

APPROVED

[2021] IEHC 666

THE HIGH COURT
JUDICIAL REVIEW

2021 No. 773 JR

BETWEEN

FRIENDS OF THE IRISH ENVIRONMENT CLG

APPLICANT

AND

ROSCOMMON COUNTY COUNCIL
IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 4 November 2021

INTRODUCTION

1. This judgment is delivered in respect of an application to issue an order of attachment in respect of the chief executive of Roscommon County Council. The application is made pursuant to Order 44 of the Rules of the Superior Courts. The order of attachment, if issued, would command the Commissioner of An Garda Síochána to bring the chief executive before the High Court to answer for the contempt which he is alleged to have committed against the High Court.
2. The application is moved by Friends of the Irish Environment (“*the applicant*”). It is alleged that Roscommon County Council (“*the local authority*”) is in breach of an order made by this court on 25 August 2021. It is sought to make the chief executive answerable for the local authority’s alleged contempt of court.
3. The response of the chief executive and the local authority to the application is to say that there has been no breach of the High Court’s order. Counsel has confirmed that in

NO REDACTION REQUIRED

the event that this court were to find that—contrary to the local authority’s *bona fide* understanding of the order—there had been a breach, then the local authority would immediately take such steps as are necessary to comply with the order as properly interpreted.

PROCEDURAL HISTORY

4. The within judicial review proceedings sought to challenge the validity of a decision which purported to authorise certain flood relief works at Lough Funshinagh in County Roscommon. Lough Funshinagh is designated as a Special Area of Conservation (“*the SAC*” or “*the European Site*”). The qualifying interests of the SAC include a priority habitat under Annex I of the Habitats Directive, namely turloughs.
5. In the ordinary course, it might be anticipated that a proposal to carry out a project of this scale within the vicinity of a SAC would be subject to screening for the purposes of the Habitats Directive and the Environmental Impact Assessment Directive. The local authority had purported to sidestep the possibility of any such procedural obligations by purporting to authorise the project pursuant to the Local Authorities (Works) Act 1949.
6. These proceedings were instituted on 13 August 2021. On that date, counsel on behalf of Friends of the Irish Environment moved an *ex parte* application for leave to apply for judicial review. The application came before me as duty judge. I made an order granting leave to apply for judicial review, and placed a stay on the carrying out of works. The proceedings were made returnable before me on 25 August 2021.
7. On the return date, counsel for the applicant and the local authority, respectively, confirmed that the proceedings had been settled as between the parties, and that, subject to the approval of the court, certain orders could be made on consent. It was further

confirmed that the proceedings as against Ireland and the Attorney General could be struck out with no order as to costs.

8. Having heard from counsel, and having regard to the pleadings and affidavits to date, I was satisfied to make the proposed orders. Insofar as relevant to the application for attachment, the operative part of the order of 25 August 2021 reads as follows.

“By Consent IT IS ORDERED as follows:

1. THE COURT DOTH MAKE an Order of *certiorari* quashing the decision of the First Named Respondent authorising flood relief works at Lough Funshinagh pursuant to the Local Authorities (Works) Act 1949 dated 19th May 2021 (Local Authority Ref R/74/21).
2. THE COURT DOTH MAKE an Order requiring the First Named Respondent to remediate the lands the subject of these proceedings in accordance with the Lough Funshinagh Flood Management Project Remediation Plan dated August, 2021, which is appended to this Order.
3. Liberty to Apply in respect of the carrying out of said remediation in accordance with the aforementioned Remediation Plan.

[...]”

9. As appears, the order imposed an obligation on the local authority to remediate the lands. This aspect of the order was necessary to address the fact that certain works had been carried out, between June and August 2021, pursuant to the invalid decision. These works included, *inter alia*, the laying of a section of an outfall pipe of approximately 827.5 metres. The remediation plan envisaged that this section of pipe would remain *in situ*, but that it would be sealed by the installation of end caps. It was also envisaged that open trenches would be backfilled using stockpiles of excavated material, and that the manholes in the pipe would be capped with a precast concrete slab and backfilled.
10. The chief executive has confirmed on affidavit that these remediation works had been substantially completed during the period 2 September to 18 October 2021. (There is a

minor trench which remains open: the backfilling work had been halted due to adverse weather conditions).

