APPROVED **[2024] IEHC 139**

THE HIGH COURT
JUDICIAL REVIEW

2021 352 JR

BETWEEN

COASTAL CONCERN ALLIANCE

APPLICANT

AND

MINISTER FOR HOUSING, LOCAL GOVERNMENT AND HERITAGE
MINISTER OF STATE IN THE DEPARTMENT OF HOUSING, LOCAL GOVERNMENT AND HERITAGE WITH SPECIAL RESPONSIBILITY FOR PLANNING AND LOCAL GOVERNMENT

RESPONDENTS

RWE RENEWABLES IRELAND LTD

NOTICE PARTY

JUDGMENT of Mr. Justice Garrett Simons delivered on 21 March 2024

INTRODUCTION

1. This judgment is delivered in respect of an application to dismiss the within judicial review proceedings on the basis that they are moot. The proceedings seek to challenge a form of development consent issued under the Foreshore Act 1933. The respondent decision-maker asserts that the proceedings are now moot

in circumstances where the activities authorised by the development consent were carried out and completed prior to the hearing of the substantive application for judicial review.

2. The issue of principle to be addressed in this judgment is whether a legal challenge to the validity of a development consent becomes moot in circumstances where (i) the applicant for judicial review fails to secure a stay on the implementation of the development consent, and (ii) the permitted works or activities have been carried out and completed prior to the date upon which the substantive judicial review application comes on for hearing before the High Court.

PROCEDURAL HISTORY

3. The applicant in these judicial review proceedings seeks to challenge a foreshore licence granted by the Minister of State under the Foreshore Act 1933. The foreshore licence was executed on 25 January 2021 pursuant to an earlier decision by the Minister for Housing, Local Government and Heritage approving the grant of a foreshore licence subject to recommended conditions and licence fee. The Minister of State issued a notice of determination of the foreshore licence on 28 January 2021, and this was subsequently published in Iris Oifigiúil on 2 February 2021 as required under section 21A of the Foreshore Act 1933.

4. The foreshore licence purports to authorise the following "*operations*":

> "'Operations' means to undertake surveys, including geophysical surveys, geotechnical surveys, ecological surveys; deploying up to two buoys mounted floating lidar units and up to two wave rider buoys incorporating wave and current measurement devices, to inform the preliminary design for a proposed wind farm array and ancillary infrastructure at the Licensed Area for the Permitted Use and as specified in the Plans."

5. These judicial review proceedings were instituted on 19 April 2021. The principal relief sought in the proceedings is an order of *certiorari* quashing the decision of 28 January 2021 ("*the impugned decision*"). The High Court directed that the application for leave be heard on notice. Leave was granted, unopposed, on 16 June 2021 by the High Court (Meenan J.). The proceedings were made returnable to 12 October 2021 with directions that opposition papers be filed in advance of that date.

6. At the leave hearing on 16 June 2021, there was a brief discussion of a potential application for a stay on the implementation of the foreshore licence. Counsel for the developer indicated that his side intended to oppose any application for a stay on the development consent and would require time to file affidavit evidence. The court granted the applicant liberty to apply in relation to a stay. Counsel for the applicant requested that the developer's solicitor keep his side informed of the progress of the activities. The implication being that a stay might not be necessary if the proceedings came on for early hearing prior to the commencement of any significant activities. In the event, no application for a stay was ever made. This was so notwithstanding that the developer's solicitor provided regular updates on the progress of the activities.

Why was no stay not applied for?

7. Opposition papers were filed in January and February 2022, respectively. On 12 July 2023, the substantive application for judicial review was assigned a hearing date of 5 March 2024. The hearing of this case and a related case was estimated to take five days.

8. On 14 February 2024, an issue was raised, for the first time, that the proceedings had become moot and should be struck out in circumstances where the activities authorised by the foreshore licence have been carried out and completed. This

issue was raised in correspondence from the Office of the Chief State Solicitor. The Minister was given liberty to issue a motion seeking to have the proceedings struck out as moot. The hearing of the substantive application for judicial review has been rescheduled for July 2024 (in the event that the proceedings are not struck out). The strike out application was heard before me on 5 March 2024 and judgment reserved until today's date.

