Friends of the Curragh Environment Limited, Applicant v. **An Bord Pleanála**, Respondent and **The Trustees of the Turf Club, Kildare County Council, Percy Podger and Associates** and **Geraldine McCann**, Notice parties [2006] IEHC 243, [2006 No. 240 J.R.]

High Court 14th July, 2006

Practice – Costs – Protective costs order – Criteria for determining application – Whether issues of general public importance raised.

European Union – Directive – Directive not implemented in compliance with deadline – Whether Directive directly effective –Whether sufficiently clear – Whether capable of horizontal effect – Council Directive 85/337/EEC, art. 10a – Parliament and Council Directive 2003/35/EC.

The applicant sought leave to judicially review two planning permissions granted by the respondent to the first notice party. Prior to the hearing of the leave application the applicant sought an order protecting it from the payment of any costs in relation to the action *i.e.* a protective costs order, invoking the common law jurisdiction of the court and article 10a of Directive 85/337/EEC on the assessment of certain public and private projects on the environment. Article 10a provided, *inter alia*, that member states should ensure that members of the public concerned had access to a review procedure before a court of law or another independent and impartial body established by law, to challenge the substantive or procedural legality of decisions, acts or omissions relating to the drawing up of certain plans which were subject to the public participation provisions of the Directive. It further provided that "[a]ny such procedure shall be fair, equitable, timely and not prohibitively expensive." The applicant contended that as the State had failed to implement the Directive by the due date, it had direct effect.

Held by the High Court (Kelly J.), in refusing the reliefs sought 1, that, the principles governing protective costs orders were as follows: (1) a protective costs order might be made at any stage of the proceedings, on such conditions as the court thought fit, provided that the court was satisfied that (i) the issues raised were of general public importance; (ii) the public interest required that those issues should be resolved; (iii) the applicant had no private interest in the outcome of the case; (iv) having regard to the financial resources of the applicant and the respondent and to the amount of costs that were likely to be involved, it was fair and just to make the order; and (v) if the order was not made the applicant would probably discontinue the proceedings and would be acting reasonably in so doing; (2) if those acting for the applicant were doing so *pro bono* this would be likely to enhance the merits of the application for a protective costs order. (3) it was for the court, in its discretion, to decide whether it was fair and just to make the order in the light of the considerations set out above.

Reg. v. Lord Chancellor, Ex p. C.P.A.G. [1999] 1 W.L.R. 347 and *R. (Corner House) v. Trade and Industry Secretary* [2005] EWCA Civ 192 [2005] 1 W.L.R.

2600 followed; *Village Residents Association Ltd. v. An Bord Pleanála (No.2)* [2000] 4 I.R. 321 approved.

2. That the issues raised in the case would be resolved by the application of well established legal principles and caselaw and did not raise issues of general public importance. As such, it was not in the public interest that such issues as were raised be resolved with the aid of a protective costs order.

3. That article 10a of Directive 85/337/EEC, as inserted by Directive 2003/35/EC, was not sufficiently clear, precise and unconditional to render it capable of having direct effect.

Quaere: Whether article 10a of Directive 85/337/EEC, as inserted by Directive 2003/35/EC, applied to judicial review proceedings?

Cases mentioned in this report:-

Arklow Holidays Ltd. v. Bord Pleanála [2006] IEHC 15, [2007] 1 I.L.R.M. 125.

Battle v. Irish Art Promotion Centre Ltd. [1968] I.R. 252.

Becker v. Finanzamt Münster-Innenstadt (Case 8/81) [1982] E.C.R. 53.

Boland v. An Bord Pleanála [1996] 3 I.R. 435.

Kenny v. An Bord Pleanála (No. 1) [2001] 1 I.R. 565.

Lancefort Ltd. v. An Bord Pleanála (No.2) [1999] 2 I.R. 270; [1998] 2 I.L.R.M. 401.

Marshall v. Southampton & South-West Hampshire Area Health Authority (Case 152/84) [1986] E.C.R. 723.

Reg. v. Lord Chancellor, Ex p. C.P.A.G. [1999] 1 W.L.R. 347.

R. (Corner House) v. Trade and Industry Secretary [2005] EWCA Civ 192 [2005] 1 W.L.R. 2600; [2005] 4 All E.R.1.

Village Residents Association Ltd. v. An Bord Pleanála (No.2) [2000] 4 I.R. 321; [2001] 2 I.L.R.M. 22.

Wells v. Secretary of State for Transport, Local Government and the Regions (C-201/02) [2004] E.C.R. I-723; [2004] 1 C.M.L.R. 31.

Motion on notice

The facts have been summarised in the headnote and are more fully set out in the judgment of Kelly J., *infra.*

By motion on notice dated the 2nd March, 2006, the applicant sought orders that it should not be liable for the costs of any party arising from its application for judicial review, that it should not have to furnish security for costs of any party and that it should not have to give any undertakings as to damages.

The matter was heard by the High Court (Kelly J.) on the 25th May, 2006.

Barbara Ohlig-Schäfer, solicitor, for the applicant.

Niamh Hyland for the respondent.

Eamon Galligan S.C. (with him *Caroline Costello*) for the first notice party.

Cur. adv. vult.

Kelly J. 14th July, 2006

Costs

[1] It is unusual to deal with an issue of costs at the commencement of a judgment. It is even more rare to deal with the topic at the beginning rather than the end of litigation. But that is what I am asked to do in this case.

