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cases.

A SHORT ADJOURNMENT

JUDGMENT DELIVERED BY MR. JUSTICE CHARLETON

15:41

MR. JUSTICE CHARLETON: There are three elements to this case which I regard as being very important.

15:45

Firstly, what is the order that is being sought from the Court? Secondly, whether there are discretionary grounds which override any defect in terms of the formality of the permissions granted or not in existence. Thirdly, whether in fact there is any point. Fourthly, whether that point is such as to require the Court to act.

15:46

Now I am going to go through those in order.

15:46

Firstly in the relation the order sought. The situation here is unusual. This whole case concerns the Corrib Gas Pipeline, and as is well known, it is something that has caused a great deal of disquiet and unrest, both in the local area at Northwestern Co. Mayo, and more widely by persons who feel that there are certain aspects of the pipeline and the economic relationship of the Government to Shell, which caused them to be worried. I have no comment to make,

15:46

1 obviously, in relation to that.
2
3 But what does strike me forcibly is that under ordinary
4 circumstances where an application is brought under
5 Section 160 of the Planning and Development Act 2000, 15:47
6 it is immediately apparent what it is that is objected
7 to and what it is that is sought to be done. Is also
8 usually immediately apparent what it is that is said to
9 be wrong. Here it is necessary to search very deeply
10 to find out what is wrong, and in relation to the order 15:47
11 sought it is not at all clear as to whether that is
12 going to be of benefit to the Applicant.
13
14 The Plaintiff, Jonathan O'Donnell, is a fisherman who
15 operates out of Northwestern Mayo, and I am sure he is 15:47
16 a genuine person and a decent person. He is a crab
17 fisherman and therefore he is laying baskets on the
18 sea. I note that he says himself in relation to his
19 Affidavit that he has been arrested on a number of
20 occasions in relation to what must have been protests 15:47
21 against the Corrib Gas Pipeline.
22
23 what he seeks as an order from the Court, however, is
24 very different to the ordinary application under
25 Section 160 of the Planning and Development Act. It is 15:48
26 not an order that, for instance, a building site should
27 be terminated. It is not an order that a structure
28 should be torn down. It is not an order to prevent
29 something happening that is going to happen imminently.

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Instead, it seems to be an order to suggest that the Court should say that some aspect of the Corrib Gas Pipeline is unlawful. I stop there and I ask myself the question; what exactly is the point of that? How does it assist a fisherman in Mayo to get an order saying that some aspect of the Corrib Gas Pipeline is unlawful? That is something that I find very hard to understand, and it hasn't been explained in the course of the hearing.

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15:48

Secondly, it is suggested in answer to the Court's question that perhaps what ought to happen in relation to this situation is that the portion of the gas pipeline between the high water mark at normal tide levels and the location where, in due course it is proposed to build the Landfall Valve Installation, should be torn up.

15:49

The Court then asks itself in relation to its powers, and how they are being used, as to how that is going to assist anybody? No doubt the pipe would be blocked off at the ordinary high water mark. No doubt the installation would be torn up, and a gaping hole would take place in the pipe. The Court is not a stranger to the fact that a pipe is a unitary thing which begins at a place and ends at a place, and that if it is interrupted it ceases to have any affect as a pipe. That is something that I need to go back to in relation to the main arguments made in favour of this

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application for an injunction.

But moving on to the discretionary ground, I am taking into account the fact that the orders sought from the Court are essentially futile in nature and have a very strongly mischievous aspect to them. This is not a case where there is a strong interest by the Plaintiff. It is a case where what is sought by reason of the order of the Court is something that is so contrary to any ordinary principles of orderly development that the Court should set its face against it.

But when I turn to the discretionary grounds, it seems to me that it is not necessary to open a large amount of case law to establish a number of things that are perfectly clear on the ground, and the most obvious of them is this; the Defendant in this case, Shell E&P Ireland Limited, are a company which have, at all times, sought the relevant consents and the relevant planning permissions. I have before me applications, for instance which were granted in April 2002, which were a consent for the pipeline under section 40 of the Gas Act 1976. I have, in addition, a consent in relation to foreshore development, and I have in addition two declarations made by the planning authority in relation to two of the matters most at issue here, namely the gas interchange, called the Landfall Valve Installation, the fencing there, and the associated works, and the relevant pipeline which have

1 been declared, not only by Mayo County Council but also
2 by An Bord Pleanála, to be lawful under a declaration
3 granted through section 5 of the Planning and
4 Development Act 2000.