9. The parties were given leave to deliver supplemental written submissions addressing a judgment which had arisen during the course of argument, namely, *North Wall Property Holding Company Ltd v. Dublin Docklands Development Authority* [2009] IEHC 11. The submissions were duly delivered on 12 March 2024 and have been considered in the preparation of this judgment.

GROUNDS UPON WHICH FORESHORE LICENCE IS CHALLENGED

10. In brief, the case as pleaded in the statement of grounds is that the decision to grant the foreshore licence is invalid in that it had been reached in contravention of the Habitats Directive (92/43/EEC) and the Environmental Impact Assessment Directive (2011/92/EU). The application for a foreshore licence had been subject to a screening determination for the purposes of the Habitats Directive and the implementing domestic legislation. The screening determination was to the effect that, save in respect of four specified European Sites, the proposed activity was not likely to have a significant effect on a European Site. As to the four specified sites, the decision-maker concluded, following the completion of a stage two appropriate assessment, that the proposed activities were "*not likely to pose a significant likely risk*" to the nature conservation interests of any Natura 2000 site. The applicant contends that this

is the incorrect test for a stage two appropriate assessment and does not comply with Article 6(3) of the Habitats Directive and the domestic implementing regulations. The stage two appropriate assessment is also criticised on the ground that the guidance relied upon is out of date. In particular, it is argued that the foundational document, upon which the National Parks and Wildlife Service guidelines are based, had been updated in 2019 and that the NPWS guidelines should have been updated to reflect this.

11. As to the stage one screening determination, it is alleged that the decision-maker erred in law in purporting to screen out the North Dublin Bay SAC. The argument here seems to be that the decision-maker took into account *mitigation measures* which, it is said, is impermissible in the context of a screening determination. The applicant cites in this regard the judgment of the CJEU in *People over Wind*, Case C-323/17, EU:C:2018:244. More generally, criticism is also made of what are alleged to have been failures in terms of the public information provided in respect of the application for the foreshore licence.

12. As to the EIA Directive, it is submitted that the screening determination was mistakenly carried out by reliance upon an outdated legislative regime. In particular, it is submitted that the screening determination was not made by reference to the 2011 version of the EIA Directive, nor the amendments introduced thereto by Directive 2014/52/EU.

LEGAL CONSEQUENCES IF CHALLENGE SUCCESSFUL

13. It is not necessary, for the purpose of determining the strike out motion, to indicate a view on the strength or otherwise of the underlying merits of the substantive application for judicial review. It is, however, relevant to consider

what the legal consequences would be should it transpire, following a full hearing, that the grounds of judicial review are made out.

14. The gravamen of the applicant's case is that a form of development consent was granted without there having been proper compliance with the provisions of the Habitats Directive and the EIA Directive. If the applicant were to succeed in establishing its case, then the default position would be that the development consent should be set aside, and consideration given to the carrying out of some form of remedial assessment. This represents the default position under EU law.

15. The obligations of the national court in such circumstances are well established. The national court must take measures to eliminate the unlawful consequences of that breach of EU law. This principle has been reiterated as follows, in the context of the EIA Directive, by the CJEU in *Commission v. Ireland (Derrybrien Wind Farm)*, Case C-261/18, EU:C:2019:955 (at paragraphs 75 to 77):

> "Under the principle of sincere cooperation provided for in Article 4(3) TEU, Member States are nevertheless required to eliminate the unlawful consequences of that breach of EU law. That obligation applies to every organ of the Member State concerned and, in particular, to the national authorities which have the obligation to take all measures necessary, within the sphere of their competence, to remedy the failure to carry out an environmental impact assessment, for example by revoking or suspending consent already granted, in order to carry out such an assessment (see, to that effect, judgments of 7 January 2004, *Wells*, C-201/02, EU:C:2004:12, paragraph 64, and of 26 July 2017, *Comune di Corridonia and Others*, C-196/16 and C-197/16, EU:C:2017:589, paragraph 35).
>
> As regards the possibility of regularising such an omission a posteriori, Directive 85/337 does not preclude national rules which, in certain cases, permit the regularisation of operations or measures which are unlawful in the light of EU law, provided that such a possibility does not offer the persons concerned the chance to circumvent the rules of EU law or to dispense with their application, and that it should remain the exception (judgment of 26 July 2017, *Comune di*

Planning Bill

> *Corridonia and Others*, C-196/16 and C-197/16, EU:C:2017:589, paragraphs 37 and 38).
>
> An assessment carried out in the context of such a regularisation procedure, after a plant has been constructed and has entered into operation cannot be confined to its future impact on the environment, but must also take into account its environmental impact from the time of its completion (see, to that effect, judgment of 26 July 2017, *Comune di Corridonia and Others*, C-196/16 and C-197/16, EU:C:2017:589, paragraph 41)."

