered into the substantive questions that I have asked the CJEU to consider. Given that a reference is being made, I do not think it is useful to set out any views on the substance of the issues being sent for preliminary reference.
36. Before identifying the questions to be referred, I will explain why I have decided not to refer two questions suggested by the applicant. First, the applicant requested that I refer a question in relation to the impact of Article 5(2) of the WFD on the obligation to designate surface water bodies not originally designated in the initial analysis under Article 5(1). Article 5(1) provides that the analysis and reviews mentioned under paragraph one shall be reviewed and if necessary updated at the latest thirteen years after the date of entry into force of the directive and every six years thereafter. The EPA object to this proposed question on the basis that (a) the proceedings contain no ground of challenge in relation to the review process under Article 5(2) and (b) that the obligation on the member states is clear under Article 5(2).
37. I decline to put a question to the CJEU on this topic in circumstances where Article 5(2) was simply not at issue in any way in the proceedings before me and therefore does not arise on the facts of this case and accordingly does not require to be answered by the

CJEU as a discrete question. Of course, if the CJEU considers that Article 5(2) has any relevance to the questions referred to above, it will undoubtedly address that matter in its ultimate decision.

38. Equally, the applicant requested that a question be included as to the relevance of system A and system B of the WFD. Again, I do not think it is necessary to make that the subject of a separate question: if the CJEU considers it relevant to the answers to the questions referred, it will no doubt include a reference to same in its judgment.

Questions to be Referred

Question 1:

- (a) Are member states required to characterise and subsequently classify all water bodies, irrespective of size, and in particular is there a requirement to characterise and classify all lakes with a topological surface area below 0.5 km²?
- (b) To what extent is the position different with respect to water bodies in a protected area, if at all?

Question 2

If the answer to question 1(a) is yes, can a competent authority for the purposes of development consent grant development consent for a project that may affect the water body prior to it being categorised and classified?

Question 3

If the answer to question 1(a) is no, what are the obligations on a competent authority when deciding upon an application for development consent that potentially affects a water body not characterised and/or classified?