APPROVED **[2021] IEHC 345**

THE HIGH COURT
JUDICIAL REVIEW

2021 No. 135 JR

BETWEEN

PELAGIC WEIGHING SERVICES LIMITED
KILLYBEGS FISHERMEN'S ORGANISATION LIMITED

APPLICANTS

AND

SEA-FISHERIES PROTECTION AUTHORITY

RESPONDENT

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

INTRODUCTION

1. These judicial review proceedings concern the statutory process for the approval of a pier-side weighing system at Killybegs Port. The pier-side weighing system is intended to allow fish catches to be weighed on landing to ensure compliance with the relevant European and domestic legislation on fisheries control.

2. The Sea-Fisheries Protection Authority ("***the Authority***") has, to date, failed to approve the use of the pier-side weighing system. There is a dispute between the parties as to whether a decision on approval has merely been deferred (as the Authority would have it) or whether a decision to refuse was made in December 2020 (as the applicants for

judicial review would have it). This dispute is, however, subsidiary to the principal issue in the proceedings which concerns the division of competence between the Sea-Fisheries Protection Authority, as the designated national authority for fisheries control, and the European Commission. The dispute between the parties centres on the question of whether the Sea-Fisheries Protection Authority has improperly abdicated its statutory responsibilities to the European Commission.

LEGISLATIVE REGIME

3. The resolution of these proceedings requires consideration of the following three legislative measures which put in place a control system for ensuring compliance with the European Common Fisheries Policy.

(i) Council Regulation (EC) No. 1224/2009

4. The first legislative measure is Council Regulation (EC) No. 1224/2009. This is known generally as "***the Control Regulation***". One of the objectives of the Control Regulation is to give effect to the policy of allocating fishing quotas. In order to achieve adherence to these quotas, the Member States are obliged to ensure that fisheries products are weighed.

5. The provisions of the Control Regulation of most immediate relevance to these judicial review proceedings are those at Article 60 and Article 61. Critically, these provisions draw a distinction between (i) the weighing of fisheries products on initial landing, i.e. prior to their being held in storage, transported or sold; and (ii) the weighing of fisheries products *after* transport from the place of landing. The default position, provided for under Article 60(2), is that weighing shall be carried out on landing. (This is subject to a derogation whereby Member States may permit fisheries products to be

weighed *on board the fishing vessel* subject to a sampling plan. This derogation is not relevant to the issues in these proceedings).

6. Article 60(1) imposes an obligation upon the individual Member States to ensure that fisheries products are weighed on systems approved by the national competent authorities. This can be done by weighing all fisheries products on landing. Alternatively, it is permissible to weigh a *sample only* of fisheries products, provided that this is done pursuant to a sampling plan approved by the European Commission.

7. It is apparent from the wording of Article 60(1) that it is a matter for the national competent authorities to approve the weighing systems. The European Commission's role under the sub-article is confined to the separate matter of approving the methodology of a sampling plan.

8. Article 61 makes provision for the possibility of a derogation from the default position that fisheries products are to be weighed on landing. Critically, this derogation is subject to approval by the European Commission. More specifically, the relevant Member State must have adopted a "control plan" which has been *approved by* the European Commission. See Article 61(1) of the Control Regulation as follows.

> "1. By way of derogation from Article 60(2), Member States may permit fisheries products to be weighed after transport from the place of landing provided that they are transported to a destination on the territory of the Member State concerned and that this Member State has adopted a control plan approved by the Commission and based on the risk-based methodology adopted by the Commission in accordance with the procedure referred to in Article 119."

9. The European Commission had approved a control plan for Ireland for a number of years. The position changed, however, in April 2021 when the European Commission revoked the control plan. The legal consequence of this is that weighing must now be carried out on landing. The previous practice whereby certain fisheries products were transported directly to a factory and weighed there, for the first time, has had to cease.

10. The European Commission has general powers under Articles 100 and 101 of the Control Regulation to carry out audits of the control systems of the Member States, and has the power to carry out verification, autonomous inspection and audit reports.

11. The final provision of the Control Regulation of relevance to these proceedings is Article 5. Article 5(1) provides as follows.