16. The Advocate General (at paragraph 36 of his opinion) emphasised that the remedial obligation applies even if the project has already been completed:

> "[…] in the event of breach of the obligation to carry out a prior environmental impact assessment of a project likely to have significant effects on the environment, Member States are required to adopt all necessary measures to ensure that such an assessment, or a remedial assessment, is carried out after consent has been granted, even if the project is under way or has already been completed. Where national law allows, the competent national authorities are required to suspend or set aside the consent already granted, so as to enable it to be regularised or a new consent to be granted that meets the requirements of the directive."

17. A similar remedial obligation arises under the Habitats Directive. See, for example, *AquaPri*, Case C-278/21, EU:C:2022:864 (at paragraphs 37 and 38).

18. The CJEU held, in *Commission v. Ireland*, Case C-215/06, EU:C:2008:380, that any system of domestic law, which allows the regularisation of operations or measures which are unlawful, should be subject to the conditions that it does not offer the persons concerned the opportunity to circumvent EU environmental legislation and should not have the effect of encouraging developers to forgo submitting to screening and environmental assessment.

ARGUMENTS ON WHETHER PROCEEDINGS ARE MOOT

19. Both the Minister, *qua* decision-maker, and the developer contend that the proceedings are moot in circumstances where the activities authorised under the foreshore licence have been carried out and completed. More specifically, it is contended that the developer has now completed so much of the authorised activities as it intends to carry out. The developer has, through counsel, given a formal undertaking to the High Court that it will not carry out any further surveys pursuant to the terms of the foreshore licence and that it will surrender the foreshore licence as soon as practicable. This surrender is not, however, intended to have *retrospective* effect, i.e. it is without prejudice to the legal status of the activities carried out prior to the date of surrender. The proposed surrender cannot, therefore, affect the question of whether the proceedings are moot.

20. Counsel for the Minister and the developer both sought to emphasise the limited nature of the activities authorised by the foreshore licence. Both counsel did, however, accept, to varying degrees, that the logical terminus of their argument is not necessarily confined to such small-scale development. Counsel for the developer, for example, accepted that the same logic would apply to a *temporary* planning permission for quarrying activities where the works were completed prior to the hearing and determination of the judicial review proceedings. Counsel for the Minister submitted that the principle was of general application and not confined to cases in the planning arena. Counsel cited the example of judicial review proceedings seeking to challenge a criminal prosecution where a stay is not obtained, and the person is convicted prior to the hearing and determination of the judicial review proceedings. Counsel deployed the metaphor of the water having flowed under the bridge.

DISCUSSION AND DECISION

21. These proceedings present the following issue of principle, namely, whether a legal challenge to the validity of a development consent becomes moot in circumstances where (i) the applicant for judicial review fails to secure a stay on the implementation of the development consent, and (ii) the permitted works or activities have been carried out and completed prior to the date upon which the substantive judicial review application comes on for hearing before the High Court.

22. The essence of the argument advanced in support of the proposition that the proceedings are rendered moot is that, once the development consent has been implemented, there is no longer any effective remedy which the High Court can provide. This approach is said to be justified in circumstances where it is open to an applicant to seek an interlocutory injunction restraining the carrying out of the works prior to the hearing of the substantive application for judicial review. On this approach, the forfeit for failing to secure such an interlocutory injunction is that the judicial review proceedings may have become academic as of the date of the full hearing.

