UNAPPROVED

THE COURT OF APPEAL

CIVIL

Neutral Citation Number: [2020] IECA 84
Record Number: 2018 31

The President

Ni Raifeartaigh J.

Haughton J.

BETWEEN

MAURA HARRINGTON

APPLICANT/APPELLANT

AND

THE ENVIRONMENTAL PROTECTION AGENCY, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

VERMILLION EXPLORATION AND PRODUCTION IRELAND LIMITED SHELL E&P (IRELAND) LIMITED

NOTICE PARTY

JUDGMENT of the President delivered on the 6th day of April 2020

1. These proceedings mark the latest phase in the long-running Shell Bellanaboy controversy. At issue is an appeal from a decision of the High Court (Binchy J) of 21st November 2017. The decision in question was given in the context of the applicant challenging the decision of the first-named respondent dated 8th October 2014 to grant the notice party, then known as Shell E&P (Ireland) Ltd. a revised industrial emissions licence. The revised licence, which was the subject of challenge, was issued following a review of an

existing licence, PO738-01, which had been granted by the Environmental Protection Agency ("EPA") in 2007 and which was amended in 2014. The 2007 licence and the revised licence relate to activities undertaken by Shell in connection with the Corrib gas field development. At a meeting on 29th September 2015, the EPA approved the recommendation of its Technical Committee and made a decision to grant a revised licence to the notice party. A formal revised licence was drawn up and dated 8th October 2015. It is this revised licence which the applicant, with others, sought to challenge in the High Court and now in this Court on appeal.

2. By order of 14th December 2015, four applicants, Martin Hartington, Maura Harrington, Monica Muller, and Peter Sweetman were granted leave to seek judicial review. The applicants were seeking the following reliefs:

> "(i) An order of *certiorari* quashing the decision of the respondent to grant a licence, 0738-03 subject to conditions, to the Notice Party in respect of an activity consisting of a gas refinery and large combustion plant at Bellanaboy Bridge, Bellagelly South, County Mayo.
>
> (ii) A declaration that no Environmental Impact Assessment (EIA) sufficient to comply with the requirements of 2011/92/EU (the Consolidated Environmental Impact Assessment Directive) ('the Directive') in respect of the development the subject matter of licence no. 0738-03 which is the operation of a gas refinery and large combustion plant, associated pipe network, including the pipe line conveying the raw gas from the well head and the pipe network connecting to the Bórd Gáis Éireann network, which assessment must be carried out in order to comply with the requirements of the aforesaid Directive 2011/92/EU.

(iii) A declaration that both the first named Respondent and the second named Respondent were required and obliged to take all general or particular measures to remedy any past failure to carry out an assessment of the environmental impact and or effects of a project as provided for under the EIA Directive and take the appropriate necessary measures to ensure that in carrying out an EIA the requirements of Directive 2011/92/EU were complied with.

(iv) In the alternative, the second named respondent failed to transpose the requirements of Council Directive 2011/92/EU in failing to provide for appropriate procedures to ensure that the requirements of the EIA Directive are fully complied with and through a system of law has created a procedure where no integrated EIA is carried out in respect of those projects specified under the EIA Directive and in particular that the full effects of such developments including direct and indirect effects of a project in accordance with Articles 3,4 - 11 of the Directive on human beings, fauna and flora, soil water air climate and landscape, material assets and the cultural heritage and the interaction between these factors are carried out and to nullify the unlawful consequences of a breach of laws out of the principal of cooperation and good faith laid down in Article 10 EC (Articles 4(3)) of the Treaty of the European Union and filed to take appropriate measures necessary to remedy failure to carry out an EIA in respect of the [whole] of the project the subject matter of licence 0738-03.

(v) An order requiring the respondents to take such steps so as to carry out an EIA in respect of the gas refinery at Bellanaboy Bridge gas terminal to include all the elements of the project and specifically the upstream gas

pipeline conveying raw gas from the well head to the terminal, the gas distribution network conveying the treated gas in the pipeline specifically constructed for that purpose, the gas refinery and all associated plant and equipment, the waste water treatment pipe so as to accord with Articles 3 and 4-11 of the EIA Directive and in particular identify all likely significant effects both direct and indirect, the cumulative effects so as to fully comply with and have the project properly assessed pursuant to the requirements of that directive.

