THE HIGH COURT
JUDICIAL REVIEW

2020 No. 76 J.R.

BETWEEN

FRIENDS OF THE IRISH ENVIRONMENT CLG

APPLICANT

AND

MINISTER FOR COMMUNICATIONS CLIMATE ACTION AND THE ENVIRONMENT IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

SHANNON LNG LIMITED

NOTICE PARTY

JUDGMENT of Mr. Justice Garrett Simons delivered on 3 April 2020

INTRODUCTION

1. This judgment sets out my ruling in respect of an application for an adjournment of the substantive hearing of these judicial review proceedings. The adjournment application has been dealt with on the papers, i.e. without an oral hearing in open court. Each of the parties was instead afforded an opportunity to state their position in correspondence. None of the parties took up the court's invitation to request an oral hearing.

2. The ruling is being published by way of a formal judgment in order to ensure compliance with the constitutional requirement that, save in such special and limited cases as may be prescribed by law, justice shall be administered in public. This judgment will be posted on the Courts Service's website.

PROCEDURAL HISTORY

3. These proceedings have been admitted to the Strategic Infrastructure Development List of the High Court ("***the SID List***"). The SID List had been established by the President of the High Court (Kelly P.) in February 2018 to ensure that legal proceedings in respect of strategic infrastructure development projects are afforded an expeditious hearing. To this end, such proceedings are subject to active case management, and are assigned early hearing dates. The judge assigned to hear the case reads the papers in advance of the substantive hearing, and this ensures that the hearing is more focused.

4. The judge in charge of the SID List, McDonald J., admitted the proceedings into the list on 13 February 2020. Directions have been given as to the exchange of pleadings, affidavits and written legal submissions. The substantive hearing of the application for judicial review has been fixed for 3 to 4 days commencing on 30 June 2020. McDonald J. has since assigned the case to me for hearing.

5. The adjournment application has been made on behalf of the respondents to the proceedings, namely the Minister for Communications Climate Action and the Environment, Ireland, and the Attorney General ("***the State Respondents***"). The adjournment application is opposed by the applicant for judicial review, Friends of the Irish Environment ("***the Applicant***"). No submission has been received from the notice party.

ADJOURNMENT APPLICATION

6. The adjournment application is grounded upon the affidavit of Mr Kevin Brady. Mr Brady is a Principal Officer in the Department of Communications, Climate Action and Environment ("***the Department***").

7. The nature of the evidence which the Department *may* wish to adduce in their opposition papers is identified as follows (at paragraph 11 of the affidavit).

> "In order to respond to the Applicant's case, the Respondent may wish to adduce evidence on *inter alia* the facts as they relate *inter alia* to the security of energy supply of the European Union as well as that of the State; the technical and scientific evidence on the relative greenhouse gas emissions from different energy sources in the energy mix of the State and the Union; the nature of the legal duties of States and the Union during the transition to a low-carbon economy; and the respective roles of the Union institutions, the Regional Groups, the Agency for the Cooperation of Energy Regulators and the Member States in the Regulation as well as the procedures followed in the case of the approval process at issue in this case and, to the extent that it is able and/or privy to same, the facts relating to the procedure followed at EU level leading up to the Commission approval at issue, including the public participation process that has taken place in relation to the PCI list at EU level."

8. The affidavit goes on to explain that the team within the Department which is principally responsible for dealing with the issues raised by these proceedings is a small team, consisting of two full-time individuals who are managed by a Principal Officer. The officials are responsible for security of supply policy in relation to natural gas and electricity, but also have a range of other additional responsibilities, including gas regulatory policy, renewable gas policy, renewable heat policy and commercial and public sector energy efficiency policy.

9. The exceptional circumstances underlying the adjournment application are then detailed as follows (at paragraphs 13 and 14 of the affidavit).

> "I say that these team members along with a number of other colleagues in the Department of Communications, Climate Action and Environment are dealing at present with the implications and potential future implications of the COVID-19 virus for the security of supply of Ireland's natural gas and electricity systems. I say and believe that the individuals working on this issue are the same individuals, as set out above, as those who have the knowledge and expertise to prepare the State's response to these proceedings. I say and believe that this team is currently working with the Commission for Regulation of Utilities, Gas Networks Ireland, EirGrid and ESB Networks to ensure the continued safe and secure supplies of electricity and natural gas within the State. I say and believe that this

> work is being given the highest priority in the national interest at present.
>
> I further say and believe that these staff working are at present, due to the national measures put in place to deal with the COVID-19 virus, working remotely which means that the individuals at issue cannot work as efficiently as they would otherwise be able to and do not all currently have access to their full paper and digital files that would be necessary to provide full instructions in these proceedings."

