

THE HIGH COURT

[2022] IEHC 298

RECORD NO. 2021/34/JR

BETWEEN

CHARLIE FARRELLY

APPLICANT

AND

KERRY COUNTY COUNCIL

AND

NORTH, EAST AND WEST KERRY DEVELOPMENT

RESPONDENTS

JUDGMENT of Ms. Justice Niamh Hyland delivered on 16 May 2022

Summary of findings

1. By these proceedings, the applicant, Councillor Farrelly, seeks to upset the results of an election held by Kerry County Council ("the respondent") whereby it appointed Councillors Sheehy and Kennelly to the board of North, East & West Kerry Development ("NEWKD"), a LEADER body, following an ordinary meeting on 16 November 2020. The applicant had been nominated for appointment to the board but was unsuccessful in two rounds of voting. He challenges the voting process and seeks various declarations and an Order of *certiorari* quashing the appointment of Councillors Sheehy and Kennelly.
2. For the reasons set out in this judgment, I find that the procedure employed by the respondent to identify the two members to be appointed i.e. that identified in Paragraph 18(1) of Schedule 10 of the Local Government Act 2001 ("the 2001 Act"), was not available in circumstances where the necessary conditions for availing of Paragraph 18 were not met. Here, no group had nominated a candidate resulting in the appointment of that person without any vote being taken as provided for by Paragraph 18(1)(a). I find that step is a necessary precursor to any entitlement to utilise successive voting under Paragraph 18(1)(b).
3. Successive voting may be described as a process whereby one person is appointed in the first round of voting and further rounds of voting then take place in respect of the remaining appointments to be made. Paragraph 18 only envisages the process in subparagraph (b) being used after a group has appointed a candidate under subparagraph (a) and not in the absence of any such appointment. Accordingly, the appointment mechanism in subparagraph (b) could not be used where, as in the instant situation, an attempt was made to form a group and nominate a candidate without voting, but that attempt was unsuccessful due to an insufficient number of persons willing to form a group.
4. I should emphasise that the illegality arose, not because of the use of successive voting per se, but because the successive voting that took place was explicitly done pursuant to Paragraph 18(1)(b), which procedure was not available to the respondent in the circumstances. In those circumstances, I find the appointments of Councillors Sheehy and Kennelly were unlawful.

5. Contrary to the submissions of the respondent, my conclusion is not affected by the fact that, had the respondent proceeded under the provisions of Paragraph 12 of Schedule 10 to the Act, it would in my view have been entitled to employ successive voting. This is because nothing in Paragraph 12 precludes successive voting where the elected members are appointing two or more persons to a body. The only relevant obligation in Paragraph 12 is the obligation to determine an act by simple majority. That obligation is not breached by having successive rounds of voting on each person appointed to a body.
6. However, the respondent did not use the procedure under Paragraph 12 but rather explicitly relied upon the Paragraph 18 procedure. Requirements of legal certainty and transparency dictate that, where a process identified as applicable to an appointment of members to a body is deemed unlawful, the decision resulting from that process cannot be treated as lawful. This is so even though the steps taken mirror the steps in a different process otherwise available to the respondent.

Summary of facts

7. The applicant is an elected member of the respondent. In that capacity he attended an ordinary meeting of the respondent on 16 November 2020. Item number nine on the agenda was the nomination of two members to the board of NEWKD (North, East and West Kerry Development group), a LEADER group. LEADER is an EU programme the aim of which is to involve local actors in the development of their own regions by forming Local Action Groups to implement initiatives. Those local action groups are of considerable importance, particularly in rural communities, as, amongst other functions, they decide upon the disbursement of significant amounts of funds for community purposes.
8. Three candidates were put forward for nomination to the two positions – Councillor Sheehy, Councillor Kennelly, and the applicant. Ordinarily, voting at meetings of elected members of the respondent is regulated by Paragraph 12 of Schedule 10 of the 2001 Act. However, Paragraph 12 envisages that decisions may be made otherwise than by the process prescribed by Paragraph 12 where other procedures are provided for in the Act. The procedure identified in Paragraph 18 is one such example. Paragraph 18(3)(k) of Schedule 10 provides that where, *inter alia*, an appointment is to be made to the board of a LEADER group, in this case NEWKD, the elected members are entitled to use the procedure established by Paragraph 18(1) of Schedule 10.
9. Under the Paragraph 18 procedure, a group comprising a number of members equal to the total number of members present divided by the number of nominations to be made (to the nearest whole number) can nominate an appointee without any vote being taken. In this case, as I explore in more detail below, the Paragraph 18 process was identified as the applicable procedure. 27 members were present when the agenda item requiring appointments to NEWKD was reached, with the terms of Paragraph 18 requiring a group of 14 to select one of the nominees without a vote. Paragraph 18 envisages that the remaining appointments are to be made successively by the other elected members who are not members of such a group. Although attempts were made to form a group on the day of the meeting, the parties agree that a group was not successfully formed within the meaning of Paragraph 18 since 14 persons could not be identified to select a candidate.

10. After some discussion as to the appropriate process to be deployed in the situation where no group had been formed, a vote was taken where simple majority voting was employed to select a member for nomination and each elected member had one vote. Councillor Sheehy received 17 votes, Councillor Kennelly received no votes and the applicant received 9 votes. Councillor Sheehy was declared nominated to the board of NEWKD. A further round of voting was held, with all elected members who had previously voted, voting again. On this occasion Councillor Kennelly received 16 votes and the applicant received 10. Councillor Kennelly was declared nominated to the board of NEWKD. The applicant immediately registered his strong dissatisfaction with the process used.
11. In correspondence exchanged between the solicitors for the applicant and respondent, the applicant contended that the respondent had impermissibly used the Paragraph 18 procedure despite the failure to form a group, and there was no entitlement to appoint members by way of successive voting unless a group had first been established and a member nominated and appointed by the group as prescribed by Paragraph 18. The respondent rejected this argument, responding that it was entirely permissible to hold two separate simple majority votes, one after the other, to nominate the two candidates to the board of NEWKD.