[2] These are not the only unusual aspects of the matter. I am asked to depart from the general rule, which has been traditionally accepted in this jurisdiction, that costs are awarded to a successful litigant. Instead, I am asked to make an order, the effect of which, if granted, will be to insulate the applicant from any costs liability to any other party regardless of the outcome of the litigation. In addition, I am asked to make an order absolving the applicant from any obligation to furnish security for costs or to give any undertakings as to damages to any other party to the litigation.

[3] Such orders appear to turn on their head the long accepted view on the awarding of costs in this jurisdiction, as mentioned above. The Irish courts are not alone in their approach. Throughout the common law world the issue of costs is decided at the conclusion of litigation and in general they are awarded to the successful litigant, or, to use the language of lawyers, they follow the event.

[4] But orders of the type sought are not unknown. They are certainly unusual but not unprecedented. They have been considered and granted in a number of common law jurisdictions.

[5] There is just one instance of such an order being sought in this State. It was refused, but the jurisdiction to grant such an order in an appropriate case was acknowledged (*Village Residents Association Ltd. v. An Bord Pleanála (No.2)* [2000] 4 I.R. 321). Indeed the topic was also considered by the Law Reform Commission in its report on *Judicial Review Procedure* (LRC 71-2004).

[6] The applicant here contends that it is entitled to such an order not merely by reference to the principles which have been worked out at common law, but also on foot of certain alleged European legal rights which I shall have to consider in due course.

Background

[7] The applicant is a company limited by guarantee and does not have a share capital. Its principal objects are to "preserve, protect and improve the environment and heritage of the Curragh of Kildare by representing the interests of members of the community of, and owners and users of sheep grazing rights on, the Curragh of Kildare and its environs and to take such legal or other actions as may be considered necessary or desirable to promote such interests".

[8] The first notice party is proposing to develop lands at the Curragh.

[9] The respondent granted two planning permissions to the first notice party in that regard.

[10] It is these permissions which the applicant seeks leave to judicially review.

The planning permissions

[11] Both permissions are dated the 18th January, 2006.

The first grants permission for the realignment of approximately 1.1 km of the R413 road, generally situate to the north of the existing Curragh racecourse complex and to the south of the existing Stand Hotel. The new realigned R413 will include a total of five new accesses along its length as well as a horse and rider underpass. The permission was granted subject to six conditions.

[12] The second decision of the respondent grants permission to the first notice party for the demolition of the western half of the west stand at the Curragh and the construction of a 72 bedroom hotel and ancillary facilities. This permission was granted subject to eleven conditions.

[13] Each decision of the respondent was accompanied by a letter in identical terms signed by an administrative assistant to the respondent.

[14] Each letter is dated the 18th January, 2006. They point out that an order had been made by the respondent under the relevant legislation and that the respondent took the decisions within the specified statutory time period. They say that due to work load constraints it was not possible to sign and issue the order in the appeal on that day. The letters then continue:-

> "In accordance with s. 146(3) of the Planning and Development Act 2000, the Board will make available for inspection and purchase at its offices the documents relating to the appeal within three working days following its decision. In addition, the Board will also make available the inspector's report and the Board direction on the appeal on its website (www.pleanala.ie). This information is normally made available on the list of decided cases on the website on the Wednesday following the week in which the decision is made."

These proceedings

[15] The substantive relief sought in these proceedings is judicial review of the two decisions of the respondent. Pursuant to the provisions of s. 50 of the Planning and Development Act 2000, such an application must be made on notice to the relevant parties.

[16] In this case the originating notice of motion is dated the 2nd March, 2006.

[17] The first three reliefs sought in the notice of motion are those relating to costs which I have already outlined. The remaining parts of it seek the substantive reliefs.

[18] It was agreed by all parties to the litigation that the court should consider the costs orders which are sought, first. Indeed the applicant made it clear on a number of occasions that in the event of it being unsuccessful in obtaining the costs orders it will not proceed further with the judicial review application.

[19] The institution of these proceedings was preceded by an extraordinary application which was made to Laffoy J. That application was apparently made on the 28th February, 2006. The applicant there sought *ex parte* the three reliefs which are the subject of this judgment. Not surprisingly, that application failed.

[20] The originating notice of motion was issued on the 2nd March, 2006 and made returnable in the judicial review motion list for the 27th March, 2006. In the meantime however, the first notice party issued a notice of motion on the 22nd March, 2006, seeking to have the case transferred into the commercial list pursuant to the provisions of O. 63A of the Rules of the Superior Courts 1986.

[21] That motion was heard on the 3rd April, 2006 and I made an order pursuant to the provisions of O. 63A, r. 1(g), of the Rules of the Superior Courts entering the case into the commercial list despite the opposition of the applicant.

[22] I then proceeded to treat the hearing of the motion as the initial directions hearing in accordance with the normal practice in the commercial list.

The statement of grounds

[23] On that directions hearing it was obvious that the statement of grounds accompanying the originating notice of motion fell far short of what is required in such a document. This was so despite the fact that the applicant was represented by a lawyer whose entitlement to practice as such is recognised by the Law Society of Ireland.

[24] A good example of the substandard nature of the document is to be found at para. E where the grounds relied on to support the application for judicial review are required to be set forth. All that is said is that such grounds "are outlined in the affidavit of Percy Podger dated the 2nd March, 2006. They are mainly infringements of European environmental legislation, Irish planning law including procedural matters".