(vi) An order requiring production of all reports and or draft reports and or all other documents prepared by or on behalf of the first named respondent relating to or connected with the decision of the 8th October 2015 on licence 0738-03.

(vii) If necessary an order pursuant to Article 234 of the TEU for a referral to the European Court of Justice."

A motion seeking the reliefs set out above was issued, grounded upon an affidavit of Mr. Peter Sweetman, the fourth-named applicant.

3. On 2nd February 2017, the first, third and fourth-named applicants withdrew from the proceedings and the legal representatives who, to that point, had acted for all the applicants, came off record. It seems that the decision of the third and fourth-named applicants to withdraw from the proceedings was linked to the fact that they had, in earlier proceedings, challenged a decision of An Bord Pleanála dated 19th January 2011, granting approval for the construction of an onshore pipeline associated with the project. The earlier proceedings were settled and the settlement was reduced to writing. The settlement saw the applicants in those proceedings, Ms. Muller and Mr. Sweetman, agree not to litigate before the courts or to make a complaint to the European Commission, European Parliament, the Aarhus Convention

Committee, or any international body, any issue in respect of the above named consents or any amendments thereof or modifications thereto, and not to procure, encourage or assist others to institute or pursue any proceedings. While it is not entirely clear why the first-named applicant joined the third and fourth-named applicants in withdrawing from the proceedings, it is a fact that he did so, leaving Ms. Maura Harrington as the only remaining applicant. She represented herself at the hearing before Binchy J. in the High Court. Prior to the withdrawal from the proceedings of the other applicants, and at a time when they and Ms. Maura Harrington were still legally represented, an issue paper was prepared. The Court has been told that it was the subject of discussion and negotiation involving the four legal teams that were then party to the proceedings *i.e.* the teams representing each of the respondents, the notice party, and the applicants. It seems that the suggestion of an issue paper may have emanated from a suggestion made by a judge in the course of a case management listing.

4. As one of the questions or issues referred to in the issue paper is central to the present appeal and as the document is not a lengthy one, for ease of reference, it is convenient to set out its terms in full:

> "(1) (a) Was there an Environmental Impact Assessment carried out in accordance with the requirements of Council Directive 20/11/92/EU?
>
> (b) Was there an Environmental Impact Assessment carried out for the purposes of domestic law?
>
> (2) Is the applicants' contention that an adequate Environmental Impact Assessment was not carried out premised on an impermissible collateral attack to the validity of earlier development consents?
>
> (3) Was the approach adapted by the respondents consistent with the judgment of the European Court of Justice in Case C-50/09 and/or with C-50/09 relative to those assessments previously carried out?

(4) Did the first named respondent carry out an Appropriate Assessment for the purposes of Council Directive 2011/92/EU?

(5) Has there been a failure to give reasons in accordance with ground 12?

(6) Can a licence which has expired and was not in existence be the subject of a review?

(7) In the event that the answer to (1)(b) is in the affirmative, is the applicants' claim in respect of transposition inadmissible by reason of the applicants'' failure to provide proper particulars of the alleged shortcomings in national law? If it is admissible, have the requirements of the Directive been appropriately transposed?

(8) Whether the proceedings previously brought and the subsequent settlement in November 2011 are such as to disentitle or prevent these proceedings against the State respondents and/or the EPA from being heard and determined, in whole or in part?

(9) Does the applicants' failure to disclose the existence of the earlier proceedings and of the settlement agreement in their application for leave to apply for judicial review amount to a breach of the applicants' duty of disclosure such as to disentitle the applicants to any relief?"

It is paragraphs (1)(a), and to a lesser extent, paragraph (6) of the above issue paper which are of relevance to this appeal.

