APPROVED **[2024] IEHC 60**

THE HIGH COURT
JUDICIAL REVIEW

2022 365 JR

BETWEEN

AN TAISCE
THE NATIONAL TRUST FOR IRELAND

APPLICANT

AND

AQUACULTURE LICENCES APPEALS BOARD
MINISTER FOR AGRICULTURE, FOOD AND THE MARINE
IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

WEXFORD MUSSELS LTD, FJORD FRESH MUSSELS LTD, LOCH GARMAN HARBOUR MUSSELS LTD, NOEL SCALLAN, SHEILA SCALLAN, RIVERBANK MUSSELS LTD, WD SHELLFISH LTD, CRESENT SEAFOODS LTD, FLORENCE SWEENEY, PATRICK SWORDS, BILLY GAYNOR, DANIEL GAYNOR AND TL MUSSELS LTD

NOTICE PARTIES

JUDGMENT of Mr. Justice Garrett Simons delivered on 13 February 2024

INTRODUCTION

1. The principal issue addressed in this judgment is whether an applicant for judicial review is entitled to defer the institution of proceedings pending their obtaining assurances in respect of costs protection. The term "*costs protection*" is used here as a shorthand to describe the special costs regime applicable to certain types of environmental litigation, whereby an unsuccessful applicant is, generally, shielded from having to pay the winning side's legal costs. The special costs regime is prescribed, primarily, under Section 50B of the Planning and Development Act 2000 and Part 2 of the Environment (Miscellaneous Provisions) Act 2011. These provisions give effect to the principle that the legal costs of the review procedure are "*not prohibitively expensive*".

2. The applicant herein, An Taisce, held off instituting these judicial review proceedings until such time as it had obtained a judgment from the High Court in satellite litigation confirming that any application for a pre-emptive costs order would itself benefit from costs protection. By the time An Taisce ultimately came to institute these proceedings, the three month time-limit prescribed for judicial review proceedings had long since expired. The question to be addressed by the court is whether an extension of time should be allowed.

3. To resolve this question, it will be necessary, first, to rule upon a preliminary issue, namely, whether the proceedings are subject to the statutory judicial review procedure prescribed under Section 73 of the Fisheries (Amendment) Act 1997 (as opposed to conventional judicial review under Order 84 of the Rules of the Superior Courts).

PROCEDURAL HISTORY

4. These proceedings relate to a number of decisions on applications for aquaculture licences. The statutory scheme is such that the decision on a licence application is made, at first instance, by the Minister for Agriculture, Food and the Marine ("*the Minister*"). Thereafter, there is a statutory right of appeal to the Aquaculture Licences Appeals Board ("*Appeals Board*").

5. The licence applications in the present case all relate to sites within Wexford Harbour. In some instances, the same entity had submitted more than one licence application to the Minister. Where this had occurred, the Minister, for the purposes of notifying his decisions, grouped together the individual licence applications. The consequence of this is that the number of decisions issued is slightly less than the number of individual licence applications submitted. The decisions on the licence applications issued on two dates in September 2019.

6. It seems that each of the licence applications had triggered the requirement for an appropriate assessment for the purposes of the Habitats Directive (Directive 92/43/EEC). The Minister arranged for a single appropriate assessment report to be prepared to assist him in deciding all the licence applications.

7. An Taisce wished to challenge, by way of an appeal, the Minister's decisions on the licence applications. To this end, An Taisce submitted an omnibus appeal in relation to the multiple decisions. Importantly, the appeal was accompanied by the fee appropriate to a single appeal only. An Taisce, in a legal submission appended to the appeal document, sought to justify this approach by reference to Section 42 of the Fisheries (Amendment) Act 1997. This section confers a discretion upon the Appeals Board to treat two or more appeals as a single appeal.

8. By letter dated 26 November 2019, the Appeals Board wrote to An Taisce declaring the appeal to be invalid. The stated reason was that the fee was inadequate. Rather than allocate the fee and appeal to any single licence application, the Appeals Board rejected the entire appeal as invalid.

9. An Taisce instituted a first set of judicial review proceedings in December 2019 ("*the first judicial review proceedings*"). The first judicial review proceedings sought to challenge both (i) the Minister's first instance decisions on the licence applications, and (ii) the Appeals Board's decision to reject An Taisce's appeal as invalid. The first judicial review proceedings had been instituted by way of conventional judicial review (rather than statutory judicial review under Section 73 of the Fisheries (Amendment) Act 1997).

10. The first judicial review proceedings had been opened for the purpose of stopping the clock running on 11 December 2019. Thereafter, those proceedings had been adjourned to the Judicial Review List on 20 January 2020. In the interim, the solicitors acting on behalf of the Minister wrote to An Taisce to object that those proceedings should have been taken by way of statutory judicial review. This would have entailed the institution of those proceedings by way of an originating notice of motion (rather than an *ex parte* application for leave).

11. As of January 2020, there might still have been time for An Taisce to correct any procedural misstep in this regard, at least insofar as the challenge to the Appeals Board's decision was concerned. It will be recalled that the decision rejecting the appeal as invalid is dated 26 November 2019. On either version of the judicial review procedure, An Taisce had three months within which to institute proceedings challenging the Appeals Board's decision. An Taisce

could, in principle, have mended its hand by pursuing the application for leave to apply for judicial review on notice. See, by analogy, *Dunmanus Bay Mussels Ltd v. Aquaculture Licences Appeals Board* [2013] IEHC 214, [2014] 1 I.R. 403.

12. The first judicial review proceedings came before the High Court (Meenan J.) on 20 January 2020. On that date, the court directed that the application for leave be heard on notice. Thereafter, An Taisce resolved to discontinue the first judicial review proceedings. It has since been explained on affidavit that those proceedings had been issued "*in haste*" and without fully understanding the potential costs risk. It seems that An Taisce became concerned that the mere *service* of the first judicial review proceedings on all of the respondents and the mandatory notice parties, i.e. all of the licence applicants, would have exposed An Taisce to a potential liability for those parties' legal costs.