[25] It was accepted that this statement of grounds was not in proper form and accordingly on the 3rd April, 2006, I afforded the applicant an opportunity to mend its hand in that regard. I gave it liberty to put the statement of grounds into proper form and to file it and serve it on all of the relevant parties. I also fixed times for the respondent and the first notice party to file any replying affidavit evidence which they wished and adjourned the directions motion to the 26th April, 2006. The purpose of the hearing on the 26th April was, in the light of all of the affidavit evidence that would then be before the court, to decide whether the costs order sought by the applicant should be determined first or along with the application for leave to apply for judicial review.

The hearing of the 26th April, 2006

[26] The applicant, in purported compliance with the order of the 3rd April, 2006, filed and served a fresh statement of grounds. This fresh statement of grounds is the subject of complaint by the respondent because it is said it seeks to introduce new matter which could not be gleaned from a fair reading of either the original statement or the affidavit of Mr. Podger referred to in it. That new matter it is alleged has now been introduced outside the statutory time limit for the bringing of a judicial review application. Accordingly, a motion has been issued seeking in effect to disallow those parts of the fresh statement of grounds which are said to be new and time barred. I need not deal further with this aspect of the matter in this judgment.

[27] At the hearing on the 26th April, 2006, a strange thing happened. The lawyer on record for the applicant failed to appear and instead Mr. Percy Podger purported to address the court on behalf of the applicant. It appears that this arrangement came about as a result of some agreement between the applicant and its lawyer.

[28] I pointed out to Mr. Podger that it was not open to him, as a member of the company, to appear on its behalf. I explained in some detail to him why this was so having regard to the decision of the Supreme Court in *Battle v. Irish Art Promotion Centre Ltd.* [1968] I.R. 252. Despite his inability to represent the applicant I nonetheless heard what he had to say and gave him considerable leeway in explaining the position of the applicant. I found it difficult to understand why a lawyer on record for the applicant simply did not appear on the day in question and left it to Mr. Podger to do the best he could.

[29] In these circumstances I directed the lawyer to appear in court the following day to explain the position. She did not appear to have a great deal of appreciation of the obligations of a lawyer on record. In any event she remained on record and has appeared for the applicant ever since.

The orders sought

[30] The precise wording of the orders sought by the applicant are as follows:-

"1. an order directing that the applicant shall not be liable for the costs of any other party to the application for leave to take judicial review proceedings and the judicial review proceedings that shall emanate from the initial application for leave, in the matters of the respondent's decisions to grant planning permission in PL09.213787 and PL09.213791 (An Bord Pleanála reference numbers) to the first notice party, as may arise, or for the reserved costs of any such party as may arise in such proceedings;
2. an order directing that the applicant shall not have to furnish security for costs of any other party to all the afore stated sets of proceedings; and
3. an order directing that the applicant shall not have to make any undertakings as to damages or to any other party to the afore stated sets of proceedings."

The orders sought were referred to during the course of the hearing as either pre-emptive costs orders or protective costs orders. The latter description seems to be the more up to date one. I will refer to the order sought as a protective costs order.

Jurisdiction

[31] The first and only time, as far as I can ascertain, that a court in this jurisdiction had to consider a protective costs order was in the case of *Village Residents Association Ltd. v. An Bord Pleanála (No.2)* [2000] 4 I.R. 321.

[32] In that case the High Court (Laffoy J.) held that this court has jurisdiction to make a protective costs order.

[33] In coming to that conclusion she considered in some detail the only authority cited to her in support of the proposition. That was the decision of Dyson J. in *Reg. v. Lord Chancellor, Ex p. C.P.A.G.* [1999] 1 W.L.R. 347.

[34] It is not necessary for me to rehearse the analysis of his judgment carried out by Laffoy J. in *Village Residents Association Ltd. v. An Bord Pleanála (No.2)* [2000] 4 I.R. 321 save to say that I agree with it. In reaching her conclusions Laffoy J. said at p. 330:-

> "While I am satisfied that the court has jurisdiction in an appropriate case to deal with costs at an interlocutory stage in a manner which ensures that a particular party will not be faced with an order for costs against him at the conclusion of the proceedings, it is difficult in the abstract to identify the type or types of cases in which the interests of justice would require the court to deal with the costs issue in such a manner and it would be unwise to attempt to do so. For the reasons adumbrated in the passage from the judgment of Hoffman L.J. quoted by Dyson J. in *Reg. v. Lord Chancellor, Ex p. C.P.A.G.* [1999] 1 W.L.R. 347, I cannot envisage such an approach to a costs issue having any place in ordinary *inter partes* civil litigation. As a broad proposition the principles enunciated by Dyson J. – confining the possibility of making such orders to cases involving public interest challenges, as Dyson J. explained the concept of a public interest challenge, and requiring that the issues raised on the challenge be of general public importance and that at the stage at which it is asked to make the order the court should have a sufficient appreciation of the merits of the claim to conclude that it is in the public interest to make the order – would seem to meet the fundamental rubric that the interests of justice should require that the order be made. Having said that, it may be that in a particular type of case other factors may come into play. For instance, in judicial review proceedings challenging the validity of a decision of An Bord Pleanála or of a planning authority which has no private, as opposed to public, ramifications and, therefore, where what is at issue is a true public interest issue of general importance, perhaps a heritage protection issue or an environmental issue, it might well be that there

would exist policy considerations reflected in legislation which the courts would have to have regard to. The observations of Keane J., as he then was, on the question of *locus standi* in *Lancefort Ltd. v. An Bord Pleanála (No. 2)* [1999] 2 I.R. 270, highlight the multiplicity of factors and considerations which might arise and, for my part, are sufficient to discourage any generalisation as to the circumstances in which it would be appropriate to make a pre-emptive costs order."

