

APPROVED

[2022] IEHC 44



THE HIGH COURT  
JUDICIAL REVIEW

2021 No. 1097 J.R.

BETWEEN

FRIENDS OF THE IRISH ENVIRONMENT CLG

APPLICANT

AND

ROSCOMMON COUNTY COUNCIL  
IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

**EX TEMPORE JUDGMENT delivered by Mr. Justice Garrett Simons on  
28 January 2022**

## INTRODUCTION

1. This ruling is delivered in respect of an interlocutory application seeking to restrain the carrying out of development works pending the hearing and determination of these judicial review proceedings. The proceedings question the validity of an order made by the chief executive of Roscommon County Council on 14 October 2021. I will refer to this order as “*the impugned order*”. The impugned order purports to authorise the carrying out of what is described as interim flood relief works.

NO REDACTION REQUIRED

2. The order consists of a number of related decisions, the overall effect of which, if valid, would be to authorise the carrying out of the interim flood relief works (hereinafter “*the proposed works*”). These include, *inter alia*, the following. First, a screening determination, for the purposes of Article 6 of the Habitats Directive 92/43/EC and Regulation 42 of the domestic implementing regulations, the Birds and Natural Habitats Regulations 2011 (SI No 477 of 2011), which purports to find that the proposed works are not likely to have a significant effect on a European Site. Secondly, a screening determination for the purposes of the Environmental Impact Assessment Directive 2011/92/EU (“*EIA Directive*”) which purports to find that the proposed works are not likely to have a significant effect on the environment. Thirdly, and more controversially, there is a decision purporting to deem the proposed works as comprising an urgent solution to an “*emergency situation*” calling for immediate action for the purposes of the Local Government Act 2001 and the Planning and Development Act 2000.
3. One of the legal consequences of deeming there to be an “*emergency situation*” is that certain procedural safeguards, which would otherwise have obtained, are disapplied in respect of the proposed works. See Section 179(6)(b) of the Planning and Development Act 2000. Crucially, the mechanism whereby local authority development can be referred to an independent competent authority (An Bord Pleanála) for screening is avoided. The parties are agreed that Article 120(3) of the Planning and Development Regulations 2001 (as substituted in 2018) does not apply in the case of a deemed “*emergency situation*” because it only applies to local authority development which is subject to Part 8 of the Planning and Development Regulations 2001.

4. The applicant for judicial review seeks to challenge each of these decisions. In addition, and in the alternative, the applicant seeks to challenge the validity of the underlying legislation pursuant to which certain of these decisions were made. In particular, it is contended that it is not permissible as a matter of EU law to allow a local authority *qua* developer to make screening determinations in respect of its own development. It is said that this is inconsistent with the requirements of Article 9a of the EIA Directive and the thrust of the Habitats Directive.
5. There is a final matter which should be flagged as part of the introduction to this ruling. The interim flood relief works the subject-matter of the within judicial review proceedings represent a modified and scaled-down version of a previous development proposal. The local authority had commenced works in respect of this previous development proposal in the summer of 2021. Those works were purportedly authorised pursuant to the Local Authorities (Works) Act 1949. This Act, self-evidently, predates the coming into force and effect of the relevant EU environmental legislation, and has not been updated to reflect the changes mandated by EU law. The Act of 1949 did not, therefore, impose an obligation as a matter of domestic law upon the local authority to carry out a screening exercise for the purposes of either the EIA Directive or the Habitats Directive.
6. The conduct of the local authority in purporting to utilise the Local Authorities (Works) Act 1949 was itself challenged in separate, earlier judicial review proceedings (*Friends of the Irish Environment v. Roscommon County Council*; 2021 No. 773 JR). The local authority did not seek to defend those earlier judicial review proceedings, and certain orders were made by this court with the consent of the parties on 25 August 2021.

7. The relevance of all of this for present purposes is that the local authority intends to utilise certain of the works carried out in the summer of 2021 for the new proposed flood relief works. In particular, it is intended to incorporate a section of pipeline of some 800 metres into the revised project. Put otherwise, the local authority is seeking to incorporate into its new development proposals some of the works which were carried out pursuant to the now quashed development consent. As explained presently, there is a question mark as to the legal status of these earlier works.