23. It should be emphasised that this argument necessitates a subtly different conception of the rationale for the doctrine of mootness than the traditional understanding. As explained by the Supreme Court in *Odum v. Minister for Justice and Equality* [2023] IESC 3, [2023] 2 I.L.R.M. 164 (at paragraph 32), the traditional understanding of the justification for the doctrine of mootness is the importance attached, in the common law system, to proceedings presenting "*live controversies*". This is central to the doctrine of mootness because of the

interlinked factors of a requirement of a full adversarial context for a legal decision; the management of scarce and expensive court resources; and in cases likely to become precedents, the desirability, and perhaps necessity, of avoiding purely advisory opinions (*ibid*).

24. By contrast, in the present case the argument for mootness is predicated on the supposed inability of the High Court to provide an *effective remedy*. This argument is advanced notwithstanding that there remains a live controversy between the parties as to whether the development consent was invalid. This is not a case where, for example, the impugned development consent has been revoked or superseded by a subsequent development consent: here, the impugned development consent has been relied upon to carry out the authorised activities. The applicant insists that the development consent is invalid and that, in consequence, the works carried out are unauthorised.

25. For the reasons which follow, I have concluded that the proceedings are not moot. The High Court's ability to provide an effective remedy has not been frustrated by the completion of the activities authorised by the foreshore licence. The High Court remains obliged to take measures to eliminate the unlawful consequences of a breach of EU law. In the event that the applicant were to establish, at the substantive hearing of the judicial review proceedings, that the foreshore licence had been granted in breach of either the Habitats Directive or the EIA Directive, the High Court would be obliged to take all measures necessary, within the sphere of its competence, to remedy the failure to carry out the requisite assessments. As is apparent from the case law discussed at paragraphs 13 to 18 above, this obligation persists even where the works have already been completed. The CJEU considers that it is still possible to provide

a meaningful and worthwhile remedy in such a scenario: this might, for example, be achieved by directing a remedial assessment.

26. It is correct to say—as the Minister and the developer do—that the temporary nature of the development consent in the present case has certain practical implications. In contrast to a more conventional development consent, there are no ongoing activities or extant structures which might be the subject of a court order. This is because the activities authorised under the foreshore licence were transient and have now been completed. However, this does not necessarily mean that there is no effective remedy which the High Court might provide in the event that the development consent were found to be invalid. The High Court might, for example, make an order directing that a remedial assessment be carried out for the purposes of the Habitats Directive and/or the EIA Directive. The High Court might make an order directing that remediation works be carried out to address any environmental damage caused by the activities carried out pursuant to the defunct development consent. The precise type of order, if any, to be made would depend on the basis upon which the High Court had decided that the development consent was invalid. For present purposes, the crucial point is that it cannot be said, in advance of the substantive hearing, that there is no likely scenario in which an effective remedy might be provided in the event that the development consent was held to be invalid.

27. Counsel for the Minister and the developer placed stress, throughout their submissions, on the limited nature of the activities authorised by the foreshore licence. The implication being that the activities were *de minimis* and that it might be assumed that no environmental damage had been caused. Emphasis was placed, in particular, on the fact that the permitted geotechnical survey

works have not been carried out. The description of these works as *per* the application for a foreshore licence suggests that they might be more invasive than the other surveys. It seems, for example, that there would be drilling or boring involved. The omission of these works may have reduced the environmental impact of the implementation of the foreshore licence.

28. It is not open to the High Court to reach definitive findings in relation to these matters in the context of an application to strike out the proceedings as moot. Rather, if and insofar as there is to be any appraisal of the limited environmental impact, if any, of the activities carried out pursuant to the foreshore licence, same can only take place in the context of the substantive hearing of the judicial review proceedings.

29. Moreover, it should also be observed that, even on the Minister's own case, the (then) proposed activities triggered the requirement for a stage two appropriate assessment albeit confined to potential impacts on four specific European Sites. This indicates that, again on the Minister's case, the proposed activities met the threshold of being likely to have a significant effect on these four sites.

30. A developer who chooses to carry out works pursuant to a development consent, which is subject to pending judicial review proceedings, does so at their own risk. Indeed, in *Seery v. An Bord Pleanála* [2001] IEHC 13, [2001] 2 I.L.R.M. 151, the High Court (Finnegan J.) went so far as to say that it would represent "*commercial folly*" to do so.