[35] Laffoy J. then went on to give reasons for refusing the application in that case. The first involved her finding that the challenge in that case was not a public law challenge in the sense that that concept had been explained by Dyson J. She pointed out that the members of the applicant company there had a private interest in the outcome of the application. Secondly, she was not satisfied that the ground on which the applicant had been granted leave raised an issue of general public importance. Thirdly, she had insufficient information on the merits of the case to conclude that it was in the public interest to make a protective costs order. Finally, she took the view that the making of a protective costs order against the second respondent, which was a private company, would be unjust in the circumstances of that case.

[36] Laffoy J. accepted the definition of a public law challenge for the purpose of a protective costs order as defined by Dyson J. in *Reg. v. Lord Chancellor, Ex p. C.P.A.G.* [1999] 1 W.L.R. 347. In his judgment he said this on that topic at p. 353:-

"The essential characteristics of a public law challenge are that it raises public law issues which are of general importance, where the applicant has no private interest in the outcome of the case. It is obvious that many, indeed most judicial review challenges, do not fall into the category of public interest challenges so defined. This is because, even if they do raise issues of general importance, they are cases in which the applicant is seeking to protect some private interest of his or her own."

Laffoy J. accepted a number of other observations made by Dyson J. First, he made it clear that the discretion to make protective costs orders, even in cases involving public interest challenges, should be exercised only in the most exceptional circumstances. His conclusions as to the necessary conditions for the making of such orders were expressed by him as follows at p.358:-

"I conclude, therefore, that the necessary conditions for the making of a pre-emptive costs order in public interest challenge cases are that the court is satisfied that the issues raised are truly ones of general public importance, and that it has a sufficient appreciation of the merits of the claim that it can conclude that it is in the public interest to make

> the order. Unless the court can be so satisfied by short argument, it is unlikely to make the order in any event. Otherwise, there is a real risk that such applications would lead, in effect, to dress rehearsals of the substantive applications, which in my view would be undesirable. These necessary conditions are not, however, sufficient for the making of an order. The court must also have regard to the financial resources of the applicant and respondent, and the amount of costs likely to be in issue. It will be more likely to make an order where the respondent clearly has a superior capacity to bear the costs of the proceedings than the applicant, and where it is satisfied that, unless the order is made, the applicant will probably discontinue the proceedings, and will be acting reasonably in so doing."

[37] Subsequent to the decision of Dyson J., protective costs orders were considered on a number of occasions in the High Court and in the Court of Appeal in England. The issue arose before the Court of Appeal in December, 2004, in *R. (Corner House) v. Trade and Industry Secretary* [2005] EWCA Civ 192, [2005] 1 W.L.R. 2600.

[38] The court took the opportunity to conduct a comprehensive review of the authorities on the topic of protective costs orders not merely in England but throughout the common law world. The judgment of the court which was prepared by Brooke L.J. was delivered by Lord Phillips M.R. Amongst the authorities considered was the decision of Laffoy J. in *Village Residents Association Ltd. v. An Bord Pleanála (No. 2)* [2000] 4 I.R. 321 and the views expressed by the Irish Law Reform Commission in its 2004 report on *Judicial Review Procedure*. The judgment noted that the Commission recommended that the jurisdiction should be exercised only in exceptional circumstances which it did not attempt to define.

[39] Lord Phillips, in considering the judgment of Dyson J. in *Reg. v. Lord Chancellor, Ex p. C.P.A.G.* [1999] 1 W.L.R. 347 accepted his definition of public interest challenges. Of that definition he said at para.72:-

> "We believe that this definition can usefully be incorporated into the guidelines themselves. Dyson J. said that the jurisdiction to make a protective costs order should be exercised only in the most exceptional circumstances. We agree with this statement, but of itself it does not assist in identifying those circumstances."

[40] The Court of Appeal went on to endorse the bulk of the guidelines which had been adumbrated by Dyson J. but recast them.

At para. 74 of the judgment Lord Philips said:-

> "We would therefore restate the governing principles in these terms:

(1) A protective costs order may be made at any stage of the proceedings, on such conditions as the court thinks fit, provided that the court is satisfied that: (i) the issues raised are of general public importance; (ii) the public interest requires that those issues should be resolved; (iii) the applicant has no private interest in the outcome of the case; (iv) having regard to the financial resources of the applicant and the respondent(s) and to the amount of costs that are likely to be involved, it is fair and just to make the order; and (v) if the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in so doing.
(2) If those acting for the applicant are doing so *pro bono* this will be likely to enhance the merits of the application for a protective costs order.
(3) It is for the court, in its discretion, to decide whether it is fair and just to make the order in the light of the considerations set out above."

[41] These appear to me to represent the appropriate principles which courts in this jurisdiction ought to have regard to in deciding whether or not to exercise their discretion to make orders of the type sought. They differ very little from those stated by Laffoy J. in *Village Residents Association Ltd. v. An Bord Pleanála (No.2)* [2000] 4 I.R. 321.

[42] An order of the type sought will only fall to be made in most exceptional circumstances and where the interests of justice require such a course to be taken.