13. An Taisce then resolved to institute a *fresh* set of judicial review proceedings which would be confined to the Appeals Board's decision to reject the appeal as invalid. An Taisce continued to have a concern in relation to its potential exposure to a liability to have to pay the legal costs of the parties in any judicial review proceedings. In an attempt to avoid this potential exposure, An Taisce settled upon the following strategy.

14. An Taisce instituted proceedings against the Minister for Agriculture, Food and the Marine; Ireland; and the Attorney General ("*the State Parties*"). This second set of proceedings will be referred to in this judgment as "*the indemnity proceedings*". The indemnity proceedings were instituted on 25 February 2020, i.e. within three months of the Appeals Board's decision to reject the appeal as invalid. Crucially, neither the Appeals Board (the relevant decision-

maker), nor the licence applicants (the parties who would be directly affected by any order setting aside the rejection of the appeal), were joined as parties to the indemnity proceedings.

15. The indemnity proceedings were instituted by way of an originating notice of motion, purportedly issued pursuant to Order 84B of the Rules of the Superior Courts. In essence, the indemnity proceedings sought, first, a pre-emptive costs order to the effect that the intended judicial review proceedings attracted costs protection, and, in the alternative, a court direction to the effect that the Irish State must indemnify An Taisce in respect of any costs which might be ordered against it in the context of the intended judicial review proceedings. Notwithstanding that the pre-emptive costs order was, purportedly, sought pursuant to Section 7 of the Environment (Miscellaneous Provisions) Act 2011, the mandatory parties to the intended judicial review proceedings had not been joined to the indemnity proceedings as required under subsection 7(5).

16. The rationale for this approach—as set out in the grounding affidavit of the Chair of An Taisce and in the written legal submissions—had been that the Irish State has (supposedly) failed properly to transpose the requirements of EU environmental law in respect of legal costs. It was said that An Taisce could not begin its intended judicial review proceedings without exposing itself to the risk of costs, and that it could not even bring an application for a pre-emptive costs order without exposing itself to having to pay the costs of that application if unsuccessful. It was further said that An Taisce had felt itself constrained, before bringing an application seeking a pre-emptive costs order on notice, to seek reassurance from the Irish State that it (An Taisce) would not be liable to pay the costs of such an application. If and insofar as the domestic

legislation exposed it to a liability to pay the costs of the holders of the impugned aquaculture licences, An Taisce sought an indemnity from the Irish State. It was said that the Irish State is obliged to provide such an indemnity in order to make good its (supposed) failure to implement EU environmental law in respect of legal costs correctly. An Taisce cited Article 11 of the Environmental Impact Assessment Directive (2011/92/EU) ("*EIA Directive*"), and, more generally, the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ("*Aarhus Convention*").

17. Unfortunately for all, the hearing and determination of the indemnity proceedings was delayed for a significant period of time as a result of the restrictions on court sittings introduced as part of the public health response to the coronavirus pandemic. The indemnity proceedings were adjourned generally in April 2020 and were not re-entered until January 2021. Thereafter, a hearing date was assigned for October 2021.

18. The indemnity proceedings ultimately came on for hearing before me. During the course of oral submission, it emerged that it might be possible to resolve the dispute between the parties by the court making a finding that an application for a pre-emptive costs order pursuant to Section 7 of the Environment (Miscellaneous Provisions) Act 2011 attracts costs protection. The indemnity proceedings were adjourned to allow the State Parties' legal representatives to take express instructions on this point. The indemnity proceedings were further delayed as a result of the tragic death of one of the counsel in the case.

19. The indemnity proceedings ultimately resulted in a judgment confirming that costs protection pertains to an application for a pre-emptive costs order. See *An Taisce v. Minister for Agriculture Food and the Marine* [2022] IEHC 96. This judgment was delivered on 28 February 2022. The matter was put back to allow for submissions in relation to the incidence of the costs of the motion itself. These were addressed at a short hearing in March and the order was formally drawn up (perfected) on 21 March 2022.

20. An Taisce then instituted the within judicial review proceedings on 5 May 2022. These proceedings have been brought by way of statutory judicial review pursuant to Section 73 of the Fisheries (Amendment) Act 1997. The originating pleading is a motion seeking leave to apply for judicial review on notice. These proceedings will be referred to in this judgment as "*the second judicial review proceedings*".

21. It should be explained that the second judicial review proceedings were instituted prior to the exchange of correspondence in relation to costs protection for those proceedings. An Taisce—safe in the knowledge that, in the event of a dispute, it could bring an application for a pre-emptive costs order without incurring liability for the costs of that motion—was, finally, prepared to institute fresh judicial review proceedings.

22. This sequencing had the practical benefit that the parties had a copy of the statement of grounds in the second judicial review proceedings available to them prior to stating their position in relation to costs protection. The Appeals Board and the licence applicants all took the pragmatic view that they would accept, for the purposes of the judicial review proceedings, that costs protection applied. This was so notwithstanding that, as of June 2022, there

was still some uncertainty as to the precise parameters of costs protection in that the appeal to the Supreme Court against the judgment of the Court of Appeal in *Heather Hill Management Company v. An Bord Pleanála* had not yet been heard and determined.

23. As an aside, it should be observed that the emphasis placed by the Minister and the Appeals Board on the sheer length of the delay tends to obscure the true issues. It is correct to say that the lapse of time between the date of the impugned decision (26 November 2019) and the date upon which these proceedings were instituted (5 May 2022) is significant, and far beyond the type of delay which would ordinarily be forgiven by way of the grant of an extension of time. However, the position is more nuanced. An Taisce had instituted proceedings, in the form of the indemnity proceedings, within three months of the date of the impugned decision. Most of the delay thereafter is related to the restrictions on court sittings which were necessitated as part of the public health measures introduced in response to the coronavirus pandemic. Such delay is a circumstance beyond the control of An Taisce. Crucially, a similar period of delay might have occurred even if An Taisce had taken the procedurally correct step of bringing an application for a pre-emptive costs order on notice.

24. The parties have adopted the pragmatic approach that these judicial review proceedings should be dealt with by way of a telescoped or rolled-up hearing of the leave application and the substantive application. What is meant by this is that rather than there being a separate hearing of the leave application (followed by a subsequent hearing of the substantive application for judicial review in the event that leave is granted), the entire case has been argued

before the High Court at an omnibus hearing. The rolled-up hearing took place before me over two days commencing on 23 January 2024.