31. A person, with a "*sufficient interest*", has a statutory right under the Foreshore Act 1933 to challenge the validity of a foreshore licence by way of an application for judicial review. The legislation seeks to balance this right against the rights of the developer by putting in place a number of important procedural

safeguards. In particular, an application for judicial review must be brought within the period of three months. This ensures that the developer is put on notice, in early course, of the fact that the validity of the development consent is being questioned.

32. The High Court, in determining an application for judicial review, is obliged to act as expeditiously as possible consistent with the administration of justice (Foreshore Act 1933, section 21B). In appropriate cases, a developer may apply for a priority hearing in the Judicial Review List or for admission to the Planning and Environmental List (or formerly, to the Commercial List).

33. In certain cases, an applicant might apply for and obtain an interim or interlocutory order restraining the carrying out of development works pending the full hearing of the judicial review proceedings. The order may take the form of a stay under Order 84, rule 20(8) of the Rules of the Superior Courts or an interlocutory injunction. Such restraining order will, generally, only be sought in cases where the carrying out of works would result in irremediable harm, such as where the impugned development consent purports to authorise the demolition of a protected structure or national monument. See, for example, *Dunne v. Dun Laoghaire-Rathdown County Council* [2003] 2 I.L.R.M. 147.

34. The fact that an applicant has not secured an order restraining the carrying out of development works does not have the legal consequence that such works as are carried out prior to the hearing and determination of the judicial review proceedings are to be treated as valid, still less that the judicial review proceedings will have been rendered moot in the event that the works have been completed. The outcome of the judicial review proceedings does not depend on the happenstance of the timing of the hearing relative to the progress of the

works. The court and the developer are not pitted against each other in an unseemly footrace, with the outcome depending on whether the development or the legal proceedings are completed first. Rather, the rule of law demands that the judicial review proceedings should be determined on their merits. There remains a "*live controversy*" between the parties as to whether the development consent is valid, and, if not, as to what the legal consequences of that are. The fact, if fact it be, that certain works may have been carried out pursuant to the development consent, which has since been found to be invalid, does not render the proceedings moot. There will still be a live controversy as to what is to happen to those works. The litigation in respect of what is now the Central Bank building at North Wall Quay provides a practical example of the High Court hearing and determining judicial review proceedings notwithstanding that significant works had been carried out in the interim pursuant to the impugned development consent. This example is discussed further at paragraph 40 below.

35. It should be recalled that, in the present case, the developer indicated an intention to *oppose* any application for a stay on the carrying out of the activities authorised by the foreshore licence. It also appears that certain activities were carried out *prior* to the expiration of the three month period allowed for the bringing of judicial review proceedings. This highlights the harshness of the proposition advocated for on behalf of the Minister and the developer. This proposition draws no distinction between cases, such as the present, where an applicant does not apply to restrain the implementation of the development consent, and those where such an application is made but refused. Rather, it is the *fact* of the authorised works or activities having been completed prior to the hearing and determination of the judicial review proceedings which is said to

render the proceedings moot. This would mean that the *ultimate outcome* of the proceedings would be determined by the outcome of an application for a stay or an interlocutory injunction. In the event that an application for a stay had been brought and successfully resisted by the developer, the proceedings would—on this argument—become moot unless an early hearing date could be obtained. With respect, this does not represent the correct legal position. It is not the law that an applicant is expected to apply for a stay or an interlocutory injunction as a matter of course. Rather, the position is more nuanced. It is open, in principle, to a developer to carry out works pursuant to an impugned development consent. The developer does so at their own risk.

36. For completeness, it is necessary to address the judgment of the High Court (Humphreys J.) in *Toole v. Minister for Housing, Local Government and Heritage* [2023] IEHC 317. This judgment was delivered in the context of an application to discharge an interim injunction. The facts of the case are very close to those of the present case: in each instance, the applicant sought to challenge a foreshore licence which purported to authorise, *inter alia*, geotechnical and geophysical site investigations.