> "1. Member States shall control the activities carried out by any natural or legal person within the scope of the common fisheries policy on their territory and within waters under their sovereignty or jurisdiction, in particular fishing activities, transhipments, transfer of fish to cages or aquaculture installations including fattening installations, landing, import, transport, processing, marketing and storage of fisheries and aquaculture products."

12. As appears, it is the Member State who is to control the activities carried out by any natural or legal person within the scope of the common fisheries policy on their territory and within waters under their sovereignty or jurisdiction.

13. The Sea-Fisheries Protection Authority attaches particular significance to Article 5(3) of the Control Regulation as follows.

> "3. Member States shall adopt appropriate measures, allocate adequate financial, human and technical resources and set up all administrative and technical structures necessary for ensuring control, inspection and enforcement of activities carried out within the scope of the common fisheries policy. They shall make available to their competent authorities and officials all adequate means to enable them to carry out their tasks."

14. As discussed presently, the argument here appears to be that the European Commission has a role in determining whether a proposed course of action by a national competent authority represents an "appropriate measure". This is said to follow from what the Authority describes as the European Commission's role as "Guardian of the Treaties".

15. Under Article 5(5) of the Control Regulation, a Member State is required to designate a "single authority" as follows.

> "5. In each Member State, a single authority shall coordinate the control activities of all national control authorities. It shall also be responsible for coordinating the collection, treatment and certification of information on fishing activities and for reporting to, cooperating with and ensuring the transmission of information to the Commission, the Community Fisheries Control Agency established in accordance with Regulation (EC) No 768/2005, other Member States and, where appropriate, third countries."
>
> *Footnote omitted.

16. The Sea-Fisheries Protection Authority is the "single authority" for the purposes of Article 5(5) of the Control Regulation. It also appears to be one of two competent authorities for the purpose of approving weighing systems. As discussed presently, the structure of the domestic implementing regulations is somewhat unclear in this regard.

(ii). Commission's Implementing Regulation

17. The Commission's Implementing Regulation (EU) No 404/2011 is a delegated regulation, i.e. a form of secondary legislation. The Control Regulation has delegated powers to the European Commission to make regulations which lay down detailed rules for the implementation of the principles established in the parent legislation.

18. It is clear from the terms of the Commission's Implementing Regulation that there is no prohibition on weighing equipment being held in private ownership. This is evident from the provisions of Article 83 and Article 84 which refer to both "publicly operated weighing facilities" and "privately operated weighing facilities". It is accepted on behalf of the Sea-Fisheries Protection Authority, for the purpose of these proceedings, that a weighing facility need not be in public ownership.

19. Article 72 of the Commission's Implementing Regulation provides that all weighing systems shall be calibrated and sealed in accordance with national systems by competent authorities of the Member State.

(iii). Domestic Regulations 2016

20. The third legal instrument relevant to these proceedings is the Sea-Fisheries (Community Control System) Regulations 2016 (S.I. No. 54 of 2016). These will be referred to in this judgment as "***the Domestic Regulations 2016***". The Domestic Regulations 2016 designate the national authorities which are to fulfil the functions of "competent authority" and "single authority" for the purposes of the Control Regulation.

21. The approach taken by the Domestic Regulations 2016 to the allocation of responsibility for the weighing of fisheries products is somewhat anomalous. The Sea-Fisheries Protection Authority is designated as the "single authority" for the purposes of Article 5(5) of the Control Regulation. The Authority is also designated as "competent authority" for certain functions. This designation does not, however, expressly extend to the function of approving weighing systems for the purposes of Article 60(1) of the Control Regulation. Rather, it is the Legal Metrology Service (otherwise the National Standards Authority of Ireland) which is designated as competent authority for this purpose. However, at Article 12 of the Domestic Regulations 2016, there is a requirement that weighing systems be approved by both the Legal Metrology Service and the Sea-Fisheries Protection Authority.

> "12. (1) Subject to paragraph (4), an operator shall not use any equipment or system for weighing a fishery product unless it is approved by the Legal Metrology Service and the SFPA and complies with Article 72 of the Commission Regulation."