#### **LEGAL TEST FOR INTERLOCUTORY RELIEF**

8. I turn now to consider the legal test governing an application for interlocutory relief. The parties are in broad agreement as to the legal principles to be applied by this court in determining the application for interlocutory relief. All sides rely on the judgments of the Supreme Court in *Okunande v. Minister for Justice, Equality and Law Reform* [2012] IESC 49; [2012] 3 I.R. 152 and in *Krikke v. Barranafaddock Sustainability Electricity Ltd* [2020] IESC 42. The parties also rely on the very recent judgment of the High Court (Holland J.) in *Jennings v. An Bord Pleanála* [2022] IEHC 11.
9. The factors to be considered are summarised as follows in *Okunande*:
- “(a) the court should first determine whether the applicant has established an arguable case; if not the application must be refused, but if so then;
  - (b) The court should consider where the greatest risk of injustice would lie. But in doing so the court should:-
    - (i) give all appropriate weight to the orderly implementation of measures which are prima facie valid;

- (ii) give such weight as may be appropriate (if any) to any public interest in the orderly operation of the particular scheme in which the measure under challenge was made; and,
- (iii) give appropriate weight (if any) to any additional factors arising on the facts of the individual case which would heighten the risk to the public interest of the specific measure under challenge not being implemented pending resolution of the proceedings;

but also,

- (iv) give all due weight to the consequences for the applicant of being required to comply with the measure under challenge in circumstances where that measure may be found to be unlawful.
- (c) in addition the court should, in those limited cases where it may be relevant, have regard to whether damages are available and would be an adequate remedy and also whether damages could be an adequate remedy arising from an undertaking as to damages; and,
- (d) in addition, and subject to the issues arising on the judicial review not involving detailed investigation of fact or complex questions of law, the court can place all due weight on the strength or weakness of the applicant's case."

10. Insofar as the challenge to the underlying legislation is concerned, the parties rely upon the judgment of the Supreme Court in *Dowling v. Minister for Finance* [2013] IESC 37; [2013] 4 I.R. 576 and the judgment of this court in *Friends of the Irish Environment Ltd v Minister for Communications* [2019] IEHC 555. The parties have also referred to the Order of the Court of Justice dated 21 May 2021 in Case C-121/21 R., *Czech Republic v. Republic of Poland*, EU:C:2021:420.
11. A court determining an application for interlocutory relief is normally required to consider three matters in sequence as follows. The first is whether the moving party has established an arguable case. The court is not ordinarily required to assess the strength of the parties' respective cases. The more recent

jurisprudence, however, suggests that there may be a modification required in circumstances where there is a challenge being made to primary legislation. (See *Dowling* cited above). The strength of the parties' respective cases may also arise for further consideration in the context of the assessment of the balance of justice or the balance of convenience. The second matter to be considered is the adequacy of damages. The third matter, then, is the balance of convenience or the balance of justice as it is sometimes referred to.

12. There is agreement between the parties that the applicant in these proceedings has made out an arguable case for the relief sought both in terms of the challenge to the individual administrative decisions, and, more generally, to the underlying legislation. Neither respondent, of course, concedes the challenge or concedes that the case is particularly strong, but it is accepted that the first limb of the test has been met by the applicant. In turn, it is accepted by the applicant itself that there is an arguable defence to the challenge to the legislation insofar as it is necessary to consider the strength of the defence in accordance with the judgment of the Supreme Court in *Dowling*.
13. The question of the adequacy of damages does not really arise for consideration in the present case. This is because the interests relied upon by the respective parties in support of their positions are not financial or commercial interests. This is a crucial distinction between the facts of the present case and those of *Jennings v. An Bord Pleanála*. The applicant is an environmental non-governmental organisation, a so-called ENGO, and its interest in pursuing these proceedings is to protect and prevent what it perceives to be a breach of European environmental law in respect of, in particular, a priority habitat type.