10. Mr Brady then prays for an adjournment. In earlier correspondence (which has been exhibited), it had been suggested that the substantive hearing might be adjourned to a date in October 2020.

11. The Applicant opposes the adjournment application. The principal grounds for so doing are set out as follows in its submission of 2 April 2020. (See letter from FP Logue Solicitors). First, it is submitted that much of what has been identified by Mr Brady as matters in respect of which the State Respondents "may" wish to file affidavit evidence does not appear to be factual evidence at all. Mr Brady's references to the "legal duties" on the State and the Union in the transition to a low carbon economy, and to the roles of the various actors under the PCI Regulation, are cited as examples in this regard. Secondly, it is submitted that, in any event, all these matters, if considered relevant now, must also have been relevant at the time the decisions were taken which was not very long ago. Thirdly, it is submitted that Mr Brady has not identified any file or document that is inaccessible, let alone the person to whom it is inaccessible, the reason for that inaccessibility, what efforts are being made to restore access and when such access will be restored.

12. The submission concludes by suggesting that the substantive hearing would be suitable for a remote hearing.

13. A replying submission has been received this morning (3 April 2020) from the State Respondents. This consists largely of a legal argument re: jurisdiction. This argument is summarised at paragraph 15 below.

OVERVIEW OF JUDICIAL REVIEW PROCEEDINGS

14. The nature of the relief sought in these proceedings is such that the extent of the affidavit evidence required in response will be much less than in most other judicial review proceedings in the SID List. The principal relief sought in the proceedings is that the High Court should make a reference to the Court of Justice of the European Union ("***the CJEU***") to determine the validity of the adoption of the 4th Union list of Projects of Common Interest ("***PCI List***"). More specifically, the applicant for judicial review seeks to challenge the inclusion of the Shannon LNG terminal and connecting pipeline in the PCI List.

15. It appears to be common case between the parties that the High Court, as a national court, does not have jurisdiction to make a determination that the PCI List is invalid. The parties are, however, in disagreement as to the appropriate procedure by which the adoption of the PCI List may be challenged. In particular, the State Respondents object that the Applicant could have brought proceedings directly before the General Court of the European Union to challenge the adoption of the PCI List, citing Article 263(4) TFEU. It is further submitted that the time-limit for the bringing of such proceedings has expired, and that it is not permissible to institute proceedings before a national court as a means of circumventing time-limits for challenging the validity of EU acts before the European Courts. The judgment in Case C-188/92, *TWD Textilwerke Deggendorf* is cited in this regard.

16. These objections will, of course, have to be given serious consideration at the substantive hearing of the judicial review proceedings. In a sense, however, the arguments now advanced on behalf of the State Respondents prove too much in the context of the *adjournment application*. It is evident from these arguments that the resolution of these proceedings will turn largely on legal, rather than factual, issues. For example, the question of the appropriate forum before which the validity of the PCI List may be challenged is quintessentially a legal issue. The outcome of this legal issue will require careful consideration of the relevant provisions of the treaties, legislation and case law. Without in any way wishing to diminish the expertise of the Departmental officials, there is little, if any, by way of factual evidence which will be required from them in order to allow the High Court to determine these legal issues.

17. Moving on from the jurisdictional issue as to the appropriate forum for determining the validity of the PCI List, it is evident from the Statement of Grounds that the gravamen of the Applicant's case is directed to the decision-making of the European Commission. A series of criticisms are made in this regard (in particular, at paragraphs (e) 13 to (e) 23). The Applicant is not inviting the High Court to rule upon these criticisms, but rather, as explained, in particular at paragraph (e) 24 of the Statement of Grounds, seeks to have these matters referred to the CJEU.

18. Given this approach on behalf of the Applicant, it is difficult to envisage what affidavit evidence the State Respondents could usefully advance in relation to these matters. The most that could be done, presumably, is to put before the High Court, by way of exhibits, documentation referable to the decision-making of the European Commission. It is perhaps telling that Mr Brady himself is circumspect: using the qualifying words "*to the extent that it is able and/or privy to same*" when describing the evidence that might be

adduced by the State as to the procedure followed at EU level leading up to the Commission's adoption of the PCI List.

