[2022] IEHC 474

THE HIGH COURT

JUDICIAL REVIEW

[2021 No. 20 JR]

IN THE MATTER OF SECTION 50B, SECTION 214 AND SECTION 215 OF THE PLANNING AND DEVELOPMENT ACT 2000 AS AMENDED AND SECTION 51 OF THE ROADS ACT 1993 AS AMENDED AND SECTION 10 OF THE LOCAL GOVERNMENT (No. 2) ACT 1960

BETWEEN

JAMES CLIFFORD AND PETER SWEETMAN

APPLICANTS

AND

AN BORD PLEANÁLA, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

KERRY COUNTY COUNCIL

NOTICE PARTY

AND

THE HIGH COURT

JUDICIAL REVIEW

[2021 No. 19 JR]

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 76 OF AND THE THIRD SCHEDULE TO THE HOUSING ACT 1986 AS EXTENDED BY SECTION 10 OF THE LOCAL GOVERNMENT (NO. 2) ACT 1960 AND SUBSTITUTED BY SECTION 86 OF THE HOUSING ACT 1966 AND IN THE MATTER OF THE PLANNING AND DEVELOPMENTS ACTS 2000 TO 2019 AND IN THE MATTER OF SECTION 50B OF THE PLANNING AND DEVELOPMENT ACT 2000 AND IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 51 OF THE ROADS ACT 1993 (AS AMENDED) AND IN THE MATTER OF AN APPLICATION

BETWEEN

DENIS O'CONNOR, CHRISTY MCDONNELL, MARY O'NEILL MCDONNELL AND THE GREENWAY INFORMATION GROUP

APPLICANTS

AND

AN BORD PLEANÁLA, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

KERRY COUNTY COUNCIL

NOTICE PARTY

(No. 3)

JUDGMENT of Humphreys J. delivered on Monday the 15th day of August, 2022

1. Directive 2014/52/EU amending directive 2011/92/EU (the EIA directive) was adopted on 16th April, 2014.

2. On 23rd January, 2017, in contemplation of making a planning application for the South Kerry Greenway, Kerry County Council sought a direction from the board as to whether an Environmental Impact Statement (as an EIA report was then known) was required. The board decided that it was.

3. The deadline for transposition of the 2014 directive expired on 16th May, 2017 but without timely transposition in the context of an application such as this one, which is governed by s. 51 of the Roads Act 1993.

4. A pre-application consultation with the board took place on 26th June, 2018.

5. On 27th August, 2018, the council made a compulsory purchase order in respect of the lands required.

6. On 29th August, 2018, the council applied for development consent under s. 51 of the 1993 Act for a proposed 31.93 km greenway route.

7. Notice of the application was published in *Kerry's Eye* newspaper on 30th August, 2018.

8. On 31st August, 2018, the council applied to the board to confirm the compulsory purchase order. Submissions were made by a number of the applicants and interested parties: by Mr. Clifford on 13th October, 2018, Mr. McDonnell on 15th October, 2018, Mr. Sweetman on 17th October, 2018, Mr. O'Connor on 18th October, 2018 and the Greenway Information Group on 19th October, 2018.

9. On 30th November, 2018, the board requested further information from the council. The applicants were notified of this on 3rd December, 2018. The council provided the further information on 8th April, 2019.

10. On 23rd April, 2019, the board decided that the information was significant and wrote to Kerry County Council requiring advertisement of the further information. Notice to that effect was published in the *Irish Examiner* and *Kerry's Eye* on 9th May, 2019. Submissions were then made on this further information, including one from Ms. McDonnell on 21st June, 2019.

11. A crucial development for the purposes of the present case then occurred on 24th June, 2019 which was the coming into operation of regulations implementing the 2014 directive namely the European Union (Roads Act 1993) (Environmental Impact Assessment) (Amendment) Regulations 2019 (S.I. No. 279 of 2019).

12. The deadline for close of submissions on the additional information was the same day, 24th June, 2019. At 16:13 that day, a submission was received from Harrington Solicitors on behalf of Greenway Information Group. This submission was not put on the board's website.

13. Notice of the making of the 2019 regulations was published in *Iris Oifigiúil* on 28th June, 2019.

14. Letters were sent by the board in relation to an oral hearing on 15th August, 2019. Harrington Solicitors replied on 30th August, 2019 and ultimately an agenda for an oral hearing was sent on 19th September, 2019.

15. The oral hearing was held by the board's inspector in Tralee from 8th to 18th October, 2019 and from 12th to 22nd November, 2019. Importantly for present purposes, during the oral hearing additional information was added to the EIA report as well as the CPO process in the form of four *errata* documents. Again, these documents were not put on the board's website.

16. The inspector prepared a report dated 28th April, 2020. She proposed omitting two sections of the greenway pending further consideration of environmental impacts, particularly in relation to erosion: firstly, Reenard Point to Cahersiveen (Chainage c. 50 to c. 3,700); and secondly, at Cloghanelinaghan (chainage c. 5,975 to c. 7,100).

17. A first board meeting was held on 17th June, 2020 and the inspector's original report was before the board at that point. Following certain issues being raised by the board and by the inspector's supervisor, the inspector's report was amended on some date between 17th and 26th June, 2020.

18. A second board meeting took place on 7th October, 2020 and the amended report was before the board on that occasion. The board then made a direction in relation to the grant of permission.

19. The formal decision was made on 10th November, 2020 to approve the permission and the CPO subject to the omission of the sections recommended for removal by the inspector.

20. The applicants were notified of the decision on 11th November, 2020 and public notice was published in *Seachtain* newspaper (which is distributed with the *Irish Independent* on Wednesdays) on 25th November, 2020 and in *Kerry's Eye* on 26th November, 2020.

21. Leave in the present proceedings challenging the board's decision was granted on 14th January, 2021 in Clifford and on 21st January, 2021 in O'Connor.