11. The chief executive has now made an order purporting to authorise emergency flood relief works at Lough Funshinagh. It should be explained that the emergency works now proposed are said to be significantly scaled back from the original proposal. This order is made pursuant to section 151 of the Local Government Act 2001 and is dated 14 October 2021. Relevantly, the chief executive's order purports to determine, *inter alia*, that the emergency works are not likely to have any significant effect on a European Site, so that no application to An Bord Pleanála for approval under section 177AE of the Planning and Development Act 2000 is required. The chief executive's order also purports to determine that the emergency works do not comprise a project in respect of which environmental impact assessment is required.
12. The chief executive has confirmed that the emergency works will utilise the section of pipe which had been installed pursuant to the decision set aside by the High Court order of 25 August 2021. (See paragraph 40 of the chief executive's affidavit sworn on 28 October 2021). The emergency works will require the removal of the end caps which had been installed as part of the implementation of the remediation plan. It seems that one of the installed end caps has already been removed, and that it had been intended to remove another of the installed end caps on the week commencing 1 November 2021.
13. The applicant submits that these actions represent a contumacious breach of the High Court order of 25 August 2021. The applicant further submits that the pipework must remain capped and the manholes remain sealed unless and until the court order is varied by application or appeal or is otherwise discharged. It is said that the remediation plan required that the pipes which had already been laid be rendered useless for their designed purpose of carrying water.

14. It is further submitted that the legal effect of the court order is not discharged by the local authority temporarily achieving substantial compliance, after which the effect of the order is spent and the works necessary to achieve compliance can thereafter be removed.
15. The applicant notes that neither the court order nor the remediation plan contained any temporal limitation which would allow the works to be undone at a defined point in time or on the occurrence of a future event. The court order specifically granted the parties liberty to apply, which liberty has never been exercised by the local authority.

APPROACH TO INTERPRETATION OF COURT ORDER

16. There is a very useful discussion in S. Collins, *Enforcement of Judgments* (2nd ed., 2019, Round Hall, §§15–11 to 15–18) of the proper approach to be taken in determining whether or not there has been a breach of a court order such as to amount to contempt. The learned author refers, in particular, to the judgment of the High Court (Clarke J.) in *P. Elliott & Company Ltd v. Building and Allied Trades Union* [2006] IEHC 340 (at paragraph 3.3). There, the following test was posited:

“In the course of debating the issue with counsel it was agreed on both sides, and I agree, that there is one refinement to that position that needs to be noted. Courts strive to ensure that orders made are clear in their terms. It is particularly important in cases where a party may be exposed to the risk of severe sanction for breach of an order that it be clear to that party what they can, cannot or must do. However despite the best efforts of all concerned it does remain the case that on certain occasions it may not be absolutely clear as to what is or is not within the scope of a binding order of the court. In those circumstances I am satisfied that, having regard to the penal nature of the contempt jurisdiction, a party could not be said to be in contempt of a court order where, objectively speaking, there was reasonable doubt as to whether the actions complained of came within or without the scope of the order concerned. I should emphasise that, in my view, the relevant test is an objective one. Would a reasonable and informed person, having had sight of the court order, come to the view that the acts complained of were legitimate having regard to that order.”

