

**THE HIGH COURT
JUDICIAL REVIEW**

[2022 No. 858 JR]

FRIENDS OF THE IRISH ENVIRONMENT CLG

APPLICANT

AND

GALWAY COUNTY COUNCIL, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Humphreys J. delivered on the 17th day of February, 2023

1. In 2010, a 10 m wide concrete bridge and culvert was constructed at the N59 at Polladirk River, Kylemore, Connemara, Co. Galway.
2. As of an assessment in May, 2022, a significant quantity of sediment and material is said to have accumulated around the bridge/ culvert. The council took the view that removal of material was required to avoid flooding. A report was prepared by consultants, Hydro Environmental Ltd., on 24th June 2022. A method statement was prepared by MKO Environmental Consultants on 7th July, 2022. Works to remove sediment and materials were then carried out by the council, apparently being completed on 12th August, 2022.

Procedural history

3. The statement of grounds in the present proceedings was filed on 12th October, 2022. The matter was mentioned to the court on 13th October, 2022. Leave has yet to be granted
4. On 29th November, 2022, the applicant brought a motion to admit this case to the Commercial Planning and Strategic Infrastructure Development List on the basis of O. 63A, r. 1(g) RSC as applied to the List. The motion is opposed by Galway County Council, although leaving aside the legal rationale for that approach, the strategic rationale seemed unclear.
5. The council argued that its motivation was because proceedings in the List are more costly to manage, but that seems to me to be almost certainly wrong, for at least three reasons:
 - (i). First of all, case management in the list should ensure far fewer mention dates because default or agreed directions will apply, rather than adjournment from time to time in a general list.

- (ii). Secondly, there is a general time-limit for hearings in the List of three days for substantive matters (or four days if multiple cases are heard together), which is only rarely departed from. The council argued that this case might not exceed such a time period anyway, but that is speculative. Maybe or maybe not, but the case involves complex questions that also engage arguments against the State. A modest limit for the length of the hearing could well bring significant benefits in this case.
- (iii). One other factor that could reduce costs which is worth mentioning is the benefit of having the matter dealt with in a specialised list. The advantage of specialisation is normally that it avoids any possible requirement for a judge assigned to a more general area to have to read into the particular topic concerned, especially a field as technical as planning. Hence specialisation gives rise to a potentially quicker hearing and determination of the matter. Obviously some general judicial review judges have considerable planning exposure and expertise, but coming before such a judge is not absolutely guaranteed by reason of the nature of the judicial review list itself. To argue, as the council says here, that there is enough expertise in the general judicial review list, is to come close to almost nihilistically denying the whole purpose of a specialised list in the first place. That is not a proposition that stands up to a whole lot of scrutiny.

6. Sensibly, the State respondents pleaded neutrality on the motion to admit. Indeed there is a general unwritten practice that public law entities don't stoop to such tawdry practices as forum-shopping, objecting to transfer of cases to specialised lists, demanding recusal of judges and so on, but are expected to fatalistically accept whatever judge they come before, thus contributing something intangible but real by way of upholding mutual respect as between the judicial and other branches of government. Galway County Council doesn't seem to have got that memo, but so be it; I don't hold that against them and I will have to determine the objection on its legal merits.

Materials before the court

7. Materials placed before the court by being uploaded to the ShareFile platform for this case included pleadings, exhibits, leave checklists and affidavits running to a total of 217 pages.

Reliefs sought in the proceedings

8. The reliefs sought in the proceedings are as follows:

1. "An order of *certiorari* quashing the decision ('the impugned decision') of the First Named Respondent authorising emergency flood relief works at N59 Kylemore

Bridge, Connemara, County Galway pursuant to the Local Authorities (Works) Act 1949 dated 14th July 202 [sic] (Local Authority Ref E3998).

2. Such declaration(s) of the legal rights and/or legal position of the Applicants and/or persons similarly situated and/or of the legal duties and/or legal position of the respondent(s) as the Court considers appropriate.
3. A declaration that the works purported to be authorised by the impugned decision are prescribed under section 176 of the Planning and Development Act 2000 and Regulation 93 of the Planning and Development Regulations 2001 and/or section 179 and Regulation 80 of the Planning and Development Regulations 2001 and were therefore required to be subject to the consent procedures under that Act and those Regulations.
4. In the alternative, a declaration that the impugned decision was granted consent contrary to the requirements of Articles 27 and 42 of the European Communities (Birds and Natural Habitats) Regulations (S.I. 477 of 2011).
5. If necessary, a declaration that section 2 of the Local Authorities (Works) Act 1949 and/or section 179(6)(b) of the 2000 Act is *ultra vires* and invalid in that it constitutes a mis-transposition of Article 6(3) of the Habitats Directive (Council Directive 92/43 on the protection of natural habitats) and/or the Second and Third Named Respondents have failed to properly transpose Article 6(3) of the Habitats Directive for the purposes of the Local Authorities (Works) Act 1949 and/or section 179(6)(b) of the 2000 Act and/or that Article 6(3) is directly effective.
6. A declaration that section 2 of the Local Authorities (Works) Act 1949 is *ultra vires* and invalid in that it constitutes a mis-transposition of Articles 1, 2 and 4 of the Environmental Impact Assessment Directive (Directive 2011/92/EU as amended) and/or the Second and Third Named Respondents have failed to properly transpose Articles 1, 2 and 4 of the EIA Directive for the purposes of the Local Authorities (Works) Act 1949.
7. A stay on works being carried out pursuant to the Decision pending the resolution of these proceedings.
8. An Order, including an interim and/or interlocutory Order, requiring the Respondent to suspend the works the subject matter of the decision.