15:51

5
6 The attitude of the planning authorities, in addition,
7 is a matter which is of importance. But when I look at
8 the applications that were made in aid of the gas
9 pipeline, whether it is right or whether it is wrong
10 that there should be a gas pipeline there, or whether 15:52
11 the economic relation of the State to the company
12 involved, Shell E&P Ireland Limited, is or is not
13 correct, it is abundantly clear to me that the
14 Defendant did everything it possibly could to act
15 within the limit of the law and to obtain the consents 15:52
16 that were necessary. People of course can say that
17 that is wrong. They are entitled to have their
18 opinion. But in terms of the administration of law,
19 the Court has to have regard instead to whether an
20 attitude of determined compliance with the law has been 15:52
21 shown by the Defendant, or whether it has not. It is
22 demonstrated to me clearly on the papers that that is
23 what the Defendant has done.

24
25 Now, in consequence of what I must now mention, there 15:52
26 are further applications before the planning
27 authorities, including in relation to the issue of the
28 change of pipe, and here I need to refer to something
29 briefly.

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In consequence of the trouble that there was in Co. Mayo, and I use that neutrally, because I have no view on the merits of one side or the other, Mr. Peter Castle, a well respected negotiator, was appointed to arbitrate and to give a view as to what ought to happen. He made a number of recommendations, one of which was that the pressure in the pipe as it came ashore should be lowered, thereby easing fears that might well be legitimate, I do not know, in relation to an accident. If the pressure in the pipe is less, obviously there is less chance of a pipe exploding. That follows as a matter of common sense. He also made a recommendation that the routing of the pipe should change, so that instead of going very close to dwellings it should at all times be at least a distance of 200m. Again, this is a safety matter and something which took into account the perhaps justifiable, I do not know, fears of local people, people who have to live in the vicinity of this.

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Now Shell E&P Ireland Limited, the Defendant here, could have ignored that recommendation or they could have acted on it. They chose to act on it, but in consequence of that, by reason of the fact that since 31st January 2007, the Strategic Infrastructure Act of the previous year, 2006, was in force, it necessitated an application for planning permission. The consequence of that was that it could be said, and

15:54

1 indeed has been argued in this case, that what happened
2 was that the gas came ashore and ended at the end point
3 where in due course the appliance for reducing the
4 pressure on the land of the gas within the pipe, the
5 Landfall Valve Installation, would be situated, becomes 15:55
6 one portion of the pipe, and the portion from there on
7 up to the Bellanaboy gas terminal, from whence the gas
8 will get to the rest of the country, and perhaps
9 elsewhere, becomes another part of the pipe. It is
10 said that by reason of that there is a disunity in the 15:56
11 permission that exists in consequence of which the
12 entire permission is rendered invalid.

13
14 Well, I want to turn to that point first, because it
15 seems to me to be by far the most important point that 15:56
16 has been made on behalf of the Plaintiffs in this case.

17
18 I haven't got any doubt that a planning permission
19 entails two things. It entails first of all what is
20 expressly granted, and it entails what my necessary 15:56
21 implication is rendered lawful by the permission. In
22 saying that in relation to a planning permission, I
23 believe it also applies to any consent that is given
24 under the Gas Act 1976, or any consent that is given
25 under an Act dealing with the foreshore by the State to 15:56
26 use the foreshore for a particular purpose.

27
28 Again, it is not simply a question, in my view, of
29 legal formalism. It is, as was very well put, in my

1 view, by Carroll J. in the case of Dwyer Nolan
2 Development Limited -v- Dublin County Council, which is
3 1986 IR, and the passage I am quoting is at 139,
4 whereby she held that she was not prepared to hold
5 that:

15:56

6 "....a developer can draw on any other
7 existing permission to complete an
8 unfinished scheme. The developer must
9 apply for further planning permission
10 in respect of the completion
11 incorporating, either directly or by
12 implication, the partial development
13 which has already taken place."

15:57

14 It follows to me it seems, as night follows day, that
15 where there is an application in good faith in relation
16 to the completion of a project, and where a consent is
17 given, that whatever is actually necessary and
18 reasonably encompassed by the licence or permission in
19 that regard, is part of the licence, or part of the
20 permission that is given, just as in relation to a
21 planning permission, the grant of a planning permission
22 implies that the works will take place, implies that
23 they may need to be fenced in a particular way, and
24 implies in addition that what is applied for, such as a
25 factory, is what the area or development is going to be
26 used for. I see no ground for saying, in this case,
27 that there are matters incidental, such as the area
28 between the high water mark and foreshore, and where
29 eventually the Landfall Valve Installation will be put
in, which is to be regarded as separate or apart from
that.

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But in addition, it is said that the unity of the permission originally granted under the Gas Act 1976, has now been destroyed. I just don't accept that that could ever possibly be the case.

15:58

Under section 40 of the Gas Act it says that:

"A person shall not, without the consent of the Minister, construct or operate an upstream pipeline on, over or under the surface of any land or of the seabed that is situated in the territorial seas of the State or a designated area."

