

**APPROVED**



**THE HIGH COURT**

**[2024] IEHC 295**

**Record No. 2019/315JR**

**BETWEEN/**

**SANDRA DUNLEA**

**APPLICANT**

**-AND-**

**AN BORD PLEANÁLA, THE MINISTER FOR HOUSING, LOCAL GOVERNMENT  
AND HERITAGE, IRELAND AND THE ATTORNEY GENERAL**

**RESPONDENTS**

**-AND-**

**DERMOT GRIFFIN, BREDA GRIFFIN, MICHEAL GRIFFIN**

**AND KERRY COUNTY COUNCIL**

**NOTICE PARTIES**

**Ex tempore JUDGMENT of Mr. Justice Conleth Bradley delivered on the 14<sup>th</sup> day of May 2024**

## INTRODUCTION

### *Preliminary*

1. This is an application by the Second, Third and Fourth Named Respondents (“the State Respondents”) seeking to dismiss the reliefs claimed by the Applicant as against the State Respondents for want of prosecution because of inordinate and inexcusable delay pursuant to my inherent jurisdiction and/or for want of prosecution within the time periods referred to in Order 122, rule 11 of the Rules of the Superior Courts, 1986, as amended (“RSC 1986”).
2. A minor procedural application is also applied for, due to the change in the name of the Second Named Respondent from ‘*The Minister for the Environment, Heritage and Local Government*’ to ‘*The Minister for Housing, Local Government and Heritage*’ since the date of the order of this court (Noonan J.) granting leave to apply for judicial review on 27<sup>th</sup> May 2019. I shall accede to the change of name application and this is also reflected in the description of the Second Named Respondent in the title of this *ex tempore* judgment.
3. The proceedings relate to the Applicant’s challenge to a decision of An Bord Pleanála (“the Board”) dated 25<sup>th</sup> April 2019 allowing an appeal against the initial decision dated 14<sup>th</sup> December 2018 of Kerry County Council to grant planning permission to the Applicant for the construction of a dwelling house, installation of wastewater treatment unit and soil polishing filter, new entrance and access road and associated site works at Barleymount West, Killarney, County Kerry. The Applicant’s central challenge is to the decision of the Board.

4. Insofar as the Applicant seeks reliefs as against the State Respondents, if the Applicant fails in her challenge to the decision of the Board, it is pleaded and alleged that (a) the Sustainable Rural Housing Guidelines 2005 and National Policy Objective 19 should be interpreted having regard to the property and family rights of the Applicant under the Constitution and (b) they represent an impermissible restriction on the property rights of the Applicant and her family, and are thereby unconstitutional and an interference in the Applicant's family life.
5. Anthony McBride SC (with Niall Handy SC) appeared for the State Respondents and, as explained later in this judgment, there was no appearance by or on behalf of the Applicant. As the motion was enjoined as between the State Respondents and the Applicant only, the Board and the Notice Parties did not participate in this application.

### ***Chronology***

6. The Applicant's Statement of Grounds and verifying Affidavit are dated 23<sup>rd</sup> May 2019. These are the central documents for an applicant in any judicial review application. At paragraph F of the Statement of Grounds, the Name and Registered Place of Business of the Solicitors for the Applicant is recorded as Terence F. Casey, 99 College Street, Killarney, County Kerry and at paragraph G of the Statement of Grounds, the Applicant's Address for Service within the Jurisdiction is recorded as '*Upon her Solicitors.*'
7. The order granting the Applicant liberty to apply for judicial review from Noonan J. is dated 27<sup>th</sup> May 2019. The Board's Statement of Opposition and verifying Affidavit

are dated 18<sup>th</sup> November 2019. The State's Statement of Opposition and verifying Affidavit of Colin Ryan are dated 9<sup>th</sup> February 2021.

### **SERVICE & NOTIFICATION OF THIS APPLICATION**

8. The Affidavit of Siobhán McNamee (State Solicitor in the Office of the Chief State Solicitor), sworn on 17<sup>th</sup> April 2024, confirms service of the State's dismissal application comprising the Notice of Motion dated 28<sup>th</sup> March 2024, which was returnable to 24<sup>th</sup> April 2024, and the grounding Affidavit of Siobhán McNamee dated 28<sup>th</sup> March 2024, together with exhibits A, B and C on Sandra Dunlea (the applicant in these proceedings) on 5<sup>th</sup> April 2024 confirms the posting of a true copy of these documents to Ms. Dunlea at Saint Andrews Street Post Office, Dublin 2 in a registered prepaid envelope addressed to Terence F. Casey & Company Solicitors, 99 College Street, Killarney. Ms. McNamee exhibits the Official Post Office Certificate of Posting, proof of delivery and confirms that this documentation has not been returned by the Postal Authorities marked undelivered. Ms. McNamee further states that on 11<sup>th</sup> April 2024, within three days after the service of the documents, she endorsed on the Notice of Motion the day, week and month of such service.
  