37. In the course of applying the principles in *Okunade v. Minister for Justice Equality and Law Reform* [2012] IESC 49, [2012] 3 I.R. 152, which govern an application for an interlocutory injunction, the High Court stated as follows (at paragraphs 35 and 36):

> "This is relevant because this case will almost certainly be moot if the interim stay is discharged. The works itself to which the foreshore licence relates can be completed in a matter of months. The applicants are entitled to an effective remedy under EU law, equivalent to the right of access to the court under the Constitution. That is not absolute, but it is certainly a major factor. It is one thing to refuse to halt a process where the process itself contains a possible ultimate

remedy for an applicant. It is quite another thing to allow a process to continue which will result in the elimination of any such remedy.

It is part and parcel of the right to an effective remedy that the court has to make serious attempts to leave open the possibility of the parties obtaining a benefit in the event that their position is successful. It is at the same time true, as the notice party submits, that the entire process of constructing the offshore development won't be moot because there are other steps to be taken, each of which can be challenged in turn, but that does not get away from the fact that this particular case will be moot."

38. It is apparent that Humphreys J. considered that the completion of the activities authorised by the impugned foreshore licence would "*almost certainly*" render the legal challenge to the foreshore licence moot. These observations of a fellow High Court judge must carry substantial weight. However, these observations must be seen in context. These observations were made as part of the overall assessment required by the *Okunade* test. The principal point being made in the passage above is that the court has to make "*serious attempts*" to leave open the possibility of the parties obtaining a benefit in the event that their position is successful. The court in *Toole v. Minister for Housing, Local Government and Heritage* was not being asked to rule definitively on the specific question of whether the completion of the works would render the proceedings moot. By contrast, that specific issue has now arisen for determination in the proceedings before me. I have had the benefit of detailed argument on the specific issue. For the reasons explained above, it would not be consistent with the EU obligations of a national court to dismiss a legal challenge to the validity of a development consent as moot simply because the works have been completed. This would, erroneously, foreclose consideration of the need for a remedial assessment or for remediation works.

TIMING OF CONSEQUENTIAL RELIEF

39. As is apparent from the case law discussed at paragraphs 13 to 18 above, a national court is obliged to take all measures necessary to remedy a failure to carry out the requisite assessments under the EIA Directive or the Habitats Directive. As a matter of domestic law, this is generally achieved in stages. First, the development consent will be set aside in judicial review proceedings. Second, any works which have been carried out pursuant to the defunct development consent will, in principle, be amenable to enforcement proceedings. It would be unusual for orders to be made in the judicial review proceedings directing, for example, the removal of the works. Such matters are typically addressed in subsequent enforcement proceedings. In many instances, the developer will seek to regularise the status of the works by applying for a form of retrospective development consent, e.g. "*substitute consent*" under the Planning and Development Act 2000. This will normally entail a form of remedial assessment of both the past and future environmental impacts. The court hearing the enforcement proceedings *might* be prepared to adjourn same to allow such an application for retrospective development consent to be pursued.

40. A practical example of this sequence of judicial review proceedings followed by enforcement proceedings is provided by the litigation in respect of what are now the offices of the Central Bank of Ireland. The High Court held, in judicial review proceedings, that the development consent initially granted for the works was invalid. The developer had carried out significant works prior to the hearing and determination of the judicial review proceedings. The High Court held in a supplemental judgment, *North Wall Property Holding Company Ltd v. Dublin*

Docklands Development Authority [2009] IEHC 11, that the status of those works was a "*separate and distinct issue*" from those determined in the judicial review proceedings and that this issue fell to be determined in separate enforcement proceedings. In the event, An Bord Pleanála granted planning permission to retain and complete the development on 30 August 2010.

41. The interaction between judicial review proceedings and subsequent enforcement proceedings was also briefly referenced by the Supreme Court in *Balz v. An Bord Pleanála* [2020] IESC 22. On the facts, the developer sought a stay on an order for *certiorari* setting aside its planning permission, pending the determination of an application for a substitute consent to regularise the planning status of its wind farm. The Supreme Court imposed a partial stay which precluded the operation of the wind farm in the interim. The Supreme Court stated that this would be of substantial benefit to the applicants/objectors since it was an outcome that would not be achieved if an immediate order of *certiorari* had been made, as it would still be necessary to bring separate enforcement proceedings.

42. Returning to the present case, the normal course, in the event that the judicial review proceedings were to be successful, would be for the question of a remedial assessment or remediation works to be addressed in separate enforcement proceedings.