15:58

It also says that:

"The Minister for the Marine is entitled to revoke a consent but nothing in the section is to prejudice the validity of anything done previously pursuant to and in accordance with the consent."

15:58

That implies to me, what strikes me as being simply eminent common sense, that there has to be a provision in law whereby if a matter changes, such as, as is argued in this case, the bringing into force of the Strategic Infrastructure Act 2006, that it is a matter of necessary implication of law that what has been permitted up to that point continues in force unless the new Act in some way affects it.

15:59

15:59

But even if that were not the case, by reason of ordinary or necessary implication, it seems to me also

1 to be clear that by reason of Section 22 of the Energy
2 (Miscellaneous Provisions) Act 2006, the Oireachtas
3 expressly provided for the continuance of previous
4 consents whereby the continuing of a project under the
5 Gas Act, 1976, was to be regarded as being lawful, 16:00
6 notwithstanding the fact that in the meantime the Act
7 which I have mentioned, the Strategic Infrastructure
8 Act, came into force, and that by reason of that
9 planning permission needed to be applied to, as it has
10 now been applied to in relation to the land ward side 16:00
11 of this, to An Bord Pleanála.
12

13 Part 8, Section 22, states that:

14 "No approval shall be required in
15 relation to a development referred to 16:00
16 at Section 182C if -

17 In the case of a development so
18 referred to it has been subject to the
19 grant of a consent under Section 39A or
20 40 of the Gas Act of 1976 before the
21 commencement of this section and that
22 consent is in force immediately before
23 such commencement." 16:00

24 That is, it seems to me, a prophylactic measure which
25 is probably not necessary as a matter of law, to state
26 that where a new Act comes into force, and the new Act
27 being the Strategic Infrastructure Act, does not
28 specifically affect, by its expressed terms, a 16:01
29 permission that has hitherto been given, that in fact
once the permission has been given it has no effect at
all on the permission, and that the permission
continues to be valid as a matter of law.

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I turn then, in relation to the merits of the case, to Section 182C. I appreciate that under Section 182C, which was brought in by the Strategic Infrastructure Act, where a person intends to carry out a strategic gas infrastructure he has to apply for approval to An Bord Pleanala and issue an Environmental Impact Statement in that regard, and the development is not to be carried out unless the Board has approved it.

16:01

16:01

But even when I read that section, the obvious question that applies to my mind is this; whereas legal ingenuity can be taken to great heights, legal formalism cannot be taken to the depths where people don't know where they stand as an ordinary matter of implication of the existence of law, and it is clear to me that where the consent already existed, there is nothing in the decision of the Board which requires for that consent to be undertaken for a second time.

16:02

16:02

It is clearly right that Shell have applied now under section 182C in relation to the section of the pipeline that will run from Bellanaboy back to where, at the Landfall Valve Installation, the gas comes ashore. But it is impossible for me to see, by reason of that prudent course, that somehow the portion of the gas pipeline that goes from where the Landfall Valve Installation will in due course be installed and out to sea, has become unlawful. were to be the case, then

16:02

1 provisions such as actually do exist in the Planning
2 and Development Act 2000, rendering null and void
3 existing permissions, or continuing existing
4 permissions, would have been in place. Instead, the
5 only guidance which is given on it is Section 22, which 16:03
6 I have quoted, and that guidance is, it seems to me,
7 absolutely determinative in relation to the facts of
8 this case.

9
10 Then an argument is made in relation to the foreshore, 16:03
11 and again I am noting in dealing with this matter, that
12 at all times I am satisfied that what Shell, the
13 Defendant in this case have been doing. Has been, as
14 far as I am concerned, a genuine attempt to comply with
15 the law. Whereas there may now be, and I understand 16:03
16 there is an existing Foreshore Licence, and a further
17 Foreshore Licence application in relation to the
18 matter, the obligation to obtain permission in respect
19 of the development on a foreshore is definitively
20 catered for by Section 225 of the Planning and 16:04
21 Development Act, 2000.

22
23 The section, however, doesn't apply to a development by
24 a local authority on the foreshore, which is section
25 226, and it doesn't apply to a development consisting 16:04
26 of:

27 "Underwater cables, pipes, wires, or
28 other similar appliances for the
29 purpose of transmitting electricity or
telecommunication signals, or carrying
gas, petroleum, oil, or water."

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The requirement, therefore, for Section 34 permission under the Planning and Development Act, 2000, does not apply.