25. The High Court must decide, first, whether to grant leave to apply for judicial review, and, if so, to determine the substantive application for judicial review within the same judgment. A rolled-up hearing was especially appropriate in the present case where there is a dispute not only in relation to whether an extension of time should be granted, but also in relation to the *form* of judicial review which pertains to a challenge to a decision to reject an appeal as invalid.

POSITION ADOPTED BY THE APPEALS BOARD

26. For completeness, brief reference should be made to the position adopted by the Appeals Board in relation to costs protection. Whereas the Appeals Board had not been joined as a party to the indemnity proceedings, it was subsequently furnished with a copy of the pleadings in same by the State Parties. Thereafter, the Appeals Board's then solicitors wrote to An Taisce's solicitors on 25 June 2020 and sought to be joined to the indemnity proceedings. The Appeals Board asserted that the indemnity proceedings could have a "*very significant impact*" upon it in that were costs protection to be granted, then An Taisce might not be obliged to discharge the Appeals Board's costs even if it successfully defended An Taisce's legal challenge. The only reasonable inference to be drawn from this correspondence is that the Appeals Board intended to resist the application for a declaration that costs protection would apply to the intended judicial review proceedings. It would make no sense for the Appeals Board to seek to be joined to the indemnity proceedings if its intention was simply to consent to the making of a

declaration. If this had been its intention, it should simply have agreed that costs protection would apply. Subsection 7(3) of the Environment (Miscellaneous Provisions) Act 2011 envisages that the proposed parties to intended proceedings may, before the institution of proceedings, reach an agreement that costs protection will apply, i.e. without the necessity for a court order.

27. An Taisce's solicitors responded by letter dated 25 September 2020 indicating that they had no objection to joining the Appeals Board to the indemnity proceedings, provided that the latter confirmed that it accepted that the indemnity proceedings attracted costs protection. For reasons which have not been properly explained, the Appeals Board's erstwhile solicitors never responded to this letter. The Appeals Board did not ultimately pursue its request to be joined to the indemnity proceedings.

28. The failure by the Appeals Board to make a response to the letter from An Taisce's solicitors is regrettable. Having been asked to do so, the Appeals Board should have clearly stated its position in respect of costs protection. Had this been done promptly, it might well have led to an earlier resolution of the dispute in relation to costs protection. It is contrary to the spirit of the Aarhus Convention, and the domestic legislation which gives effect to same, for a competent authority not to disclose its position in respect of costs protection when requested to do so. There is an obligation upon the Appeals Board to provide "*practical information*" on judicial review procedures, and this necessarily extends to the provision of information on the legal costs regime pertaining to such procedures. (See regulation 19 of the Aquaculture (Licence

Application) Regulations 1998 (S.I. 236 of 1998) (as amended by S.I. 369 of 2010 and S.I. 240 of 2018)).

29. The Appeals Board ultimately confirmed, in June 2022, in response to a letter on behalf of An Taisce that it was prepared on a pragmatic basis to accept that costs protection applies to the second set of judicial review proceedings.

MOOTNESS

30. It should be explained that, in a number of instances, individual licence applicants have brought an appeal against the Minister's decision on their application. An appeal of this type is often referred to as a "*first party appeal*". In one instance, a third party, Birdwatch Ireland, has brought an appeal. An Taisce has had an opportunity to make submissions on these various appeals as a statutory consultee. This has allowed An Taisce to make precisely the same submission to the Appeals Board as it would have done had its own appeal not been rejected as invalid. The appeals have not yet been determined by the Appeals Board.

31. An Taisce's complaint, i.e. that its own appeal should not have been rejected as invalid, would appear to be moot insofar as these appeals are concerned. This is because An Taisce has not suffered any prejudice: it has had an opportunity to be heard on these appeals and to bring its concerns to the attention of the Appeals Board. A favourable outcome to these judicial review proceedings would not, therefore, confer any practical benefit upon An Taisce. (*Lofinmakin v. Minister for Justice, Equality and Law Reform* [2013] IESC 49, [2013] 4 I.R. 274). There are, however, a small number of instances where no

appeal has been brought and, to this extent, the judicial review proceedings might serve some useful purpose.

FORM OF JUDICIAL REVIEW PROCEDURE

32. The parties are in disagreement as to whether a legal challenge to a decision by the Aquaculture Licences Appeals Board to reject an appeal as invalid is subject to conventional judicial review under Order 84 of the Rules of the Superior Courts, or, alternatively, statutory judicial review under Section 73 of the Fisheries (Amendment) Act 1997. The resolution of this dispute turns on the proper characterisation of the decision of the Appeals Board to reject the appeal as invalid, and, in particular, on whether this decision entails a "*determination … on an appeal*".

33. The scope of the statutory judicial review procedure is defined as follows under subsection 73(1) of the Fisheries (Amendment) Act 1997:

> "(1) A person shall not question—
>
> (a) a decision on an application for a licence or the revocation or amendment of a licence, or
>
> (b) a determination of the Board on an appeal,
>
> otherwise than by way of an application for judicial review under Order 84 of the Rules of the Superior Courts (S.I. No. 15 of 1986) (in this section referred to as 'the Order')."

34. This subsection has to be read in conjunction with subsection 73(5), which is to the effect that references to Order 84 shall be construed as including references to the Order as amended or re-enacted (with or without modification) by rules of court. It follows, therefore, that Section 73 is to be read in conjunction with the post-2011 version of Order 84, i.e. the version inserted by the Rules of Court (Judicial Review) 2011, rather than the version in force at the time the

Fisheries (Amendment) Act 1997 was enacted. The practical significance of this is that the relevant time-limit is now the same for conventional judicial review and statutory judicial review. In each instance, the time-limit is three months.

35. The position adopted on behalf of the Minister and the Appeals Board is that the statutory judicial review procedure only applies to a determination on the merits of an appeal. It is submitted that the decision to reject an appeal as invalid is merely an administrative decision and is not a determination "*on*" the appeal.