5. The High Court Judge commented that the applicant's statement of grounds was, regrettably, prolix, repetitious and at times both general and vague in character. In the course of careful and very comprehensive judgment, the judge summarised what he saw as the key issues raised by the applicants in their statement of grounds and the responses of the respondents thereto. In the course of this exercise, he identified twelve grounds. The judge's

approach was then to turn to the issue paper, having referred to the fact that the applicant had confirmed her agreement with the issue paper on the first day of the hearing. Having referred to the submissions from the applicant and from the respondents on each of the issues, the judge gave his ruling on each respective issue raised.

(1)(a) Was there an Environmental Impact Assessment carried out in accordance with the requirements of Council Directive 20/11/92/EU ["the EIA Directive"]?

6. In relation to the first point on the issue paper, the judge was of the view that the applicant had not identified any specific shortcomings in the EIA. One specific issue, that of cold venting, which had been referred to by the applicant in her submissions, was addressed by the Inspector (Ms. Jennifer Cope) in her report and had been subject to an EIA in connection with the 2007 licence application. As to the applicant's contention, echoing what had been said by Mr. Sweetman in his grounding affidavits, that there had been no assessment of changes to the project since the issue of previous consents, the judge saw that as flatly contradicted by the evidence of the respondents. The judge said that it was clear that the evidence established that the EIA conducted by the EPA was an assessment of the activities as they are designed to operate and that he was satisfied that that was so. The judge felt that the applicant's other main argument under this heading was a legal rather than a factual matter, and was to the effect that the entire project has to be the subject of a single integrated assessment. The judge was of the view that it was clear from the authorities, instancing *Martin v. An Bord Pleanála* [2008] 1 IR 336 and *Commission v. Ireland* Case C-50/09, that there was no such requirement under the EIA Directive and that it was open to competent authorities in member states to entrust the task of an EIA to several entities if that was considered appropriate. Accordingly, the judge was satisfied that the applicant had failed to establish that the EIA had not been carried out in accordance with the EIA Directive, and

consequently, the applicant's challenge to the issue of the licence, insofar as it was grounded upon an alleged failure to conduct an EIA in accordance with the EIA Directive, must fail.

(1)(b) Was there an Environmental Impact Assessment carried out for the purposes of domestic law?

7. The judge quoted the applicant as having said, in the course of her oral submissions, that her submissions as regard question (1)(b) were the same as those advanced in relation to question (1)(a). He put this issue in the context of the applicant's contention that there had to be a single integrated EIA of the entirety of the project. Put differently, the complaint was that the State had not correctly transposed the EIA Directive into Irish law. The judge repeated his earlier expressed view that there was no authority for such a proposition, and that if anything, the manner in which the State had chosen to implement the EIA Directive had been endorsed by the Supreme Court in *Martin* and by the CJEU in Case C-50/09. He said that it followed from what he had said that the applicant had failed to establish that the EIA conducted by the EPA was not carried out in accordance with domestic law.

(2) Is the applicants' contention that an adequate Environmental Impact Assessment was not carried out premised on an impermissible collateral attack to the validity of earlier development consents?

8. The judge pointed out that in her oral submissions, the applicant stated that it was never her intention to attempt an impermissible collateral attack on earlier development consents and that she had stated that she was not seeking to have earlier consents set aside. The applicant had expressly stated that the question did not arise for her and she did not address the question. The judge said that, strictly speaking, therefore, there was no need to address the question, but that while the applicant had made it very clear that she did not wish to mount a collateral challenge to earlier consents or licences, that there could be scarcely any

doubt that had in fact she done so, and further noting that such a challenge would have been doomed to fail in any event.

(3) Was the approach adapted by the respondents consistent with the judgment of the European Court of Justice in Case C-50/09 and/or with C-50/09 relative to those assessments previously carried out?

9. The judge commented that it was difficult to know precisely what case the applicant was making as regards Case C-50/09. Indeed, no reference to that case was to be found in the applicant's submissions. The respondents had pointed to the fact that the CJEU had expressly concluded that it was permissible to entrust the task of conducting an EIA to several entities. Insofar as the CJEU identified a "gap" or a *lacuna*, that gap had been addressed by way of amendments to the Environmental Protection Act 1992, and the Waste Management Act 1996, so as to impose an express obligation on the EPA to carry out an EIA. Accordingly, the judge was satisfied that the reliance placed by the applicant upon Case C-50/09 was misplaced.