14. The local authority seeks to carry out the flood relief works in the public interest, having regard in particular to public safety, and the need to protect a number of residential dwellings which are affected by flooding from the protected sites. More broadly, the local authority also seeks to rely on the public interest in upholding administrative decisions, citing in particular the judgment of the Supreme Court in *Okunande*. The State Respondents, in turn, rely on the public interest in upholding legislation which has been enacted by the Oireachtas, and, therefore, enjoys a presumption of validity.
15. For the reasons explained more fully by D. Browne in *Simons on Planning Law* (Round Hall, 2021), damages will rarely be a consideration in environmental litigation because an applicant for judicial review will not generally be entitled to recover damages in the proceedings. See §12.1046 and §12.1047 from Mr. Browne's book as follows:

“The question of the adequacy of damages (which can be decisive in private law proceedings) will usually not be relevant in judicial review proceedings insofar as the applicant is concerned. This is because the fact that a decision is invalid does not per se entitle an applicant to an award of damages; it is necessary that the applicant establish some *additional* element in order to found a claim in tort (for example, for misfeasance of public office or for negligence). In practice, it is very unusual for any applicant to recover damages against a planning authority or An Bord Pleanála. This is because it will be difficult to demonstrate that either body owes a duty of care to the individual applicant: the discharge of duties under the planning legislation is almost always regarded as being done in the public interest, and not for the protection of any particular group, e.g. developers, landowners, etc. Indeed, in most cases, an applicant will not even bother to include a claim for damages in his or her statement of grounds.

Given that an applicant is unlikely to achieve an award of damages following a full hearing of the judicial review proceedings, even if his claim that the decision is ultra vires is well founded, it would be anomalous to require a respondent to provide an undertaking as to damages on an

interlocutory basis. This is because if an undertaking as to damages was given to the applicant, and the applicant were ultimately to succeed at the full hearing, then the respondent decision-maker and/or the developer would have to pay monetary compensation for any loss suffered by the applicant in the interim. Thus the respondent and/or developer would have incurred a liability to the applicant in circumstances where the general rule is that no such liability exists.”

\*Footnotes omitted.

16. It seems, therefore, that the outcome of the present application will turn largely on the balance of justice.

## **DISCUSSION AND DECISION**

17. The applicant for judicial review alleges that there is a risk of serious and irreparable harm to a European Site, to wit an Annex I priority habitat type, were the works to go ahead. The applicant has put in affidavit evidence from experts which suggests that even insofar as the construction phase is concerned there is a risk to a number of European Sites, i.e. the Lough Funshinagh SAC and the Lough Ree SAC / SPA, from matters such as, *inter alia*, the introduction of non-native invasive species (a matter raised by the local authority’s own consultants in the context of the works in the summer of 2021); waste; and a risk to water quality. See, in particular, paragraphs 33; 34; and 41 through to 46 of Dr. William O’Connor’s affidavit.
18. The applicant is also highly critical of the fact that the proposed works incorporate what it characterises as unauthorised works carried out in the summer of 2021. It is said, in particular, that this feature of the proposed development undermines any claim on the part of the local authority that its actions should enjoy a presumption of validity or regularity.



19. On the other side of the scales, the local authority relies on the fact that the increased water levels at the Lough Funshinagh SAC have in recent years resulted in flooding events. These have affected the use of the local road and a number of individual dwelling houses. The local authority relies on public health and safety, and a risk to human life, as factors in support of allowing it to carry out the works in the interim. It is said that because of logistical considerations the works must be carried out and completed during the spring months if there is to be any alleviation of the flood risk this coming winter. Put otherwise, if the carrying out of the works is delayed until after the hearing of these judicial review proceedings in May 2022, it will then be too late to carry out any works of benefit for this year.
20. The local authority relies, more generally, on the public interest in upholding administrative decisions, citing the judgments in *Okunande* and *Jennings*.
21. Insofar as the evidence is concerned, counsel on behalf of the local authority submits that most of the evidence on the part of the applicant is directed to the supposed impact of the operational phase of the flood relief scheme. The local authority has indicated to the court and to the other side that it is prepared to hold off commencing the operational phase, i.e. the pumping out of waters from Lough Funshinagh, until further order of this court. The only matter to be considered at this stage, therefore, according to the local authority, is the impact of the construction phase. It is said that the construction works are uncontroversial and that there is evidence before the court that no issue has arisen thus far given that the works were carried out in the summer of 2021 and refuting the allegations made by the other side in particular Dr. O'Connor.

