

APPROVED

[2023] IEHC 784



THE HIGH COURT
JUDICIAL REVIEW

2017 No. 644 J.R.

BETWEEN

PETER SWEETMAN

APPLICANT

AND

ENVIRONMENTAL PROTECTION AGENCY

RESPONDENT

IRISH WATER

NOTICE PARTY

JUDGMENT of Mr. Justice Garrett Simons delivered *ex tempore* on 9 October 2023

1. This matter comes before the court by way of an unusual application. In essence, the moving party, Mr. Sweetman, seeks to have the court provide an advisory opinion to the Environmental Protection Agency (“EPA”) in advance of the EPA reaching a decision on an application in respect of a review of a waste water

NO REDACTION REQUIRED

discharge licence. That is the essence of the application set out in a notice of motion which is made returnable before the court.

2. The key reliefs sought in that motion are as follows. In effect, the court has been asked to give declarations, in advance, in relation to the following three questions:
 - (a). Whether the review of the licence requires a remedial assessment of the direct and indirect impacts of the licensed activity pursuant to the Environmental Impact Assessment Directive (Directive 2011/92/EU);
 - (b). Whether the review of the licence requires a remedial assessment for the purposes of the Habitats Directive (Directive 92/43/EEC); and
 - (c). Whether the EPA has the power, statutory or otherwise, to conduct such a remedial assessment.
3. To explain how these declarations have been formulated, it is necessary to go back to the principal judgment delivered in these proceedings: *Sweetman v. Environmental Protection Agency* [2019] IEHC 81. That judgment was delivered in February 2019. As appears from that judgment, this court held that a “*modification*”—to use a neutral term—which had been made to the existing licence was incorrectly made in that it had purportedly been made by way of a technical amendment. The key feature of a technical amendment in this context is that it did not allow for public participation. This court found that the modification which had been made in respect of the licence was invalid and this court ultimately made a declaration to that effect.
4. Crucially, however, the court did not make an order setting aside the technical amendment. The reasons for this are explained in the principal judgment at paragraphs 88 and 89 as follows:

“For the reasons set out above, I have concluded that the purported amendment to the licence under regulation 33 was *ultra vires* the EPA. The matter should have been dealt with instead either by way of the licensee applying for a revised licence, or by the EPA invoking the revision procedure in accordance with regulation 14 because of the breach of condition. As it happens, the delay in these judicial review proceedings coming on for hearing meant that by the time the case came to trial, the six-year period on the mandatory review of the 2012 licence had already lapsed. The delay also meant that in relation to one of the principal complaints, namely the completion of the WWTP, the licence conditions have belatedly been complied with. The WWTP is completed and was commissioned early in December 2017.

Against this updated background, I do not propose to grant an order of *certiorari* setting aside the decision of May 2017 (at least not at this time). It seems preferable instead that the EPA now carry out the statutory review pursuant to regulation 14, and make such revisions as it considers necessary to the licence having complied with the public participation requirements. The parties will have liberty to apply for such further relief, if any, as may be required following the completion of the statutory review of the licence.”

5. In other words, rather than quash the technical amendment, the entire licence was going to be reviewed. That would allow the EPA to consider, in particular, a factual change in circumstances whereby the long awaited waste water treatment plant was up and running. That review process has taken longer than, certainly, I had anticipated and I would say longer than even any of the parties had anticipated. At all events, the process has now reached the stage wherein an environmental impact assessment report (“*EIAR*”) has been submitted to the Agency and the public have been invited to make submissions in relation to that. Relevantly, Mr. Peter Sweetman, who is the applicant in these proceedings, has made a submission. Mr. Sweetman makes the point in that submission that a form of remedial assessment will be required in circumstances where he says there was a period of time when the discharges being made were unauthorised

and that goes back to the invalidity of the technical amendment. Mr. Sweetman also suggests that there is a lacuna in the legislation. That is important, Mr. Sweetman seems to be saying that the Waste Water Discharge (Authorisation) Regulations 2007 (SI 684 of 2007) may be deficient in that they do not make express provision for the carrying out of remedial assessment. What is required by remedial assessment has been considered in a number of judgments of the Court of Justice of the European Union (“CJEU”), including, most relevantly, Joined Cases C-196/16 and C-197/16, *Comune di Corridonia*.