36. The position adopted on behalf of An Taisce is more neutral. The principal concern of An Taisce is that whatever form of judicial review procedure pertains, it must be open to an applicant to apply for an extension of time. This presents no difficulties in the event that the legal challenge is subject to conventional judicial review: Order 84, rule 21 affords the High Court discretion to extend time provided certain criteria are satisfied. The position is, potentially, more complex if the legal challenge is subject to statutory judicial review. An Taisce's position is that Section 73 of the Fisheries (Amendment) Act 1997 must be interpreted as allowing for an extension of time, or, if this is not possible, the section must be held to be unconstitutional having regard to the principles identified in *White v. Dublin Corporation* [2004] IESC 35, [2004] 1 I.R. 545. I will return to consider this fall-back argument at paragraphs 50 to 54 below.

37. Counsel on behalf of An Taisce also points out that in *Ecological Data Centres Ltd v. An Bord Pleanála* [2013] IESC 61, the Supreme Court held that the words "*determination*" and "*decision*" are, as used in everyday English

language, natural synonyms. This observation was made in the context of the Planning and Development Act 2000 which provides for an appeal structure similar to that under the Fisheries (Amendment) Act 1997.

38. Before turning to consider the substance of this issue, it is salutary to recall the relevant principles of statutory interpretation. The proper approach to statutory interpretation has recently been restated by the Supreme Court in *Heather Hill Management Company v. An Bord Pleanála* [2022] IESC 43, [2022] 2 I.L.R.M. 313. Murray J., writing for the Supreme Court, emphasised that the literal and purposive approaches to statutory interpretation are not hermetically sealed. In no case can the process of ascertaining the legislative intent be reduced to the reflexive rehearsal of the literal meaning of words, or the determination of the plain meaning of an individual section viewed in isolation from either the text of a statute as a whole or the context in which, and purpose for which, it was enacted. Rather, it is necessary to consider the context of the legislative provision, including the pre-existing relevant legal framework, and the object of the legislation insofar as discernible.

39. The words of the section are the first port of call in its interpretation, and while the court must construe those words having regard to (i) the context of the section and of the Act in which the section appears, (ii) the pre-existing relevant legal framework and (iii) the object of the legislation insofar as discernible, the onus is on those contending that a statutory provision does not have the effect suggested by the plain meaning of the words chosen by the legislature to establish this. The "*context*" that is deployed to that end, and "*object*" so identified, must be clear and specific, and, where wielded to displace the apparently clear language of a provision, must be decisively

probative of an alternative construction that is itself capable of being accommodated within the statutory language.

40. I turn now to apply those principles to the interpretation of the Fisheries (Amendment) Act 1997. The legislation envisages that an appeal procedure may eventuate in one of a number of different outcomes. The Appeals Board may, variously, reject an appeal as invalid; dismiss an appeal as vexatious, frivolous or without substance or foundation; deem an appeal to be withdrawn; or determine the appeal on its merits. In each instance, the outcome is dispositive of the appeal process.

41. The question of statutory interpretation which arises is whether the words "*a determination of the Board on an appeal*" are confined to circumstances where an appeal has been disposed of by an adjudication upon the merits. Taken in isolation, these words convey the sense of *any* decision reached by the Appeals Board which resolves or concludes an appeal. This follows from the ordinary and natural meaning of the noun "*determination*", i.e. the conclusion of a dispute or controversy by the decision of a judge or other arbiter.

42. Of course, in order to interpret a statutory provision properly, it is necessary to consider the words in context. Here, the words are to be found in a section which prescribes a special judicial review procedure for legal challenges to "*measures*" taken by the Appeals Board (to use neutral language). The principal features of the special judicial review procedure are as follows. First, the application for leave to apply for judicial review must be made on notice, rather than *ex parte* as is the position in conventional judicial review, and an applicant must meet a higher threshold, i.e. "*substantial grounds*", before leave will be granted. Secondly, the High Court, in determining either an application

for leave to apply for judicial review or an application for judicial review on foot of such leave, shall act as expeditiously as possible consistent with the administration of justice. Thirdly, the right of appeal to the Court of Appeal against a determination of the High Court is regulated. It is necessary for an intending appellant to obtain leave to appeal from the High Court.

43. It can be ascertained from these provisions that the legislative intent is to ensure that legal challenges to measures taken by the Appeals Board will be heard and determined expeditiously. The combined effect of an *inter partes* hearing and the higher threshold for leave is that more cases are likely to be dismissed at the leave stage than is the position in respect of conventional judicial review. The regulation of the right of appeal to the Court of Appeal will likely result in the expeditious resolution of legal challenges, with more cases being disposed of at the level of the High Court than is the position in respect of conventional judicial review.

44. Having regard to this legislative intent, the proper interpretation of Section 73 of the Fisheries (Amendment) Act 1997 is apparent. The words "*a determination of the Board on an appeal*" are intended to capture not only an adjudication by the Appeals Board on the underlying merits of an appeal but also embrace any decision which disposes of the appeal. This includes a decision to reject an appeal as invalid, a decision to dismiss an appeal as frivolous and vexatious, and a decision to deem an appeal withdrawn. It would be inconsistent with the legislative intent, which underpins the creation of same, to confine the special judicial review procedure to those cases where an appeal has been disposed of by an adjudication upon the merits. It would be anomalous were a less expeditious judicial review procedure to apply to legal

challenges which are premised on an appeal which has been held, at first instance, to be invalid or frivolous and vexatious. If anything, the imperative of ensuring that a legal challenge is resolved expeditiously is more compelling in cases where an appeal is invalid or is frivolous and vexatious. There is nothing in the Fisheries (Amendment) Act 1997 which indicates that the legislature is more tolerant of delays in such cases. Indeed, it would undermine the legislative intent in making express provision for the summary disposal of appeals which are invalid or frivolous and vexatious were any legal challenge to such a decision to be subject to a less expeditious judicial review procedure. If an appellant who has brought a stateable appeal is required to submit to the statutory judicial review procedure, then it is difficult to understand why an appellant whose appeal has been found to be frivolous or vexatious should be afforded a more leisurely option.