22. The circumstances of this case present a very real dilemma for the court. If the court refuses interlocutory relief, and the applicant for judicial review is ultimately *successful*, then the court will have allowed works to be carried out in the vicinity of two protected European Sites without the proper procedures having been gone through. Moreover, on the applicant's affidavit evidence, there is a risk that actual damage will have been caused to the European Sites.
23. Conversely, if the court grants interlocutory relief, and the application for judicial review is ultimately *unsuccessful*, then the carrying out of the flood relief works would have been delayed with the practical consequence that no flood relief alleviation will have been provided for this coming winter of 2022.
24. The court must endeavour, therefore, to navigate its way to the result which causes the least risk of injustice. The first thing which the court has done is to facilitate an early hearing of these proceedings. The case is now listed for hearing, for four days, commencing on 2 May 2022. Whereas the court would have been in a position to offer the parties an even *earlier* trial date, this is a difficult and complicated case and in order to ensure justice the parties have to be afforded sufficient time to prepare their affidavit evidence and thereafter their written legal submissions. The date allocated for the hearing is the earliest which coincides with the timetable suggested by the parties themselves.
25. For the reasons which follow, I have decided to grant interlocutory relief restraining the carrying out of any further works. This case turns on the balance of justice. The principal determinant of whether or not to grant interlocutory relief must be the impact on the two protected European Sites, including, in particular, the Annex I priority habitat type. I am satisfied on the affidavit evidence before the court that there is a real risk that were interlocutory relief to

be refused there could be negative effects on the two European Sites. The applicant has put in sufficient expert evidence in this regard to persuade the court, at this interlocutory stage, that there is such a risk.

26. This evidence has only been engaged with to a limited extent by the evidence put in by the local authority. It has to be said that the local authority's evidence in this regard is far from satisfactory. The principal affidavit has been sworn by the chief executive himself, who is not an expert and is certainly not an independent expert.
27. An attempt was then made to shore up this evidential deficit by the filing of what is described as a verifying affidavit by one of the consultants retained by the local authority. With respect, this is not an appropriate way to proceed. If expert evidence by the other side is to be engaged with then an affidavit to that effect should be filed. It is not good enough for an expert to echo the views expressed by another unqualified deponent. Moreover, it is unsatisfactory that the evidence has been put in by the very firm of consultants whose screening assessments are impugned in these proceedings. Without in any way casting aspersions on their professional integrity, this evidence cannot be regarded as independent in the specific sense that that term is used in the context of the legal requirements for expert evidence. In effect, it is the consultants' decision-making and assessment which is under challenge in these proceedings. (The chief executive of the local authority simply adopted, without modification, the screening assessments carried out by the consultants, in his impugned order of 14 October 2021). Therefore, the consultants are, to that extent, identified with the decision which is the subject-matter of these proceedings.

28. If the local authority had wished to engage with the independent expert evidence provided by the other side, it should have retained an independent outside expert not somebody who is themselves enmeshed in the judicial review proceedings. This is especially so where one of the fundamental issues raised in these proceedings is an alleged lack of independence in respect of the decision-making whereby the local authority purported to authorise its own development.
29. It is also a cause of concern that, as emphasised by counsel for the applicant, the affidavit evidence of the local authority is predicated upon the contention that Lough Funshinagh is not, in fact, a “*turlough*”. The contention is advanced notwithstanding that this is the precise habitat type for which the SAC has been designated: see European Union Habitats (Lough Funshinagh Special Area of Conservation 000611) Regulations 2019 (SI No. 211 of 2019).
30. Even overlooking these evidential defects, I am satisfied that the most that can be said in favour of the local authority is that there is a conflict of expert evidence. That is not a conflict which this court can resolve on an interlocutory application. The proper approach is similar to that adopted by the Court of Justice in Case C-121/21 R., *Czech Republic v. Republic of Poland*. See, in particular, paragraphs 59 and 60 of the order as follows:

“In that regard, the Court recalls that the procedure for interim relief is not designed to establish the truth of complex facts that are very much in dispute. The Court hearing an application for interim measures does not have the means necessary in order to carry out such examinations and in numerous instances it would be difficult for it to manage to do so in good time (order of 20 November 2017, *Commission v Poland*, C-441/17 R, EU:C:2017:877, paragraph 54).

In addition, the court hearing an application for interim relief must postulate, solely for the purposes of assessing urgency, without this involving it taking any position as regards the merits of the pleas put forward in the main action by the

applicant for interim relief, that those pleas might be upheld. The serious and irreparable damage whose likely occurrence must be established is that which would result, where relevant, from a refusal to grant the interim measures sought in the event that the main action was subsequently successful (order of 8 April 2020, *Commission v Poland*, C-791/19 R, EU:C:2020:277, paragraph 83 and the case-law cited).”

31. I also rely on the importance of the precautionary principle, as referred to in paragraph 71.
32. Counsel on behalf of the local authority has sought to contrast what he says is the detailed evidence put in in the *Czech Republic* case with the evidence in the present case. With respect, that misses the point. In the *Czech Republic* case, there was an ongoing situation involving mining and flooding which had lasted for a number of years, and it was precisely because of the ongoing status that it was possible to put in detailed evidence. Here, of course, the works have only recently commenced, albeit that some of the works were carried out in the summer of 2021. In order to ensure effective judicial protection, it would be unreal and unreasonable to expect an applicant to prove to a very high standard damage to a European Site in circumstances where the very point that the applicant is making is that such risks cannot be ruled out without first carrying out a detailed assessment under the EIA Directive and the Habitats Directive.
33. It seems to me that the evidence put in by the applicant is sufficient for the purpose of the interlocutory application to justify the grant of interlocutory relief.
34. It is next necessary to consider whether the environmental risk is outweighed by some other public interest factor, including most relevantly the issues of human health and safety raised by the local authority. Having carefully considered these matters, I have come to the conclusion that the balance lies in favour of the grant of interlocutory relief. The issues relied upon by the local authority are ones

which it has been aware of since at the very latest June and July 2020. The delay in carrying out and completing lawful flood relief works has been entirely caused by the local authority's own actions, in particular, its misstep in attempting illegally to use the procedure under the Local Authorities (Works) Act 1949 in the summer of 2021. Had the local authority, instead, taken the obvious course of applying to An Bord Pleanála, it is likely that the flood relief works would now have been finished within time.

35. I am satisfied, therefore, to rest my decision on the above considerations. For completeness, however, and given that it was fully argued before me, I propose to make some comment on the strength of the case.
36. It is clear from the judgment of *Okunande* itself (at paragraph 95), and, more recently, from the judgment of the Supreme Court in *Krikke*, that a court hearing an interlocutory injunction application is entitled, when it comes to the balance of justice, to consider the strength of the parties' respective cases especially if one party's case is particularly strong. As O'Donnell J. (as he then was) points out in *Krikke*, by reference to his own judgment in *Merck Sharp and Dohme v. Clonmel Healthcare* [2019] IESC 65 (at paragraph 62):

“if the question of adequacy of damages is evenly balanced, it may not be inappropriate to consider the relative strengths and merits of each party's case as it may appear at the interlocutory stage. Courts are correctly reluctant to express views in cases which are to come to trial. However, it would be absurd if this rule of abstention were to result in a court conducting an agonised and necessarily imperfect assessment of a number of variable factors in a field with which it has little familiarity, and where the evidence is indirect, written and untested, all the while averting its attention from the area (perhaps of pure law) in which it can justifiably claim expertise.”