22. An amended statement of grounds in O'Connor was filed on 20th January, 2021.

23. In *Clifford v. An Bord Pleanála (No. 1)* [2021] IEHC 459 (Unreported, High Court, 12th July, 2021), I refused *certiorari* of the decision of the board leaving over certain declaratory reliefs for module II.

24. In *Clifford v. An Bord Pleanala (No. 2)* [2021] IEHC 642, [2021] 10 JIC 1502 (Unreported, High Court, 15th October, 2021), I refused leave to appeal.

25. In *Clifford v. An Bord Pleanala* [2022] IESCDET 13 (Unreported, Supreme Court, MacMenamin, Dunne and Woulfe JJ., 7th February, 2022), the Supreme Court refused leapfrog leave to appeal.

26. I am now dealing with the second module which relates to the declaratory reliefs.

27. As indicated in the No. 1 judgment (at paras. 29 and 30), two matters were left over. The first was the challenge to the validity of para. 10(dd) in Part 2 of Schedule 5 to the Planning and Development Regulations 2001 (S.I. No 600 of 2001). The applicants decided not to pursue that challenge without prejudice to the right to pursue it in respect of some further development proposal.

28. The second set of issues related to the question of whether the board had complied with its publication obligations.

29. In accordance with Practice Direction HC107, the applicants quite properly claim general declaratory relief with a view to identifying the specific declarations required in the course of submissions. The reason or the desirability of such a general plea have been well rehearsed elsewhere and are essentially practical. It is normally pointless claiming elaborate declarations which duplicate a claim for *certiorari*. The present case is an unusual one where the point being made does not go to *certiorari*, but could warrant declaratory relief.

30. The precise nature of any necessary declaration can be teased out in submissions and does not need to be specified in the statement of grounds. The essential grounds complaining about publication requirements are core grounds 5 and 7, and sub-grounds 15 and 16 in Clifford, and grounds 43, 45, 54, and 55 in O'Connor. While these grounds are phrased as a basis for a *certiorari*, nonetheless the other parties are on reasonable notice of the point despite this drafting infelicity.

31. There is also a slight difficulty in that sub-grounds 15 and 16 in Clifford, and the corresponding grounds in O'Connor attempt to place direct reliance on EU law in circumstances where no challenge is made to the adequacy of the transposition of that law and where no reference is made to the purportedly transposing legislation. While that is sub-optimal, I previously held in *Reid v. An Bord Pleanala (No. 2)* [2021] IEHC 362, [2021] 5 JIC 2705 (Unreported, High Court, 27th May, 2021), that although it is preferable to plead domestic legislation in such a situation, if an applicant pleads the directive alone that should be taken as meaning the transposing legislation. It would be unduly technical to deprive an applicant of the point when a respondent or notice party is fully on notice of it by means of such a plea.

32. The complaint about lack of publication broke down into two headings:

    (i). failure to publish materials on the board's website in the course of the application procedure; and

    (ii). failure to publish notice of the decision at the end of the procedure.

Failure to publish material on the board's website

33. The matter is inevitably complicated by the fact that there are two websites at issue. Kerry County Council's website, www.kerrycoco.ie, contained information on the application for the

permission and simultaneously the board maintained its own website setting out the decision on www.pleanala.ie. There is a third website which is the EIA portal at www.housing.gov.ie.maps.arcgis.com which is maintained by the Minister for Housing, Local Government and Heritage.

34. What was not published on the board's website falls chronologically into two categories:

(i). information that arose before transposition of the amending EIA directive; and

(ii). information that arose on or after that transposition.

35. As regards information that came to hand before transposition, the EIA report was published on the council's website, but not on the board's website. It would also appear that the additional information and the notice seeking the additional information were not published on the board's website and nor were location maps.

36. As regards information on or after transposition, as noted above the submission of Greenway Information Group *via* their solicitors was received on 24th June, 2019 and was not put on the board's website. Furthermore, the four *errata* documents furnished during the oral hearing that took place from 8th to 18th October, 2019 and 12th to 22nd November, 2019 that added to the EIA report were not put on the board's website.

37. Finally, the original inspector's report was not published either. When that fact came to light, the point was raised that the applicant had not pleaded that, and I noted at para. 27(iv) of the No. 1 judgment that no amendment had been sought at that time. In fact, no amendment was ever sought even after the point came to light, and the applicants expressly accepted that the failure to publish the original inspector's report was not now part of the case. They did not attempt to argue that the non-publication of the original report came within their general pleas so I don't have to deal with that.

38. To recap from the No. 1 judgment, the essential reason why any lack of publication does not go to *certiorari* is that these applicants were not handicapped in their submissions by virtue of any lack of publication. However, that still leaves open the possibility of declaratory relief if a breach has been shown. While the main focus of the applicants' submission was in relation to the board's failure to publish material on its own website some reference was made to the central portal, and I should deal with that first.

Non-publication on the central portal

39. Article 6(4) and (5) of the EIA directive require that, as part of an effective opportunity for public participation, relevant information relating to development consent that is subject to EIA will be electronically accessible to the public through at least a central portal or easily accessible points of access at the appropriate administrative level. This is implemented by the Planning and Development Act 2000, s. 172A, which requires the Minister to maintain a website containing information on developments subject to EIA. The Oireachtas has thus

determined that the appropriate administrative level is that the Minister should do the publishing.

40. On the face of things, the present development consent comes within s. 172A. It was suggested that information on this development was not included in the portal. No settled view can be formed on these matters because the Minister was not joined as a respondent and thus the applicants cannot be entitled to any relief in relation to any alleged failure by the Minister in the operation of this central portal. That point quite simply ends there for the purposes of these proceedings. However, that does not mean that there cannot be relief in relation to publication by the board specifically, which is the issue to which I will now turn.

Lack of publication of material by the board

41. Section 51(3)(aa) of the 1993 Act provides:

"Where a road authority or the Authority has made an application for approval under subsection (2), it shall as soon as may be—

(aa) send to An Bord Pleanála an electronic version of —

(i) the notice referred to in paragraph (a),

(ii) the environmental impact assessment report in respect of the proposed development, and

(iii) a map of the location of the proposed road development to a scale of not less than 1:1000 in relation to built-up areas and 1:2500 in relation to all other areas, or such other scale as may be agreed with the Minister for Housing, Planning and Local Government in a particular case, and marked so as to identify clearly the land or structure to which the application relates ...".

