

**THE HIGH COURT**

[2021]IEHC259

**[Record No. 2018/1076 JR]**

**BETWEEN**

**PETER SWEETMAN**

**APPLICANT**

**AND**

**AN BORD PLEANÁLA**

**RESPONDENT**

**AND**

**KILSARRAN CONCRETE T/A KILSARRAN BUILD**

**NOTICE PARTY**

**JUDGEMENT of Ms. Justice Miriam O'Regan delivered on the 14th day of April, 2021.**

**Introduction**

1. The above applicant secured leave on 14 January 2019 to maintain the within judicial review proceedings wherein he seeks to quash two separate decisions of An Bord Pleanála (ABP), both dated 24 October 2018. In addition, the applicant seeks various declaratory reliefs.
2. The two decisions of 24 October 2018 relate to the notice party's quarry at Hilltown Little, Bellewstown, Co. Meath. In one of the decisions substitute consent (SC) was afforded to the notice party pursuant to the provisions of s.177K of the Planning and Development Act 2000 (as amended) (the PDA) and the second decision was a grant of planning permission for future use and development pursuant to the provisions of s.37N of the PDA.
3. Similar although not completely identical proceedings were instituted by one John Moore (in respect of the instant quarry), where leave was also granted on 14 January 2019. The *Moore v. An Bord Pleanála* [2020] IEHC 652 (*Moore*) proceedings were heard in October 2020 following which I delivered judgment on 4 December 2020. It had been intended to hear the within proceedings immediately following the Moore proceedings, however that did not prove possible.
4. The applicant had prepared written submissions for the hearing of the within proceedings, prior to the issuing of the judgment in the *Moore* proceedings. The notice party prepared submissions in respect of the within matter dated 24 February 2021 and at para. 5 thereof it was submitted that the applicant should be required to provide updated legal submissions in order to focus the submissions on how the applicant intends to distinguish its case from *Moore*. In purported response to this submission by the notice party, the applicant delivered further submissions on 4 March 2021. At para. 1 of the further submissions it was indicated that same were delivered in the light of the request of the notice party for the applicant to deliver supplementary submissions. There was no attempt in the supplementary submissions to distinguish the within matter from the *Moore* judgment, however, at the conclusion of the hearing the parties did agree a list of issues argued in *Moore*.

5. I indicated to the applicant from the outset that any argument he wished to make which was already dealt with in *Moore*, would be assumed to have been made in this matter, with a like response from the Court as was given in the judgment in *Moore*.

**Issues**

6. Arising from the foregoing I am of the view that the following issues remain to be addressed by the Court in this judgment:

- (1) *Reference under Article 267*: (a) It is argued in submissions that the Court should of its own motion make a reference to the Court of Justice of the European Union (CJEU) under Article 267 of the Treaty on the Functioning of the European Union (TFEU).  
  
(b) Contrary to the finding in *Moore* the domestic jurisprudence on collateral attack does not avail ABP in circumstances where it is asserted that exceptional circumstances had not been demonstrated to exist contrary to the clear finding of the CJEU in the case of *Commission v. Ireland Case C-215/06*. It is in this regard that the applicant suggests that a reference to the CJEU is warranted.
- (2) *Reasons*: Although *Moore* did deal with the adequacy of reasons, it is asserted that the Court did not engage with the Supreme Court judgment in *Connolly v. An Bord Pleanála* [2018] IESC 31, as to the necessity not only to set out what matters ABP had regard to but to also identify in its decision as to “why” it came to the conclusion it did which was contrary to the conclusion of the ABP Inspector in his report of 6 November 2014.
- (3) *Time travel argument*: In *Moore* the applicant argued the “time travel” argument in relation to mitigation measures, and same was dealt with at para. 16 of the judgment, but only to the extent that I found that ABP did not act outside of its jurisdiction, and had a basis for the conclusions that it came to in relation to the destruction of the monument and concerns of the local community. The applicant has repeated this argument in these proceedings, and in particular queries how future mitigation measures could possibly be sufficient to address past issues on the site which have occurred without the benefit of planning permission. It should be borne in mind that the statutory process of reviewing the status on the ground for the purposes of securing SC is not at issue in these proceedings and there are no State respondents to the proceedings.
- (4) *Depth of excavation*: It is argued that ABP afforded planning permission for future development of a depth which was nine metres in excess of the application made to it, and this is irrational with such grant afforded without a proper Environmental Impact Assessment (EIA) or Appropriate Assessment (AA) in respect of such additional depth.