37. There are at least two aspects of the applicant's case which present to me as being very strong. They are as follows. The first is in relation to the inclusion

in the proposed works of construction works previously carried out under the flawed development consent in the summer of 2021. The project, as envisaged in the spring and summer of 2021, was one which the local authority's own consultants appeared to have thought required screening and assessment. (See statement of grounds in first set of judicial review proceedings). Indeed, the implication seems to have been that the matter would have to go to An Bord Pleanála, and that the development consent may, in fact, have had to have been dealt with under Article 6(4) of the Habitats Directive.

38. Instead, the local authority purported to rely on legislation which was clearly inapplicable, i.e. the Local Authorities (Works) Act 1949. Tellingly, the local authority did not even attempt to stand over that decision when the matter came before the High Court on 25 August 2021.
39. The works, obviously, were only partially completed in the summer of 2021, but certain of the works remain *in situ* including, relevantly, some 800 metres of pipeline.
40. It is apparent from the case law of the Court of Justice that there are limits to the circumstances in which development which has been carried out in breach of EU environmental law can be regularised. This is evident, in particular, from the judgment in Case C-215/06, *Commission v. Ireland*, EU:C:2008:380 (at paragraphs 56 and 57):

“While Community law cannot preclude the applicable national rules from allowing, in certain cases, the regularisation of operations or measures which are unlawful in the light of Community law, such a possibility should be subject to the conditions that it does not offer the persons concerned the opportunity to circumvent the Community rules or to dispense with applying them, and that it should remain the exception.

A system of regularisation, such as that in force in Ireland, may have the effect of encouraging developers to forgo ascertaining whether intended projects satisfy the criteria of Article 2(1) of Directive 85/337 as amended, and consequently, not to undertake the action required for identification of the effects of those projects on the environment and for their prior assessment. The first recital of the preamble to Directive 85/337 however states that it is necessary for the competent authority to take effects on the environment into account at the earliest possible stage in all the technical planning and decision-making processes, the objective being to prevent the creation of pollution or nuisances at source rather than subsequently trying to counteract their effects.”

41. Whereas a Member State does have some discretion to regularise breaches, it can only do so in a manner which does not compromise European environmental law or incentivise developers to fail to undergo screening. On the facts of Case C-215/06, what was at issue was screening for the purposes of the EIA Directive, but the same logic applies to the Habitats Directive.
42. The fact of the matter is that the local authority carried out development works in the summer of 2021 which were clearly in breach of the requirements of EU law. There was a failure to carry out proper screening as required under both the Habitats Directive and the EIA Directive. The local authority now seeks to capitalise upon its having carried out those works to assist it to complete the current version of the project. It is intended to incorporate those works into the project.
43. I am not deciding the point at this stage as this is only an interlocutory application, but there is a strong argument that that approach is contrary to EU law. EU law requires that there be a remedial assessment carried out which is both forward-looking and backward-looking. That has not happened in this case. The requirement for a forward- and backward-looking remedial assessment is to be found in judgments including Case C-196/16, *Comune di Corridonia*,



EU:C:2017:589; and, most recently, the second of the *Derrybrien* judgments: Case C-261/18, *Commission v. Ireland (Derrybrien Wind Farm)*, EU:C:2019:955. I am satisfied that there is a very strong argument in relation to this aspect of the case.

44. The second aspect of the case which appears to me to be very strong is in relation to the use of the “*emergency situation*” exception under the Local Government Act 2001 and Section 179 of the Planning and Development Act 2000.
45. Article 1, paragraph 3 of the EIA Directive provides as follows:

“Member States may decide, on a case-by-case basis and if so provided under national law, not to apply this Directive to projects, or parts of projects, having defence as their sole purpose, or to projects having the response to civil emergencies as their sole purpose, if they deem that such application would have an adverse effect on those purposes.”