45. In summary, the meaning of the term "*determination*", as employed under Section 73 of the Fisheries (Amendment) Act 1997, is not confined to an adjudication upon the underlying merits of an appeal. The term is, at the very most, ambiguous in this regard. An interpretation which ensures that the statutory judicial review procedure embraces any decision by the Appeals Board which is dispositive of an appeal—including, relevantly, a decision to reject an appeal as invalid—is more consistent with the legislative intent than one which restricts it to an adjudication upon the merits of an appeal. This interpretation does not involve straining the statutory language.

46. For completeness, it should be noted that different canons of construction apply to legislative provisions which regulate the constitutional right of appeal to the Court of Appeal. As appears from judgments such as *North Westmeath*

Turbine Action Group v. An Bord Pleanála [2020] IECA 355, any limitation on the appellate jurisdiction has to be "*clear and unambiguous*".

JURISDICTION TO EXTEND TIME

47. Section 73 of the Fisheries (Amendment) Act 1997 contains an express cross-reference to Order 84 of the Rules of the Superior Courts. It is apparent from this cross-reference that the statutory judicial review procedure incorporates elements of the conventional judicial review procedure. The provisions of Section 73 are not intended to be exhaustive, but rather are supplemented by the provisions of Order 84, save and insofar as same would be inconsistent with the exigencies of the statutory judicial review procedure. Thus, for example, procedural issues, such as the cross-examination of deponents on their affidavits or the amendment of pleadings, are regulated by Order 84 rather than by Section 73 alone.

48. The specific issue which arises in the present proceedings is whether the statutory time-limit is capable of extension by reference to the provisions of Order 84. The starting point for the analysis of this issue must be the statutory language itself. Section 73 is silent on the question of whether the three month time-limit is capable of extension. It simply provides that the application for leave to apply for judicial review shall be made within the period of three months commencing on the date on which the decision or determination was made. There is nothing in the language of Section 73 which indicates a legislative intent to exclude the possibility of an extension of time. The time-limit under both Section 73 and Order 84 is now the same, i.e. three months. This had not always been the position: as of the date the Fisheries

(Amendment) Act 1997 had been enacted, the time-limit prescribed, under the then applicable version of Order 84, for a legal challenge to the decision of a public authority had been six months. This was subsequently reduced to three months under the Rules of the Superior Courts (Judicial Review) 2011. As noted earlier, Section 73 provides that references therein to Order 84 shall be construed as including references to the Order as amended or re-enacted (with or without modification) by rules of court. The fact that the time-limits are now aligned means that there would be no practical difficulty in reading the statutory time-limit in conjunction with the extension of time provisions under Order 84.

49. It would seem to follow that, on its ordinary and natural meaning, Section 73 is to be interpreted as indicating that the statutory time-limit is to be supplemented by the extension of time provisions under Order 84. Lest this interpretation be incorrect, however, it is appropriate to consider, briefly, the implications of the "*double construction*" rule of constitutional interpretation.

50. This issue arises in the following way. An Taisce's pleaded case includes, as a fall-back, a formal challenge to the validity of Section 73 of the Fisheries (Amendment) Act 1997. An Taisce's position is that either the section must be interpreted as allowing for an extension of time, or, if this is not possible, the section must be held to be unconstitutional having regard to the principles identified in *White v. Dublin Corporation* [2004] IESC 35, [2004] 1 I.R. 545. There, the Supreme Court held that an absolute two month time-limit under the Local Government (Planning & Development) Act 1963, which was incapable of extension, was repugnant to the Constitution of Ireland. The impugned

legislation was held to compromise a substantive right guaranteed by the Constitution, namely, the right of access to the courts.

51. The "*double construction*" rule has been summarised as follows in *East Donegal Co-Operative Livestock Mart Ltd v. Attorney General* [1970] I.R. 317 (at 341):

> "Therefore, an Act of the Oireachtas, or any provision thereof, will not be declared to be invalid where it is possible to construe it in accordance with the Constitution; and it is not only a question of preferring a constitutional construction to one which would be unconstitutional where they both may appear to be open but it also means that an interpretation favouring the validity of an Act should be given in cases of doubt. It must be added, of course, that interpretation or construction of an Act or any provision thereof in conformity with the Constitution cannot be pushed to the point where the interpretation would result in the substitution of the legislative provision by another provision with a different context, as that would be to usurp the functions of the Oireachtas. In seeking to reach an interpretation or construction in accordance with the Constitution, a statutory provision which is clear and unambiguous cannot be given an opposite meaning. […]".

52. As appears, there are limits to the "*double construction*" rule: the "*constitutional*" interpretation of a legislative measure must be one which is reasonably open on the statutory language. A statutory provision which is clear and unambiguous cannot be given an opposite meaning.

53. Here, the application of the "*double construction*" rule presents no difficulties. It is possible, without in any way straining the statutory language, to interpret Section 73 of the Fisheries (Amendment) Act 1997 in a manner which is consistent with the constitutional requirements identified by the Supreme Court in *White v. Dublin Corporation.* The section is well capable of bearing the "*constitutional*" interpretation. Indeed, on one view, this is the ordinary and natural meaning of the provision. Put otherwise, the section is, at most,

ambiguous on the question of whether the time-limit is amenable to extension. If and insofar as any such ambiguity exists, same is to be resolved in favour of the only "*constitutional*" interpretation open.

54. In conclusion, therefore, the proper interpretation of Section 73 of the Fisheries (Amendment) Act 1997 is that the three month time-limit prescribed for judicial review proceedings is capable of extension by the court pursuant to Order 84, rule 21.

EXTENSION OF TIME: GOVERNING PRINCIPLES

55. Order 84, rule 21(3) and (4) confers discretion on the High Court to extend time as follows:

> "(3) Notwithstanding sub-rule (1), the Court may, on an application for that purpose, extend the period within which an application for leave to apply for judicial review may be made, but the Court shall only extend such period if it is satisfied that:
>
> (a) there is good and sufficient reason for doing so, and
>
> (b) the circumstances that resulted in the failure to make the application for leave within the period mentioned in sub-rule (1) either:
>
> (i) were outside the control of, or
>
> (ii) could not reasonably have been anticipated by the applicant for such extension.
>
> (4) In considering whether good and sufficient reason exists for the purposes of sub-rule (3), the court may have regard to the effect which an extension of the period referred to in that sub-rule might have on a respondent or third party."