22. It is implicit from this that the Sea-Fisheries Protection Authority is one of two competent authorities with a role in the approval of weighing systems. It is not clear from the Domestic Regulations 2016 as to what criteria the Sea-Fisheries Protection Authority is to apply in this regard, and as to how precisely its role differs from that of the National Standards Authority of Ireland.

FACTUAL BACKGROUND

23. The legal dispute between the parties centres on the correct interpretation and interaction of the Control Regulation, the Commission's Implementing Regulation and the Domestic Regulations 2016. Given that this is quintessentially a matter of law, it is only necessary to provide a brief outline of the factual background leading up to the present dispute.

24. The Sea-Fisheries Protection Authority made a decision in December 2019 to introduce additional specific measures of control for landings of pelagic species prior to their transport from their initial place of landing. It seems that these measures were introduced in accordance with the recommendations of an audit conducted by the European Commission. The new controls required that an increased percentage of catches of pelagic species were to be weighed upon landing. This would involve the use of an existing weighbridge at Killybegs Port.

25. The weighbridge is not specifically designed for weighing fish. It appears from the affidavit evidence filed that certain of the fishermen in Killybegs regarded themselves as presented with an unattractive choice between (i) protecting the quality and value of the fish by weighing the same in its protective envelope of refrigerated sea water but thereby recording the water as fish, or, alternatively, (ii) dewatering the catch prior to weighing, with a risk of damaging the quality and value of the fish.

26. The local fishermen decided that it would be preferable to put in place a dedicated fish weighing system so as to accurately measure weight on the pier, while at the same time preserving the quality of the fisheries product. More specifically, it was proposed to put in place a conveyor belt weighing system known colloquially as a "flowscales".

27. The fishing industry put together a working group on this issue. The working group was attended, for a time, by representatives of the Sea-Fisheries Protection Authority. The members of the Authority ultimately withdrew from the working group because of a

concern in respect of *other* legal proceedings taken against the Authority. The concern seems to have been that it would be inconsistent for members of the Sea-Fisheries Protection Authority to be dealing directly with individuals who were involved in litigation against the Authority.

28. It appears from the minutes of the earlier meetings of the working group that there had been some discussion as to the potential ownership of the weighing system. More specifically, there had been some suggestion that it might be taken into the ownership of the Sea-Fisheries Protection Authority. At most, however, this was an agreement in principle only. No formal agreement was ever put in place.

29. (The stated position of the Sea-Fisheries Protection Authority in these proceedings is that it will have responsibility for neither the operation nor ownership of the weighing system. See, in particular, the email of 4 December 2020 from Mr. Kinneen wherein it is stated that this position is adopted for both practical and principled reasons).

30. At all events, a "flowscales" weighing system was commissioned and has since been purchased in the ownership of the Pelagic Weighing Services Ltd, the first named applicant in these judicial review proceedings. The weighing system has been approved by the National Safety Authority of Ireland. (It will be recalled that the NSAI is the Legal Metrology Service and is a competent authority under the Domestic Regulations 2016).

31. The European Commission appears to have taken the view towards the end of 2020 that it would be inappropriate for the weighing system to be in private ownership. The concerns of the European Commission have been set out in detail in a letter sent on 11 November 2020 to the Chair of the Sea-Fisheries Protection Authority. The relevant part of the letter reads as follows.

> "I would like to draw your attention to the system that the Irish pelagic fisheries industry wish to use for the weighing of pelagic catches at landing. This proposed system appears to resolve the issue of separating water from the catch to the industry's satisfaction.

> However, the use of an industry owned, operated and maintained approved weighing system would not be appropriate for the control weighing of such catches. Any such weighing system would be as susceptible to manipulation at the pier as such systems apparently are at factory premises. Such a system would not be an appropriate measure for the Irish authority to ensure control of pelagic landings and to verify the actual quantities landed.
>
> Regarding this development, I would like to underline once more that any renewed control scheme must in our view incorporate the use of publicly owned and operated weighing systems or systems purchased, owned and used exclusively by the SFPA. It is our belief that this is essential considering the issues found concerning the manipulation of weighing and circumvention of controls when relying on private weighing systems, and the difficulties Ireland has had with sanctioning inaccurate weighing. I am sure the Irish authority will acknowledge these risks and take them into account when adapting and refining future landing inspection procedures."