Proceedings

12. The applicant obtained leave by Order of Meenan J. on 25 January 2021 to seek various reliefs, including an Order of *certiorari* quashing the appointment of Councillors Sheehy and Kennelly to the board of NEWKD. As part of the reliefs, he was granted a stay restraining NEWKD from taking into account the votes of the members putatively nominated by the respondent to its board. Counsel for the applicant informed me that the second named defendant (whom the respondent identifies as being incorporated as NEWKD, rather than North, East and West Kerry Development as it is named in the proceedings) has been operating since the leave application without the two Councillors appointed following the meeting.
13. The applicant filed a Notice of Motion in respect of this application on 28 January 2021 grounded on his affidavit dated 19 January 2021. The respondent subsequently filed a Statement of Opposition dated 12 March 2021 alongside the affidavit of Pdraig Corkery of the same date. The applicant swore a replying affidavit dated 20 April 2021. The second named notice party did not participate.

Summary of arguments of the parties

14. In short, the applicant says that the respondent was not entitled to use the successive voting procedure prescribed by Paragraph 18 as no group had been successfully formed as required by Paragraph 18. The applicant submits that instead of proceeding as required to one - and one only - straight majority vote under Paragraph 12 as it ought to have done, the respondent proceeded on a "hybrid" basis by purporting to hold successive votes despite Paragraph 18 being inapplicable.
15. The applicant argues that such a procedure is only permissible where the Paragraph 18 procedure is engaged. He submits that it was not open to the first respondent to import

the principle of successive nomination under Paragraph 18 into the majority voting procedure set out in Paragraph 12.

16. It is contended that where a group is not formed within the terms of Paragraph 18(1)(a), the option to appoint nominees by groups cannot be exercised and therefore Paragraph 18 becomes inoperative in its entirety. He argues that subparagraphs (a) and (b) of Paragraph 18(1) are conjunctive, i.e. that it is only after a group is formed under (a) that the remaining nominees can be "appointed successively" to the exclusion of those "members of any group referred to in clause (a)" under (b). The applicant claims that the purpose of this procedure is to address the "democratic deficit caused by a tyranny of the majority".
17. Beyond this, the applicant argues that the concept of majority voting is predicated on the concept of "one man one vote" (hereafter described in the interests of accuracy as the principle of "one person one vote") and that once a vote is cast it is spent. He contends that the introduction of successive rounds into a majority voting regime leads to a "renewable" vote, a concept unknown to such systems. He argues that such an approach leads to the least democratic and least representative method of appointment.
18. On the other hand, the respondent says that the requirements of Paragraph 18 were met when properly interpreted. Even if that is not the case, it argues that the procedure adopted was permissible under Paragraph 12 in any case and that I should not quash a decision resulting from a voting process that was otherwise lawful. It is also argued that the applicant has failed to identify the "lawful way" in which voting ought to have been done and that he must do so to persuade me that the way in which it was done was unlawful. In the circumstances, the respondent says there was only one way in which voting could have been carried out i.e. by successive voting compliant with the Paragraph 12 requirement for majority voting, and that where it was carried out in that way, I should not quash the decision. This is both a substantive objection but also the basis for an argument that I should exercise my discretion not to provide relief even if the legal complaint is made out, where such relief would afford no benefit to the applicant.
19. Further, the respondent argues that the approach suggested by the applicant is impermissible. In what the respondent characterises as the applicant's version of a "straight vote" procedure, each councillor would get one vote between the three candidates. In this circumstance the respondent argues that this would mean each councillor would only have a vote on one of the two nominations, thus depriving them a vote on the other nomination which it contends would be in clear violation of Paragraph 12(1).
20. The respondent also argues that the applicant is estopped from making this argument because he participated in the voting process despite his objections to same and therefore he cannot now seek to challenge it.

21. Finally, it is also argued that procedurally the application is flawed because the applicant failed to join the two persons who had been successfully appointed, Councillors Sheehy and Kennelly.

Procedure governing the appointment of Councillors Sheehy and Kennelly

22. Before considering the provisions of Paragraphs 12 and 18 and the correct interpretation of same, I must identify as a matter of fact the process that governed the election on 16 November 2020. Fortunately, I have detailed minutes of the meeting available to me which I understand from counsel for the respondent constitute as a matter of law the accurate record of the meeting. In my view, those minutes make it perfectly clear that the process of appointing members to the NEWKD was done exclusively pursuant to Paragraph 18 and that Paragraph 12 was not employed at any stage.
23. The official version of the minutes is exhibited to the affidavit of Padraig Corkery of 12 March 2021. (The applicant exhibited his own set of minutes but accepts that the version of Mr. Corkery is the official version that I should rely upon). The minutes identify that the meeting of 16 November 2020 was an ordinary meeting of Kerry County Council held online. I am told that this was the first online meeting that had taken place. Those councillors present are identified at the start of the minutes and include the applicant. They were attended by various council executives, including Mr. Corkery who is described as the "meetings administrator" and Mr. O'Connor, Director of Services. The Cathaoirleach of the meeting was Councillor Patrick Connor-Scarreen. The ninth item on the agenda was "To agree two nominees to the Board of North, East & West Kerry development (NEWKD)".
24. Under the heading: "Nomination to North, East & West Kerry development (NEWKD)" the minutes record that Mr. Corkery noted that Kerry County Council had been requested to nominate two elected members to the board of NEWKD. Mr. Mikey Sheehy was first proposed and seconded, then Mr. Mike Kennelly was proposed and seconded and finally the applicant was proposed and seconded.
25. The minutes then record as follows:

"Mr. P. Corkery, Meetings Administrator, stated that the nominations under this item would be selected on the basis of the Group System and a roll call of attendance would now be taken to determine the number of Elected Members present and therefore the number required to form a Group."
26. A roll call of attendance was duly taken. 27 persons were stated to be present. 6 were stated to be absent. Mr. Corkery confirmed that 27 elected members indicated that they were present and therefore a group required 14 elected members to nominate a person to the board of NEWKD, noting:

"This was stated to be in accordance with paragraph 18.1 (a) which provides that the number of members necessary to form a group for the purposes of the paragraph shall be obtained by dividing the total number of members present at

the meeting of the authority at the time when the business of making the relevant appointment is reached, by the number of the appointments to be so made, or, where the number so obtained is not a whole number, the whole number at next above the number so obtained. Therefore because two appointments were to be made and there were 27 people at the meeting when the business was reached, $27 \div 2$ is 13.5, not being a whole number, and therefore the next whole number is 14".