42. Subsection (3A) provides:

"An Bord Pleanála shall make an electronic version of the documents specified in subsection (3) (aa) available to the public on its website (at the location referred to in subsection (3B) (g))."

43. Subsection (3B)(g) provides:

"(3B) An Bord Pleanála shall send to the Minister for Housing, Planning and Local Government each of the following: ...

(g) notification of the location where information in electronic form that relates to the application, including any determination under section 50(1A) (d), is available on An Bord Pleanála's website."

44. Subsection (4A)(a) provides:

"(4A) The Minister shall, where he considers that additional information furnished in accordance with a requirement under subsection (4) contains significant additional data in relation to the effects on the environment of the proposed road development, require the relevant road authority to —

(a) publish in one or more newspapers circulating in the area in which the proposed road development would take place a notice stating that significant additional information in relation to the said effects has been furnished to the Minister, that the additional information will be available, for inspection or for purchase (on payment of a specified fee not exceeding the reasonable cost of making a copy) , at a specified place and at specified times during a specified period, and that submissions or observations in relation to the additional information may be made in writing to the Minister before a specified date, ..."

45. Subsection (4B) provides:

"Where An Bord Pleanála requires the relevant road authority, or as the case may be the Authority, to publish a notice in accordance with subsection (4A)(a) the relevant road authority, or as the case may be the Authority, shall provide An Bord Pleanála with an electronic version of that notice and An Bord Pleanála shall make the electronic version of the notice and an electronic version of the additional information referred to in subsection (4A) available at the location referred to in subsection (3B)(g)."

46. Subsection (4C) provides:

"Where An Bord Pleanála receives any submissions made in relation to the likely effects on the environment of the proposed road development it shall make them available in electronic form at the location referred to in subsection (3B) (g)."

47. Insofar as documents that came into existence prior to the transposition of the directive (and the insertion of the relevant provisions in s. 51 of the 1993 Act) is concerned, the argument that on such transposition, the board had to retrospectively revisit its past actions and apply the new law to such past actions by, for example publishing documents which it had received historically, does not stand up to scrutiny. That would be a genuinely retrospective application and it would be impractical to impose such a sudden one-off administrative burden to publish a large amount of pre-existing material in relation to all projects that happen to be still in the pipeline on the date of transposition. Considerations of orderly implementation of public administration militate against the court implying into the legislation any such unarticulated obligation. As Dodd said in *Statutory Interpretation in Ireland* (London, Bloomsbury Professional, 2008) at p. 196, "[t]he legislature is … presumed not to enact provisions that create inconvenient results" (see also *Shannon Realties Ltd. v. Ville de St. Michel* [1924] AC 185 at 192, *The People (A.G.) v. McGlynn* [1967] I.R. 232, *Murphy v. Dublin Corporation* [1976] I.R. 143).

48. The context, language and purpose of the legislation all militate in favour of an interpretation that the new obligation to publish material introduced on 24th June, 2019 was an essentially prospective obligation to publish material received on or after that date, not an obligation to be required to reopen files so as to be obliged to publish previously received material. Insofar as the complaint under s. 51(3A) and (4B) is concerned, the matters required to be published under those provisions had already been and gone when those provisions were enacted. Such provisions apply to future acts in an ongoing process, not to past acts already completed even if the process itself remains live at some subsequent stage.

49. The situation is totally different in relation to failure to publish materials on or after the transposition of the directive. Thus, while the matters addressed in s. 51(3A) and (4B) had already happened, the submission under sub-s. (4C) (received on 24th June, 2019) should have been published as should the four additional documents furnished at the oral hearing from 8th to 18th October, 2019 and 12th to 22nd November, 2019 insofar as they constituted addenda to the EIA report.

50. That was not done, so there was a clear breach of the legislation in relation to both failures. It would have been perfectly possible to apply the new legislation to new materials as they arose in ongoing planning applications. The level of inconvenience, if any, in doing so is nowhere near the difficulties that would have arisen in applying the new legislation in a single job-lot to past documents in the context of all planning applications that happen to be live at that point. The essentially prospective nature of applying the regulations to newly arriving documents in an ongoing process does not come remotely near the category of affecting the smooth functioning of public administration, let alone inconvenience, and is a million miles removed from anything that could be described as an absurdity or non-intended result. The material was not published on the council's website either, but even if it had been that does not absolve the board of a clear statutory obligation to publish the material on its own website.

51. The board offered an embarrassment of excuses for its failure to publish this material, which I can summarise as follows:

    (i). uncertainty as to whether the submissions were received before or after the new regulations;

    (ii). the fact that the publication of notice in *Iris Oifigiúil* only came later; and

    (iii). legal certainty or lack of prejudice.

52. None of these excuses have any merit. I will examine each in turn.

Whether the submission was made before or after the regulations

53. The board suggested that perhaps the regulations were made after 16:13 on 24th June, 2019 and that "we simply do not know". That submission of course flies in the face of s. 16(3) of the Interpretation Act 2005: "Subject to subsection (4), every provision of a statutory instrument comes into operation at the end of the day before the day on which the statutory

instrument is made." Thus, it makes absolutely no difference as to what time of the day a statutory instrument is signed. An instrument applies to the entirety of the day on which it is made.

54. There is an implied constitutional limitation that an act cannot be rendered a contravention of the law that was not so at the time it was carried out, but this is not such a situation. Rather, the effect of the application of the instrument throughout the entirety of 24th June, 2019 was that the board then had a obligation, to be carried out subsequently, to publish a submission received at any time during that day, because it was caught by the terms of the instrument. There is no retrospection in any strict sense in such a provision. Also, for what it is worth, the board's fundamentally flawed submission under this heading (which failed to make any reference whatsoever in written submissions to the Interpretation Act 2005) is no answer to the failure to publish the *errata* to the EIA report which occurred somewhat later.