19. I hasten to add that these comments are made strictly in the context of the adjournment application, and are not intended to impose any restrictions upon the nature and extent of the affidavit evidence which the State Respondents may wish to file. The only point being made is that it is not immediately obvious that much will be required by way of affidavit evidence, rather than exhibits to affidavits.

20. The proceedings do, of course, go on then to make a number of complaints against the State Respondents. First, the alleged absence of a clear procedure for the purposes of obtaining a referral to the CJEU under Article 267 in respect of the validity of acts of the institutions, bodies, offices or agencies of the European Union is criticised. Again, this is a legal issue. The broad outline of the State Respondents' answer to this complaint is already evident from the exchange of submission on the adjournment application. As discussed at paragraph 15 above, the position seemingly being taken by the State Respondents is that the adoption of the PCI List should have been challenged by a direct action before the General Court.

21. Secondly, complaint is made that the State Respondents do not appear to have conducted any, any adequate or any adequate written sustainability assessment prior to their recommending approval of the Shannon LNG project for the PCI List. As part of its answer to this aspect of the case, the State Respondents may wish to exhibit documentation which they say evidences that they had carried out such an assessment. Alternatively, the State Respondents may wish to advance a legal argument as to the nature and extent of the obligation, if any, upon a Member State to carry out the sustainability assessment. These are both matters which can be attended to in relatively short course.

22. It seems unlikely that the Departmental officials would be required to expend time on the preparation of *new* reports or materials. The criticism made by the Applicant is that a sustainability assessment was not carried out at the relevant time. It is not immediately obvious that it would be an answer to that complaint to prepare new reports or materials *ex post facto*. Again, I hasten to add that these comments are made strictly in the context of the adjournment application, and are not intended to impose any restrictions upon the nature and extent of the affidavit evidence which the State Respondents may wish to file. The only point being made is that it is not immediately obvious that the officials will be required to engage upon a particularly time-consuming task.

23. Similar considerations would appear to apply to the third complaint made against the State Respondents. This involves an allegation that the Department failed to comply with the Climate Change and Low Carbon Act 2015 in making the approval decision. Again, this complaint is addressed to the manner in which (historic) decision-making had been carried out. The State Respondents may wish to exhibit such and any materials as had been generated during the course of that decision-making process. Again, this would not appear to require time-consuming effort on the part of the officials.

24. The fourth relief concerns reasons and an alleged right of public participation. This, again, relates to the manner in which the decision-making had been carried out.

25. The final matters raised in the Statement of Grounds address the question of whether the proceedings have been brought within time, and whether the applicant has standing (*locus standi*) to maintain the judicial review proceedings. These are both, quintessentially, legal issues.

RULING OF THE COURT

26. In ruling upon this adjournment application, the High Court must have regard to its obligation to ensure that proceedings which have been admitted to the SID List are determined as expeditiously as possible consistent with the administration of justice. The SID List has been established, and judicial resources made available, in order to ensure that legal proceedings in respect of strategic infrastructure development projects are determined expeditiously. There is a public interest in ensuring that such proceedings be resolved, one way or another, promptly. It is in the interest of all stakeholders—including competent authorities, members of the public, environmental non-governmental organisations and developers—that this should be done.

27. The need for expedition is especially strong in the present case. The challenge is to the validity of the inclusion of the Shannon LNG terminal and connecting pipeline in the Union List of Projects of Common Interest. One of the principal objectives of the EU Regulation which introduced the concept of a "project of common interest" is that the development consent process in respect of same should be dealt with expeditiously. See, Article 7(1) to (3) of Regulation (EU) No 347/2013 on guidelines for trans-European energy infrastructure, as follows.

> 1. The adoption of the Union list shall establish, for the purposes of any decisions issued in the permit granting process, the necessity of these projects from an energy policy perspective, without prejudice to the exact location, routing or technology of the project.
>
> 2. For the purpose of ensuring efficient administrative processing of the application files related to projects of common interest, project promoters and all authorities concerned shall ensure that the most rapid treatment legally possible is given to these files.
>
> 3. Where such status exists in national law, projects of common interest shall be allocated the status of the highest national significance possible and be treated as such in permit granting processes — and if national law so provides, in spatial planning — including those relating to environmental assessments, in the manner such treatment

> is provided for in national law applicable to the corresponding type of energy infrastructure.