[43] Whether one applies the relevant principles in their original or recast form, it is clear that the first thing an applicant for a protective costs order must demonstrate is that the issues raised are of general public importance. It is to that topic that I now turn in the context of the facts of this case.

[44] In considering this question I will proceed on the basis of the amended statement of grounds being in order. By so doing I am not adjudicating upon the issue, which is the subject of the separate motion which I have already mentioned and which seeks to strike out some parts of that statement for being time barred.

The grounds

[45] Despite the length of the grounds in the amended statement of the 7th April, 2006, it is clear that the applicant's case falls under four headings.

[46] They can be summarised as set out below.

1. It is alleged that there has been an unlawful delegation by the respondent to the planning authority in respect of certain conditions attached to the respondent's decisions. Those conditions require agreement to be reached between the planning authority and the developer. The applicant contends that these are matters that ought not to have been delegated and that by so doing its right of participation in the planning process has been denied. In this regard it refers to Directive 85/337 on the assessment of the effects of certain public and private projects on the environment, (Environmental Impact Assessment, E.I.A.) and to the amendment of that directive by Directive 2003/35.
2. The applicant alleges that the first notice party has engaged in what is called "project splitting". It contends that the first notice party has a master plan for the entire location. It criticises it for not applying for planning permission in respect of the implementation of this entire plan. Its says that the first notice party's statement of the environmental impact of the whole intended proposal should have been furnished to the respondent and that it was not sufficient to apply for permission only in respect of that part of the development which the first notice party wishes to proceed with at present. By so doing it is said that the environmental impact of the whole proposal as distinct from that involved in the projects, the subject of the decisions of the respondent, has not been assessed.
3. Criticism is made of the environmental impact statement which was submitted. One environmental impact statement was submitted. It is criticised in some detail. In addition it is contended that the local planning authority should have obliged the first notice party to submit a single application for planning permission and not have permitted the two applications which were in fact made. These two applications in due course gave rise to the two decisions in suit.
4. In delaying between making its decision and notifying the applicant it is said the respondent prejudiced the applicant in respect of its legal rights.

[47] I will consider each of these grounds in turn. In doing so I am conscious of the fact that as yet the application for leave to seek judicial review has not been heard. Nonetheless I am in receipt of sufficient information to enable me to identify whether these grounds raise issues of *general* public importance.

Ground 1 - unlawful delegation

[48] The question of the entitlement of the respondent to attach conditions which involve a developer obtaining the subsequent consent or agreement of the planning authority has been considered by the courts on a number of occasions.

[49] In *Boland v. An Bord Pleanála* [1996] 3 I.R. 435, the Supreme Court concluded that there was an entitlement on the part of the Board so to do. It held that the Board is entitled to grant a permission subject to conditions. Such conditions may, in certain circumstances, provide that a matter be agreed between the planning authority and the developer. Whether or not the imposition of such a provision in a condition imposed by the Board constitutes an abdication of its decision making power depends upon the nature of the matter which is to be the subject of agreement between the developer and planning authority. What is permitted to be the subject matter of agreement between the developer and the planning authority must be resolved having regard to the nature and the circumstances of the particular application and development.

[50] That court also set forth the considerations which the Board is entitled to have regard to in imposing a condition that a matter be left to be agreed between a developer and a planning authority.

[51] If there was any doubt concerning the entitlement to attach conditions leaving matters to be agreed between the planning authority and the developer subsequent to the decision in *Boland v. An Bord Pleanála* [1996] 3 I.R. 435 it was disposed of by the provisions of the Act of 2000.

[52] The question was again judicially considered in *Kenny v. An Bord Pleanála (No. 1)* [2001] 1 I.R. 565, by the High Court (McKechnie J.). In that case the judge had to consider an argument that a condition attached to a planning permission amounted to an unlawful delegation by the Board of its decision making power to the planning authority. It was claimed that as a result of the condition the developer and the planning authority were at large as to the appearance, nature and scale of the ultimate development. This, it was said, gave rise to the agreement of matters in private without any input from or access by members of the public.

[53] The judge identified the appropriate criteria to apply in examining the complaint in the light of the facts of the case. He had no difficulty in refusing leave to apply for judicial review.

[54] The topic was again considered by the High Court (Clarke J.) in *Arklow Holidays Ltd. v. An Bord Pleanála* [2006] IEHC 15, [2007] 1 I.L.R.M. 125.

[55] In that case Clarke J. considered all of the preceding jurisprudence and applied the well established principles set out in *Boland v. An Bord*

Pleanála [1996] 3 I.R. 435 which are binding on this court. In addition he also addressed the issue raised here under Council Directive 85/337/EEC in the context of an alleged unlawful delegation to the planning authority. He said this at pp.141 to 142:-