The argument that the publication of notice in *Iris Oifigiúil* came later

55. The argument that the publication of notice in *Iris Oifigiúil* of the making of the regulations only occurred seven days later is unfortunately totally irrelevant as well. That is also answered by s. 16(3) of the Interpretation Act 2005. Publication in *Iris Oifigiúil* is only for information. It is not a legal prerequisite to the coming into operation of instruments. Some jurisdictions have a general rule that regulations don't come into force until their official promulgation, but Ireland is not one of those jurisdictions. Nor does it particularly help the board's argument that it is a State body and a creature of statute.

Legal certainty

56. The final catch-all heading for the board's defence was the rather general category of legal certainty and prejudice. The problem for the board with its defence of the needs of legal certainty is that the issue is *whether the law applies*, not when the board found out about it. The board appealed for sympathy because it seemed to suggest or imply that it did not know about the new regulations. In making such a suggestion the board appeared to be attempting to make something of a virtue of its own apparent ignorance of the law and use that as an excuse for non-compliance. In fairness to the board, while it attempted to create the impression of unawareness of the regulations, it has not actually said that outright, and indeed has not submitted any evidence as to when it found out about those regulations. But even if it had, it wouldn't matter because it is not a defence not to be aware of the law. *Ignorantia juris* is the applicable principle – doubly so for a State body.

57. The board also appeals for sympathy because only one submission was caught by the regulations. Unfortunately, that is not a ground for sympathy - either the amended regulations applied to the submission, or they did not.

58. That leaves the complaint that because the process had already got underway at some point prior to the 2019 regulations, the regulations should not apply to new incoming material due to some version of an argument about legal certainty. The many problems for that argument include firstly the fact that the regulations do not say that. Secondly, such an interpretation

would severely undermine the regulations, particularly given their EU law focus and the context of late transposition. Thirdly, applying the amended legislation to *new* incoming material in a live process isn't retrospection in any meaningful sense and nor is it particularly inconvenient viewed from the standpoint of a properly-organised system. Fourthly and crucially, whether the board has to publish a document or not is a procedural question and not a substantive question on any interpretation.

59. The board majors on *Kenny v. An Bord Pleanála (No. 1)* [2000] IEHC 146, [2001] 1 I.R. 565, but that involved an unusual situation and is far removed from the present case. In that case an application was made to Dublin City Council for permission on 12th April, 1999. The Local Government (Planning and Development) Act 1999 was enacted on 30th June, 1999. Section 2 required all development plans to include a record of protected structures. On 11th November, 1999 the city council decided to grant permission. The applicant then appealed to the board. The 1999 Act commenced on 1st January, 2000. On 4th August, 2000, the board decided to grant permission which involved demolition of a gate lodge.

60. There is no evidence outlined in the judgment that the city council had amended the development plan to classify the gate lodge as a protected structure. Rather, the applicant's submission (as recorded at p. 571 of the report) was that "this lodge is a protected structure within the Local Government (Planning and Development) Act, 1999". That assumes that the Act is self-executing, which it manifestly is not. Strictly speaking, therefore, *Kenny* is *obiter* in respect of this point because it rests on a factual premise that was not in fact established. I appreciate that the court itself did not see the point that way, but it is inherent in the doctrine of *stare decisis* that a subsequent court has a certain degree of latitude to classify a point as *obiter* that is not so classified by the original court itself.

61. Leaving that aside, however, insofar as the High Court in *Kenny* considered that it was "retrospective" to apply the 1999 Act to an ongoing process, I consider there is a semantic issue here. Properly speaking, retrospection in the true sense is to apply a new law to past events. Applying a new law to future developments is not retrospection even in the context of a process that is already ongoing. In such a context it is "transitional" rather than "retrospective". The board of course seizes on some general language used in *Kenny*, particularly the phrase at para. 23 that: "[w]hen under a statutory regime a process has been commenced, those involved in or affected thereby, have a right to see that process through, to a conclusion, under the law as it was at the date of its commencement." However, as a bald statement, that clearly *obiter* comment requires very considerable qualification.

62. The board advanced something approaching a statute-like literal interpretation of the judgment in *Kenny* to the effect that a process must continue by reference to the procedure applicable when it was commenced unless legislation said otherwise. That interpretation is clearly wrong and is contrary to a mountain of authority and academic opinion. The obligation to continue the process as it was originally only applies if some vested substantive right is thereby unfairly adversely affected. There is no relevance to merely procedural rights.

Indeed, the very opening sentence of the discussion on retrospection in Dodd on *Statutory Interpretation* is "there is no presumption that procedural or evidential changes are intended to be prospective only" (see para. 4.133, p. 108).

63. *R v. Chandra Dharma* [1905] 2 K.B. 335 at 338 (not cited in *Kenny*) established that "[t]he rule is clearly established that, apart from any special circumstances appearing on the face of the statute in question, statutes which make alterations in procedure are retrospective." This was quoted with approval in *Toss Ltd. v. District Court* [1987] 11 JIC 2401, 1987 WJSC-HC (Unreported, High Court, 24th November, 1987), by Blayney J. (not cited in *Kenny* either) in holding that new legislation for the issue of criminal proceedings could be applied to a complaint made to a District Court Clerk prior to s. 1 of the Courts (No. 3) Act 1986. There was no suggestion that those involved in a process had the right to see it through to a conclusion under its original terms of reference in that case - even by reference to the heightened protections that apply in the criminal context.

64. Likewise in *D.P.P. v. McDermott* [2005] IEHC 132, [2005] 3 I.R. 378, the court upheld the application of new legislation regarding admissibility of evidence to pending proceedings and quoted Bennion, *Statutory Interpretation*, 4th ed. (Oxford, Butterworths, 2002), to the effect that "[b]ecause a change made by the legislator in procedural provisions is expected to be for the general benefit of ... litigants and others, it is presumed that it applies to pending as well as future proceedings." *Craies on Legislation*, 12th ed. (London, Sweet & Maxwell, 2021) elaborates the point further. It notes encapsulation of the rule in the speech of Lord Brightman in *Yew Bon Tew v. Kenderaan Bas Mara* [1983] 1 AC 553 at 557 for the Privy Council (not cited in *Kenny*), that "[n]o person has a vested right in any particular course of procedure."