17. I respectfully adopt this as a correct statement of the law.

DISCUSSION AND DECISION

18. The very first issue which falls for determination on this application for attachment is whether there has been any breach of the High Court order. This involves a consideration of what precisely the order of 25 August 2021 required the local authority to do. The order must be interpreted objectively, as it would be understood by a reasonable and informed person. Any doubt or ambiguity must be resolved in favour of the alleged contemnor.
19. It is only if this first issue is decided in favour of the moving party, Friends of the Irish Environment, that it would then become necessary to consider the nature and extent of the breach, and the sanction, if any, to be imposed.
20. Any court order must be interpreted in the context of the proceedings in which it was made. It is appropriate, therefore, to say something about the complaints made, and the reliefs sought, in these proceedings.
21. The proceedings sought to challenge a decision made by the chief executive of the local authority which purported to authorise the carrying out of certain flood relief works. The impugned decision of the local authority had purportedly been made pursuant to the provisions of the Local Authorities (Works) Act 1949. This legislation is of relatively old vintage, and, crucially, has not been amended so as to give effect to the Irish State's obligations under EU environmental legislation. In particular, the Act does not allow for compliance with the requirements of the Habitats Directive (Directive 43/92/EEC) nor the Environmental Impact Assessment Directive (Directive 2011/92/EU as amended by Directive 2014/52/EU).
22. The materials before the court on the *ex parte* application for leave to apply for judicial review indicated that the proposed flood relief works then contemplated represented a

project of a type which would have triggered the procedural requirements of the Habitats Directive. At the very least, a stage one screening determination would have been required to decide whether the project was likely to have a significant effect on the European Site. Indeed, on the basis of the local authority's own reports, it seemed almost inevitable that a stage two appropriate assessment would have been required. See, in particular, the report commissioned by the local authority from Malachy Walsh Partners. This report indicates that the project, as then envisaged, was likely to result in the loss of a priority habitat and thus it might only be authorised pursuant to article 6(4) of the Habitats Directive.

23. In circumstances where neither screening nor an appropriate assessment had been carried out, the impugned decision under the Local Authorities (Works) Act 1949 was invalid in that it purported to authorise the carrying out of a project in breach of the procedural requirements prescribed under the Habitats Directive.
24. It must be emphasised that the gravamen of the complaint made in the proceedings had been that the *form* of development consent supposedly relied upon, i.e. the decision made pursuant to the Local Authorities (Works) Act 1949, was invalid. Put otherwise, the local authority were not entitled to invoke the provisions of the Local Authorities (Works) Act 1949 in respect of a project of the scale then proposed precisely because that legislation did not allow for compliance with the Habitats Directive.
25. This complaint can properly be described as procedural in nature. The term "*procedural*" is not used here in a pejorative sense: the failure to comply with the Habitats Directive represented a serious breach of EU law and one which this court, as a national court of a Member State, is required to remedy by setting aside the offending development consent (save in exceptional circumstances). (See, generally, Case C-411/17, *Inter-Environnement Wallonie* (paragraphs 169 to 177)).

26. The significance of the complaint being procedural in nature is that it was not necessary for the purpose of resolving the proceedings for this court to reach any determination as to whether a project of this type could ever be lawfully carried out at this location. The finding of the court, as embodied in the order of 25 August 2021, was simply to the effect that development consent could not be granted pursuant to the provisions of the Local Authorities (Works) Act 1949.
27. The court did not consider—and the order does not address—the contingency of the local authority seeking to obtain development consent for a smaller scale project on a *different* statutory basis. The order is not intended, for example, to preclude the possibility of the local authority seeking a form of development consent from An Bord Pleanála pursuant to the procedure applicable to certain types of local authority development under the Planning and Development Act 2000 (“*PDA 2000*”). It was open to the local authority to make such an application, and, in the event that development consent was granted, it would be open to Friends of the Irish Environment (or any other person with a “*sufficient interest*”) to question the validity of such a development consent by way of judicial review. As it happens, the local authority has purported to invoke a different procedure, namely that provided for under the Local Government Act 2001 in respect of an “*emergency*” as defined. It is said that the project is significantly scaled back from the original proposal and does not require a stage two appropriate assessment for the purposes of the Habitats Directive.
28. The absence of any intention on the part of the court to preclude the possibility of the local authority obtaining a different form of development consent pursuant to legislation other than the Local Authorities (Works) Act 1949 must inform the interpretation of the High Court order.