56. The obligations to be complied with by an applicant who seeks an extension of time are prescribed under Order 84, rule 21(5). This rule provides that an application for an extension of time shall be grounded upon an affidavit sworn

by or on behalf of the applicant which shall set out the reasons for the applicant's failure to make the application for leave within the period prescribed, and shall verify any facts relied on in support of those reasons.

57. The Supreme Court in *M. O'S. v. Residential Institutions Redress Board* [2018] IESC 61, [2019] 1 I.L.R.M. 149 has confirmed that an applicant, who does not apply for leave to issue judicial review within the time specified, is required to furnish good reasons which explain and objectively justify the failure to make the application within the time-limit and which would justify an extension of time up to the date of institution of the proceedings.

58. The Supreme Court further held that the phrase "*the circumstances that resulted in the failure*", under Order 84, rule 21(3), encompasses all the relevant circumstances which resulted in the failure to apply within time. The relevant circumstances could, in principle, include the state of the jurisprudence as of the date the time-limit expired. On the facts of *M. O'S*, the applicant successfully sought an extension of time by reference to a change in the legal landscape. More specifically, the Court of Appeal had delivered a judgment which clarified the interpretation of a key statutory provision, and, in consequence of which, the applicant now had an unanswerable case on the merits.

59. The principles governing an extension of time have been reiterated by the Court of Appeal in *Arthropharm (Europe) Ltd v. Health Products Regulatory Authority* [2022] IECA 109 (at paragraph 87). The judgment emphasises that the court, in addition to being satisfied that "*good and sufficient*" reasons exist for an extension of time, must also be satisfied as a matter of fact that the circumstances which resulted in the delay were outside the control of the

applicant. Where a delay arises from circumstances which were within the control of the applicant, the court may not extend time.

DISCUSSION OF APPLICATION TO EXTEND TIME

60. An Taisce delayed the institution of these proceedings because of a concern on its part as to a potential exposure to legal costs. The strategy embarked upon by An Taisce to address this concern had been to pursue the indemnity proceedings. The indemnity proceedings were instituted on 25 February 2020, i.e. within three months of the Appeals Board's decision to reject the appeal as invalid. An Taisce only instituted the within proceedings, i.e. the second judicial review proceedings, after the indemnity proceedings had been resolved in its favour and after the formal order of the court in those proceedings had been drawn up. These proceedings were instituted on 5 May 2022.

61. Before turning to discuss in detail whether this strategy was justified in the sense of providing a good and sufficient reason for the extension of time, it may be helpful, first, to set out what is the current understanding of the law in relation to costs protection and to contrast that with the legal landscape as it stood in November 2019.

62. The Supreme Court judgment in *Heather Hill Management Company v. An Bord Pleanála* [2022] IESC 43, [2022] 2 I.L.R.M. 313 was delivered on 10 November 2022. This judgment removed the uncertainty which had arisen from the sometimes conflicting judgments of the lower courts. The judgment explains that the operation of Section 50B of the Planning and Development Act 2000 in relation to any given set of proceedings is defined by three conditions. The conditions are (a) that the proceedings comprise an application

for judicial review or for leave to seek judicial review, (b) that the decision of which judicial review is sought is made pursuant to a statutory provision, and (c) that the statutory provision is one which gives effect to one of four named EU Directives. Once these conditions are fulfilled, then *all* of the grounds agitated in the judicial review proceedings benefit from costs protection. This is so even if the grounds do not raise issues of EU law.

63. Applying the principles stated by the Supreme Court to the statutory regime for decision-making in respect of aquaculture licences, a legal challenge to a decision on an application or appeal in respect of an aquaculture licence attracts costs protection. This is because the relevant provisions of the Fisheries (Amendment) Act 1997, pursuant to which the decision is made, give effect to the Environmental Impact Assessment Directive (2011/92/EU) and the Habitats Directive (92/43/EEC).

64. In most instances, it will be a relatively straightforward matter to determine whether any given set of judicial review proceedings fulfils the statutory requirements for costs protection. There will, of course, be cases at the margin. If an (intended) applicant wishes to obtain confirmation, in advance, that costs protection applies, they may do so by making an application for a pre-emptive costs order. Such an application will, generally, be made pursuant to Section 7 of the Environment (Miscellaneous Provisions) Act 2011. The High Court does, however, have a broader jurisdiction to make such a costs order: see, generally, *King v. An Bord Pleanála* [2024] IEHC 6.

65. An application for a pre-emptive costs order can be brought as a preliminary application within the substantive judicial review proceedings, or, alternatively, may be brought as a stand-alone application by way of originating notice of

motion *prior* to the institution of intended judicial review proceedings. Section 7(1) of the Environment (Miscellaneous Provisions) Act 2011 expressly envisages that an application for a pre-emptive costs order can be made before the institution of intended judicial review proceedings.

66. Irrespective of which mechanism is used, an application for a pre-emptive costs order will, generally, attract costs protection. In an exceptional case, where an applicant has demonstrated bad faith or has otherwise engaged in litigation misconduct, then it might be open to the court to mark its disapproval by the making of a costs order. This would, however, be very much the exception.

67. Put shortly, an applicant does not have to expose themselves to a potential liability to pay the other side's legal costs in order to obtain an advance ruling as to whether costs protection pertains to the proceedings. This latter point has been clarified in a number of judgments including, most relevantly, that delivered in the indemnity proceedings: *An Taisce v. Minister for Agriculture Food and the Marine* [2022] IEHC 96.

68. With the benefit of hindsight, therefore, the procedural route which should have been adopted by An Taisce following the Appeals Board's decision of 26 November 2019 was clear-cut. An Taisce should have written to the proposed parties to the intended judicial review proceedings and asked them to confirm that they accepted that costs protection would apply to judicial review proceedings challenging the Appeals Board's decision. In the event that any of the proposed parties indicated that they did not accept that costs protection applied, An Taisce should then have brought a pre-emptive costs application. This application could have been brought pursuant to Section 7 of the Environment (Miscellaneous Provisions) Act 2011, or, alternatively, pursuant

to the High Court's broader jurisdiction under Order 99 of the Rules of the Superior Courts. This motion should have been served on all proposed parties to the intended judicial review proceedings.