65. *Craies* notes at p. 607 that "a new law about procedure will often apply to proceedings begun before, or relating to matters arising before, the commencement of the new law." Indeed, the learned authors go on to say that "not only is there no sign that the strength of the general understanding that procedural matters are an exception to the undesirability of retrospectivity is diminishing, there are even signs that it is turning into a positive presumption in favour of retrospection."

66. In *R. v. Makanjuola* [1995] 2 Cr. App. R 469 at 472 A-B, Lord Taylor of Gosforth C.J. said: "[t]he general rule against the retrospective operation of statutes does not apply to procedural provisions … [i]ndeed, the general presumption is that a statutory change in procedure applies to pending as well as future proceedings." Such a presumption is also positively stated in Bennion (see 4th ed., 2002, p. 269): "because a change made by the legislature in procedural provisions is expected to be for the general benefit of litigants and others, it is presumed that it applies to pending as well as future proceedings." The principle as stated in the previous edition was relied on in *Hewitt v. Lewis* [1986] 1 W.L.R. 444 at 448 (not cited in *Kenny*).

67. The naturally introspective and court-focused concern of lawyers with legal proceedings should not distract one from realising that the application of new procedures to ongoing processes includes ongoing court processes (*O'Riordan v. O'Connor* [2005] IEHC 96, [2005] 1 I.R. 551,

Hamilton v. Hamilton [1982] I.R. 466, *Sweetman v. Shell E&P Ireland Ltd.* [2016] IESC 58, [2016] 1 I.R. 742), but is not confined to that context. The application of this principle to administrative processes, as well as just court procedures, was acknowledged in *Antonelli v. Secretary of State for Trade and Industry* [1998] Q.B. 948, [1998] 2 W.L.R. 826 (not cited in *Kenny*), that provisions on disqualification under the Estate Agents Act 1979 could be applied to estate agents who were convicted of offences prior to the commencement of the Act. Beldam J. held at 835 that "it would be quixotic to suppose that Parliament intended that the public should be protected from the activities of a practitioner convicted a week after the Act came into force but not from those of the practitioner convicted a week before".

68. Another example similar to *Antonelli* was provided in *R. (Christchurch Borough Council) v. Secretary of State for Housing, Communities and Local Government* [2018] EWHC 2126 (Admin). In that case Parliament had provided a procedure for merging local authorities under the Local Government and Public Involvement in Health Act 2007. This procedure was then changed by the Cities and Local Government Devolution Act 2016, which authorised the making of regulations, specifically the Dorset (Structural Changes) (Modification of the Local Government and Public Involvement in Health Act 2007) Regulations 2018 (2018 S.I. No. 636).

69. The 2018 regulations made provision in regulation 4 to the effect that "[a] proposal made by any of the relevant authorities before the date that these Regulations come into force that otherwise complies with section 2 of the 2007 Act (as modified by these Regulations) shall be treated as a proposal made under that section."

70. The applicant made the case (see para. 41 of the judgment) that the 2018 regulations were *ultra vires* because they involved retrospective delegated legislation by deeming a proposal previously made outside the 2007 Act because it was not made by the invitation of the Secretary of State to be a proposal made under the 2007 Act as amended by the 2018 regulations. Thus, an event which occurred in the past (namely a proposal for reorganisation of local government in Dorset, which Dorset local authorities submitted to the Secretary of State in February, 2017) was being treated as having complied with the legal regime that did not come into force until late May 2018. This claim was rejected in very clear terms by Cranston J. who stated as follows:

"58. Finally, there is no legal right the claimant enjoys with which there has been an unfair interference as a result of the decision challenged in this case. As a result of the proposal the claimant will be abolished, along with the other local authorities in Dorset. But without the regulations, the claimant would not have enjoyed a right under the legislation not to be abolished. The regulations have the effect of allowing the Secretary of State to implement a proposal for change if certain conditions are met. The situation in the [*Secretary of State for Energy and Climate Change v*.] *Friends of the Earth* [[2012] EWCA Civ 28] case, on which the claimant placed such reliance, was to deprive by secondary legislation those producing renewable energy of an entitlement to a fixed rate of payment. The position here is quite

different. It is not a case as with *Friends of the Earth* where private parties have made arrangements on the basis of a certain state of affairs, which they cannot revisit if legislation has retrospective effect.

59. In addition to these three points, the Secretary of State is correct in my view in his further submission that the regulations in this case are procedural in character, and thus the principle that the law should not take retrospective effect does not arise: see *Bennion on Statutory Interpretation* (LexisNexis, 7th ed), section 5.12(1). Procedure in this context is not confined to court (or arbitral) proceedings. There is no authority to that effect. Rather, procedural is used in the context of this principle by contrast with a situation where primary or secondary legislation retrospectively causes prejudice to, or deprives someone of, a valuable substantive right which could not fairly have been predicted at the relevant time. In this case the regulations are procedural in that they simply make changes to the procedural requirements before a proposal for local government reorganisation can be implemented. The presumption against retrospectivity does not arise."

71. Overall the law is clear – and that includes a great deal of law that pre-existed, but was not opened to the court in, *Kenny*. Nobody has a "right" to maintenance of current procedural arrangements by reference merely to the fact that the procedure has already commenced when a new law is enacted.