6. (It should be explained that, in other legislative contexts, the need to carry out a remedial assessment, which is both retrospective and prospective, has resulted in the introduction of legislative amendments which expressly address the need for a retrospective element: see, in particular, the approach taken to “*substitute consent*” under Part XA of the Planning and Development Act 2000 (as amended). An equivalent amendment has not been made in the specific context of the Waste Water Discharge (Authorisation) Regulations 2007. It is a moot point whether a legislative amendment is required).
7. The current state of play, therefore, is that the environmental impact assessment report is in; submissions are in; the Agency intends to prepare, as I understand it, an inspector’s report between now and the end of the year; and the Agency hopes to be in a position to issue a decision—one way or another—on the licence-review in early 2024.
8. Mr. Sweetman, the applicant herein, seeks to pre-empt that decision-making process before the EPA by inviting the court now to make certain declarations in relation to the requirement for a remedial assessment. The manner in which the declarations have been framed in the notice of motion is less emphatic than

in Mr. Sweetman's submission to the EPA. It is not suggested, in the notice of motion, that there is, in fact, a lacuna in the legislation, i.e. the Waste Water Discharge (Authorisation) Regulations 2007, in respect of remedial assessment. Rather, there is a concern expressed that there *might* be a lacuna. That is significant because, as counsel on behalf of the EPA correctly points out, there is, in fact, at the moment no live dispute between the parties in relation to the issue. Things might be different had Mr. Sweetman taken an emphatic view and said "*Look, the legislation is deficient, i.e. it does not provide for a remedial assessment, and it is accordingly not possible for the Agency to deliver a lawful decision in relation to this licence-review*". But that is not the position that has been adopted before the court. That is important because, when we come to look at the case law, the question is whether a process has gone irremediably wrong. If so, then court intervention may be appropriate.

9. So turning then to the authorities, there is very little disagreement between the parties in relation to the relevant law. I think it is fair to say that the leading judgment is the judgment of Costello J. in the Court of Appeal in *Spencer Place Development Company Ltd v. Dublin City Council* [2020] IECA 268. In that judgment, Costello J. approves the judgment of the High Court (Humphreys J.) in *North East Pylon Pressure Campaign Ltd v. An Bord Pleanála (No. 1)* [2016] IEHC 300.
10. Costello J. makes the point (at paragraph 68) that the general rule is that a statutory decision-making process should be pursued to the end and that judicial review should not be sought at an earlier stage unless there are exceptional circumstances.

11. Applying those principles to the facts of the present case, it is necessary for the moving party, Mr. Sweetman, to identify some exceptional circumstance which would justify court intervention now, as opposed to once the decision on the licence-review is reached.
12. In principle, there are two possible bases upon which such an intervention might have been contended for. The first would be to say that the decision-making process has gone irremediably wrong. As is clear from the judgment of Clarke J. in the Supreme Court in *Rowland v. An Post* [2017] IESC 20, [2017] 1 I.R. 355, there will be circumstances where it is obvious, even at an early stage in a process, that it has gone off the rails and that it is not possible that a lawful decision will be reached at the end of the process. See paragraphs 13 and 14 of the reported judgment as follows:

“However, the practical consideration which leans against a court interfering with an ongoing process may point in the opposite direction in a limited number of cases where the conduct of the process, up to the point when the court is asked to review it, is such that it is clear that the process has gone irremediably wrong. In such a case, rather than the practicalities pointing to letting the process come to its natural conclusion and, if necessary, being reviewed by a court thereafter, those same practicalities point to stopping the process and thus saving all concerned from engaging in what must necessarily turn out to be the fruitless exercise of continuing a process whose conclusions if adverse are almost certain to be quashed.

However, in order for that latter consideration to become the dominant factor in the court’s assessment, it follows that the court must be satisfied that it is clear that the process has gone wrong, that there is nothing that can be done to rectify it and that it follows that it is more or less inevitable that any adverse conclusion reached at the end of the process would be bound to be unsustainable in law. In any case where the plaintiff cannot establish that the case meets that standard it will ordinarily be inappropriate for the court to intervene at that stage but rather the process should be allowed to continue to its natural conclusion at which stage it can, if any party wishes it, be reviewed.”