9. The further Affidavit of Ms. McNamee, State Solicitor sworn on 13<sup>th</sup> May 2024 states that she notified the Applicant's solicitors by letter dated 25<sup>th</sup> April 2024 of the hearing date on 13<sup>th</sup> May 2024 of the State's motion to dismiss the Applicant's claims as against the State Respondents. This letter was served by e-mail and DX on 25<sup>th</sup> April 2024 and was also sent by registered post on 26<sup>th</sup> April 2024 on the Applicant, Ms. Dunlea, by posting a true copy of the letter at Saint Andrews Street Post Office,

Dublin 2 in a registered prepaid envelope addressed to Terence F. Casey & Company Solicitors, 99 College Street, Killarney, County Kerry. Ms. McNamee exhibits the Official Post Office Certificate of posting of the registered envelope and confirms that the documents have not been returned by the Postal Authorities marked undelivered.

10. Ms. McNamee, State Solicitor, further states that she served a true copy of her letter dated 3<sup>rd</sup> May 2024 by e-mail and by DX on the Applicant's solicitors, notifying them again of the hearing date of the State Respondents' motion to dismiss on 13<sup>th</sup> May 2024, along with the submissions filed on behalf of the State Respondents and received a confirmed delivery receipt from *postmaster@tfcasey.ie* on 3<sup>rd</sup> May 2024 at 17:02. The letter of 3<sup>rd</sup> May 2024 and the State Respondents' submissions were also sent by registered post on 8<sup>th</sup> May 2024 on the Applicant's solicitors by posting true copies of these documents at Saint Andrews Street Post Office, Dublin 2 in a registered prepaid envelope addressed to Terence F. Casey & Company Solicitors, 99 College Street, Killarney, County Kerry. Ms. McNamee exhibits the Official Post Office Certificate of posting of the registered envelope and confirms that the documents have not been returned by the Postal Authorities marked undelivered.

11. Ms. McNamee states that she served a true copy of her letter dated 9<sup>th</sup> May 2024 by e-mail and by DX on the Applicant's solicitors, notifying them again of the hearing date of the State Respondents' motion to dismiss on 13<sup>th</sup> May 2024 and further informing them that the State Respondents' application to dismiss was called on before Ms. Justice Hyland in Court 6 (Four Courts) and that the application would be heard on Monday 13<sup>th</sup> May 2024. Ms. McNamee states that she received a confirmed delivery receipt from *postmaster@tfcasey.ie* on 9<sup>th</sup> May 2024 at 16:15. A copy of the letter of

9<sup>th</sup> May 2024 was served on the Applicant's Solicitors by registered post on 9<sup>th</sup> May 2024 by posting a true copy of this letter at Saint Andrews Street Post Office, Dublin 2 in a registered prepaid envelope addressed to Terence F. Casey & Company Solicitors, 99 College Street, Killarney, County Kerry. Ms. McNamee exhibits the Official Post Office Certificate of posting of the registered envelope and confirms that the documents have not been returned by the Postal Authorities marked undelivered.

12. I am satisfied that the Applicant and her solicitors have been served with and notified of the State Respondents' application to dismiss the Applicant's claim as against the State Respondents.

#### **ASSESSMENT & DECISION**

13. The legal principles which apply to the State Respondents' application which seeks to invoke the High Court's inherent jurisdiction to dismiss for want of prosecution because of reasons of inordinate and inexcusable delay are well-settled and remain those set out by the Supreme Court in *Primor plc v Stokes Kennedy Crowley* [1996] 2 I.R. 459 at pp. 475-476) and as applied, for example, in the judgments of the Court of Appeal in *Cave Projects Ltd v Kelly* [2022] IECA 245 and the High Court (Butler J.) in *Gibbons v N6 (Construction) Ltd* [2021] IEHC 138 (which was upheld by the Court of Appeal in [2022] IECA 112), and, more recently, by the High Court (Simons J.) in *Nowak v Intesa Sanpaolo Life DAC* [2024] IEHC 263.

14. The three sequential issues which I have to consider are: (1) whether there has been inordinate delay; (2) whether this delay is excusable; and (3) if there is found to be

inordinate delay which is inexcusable, whether an assessment of the balance of justice favours dismissing the case or allowing it to proceed.