27. There was discussion as to whether it was clear who the 27 members were. There was a challenge by Councillor Maura Healy Rae who said she was present for the roll call and should be included in voting. The applicant said he understood and supported Councillor Locke's call to defer the item and suggested that the vote on the matter could be taken when there was clarity on the rules and based on the roll call taken that day. There was a further discussion on deferral and the Cathaoirleach asked that the procedures be clarified for the meeting.
28. The minutes then record that Mr. O'Connor advised the members that he was sharing the relevant extract on screen and he referred to and read an extract from "Section 44 – Schedule 10 – Meetings and procedures of Local Authorities Paragraph 18 – Right to Form Groups for Certain Appointments". The minutes then record the wording of Paragraph 18(1) in full and record Mr. Corkery as saying that none of the three nominees had been able to form a group of 14 and therefore a vote would be taken between the three nominees to fill the positions, with the procedures being as set out in s. 44, Schedule 10, Paragraph 18. A discussion by the members on the procedures to be followed is recorded, with some members requesting the proportional representation system should be applied. Mr. Connor-Scarteen then asks Mr. O'Connor to clarify the position again. The minutes record that Mr. O'Connor referred the members again to the statutory provision he outlined earlier and the group system, and, having confirmed that none of the three nominees had been able to form a of group of 14, he said a vote would be taken between the three nominees to fill the positions as follows:

"He confirmed that the legislation provided that the position would be filled successively with each of the 27 members voting on each of the 2 positions individually....

The Chief Executive said the position has been set out clearly in accordance with the legislation.

Cathaoirleach Patrick Connor-Scarteen said he has given everyone time to have their say on this matter and the Meetings Administrator and the Director of Corporate Services had clarified the statutory provisions and the procedures around this matter and that the matter would now proceed to a vote.

Mr. P. Corkery, Meetings Administrator, explained the legislation sets out that the grouping system will be applied in this instance and that the Members remaining to be appointed shall be appointed successively"

29. The minutes note that the result of the vote was as follows: Councillor Farrelly (the applicant) 9 votes, Councillor Kennelly 0 votes, Councillor Sheehy 17 votes. One councillor did not vote. The Cathaoirleach declared Councillor Sheehy nominated to the board of NEWKD.
30. The next entry is as follows;

"Mr. P. Corkery, Meetings Administrator, said a vote would now be taken on the filling of the second nomination to the board of NEWKD. The 27 members recorded as present on the roll call at the start of consideration of this item will be asked to vote. The candidates are Cllr. Mike Kennelly and Cllr. Charlie Farrelly."

The minutes note that the result of that vote was 10 votes for Councillor Farrelly and 16 votes for Councillor Kennelly with one councillor abstaining. The applicant lays considerable emphasis on the last entry in relation to this agenda item being as follows:

"Cllr. Farrelly stated that he wished to congratulate both candidates who were successful but that he was deeply unhappy with the manner in which the vote was conducted."

31. Having reviewed that evidence, I am quite satisfied that the process selected for the appointments to the board of NEWKD was exclusively that prescribed by Paragraph 18. As I explore below, had Paragraph 12 been the process selected for the appointments, the same steps as were taken here i.e. successive votes on a simple majority basis, could have been permissibly employed. However, contrary to the argument of the respondent, that does not mean that it was immaterial which process was identified as the applicable selection process for the board members of NEWKD. The process deployed was not that under Paragraph 12. Rather, Paragraph 18 was identified as the applicable process. Immediately after the nominations, Mr. Corkery stated that the nominations would be selected on the basis of the group system and from that moment on, the voting process was exclusively regulated by the terms of Paragraph 18.

Correct interpretation of Paragraph 18

32. The core objection by the applicant to the appointments is that they were made following the impermissible use of Paragraph 18. To understand that argument it is necessary to consider the legislative provisions in relation to voting at council meetings.
33. Voting at council meetings is regulated by the 2001 Act. Section 44 provides that Part 6 of the Act and Schedule 10 apply and have effect in relation to the meetings and proceedings of local authorities and to connected matters. Schedule 10 is substantial and identifies in some considerable detail the rules relating to meetings and proceedings of local authorities. It provides, for example, for the place, date and time of meetings, the day of annual meetings, the business and public notice of annual meetings, the local authority budget meeting, special meetings, notification of meetings, an agenda, public notice of meetings, business of meetings, sharing of meetings, quorums, the determination of questions, disorderly conduct, minutes, records of attendance, standing

orders, committees, the right to form groups for certain appointments and equity in appointments. Paragraph 12 of Schedule 10 governs the determination of acts by the elected members in general and I consider it in detail below.

34. Paragraph 18 provides in relevant part as follows:

18.—(1) Where 2 or more persons are to be appointed by a local authority to a body to which this paragraph applies, then—

(a) any group of members who are present at the meeting at the time when the business of making the appointments is reached and comprising the number of members necessary for the purposes of this paragraph may nominate a person to be a member of that body and the person shall be so appointed on that nomination without any vote being taken, and

(b) the members of the body then remaining to be appointed shall be appointed successively by the members of the local authority who are not members of any group referred to in clause (a) and who were present at the meeting at the time when the business of making the appointments was reached.

(2)(a) Subject to clause (b) the number of members necessary to form a group for the purposes of this paragraph shall be obtained by dividing the total number of members present at the meeting of the authority at the time when the business of making the relevant appointments is reached by the number of the appointments to be so made, or, where the number so obtained is not a whole number, the whole number next above the number so obtained.

(b) No member of a local authority shall be a member of more than one group for the purposes of this paragraph.

(3) This paragraph applies to the following bodies:

...