- (5) *Bias*: It is asserted that in granting the two decisions on 24 October 2018 there is an apprehension of objective bias, and pre-determination of the grant of future planning permission under s.37N of the PDA.
  - (6) *Website*: The applicant claims that ABP neglected to publish in a readily accessible public forum and in a timely manner, or at all, the decisions of 24 October 2018 on its website and the applicant seeks a declaration that same was in breach of fair procedure, natural justice, the Aarhus Convention and its implementing directives.
7. The above issues fall to be dealt with by reference to the leave afforded on 14 January 2019, the content of the statement of grounds and O.84 of the Rules of the Superior Courts, 1986.

**Article 267 referral and pleadings generally**

8. Paragraphs 12 and 47-49 inclusive, of *Moore*, deal with time limits, the possible extension of time and matters properly before the Court.
9. In *Sweetman v. An Bord Pleanála* [2007] IEHC 153, Clarke J. identified that one looks at the statement of grounds and determines the issues on a fair and reasonable reading both of individual clauses, and the statement of ground as a whole, as a means of interpreting the issues actually raised therein.
10. In *Fitzpatrick v. Board of Management of St. Mary's* [2013] IESC 62, McKechnie J. indicated that the scope of the relief and the grounds thereon are to be identified from the order granting leave subject only to amendments or variations subsequently allowed. Unless expressly or by interpretation, implicitly, within such order, no relief or ground which differs therefrom can be argued.
11. Although within the statement of grounds the applicant identified at para. 15 thereof that he may need to amend the pleadings and seek liberty to file further affidavits, no such application was made to the Court.
12. ABP has laid considerable emphasis on the procedural requirements above and called in aid the decision of Haughton J. in the matter of *People Over Wind v. An Bord Pleanála* [2015] IEHC 271.
13. The applicant relied on *Brown v. Donegal County Council* [1980] IR 132 where the Court of its own motion discovered a statutory provision not identified in submissions by the parties before the Court, and the case was relisted to hear counsel on the meaning and effect of this new provision. The applicant argues that this case is authority for the proposition that the Court, of its own motion, can put forward legal principles or statutory provisions not dealt with by the parties in their pleadings.
14. The applicant also relies on the judgment of *Simons J. in Friends of the Irish Environment Limited v. An Bord Pleanála* [2019] IEHC 80. As appears in the first line of that decision the principal issue was as to whether or not a decision to extend the duration of a planning permission engages the Habitats Directive. In that matter an application to

extend planning permission was made under s.146 of the PDA, however, it is clear that an AA was not required under that section. On the Court's own motion s.42 of the PDA was referenced under which an application to extend planning permission could be processed, however, an AA would be required.