32. It should be explained that this letter was not shared, in full, with the applicants for judicial review at the time. Instead, a summary of the gist of the letter was provided by way of an email dated 16 November 2020 (p.128 of pleadings). The Authority then explains that the correspondence has placed it in a "very difficult position", as follows.

> "Our receipt of this correspondence from the EU Commission places the SFPA in a very difficult position as to how we can now agree to your request to assess the suitability of the pierside weighing unit in so much we are subject to audit by the Commission on our systems of control. In circumstances where the Commission has expressed such a clear view against an Industry owned and operated system we feel we are unable to consider the use of the pierside weighing system until this matter can be clarified.
>
> I would appreciate if you would consider these developments and revert back to us on your thinking as to how these matters might be resolved, as always we are available to meet and consider what might be possible to make progress with this difficult problem […]".

33. There is a dispute between the parties as to what precisely occurred next. The position of the applicants for judicial review is that the Sea-Fisheries Protection Authority made a decision *to refuse* approval. This purported decision is said to be evidenced by emails dated 4 December 2020 (p.131 of pleadings) and 14 December 2020 (p.370 of pleadings). The operative part of the latter email reads as follows.

> "I hope you have been made aware of recent correspondence from the European Commission regarding privately owned and operated weighing equipment. Unfortunately the SFPA is of the view that precludes the use of the new pier side weighing equipment to conduct an official weighing."

34. The language used—in particular, the phrase "precludes the use of"—is said to indicate a decision to refuse approval.

35. By contrast, the position of the Sea-Fisheries Protection Authority is that it has simply *deferred* the making of a decision on approval. In the written legal submissions subsequently filed in these proceedings, it is submitted on behalf of the Authority that this deferral was a proportionate reaction to the concerns expressed by the European Commission. It is accepted that such a deferral cannot be indefinite, and that ultimately the Sea-Fisheries Protection Authority will have to form its own view as to the approval.

36. These judicial review proceedings were instituted by way of an *ex parte* application for leave on 1 March 2021. The substantive application for judicial review came on for hearing (remotely) before me on 19 May 2021 and judgment was reserved to today's date.

DISCUSSION AND DECISION

37. The principal dispute between the parties centres on whether it is lawful for the Sea-Fisheries Protection Authority to withhold approval for the pier-side weighing system pending further engagement with the European Commission. I have deliberately used the neutral term "withhold" to reflect the fact that there is a dispute between the parties as to whether approval has been refused or merely deferred.

38. Before turning to consider this issue, it is important to emphasise that the parties are in agreement that there is nothing under either the Control Regulation or the Commission's Implementing Regulation which precludes weighing facilities being held in private

ownership. Both parties accept that this follows from the wording of Article 83 and Article 84 of the Commission's Implementing Regulation, which provisions refer to public and private ownership, respectively.

39. The consensus on this issue is significant in that the Sea-Fisheries Protection Authority does not seek to stand over the legal concern raised by the European Commission, namely that the pier-side weighing system should not be in private ownership. Indeed, it is evident from the correspondence between the Sea-Fisheries Protection Authority and the European Commission that the former has sought on a number of occasions now to obtain clarification from the European Commission as to whether there is any possible legal basis for its stated concern. See, in particular, the letter dated 4 May 2021 from the Authority to the European Commission (pp. 409 to 411 of pleadings). This letter seeks confirmation as to whether the European Commission remains of the view that controlled weighing should not take place using privately owned or operated equipment. The relevant part of the letter reads as follows.

