

**THE HIGH COURT**

**JUDICIAL REVIEW**

**2022 No 910 JR**

**MONDAY THE 26<sup>th</sup> DAY OF JUNE 2023**

**BEFORE MR JUSTICE HOLLAND**

**BETWEEN/**

**FUTUREPROOF CLARE**

**APPLICANT**

**AND**

**AN BORD PLEANÁLA, AUGHINISH ALUMINA LTD,**

**THE MINISTER FOR HOUSING PLANNING AND LOCAL**

**GOVERNMENT, IRELAND AND THE ATTORNEY GENERAL, AND**

**LIMERICK CITY AND COUNTY COUNCIL**

**RESPONDENTS**

**AND**

**AN TAISCE – THE NATIONAL TRUST FOR IRELAND**

**NOTICE PARTY**

Upon Motion of Counsel for the Applicant coming before the Court this day for mention by way of remote hearing pursuant to Notice of Motion of the Applicant filed on the 3<sup>rd</sup> day of February 2023 seeking the following reliefs

1. “An Order of *Certiorari* pursuant to Order 84 of the Rules of the Superior Courts 1986 as amended and Section 50 of the Planning and Development Act 2000 as amended quashing the decision of the First Respondent, An Bord Pleanála (the Board), dated 31 August 2022, file reference ABP-312146-21, and there described as:

*“... works to facilitate an expansion of the disposal capacity at the existing Bauxite Residue Disposal Area (BRDA). The works will generally consist of the construction of rock fill embankments at the perimeter of the Bauxite Residue Disposal Area, offset internally and*

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*founded on the previously deposited and farmed bauxite residue, in two-metre-high vertical lifts. The proposed development will result in the footprint of the Bauxite Residue Disposal Area decreasing as it increases in height. The proposed development will result in a circa 12 metres increase in height (over that previously permitted under Limerick City and County Council Planning Register Reference Number: 05/1836; An Bord Pleanála Planning Reference Number: PL 13.217976) to a maximum height of circa 44 metres Ordinance Datum upon closure. The proposed expansion of the Bauxite Residue Disposal Area will provide for the deposition of an additional circa 8.0 million cubic metre bauxite residue over the lifetime of the development. The proposed development also provides for an expansion of the existing capacity of the Salt Cake Disposal Cell (SCDC), which is located within the Bauxite Residue Disposal Area through a vertical extension of the existing perimeter wall and associated cell lining resulting in a circa 2.25 metre crest height increase of the existing cell to circa 31.25 metre Ordinance Datum and maximum overall height of circa 35.50 metre Ordinance Datum upon closure. The increase in capacity of the Salt Cake Disposal Cell, will provide for the storage of an additional circa 22,500 cubic metres of salt cake.” Together with the additional and further works recited and, “All located within the site of circa 222 hectares in the townlands of Aughinish East, Aughinish West, Island Mac Teige, Glenbane West and Fawnamore at or adjacent to Aughinish Island, Askeaton, County Limerick”*

2. Such declaration(s) of the legal rights and/or legal position of the applicant and (if and insofar as legally permissible and appropriate) persons similarly

situated and/or of the legal duties and/or legal position of the Respondents as the court considers appropriate.

3. A declaration for the purposes of S177B of the Planning and Development Act 2000 as amended, that permission reference 05/1836 for which— (a) an environmental impact assessment, (b) a determination in relation to whether an environmental impact assessment was required, and / or (c) an appropriate assessment, was or is required, which permission was granted by the Council, was granted in breach of law, and is invalid or otherwise defective in a material respect because of— (i) any matter contained in or omitted from the application for permission including inadequacy of an environmental impact assessment or an Appropriate Assessment or (ii) any error of fact or law or procedural error.
4. An Order of Certiorari quashing a decision of Limerick County Council (now Limerick City and County Council) made on or about 15 May 2006, reference 05/1836, authorising construction of Phase 2 Bauxite Residue Disposal Area, retention of increase in annual alumina production tonnage to 1.6 million, and further increase in tonnage to 1.95 million, therein described as:

*PERMISSION for construction of a bauxite residue disposal area (circa 80 hectares in area to 32m in height above mean sea level) on adjoining lands to south of existing Bauxite Residue Disposal Area, ancillary mud distribution pipes and water sprinkler pipes, 2.5m high electrical package substation; 4 no. 6m high street lights; 6 no. 2m high walkway lights; operating platform; perimeter roadway, site perimeter fence, extraction of topsoil & subsoil from borrow area & site development works; increase in height of existing and permitted Bauxite Residue Disposal Area (circa 104 hectares in area to 32m in*