- 14.1 The Court found that an extension of the duration of planning permission could only be granted pursuant to s.42 as otherwise CJEU rules requiring a screening, and if necessary an AA under the Habitats Directive, would be circumvented. Such an outcome was resisted by the developer on the basis of s.50A(5) of the PDA which provides that no grounds shall be relied upon in an application for judicial review other than those determined by the Court to be substantial under sub. (3)(a).
- 14.2 Simons J. recognised that the introduction of a new argument at the eleventh hour can prejudice the other side in that it denies them an opportunity of putting forward a detailed response and possibly adducing evidence which may be relevant to the point, and in this regard reference was made to a judgment of McDonald J. in *Sanofi Aventis Ireland Limited v. HSE* [2018] IEHC 566.
- 14.3 Simons J. was satisfied that in the matter before him the position was much less extreme as the issue was a net point of law turning on statutory interpretation, and apparently there was no question of evidence being relevant to the issue, with the relevant issue being clearly linked to the issues raised in the pleadings. Simons J. suggested that a more flexible approach to proceedings may be required in circumstances where the court is seeking to comply with its European law obligations.
15. Reference was made to *Callaghan v. An Bord Pleanála* [2017] IESC 60 where the Court stated that in considering the proper interpretation of statutory measures it may well take into account any constitutional principle which might impact on a proper construction, even if its principles were not specifically raised by the parties, in that a Court of final appeal is required to give a definitive interpretation of a legislative measure which comes into question. The Supreme Court considered that it was at least arguable that the Court, in order to comply with the principle of conforming interpretation, would be required to have regard even on its own motion to provisions of European law.
16. The applicant suggests that the above jurisprudence should guide this Court insofar as it is suggested that in order to comply with Ireland's remedial obligation as identified in *Commission v. Ireland* Case C-215/06, the Court should of its own motion either make a reference to Europe, or determine that the decision of ABP of 10 October 2013 directing the notice party to make an application for SC should be reviewed, as it is asserted that no exceptional circumstances, on a proper interpretation of the provisions of s.261A arose. This element of exceptionality is central to the European Court's jurisprudence.
17. Unlike in the matter before Simons J., I am satisfied that on a fair and reasonable reading of the statement of grounds, the decision of 10 October 2013 is not sought to be impugned, unless in a vague and imprecise manner, and furthermore it is hard to conceive how the matter could proceed, in the absence of agreement amongst the parties

that exceptionality was absent at the time of the decision of 10 October 2013, or could be fairly disposed of, without further affidavits.

18. In the statement of grounds, the two decisions of ABP of 24 October 2018 are clearly impugned. Insofar as there is any reference to the decision of 10 October 2013 same is included at para. 3 of the grounds as follows:

“Accordingly, the decision of 10 October 2013 defined the jurisdiction under which the Respondent accepted the planning applications which led to the impugned decisions.”

19. On any fair and reasonable reading of para. 3 above:

- (1) no infirmity in the decision of 10 October 2013 is alleged;
- (2) if anything the decision of 10 October 2013 is being relied upon in support of the applicant’s claim; and,
- (3) the paragraph differentiates between the decision of 10 October 2013 and the impugned decisions within the statement of grounds.

20. The only reference in the statement of grounds to exceptional circumstances is made at para. 24 (there being a total of 52 numbered paragraphs within the grounds) which paragraph commences with a complaint that the destruction of a national monument without planning permission and/or a full EIA in advance was not sufficiently considered by ABP and this and other effects of the development cannot now be assessed so that EU law has been undermined and circumvented. Thereafter the paragraph ends with:

“... and, no exceptional circumstances have been identified such as would warrant the grant of a retrospective consent.”

21. On any fair and reasonable reading of para. 24 aforesaid, insofar as reference to exceptional circumstances is concerned, it appears to me:

- (1) the complaint as to a lack of exceptional circumstances is by way of reference to one or both of the decisions of 24 October 2018 where it is asserted that ABP failed to have any, or any sufficient regard to the destruction of the national monument; and,
- (2) reference to a lack of exceptional circumstances comes within the body of para. 24 and a fair and reasonable reading of para. 24 would not incorporate any form of condemnation of a decision of 10 October 2013.

22. When one reviews the entirety of the statement of grounds, in my view, a different interpretation of the complaint made therein could not be arrived at. One would be obliged to read into the statement of grounds a claim that the decision of 10 October 2013 was defective insofar as a direction was made to the notice party to apply for SC in

the absence of exceptional circumstances. This would not amount to a fair and reasonable interpretation of the statement of grounds.