(k) a LEADER group established in the framework of an EU community initiative for rural development;

35. The applicant argues that it was not permissible to use the process identified under Paragraph 18(1)(b) i.e. successive voting, in circumstances where it had not been possible to first form a group under Paragraph 18(1)(a). The respondent on the other hand argues that, properly interpreted, Paragraph 18(1)(b) should be read disjunctively so that the processes identified therein may be used even where it has not been possible to form a group under Paragraph 18(1)(a) first. To resolve this dispute, it is necessary to consider the entirety of Paragraph 18 closely.

36. One sees a novel and distinct process in relation to appointments of persons by a local authority to a body to which Paragraph 18 applies. Those bodies are set out at Paragraph

18(3) and include for example a committee of a local authority, a joint committee of one or more local authorities, a regional authority, a County Enterprise Board and at subparagraph (k), a LEADER group.

37. Paragraph 18(1)(a) permits a group of members present at a given time and comprising the necessary number as identified at Paragraph 18(2), to nominate a person to be a member of the body and that person shall be so appointed on that nomination without any vote being taken. Subparagraph (a) is immediately followed by the word "and". Subparagraph (b) provides that the members of the body then remaining to be appointed shall be appointed successively by persons *not members of any group referred to in clause (a)* (my emphasis).
38. The clarity of the process under 18(1)(a) is to be contrasted with the lack of detail in 18(1)(b). Subparagraph (b) simply provides that the members of the body then remaining to be appointed shall be appointed successively by the persons entitled. The method of voting to be used is not made clear, for example it is not set out whether the Cathaoirleach has a casting vote as in Paragraph 12, whether voting is to be done by majority of the members present and voting, or whether the provisions of Paragraph 12 are simply taken to apply by implication. These are questions for another day because what I must decide at this point is whether the procedure that was adopted here i.e. successive voting with decisions being made on a majority basis, came within Paragraph 18(1)(b) in circumstances where Paragraph 18(1)(a) had not resulted in the appointment of a member.
39. In my view, the wording of Paragraph 18(1) makes it clear that if the conditions for subparagraph (a) are not met, it is not permissible to go on to the procedure identified in subparagraph (b). Subparagraphs (a) and (b) are intended to work together. The following features indicate this. First, the reference to the word "and" at the end of subparagraph (a). Second, subparagraph (b) talks about the members of the body "then" remaining. This makes it clear that it is intended that (b) should come into play only after (a) has played out, resulting in the appointment of a person or persons pursuant to (a). Most obviously, subparagraph (b) is in my opinion only intended to be operative where the persons appointing do not constitute all the members present at the time when the business of making the appointments is reached. This is made clear by the wording in (b) i.e. that members shall be appointed successively by members "who are not members of any group referred to in clause (a) and who were present at the meeting at the time when the business of making the appointment was reached". In other words, it is clearly not intended that (b) is to be used to regulate the process in a meeting where that meeting has not excluded certain persons from voting pursuant to (a). Subparagraph (b) is only intended to apply in the absence of the members who have nominated a candidate successfully under (a). Here, all the members who were present when the business of making appointments was reached either voted or abstained.
40. The applicant has also relied upon a purposive analysis of Paragraph 18(1), arguing that the successive voting referred to in subparagraph (b) cannot be used where an attempt to

use (a) has not resulted in the nomination of a member. He identifies the purpose of Paragraph 18 as being to prevent a majority group dominating the voting, because it removes a majority group or members of same from the appointment process after they have exercised their right to form a group under 18(1)(a). It is said that where the members of the group are not removed at the subparagraph (b) stage, successive voting is extremely unfair because it would allow a majority group to have more than one of their group elected to the exclusion of minority groups.

41. I do not have to adjudicate on this argument because as I identify above, the clear and unambiguous wording of Paragraph 18(1) makes it clear that Paragraph 18(1)(b) cannot be deployed unless 18(1)(a) has first been successfully utilised, thus removing from the electorate all those who formed part of the group.
42. Separately, the respondent identifies in its written legal submissions that I should interpret Paragraph 18(1)(b) as permitting voting in the circumstances of the instant case because to do otherwise would be contrary to the fundamental rule as identified by Lynch J. in *McGlinchey v Governor of Portlaoise Prison* [1988] IR 671 that documents should be construed so they take effect rather than be left ineffectual and useless "if such construction is reasonably open on a consideration of the document as a whole". I am satisfied for the reasons set out above that the construction contended for by the respondent is not reasonably open to me given the clarity of the wording of Paragraph 18. I should add that I do not agree that this interpretation of Paragraph 18 leaves it ineffectual or useless. Rather, it limits its use to a situation where a group is successfully formed pursuant to its provisions, as per the intention of the legislature.
43. In the instant case no group was successfully formed and no nomination took place under s.18(1)(a). That means in my view that the elected members were not entitled to appoint candidates pursuant to the Paragraph 18 procedure.

Validity of appointments given unavailability of Paragraph 18 process

44. Given my decision that (i) as a matter of fact the procedure adopted by the elected members to nominate members to NEWKD was that prescribed by Paragraph 18 (1)(b); and (ii) that procedure was not available to the elected members as the conditions in Paragraph 18(1)(a) had not been met, that might suggest the applicant has succeeded in his case. However, before so concluding, I must address the argument of the respondent that because the legally correct method was adopted, whether Paragraph 18 or Paragraph 12 applied, it is immaterial as to how it came to be adopted. This is because the result would have been no different if Paragraph 12 had been explicitly employed. (It is not entirely clear whether the respondent is conceding that as a matter of fact, the vote on the day was taken pursuant to Paragraph 18; on balance I think that concession was not made. As identified above, I am satisfied this was in fact the case).
45. The applicant argues in reply that successive voting under the Paragraph 12 approach could not in any case have been used to elect members to NEWKD. I consider (and reject) that argument below.