28. It would be inconsistent with the spirit of these objectives to allow judicial review proceedings, which seek to challenge the very validity of the adoption of a specific development project as a "project of common interest", to be delayed unnecessarily.

29. Indeed, it is to be noted that the State Respondents themselves seek to raise an objection on the grounds of *delay*. More specifically, it is alleged that the proceedings were instituted out of time. (See paragraph 15 above). Although this objection is not directly based on Regulation (EU) No 347/2013, it is, nevertheless, indicative of the sense of urgency which should, properly, attach to proceedings of this type.

30. As against all of this, it has to be acknowledged that Ireland is in an unprecedented situation as it seeks, as with all other countries, to respond to the coronavirus disease pandemic. Extraordinary times call for extraordinary measures. The business of all three branches of government has been disrupted, as priority is given to measures intended to ensure public health and safety.

31. This court fully recognises that the relevant officials within the Department have their own vital role to play in responding to this pandemic. As carefully explained by Mr Brady in his affidavit, the officials are responsible for security of supply policy in relation to natural gas and electricity. This court would never do anything which would impede the ability of these officials to discharge their vital role in this time of national crisis.

32. Having carefully considered the affidavit evidence, the submissions, and the nature of the claim advanced in these judicial review proceedings, I am not satisfied, however, that there is any conflict between (i) ensuring that the hearing goes ahead on 30 June 2020, and (ii) allowing the officials time to carry out their vital role. First, there is an obvious public interest in ensuring that a challenge to the inclusion of the Shannon LNG project within the adopted PCI List is determined—one way or another—expeditiously. The

very existence of the proceedings casts a shadow over the proposed project. It will be in the State's interest to have the proceedings determined promptly.

33. Secondly, the nature and extent of the work actually required from the Departmental officials in relation to these proceedings would appear to be considerably less than Mr Brady might apprehend. As discussed under the previous heading, the resolution of these judicial review proceedings will turn largely on legal issues, rather than on the determination of any factual dispute. The principal relief sought is that the High Court make a reference for a preliminary ruling to the CJEU. It seems to me that this is a case where the burden of work will fall more heavily upon the lawyers representing the State Respondents than upon the Departmental officials. Whereas the Department will, of course, be responsible for instructing the Chief State Solicitor's Office as to how the proceedings are to be defended, much of the heavy lifting thereafter will be done by the solicitors and counsel.

34. Thirdly, it seems that at least part of the rationale for the adjournment stems from practical or logistical difficulties presented by the relevant officials having to work from home. Unless the administration of justice is to grind to a halt entirely, however, this cannot represent a valid excuse for adjourning legal proceedings for a period of in excess of three months. All of us will have to accommodate ourselves to the new working environment demanded by the need to respond to the pandemic.

35. I will adjust the timetable so as to afford extra time for the Departmental officials and their legal representatives to prepare opposition papers. Opposition papers will not now have to be filed until 12 May 2020. This means, in effect, that the State Respondents will have had a period of some three months within which to prepare opposition papers. (The new timetable is set out in full at the end of this judgment).

36. It also occurs to me that at least some of the documentation which the parties may wish to rely upon at the substantive hearing will be available online. I propose to dispense with the requirement to formally exhibit such documentation, at least in circumstances where the parties can agree that certain documentation is relevant and admissible. This is also in ease of the Departmental officials.

37. Finally, the court will be flexible as to the precise form which the hearing on 30 June 2020 takes. It seems to me that this is a case which could be dealt with by way of a remote or virtual hearing. Indeed, subject always to hearing the views of the parties, it occurs to me that this is a case which might even be capable of being dealt with on the papers only.

CONCLUSION AND FORM OF ORDER

38. The application for an adjournment is, hereby, dismissed. The substantive hearing of these judicial review proceedings goes ahead, as scheduled, on 30 June 2020.

39. The timetable has been adjusted so as to afford extra time for the Departmental officials and their legal representatives to prepare opposition papers.

12 May	Opposition papers to be filed
26 May	Applicant's Submissions to be filed (with any replying affidavit)
9 June	Respondent's Submissions to be filed
23 June	Papers to be lodged or uploaded online for the High Court
30 June	Substantive hearing (3 to 4 days).