16:04

Even if that were not the case, I am not prepared to go down the route of extreme legal formalism whereby I hold that on the one hand there is a valid application before a local authority in relation to re-routing the pipe from the Landfall Valve Installation, and that on the other hand there is a genuine and subsisting, under Section 22, consent in relation to the gas pipeline under Section 40 of the Gas Act, but that at the same time a tiny section of perhaps 100m or 200m is unlawful, and that the entire of the consents given in relation to one side, namely the sea ward side, and which will be given, or which have certainly been applied for in relation to Section 182C in relation to the land ward side of matters, should be set at nought by an order of the Court tearing up the intermediate portion as if the Court is not obliged, as a matter of ordinary common sense, to have regard to the fact that the pipe is one unit and cannot be treated in that respect.

16:04

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16:05

On the burden on proof, I am not satisfied that anything has been put before me which would enable me to say that the water pipe in question is not a water

1 pipe, or that the water pipe is in some way a different
2 water pipe, or one which is the subject of in some way
3 a deceptive application whereby it is no longer
4 carrying what it is supposed to carry. Instead, my
5 view in relation to the water pipe is that it is a 16:06
6 water pipe, and if there are any issues in relation to
7 pollution or what it will carry, that these are
8 properly dealt with by An Bord Pleanála, or if
9 necessary the Environmental Authority.

10 16:06
11 Now, I come back then to the issue of discretion,
12 having dealt with those points, and in doing so, I must
13 say that I say this; that I don't accept that the
14 matters referred to as being outside the scope of the
15 permissions granted are not exempted developments. I 16:06
16 don't accept that exempted development applies due to
17 an error in the draftsman of the Planning and
18 Development Act, 2000, only to matters which are
19 exempted under Part III.

20 16:07
21 It seems to me to be absolutely clear that when the
22 wording of the planning regulations refers to the
23 matters that are covered here, including the road, and
24 including the fencing, that what is intended by the
25 Oireachtas in those regulations is that those matters 16:07
26 should be covered and not in fact left out.

27
28 In particular, it seems to me that in the Planning
29 Regulations by reason of Class 17 and Class 25,

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whereby:

"The carrying out in accordance with the requirements of any permission under Section 40 of the Gas Act, consisting of the construction of an underground pipeline for the transmission of gas or the construction or erection of any apparatus equipment or other thing ancillary to such a pipeline is in fact an exempted development."

16:07

whether Shell is a gas undertaking or not, it seems to me is irrelevant.

16:08

It is also clear to me that when planning permission is granted, or where any other form of consent is granted, that what is reasonably necessary for carrying that out is part of the implied permission, is something that I have already indicated.

16:08

I turn then to the whole notion, and coming back to the notion of the discretionary grounds. There is no point in me splitting up this project. Splitting up of this project has been done already by Shell, and for good reasons. The Court is not to act in vain. The attitude of the planning authorities is clearly declared by the two declarations that have been given under Section 5 of the Planning and Development Act, one by An Bord Pleanála and the other by the local authority.

16:08

16:08

The bona fides of the Defendant is established. I am

1 sure the Plaintiff is himself a man who acts in good
2 faith, and who has serious views on this matter, but at
3 the same time as a matter of law, where he is taking a
4 case, he has to prove his case, and there is nothing in
5 this case which shows me that the Defendant here, 16:09
6 Shell, acted in any way other than in a perfectly
7 correct manner in good faith to obtain the necessary
8 consents.

9
10 I look at the nature of the affect on the Plaintiff, 16:09
11 and I note that he is crab fisherman, but any affect
12 that there may be in relation to the existence of this
13 gas pipeline on him is minimal as compared to the
14 affect which the existence of the gas pipeline may have
15 on the country, and he has shown no particular interest 16:09
16 in that regard.

17
18 I look in addition as to the nature of the affect on
19 the Defendant. It would neither to be fair nor right
20 for the Court to adopt some kind of an ideological 16:10
21 approach and treat Shell E&P Ireland Limited in any
22 different way to any other litigant before this Court,
23 and make an order which is legally formalistic, which
24 involves the tearing up of a short portion of an
25 infrastructure project, or which declares something to 16:10
26 be unlawful, when the net affect of that is to set the
27 entire project, which has been subject to consents by
28 the relevant Minister, and which will be subject to
29 consents in due course, in the event that the

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application is made correctly by An Bord Pleanala, which has been subject to declarations in favour of it by the local authority and by An Bord Pleanala, at nought. I am simply not prepared to do at that.

16:10

So that is my decision.

END OF JUDGMENT

MR. McDONALD: May it please the Court.

16:10

MR. MACEOCHAIDH: May it please the Court.

MR. JUSTICE CHARLETON: Yes.

MR. McDONALD: In light of the Court's decision, I would have an application to make for costs, Judge.

16:11

MR. MACEOCHAIDH: I cannot resist that, Judge.

MR. JUSTICE CHARLETON: It follows. Thank you.

THE HEARING WAS THEN CONCLUDED