72. The board implausibly submitted that its "rights" would be infringed by a finding in favour of the applicant on this point. But the board is a creature of statute and subject to the changing statutory scheme, which it is its duty to implement. As the decision-maker, it is not a rights-holder in this context. It does not have any rights that are relevant to the resolution of the specific problem here and certainly does not have a "right" not to have to publish material on its website, or a "right" to be exempted from any particular procedural requirement merely because an individual planning application had already commenced. One can illustrate the fallacy of the board's attempt as a decision-maker to descend into the arena and to claim to be a rights-holder with the following hypothetical. If a judge were to ludicrously assert a "right" vested in herself to decide a particular case by refence to the statutory and procedural law in force when the case commenced, and to give judgment by ignoring procedural changes since then on the grounds that her rights as a judge would be infringed if she was required to consider any new law, one might speculate that an appellate court's response could be one of bemusement at best. The board's far-fetched appeal to its "rights" here has the same energy.

73. *Kenny* is best interpreted as having simply no relevance to merely procedural change. Insofar as *Kenny* might be said to have some possible relevance to substantive change in terms of vested rights, I might be allowed to say in passing that I am not persuaded by the argument that there could ever be a legally recognisable vested right to demolish a structure that warrants protection. Just as a local authority does not have a "right" not to be abolished (see *Christchurch Borough Council*, para. 58) a developer does not have a right to knock down a protected structure or damage it in any way. The hope of anticipating the possibility of getting

permission for a particular development is not a legally cognisable vested right. To that extent it is qualitatively different from a permission that has actually been granted.

74. Likewise, by analogy with *Antonelli* it is hard to see how the legislature intended that there would be no protection against the destruction of protected structures that were subject to planning applications made before 1st January, 2000 but only for planning applications made after that date. Generally, objective environmental considerations affect the whole community and transcend the rights of any particular landowner such as they are. However, any further consideration of that point can be left to a case where it arises.

75. On any view of the caselaw overall, *Kenny* has no relevance here and does not affect the situation where purely procedural change is an issue. If there is any doubt about the matter, the fact that transposition was late militates against an interpretation that creates yet further delay in implementing the 2014 directive. That would leave us in the bizarre situation that an emanation of the State was entitled to decline to publish something that EU law requires to be published on the grounds that a process had begun after transposition of EU law was due, but before it actually happened, even if the document to be published only came into existence after the transposition belatedly took place. I do not accept that that would be compatible with EU law. Indeed, in Case C-167/17 *Klohn v. An Bord Pleanála* (Court of Justice of the European Union, 17th October, 2021, ECLI:EU:C:2018:833), the CJEU said (at para. 34):

"Given that the provisions of Directive 85/337 as amended at issue do not have direct effect and were transposed belatedly into the legal system of the Member State concerned, the national courts of that Member State are required to interpret national law so far as possible, once the time limit for the Member States to transpose those provisions has expired, with a view to achieving the objective sought by those provisions, favouring the interpretation of the national rules which is the most consistent with that purpose in order thereby to achieve an outcome compatible with the provisions of the directive (see, to that effect, judgment of 4 July 2006, *Adelener and Others*, C-212/04, EU:C:2006:443, paragraph 115 and operative part)."

76. That is reinforced by the potential direct effect of the obligation to carry out EIA: see Case C-72/95 *Aannemersbedrijf P.K. Kraaijeveld BV e.a. v. Gedeputeerde Staten van Zuid-Holland* (European Court of Justice, 24th October, 1996, ECLI:EU:C:1996:404), at para. 56, Case C-244/12 *Salzburger Flughafen GmbH v. Umweltsenat* (Court of Justice of the European Union, 21st March, 2013, ECLI:EU:C:2013:203), at para. 48.

77. The board complained about reference being made to late transposition and claimed that this was a matter for the State. While that objection does have a veneer of superficial linguistic plausibility, it collapses on examination. The State were on notice of these proceedings, and decided not to get involved. That is hardly the applicants' fault. Furthermore, and more fundamentally, I am not making any declaration about late transposition, but merely interpreting the legislation as applying, prospectively, to the publication of new documents after actual transposition which arise in already commenced proceedings. There is no

necessity for the State to be party to the proceedings for the purposes of statutory interpretation in that respect or for cases involving statutory interpretation generally. The board's complaint that the State did not get involved in this module is just a case of pass-the-parcel. Even if, counterfactually, it had merit, the applicants did notify the State and haven't failed to do anything necessary to get relief.

78. Ultimately the board attempted to inject a lot of blustering rhetoric into this point. Legal dictionaries seem to have been raided for the purpose, and few imposing legal terms were omitted from this defensive sandcastle - a planning application is "a unitary process", "legal certainty" is threatened, the board's obligations "crystallise" at the start of the process, there can be no "severability" that would allow new obligations apply at a certain point in the process. The effect seems to be to pile on the grand legal terms as a substitute for engaging with the board's statutory and EU law obligations and for the perfectly normal and general principle of statutory interpretation that procedural change can and often is presumed to apply to new steps in an already-commenced administrative process.

79. A planning application is not a "unitary process" in the sense argued by the board. If the law, whether procedural or substantive (having regard to objective environmental considerations) changes during the process prior to a decision, the new law should be applied as of the time of the decision, not as of the time of the original application. This is fundamental and has a vast range of implications. For example, the board bridled at the suggestion that they would or should disregard new ministerial guidelines merely because they were published after a planning application was made, and immediately shied away from that consequence of their argument. Similarly, where a development plan changes, the board also seemed to resist the point that it was a necessary consequence of their argument that such a change should be disregarded as well. I agree with that reluctance – the law to be applied is that as of the date of the decision, not the date of the original application. The board can't be allowed to make an unlawful decision merely because the law was otherwise on the date when the original planning application was made.

80. Ultimately, even the mildest stress-testing of the board's point led to the unitary-process/ non-severability/ crystallisation/ legal-certainty argument being reduced to ruins or at least to a bonsai state that essentially amounted to a bespoke argument manufactured for the purpose of defeating the present application. The requirements of logic and consistency must come into the picture at some stage and their introduction unfortunately militates against acceptance of the board's defence here.