> "We are aware that the Commission's view on the ownership of weighing systems for control purposes has arisen, at least in part, following known examples of the apparent tampering of weighing equipment used in factories. Now, following the Commission Decision to remove Ireland's Control Plan, pelagic fish are no longer weighed in factories in Ireland. Does the Commission remain of the view that controlled weighing should not take place using privately owned or operated equipment? In considering this matter, please note that any weighing equipment used to weigh pelagic fish will be subject to assessment and approval by both the NSAI (Ireland's metrology service) and the SFPA.
>
> The SFPA is defending the proceedings and delivered opposition papers on 26th March 2021. The Irish High Court has also fixed a hearing date for the proceedings of 19th May 2021 and in the circumstances the SFPA requests that the European Commission would now urgently clarify to it the legal basis upon which it objects to a privately owned and operated weighing system being used for control purposes under the CR in Killybegs and with a view to this information being available to the Court, should it require it, at the hearing commencing on 19th May 2021. SFPA is advised by Counsel that it would be of assistance if such clarification were supported by

> the advices of the Commission Legal Services and SFPA therefore respectfully requests that the EU Commission seek such advices on the same urgent basis and share them with the SFPA once they come to hand."

40. No response appears to have been made to this letter prior to the hearing of these proceedings on 19 May 2021.

41. The dispute between the parties thus resolves itself to a narrow question of the division of legal responsibility as between the Sea-Fisheries Protection Authority, *qua* the national "single authority", and the European Commission. As discussed at paragraphs 4 to 9 above, the Control Regulation draws a critical distinction between the weighing of fisheries products at the place of landing and weighing elsewhere. This is reflected in Article 60 and Article 61 of the Control Regulation. Insofar as weighing at the place of landing is concerned, responsibility has been entrusted to the individual Member States. Each Member State is to ensure that fisheries products are weighed on systems approved by the national competent authorities. This has been given effect to by the Domestic Regulations 2016, wherein the Sea-Fisheries Protection Authority and the National Standards Authority of Ireland (Legal Metrology Service) have been designated jointly as competent authorities. The Sea-Fisheries Protection Authority has overall responsibility for fisheries control *qua* the designated national "single authority".

42. The combined effect of Article 60(1) of the Control Regulation and Article 72 of the Commission's Implementing Regulation is that it is a matter for the national competent authorities to approve weighing facilities which are to be used for weighing fish catches on initial landing. The European Commission has no specific role in this regard. Certainly, it cannot unilaterally impose a new legal requirement, namely in respect of public ownership, which is not provided for under the Control Regulation or the Commission's Implementing Regulation.

43. This can be contrasted with the position in respect of the weighing of fisheries products at places *other than* the place of landing, which is only permissible by way of derogation granted by the European Commission. (See the discussion at paragraphs 4 to 9 above).

44. The Authority has been unable to point to any proper legal basis for its continued failure to reach a decision—one way or another—on the approval of the pier-side weighing system at Killybegs Port. Rather, it is accepted on behalf of the Sea-Fisheries Protection Authority that the European Commission does not have any legal competence in respect of the approval of the weighing system. It is also accepted that the Authority is not "bound by" the view of the Commission. (See §4.7 of the written submissions). Notwithstanding these concessions, the position of the Authority is that it was nevertheless "reasonable" for it to defer consideration of the application for approval pending its engagement with the European Commission. This, seemingly, remains the position of the Authority some six months after the European Commission first raised the ownership issue in November 2020.

45. If and insofar as the Authority seeks to rely upon the case law in respect of "irrationality" or "unreasonableness", including, in particular, *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39, such reliance is misplaced. The gravamen of the complaint made against the Authority is that it has abdicated its statutory duties to the European Commission, and that it has taken into account an irrelevant consideration, namely a supposed requirement for the public ownership of weighing facilities. These are quintessentially jurisdictional grounds of challenge, and not ones which attract the attenuated form of review allowed for in the exercise of a decision-maker's statutory discretion. Put otherwise, this is not a merits-based challenge to the exercise of a statutory discretion. The essence of the complaint is that the Authority has yet to carry

out a lawful assessment, precisely because it misdirected itself in law, by deferring to a third party and taking into account irrelevant considerations.