9. An Order directing the First Named Respondent to remediate the works carried out pursuant to the impugned decision.
10. A Declaration that Section 50B of the Planning and Development Act 2000 as amended, and / or Sections 3 and 4 of the Environment (Miscellaneous Provisions) Act 2011 and/or that the interpretative obligation set out in Case C-470/16 *North East Pylon Pressure Campaign Limited v. An Bord Pleanála* whereby proceedings where the application of national environmental law is at issue, it is for the national court to give an interpretation of national procedural law which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) and (4) of the Aarhus Convention apply to these proceedings.
11. Further or other orders.
12. Costs."

Framework for the application

9. Paragraph 1(1) and (2) of High Court Practice Direction HC107 as substituted by Practice Direction HC114 provides as follows:

"(1) The Commercial Planning and Strategic Infrastructure Development List (the "List") encompasses the following categories of cases:

(a) judicial reviews relating to strategic infrastructure development or strategic housing development, or under the Planning and Development (Amendment) (Large-scale Residential Development) Act 2021 (which cases will be administratively entered in the list without the necessity for application by any party), and

(b) planning and environmental cases of a commercial character, or with commercial aspects, which are admitted to the list under sub-paragraph (2)(a).

(2) (a) (i) A party to a planning or environmental case of a commercial character or with commercial aspects that would make it suitable for admission to the Commercial List may apply for the admission of the case to the List. An application for the entry of a case to the List should be made to the Judge in charge of the List or such other judge of the List as may be directed in any particular case or category of cases. The application should be made by notice of motion. The notice of motion shall have appended thereto a certificate of the solicitor for the moving party to the effect that the proceedings would be appropriate to be treated as "commercial proceedings" within the meaning of O. 63A r. 1 RSC, and setting out such facts relating to the proceedings as shall demonstrate this. Paragraphs 1

to 4 of High Court Practice Direction HC93 shall apply with any necessary modifications to such an application. Only in exceptional circumstances, which must be averred to on behalf of the moving party, may an application be made under this sub-paragraph in a case where the exchange of affidavits (or pleadings in the case of plenary proceedings) is complete. The court may grant such an application if the interests of justice so require.

(ii) Upon the making of an application *ex parte* for a return date for a notice of motion under this sub-paragraph, the court shall fix such a date, and on doing so any other mention dates for the proceedings shall be vacated pending the determination of the motion unless the court otherwise orders.

(iii) The papers for the motion to admit the case to the List must be lodged in electronic form by 1 p.m. on the Wednesday before the Monday on which the application is to be heard.

(b) On a case being admitted to the List, the court will give all appropriate directions including as to the next listing of the case.

(c) Any planning or environmental cases admitted to the Commercial list as of 3rd October 2022 and not yet transferred to the List shall be so transferred forthwith. No further applications to admit such cases to the Commercial List should be made in that list thereafter, and in lieu thereof, any such application should be made in the List."

10. By reason of the terms of the Practice Direction, an application to admit a case to the list is dealt with in accordance with the definitions in O. 63A RSC. Order 63A, r. 1 defines "commercial proceedings" as follows:

"(a) proceedings in respect of any claim or counterclaim, not being a claim or counterclaim for damages for personal injuries, arising from or relating to any one or more of the following:

(i) a business document, business contract or business dispute where the value of the claim or counterclaim is not less than €1,000,000;

(ii) the determination of any question of construction arising in respect of a business document or business contract where the value of the transaction the subject matter thereof is not less than €1,000,000;

(iii) the purchase or sale of commodities where the value of the claim or counterclaim is not less than €1,000,000;