43. The applicant has sought to point to a very particular remedy which the judicial review proceedings might provide, over and above the general remedies in relation to remedial assessment and remediation works. This hoped-for remedy is that the developer might be denied the *benefit* of the survey data obtained pursuant to the impugned development consent. It appears that the survey data

is intended for use as part of an application for development consent for a wind farm array.

44. The Minister makes the objection that no grounds have been pleaded which would support the grant of such relief. Counsel on behalf of the Minister made it clear that his side's objection is not that there is no suitably worded declaration sought at part (d) of the statement of grounds, but rather that there are no grounds pleaded at part (e) which would support the making of such a declaration. The statement of grounds contains the *pro forma* plea for a declaration as set out in Practice Direction HC 124 (5 December 2023).

45. It is submitted that the applicant, having failed to plead a ground relating to the use of the survey data, is precluded from litigating those matters in these proceedings. It is further submitted that the applicant would also be precluded from raising those matters in *subsequent* proceedings, having regard to the rule in *Henderson v. Henderson*.

46. Counsel on behalf of the developer makes broadly similar submissions. The developer further submits that an applicant is obliged to plead declaratory relief in terms, citing *Grafton Group v. An Bord Pleanála* [2023] IEHC 725.

47. It is not apparent, having regard to the case law discussed above, that it is always necessary to address, in the judicial review proceedings, the fallout of works having been carried out pursuant to a development consent which has since been set aside by an order of *certiorari*. In at least some instances, the consequences of the setting aside of the development consent may arise for consideration in subsequent enforcement proceedings.

48. Here, the position is more nuanced. The contention that the survey data cannot be relied upon in a future application for development consent is a novel one. It

is a relief which is intended to have a deterrent effect on other developers rather than one which is intended to remedy the immediate consequences of the (alleged) breach of the Habitats Directive and/or the EIA Directive. The relief appears to be predicated on the principle that domestic law should not offer developers the chance to circumvent the rules of EU environmental law nor encourage developers to forgo requisite environmental assessments.

49. It would be in the interests of all parties to have the issue as to the future use of the survey data addressed in these judicial review proceedings. The issue would appear to be capable of being dealt with by way of a declaration and does not require the type of mandatory relief which is typically sought in subsequent enforcement proceedings. It can, therefore, be conveniently determined within these judicial review proceedings. It is preferable that this issue be resolved now, rather than be raised in a legal challenge to some future development consent in respect of the proposed wind farm array. None of the parties should be required to invest time and energy in participating in a development consent process which might, ultimately, have to be set aside.

50. All of this is subject to the caveat that the issue in relation to the use of the survey data may only be determined within these proceedings if it is properly within the scope of the pleadings. The parties are in disagreement on this point, with the Minister and the developer insisting that the issue of the use of the survey data has not been pleaded. In order to resolve this disagreement, it is necessary to consider the extent to which an applicant for judicial review is required to plead his case.

51. Normally, an applicant for judicial review is not required to set out in detail, in the statement of grounds, all of the ancillary or consequential orders which might

flow from a finding that a development consent is to be set aside. It is usually sufficient to seek an order for *certiorari* and to set out, at part (e) of the statement of grounds, the grounds upon which it is said that the development consent is invalid. It is not necessary for an applicant to jump ahead of himself, by reciting in the statement of grounds all of the consequences which might flow from the making of an order of *certiorari*. These can only properly be teased out once the decision of the court is known. The final form of relief will depend upon the precise grounds upon which an applicant has succeeded. To impose an obligation to anticipate the various permutations which might arise and to plead them would add unnecessarily to the length of what are already lengthy pleadings in judicial review proceedings. This would be of no benefit to the parties, practitioners or judges.

52. The absence, from the statement of grounds, of a laundry list of consequential or ancillary declarations does not prejudice a respondent or notice party. They will have an opportunity to be heard in relation to the precise form of relief in proceedings where an applicant has been successful. This is apparent from the existence of a large number of *supplemental* judgments delivered in judicial review proceedings whereby the precise consequences of setting aside a development consent are teased out following the delivery of the principal judgment. There are, for example, a series of judgments addressing orders for remittal.