> "The second leg of Arklow's argument under this heading was that the same facts and the same conditions disclose a situation where there has not been an adequate assessment of the environmental impact of the project necessary to satisfy the requirements of Directive 85/337/EEC. In *Wells v. Secretary of State for Transport (Case 201/02)* [2004] E.C.R. I-273 the Court of Justice determined, in the context of Council Directive 85/337/EEC, that, in consent procedures comprising several stages, the assessment by the competent authorities of the member state concerned required by that directive must, in principle, be carried out as soon as it is possible to identify and assess all the effects which the project may have on the environment.
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> However the court went on to determine at para.70 that:-
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> > 'The detailed procedural rules applicable in that context are a matter for the domestic legal order of each Member State, under the principle of procedural autonomy of the Member States, provided that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the Community legal order (principle of effectiveness).'
>
> It is clear from the context of the judgment that the possibility of a consent being revoked is a material matter to be considered.
>
> In those circumstances it is important to note that, in so far as any matters are left over for agreement as a result of the imposition of conditions such as those contained in condition 9 and condition 13, there remains a variety of ways in which the development consent concerned may not become practically operative. Clearly such conditions impose a requirement that the agreement of the planning authority is a pre-requisite to the commencement of the development. Therefore, while there is a sense in which the developer has secured a planning consent, there is also a sense in which it is a conditional consent in that it is conditional upon an appropriate agreement being reached. Furthermore, as I have indicated above, it is open to any party to challenge an agreement reached on the basis that it does not conform with the criteria specified in the decision of the respondent. It is thus open to revocation in practice in the event that an impermissible agreement is reached. Finally it may be that, as a result of the further inquiries carried out in accordance with such a condition, it may prove impossible

to develop in accordance with the consent already granted. In that sense also the consent must be taken to be conditional.

In all the circumstances it does not seem to me, therefore, that there is any breach of the directive, as interpreted by the Court of Justice in *Wells*, where the respondent imposes a condition which complies with the *Boland* principles. In those circumstances any interested member of the public will have had the opportunity to engage in the process and to influence the criteria which the respondent specifies. Clearly if those criteria are impermissibly wide, so as not to meet the Boland test, then it might well be arguable that the public was excluded from appropriate consultation, as required by the directive, in relation to the final determination of the matters subject to the condition. Where, as I am satisfied is the case here, the respondent has imposed sufficiently detailed criteria as a result of a process involving public engagement, I am not satisfied that there is any breach of the requirements to carry out the necessary assessment under the directive."

[56] Having regard to the well established jurisprudence to which I have referred I am quite satisfied that this case, should it get to trial, will involve an assessment on whether, on the facts, the matter which was delegated by the respondent to the planning authority complies with the principles set out in *Boland v. An Bord Pleanála* [1996] 3 I.R. 435 principles or not. If what was done by the respondent was impermissibly wide it will not meet the test established in that case and consequences may flow from that.

[57] Given that the principles which the court must apply to this head of complaint are well established I am quite satisfied that the applicant has not demonstrated an issue of *general* public importance. The application of well established existing legal principles to the facts of this particular case do not raise issues of general public importance. In such circumstances it would be neither fair nor just to make a protective costs order.

Ground 2 – project splitting

[58] This is a rather pejorative term. It applies to situations where a developer splits a project into sections so that each section falls below the threshold necessary for an environmental impact statement to be carried out.

[59] Such is not, of course, the case here. A lengthy environmental impact statement running to in excess of 200 pages was prepared, considered and an environmental impact assessment carried out in respect of both developments.

[60] The real argument which the applicant seeks to make is that the respondent ought to have taken into consideration future proposed works which were not the subject of an application for planning permission.

[61] It is correct to say that in the environmental impact statement it is made clear that the permissions sought are in respect of the first phase in the redevelopment of the overall Curragh racecourse complex. That redevelopment is being undertaken pursuant to a master plan. The applicant says that, such being the case, it is impermissible to apply for permission in respect of the development on a phased basis. Rather a single permission should be sought with a single environmental impact assessment to be carried out covering all elements of the proposed development.

[62] Apart from the fact that this proposition lacks all commercial reality, I am quite satisfied that it does not give rise to any issue of law of general public importance. I so conclude for the following reasons.

[63] An environmental impact assessment is required in respect of a development project for which planning permission is sought once the project is in excess of the threshold where such assessments are inapplicable. The project in the present case is the development works in respect of which the permissions were sought by the first notice party. No further planning permissions were sought. There is no power invested in the respondent to force somebody to make an application in respect of proposed works.

[64] If, in the future, the first notice party proceeds to the next stage of its master plan it will be obliged to obtain planning permission for that development. The respondent will be obliged to carry out an environmental impact assessment for that development and in so doing will have regard to all of the circumstances that obtain in relation to that project including the development for which planning permission had already been granted. No part of the total development will therefore avoid being subject to appropriate scrutiny.

[65] A similar issue fell for consideration by Clarke J. in *Arklow Holidays Ltd. v. An Bord Pleanála* [2006] IEHC 15, [2007] 1 I.L.R.M. 125. In dealing with the topic he said this at p.142:-

> "The term project splitting is more properly applied to allegations raised by objectors who contend that a developer has divided a single overall project into two or more separate (and by definition smaller) projects so that each of the subdivisions fall below thresholds set out in both European and domestic legislation over which higher levels of environmental assessment are required. There is an established jurisprudence for determining whether project splitting in that sense has occurred."

He then went on to consider the allegation made in that case which was not one of project splitting but rather one involving an allegation that the respondent had failed to take into account other existing works that had not been included in the environmental impact statement submitted by the developer.

[66] I am satisfied that, as Clarke J. said, there is an established jurisprudence for determining whether project splitting in the proper sense of that word has occurred. It is difficult to see how the applicant can bring itself within that jurisprudence having regard to what happened here. If, however, the case proceeds to trial it will involve an assessment of the facts by reference to well established jurisprudence. No issue of law of general public importance has been identified.