46. But assuming the respondent was entitled to rely on the procedure identified in Paragraph 12, I cannot agree that the explicit reliance upon Paragraph 18 on 16 November 2020 can be ignored. Elected representatives are entitled to understand the basis upon which they are being asked to vote. Great pains were taken by the representatives of the respondent, Mr. O'Connor and Mr. Corkery, to identify the provisions of Paragraph 18 and to remind members of the Paragraph 18 process and how it was applicable in the instant circumstances. Indeed, the wording of same was put up on the screen for elected members to review. The number of persons needed for a group vote was identified and explicit reference was made to the successive voting system in 18(1)(b). No reference was made to Paragraph 12. The minutes disclose there was a call to adjourn the meeting over disquiet about the use of the procedure in Paragraph 18(1)(b) in the circumstances. Had the meeting been adjourned at that stage and then reconvened and had the respondent's officials identified that Paragraph 12 was being used, the members would have been clear as to the applicable process. They could have made whatever comments they wished or moved any motions in that respect. But none of those things took place. Instead two rounds of voting took place explicitly pursuant to the Paragraph 18 procedure.
47. To treat the process as if it had taken place under an entirely different process would be quite unfair on the elected members and would introduce a type of parallel process whereby, although one procedure is identified and understood by the members as the applicable process, another process may be later invoked as having been in fact the applicable procedure. Such an approach is undesirable for overwhelmingly obvious reasons. The elected members are entitled to understand the legal basis upon which they are voting. Respect for the rule of law requires recognition and acknowledgement of the process used. Requirements of legal certainty and transparency dictate that where one procedure is identified and relied upon as the basis for voting, but that procedure is found to be unlawful, the decision made pursuant to the procedure identified cannot be treated as lawful. This is so even if the steps taken are identical to steps available in a different and permissible process available to the respondent.
48. In the circumstances I am quite satisfied that the vote must be quashed on the basis that it was done pursuant to a legislative provision unavailable in the circumstances i.e. Paragraph 18, even though the same steps, taken under a different legislative provision, i.e. Paragraph 12, would have been lawful.

Permissibility of successive votes under Paragraph 12

49. Because I have found that reliance on Paragraph 12 cannot save the appointments of the members from invalidity, strictly speaking I do not need to decide whether the Paragraph 12 procedure could have been deployed in the circumstances. However, I will consider this issue for the sake of completeness. In short, I conclude that it would have been permissible for the respondent to rely upon Paragraph 12 as the legal basis for the voting mechanism employed i.e. successive voting.
50. Paragraph 12 provides in relevant part:

"12. (1) Each member present at a meeting of a local authority shall have a vote unless prohibited from voting by this or any other enactment.

(2) All acts of a local authority which are reserved functions or questions duly coming or arising before a meeting of a local authority shall be determined—

(a) by a majority of the votes of the members present and voting, or

(b) where there is an equality of votes, by a second or casting vote of the person chairing the meeting (which person shall have and may choose to exercise such a vote).

(3) This paragraph is without prejudice to the other provisions of this Act (including provisions required to be included in standing orders by virtue of paragraph 16) or of any other enactment, requiring either the presence of a specified number or proportion of the members or that a specified number or proportion should vote in favour for the doing of any particular act.

51. The applicant argues that Paragraph 12 does not permit successive voting. His primary argument is based on what he describes as a breach of the principle of "one person one vote", which he says is encapsulated in Paragraph 12(1). In fact, when one dissects this argument a little more closely, the applicant's real argument must be that only one vote is permissible in relation to the appointment of nominees to the board of NEWKD, because it is understandably not suggested by the applicant that each elected member can only vote once in total at a meeting. In support of this argument, he relies upon the wording of Paragraph 12(1) and (2) and on the wording of the agenda for the meeting of 16 November 2020. He argues that under Paragraph 12(2) the act of appointing nominees should be done in one vote as opposed to successively. He focuses on the absence of the reference to successive votes in Paragraph 12, contrasting this with Paragraph 18(1)(b) which specifically authorises successive votes.
52. It is necessary to unpick Paragraph 12 a little to adjudicate upon these arguments. Paragraph 12(1) provides that each member present at a meeting of a local authority shall have a vote unless prohibited from voting by 12(1) or any other enactment. This cannot mean that at each meeting a member only is permitted to vote once. That would clearly be an untenable interpretation from a practical point of view given the multiplicity of matters that require to be voted upon. Moreover, it is not supported by the wording of the section, the purpose of which is in my view to make clear that there must be no distinction between members at a meeting insofar as votes are concerned and that all members must be entitled to vote unless otherwise prohibited.
53. Subparagraph 2 deals with the mode of determination of acts of local authorities. Acts that are reserved functions or questions coming or arising before a meeting of the local authority shall be determined in the way prescribed. This is important as it is expressed in mandatory terms (unless subparagraph 3 comes into play, which acknowledges that other methods of determination are permitted where the Act explicitly provides for this.

Paragraph 18 is an example of another method of determination). The mechanism identified by subparagraph 2 is also significant. It requires that acts shall be determined by a majority of the votes of the members present and voting, suggesting that the votes of persons abstaining are to be excluded for the purposes of determining the majority. Paragraph 12(2)(b) provides that where there is an equality of votes, matters shall be determined by a second or casting vote of the person chairing the meeting. I am told that these rules are reflected in Standing Order no.54.

54. Paragraph 12 does not address the question of successive voting or the number of times voting may take place on any act requiring to be determined within the meaning of the Paragraph. There is neither an express provision for successive voting, as in Paragraph 18, or any prohibition on same. If the applicant wishes to establish Paragraph 12 precludes more than one vote being taken on the appointment of members to a board, he must persuade me that the language of Paragraph 12 and/or the overall construction of the Schedule or Act implicitly prohibits it.