(4) Did the first-named respondent carry out an Appropriate Assessment for the purposes of Council Directive 2011/92/EU?

10. The crux of the applicant's issue with the assessment in this respect was that it was purportedly conducted without due independence. The judge began his consideration by holding that there was no obligation on the EPA to share the Scott Cawley Report. This was an expert report commissioned by the EPA to confirm that the approach adopted by its own Inspector had been a proper one. The judge was of the view that while the EPA had decided, out of an abundance of caution, to obtain an independent view, that it had been under no obligation to do so, and that really there was no difference in substance between what had occurred and having the Inspector's conclusions reviewed by a colleague within the Agency.

As to the suggestion that there was an obligation to disclose the Scott Cawley Report pursuant to the provisions of the Aarhus Convention, the judge agreed that while a report had been sought from an independent expert in the circumstances described, it was, in his view, an internal report for the members of the EPA's sole consideration. This flowed from the fact that it had been obtained in the period after the public consultation had taken place. The judge was of the view that the applicant had failed to put forward any basis upon which it could be said that the assessment conducted by the EPA did not meet the requirements of the Council Directive 92/43/EEC ('Habitats Directive').

(5) Has there been a failure to give reasons in accordance with ground 12?

11. The judge first explained that the reference to ground 12 was a reference to ground 12 advanced by the applicant in the statement of grounds. That ground had stated:

> "[t]he first named respondent failed to give any reasons sufficient to justify the change in the emissions from licence 0738-01 to licence."

The EPA submitted that the minutes, which record the decisions of that body, set out in considerable detail its reasons for concluding that the licensed activities would not adversely affect the integrity of any European site. The judge was satisfied that far from not giving any reasons sufficient to justify the change in the emission level value ("ELV"), the report of the Inspector, the report of the Technical Committee, and the minutes of the EPA all recorded a detailed analysis of the issue and gave sufficient reasons to justify the decision. In a nutshell, as the judge put it, the EPA had been satisfied that the increases in the ELV proposed did not give rise to any pollution of Carrowmore Lake and would not affect the integrity of any relevant European site.

(6) Can a licence which has expired and was not in existence be the subject of a review?

12. The judge first observed that the question had not been correctly posed because it assumed that the 2007 licence had expired and that was something that was in dispute between the parties. The judge concluded that the applicant's claim under this heading must also fail. As this issue has featured prominently in the appeal, I will return to it in greater detail later in this judgment. Suffice to say at this stage the affidavit of Gerry Costello dated 16th April 2016, retired Regulatory Affairs Manager of Shell, indicated to the satisfaction of the judge that the activity had commenced in accordance with the letter submitted to the agency dated 11th November 2014.

(7) In the event that the answer to (1)(b) is in the affirmative, is the applicants' claim in respect of transposition inadmissible by reason of the applicants'' failure to provide proper particulars of the alleged shortcomings in national law? If it is admissible, admissible, have the requirements of the Directive been appropriately transposed?

The judge referred to the fact that he had already determined that, for the purposes of domestic law, the applicant had failed to establish that there was any defect in the EIA that was carried out by the EPA. He felt that absent submissions addressing the question of alleged shortcomings in national law, the applicant's claim that the State respondents had failed to transpose the requirements of the EIA Directive properly was inadmissible to the extent that it had been advanced at all.

(8) Whether the proceedings previously brought and the subsequent settlement in November 2011 are such as to disentitle or prevent these proceedings against the State respondents and/or the EPA from being heard and determined, in whole or in part?

13. The judge pointed out that the respondents had elected not to pursue that line of opposition in view of the fact that the applicant was not a party to the settlement of the proceedings in November 2011.

(9) Does the applicants' failure to disclose the existence of the earlier proceedings and of the settlement agreement in their application for leave to apply for judicial review amount to a breach of the applicants' duty of disclosure such as to disentitle the applicants to any relief?