Alleged lack of prejudice

81. The lack of prejudice to the applicant has already been catered for by the refusal of *certiorari*. However, that lack of prejudice does not automatically amount to a defence to a claim for declaratory relief. The purpose of a declaration is to uphold the rule of law even where the legal breach does not warrant quashing the decision. Thus, while it is true that the applicants cannot assert the rights of third parties (as the council were keen to stress), I think that has

been adequately taken on board by refusing *certiorari* in the No. 1 judgment. When it comes to declaratory relief, the court has a broader scope to clarify the law and the legal position in the interests of the rule of law and the proper administration of the statute. The lack of prejudice to any individual applicant is not a fatal obstacle to doing so.

Historic nature of the point and discretionary nature of declarations

82. The council expanded on this argument by saying that the point is moot and historic, and did not affect the rights of anybody and that, therefore, declarations were not necessary. While in fairness there is some logic to that submission, in that the particular transitional application of new legislation to pending planning applications in the specific circumstances of this case is indeed historic, there are three reasons why that is not fatal here. Firstly, clarification of the general issues might assist in understanding analogous legal situations that might arise in other contexts and accordingly it seems to me that declaratory relief is warranted. Secondly and more immediately there is the fact that the board has failed to comply with the statute, and rule of law considerations militate in favour of that being marked in an appropriate way. And thirdly, these failures are ongoing and have yet to be rectified by the board.

Pleading objection

83. Essentially, therefore, subject to the pleading objection that was made against the applicants, they have made out a case for a declaration that s. 51(6C) of the 1993 Act was infringed. It seems to me that that complaint was properly pleaded. Taking the Clifford grounds for the purposes of quotation, and bearing in mind that the O'Connor grounds are pretty much identical, core ground 5 states as follows:

> "The decision of 10 November 2020 to approve the development of the greenway pursuant to s.51 of the Roads Act 1993, as amended, is invalid in that the First Respondent failed to make an electronic version of the public notices, Environmental Impact Assessment Report, location maps and further information documentation available to the public on its website contrary to s.51 subsections 3A, 4B, 4C and 6C of the Roads Act 1993, as amended."

84. The wording is somewhat suboptimal because the documents referred to embrace the further information but do not include submissions, although on the other hand the statutory provisions referred to include s. 51(4C) which does relate to submissions. A more general plea is contained in sub-ground 15 which states as follows:

> "Contrary to Article 6(5) of the EIA Directive, the First Respondent failed to take the necessary measures to ensure that the relevant information is electronically accessible to the public, through at least a central portal or easily accessible points of access. In failing to make the file material available to the public on its website the First Respondent failed to comply with the arrangements set down by the Oireachtas for providing information on the decision to the public as specified in s.51of the Roads Act. The First Applicant avers that the material placed by the Notice Party on its website is incomplete and is not accessible through a central portal or easily accessible points of access."

85. It seems to me having regard to this general complaint about the lack of "the file material" that must include the submissions and consequently the point under subsection (4C) is adequately pleaded.

Alleged failure to publish newspaper notices

86. Article 9(1) of the EIA directive provides as follows:

> "When a decision to grant or refuse development consent has been taken, the competent authority or authorities shall promptly inform the public and the authorities referred to in Article 6(1) thereof, in accordance with the national procedures, and shall ensure that the following information is available to the public and to the authorities referred to in Article 6(1), taking into account, where appropriate, the cases referred to in Article 8a(3):
>
> (a) the content of the decision and any conditions attached thereto as referred to in Article 8a(1) and (2);
>
> (b) the main reasons and considerations on which the decision is based, including information about the public participation process. This also includes the summary of the results of the consultations and the information gathered pursuant to Articles 5 to 7 and how those results have been incorporated or otherwise addressed, in particular the comments received from the affected Member State referred to in Article 7."

87. Section 51(6C) of the 1993 Act provides as follows:

> "Where An Bord Pleanála makes an order referred to in subsection (6) it shall—
>
> (a) publish in one or more newspapers circulating in the area in which the proposed road development would take place, and in electronic form at the location referred to in subsection (3B) (g), a notice stating—
>
> (i) that An Bord Pleanála has approved or, as the case may be, refused to approve the proposed road development,
>
> (ii) the main reasons and considerations on which the decision to approve or refuse to approve is based, including—
>
> (I) information about the public participation process,
>
> (II) a summary of the results of the consultations and the information gathered pursuant to section 50 and this section (in particular, where a copy of the environmental impact assessment report was sent in accordance with subsection (3)(c), the results of consultations and the information gathered under subsection (3)(d)), and,

(III) a description of how the results referred to in clause (II) have been incorporated or otherwise addressed,

(iii) where the proposed road development was approved subject to modifications or environmental conditions (including conditions regarding monitoring measures, parameters to be monitored and the duration of monitoring), particulars of those modifications or conditions,

(iv) that a copy of the order is available for inspection during specified hours, at a specified place, for a specified period of time, and in electronic form at the location referred to in subsection (3B)(g), and

(v) that practical information regarding the judicial review procedures by which a person may seek to question the validity of a determination by An Bord Pleanála on a proposed road development can be found at the location referred to in subsection (3B)(g),

b) forward to each of the bodies referred to in subsection (3)(b) a copy of the order under subsection (6),

and

(c) where a copy of the environmental impact assessment report was sent in accordance with subsection (3)(c), forward to the prescribed authority in Northern Ireland a copy of the order under subsection (6)."

Applicants' specific objections

88. The board's overall defence was that the process was already underway, and thus that the amended legislation allegedly does not apply to notice of the final decision, This needs to be rejected under this heading for similar reasons as to why it fails in relation to its application to material generated during the course of the planning process.

89. I turn then to the applicants' specific points in relation to the newspaper notice.

90. Firstly, it is that the notice did not specify that a section of the route was omitted. There is nothing much to that complaint because the legislation is framed in terms of notice as to whether the application was granted or refused. Being granted with the conditions involving the omission of part of a route is a form of grant.

91. Insofar as it is claimed that particulars of any modifications were not specified, the modifications are apparent from the decision itself.