One person one vote

55. Insofar as the principle of one person one vote is concerned, as identified above Paragraph 12(1) cannot mean an elected member is entitled to vote once only at a meeting. Therefore, the applicant needs to persuade me that only one vote is permitted on the appointment of members to the board of NEWKD. Successive voting on an agenda item will only be required where more than one vote is considered necessary to determine the matter. Here, because there were two nominations required, the elected members decided each nomination would be treated as a separate act requiring a vote to be determined. In fact, the two votes taken were not successive votes on the same thing or "renewable votes" as described by the applicant's counsel. Rather they were votes in respect of two distinct acts i.e. the appointment of one member to the board of NEWKD, followed by the appointment of a second member to the board.
56. Each of the 27 members were required to have a vote on each appointment because of the requirements of Paragraph 12(1). No member could be denied a vote. But that is quite different to interpreting 12(1) as requiring one voting round only, or one vote per member only in respect of the appointment of members to the board. Paragraph 12(1) only identifies that each member present at a meeting shall have a vote unless prohibited from voting. Even if one assumes that the appointment of two members to the board must be treated as one "act" within the meaning of Paragraph 12(2) – an assumption I can see no basis for – 12(1) does not refer to "one vote" for each act to be determined by the elected members. It simply refers to each member having a vote – "a vote" being different to "one vote".
57. Nor does Paragraph 12(2) assist the applicant. That is a limiting provision in that it provides that an act must be determined by a majority of the votes of the members present, with special rules where there is an equality of votes. But the absence of any other limiting rules, for example in relation to successive voting on acts, suggests that same is permitted provided the rule on majority voting is observed.

58. In summary, although it may be unsatisfactory from a candidate's point of view to have voting on a successive basis without the electorate for the successful candidate being removed at the second round of voting (as would be the case if the group voting had taken place under Paragraph 18) I cannot see how it is in breach of the requirements of Paragraph 12.

Relevance of reference to successive voting in Paragraph 18

59. The applicant also argues that the explicit reference to successive voting in Paragraph 18(1)(b) and the absence of same in Paragraph 12, means that I must imply a prohibition on successive voting under Paragraph 12. The applicant does not identify any principle of statutory interpretation justifying this argument. But I do not think an examination of the respective Paragraphs bears this out. Paragraph 18 establishes an entirely different system for appointing persons to a body to that identified in Paragraph 12, and the presence or absence of successive voting in that context, is not necessarily relevant to it in the context of Paragraph 12. In particular, as previously identified, Paragraph 18 removes a portion of the electorate from voting once they have elected a group and, in those circumstances, it may have been thought necessary by the legislature to explicitly identify the way in which the remaining nominees were to be appointed.

60. In fact, if the reference to successive voting in Paragraph 18 is of any relevance, it is more likely to be helpful to the respondent than to the applicant. This is because in the part of the Act dealing with the method of determining appointments to bodies, the process selected is successive voting (albeit after removing a proportion of the electorate under subparagraph (a)). The absence of an equivalent provision in Paragraph 12 may be easily understood on the basis that it is designed to cover all acts requiring to be determined by elected members and not just contested appointments to a body. The acknowledgment in the Act under Paragraph 18 that members should be appointed successively supports an argument that, where the Paragraph 12 procedure is required to be employed for this purpose, the appropriate way to do it is by way of successive appointments.

61. For those reasons, I cannot agree with the applicant's argument that the presence of successive appointments in Paragraph 18 militates against such a procedure when Paragraph 12 is being deployed; in fact, if anything, its presence in Paragraph 18 supports its use in the context of Paragraph 12.

Practical impact of applicant's approach on voting under Paragraph 12

62. Finally, the respondent has argued that the applicant's approach results in a breach of the majority voting provisions of Paragraph 12. It contends that if there is only one voting round to determine the candidates to be appointed, and each member is only given one vote in that round, although it is possible to discern the preferences of the members in relation to each of the three candidates by seeing the numbers of votes for each candidate, it is not possible to select two members each by majority vote. In fact, because I have already concluded that successive voting is permissible under Paragraph 12, it is not necessary for the respondent to establish that no other type of voting is available to it. However, because this issue was the subject of such sustained argument

at the hearing, and because it assists in understanding the workings of Paragraph 12 in practice, I will address certain of the points raised by the respondent.

63. The procedure prescribed at Paragraph 12 is not tailored for an election type situation where there is a competition between elected members for nominations. The requirement for a majority is most suitable in a situation where members are required to vote for or against a proposition. It is less suitable where there are a number of choices to be made, such as in the present case where two members require to be appointed but three members are seeking appointment. While arguing that successive voting was unlawful, the applicant was reluctant to identify a voting process for appointment to a board that would be lawful, saying that his only obligation was to establish the unlawfulness of the approach taken rather than to posit a lawful approach. I can understand the applicant's reluctance to commit to an alternative; but to tease out the respondent's argument, it is necessary to explore what type of voting situation would be compatible with Paragraph 12. Certainly, if what is suggested is a straight voting system where each elected member votes once for one nominee only, it would not be possible to appoint two members in a manner compatible with Paragraph 12 because two people cannot be elected, both of whom have a majority. At least the second person will be appointed without a majority, thus resulting in a situation where the act of appointing at least one of the nominees would not comply with the requirement of Paragraph 12(2)(a).
64. Of course, that may also be the situation when the approach identified by the respondent is adopted, i.e. successive voting, as in certain cases, a vote will not produce a result as no simple majority will be achieved. So, for example if there were 30 members voting, and one candidate got 14 votes, another got 13 and the last got 3, no candidate would have obtained a simple majority. However, the key difference between the two approaches is that what I will describe as the applicant's approach could never provide a result compliant with Paragraph 12 whereas the respondent's approach is at least capable of doing so.
65. Submissions were made at the hearing as to whether there might be another method that would permit one round of voting only, perhaps by permitting members to vote for two or more candidates. However, the applicant did not identify any such system that was at least capable of resulting in the appointment of the necessary number of members compliant with Paragraph 12.
66. In those circumstances, the respondent may well be right in its argument that successive voting is required to permit compliance with the requirement for majority voting in Paragraph 12. However, to be sure about this, it would be necessary to carry out a very sophisticated and detailed analysis of alternative voting methods available to ensure no other method was possible. No such analysis was before me. Accordingly, I conclude that successive voting is permitted, not because there is no alternative to same but because as per my analysis above, there is no impediment in Paragraph 12 to elected members voting on more than one occasion at a meeting to determine the appointment of members to a board.