46. The approach of the Sea-Fisheries Protection Authority is unlawful. It is not permissible for the national "single authority" and a "competent authority" to abdicate its statutory decision-making functions in this way. The Authority is obliged, both as a matter of European and domestic law, to regulate weighing systems itself. The Authority cannot rely on the more general provisions of Article 5(3) of the Control Regulation to yield its decision-making function to the European Commission. The fact that the European Commission has an audit function does not confer upon it the power to introduce legal restrictions in respect of the ownership of weighing facilities. Nor is such a power to be inferred from the fact that the European Commission has an entitlement *to institute* infringement proceedings against a Member State before the Court of Justice under Article 258 of the Treaty on the Functioning of the European Union. The European Commission is merely a litigant in such proceedings, and does not have any adjudicative function.

47. In summary, the Sea-Fisheries Protection Authority has acted *ultra vires* by continuing to withhold approval for the pier-side weighing facility at Killybegs Port by reference to the ownership concerns raised by the European Commission (which concerns are not, in fact, shared by the Sea-Fisheries Protection Authority in any event).

48. The applicants are, therefore, entitled to a form of declaration broadly in accordance with that sought at paragraph D. (7) of the Statement of Grounds, as follows.

> "A Declaration by way of an application for Judicial Review that the Respondent acted in breach of national and European Union law and otherwise *ultra vires* its competences in refusing to consider the first Applicant's application for approval / refusing the same on the basis that it was prevented from doing so on being informed by the European Commission that such a flowscales could not be approved unless it was in public ownership and control."

49. It is not necessary for the purpose of resolving these proceedings to reach a definitive view as to whether the Sea-Fisheries Protection Authority had made a final decision to refuse approval or were simply deferring a decision on approval. In practice, the legal effect is the same, approval has been *withheld* as a result of the Sea-Fisheries Protection Authority taking into account an irrelevant consideration and/or abdicating its statutory function to a third party, namely the European Commission.

50. The applicants have sought certain mandatory orders directing the Sea-Fisheries Protection Authority to make a decision. I will discuss with counsel whether such an order is necessary. It is to be presumed that a public authority, such as the Sea-Fisheries Protection Authority, will act in accordance with the findings of the court and that a formal order of mandamus may not therefore be required.

51. Finally, for the avoidance of any possible doubt, it should be emphasised that this judgment is confined to the issues discussed above. This is being emphasised because it appears from the final affidavit filed on behalf of the Sea-Fisheries Protection Authority that the Authority now envisages that—separate entirely from the ownership issue—certain technical criteria remain to be complied with. See paragraph 15 of Mr. Kinneen's affidavit of 4 May 2021 as follows.

> "[…] The Respondent therefore wishes to take expert advice on the appropriateness of requiring safeguards which include, but are not limited to:
>
> (a) the inclusion of a working zero setting function on the flow scales;
>
> (b) the inclusion of a mechanism for monitoring and protecting the tension of the production belt feeding the fish through the flow scales;
>
> (c) ensuring certain specifications of the flow scales' functionality are linked to a belt stop function rather than just to an alarm system;

(d) ensuring the operation of the flow scales be monitored externally using a red/ green light system;

(e) ensuring the flow scales have capacity to capture and record statistical data on certain key functional features such as the belt speed;

(f) confirming that the flow scales cannot be controlled remotely;

(g) assessing the environmental effects of locating the flow scales on a 'mobile platform' and, as necessary, testing the mitigants (*sic*) required to address any impacts; and

(h) the inclusion of CCTV camera systems to monitor any possible interference with the flow scales or other relevant equipment."

52. The question as to whether these criteria are properly within its competence under the Domestic Regulations 2016 is not an issue which has been fully argued before me. This is because the suggestion that further criteria would have to be met was only raised, for the first time, in the final replying affidavit. It does not, by definition, form part of the pleaded case. It is not appropriate, therefore, for this court to make a definitive ruling in relation to these matters at this stage. The parties will, however, have liberty to apply lest this laundry list of criteria creates further legal issues between them.

SUFFICIENT INTEREST / LOCUS STANDI

53. The Sea-Fisheries Protection Authority has raised a procedural objection that the applicants do not have a "sufficient interest" to pursue the application for judicial review, as required under Order 84, rule 20(5) of the Rules of the Superior Courts.