14. The judge pointed out that this question had been formulated when all named applicants were party to the proceedings. The judge was of the view that the third and fourth-named applicants should have brought the settlement of the 2011 proceedings to the attention of the High Court at the application for leave stage. However, he felt that this was not an issue that could disentitle the applicant to relief to which she might otherwise have been entitled.

15. The judge concluded his judgment by saying that given the applicant had failed to obtain any of the reliefs sought, it followed that the application had to be dismissed in its entirety. He also stated that he saw no necessity to make a reference to the CJEU as none of the issues raised by the applicant merited doing so.

Issue to be Decided in this Appeal

16. The Notice of Appeal filed 25th January 2018 contains two substantive grounds of appeal which identify particular paragraphs of the High Court judgment with which Ms. Harrington has taken issue:

(a) Paragraph 62 – the learned judge erred in law and fact in failing to completely answer Q1(a) of the Issue Paper in circumstances where the Judge confirms at paragraph 50 of the judgment that the Applicant/Appellant was acting at a considerable disadvantage. In those circumstances if the Applicant/Appellant was not so disadvantaged the expert evidence required by the Judge to decide/determine Issue 1(a) would have been available.

(b) Paragraphs 81-87 – the learned judge erred in law and fact in failing to correctly apply Section 92(1) EPA Act 1992 [as amended] and in particular failing to consider whether the carrying on of the activity had or had not been substantially commenced during the seven year period in circumstances where the Judge noted that 'it is indeed curious that there is nothing in the materials produced before the Court to indicate that the EPA verified that the activities the subject of the 2007 licence had indeed commenced within the seven year period'.

The appellant's submissions sought to alter the above grounds of appeal so as to include criticisms of paragraphs 61 and 63 of the High Court judgment and at the same time exclude paragraphs 86 and 87 from consideration. It is accepted by Ms. Harrington that such a reformulation was necessary due to an error on her own part which she attributes to her status as a lay litigant, representing herself.

17. Insofar as the applicant now suggests that paras. 61 and 63 of the judgment of the High Court should form part of the appeal, it is the case that there has been no application to expand the grounds of appeal put before this Court. The ground of appeal in question specifically and directly related to the decision of the judge not to seek to provide a full answer to question (1)(a) on the issue paper. Any criticisms, therefore, of paras. 61 and 63 do not form part of the appeal. However, the summary of the judgment set out above makes clear that what the applicant is seeking to do at this stage is to argue that the EPA was required to undertake a single integrated assessment pursuant to the EIA Directive and not split the task of conducting an EIA among several entities as occurred here. This is the substance of what I have labelled "Ground A". The other issue, "Ground B", concerns whether the activities which form the subject matter of the case *i.e.* those conducted pursuant to the 2007 licence were commenced within the seven-year period provided for by same.

The Purported Necessity of a Single Integrated Assessment [Ground A]

18. I am happy to confirm that I am in agreement with the judge that there is no requirement under the EIA Directive for a single integrated assessment, and I agree with his view that it was open to the national authorities to entrust the task of conducting an EIA to several entities. The judge's approach was in accordance with the judgment of the Supreme Court in *Martin v. An Bord Pleanála*, and in accordance with the decision of the CJEU in Case C-50/09.

Whether the Activities were "Substantially Commenced" within the Seven Year Period [Ground B]

19. The other ground of appeal advanced seems to have been promoted by the judge's observation at para. 85 of his judgment that:

> "[i]t is indeed curious that there is nothing in the materials produced before the Court to indicate that the EPA verified that the activities the subject of the 2007 licence had indeed commenced within the seven-year period."

In her submissions, the applicant had contended that there was nothing in the materials before the High Court to indicate that the EPA had done anything to verify the confirmation that it received from Shell, and the judge added that this appeared to be the case. Having made the comment which has triggered the applicant's interest, set out above, the judge went on to say

> "[b]ut it is beyond any doubt that the respondents are correct in their submissions as to the legal effect of s. 92(1) of the EPA Act. For a licence to cease to have effect, the EPA must notify the licence holder that the activity has not commenced within the specified period."