Ground 3 – the single environmental impact statement

[67] In the present case a very detailed environmental impact statement was submitted in respect of both of the applications. I cannot identify any issue of law, still less an issue of law of general public importance, in relation to the complaint which is made here. In the course of developing this line of argument the applicant's lawyer pointed to what she perceived as shortcomings in the environmental impact statement. For example, she criticised the bat survey. Bats are dealt with over approximately ten pages of the environmental impact statement. The criticism was levelled at the fact that a bat fauna study was undertaken on just one day. Likewise it was suggested that in dealing with the question of birds the environmental impact statement failed to identify the golden plover as being a species present on the Curragh.

[68] Following the lead of McKechnie J. in *Kenny v. An Bord Pleanála (No. 1)* [2001] 1 I.R. 565, I am quite satisfied that the court should not concern itself with such matters. To use the language of McKechnie J. at p. 578:-

> "I would set my face totally against such a microscopic examination by this court of such matters of detail."

[69] The fact that a single environmental impact statement covering the two permissions was prepared made perfect sense. It covered both.

[70] The seeking of two permissions rather than a single one in circumstances where there was no project splitting in the true meaning of that term does not give rise to a point of law of general public importance.

Ground 4 – delay

[71] The contention here is that the applicant's legal rights were unlawfully interfered with because of the delay between the making of the respondent's decision and its notification. It is contended that the time periods given to it to take such steps as it might think appropriate were shortened by some twelve days. This is the subject of the letter from an administrative officer of the respondent from which I quoted earlier in this judgment.

[72] It is difficult to see how any point of law, still less a point of law of general public importance, is sought to be raised in respect of this complaint.

[73] The respondent met on the 6th January, 2006 and made a decision to grant permission. The decision order was not finalised or issued until the 18th January, 2006. Accordingly the 18th January, 2006, is the date of the decision of the respondent from the point of view of the reckoning of time. Time began to run from that date for the purposes of s. 50 of the Act of 2000. I cannot see any way in which the applicant's legal entitlements were compromised in such circumstances.

[74] In the case of the respondent (as distinct from a planning authority) there are no legal consequences which attach to a failure to determine an appeal by a particular date.

[75] I cannot identify any point of law, still less a point of law of general public importance, which would justify the making of a protective costs order in respect of this ground.

Conclusions on protective costs orders at common law

[76] None of the grounds advanced by the applicant raise an issue or issues of general public importance.

[77] That is sufficient to dispose of this part of the case. The application is dismissed.

[78] Insofar as the other matters appropriate for consideration are concerned I observe as follows.

[79] As there are no issues of general public importance raised by the applicant, it is not in the public interest that such issues as are raised be resolved with the aid of a protective costs order.

[80] The applicant, as distinct from at least some of its members, may well have no private interest in the outcome of the case. Its financial position is almost certainly weaker than that of the respondent or the first notice party. It says it will discontinue the proceedings if refused a protec-

tive costs order. There is no evidence that those acting for the applicant are doing so on a *pro bono* basis.

[81] It is difficult to see how it would be fair or just to make a protective costs order in this case. Such orders are most exceptional. This case exhibits no circumstances which would merit such an order.

European Parliament and Council Directive 2003/35/EC

[82] The applicant contends that even if it is unsuccessful in obtaining a protective costs order on foot of the common law jurisdiction of the court, it is nonetheless entitled to such an order by virtue of the provisions of this Directive.

[83] This Directive was adopted on the 26th May, 2003 and provides for public participation in respect of the drawing up of certain plans and programmes relating to the environment. It amends, with regard to public participation and access to justice, Council Directives 1985/337/EEC and 96/61/EC.

[84] The basis of the applicant's claim is the amendment, by insertion of the following article, into Directive 85/337/EEC. The inserted article is given number 10a. It reads:-

> "Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned:
> (a) having a sufficient interest, or alternatively,
> (b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition,
>
> have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive.
>
> Member States shall determine at what stage the decisions, acts or omissions may be challenged.
>
> What constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice. To this end, the interest of any non governmental organisation meeting the requirements referred to in Article 1(2), shall be deemed sufficient for the purpose of sub-paragraph (a) of this Article. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) of this Article.
>
> The provisions of this article shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review

procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

Any such procedure shall be fair, equitable, timely and not prohibitively expensive.

In order to further the effectiveness of the provisions of this article, Member States shall ensure that practical information is made available to the public on access to administrative and judicial review procedures."

[85] It is to be noted that earlier on in this Directive there is an amendment to article 1(2) of Directive 85/337/EEC by the addition of two definitions. The first is a definition of "the public". The second is a definition of "the public concerned".

[86] The "public" is defined as –

"[O]ne or more natural or legal persons and, in accordance with national legislation or practice, their associations, organisations or groups."

[87] The "public concerned" means –

"The public affected or likely to be affected by, or having an interest in, the environmental decision-making procedures referred to in Article 2(2); for the purposes of this definition, non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest."

[88] Article 6 of Directive 2003/35/EC requires member states to implement it by the 25th June, 2005, at the latest. Using the precise wording of article 6 member states are obliged to "bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 25 June 2005 at the latest. They shall forthwith inform the Commission thereof". It is common case that Ireland has failed to implement this Directive in accordance with its terms.

[89] It is not to the credit of this State that it has failed to give effect to its legal obligations under the Directive. Its omission to do so is said to give rise to the applicant's alleged entitlement to a protective costs order quite apart from any common law entitlement to such an order. The Directive also means, it is argued, that no order for security for costs ought to be made or undertaking as to damages sought from the applicant.