54. Insofar as the second named applicant, Killybegs Fisherman's Organisation Ltd, is concerned, it is said that as a representative body it does not have a sufficient interest. Reference is made, in particular, to the judgments of the Supreme Court in *Friends of the Irish Environment v. Government of Ireland* [2020] IESC 49; [2020] 2 I.L.R.M. 233 and

Construction Industry Federation v. Dublin City Council [2005] IESC 16; [2005] 2 I.R. 496.

55. The Authority's objection in respect of the first named applicant, Pelagic Weighing Services Ltd, is more nuanced. It is accepted, in principle, that the company, as the owner of the pier-side weighing system, has a sufficient interest to pursue the proceedings. Objection is taken to the fact, however, that reference is made in the grounding affidavits to the property rights and interests of the shareholders of the company. It is said that it is inconsistent with the principle of the company having a separate legal personality that the company should seek to bolster its claim to standing by reference to the interests of its shareholders.

56. It is unnecessary to rule upon the *locus standi* issue in circumstances where it is now accepted that the first named applicant company, as the owner of the pier-side weighing system, has a sufficient interest to pursue the proceedings. The fact that one of the applicants has a sufficient interest is enough to allow the case to be heard and to be determined by the High Court. See, by analogy, the approach adopted by the Supreme Court in *Grace v. An Bord Pleanála* [2017] IESC 10 (at paragraphs 8.11 and 10.1). The Supreme Court, having held that one of the two applicants in that case had standing to pursue the proceedings, decided it was not necessary, for the proper resolution of the appeal, to reach a final determination on whether the second applicant also had standing.

57. Returning to the present case, the first named applicant's entitlement to pursue these proceedings is not affected by the fact that it has made passing reference to the interests of its shareholders. It is enough that the company itself owns the weighing system the subject-matter of the judicial review proceedings. The reference to the interests of its shareholders is redundant.

58. Insofar as the second named applicant is concerned, the legal position is not necessarily as clear-cut as the Sea-Fisheries Protection Authority would have it. The core complaint advanced in these proceedings involves an allegation that the Authority acted *ultra vires*. The legal challenge is not predicated on an assertion of personal rights; rather, the primary interest asserted is an interest in upholding the rule of law by ensuring that the Authority complies with its statutory obligations. This distinguishes the present proceedings from *Friends of the Irish Environment v. Government of Ireland*. There, the Supreme Court held that the applicant company as a non-natural person did not have standing to pursue, in a representative capacity, an alleged breach of *personal rights* under either the Constitution of Ireland or the European Convention on Human Rights. Tellingly, the company did succeed on its separate challenge based on classic *ultra vires* grounds: the impugned plan was held to have been made in breach of the requirements of the Climate Action and Low Carbon Development Act 2015.

59. The judgment in *Construction Industry Federation v. Dublin City Council* is distinguishable on the basis that the proceedings there were hypothetical. The representative company had sought to challenge the validity of a statutory development contribution scheme *in limine*, without reference to any specific set of facts. The challenge was not related to any particular planning application or planning permission upon which development contributions had been levied. See paragraph 13 of the reported judgment as follows.

> "In the present case, the applicant claims to have a sufficient interest on the basis that the proposed scheme affects all or almost all of its members in the functional area of the respondent and, therefore, the applicant has a common interest with its members. However, it appears to me that to allow the applicant to argue this point without relating it to any particular application and without showing any damage to the applicant itself, means that the court is being asked to deal with a hypothetical situation, which is always undesirable. This is a challenge which could be brought by any of the members of the applicant who are affected and would then be related to the particular

> circumstances of that member. The members themselves are, in many cases, very large and financially substantial companies, which are unlikely to be deterred by the financial consequences of mounting a challenge such as this. Unlike many of the cases in which parties with no personal or direct interest have been granted *locus standi*, there is no evidence before the court that, in the absence of the purported challenge by the applicant, there would have been no other challenger. Indeed, the evidence appears to be to the contrary."

60. The judgment of the Supreme Court appears to have been informed, in part at least, by a concern that an abstract legal challenge, unmoored from a specific planning permission, would lack the force of reality that would be brought to bear were proceedings confined to an individual developer who had been affected by levies under the development contribution scheme in the context of a specific development project. This would then allow the validity of the scheme to be examined by reference to a concrete set of facts.