Section 92 of the Environmental Protection Agency Act 1992, as substituted by s. 15 of the Protection of the Environment Act 2003, provides as follows:

"*Limit on Duration of Licence*

92(1) Where, in the opinion of the Agency, the carrying on of the activity to which a licence or revised licence relates has not been substantially commenced within the period of three years beginning on the date on which the licence was granted, or, as may be appropriate, the period referred to in paragraph (a) or (b) of subsection (2), and the Agency notifies the licensee of that opinion, then that licence shall cease to have effect on the giving of that notice.

(2) The Agency may, having regard to the nature of the activity to which a licence or revised licence to be granted or granted by it will relate or relates, as the case may be, and any arrangements necessary to be made or made in connection with the carrying on of the activity and any other relevant consideration—

(a) specify for the purposes of subsection (1) a period of more than 3 years beginning on the date on which the licence or revised licence is to be granted."

20. In this case, it is not in dispute that licence number PO738-01 had stipulated a period of seven years rather than three years. Paragraph 1.5 of that document provides:

"[h]aving regard to the nature of the activity and arrangements necessary to be made in connection with the carrying on of the activity, the specified period for the purposes of section 92(1) of the EPA Acts 1992 and 2003 is seven years."

21. If one has regard to the terms of s. 92, it is clear that for the licence to cease to have effect, there are two conditions that have to be satisfied. First, the Agency must form the opinion that the carrying on of the activity to which the licence related had not been substantially commenced within the relevant period i.e. seven years. Second, the Agency must notify the licensee of that opinion. The section makes clear that it is on the giving of the notice that the licence ceases to have effect. In this case, it is quite clear that the Agency

never formed the opinion that the activity had not substantially commenced within the period of seven years, being the relevant period, and that no notice was ever given by the Agency.

22. When one considers the totality of what was before the court below, it seems to me to be beyond argument that s. 92 does not assist the appellant. No evidence was presented by or on behalf of the applicant to even suggest that the activity had not been substantially commenced within the relevant period. Insofar as there was any evidence on this issue, it went the other way. A letter was sent by Ms. Aoife Reynolds, Environmental Adviser to Shell E&P (Ireland) Ltd. to Dr. Michael Henry of the Office of Environmental Enforcement dated 26th September 2014. That letter was as follows:

> "Re: Compliance with Condition 11.1
>
> Dear Dr. Henry,
>
> In accordance with Condition 11.1 of Licence Reg. No. PO738-01 Industrial Emissions Licence, granted under Part IV of the Environmental Protection Agency Act 1993, Sepil wish to advise you that it intends to commence operations on 1st November 2014 of the Scheduled Activities at the Bellanaboy Bridge gas terminal, Bellanaboy Bridge, Bellagelly South, County Mayo.
>
> Should you have any query with the attached, please contact Aoife Reynolds."

Condition 11.1 had required the licensee to notify the Agency in writing one month in advance of the intended date of commencement of the Scheduled Activity(ies) and in advance of any planned maintenance event of the Corrib import pipeline using pressure inspection gauges/spheres.

23. A second letter was written by Aoife Reynolds dated 11th November to Dr. Henry, which stated:

> "Sepil wish to confirm that it is operating under its IE Licence PO738-01 at the Bellanaboy Bridge gas terminal, Bellanaboy Bridge, Bellagelly South, County Mayo."

Again, this confirms that the activity in question was well and truly underway such that it could be said to have commenced substantially. For all these reasons, I am quite satisfied that the complaint raised by Ms. Harrington in this regard must fail.

24. All this leads to the inescapable conclusion that this ground of appeal, to the extent it is capable of being advanced at all, must fail. I am of the view that none of the grounds advanced by the appellant have convinced me that there was any deficiency in the approach taken by the High Court Judge which would warrant the interference by this Court.

25. Accordingly, for the reasons outlined above, I would dismiss the appeal. As the events of the COVID-19 pandemic required this judgment to be delivered electronically, the views of my colleagues are set out below.

Ní Raifeartaigh J.

1. I have had the opportunity to read the judgment delivered by the President and I agree with the conclusions reached therein.

Haughton J.

1. Having read the within judgment, I also agree with the approach adopted by the President.