Alleged unfairness of successive voting

67. The applicant has focused heavily on the unfairness of a system of successive voting and how it is likely to favour members from majority groups and exclude members from minority groups. Whether that is the case or not is undoubtedly a complex issue, but it is not an issue I am charged to resolve. I am here to consider questions of legality, not policy. Those arguments, even if correct (and I make no finding in this respect), cannot be used to affect the correct construction of the legislation. These are questions for the legislature.
68. The respondent points out that Paragraph 19 of Schedule 10 provides that local authorities are authorised to make rules for the purpose of ensuring that appointments made by it to Paragraph 18 bodies and other bodies are made fairly and equitably, taking account of the various interests represented on the authority and the totality of appointments to be made to those bodies. I am told no such rules have been made. If the interpretation that I have adopted of Paragraphs 12 and 18 in some way is considered by the applicant to potentially undermine a fair balance of interests on those bodies, it is open to the applicant to make the case for the making of such rules.

Does the agenda preclude successive voting?

69. At the hearing the applicant made a new argument in support of the preclusion of successive voting to the effect that the description of the nomination process in the agenda circulated in advance of the meeting on 10 November 2020 indicated that successive voting was not permitted. That description may be found at number 9 on the agenda as follows: "To agree two nominees to the Board of North, East & West Kerry development (NEWKD). To be dealt with by Mr C.O'Connor, Director of Service". The applicant says that the agenda envisaged that there would be only one vote and that therefore successive votes were not permissible so that the approach of the respondent was in breach of the agenda item.
70. The respondent's counsel objects strongly to this argument being made in circumstances where it was not identified in the Statement of Grounds or the applicant's written legal submissions. I think the applicant faces a hurdle in including this argument in circumstances where it has not been pleaded or in any way flagged in advance and where judicial review jurisprudence makes it clear that matters must be pleaded in advance if they are to form part of the case (see *AP v DPP* [2011] IR 729). But in any case, even if this argument had been included, I do not think it would have advanced the applicant's case. The wording of the agenda does not in my view identify any method of agreeing the appointment of nominees. It does not imply that only one vote can be taken on this issue. It is simply entirely silent on the question of how the nominees are to be agreed. It cannot be inferred from the mere fact that it identifies one agenda item that there can only be one vote on this item. If one looks, for example at item 14 on the agenda, one can see that the members are being asked to approve the opening of tenders for various projects identified at (a) to (h). The minutes disclose that a vote was taken in respect of each of those proposals (page 23 of the minutes). I cannot agree that the agenda item implies that there is a prohibition on more than one vote being taken in respect of item 9.

71. Nor does Schedule 10 assist the applicant in this argument. Paragraph 7 of Schedule 10 is concerned *inter alia* with the agenda of a meeting. It provides at Paragraph 7(4) that a notification to attend a meeting shall be accompanied by an agenda listing the business proposed to be transacted at the meeting. Paragraph 7(4)(b) provides that an agenda may be altered if an agenda paper specifying the alteration is delivered not less than 3 clear days before the meeting date. Nothing in Paragraph 7 identifies that an agenda item must be voted upon only once.

Consequences for the applicant had only one vote been taken

72. That brings me to a topic that took up considerable time at the hearing. i.e. whether the applicant would have been elected had there not been successive voting. The applicant firmly contends that he would have been. He argues there was tactical voting by the majority group and that a different voting approach would have resulted in his election. The respondent on the other hand says that there can be no certainty about what would have happened in a different voting situation.
73. I cannot possibly predict what would have happened had the appointment to the board been based on one vote. Nor in my view is it relevant. The applicant undoubtedly has standing to complain about the process in circumstances where he was a candidate and argues that the procedure used was incorrect. He does not need to show he would have been elected had the correct voting procedures been used.
74. The only other relevance of this line of argument is whether the applicant was estopped from bringing these proceedings in circumstances where he participated in the vote. He says that he had to participate because he had to show that he was adversely affected by the voting procedure adopted, and that, had a different voting procedure been adopted, he would have been elected. I reject this argument for the reason given above: he has standing by virtue of his participation in the election and does not require to show he would have been elected had the process been different.

Waiver/acquiescence/estoppel

75. The respondent strongly argued that the applicant was estopped from advancing this challenge because he had participated in the vote on 16 November, despite having concerns about the procedure adopted and supporting a call that the vote be deferred. I have identified above the applicant's comment recorded in the minutes after the vote had been taken to the effect that he was deeply unhappy with the process.
76. The respondent relied upon *R (Kildare County Council) v. Commissioner of Valuation* [1901] 2 IR 215 and *Podariu v Veterinary Council of Ireland* [2017] IECA 272. In the former case the applicant sought certiorari to quash a revised valuation made by the respondent in respect of part of a railway line traversing their jurisdiction. The applicant initially appealed unsuccessfully to the respondent itself and then to the County Court which varied the revised valuation on substantive grounds. Following this, the applicant sought a writ of certiorari from the old High Court on the grounds that the respondent lacked jurisdiction to undertake the revision of the valuation in Kildare and Palles C.B. agreed, quashing the subsequent decision of the County Court alongside it.