[90] The basis for this contention on the part of the applicant is that, Ireland having failed to implement the Directive by the due date, it has direct effect. It is said that the way to give effect to it in this case is to make a protective costs order.

Direct effect

[91] There is a well established body of law setting forth the circumstances in which a Directive may have direct effect (see for example *Becker v. Finanzamt Münster-Innenstadt (Case 8/81)* [1982] E.C.R. 53 and *Marshall v. Southampton & South West Hampshire Area Health Authority (Case 152/84)* [1986] E.C.R. 723. The conditions which must be met are as follows.

[92] First, the date for implementation must have passed and the member state must either have failed to implement or have inadequately implemented the Directive.

[93] Secondly, the relevant provisions of the Directive sought to be relied upon must be identified and must be clear, precise and unconditional.

[94] Thirdly, direct effect has no horizontal effect. It may only be relied upon as against a member state or an emanation of the State (vertical effect). This third proposition rules out the possibility of a protective costs order being made in respect of the first notice party.

[95] The first of these conditions is met.

[96] The applicant argues that a protective costs order is at present the only approach open to this court to give *"effet utile"* or full effect to article 3 of Directive 2003/35/EC. It says that by reference to that part of article 10(a) which refers to a review procedure being fair, equitable, timely and not prohibitively expensive. It argues "there is no other approach established to get such a review procedure which is not prohibitively expensive other than by way of the order sought". This means, says the applicant, that it cannot be obliged to pay costs.

[97] If I were to accede to this application I would have to be satisfied that the wording of the Directive has about it that clarity, precision and unconditionality so as to make it directly applicable. I am not convinced that it does.

[98] A few examples from many that are available demonstrate why this is so.

[99] It is by no means clear that the Directive has any application to judicial review of the type in suit.

[100] Article 10a requires the public to have access to a review procedure before a court of law or other independent and impartial body to challenge the substantive or procedural legality of decisions. The Act of 2000 allows an appeal from a decision of a planning authority to the respondent. The respondent is an independent and impartial body which is established by statute. It is empowered to hear challenges, both substantive

and procedural. It conducts a *de novo* consideration of the application for planning permission.

[101] Whilst there is a right of redress on a limited basis to the courts by means of judicial review, it is not clear that it is covered by the Directive. It is just as arguable that the Directive covers an appeal to the respondent.

[102] Members of the public can bring such an appeal. It is fair and the only charges involved are the fees payable. Furthermore the respondent can award expenses pursuant to s. 145 of the Act of 2000. On this interpretation the question of a protective costs order in judicial review proceedings is unaffected by article 10(a). If judicial review can be regarded as an additional layer of challenge then that is not subject to the requirements of Article 10(a).

[103] Indeed it is also questionable as to whether the article applies to court proceedings at all in the Irish context. It must be remembered that Irish court proceedings in questions of this type do not permit of a substantive review. The only form of review is a judicial review which does not address the merits of the case. Thus, it is doubtful if the Directive applies at all.

[104] Even if the Directive can be taken as applying to judicial review applications the question arises as to what the words "prohibitively expensive" refer to. It is not clear whether this refers to court fees which are chargeable by the State or to legal costs which are not. If it is court fees then access is available to any persons on paying a modest court fee. It is particularly modest in the case of judicial review in planning matters where the originating document is a notice of motion carrying a fee which is a fraction of the fee payable for the issue of a plenary summons. If the Directive is dealing only with fees then it has no application whatsoever in the case of a protective costs order.

[105] These are just two examples out of many of how this Directive is lacking in clarity, precision and unconditionality so as to make it incapable of direct effect.

[106] It is worth pointing out that if the applicant is correct and this Directive has direct effect in the way in which it contends, it means that an applicant relying upon it could never be obliged to pay another party's costs irrespective of the outcome of proceedings. All such litigation would be conducted without any cost penalty being available against an unmeritorious claimant.

[107] In many cases it is either a planning authority, the respondent or the Environmental Protection Agency that is a respondent to such applications. All such litigation would effectively be carried on at State expense. This would give rise to a subsidisation of an applicant in environmental

litigation irrespective of the questions, the merits or the manner in which the litigation is conducted.

[108] The Directive is replete with language which is framed in such a way as to make clear that a wide measure of discretion is left to the member state as to how it should be implemented. It was never intended to be a Regulation nor is it capable of being, in effect, converted into one by reason of the state's omission in implementation. The language is not sufficiently precise, clear or unconditional to render it of direct effect.

[109] This Directive, although not given effect to by this State within the time permitted, cannot have direct effect for the reasons which I have set out.

Result

[110] I am satisfied that insofar as there is a common law jurisdiction to make a protective costs order the applicant has fallen at the first hurdle and has not demonstrated that it has a point or points of law of general public importance for litigation in this suit.

[111] Insofar as it seeks to rely upon Directive 2003/35/EC I am satisfied that that Directive does not meet the criteria which would render it capable of being given direct effect in this jurisdiction. Even if it did, it could not be utilised as a vehicle for granting a protective costs order in respect of the first notice party since that is not an emanation of the State.

[112] Insofar as the application seeks absolution from the provision of security for costs or the furnishing of an undertaking as to damages, no such applications have yet been made. Nonetheless, in accordance with the conclusion reached on the protective costs order application I see no basis upon which the applicant should be exempted from being the subject of such applications, if appropriate.

[113] This application is dismissed.

[*Reporter's note:* An appeal against the judgment and order of Kelly J. was withdrawn on the 9th July, 2010.]

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