53. There is certainly no requirement to include, as part of pleadings, express reference to core legal principles such as the obligation of a national court to take measures to eliminate the unlawful consequences of a breach of EU law. These principles are well established and do not need to be pleaded.

54. Here, the applicant has laid out, in a comprehensive statement of grounds, the precise basis upon which it is alleged that the foreshore licence is invalid. The complaints made in relation to the alleged non-compliance with the Habitats Directive and EIA Directive are laid out in detail. The principal relief sought is an order of *certiorari* setting aside the decision to grant the foreshore licence. In my experience, it would be unusual for an applicant to recite, in detail, the consequential and ancillary orders sought.

55. The *additional* relief sought in the present proceedings is of a different character. The applicant seeks to advance the novel proposition that—in the event a breach of EU environmental law has been established—the developer should be deprived of the benefit of the survey data obtained pursuant to the impugned development consent. This form of relief goes well beyond the type of ancillary or consequential relief which the parties to judicial review proceedings would be expected to anticipate would flow from a finding that a development consent is invalid. Without in any way trespassing upon the underlying merits of the arguments in favour of such relief, it has to be said that such novel relief should have been pleaded in express terms. There is nothing in the statement of grounds which gives any indication of an intention to seek such novel relief. It simply does not form part of the pleaded case.

56. Counsel for the applicant indicated at the hearing of the strike out motion that his client may wish to apply for leave to amend its statement of grounds to include a plea in this regard. Accordingly, the applicant is given liberty, if it so wishes, to bring an application for leave to amend. Any motion is to be filed by 19 April 2024 and to be made returnable before me, for mention, on 2 May 2024. The respondents and notice party will, of course, be afforded an ample

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opportunity to object to any such application to amend. In particular, they will be heard on the question of prejudice and delay.

CONCLUSION AND PROPOSED FORM OF ORDER

57. The High Court's ability to provide an effective remedy—in the event the judicial review proceedings are successful—has not been frustrated by the completion of the activities authorised by the foreshore licence. In such an eventuality, the High Court would be obliged to take measures to eliminate the unlawful consequences of any breach of EU law found to have occurred. As is apparent from the case law discussed at paragraphs 13 to 18 above, this obligation persists even where the authorised activities have already been completed. The CJEU considers that it is still possible to provide a meaningful and worthwhile remedy in such a scenario: this might, for example, be achieved by directing a remedial assessment or remediation works.

58. Accordingly, the proceedings have not been rendered moot by dint of the fact that the activities purportedly authorised under the foreshore licence had been completed prior to the hearing and determination of the judicial review proceedings. This finding, on its own, is sufficient to dispose of the application to strike out the proceedings as moot. Accordingly, the Minister's motion is denied.

59. As it happens, there is, potentially, an *additional* argument for saying that the proceedings might not be moot. The applicant has sought to point to a very particular remedy which the judicial review proceedings might provide, over and above the general remedies in relation to remedial assessment and remediation works. This hoped-for remedy is that the developer might be denied the *benefit*

of the survey data obtained pursuant to the impugned development consent. For the reasons stated at paragraphs 47 to 56 above, this relief is not properly pleaded. The applicant has liberty, if it so wishes, to bring an application for leave to amend its statement of grounds so as to address the question of the future use of the survey data obtained (i.e. in the event that the foreshore licence were to be set aside in these judicial review proceedings). Any motion is to be filed by 19 April 2024 and to be made returnable before me, for mention, on 2 May 2024. I will give directions, on that date, as to the delivery of replying affidavits. I will also hear the parties on whether the motion to amend should be adjourned to the full hearing of the action in July 2024 or determined on a standalone basis ahead of time.

60. As to legal costs, my provisional view is that the applicant, having successfully resisted the motion to strike out the proceedings, is entitled to recover its costs against the respondent as the moving party. If any party wishes to contend for a different form of costs order than that proposed, they may make submissions to the court at the listing on Thursday 2 May 2024 at 10.30 AM.

Appearances

James Devlin SC and Margaret Heavey for the applicant instructed by Harrington & Company
Feichín McDonagh SC and Emma Synnott for the respondents instructed by the Chief State Solicitor
David Browne SC for the notice party instructed by Philip Lee LLP