61. No such concerns arise in the present case in that the complaint in the proceedings is quintessentially a jurisdictional one, relating to the statutory obligations of the Authority. Reference to the specific circumstances of any one of the individual companies represented by the second named applicant would not add to the legal analysis.

62. It is also relevant to the question of standing that the second named applicant has the status of a "producer organisation" under Regulation (EU) 1379/2013. It would be anomalous were this status not to be recognised as enough to found *locus standi* under domestic law.

63. In summary, there are strong grounds for saying that the second named applicant also has a sufficient interest within the meaning of Order 84, rule 20(5). It is not, however, necessary for the resolution of these proceedings to determine this issue conclusively in circumstances where, as explained above, the first named applicant undoubtedly has a sufficient interest. This is enough to allow the proceedings to be heard and determined.

64. A related issue arises in respect of legal costs. Given that the arguments advanced on the underlying merits of the case were the same for both applicants, the involvement of a

second applicant should not be allowed to increase the potential costs' exposure of the Sea-Fisheries Protection Authority. It was not, strictly speaking, necessary for a proper articulation of the case that there be two applicants. In the event that a costs order were to be made against the Authority—and this is to be the subject of further submissions—my provisional view is that it should be liable for one set of costs only. It would then be a matter between the two applicants *inter se* to apportion the recoverable costs between themselves. This should not be a difficulty given that, very sensibly, the two applicant companies have retained the same legal representation.

CONCLUSION AND FORM OF ORDER

65. The Sea-Fisheries Protection Authority has acted *ultra vires* by continuing to withhold approval for the pier-side weighing facility at Killybegs Port by reference to the "ownership" concerns raised by the European Commission. There is no legal basis for these concerns and the Sea-Fisheries Protection Authority has not sought to argue otherwise.

66. The application for judicial review is, therefore, allowed. It seems that the appropriate relief is a declaration in terms broadly in line with the declaration sought at paragraph D. (7) of the Statement of Grounds as follows.

> "A Declaration by way of an application for Judicial Review that the Respondent acted in breach of national and European Union law and otherwise *ultra vires* its competences in refusing to consider the first Applicant's application for approval / refusing the same on the basis that it was prevented from doing so on being informed by the European Commission that such a flowscales could not be approved unless it was in public ownership and control."

67. I will discuss with counsel whether any modification to this wording is required.

68. For the reasons outlined at paragraph 50 above, an order for mandamus may not be necessary. I will, however, hear the parties further as to the precise form of order.

69. Insofar as the allocation of costs is concerned, the attention of the parties is drawn to the notice published on 24 March 2020 in respect of the delivery of judgments electronically, as follows.

> "The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of delivery subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the Court is required to make will also be published on the website and will include a synopsis of the relevant submissions made, where appropriate."

70. The default position under Part 11 of the Legal Services Regulation Act 2015 is that a party who has been "entirely successful" in proceedings is *prima facie* entitled to costs against the unsuccessful party. The court retains a discretion, however, to make a different form of costs order.

71. My provisional view is that the applicants would appear *prima facie* to be entitled to an order for costs in their favour in that they have been successful in obtaining the substance of the relief sought in the judicial review proceedings. I am also of the provisional view that the recoverable costs should be confined to one set of costs. The arguments of the two applicants on the merits of the case were almost identical, and they, very sensibly, shared the same legal representation. It would seem unfair to burden the Authority with liability for two sets of costs in the circumstances.

72. These are, however, only my *provisional* views. I will, of course, hear the parties before making any order as to costs.

73. These proceedings are to be listed before me for argument on the form of order on 11 June 2021 at 10.15 am. The parties are not required to do so, but have liberty, if they wish, to file short written submissions in advance of that date on the question of the form of relief and as to the appropriate costs order.

Appearances

David Conlan Smyth, SC and Edmund Sweetman for the applicants instructed by MG Ryan & Co (Galway)
Thomas F. Creed, SC and Donnchadh McCarthy for the respondent instructed by McCann Fitzgerald

Approved Garrett Simons