69. It is correct to say, as An Taisce does, that logistical difficulties may arise given that the institution of judicial review proceedings is subject to a tight time-limit. It will not always be possible for an intending applicant to obtain assurance, within the three month limitation period, that their intended proceedings will benefit from costs protection. The intending applicant will have to engage in correspondence with the proposed parties, and, in the event that the proposed parties do not agree that the intended proceedings will attract costs protection, will have to issue and serve an application for a pre-emptive costs order. The hearing and determination of such an application will take some time. The three month time-limit may well have expired prior to all of these procedural steps being completed. An Taisce describes all of this as creating a "*legislative trap*" for an intending applicant.

70. With respect, these logistical difficulties are by no means insurmountable. One approach would be for an intending applicant to institute their judicial review proceedings within the three month time-limit, and to adjourn the substantive proceedings until the application for a pre-emptive costs order has been heard and determined. The parties to the judicial review proceedings would not be entitled to recover any costs incurred by them in the interregnum between the institution of the proceedings and the determination of the application for a pre-emptive costs order. This is because the interim costs protection applies not only to the costs associated with the motion for a pre-emptive costs order but extends to all of the ongoing costs of the proceedings. Until such time as the

issue of costs protection is resolved, the applicant is shielded from any costs liability. A respondent could not, for example, turn around and claim the costs that it had incurred in taking advice on the proceedings or embarking upon the preliminary preparation of opposition papers. For costs purposes, the meter only starts to run from the date upon which the court rules that the proceedings do not attract costs protection.

71. An alternative approach might be for the intending applicant to bring an application for a pre-emptive costs order by way of originating notice of motion, i.e. as a standalone application, and to defer the institution of the substantive judicial review proceedings until such time as the question of costs protection is resolved. Once the application for a pre-emptive costs order has been determined, the applicant would then institute the substantive judicial review proceedings and apply for an extension of time. This alternative approach is sub-optimal. It is far preferable that the substantive judicial review proceedings would be instituted within the three month time-limit and then adjourned pending the resolution of the question of costs protection. Such an approach ensures that the parties directly affected, i.e. the respondent decision-maker and the licence applicants, are on notice of the detail of the legal challenge at an early stage.

72. The foregoing represents a summary of the current understanding of the law in relation to costs protection. The position was far less clear-cut as of the date of the impugned decision, i.e. 26 November 2019. As of that date, there was considerable uncertainty as to the nature and extent of the costs protection applicable to judicial review proceedings. The High Court's judgment in

Heather Hill Management Company v. An Bord Pleanála [2019] IEHC 186 was then under appeal to the Court of Appeal.

73. This uncertainty had a particular poignancy for An Taisce. This is because its intended legal challenge lay on the fault line between the two competing interpretations of Section 50B of the Planning and Development Act 2000. If the High Court's interpretation were to be overturned, and costs protection held to pertain only to grounds of challenge alleging a breach of one or more of the specified EU Directives, then An Taisce would not be entitled to costs protection. Its intended proceedings were predicated, primarily, on domestic law grounds.

74. An Taisce thus found itself in an invidious position as of the date of the impugned decision. It is entirely understandable that An Taisce would want to obtain an assurance as to whether costs protection pertained before it embarked upon proceedings which might otherwise prove to be financially ruinous. The practical difficulty An Taisce faced is that, as of November 2019, there was no judgment confirming that an application for a pre-emptive costs order attracted costs protection. Section 7 of the Environment (Miscellaneous Provisions) Act 2011 was silent on the point.

75. With the benefit of hindsight, An Taisce should have brought a pre-emptive costs application on notice to the parties to the judicial review proceedings: it is now established that such an application would benefit from costs protection. Instead, An Taisce embarked upon the much more convoluted approach of seeking an indemnity from the State Parties by way of parallel proceedings. Given the uncertainty in the law as of November 2019, it would be unduly harsh to criticise An Taisce for taking an alternative procedural route, provided

that same did not unnecessarily prejudice the position of the proposed parties to the intended judicial review proceedings.

76. The fatal flaw in the approach adopted by An Taisce is that it excluded those who would be most directly affected by any legal challenge, namely the licence applicants. An Taisce failed to write, in advance, to the licence applicants to invite them to confirm their position in relation to costs protection. An Taisce also failed to join the licence applicants to the indemnity proceedings.

77. It is implicit in the test of good and sufficient reason under Order 84, rule 21 that an applicant must act reasonably, and, in particular, must pursue the procedural route which is least destructive of the purpose which underlies the imposition of the time-limit. The precise purpose of the statutory time-limits governing judicial review proceedings in planning and environmental matters is to ensure that the beneficiary of a development consent knows at an early stage that there is a legal challenge to the development consent. This principle was first stated by the Supreme Court in *K.S.K. Enterprises Ltd v. An Bord Pleanála* [1994] 2 I.R. 128 and has been reiterated consistently since then. The principle was described as follows, in the specific context of Section 73 of the Fisheries (Amendment) Act 1997, in *Dunmanus Bay Mussels Ltd v. Aquaculture Licences Appeals Board* [2013] IEHC 214, [2014] 1 I.R. 403 (at paragraph 11):

> "The chief objects of s. 73(2) of the Act of 1997 may be said to be (i) to ensure that the respondent and the notice parties are aware in a timely fashion of the existence of the proceedings and (ii) to give such parties an opportunity to be heard at the first reasonable opportunity prior to any decision of this court as to the grant of leave and to resist any such application for leave."

78. An Taisce was obliged to pursue the procedural route open to it which was the least disruptive to the time-limit, and which best respected the rights of the proposed parties to the intended judicial review proceedings. The procedural route actually embarked upon by An Taisce resulted in unnecessary delay in the licence applicants being notified of the legal challenge. It also resulted in their being denied an opportunity to avoid the legal challenge becoming stalled as the result of a preliminary dispute in relation to costs protection. The licence applicants should have been afforded the opportunity to indicate their position in respect of costs protection generally. If, for example, the licence applicants had indicated that they did not accept that costs protection applied to the intended proceedings, then they could not reasonably complain thereafter that delay was incurred in having that issue resolved. The procedural route embarked upon by An Taisce denied the licence applicants that opportunity.