29. The order of 25 August 2021 addresses two issues as follows. The principal part of the order consists of an order of *certiorari* setting aside the impugned decision. The order goes on, however, to make certain consequential directions. The order seeks to address the status of the partially-built structures (including, relevantly, the stretch of pipeline) which had been installed prior to the setting aside of the impugned decision. The order requires the remediation of the site and that this be done in accordance with a detailed remediation plan which had been agreed as between the parties.
30. It is worth pausing here to note that, in most judicial review proceedings where a form of development consent is set aside, the question of what is to happen to any partially-built structures is normally left over for other proceedings. Thus, for example, in the case of the *North Wall Quay* proceedings, the party objecting to the development of an office block which had been carried out pursuant to an invalid development consent had brought separate proceedings pursuant to section 160 of the Planning and Development Act 2000 seeking the removal of those structures (*North Wall Quay Property Holdings Ltd v. Dublin Docklands Development Authority* [2009] IEHC 11).
31. In the present case, no objection was raised by the local authority to the court making a remediation order in the context of the judicial review proceedings. Given the risk that the remediation works themselves, if not properly managed, might have a significant effect on the protected European Site, it was necessary to put in place a management plan. The parties, to their credit, had been in a position to agree the terms of such a plan and to agree to its being made part of the order.
32. The order does not expressly address the contingency of the local authority subsequently obtaining a different form of development consent, and of its then seeking to utilise the partially-built structures for the purpose of the newly authorised project. As discussed above, however, it was not the intention of this court to preclude the possibility of the

development project being carried out pursuant to a lawfully granted development consent under different legislation.

33. The question which now arises is whether, notwithstanding that limitation on the intent of the order, it was nevertheless necessary for the local authority to apply to court for permission to carry out works pursuant to a fresh development consent in the event that those works involved utilising the previously unauthorised works. This question must be answered through the lens of the legal test identified earlier, namely whether a reasonable and informed person having sight of the court order would be of the view that such an application was required by the order. Any doubt or ambiguity must be resolved in favour of the alleged contemnor. This follows from the criminal character of contempt proceedings.
34. The factual background against which this question has to be answered is very stark. The High Court order had required, *inter alia*, that the partially-built pipeline be sealed up or capped. These steps are now to be reversed: the proposed flood relief works purportedly authorised by the development consent granted pursuant to the Local Government Act 2001 necessitate the removal of the cap so as to allow the pipeline to be utilised.
35. On one view, it might appear that no sooner had the local authority carried out the remediation works than it immediately took steps to undo those very works. On this view, the sequence of events might be characterised as the local authority taking a reductionistic approach to the requirements of the High Court order, by interpreting it as simply requiring the local authority to do certain works, without any obligation thereafter to retain those works in position.
36. The correct characterisation is, however, more nuanced. The fact that the local authority has obtained a fresh development consent pursuant to a different statutory regime than that improperly relied upon previously represents a significant change in circumstances.

The fresh development consent is, in the absence of legal proceedings challenging same, presumed to be valid. The correct characterisation of the sequence of events is that, first, the local authority complied with the High Court order by carrying out the remediation works; and, secondly, that the local authority has put in place a fresh development consent which it is *prima facie* entitled to rely upon. The effect of the High Court order was not to subject these lands or this particular project to a permanent form of policing by the court, still less to sterilisation. It was not intended that the local authority would have to apply to the High Court for some sort of permission to rely upon a subsequent administrative act or decision. It is even less clear as to what purpose such an application might serve. Certainly, the court could not properly rule upon the validity of the subsequent development consent in the absence of fresh judicial review proceedings.

37. The matter can be tested this way: suppose that rather than carrying out the new works within a matter of weeks of the carrying out of the remediation works, the local authority, instead, sought to carry out a flood relief project a number of years hence, pursuant to a development consent issued by An Bord Pleanála. It could not realistically be suggested that, at such a remove, it would be necessary for the local authority to return to court to seek permission to rely upon the development consent.
38. The rule of law, and, in particular, the requirement to comply with the obligations of the Habitats Directive, is vindicated by the existence of an entitlement on the part of Friends of the Irish Environment (or any other person with a “*sufficient interest*”) to institute separate proceedings challenging the fresh development consent. Such proceedings would be subject to case management. If thought appropriate, an early hearing date could be fixed for the hearing of such proceedings, and, if necessary, an application for interlocutory relief might be brought before the court.