23. The applicant argues that:
- (1) looking at the concept of exceptional circumstances is not specifically precluded under s.177K of the PDA, and therefore exceptional circumstances should be considered at SC stage (stage 2);
  - (2) ABP should have reviewed its prior decision of 10 October 2013 and should have ascertained that exceptional circumstances did not exist so that the notice party should not have been directed to apply for SC;
  - (3) the “ring-fencing” of exceptional circumstances at stage one is not consistent with EU law (notwithstanding that there are no State respondents to the within application);
  - (4) the decision of the CJEU in *The Minister for Justice and Equality v. Workplace Relations Commission Case C-378/17* obliges ABP to disapply s.177E and to reconsider exceptional circumstances at stage two; and,
  - (5) the passage of eight years since the decision of 10 October 2013 and the hearing of the within matter is of no import.
24. I am satisfied that the foregoing matters have either been dealt with in the decision in *Moore* or, in the alternative have not been sufficiently, or at all, particularised in the statement of grounds, notwithstanding the extensive nature of same, save for the suggestion that the Court should of its own motion either make a reference to the CJEU or interpret the provisions of s.177 as enabling the issue of exceptional circumstances to be reconsidered at stage two.
25. The above suggestion ignores completely my findings and decision in *Moore* and is in essence to the effect that by making a reference it might be possible to secure the overturning of *Moore*. Furthermore, the argument ignores the judgment of McKechnie J. of 1 July 2020 in *Sweetman v. An Bord Pleanála & Ors.* [2020] IESC 39 and in particular para. 149 thereof which provides:
- “After the leave decision has been made, the option to subsequently reverse that decision is no longer a possibility... the leave decision could only be challenged within the time as specified in section 50 of the Act.”
26. Clearly the eight-year time lapse is of considerable importance insofar as the notice party has since made an application for SC and future planning permission which involves considerable expenditure of time and resources.
27. The applicant partook and made submissions in or about the s.261A process, but did not appeal the order, nor in the context of these proceedings has he sought to impugn the

order of 10 October 2013, nor has he sought to amend his current pleadings notwithstanding an asserted reservation of a right to do so.

28. Insofar as the tension as between domestic law and EU jurisprudence is concerned, this has already been addressed in *Moore*. The decision of Simons J. in *Friends of the Irish Environment Limited v. An Bord Pleanála* does not advance the applicant's argument. Simons J. was concerned to ensure that the carrying out of an AA was not avoided, leading to the flexibility of approach adopted. An AA was carried out in this matter and it could not be said further evidence would not be required.
29. The EU requirement of retrospective consent being afforded only in exceptional circumstances was indeed dealt with in *Moore*. *Moore* at para. 25 identified effectively where EU law would take precedence over national procedural rules and/or collateral attack jurisprudence having regard to the various European cases referred to. I am satisfied that para. 25 accurately identifies circumstances where EU law does not preclude national procedural rules of time limits.

### **Reasons**

30. The applicant suggests that *Moore* did not deal with the judgment of Clarke C.J. in *Connolly v. An Bord Pleanála* insofar as it is necessary to ascertain from a decision as to why the decision fell the way it did (see para. 10.2 thereof). In para. 10.1 the Court indicated that it will be rarely sufficient to give a generic description of the legal test, and the duty to give adequate reasons is not a box ticking exercise. Reasoning should not be so anodyne that it is impossible to determine why the decision went one way or the other.
- 30.1 It might be borne in mind that the Court noted that decision makers are normally afforded a significant margin of appreciation within the parameters of the legal framework and the courts will not second guess sustainable conclusions of fact. It was noted that many decisions involve the exercise of a broad judgment, which will not be second guessed by the courts. However, a successful challenge will arise where it is not possible either for interested parties, or the court itself, to know why the decision fell the way it did.
31. In the instant circumstances the complaint is to the effect that in the Inspector's report of 6 November 2014, the Inspector recommended refusal of grant of SC which was based on the destruction of the monument and the impacts on local residents. ABP disagreed with the Inspector and determined on 10 August 2018 to approve the application for SC. The applicant's argument is to the effect that it is not understood "why" ABP disagreed with the Inspector. The argument is such that the Inspector's report is accepted and relied upon by the applicant.
32. Paragraphs 14 to 16 inclusive of *Moore* are relevant. In the Inspector's report (which appears to be supported by the applicant), the Inspector identifies a legacy of detrimental impact on the local community by reason of the quarry activity, and thereafter stated that the main question is whether it caused significant adverse impact to the extent that the SC application should be refused. Clearly this is the bar or threshold which will result in