92. It is more generally argued that the notice did not contain the necessary details, but refer the reader to the board's website. That in itself at the level of broad principle is not impermissible, particularly in the context of a complex application which is virtually impossible to summarise

in a newspaper notice, provided the link is adequate. While the applicants' submission sounds superficially plausible in saying that "[t]he purpose of newspaper notifications must be to notify all classes of members of the public, not only those who are also IT literate", that is a bit of a fallacy. Newspaper notices do not notify all classes of the public. Comprehension of such a notice requires ability to read English or Irish, requires one to be in the habit of accessing newspapers and in particular the ones chosen by the council, and necessarily involves one happening to have one's attention drawn to the legal notices section of the newspapers. The future (for better or worse) is going to be digital, so it would be an exercise in Luddism to hold that a weblink is not an acceptable way of referencing detail. Strangely enough the board's website (as of 22nd July, 2022) describes the decision as "Approve without Conditions", which is clearly an error. Fortunately for the board, the applicant did not raise any pleading about that.

93. The applicant goes on to say that if reference to a weblink is acceptable, the specific link was not provided. The notice refers simply to www.pleanala.ie with a reference number at the top of the notice ABP–302450-18. The board's argument is that if one combines that information by putting the reference number into the search box one gets the information at a link of https://www.pleanala.ie/en-ie/case/302450. Thus it is alleged that although there is a vast body of information on www.pleanala.ie, a person can find the relevant decision armed with the reference number.

94. The problem with that is that if one enters the number actually given "ABP-302450-18" into either of the search boxes in www.pleanala.ie, such a search returns no results. Likewise, if one omits the "ABP-" and enters simply "302450-18" again no results are returned. One has to know to also omit both "ABP-" and "-18" and simply enter "302450". Why the board's website is incapable of returning results from reference numbers that it actually publicises and attaches to cases itself is unclear at first sight. This doesn't immediately strike one as good administration.

95. The required piece of minor surgery on the reference number is not exactly self-evident. How would you know that? Either you work it out for yourself, the board tells you, or someone else tells you. Here, the board doesn't tell you, either in the newspaper notice or on the website itself. And relying on a reader's trial and error or the intervention of third parties doesn't amount to compliance with the board's informational obligations. There is no way that the uninformed, reasonably intelligent, even reasonably IT-literate member of the public would know this from the newspaper ad or even the board's website. Like everything of this kind, it's obvious once you know it, but not so obvious if you don't.

96. It seems to me that in those circumstances the reasonable member of the public would not without undue difficulty be able to reliably and readily find the details of the decision in this case from the information in the public notice. So, in my view while the use of a weblink is in principle permissible, the fact that no specific link was provided and no clear information given

as to how to properly search for the information on the general link, has the effect that inadequate information was given for the purposes of s. 51(6C).

97. The next complaint is that even if reference to the website was acceptable, the website did not contain the EIA report. Unfortunately for the applicants s. 51(6C) does not require this.

98. The applicants' final complaint was that the notice was not published promptly. The difficulty for the applicants in relation to that complaint is that the concept of the publication occurring "promptly" is set out in art. 9 of the directive and not in the implementing legislation. No plea was raised against the State of non-transposition in that respect. Therefore, the applicants' claim under this heading is dependent on the word "promptly" being sufficiently clear, precise, and unconditional as to have direct effect as against the board. Unfortunately, the case law of the CJEU suggests otherwise when one looks at the inadequacy of a test that proceedings must be brought "promptly" for the purposes of a limitation period: see case C-406/08 *Uniplex (UK) Ltd. v. NHS Business Services Authority* (Court of Justice of the European Union, 28th January, 2010, ECLI:EU:C:2010:45), Case C-456/08 *European Commission v. Ireland* (Court of Justice of the European Union, 28th January, 2010, ECLI:EU:C:2010:46).

99. Insofar as the applicant made the point that time should have run from the notification of the decision rather than its publication, relying on case C-280/18 *Flausch v. Ypourgos Perivallontos kai Energeias* (Court of Justice of the European Union, 7th November, 2019, ECLI:EU:C:2019:928), at para. 56, the problem with that argument is that its premise is mistaken. By virtue of s. 50(7) of the 2000 Act, the eight-week period runs from notification of the decision rather than its making because this was a function covered by Part XIV (ss. 214 and 215) of the 2000 Act.

100. The applicant suggested in reply that s. 50(7) did not apply because s. 51(1) of the 1993 Act was amended after the 2000 Act by s. 9 of the Roads Act 2007 to state that the board was the decision-maker. But the function had already been transferred to the board by virtue of the 2000 Act (s. 215). Statutorily embodying that in the 2007 Act did not mean that the decision-maker was no longer one which had been transferred from the Minister. In my view s. 50(2)(b) of the 2000 Act continues to apply even after the 2007 amendment. Indeed, as the council persuasively submitted, it would have been not only pointless but wrong for the 2007 Act to have inaccurately continued to refer to the function being vested in the Minister when it had already been transferred.

101. Where a limitation period runs from a date of notification rather than from a date of decision, the possibility inherently arises that the limitation period may legitimately vary depending on who the applicant is. Here the applicants were notified on 11th November, 2020 and the public generally were purportedly notified two weeks later by virtue of the newspaper notice (albeit not validly so for the reasons outlined). However, the possibility of different limitation periods for different applicants is properly inherent in the context of any procedure where the period runs from notification rather than from a specific fixed date.

Order

102. Accordingly, I will order as follows:

(i). there will be a declaration that the board acted in breach of s. 51(4C) of the Roads Act 1993 by failing to make available on its website a submission received on 24th June, 2019 and four *errata* documents furnished at the oral hearing from 8th to 18th October, 2019 and 12th to 22nd November, 2019 insofar as they affected the EIA report;

(ii). there will be a declaration that the board acted in breach of s. 51(6C) of the Roads Act 1993 insofar as information required by that sub-section was placed on its website rather than in the newspaper notice in circumstances where the newspaper notice did not adequately identify the precise link at which such necessary information was to be found;

(iii). the matter will be listed for mention on 3rd October, 2022 at 2 p.m. to deal with any further or consequential matters.