39. The legal entitlement of the local authority to pursue what it says is a significantly scaled back project pursuant to the chief executive's order of 14 October 2021 could then be subject to a careful consideration by the court, having heard full argument from both parties, and, if necessary, from the Attorney General. This is the appropriate procedure to be followed. The High Court order of 25 August 2021 cannot be interpreted as intended to provide for a parallel procedure, by imposing a tacit obligation upon the local authority to apply to the court on an *ad hoc* basis for permission to rely on the chief executive's order of 14 October 2021.
40. Finally, for completeness, it is necessary to address briefly an argument based on the judgment of the High Court (Lynch J.) in *Howard v. Commissioners for Public Works (No. 3)* [1994] 3 I.R. 394. That judgment concerned the carrying out of the development of a proposed visitors centre on a site in the Burren National Park near Mullaghmore in the County of Clare. The development had been partially-built in the mistaken assumption (i) that no planning permission was required as the works were being undertaken by a State authority, and (ii) that the Office of Public Works had statutory power to carry out development of this type.
41. Orders were made earlier in separate proceedings restraining the Commissioners of Public Works from proceeding with or undertaking any further works forming part of the development of the proposed visitors centre ("*the injunction*"). Thereafter, amending legislation was introduced which conferred *vires* on the Commissioners to carry out the development. One of the issues which fell to be determined in *Howard v. Commissioners for Public Works (No. 3)* was whether the partially-built development could now be completed in reliance upon the amended legislation.
42. The High Court suggested that the order, which had been drawn up in the earlier proceedings, had been worded in too absolutist terms, and did not reflect the declarations

upon which it had been founded. The order should, instead, have indicated that the injunction only remained in force for so long as (i) the respondent had no statutory power to carry out the works, and (ii) the development remained unauthorised development under the planning legislation.

43. The High Court further held that the basis for the injunction granted in the earlier proceedings was now gone insofar as it related to the Commissioners' *vires*: the circumstances had since changed, and the missing powers had been conferred by the amending legislation. Nevertheless, it still would be necessary for the Commissioners to apply, *in the context of the earlier proceedings*, for an order varying or discharging the original injunction.
44. The circumstances under consideration by the High Court in *Howard v. Commissioners for Public Works (No. 3)* are very different from those of the present proceedings. Notwithstanding these differences, however, it seems to be that the judgment is of some relevance to the issue which I have to decide. The judgment confirms that a finding made by a court, by reference to a particular statutory regime, that certain development works are unauthorised does not preclude those works being completed subsequently by reference to a different statutory regime. On the facts of *Howard*, the different statutory regime was as the result of legislative amendments; in the present case, the local authority has sought to invoke a different statutory regime than that condemned by this court.
45. It is correct to say that *Howard* envisaged an application to court to vary or amend the original injunction. This aspect of *Howard* is, however, clearly distinguishable. The terms of the injunction precluded the carrying out of any further works. Moreover, the order had been made in an earlier, separate set of proceedings, and thus could not be changed by the judge hearing the second case. By contrast, the order of 25 August 2021

cannot reasonably be interpreted as precluding the carrying out of a smaller-scale project pursuant to a different legislative basis than that condemned by the order.

CONCLUSION AND FORM OF ORDER

46. The application for leave to issue an order of attachment in respect of the chief executive of Roscommon County Council is refused. I will hear counsel further as to the appropriate costs order to be made.
47. For the reasons explained at paragraphs 38 and 39 above, rule of law, and, in particular, the requirement to comply with the obligations of the Habitats Directive, is vindicated by the existence of an entitlement on the part of Friends of the Irish Environment (or any other person with a “*sufficient interest*”) to institute separate proceedings challenging the fresh development consent.
48. In the event that Friends of the Irish Environment wish to institute proceedings in respect of the chief executive’s order of 14 October 2021, such proceedings will be subject to case management. All applications in any such proceedings should be made returnable before me.

Appearances

John Kenny for the applicant instructed by FP Logue Solicitors

Neil Steen, SC for the first named respondent instructed by McCann Fitzgerald LLP

The second and third named respondents did not participate on the motion

Approved
Gareth S. Mans