either a direction to apply for SC or an enforcement notice. The applicant takes no issue with this threshold.

33. It is clear therefore that the “why” allegedly outstanding from ABP’s decision is identifiable from a reading of the Inspector’s report (which was accepted and adopted by ABP save insofar as the impact on the monument and the local community are concerned), and reading the decision of ABP. ABP determined to grant SC because (on the basis of this threshold) it determined that the impacts were not so significant as to warrant a refusal. As identified in *Moore*, ABP did set out its reasons for not following the Inspector with regard to the monument and the impacts on the local community. At p.4 of 7 of ABP’s order of 24 October 2018, it identifies that whereas the Inspector concluded that the impacts were so significant as to be unacceptable, ABP did not consider that they were so severe as to merit a refusal of SC. It is clear from both the Inspector’s report and the decision of ABP aforesaid that the assessment on the threshold is a quantitative assessment within the jurisdiction of ABP.

**Time travel argument**

34. Insofar as the applicant complains that it is impossible to retrospectively determine whether or not planning permission might have been afforded in the past, this seems to me to be an argument against the entire process of applying for SC and cannot be determined in these proceedings with no State respondent.
35. The applicant highlights the difficulties the Inspector encountered in making an assessment as to whether or not to recommend the grant or refusal of SC, however, it is clear that notwithstanding such difficulties the Inspector went on to make an assessment and ultimately a recommendation.
36. The applicant suggests that it would be inconceivable that planning permission would have been afforded in 2007 enabling the notice party to destroy the barrow or that future mitigation measures would be sufficient to determine that past planning permission might be afforded. This argument would require a State respondent.
37. Section 177K of the PDA does not preclude the grant of SC if ABP cannot be satisfied planning permission would have been granted in the past to carry out the development which did occur.

Although it is certainly the case, as identified in para. 25 of the statement of grounds, past affects have already occurred it is clear that future mitigation measures will limit the impact into the future without altering the history.

38. ABP in its decision noted that the monument was excavated in 2007 under licence from the National Monuments Section of the Department of Environment, Heritage and Local Government. That licence together with the record of the excavation and the description of the monument were held by ABP to have mitigated the impacts of the loss of the monument. Given the applicant’s acceptance of the threshold identified by the Inspector

in his report it is clear that the destruction of the monument and its impact on the outcome of the consideration was a quantitative assessment made within jurisdiction.

### **Depth of excavation**

39. The statement of ground argues that granting a depth of excavation nine metres greater than was applied for was contrary to the EIA, AA and Water Directives, and was irrational. It is common case that since the institution of the proceedings the depth has been remedied by ABP, following a letter from the notice party of 4 February 2019 to ABP requesting such an amendment. There are no written submissions on the issue and the only oral submission was to the effect that the applicant was not given the benefit of identifying the error.

### **Bias**

40. Paragraphs 36 to 39 of the statement of ground complained that in the Inspector's initial report on future consent of 1 November 2016, he recommended a refusal of such consent. However, in his second report of 4 October 2018 the Inspector recommended the grant of future consent (s.37N). The applicant suggests that ABP allowed the grant of SC to determine the future development application. It is also argued that the Inspector erred in believing that the grant of SC had a bearing on his assessment of the likely impact of future development, and thereafter ABP erred in importing this analysis and conclusion into their decision. It is argued that the grant of SC should not influence future development consent.