15. In addition to the inherent jurisdiction of the High Court, the State Respondents also rely on O. 122, r. 11 RSC 1986 which provides that “[i]n any cause or matter in which there has been no proceeding for one year from the last proceeding had, the party who desires to proceed shall give a month’s notice to the other party of his intention to proceed. In any cause or matter in which there has been no proceeding for two years from the last proceeding had, the defendant may apply to the Court to dismiss the same for want of prosecution, and on the hearing of such application the Court may order the cause or matter to be dismissed accordingly or may make such order and on such terms as to the Court may seem just. A motion or summons on which no order has been made shall not, but notice of trial although countermanded shall, be deemed a proceeding within this rule.”

16. In *North Westmeath Turbine Action Group & Ors v An Bord Pleanála & Ors* [2022] IECA 126, the Court of Appeal (Noonan, Collins and Binchy JJ.) considered an application brought by the State Respondents in that case to dismiss/strike-out the proceedings against it pursuant to O. 19, rr. 27 and/or 28 RSC 1986 and/or the inherent jurisdiction of the court, stating that the proceedings disclosed no reasonable cause of action as against them and/or were frivolous and vexatious and/or were doomed to fail. The judgment of Collins J. at footnote 5 (paragraph 10) *inter alia* observed as follows:

*“No point appears to have been taken as to the form of the application brought by the State. Nevertheless, it is difficult to see how the jurisdiction to strike out a pleading given by Order 19, Rule*

*28 RSC could arise here given that the definition of “pleading” in Order 125, Rule 1 RSC does not include a statement of grounds or originating notice of motion. Indeed, that very point was made by the State by way of arguing that Order 28 RSC (amendment of pleadings) was of no relevance to the amendment application here. Similarly, Order 19, Rule 27 – which empowers the High Court to strike out or order the amendment of “any matter in any indorsement or pleading” would appear to have no application to the proceedings here. As for the Barry v Buckley jurisdiction, in Alen-Buckley v An Bord Pleanála [2017] IEHC 311 the High Court (Costello J) held that such jurisdiction was exercisable in respect of judicial review proceedings, rejecting the applicant’s argument that the appropriate procedure was to bring an application to set aside the leave, relying on the jurisdiction recognised in Adam v Minister for Justice, Equality and Law Reform [2001] 3 I.R. 53. No challenge was made to that holding in Alen-Buckley. In any event, there would appear to be no material difference between the Barry v Buckley threshold test and the threshold test articulated in Adam.”*

17. Similar issues were also addressed in the judgment of this court (Holland J.) in *Mount Salus Residents’ Owners Management Company Limited By Guarantee v An Bord Pleanála & Others* [2023] IEHC 691 at paragraphs 49 to 57 under the sub-heading “The “Pleading” point.”



18. Insofar as Mr. McBride SC (for the State Respondents) relies on O. 122, r. 11 RSC 1986, I would prefer to leave the issue as to whether this order and rule are applicable to a ‘*judicial review*’ application to a case where the matter was fully argued. I, will, therefore, proceed on the basis of the exercise of my inherent jurisdiction only (as distinct from an application to ‘*set aside*’ the grant of leave) as set out in the above quotation from Collins J. in *North Westmeath Turbine Action Group & Ors v An Bord Pleanála & Ors* [2022] IECA 126.
19. While the notion of promptitude (‘promptness’) is no longer an aspect of an application for judicial review as prescribed by the amended O. 84 RSC 1986, the procedure for judicial review is subject to focused time limits (from which extensions of time applications can be made) to ensure expediency in legal challenges to public law measures.
20. In these proceedings, the High Court (Noonan J.) granted leave to apply for judicial review on 27<sup>th</sup> May 2019. The Board’s opposition papers are dated 18<sup>th</sup> November 2019 and the State’s opposition papers and are dated 9<sup>th</sup> February 2021. Despite correspondence issued by the State Respondents to the Applicant’s Solicitors, including correspondence inviting the Applicant to discontinue her proceedings against the State Respondents, there has been no response by and/or on behalf of the Applicant. In more recent times, there has been no appearance by or on behalf of the Applicant upon the initial return of the State Respondents’ Notice of Motion to the High Court on 24<sup>th</sup> April 2024.

21. As I have found earlier in this judgment, the Applicant and her solicitors have been served with and notified of the State Respondents' application to dismiss the Applicant's claim as against the State Respondents.