- (iv) the export or import of goods where the value of the claim or counterclaim is not less than €1,000,000;
- (v) the carriage of goods by land, sea, air or pipe-line where the value of the claim or counterclaim is not less than €1,000,000;
- (vi) the exploitation of oil or gas reserves or any other natural resource where the value of the claim or counterclaim is not less than €1,000,000;
- (vii) insurance or re-insurance where the value of the claim or counterclaim is not less than €1,000,000;
- (viii) the provision of services (not including medical, quasi-medical or dental services or any service provided under a contract of employment) where the value of the claim or counterclaim is not less than €1,000,000;
- (ix) the operation of markets or exchanges in stocks, shares or other financial or investment instruments, or in commodities where the value of the claim or counterclaim is not less than €1,000,000;
- (x) the construction of any vehicle, vessel or aircraft where the value of the claim or counterclaim is not less than €1,000,000;
- (xi) business agency where the value of the claim or counterclaim is not less than €1,000,000;
- (b) proceedings in respect of any other claim or counterclaim, not being a claim or counterclaim for damages for personal injuries, which the Judge of the Commercial List, having regard to the commercial and any other aspect thereof, considers appropriate for entry in the Commercial List;
- (c) any application or proceedings under the Arbitration Act 2010 (other than an application or request for an order under Article 8(1) of the Model Law or Article II.3 of the New York Convention (each within the meaning of section 2(1) of that Act)) where the value of the claim or any counterclaim is not less than €1,000,000;
- (d) any proceedings instituted or any application or reference made or appeal lodged under the provisions of the Patents Act 1992, not including an application under section 108(4) of that Act;
- (e) any proceedings instituted, application made or appeal lodged under:
 - (i) the Trade Marks Act 1996 ;
 - (ii) the Copyright and Related Rights Act 2000 ;

(iii) the Industrial Designs Act 2001 ;

(f) any proceedings instituted for relief in respect of passing off;

(g) any appeal from, or application for judicial review of, a decision or determination made or a direction given by a person or body authorised by statute to make such decision or determination or give such direction, where the Judge of the Commercial List considers that the appeal or application is, having regard to the commercial or any other aspect thereof, appropriate for entry in the Commercial List;

(h) any proceedings by or against the Registrar (within the meaning of Article 1 of the Cape Town Convention) in connection with any function exercised or exercisable by the Registrar under the Cape Town Convention or the Aircraft Protocol (each as defined in section 3 of the International Interests in Mobile Equipment (Cape Town Convention) Act 2005) or any regulations or procedures made thereunder”.

11. This provision was considered by Kelly J. in *Mulholland v. An Bord Pleanála* [2005] IEHC 188, [2005] 3 I.R. 1, [2005] 2 I.L.R.M. 489. (The paragraph numbers in the Irish Reports are different from the unreported version and I will use both.) Kelly J. said at para 12 (para 11. of the I.R.):

“Sub-paragraph (b) of the definition confers a wide discretion upon the judge in charge to enter into the list cases which do not fall within what is described in any other part of the definition but which may nonetheless have commercial or other aspects which in the discretion of that judge make them suitable for entry into the list.”

12. At paras 15 to 18 (14 to 17 of the I.R.) he said

“15. Paragraph (g) of the definition of commercial business deals with a species of business which is primarily one of public law. It involves appeals from or judicial review of decisions given by a person or body authorised by statute to make such decisions where the judge in charge of the commercial list considers it appropriate for entry in the list having regard to the commercial or any other aspect thereof. This type of proceeding is not typically found in a commercial court. Nonetheless the Rules Committee invested a discretion in the judge in charge of the list to admit such a case in circumstances where he was satisfied that having regard to the commercial or any other aspect thereof it was appropriate for entry into such a list.

16. The Superior Court Rules Committee conferred a discretion upon the judge in charge of the list. That is evident from the fact that no case is entitled to entry into

the list as of right. All cases must be the subject of an application to the judge for entry. It is also clear that by conferring the jurisdiction which is specifically provided for at rule 1(b) very wide scope is given to the judge in charge of the list to admit cases once satisfied that because of the commercial or any other aspect thereof they are appropriate for the list.

17. Public law issues of the type dealt with at rule 1(g) are also admissible as a matter of discretion.

18. By defining "commercial proceedings" as it did the Superior Court Rules Committee appeared to wish to give a wide measure of discretion to the judge in charge so as to enable the speedy resolution of commercial disputes using that term in a broad way. The committee did not attempt to tie the judge down to a technical or narrow view of what might be appropriate to be admitted to the list."

13. He went on to say at para. 33 (para. 29 of the I.R.):

"A special definition of commercial proceedings is however to be found in r. 1(g). That clearly envisages public law appeals or applications for judicial review as capable of being regarded as "commercial proceedings" if the judge in charge of the list considers it appropriate having regard to the commercial or any other aspect thereof . The use of the phrase "or any other aspect thereof" suggests to me that the discretion given to the judge is wide. There are of course limits to that discretion and a judge would not be justified in admitting a case into the commercial list unless there was evidence of the matters referred to in the rule."