46. Counsel on behalf of the applicant has helpfully referred me to the guidance document regarding the application of exemptions under the EIA Directive published by the European Commission in the Official Journal on 14 November 2019 (C/2019/8014). In particular, I have been referred to the following passage:

“The exemption therefore covers only projects that respond to civil emergencies, not projects introducing measures designed to prevent such emergencies. It would generally be justified only if the emergency that gave rise to the project could not have been foreseen or, if it could have been foreseen, the project could not have been undertaken earlier. For example, an anti-flooding project might only be considered a measure to tackle a potential emergency sufficiently urgent to warrant the exemption being invoked, if it was impossible to undertake it earlier. *However, if flooding has occurred in the same place on several occasions and the project is a belated measure taken to stave off a potential future emergency, then the exemption is unlikely to be justified.\** On the other hand, there could be emergencies, including some natural disasters, which could have been anticipated but not prevented and which give rise to projects (such as urgent/immediate reconstruction works or works to prevent further damage) that might well qualify for the exemption.”

\*Emphasis added.

47. It seems to me that there is a strong argument that the proposed flood relief works do not represent an emergency as understood by the EIA Directive. There is a related argument to the effect that it is not appropriate for a local authority to self-authorise what is without doubt a highly controversial scheme of development. The chief executive of the local authority, by purporting to deem this an emergency situation, has by-passed crucial safeguards provided under domestic law to ensure the independence of decision-making in respect of local authority own development. In particular, the facility which is provided otherwise under Article 120(3) of the Planning and Development Regulations 2001—whereby a concerned member of the public can refer local authority development to An Bord Pleanála for a screening determination—has been by-passed. It seems to me that, having regard to Article 9a of the EIA Directive, there is a strong argument that this is contrary to European law.

48. Article 9a of the EIA Directive provides as follows:

“Member States shall ensure that the competent authority or authorities perform the duties arising from this Directive in an objective manner and do not find themselves in a situation giving rise to a conflict of interest.

Where the competent authority is also the developer, Member States shall at least implement, within their organisation of administrative competences, an appropriate separation between conflicting functions when performing the duties arising from this Directive.”

49. There is a strong argument that there is just such a conflict of interest within the local authority in Roscommon County Council, and that for that reason it is inconsistent with the EIA Directive to allow the local authority to self-authorise

projects. The final resolution of this issue is a matter for determination at the trial of the action.

### **POSITION OF STATE RESPONDENTS**

50. Insofar as the position of the State Respondents is concerned, I have had very helpful submissions this afternoon from counsel for the State, who has explained the operation of the relevant legislation and has explained how it is open to interpret that legislation in conformity with the EIA Directive. It seems to me that, having regard to these submissions, that the real dispute is as to whether the particular project at issue here can properly be deemed to be an emergency situation. In other words, it seems to me that the real dispute is in relation to the challenge to the chief executive's decision of 14 October 2021. The arguments which the applicant makes as to why it is not an emergency situation are really ones which go to the validity of the impugned decision, rather than exposing any potential weakness in the underlying legislation.
51. I flag this now because the parties may wish to consider whether a form of modular trial is appropriate in relation to that issue, i.e. this court at the hearing on 2 May 2022 would address only the administrative law challenge; and leave over for a future hearing, if necessary, any challenge to the underlying legislation. It seems to me that such an approach, if it recommended itself to the parties, would result in a foreshortening of the hearing and of the time required to produce a judgment. It might also save legal costs in that, depending on the outcome of the administrative challenge, it may not then be necessary to embark upon a consideration of the consistency of the legislation with the European Directives. I simply flag this as something for consideration by the parties.

**CONCLUSION AND FORM OF ORDER**

52. For the reasons explained, an order will be made restraining the carrying out of any further construction works in respect of the proposed flood relief works pending the hearing and determination of these judicial review proceedings.
53. The question of the costs of today's hearing will be adjourned until 17 February 2022 at 10.30 am.

*Appearances*

James Devlin, SC, Stephen Dodd, SC and John Kenny for the applicant instructed by FP Logue Solicitors

Neil Steen, SC for the first named respondent instructed by McCann Fitzgerald LLP  
Rory Mulcahy, SC and Aoife Carroll for the second and third named respondents instructed by the Chief State Solicitor

Approved  
Gemma S. Mans