13. Those comments were made in the specific context of an employment law dispute, but I think that the same principle applies logically to public law proceedings. There may be circumstances in which it is apparent and beyond argument, even at an early stage in the process, that it has gone wrong and cannot be corrected. Therefore, it may be appropriate for the court to intervene sooner rather than later when it is inevitable that there will be judicial review and not only that but a successful judicial review. In theory, it might have been open to Mr. Sweetman to argue forcefully, by reference to the wording of the Waste Water Discharge (Authorisation) Regulations 2007, that the governing legislation was deficient, did not comply with European law and that it could not produce a lawful outcome. But Mr. Sweetman has not taken that approach, he has not made that argument. Even if he had, Mr. Sweetman would also have to contend with the possibility that the legislation could be interpreted in a way which is compliant with European law. In other words, even though the legislation might not *expressly* provide for remedial assessment; applying the principles laid down in cases as far back as *Marleasing* there is an interpretative obligation which would have to be borne in mind. It is also possible then that even if the legislation could not be interpreted in a particular way, the Agency might put in place some sort of *ad hoc* procedure whereby it would carry out remedial assessment notwithstanding that the legislation did not expressly provide for that. In other words, the EPA might as an emanation of the State give direct effect or direct application to the two directives.
14. But that is not the approach that Mr. Sweetman takes. I do not make any criticism of his approach, but it is important that he did not make that argument

and therefore the first heading or first possibility of exceptional circumstances does not arise.

15. The only supposed exceptional circumstance which is called in aid in this case is to say that the entire review process is itself a product of the judgment delivered in February 2019. Therefore, or so it is said, this is a different type of case, it is a case where there already has been an invalid decision made, i.e. an invalid amendment of the licence, and the court retains seisin of the matter. This, it is said puts the case into not quite a unique category but certainly into a *sui generis* category.
16. With respect, that analysis is not borne out by a consideration of the principal judgment. It is perfectly clear from the principal judgment—especially from paragraph 89 thereof—that the court only intended that the parties would have liberty to apply *at the end* of the statutory process. That is expressly stated at paragraph 89. It is made crystal clear in the terms of the court order as drawn up. So I do not accept that the procedural history puts the court in the position of in some way managing at a granular level the process. That is not what the court intended. The court did, certainly, give liberty to apply, but the court always intended that the review process would be completed and at that stage the appropriate remedies could be considered.
17. I am not satisfied, therefore, that an exceptional circumstance has been made out. It seems to me that this is a case where the general rule applies, i.e. the statutory process should be allowed to run its course. There is no benefit to the parties in the court intervening and it is inappropriate to do so. That would require the court to consider factual matters which the Agency has not yet had an opportunity to consider.

18. The refusal of the reliefs sought in the notice of motion will not cause any prejudice to the parties. Mr. Sweetman has raised the issue of a remedial assessment squarely in his submission to the EPA. The Agency will have to deal with that in its decision. It will have to say, one way or the other, whether remedial assessment is required and will have to make some finding or express some view on whether the governing legislation, i.e. the Waste Water Discharge (Authorisation) Regulations 2007, allows it to carry out remedial assessment which is compliant with European law. If at the end of that process, Mr. Sweetman is dissatisfied with the outcome, then he can apply for judicial review. But, of course, it is quite possible that the Agency might refuse the application to review the licence. Indeed, one of the reasons for the general rule against allowing judicial review proceedings prematurely is that the outcome of the relevant statutory process might be satisfactory to the putative litigant. For example, the Agency may refuse the licence-review outright. Alternatively, the Agency may carry out remedial assessment of a type with which Mr. Sweetman is satisfied and is in accordance with EU law. That is why the courts exercise restraint, it is inappropriate to intervene in circumstances where no legal proceedings may ever be required.
19. Timing is also a consideration in this case. As it happens, we have now reached the stage where the hearing of the motion falls shortly before the intended decision on the licence-review. The motion is heard today on 9 October 2023; the EPA's decision is anticipated in January 2024. Therefore, for the sake of three months, it seems to me there can be no question of any prejudice in allowing the statutory process to run its course.

20. I will put the matter in for mention early in 2024. If at that stage no decision has been reached, and if Mr. Sweetman at that stage wishes to agitate a point in relation to delay, he may do so. I emphasise that that is a separate issue to that raised in the notice of motion. Clearly, there has been a significant lapse of time since the principal judgment was delivered in February 2019, and by next year it will almost be five years to the day. At that stage, if Mr. Sweetman wishes to make arguments in relation to the delay he can certainly do so. I anticipate already from the submissions made by counsel on behalf of Irish Water, Ms. Murray, SC, that there will be an answer proffered in relation to that. Ms. Murray has explained to me that it took time for example to carry out various modelling etc.
21. The issue of delay has not been raised in the motion. I want to emphasise that, that is not what the motion dealt with today. The motion was effectively seeking a form of pre-emptive or advisory opinion from the court and for the reasons already outlined I refuse that application.

POSTSCRIPT

22. Following submissions from the parties, the proceedings were adjourned until 5 February 2024. The motion was dismissed with no order as to costs.