14. Of particular note is his comment at para. 35 (31 of the I.R.) as follows:

"It would be unwise to set out hard and fast rules as to the business which can qualify for admission to the list under r. 1(g) particularly since the Rules Committee itself gave such a wide discretion to the judge in charge of the list. It would seem to me however that any case involving a statutory appeal or judicial review of the type described in rule 1(g) should be capable of admission to the list if it can be demonstrated that a commercial development or process or substantial sums of money whether by way of profit, investment, loan or interest are likely to be jeopardised if the case is not given a speedy hearing or is denied the case management procedures which are available in the commercial court. This is so where one or more of the parties to the suit are involved in commerce, giving a

broad meaning to that term. Such parties would include entities involved in commercial activities whether they be individuals, corporate bodies, semi-State bodies, State bodies or indeed the State itself in an appropriate case.”

The meaning of “any other aspect”

15. The council argues that the general reference to “any other aspect” of the case making it suitable for admission to the list means there must be some commercial consequences or commercial benefit to the processing of the case through the List. However as Kelly J. said, it would be unwise to set out hard and fast rules as to how such a phrase should be applied. In any event there is no need to exhaustively define such circumstances for the purpose of the present motion for a number of reasons.

16. Firstly, even if the council is right, there *is* a commercial benefit to taking the case into the list, as this will save time and costs for the reasons outlined earlier in the judgment.

17. Secondly, it is clear that the provision of public infrastructure, such as the construction or maintenance of roads, is inherently commercial in the sense that it facilitates all human activities requiring such infrastructure, including commerce generally.

18. While by no means an exact analogy, the commerce clause of the US Constitution (Article 1, section 8, clause 3) has been held to facilitate even the regulation of economic activities that are “intrastate in character when separately considered” if they have “such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions” *per* Hughes C.J. *National Labor Relations Board v. Jones and Laughlin Steel Corporation*, 301 U.S. 1 (1937). This holding was quoted approvingly by Roberts C.J. for the court in the relatively recent case on the commerce clause, *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012). Even on the previous law, *Swift & Co. v. United States*, 196 US 375 (1905), local commerce could be regulated as long as such activity could become part of a “current” of commerce that involved interstate movement of goods and services. On a similar logic, even a local road facilitates commerce by facilitating the transport of persons, vehicles, goods and materials generally. And of course, this isn’t just a local road – it’s a national secondary road, the N59 (apparently the longest numbered road in Ireland, according to public domain material).

19. A third point is that the grounds of challenge in this case are such that they could affect similar public works generally, which would cumulatively amount to significant commercial sums.

20. A fourth and final important point is that the applicants are also seeking certain reliefs which could raise questions concerning remediation (see relief 9 above) which on their view of the case could require yet further works.

The value of the contract

21. The council laid much emphasis on the value of the contract for the impugned works being only something in the order of €85,000, and thus well below the figure of €1 million mentioned in O. 63A. However works do not have to meet the €1 million threshold in order for the case to qualify, as long as the proceedings are commercial in character or otherwise appropriate for admission to the list. I have dealt with that issue above.

The historic nature of the works

22. The council lays emphasis on the works having been completed in August, 2022. The problem with that argument among other things is that the works were by their nature emergency measures, so inherently would be very likely to be completed before any potential challenge could have been brought. A party cannot insulate itself from the jurisdiction of any given process of judicial scrutiny simply by creating a *fait accompli*. In addition to the matters referred to above, the existing spending on the works is not necessarily the end of the matter because of the potential for reliefs to be sought in relation to remediation, if the case for that were to be made out at the hearing of the matter.

The floodgates argument

23. The council also appeals to the court's self-interest by saying that if a case such as the present is admitted then it is hard to see how other cases might not be admitted. As is almost always the case with floodgates arguments, this point is overblown. It may be that other infrastructure projects should be admitted to the List on the basis of the present judgment but that does not amount to an opening of floodgates and certainly does not mean that cases about modifications to domestic dwellings for example must be regarded as being of a commercial character. The present judgment merely applies the existing criteria. Any extension of the List to planning generally would undoubtedly require further resources, and amendment to existing Practice Directions.

Order

24. It seems to me on the basis of the foregoing that the applicant has made out an ample case for admitting the matter to the list by virtue of the application of the terms of O. 63A, r. 1(g) under High Court Practice Direction HC107 as amended by Practice Direction HC114.

25. Accordingly the order will be as follows:

- (i). I will grant the relief sought in the notice of motion.
- (ii). The standard terms for admission to the list will apply which will include the requirement that the applicant amend the Statement of Grounds so as to conform to the format set out in relevant Practice Directions and Guidance Notes applying to the List. That does not authorise any substantive expansion of the case that was intended to be made, and any such expansion requires to be expressly authorised by the court if it arises in any given instance.
- (iii). The matter will be listed on a date to be notified by the List Registrar, and the applicant should file the amended Statement of Grounds one week in advance of that date.