41. In the Inspector's first report of 1 November 2016 it is apparent that he believed that SC would be refused (following his recommendation in his report of 6 November 2014), and in the absence of SC, future consent should not be afforded. Clearly the SC was intended to be forthcoming by the time the Inspector conducted his second report on 4 October 2018 and this represents a significant alteration of context. Furthermore, by the time of the second report ABP had also determined that neither the impacts from the destruction of the monument, nor the impacts on the local community, were sufficient to warrant a refusal of SC.

42. In my view a reasonable independent observer conversant with all relevant facts would not apprehend bias or prejudice in the circumstances as above.

### **Website**

43. The applicant complains in paras. 40 to 42 inclusive, of a failure on the part of ABP to upload the decisions herein on its website, on the Wednesday following such decisions. It is argued that by neglecting to publish the decisions on any readily accessible public forum ABP acted contrary to the PDA, fair procedure, natural justice, and the Aarhus Convention and implementing directives. It is argued that by neglecting to publish on the website in the long accepted fashion, there was an impairment of the citizens participatory rights. The applicant complains he had no opportunity to challenge the grant of SC before it being incorporated into future development consent. The failure was contrary to Regulation 72 of the Planning and Development Regulations 2011 as amended.

44. The website apparently was updated on 17 December 2018, however, in this regard the applicant queries as to how an individual might know to search the website on that date as opposed to the Wednesday following the decisions of 24 October 2018. The applicant also refers to the declaration given by McDonald J. in *Sweetman v. An Bord Pleanála* [2020] IEHC 39, and the fact that McDonald J. was of the view that the failure to upload the website in the circumstances could not be considered insubstantial or trivial. In that matter it is accepted that there was no extension of time available. However, the applicant argues that in the within matter if the applicant had been out of time the onus would shift to him in accordance with O.84 of the Rules of the Superior Courts to identify why he should obtain an extension of time. The applicant argues that ABP was attempting to trivialise the point and a declaration should be afforded to the applicant in respect of this failure.
45. ABP relies on O.84, r.18(2) of the Rules of the Superior Courts to the effect that a declaration might be afforded by the court in its discretion if it is just and convenient to do so. ABP suggests that there was no prejudice to the applicant and there is no purpose in the granting of a declaration.
46. ABP relies on the decision of Barrett J. in *North East Pylon Pressure Campaign Limited v. An Bord Pleanála* [2017] IEHC 338. At para. 219, the Court determined that the applicants did have *locus standi* to maintain the application but did not have the requisite standing, neither of them being landowners, to make the claim concerning allegedly affected landowners.
47. The respondent also refers to the case of *Cahill v. Sutton* [1980] IR 269 where at p. 283 Henchy J. identified that, whereas an argument might be made for allowing any citizen to bring proceedings to have a particular statutory provision declared unconstitutional, to allow one litigant to present and argue what is essentially another person's case would not be conducive to the administration of justice as a general rule.
48. Both the statement of opposition of 4 June 2019 at para. 13, and the affidavit of Mr. Dillon grounding the statement of opposition at para. 8, deal with the fact that the failure to upload the decisions on the website was due to an ongoing information technology systems upgrade.
49. It is clear that the applicant has maintained his claim as against both the SC decision and future development consent decision in these proceedings, and therefore he has not been prejudiced. I accept that the applicant does not have standing to raise the claim on behalf of some other unidentified potential citizens who might have been affected.
50. Given the explanation tendered to the Court it is clear that the failure to upload the decisions on the website was not the consequence of any deliberate or mischievous act, and therefore in the context of the fact that no prejudice has in fact been identified, the affording of a declaration only in these proceedings would not be warranted.

## **Conclusion**

51. For the reasons stated above the relief sought by the applicant is refused.