79. The adverse impact upon the licence applicants was disproportionate: An Taisce's objective of obtaining an assurance that the proceedings would benefit from costs protection could have been achieved by less disruptive means. An Taisce, by the simple expedient of writing to the proposed parties, could have obtained an assurance that, at the very least, any application for a pre-emptive costs order would attract costs protection. The proposed parties might well have gone further and conceded that the substantive judicial review proceedings would also attract costs protection. This step of writing to the proposed parties could have been taken without any risk of exposing An Taisce to a potential liability to pay legal costs. It is inconceivable that the licence applicants would have been entitled to an order directing An Taisce to pay the legal costs incurred in responding to such pre-litigation correspondence *unless*

legal proceedings were subsequently instituted. This is because the statutory power under Part 11 of the Legal Services Regulation Act 2015 to award costs, on a party and party basis, is confined to circumstances where civil proceedings have been instituted. To be recoverable, the costs must be "*of or incidental to*" civil proceedings. (See also Order 99, rule 2(2)).

80. There might, in principle, have been some merit to An Taisce pursuing its indemnity proceedings in counterfactual circumstances where it had first written to the licence applicants and they had refused to acknowledge that, at the very least, any application for a pre-emptive costs order would attract costs protection. It is the failure of An Taisce to take the costs-neutral step of writing to the licence applicants that is fatal to its application for an extension of time.

81. It is correct to say—as counsel for An Taisce does—that it is, at this remove, only possible to *speculate* as to what response correspondence directed to the licence applicants in November 2019 might have elicited. This is not, however, an answer to the criticism that An Taisce failed to engage in such correspondence. The gravamen of the criticism is that the licence applicants were not informed of the legal challenge promptly and were denied an opportunity to avoid the legal challenge becoming stalled as the result of a preliminary dispute in relation to costs protection. In a sense, the nature of the response which might have been made to such correspondence is of secondary importance. Whereas the procedural steps open to An Taisce might have differed, depending upon the nature of the response, the sting of the criticism remains the same.

82. The onus is upon An Taisce to establish that there is good and sufficient reason for extending time and that the delay in instituting proceedings was caused by circumstances outside its control. Here, An Taisce, by failing to write in advance to the licence applicants, has created a scenario whereby we can only speculate as to what the response might have been.

83. As it happens, the response made by the licence applicants when An Taisce, belatedly, sought confirmation of their position in June 2022 suggests that they might well have agreed that the legal challenge would attract costs protection had they been asked in November 2019. The six licence applicants who are represented by William Fry LLP indicated, by letter dated 20 June 2022, that they were prepared to accept, on a pragmatic basis and with a view to minimising costs and court time, that costs protection applies. This concession was made notwithstanding that, as of that date, the Court of Appeal's judgment in *Heather Hill Management Company v. An Bord Pleanála* represented the prevailing law. It is not open to An Taisce to invite the court to speculate that a different response would have been received in November 2019, at a time when the High Court judgment, which was more favourable to applicants, represented the prevailing law. The absence of direct evidence as to what the position of the licence applicants would have been is as the result of An Taisce's omission to take the obvious step of writing to the licence applicants. An Taisce cannot now rely on its own default to invoke some sort of evidential presumption in its favour.

84. For all of these reasons, An Taisce has failed to establish that there is good and sufficient reason for granting an extension of time.

CONCLUSION AND PROPOSED FORM OF ORDER

85. There is no doubt but that An Taisce found itself in an invidious position as of the date of the impugned decision, i.e. 26 November 2019. As of that date, there was considerable uncertainty as to the nature and extent of the costs protection applicable to judicial review proceedings. This uncertainty had a particular poignancy for An Taisce in circumstances where its intended legal challenge lay on the fault line between the two competing interpretations of Section 50B of the Planning and Development Act 2000.

86. This uncertainty in the legal landscape is, in principle, a factor which may be taken into account in deciding whether or not to grant an extension of time pursuant to Order 84, rule 21. (*M. O'S. v. Residential Institutions Redress Board* [2018] IESC 61, [2019] 1 I.L.R.M. 149). It is, however, implicit in the test of good and sufficient reason under Order 84, rule 21 that an applicant must act reasonably, and, in particular, must pursue the procedural route which is least destructive of the purpose which underlies the imposition of the time-limit. The fatal flaw in the approach adopted by An Taisce is that it excluded those who would be most directly affected by any legal challenge, namely the licence applicants. An Taisce failed to write, in advance, to the licence applicants to invite them to confirm their position in relation to costs protection. An Taisce also failed to join the licence applicants to the indemnity proceedings.

87. The licence applicants were thus not informed of the legal challenge promptly and were denied an opportunity to avoid the legal challenge becoming stalled as the result of a preliminary dispute in relation to costs protection. The adverse impact upon the licence applicants was disproportionate: An Taisce's

objective of obtaining an assurance that its intended judicial review proceedings would benefit from costs protection could have been achieved by less disruptive means. An Taisce has failed to establish that there is good and sufficient reason for granting an extension of time.

88. Accordingly, leave to apply for judicial review is refused in circumstances where the proceedings were instituted outside the three month time-limit prescribed under Section 73 of the Fisheries (Amendment) Act 1997 and where there is no basis for an extension of time.

89. As to the legal costs of these proceedings, my *provisional* view is that there should be no order, i.e. each party should bear its own costs. This proposed order reflects the default position under Section 50B of the Planning and Development Act 2000. If any party wishes to contend for a different form of costs order than that provisionally proposed, it should file short written submissions within twenty-one days. The other parties will have twenty-one days thereafter to file written submissions in reply. In the event that no written submissions have been filed by any party by 6 March 2024, the order will be drawn up along the lines provisionally proposed.

Appearances

James Devlin SC and Alan Doyle for the applicant instructed by Fieldfisher Ireland LLP
Fintan Valentine SC and Tim O'Sullivan for the first respondent instructed by Philip Lee LLP
Colm Ó hOisín SC and Sean Aherne for the second to fourth respondents instructed by the Chief State Solicitor
Damien Keaney for six of the notice parties instructed by William Fry LLP

Approved Garrett Simons