77. The old Court of Appeal however held that the applicant was estopped by conduct from raising the jurisdiction ground in circumstances where it was open to them to raise it in the appeal to the respondent and to the County Court. The Court found that the applicant, despite being aware of the jurisdiction point, brought the appeals on the basis that there was jurisdiction to revise the valuation, in an attempt to have the valuation increased. When that attempt failed, it then sought to rely on the jurisdictional point. The Court held that this approach was one of the strongest cases of estoppel by conduct conceivable.
78. In the latter case a complaint had been made against a vet to the Veterinary Council. There were a number of counts and all of them were considered by the preliminary investigation committee ("the PIC") and sent on to the fitness to practice committee of the Council ("the FTPC"). The enquiry commenced on 20 May 2013 and in the course of same the applicant produced certain records. In the light of this evidence Mr. Podariu was notified by letter of 27 June 2013 of a proposed application to amend the notice of enquiry to allege that he had acted dishonestly in producing the records. The enquiry resumed on 1 October 2013. Neither at the hearing nor afterwards did Mr. Podariu's legal representatives dispute that the FTPC was entitled in principle to amend the notice of enquiry and the amendment took place. The hearing was adjourned for six weeks, and when it resumed, neither at that point nor on any subsequent date was the issue of the entitlement to amend the notice of enquiry raised. Mr. Podariu was ultimately found guilty of professional misconduct by reference to the amended charge only.
79. The Court of Appeal agreed that the FTPC could not amend the notice of enquiry but Hogan J. held that there was sufficient acquiescence on the part of Mr. Podariu so that he was precluded from challenging the validity of the FTPC decision. That conclusion was reached in circumstances where as the chain of events set out above demonstrates, Mr. Podariu had numerous chances to object to the jurisdiction to amend the notice of enquiry over a number of months but did not do so. It is not difficult to understand why the Court of Appeal decided Mr. Podariu had acquiesced in relation to the amendment of the notice of enquiry given that chain of events.
80. Similarly, in the *State (Byrne) v Frawley* [1978] IR 326 the applicant had been charged with burglary and had commenced with an all-male jury under the provisions of the Juries Act 1927. A few days into the trial the Supreme Court gave its decision in *De Burca v Attorney General* [1976] IR 38 holding that the provisions of the 1927 Act were unconstitutional because they de facto excluded women and non-property owners from juries. As Henchy J. noted, the applicant was presented with the opportunity in the middle of his trial to plead the unconstitutionality of his jury in the Circuit Court. An informed and deliberate decision was made to turn down that opportunity. His counsel allowed the trial to proceed rather than applying to have the jury discharged. Henchy J. observed that it was obviously thought to be in the best interests of the prisoner that he should take his chances before that jury notwithstanding its constitutional imperfection;

"Because the prisoner freely and knowingly elected at his trial to accept the empanelled jury as competent to try him, I consider that he is now precluded by that election from claiming that the jury lacked constitutionality"

81. In all those cases there was a clear knowledge of the basis for objection, a time period during which reflection could take place, the opportunity for the persons in question to be legally advised and a conscious decision not to object despite the availability of an opportunity to do so. None of those factors are present in the instant case.
82. First, in relation to whether the applicant had clear knowledge of the basis for objection, it is worth emphasising that the applicant supported a call to defer the item on the basis that the vote should be taken when there was clarity on the rules. He was therefore obviously unclear as to what was being proposed at that stage. After the deferral application, council officials identified that the Paragraph 18 procedure remained the applicable procedure. Yet this was in circumstances where no voters had been removed pursuant to the Paragraph 18(1)(a) procedure. The process was therefore irregular and the basis for objection may not necessarily have been entirely clear to the applicant at that point.
83. In relation to the second and third elements I identify above, i.e. whether there was a time period during which reflection could take place or an opportunity to take legal advice, it is clear from the minutes that everything happened very quickly without any adjournment for an opportunity for the applicant to reflect on matters or to obtain legal or other advice. An application by another member to adjourn the vote on this agenda item had been refused. In circumstances where it was the respondent's decision not to adjourn to allow for reflection or advice, despite the irregularity of the process employed, it is difficult for it to argue that there was adequate time for reflection or the obtaining of advice.
84. Finally, in respect of a conscious decision not to object, I have already identified the entry in the minutes where the applicant, immediately after the vote, signalled his clear dissatisfaction with the process. Therefore, far from not objecting, he had recorded his objection and concerns about the process immediately after its conclusion.
85. In the circumstances, I cannot agree that the applicant acquiesced with the procedure such that he has waived his right to object to it. Moreover, when the dispute as to the correct process arose, the applicant had already been nominated and seconded. If he had then pulled out of the process, the respondent might well have argued that he could not challenge the result as he had no standing to do so having withdrawn from the appointment process. He was truly in my view caught between a rock and a hard place and it would be unjust to treat him as being estopped from challenging the process or having acquiesced in the process.

Discretion not to provide relief

86. The respondent has argued that, even if I find it breached the requirements of the Act in the way in which the appointment process was carried out, I should refuse relief in the

exercise of my discretion on the basis that it would not avail the applicant. That argument is easily disposed of. Because the appointments have been quashed, I assume there will be a new appointment process. The applicant will have an opportunity to be nominated and a new process will take place. Elections are notoriously difficult to predict, and I imagine this one is no different. Indeed, there is an additional variable here since the elected members will be entitled to either use the process under Paragraph 18 (assuming a group can be formed) or under Paragraph 12. I cannot see how I could conclude at this point that there would be no benefit to the applicant were the above train of events to take place. It must at least be possible that he would be successful in a future appointment process, although I cannot assess the probability of success. Accordingly, this seems to be a particularly inappropriate case in which to exercise the narrow discretion not to grant relief even where an applicant has established an illegality.

Failure of applicant to join Councillors Sheehy and Kennelly to the proceedings

87. Finally, the respondent objected to the failure of the applicant to join the two successful candidates as notice parties, saying that it was necessary to include them given that their legal rights are affected by any decision I make on this application. The respondent is seeking to rely on an alleged interference with rights enjoyed by Councillors Sheehy and Kennelly to prevent the applicant obtaining relief. No steps were taken by the respondent to ensure that the two successful candidates were put on notice. Nor has the respondent identified any correspondence where it asked the applicant to join Councillors Sheehy and Kennelly. In those circumstances it is difficult to avoid the conclusion that this objection is being made for tactical reasons.
88. If Councillors Sheehy and Kennelly were sitting on the board of NEWKD and were not aware of the proceedings, I could not have granted the relief sought in their absence. But that is not the case. A stay was granted on the decision of Meenan J. on 25 January 2021 in the terms set out above i.e. precluding them from taking their places on the board pending determination of the proceedings, and therefore Councillors Sheehy and Kennelly must be treated as being aware of the proceedings. If they wished to be heard, they could have come to Court and sought to be joined. No such application was made and no correspondence from them was identified.
89. In the circumstances this line of objection cannot avail the respondent.

Conclusion

90. For the reasons identified above I will quash the decision of the respondent of 16 November 2020. I will hear submissions as to whether the matter requires to be remitted back and if so whether I should remit it back to a meeting composed of the members present on 16 November 2020 at the time item 9 was reached, or to some other meeting. I will hear any costs application at the same time. I propose 30 May at 10am for a remote hearing on remittal and costs. The parties have liberty to apply for a different date but if they wish to do so, they should agree a date and propose same, ideally a date prior to 1 June.