22. It is a fundamental tenet of fair procedures that all sides to a dispute be heard. This case is most unusual because the repeated efforts by the State Respondents to engage with the Applicant and her solicitors for a period of three years have been met by complete silence. It is an unacceptable position to let proceedings, particularly those involving challenges to public law measures, lie dormant. In *Gibbons v N6 (Construction) Ltd* [2021] IEHC 138 (which was upheld by the Court of Appeal [2022] IECA 112), the High Court (Butler J.), after referring to the well-known passage from Hamilton C.J. in *Primor plc v Stokes Kennedy Crowley* [1996] 2 I.R. 459 at pp. 475-476, observed as follows at paragraph 11:

*“Further, as Hardiman J. has observed in Gilroy v Flynn [2005] 1 ILRM 290, these principles now have to be applied in light of the obligation on the State under Article 6 of the European Convention on Human Rights to ensure that civil rights and liabilities are determined within a reasonable time. This has led to a somewhat stricter approach being taken by courts to delay by the parties in more recent times, one element of which – the extent of which the defendant must establish prejudice – is relevant to the argument made by the first defendant. The general consensus appears to be that while the fundamental principles to be applied have not themselves changed since Primor, the weight to be attached to the various factors relevant to the balance of justice between the parties has been recalibrated to*

*take account of the court’s obligation to ensure that litigation is progressed to a conclusion with reasonable expedition. This obligation has been characterised (by Hogan J. in *Donnellan v Western Textiles Ltd* [2011] IEHC 11 and by Irvine J. in *Millerick v Minister for Finance* [2016] IECA 206) as a constitutional imperative, and, presumably, also a Convention imperative, to protect the public interest by ensuring the timely and effective administration of justice.”*

23. I am satisfied that the Applicant and her solicitors have been served with the State Respondents’ application to dismiss the Applicant’s reliefs as against the State Respondents and have been notified that the matter was to be heard on Monday 13<sup>th</sup> May 2024. There was – and has been - however, no appearance by or on behalf of the Applicant on any of the following dates: (i) at the first return date of the application on 24<sup>th</sup> April 2024 before Barr J.; (ii) at the call-over of this application before Hyland J. on Thursday 9<sup>th</sup> May 2024 when it was called-on to be heard on Monday, 13<sup>th</sup> May 2024; or (iii) at the hearing of the application before me on 13<sup>th</sup> May 2024.

24. Accordingly, I am of the view that the failure of the Applicant to take any step in these proceedings for a period in excess of three years represents a period of inordinate delay.

25. Further, adopting (and adapting) the following observations of this court (Mulcahy J.) in *Coughlan v Stokes* [2024] IEHC 133 at paragraph 26 to the position of the Applicant in his case, “[i]n circumstances where the plaintiffs have provided no

*explanation at all for the lion's share of the delay in bringing these proceedings to trial, the delay must prima facie be regarded as inexcusable. When considered in detail, it is apparent that there have been significant periods of unexplained inactivity by the plaintiffs, which means that the delay in prosecuting the proceedings is inexcusable within the meaning of the Primor jurisprudence.*" Similarly, in this case, the lack of any response or explanation by the Applicant is inexcusable in a *Primor* sense.

26. In assessing the balance of justice, as referred to earlier in this judgment, it is unacceptable for the case claimed as against the State Respondents by the Applicant to remain in abeyance, particularly after this application has passed the relatively low threshold of 'arguability' in the order of Noonan J. granting leave/liberty to apply for judicial review on 27<sup>th</sup> May 2019. In addition, the public law measures which involve the Second Named Respondent Minister - here they are National Policy Objective 19 of the National Planning Framework and the Sustainable Rural Housing Guidelines for Planning Authorities (April 2005) – as with other public law measures, enjoy the presumption of validity and should not have a question mark hanging over them because of the failure to prosecute this application for judicial review. I, of course, make no comment upon these particular measures or as to their status vis-à-vis other proceedings in the Superior Courts or before the CJEU, but would observe that insofar as the policies subtending these measures are sought to be impugned *by this application for judicial review*, the failure of the Applicant to prosecute these proceedings has a general prejudicial effect on the Second Named Respondent in the application of those policies and measures. The balance of justice, therefore, favours the dismissal of the Applicant's case as against the State Respondents.

27. In the exercise of my inherent jurisdiction, therefore, I shall dismiss the Applicant's claims in this application for judicial review as against all of the State Respondents.

**PROPOSED ORDER**

28. I shall make an order, pursuant to the exercise of my inherent jurisdiction, dismissing the Applicant's claims in this application for judicial review as against all of the State Respondents.