*height above mean sea level); relocation of existing salt cake disposal area to location (1 hectare in area) within existing Bauxite Residue Disposal Area; realignment of 310m of existing flood tidal defence berm adjacent to the Robertstown River; an increase in height of existing storm water pond (circa 6.5 ha in area to 6.0 metre in height above mean sea level); increase in height of existing liquid waste pond (circa 1.3 hectares in area to circa 6.0 metres in height above mean sea level) and landscaping treatments over a period to 2027; RETENTION of existing Alumina production capacity of 1.60million metric tonnes per annum with associated emissions within permitted Integrated Pollution Control Licence limits: PERMISSION for increase in existing Alumina production capacity to 1.95 million metric tonnes per annum with associated emissions to remain within permitted Integrated Pollution Control Licence Limits, all on a site of circa 338 hectares in the townlands of Aughinish West & East, Island Mac Teige and Glenbane West at or adjacent to Aughinish Island. This application requires an IPC licence and an EIS has been submitted as part of the application.*

5. An Order pursuant to Section 50(8) of the Planning and Development Act 2000 as amended, extending time to apply for an Order of Certiorari challenging the validity of the Decision of Limerick County Council (now Limerick City and County Council) made on or about 15 May 2006 under file reference 05/1836, as referred to at D.4 above.
6. In the alternative, an Declaratory Order that, if and insofar as an extension of time may be a necessary precondition to the reliefs at 4 and 5 above, and if and insofar as such extension of time may not be available or may not be granted,



both of which are denied, then S50(7) and (8) of the Planning and Development Act sets a limitation period which is not reasonable for the purposes of European Union law, fails to provide an effective remedy, is invalid, and / or should be set aside.

7. A declaration that the State failed, in the period between 2000 and 2010 correctly to implement A1, A2, A3, A4, A5, A6, A8 and / or A9 of Directive 85/337 on environmental impact assessment as amended and A6 of 92/43 on habitats, and that S177B of the Planning and Development Act 2000 as amended should be interpreted as applying retrospectively to a permission granted in 2005.
8. A declaration or mandatory order requiring the Council to issue a direction to the Developer pursuant to S177B in respect of the development the subject of decision 05/1836.
9. A mandatory injunction requiring the Developer, in default of obtaining substitute consent pursuant to Part XA of the Planning and Development Act 2000 as amended, to remove all development carried out at the Installation pursuant to and subsequent to decision 05/1836.
10. A declaration that the State has failed to comply with its obligations pursuant to Directive 85/337 as amended.
11. A declaration that the State has failed to comply with its obligations pursuant to Directive 92/43.
12. A mandatory order requiring the Council to issue an Order to the Developer pursuant to S177B of the Planning and Development Act 2000 as amended.
13. A stay pursuant to Order 84 Rule 20(8)(b) of the Rules of the Superior Courts on the operation of the above Board Decision of 11 January 2022, file reference 310709, pending conclusion of the present proceedings.

14. A Declaratory Order pursuant to Section 7 of the Environment (Miscellaneous Provisions) Act 2011 as amended, Order 99 of the Rules of the Superior Courts as amended, the inherent jurisdiction of the Court, Article 47 of the Charter on Fundamental Rights of the European Union, Articles 4(3) and 19(1) of the Treaty on European Union, and / or Article 9 of the Convention on Access to Information, Public Participation In Decision-Making and Access to Justice In Environmental Matters done at Aarhus, Denmark, on 25 June 1998 (the Aarhus Convention), confirming that Section 50B of the Planning and Development Act 2000 as amended and / or Sections 3 and 4 of the Environment (Miscellaneous Provisions) Act 2011 apply to the Grounds set out at Part E hereof.
15. A Declaratory Order pursuant to Section 7 of the Environment (Miscellaneous Provisions) Act 2011 as amended, Order 99 of the Rules of the Superior Courts as amended, and/or pursuant to the inherent jurisdiction of the Court, that, if and insofar as the Applicants may not be entitled to an Order in the terms of the preceding paragraph, or an Order to equivalent effect, the State has failed adequately to guarantee and defend the Applicants' right to bring proceedings at a cost that is not prohibitively expensive, has failed to ensure the Applicants' right to effective judicial protection, and / or has failed to ensure reasonable predictability in relation to the costs of proceedings, and has accordingly failed to comply with the requirements of Article 47 of the Charter on Fundamental Rights of the European Union, Articles 4(3) and 19(1) of the Treaty on European Union, and / or Article 9 of the Aarhus Convention.
16. A Declaratory Order pursuant to Order 84 Rule 18(2) of the rules of the Superior Courts as amended and Article 4(3) of the Treaty on European Union, that the Minister, Ireland and the Attorney General, and / or the Board, are

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required by law to pay to the Applicants on the conclusion of the present proceedings, the amount of any costs which the Applicants may be ordered to pay to the other Respondents or Notice Parties, or so much of such sum as may be necessary to ensure that the costs borne by the Applicants in the proceedings are not prohibitively expensive for it.

17. An order referring a question or questions of law for determination by the Court of Justice of the European Union.
18. If necessary, an extension of time to apply for leave to seek judicial review of the decision of the Board, pursuant to Section 50(8) of the Planning and Development Act 2000 as amended.
19. Further or other relief.
20. Costs.
21. Discovery”

In the presence of Counsel for the Applicants and Counsel for the Notice Party and Counsel for the Respondent

Whereupon on reading the pleadings in the within proceedings

And on hearing said respective Counsel

And the Court being informed that the parties have agreed final orders in these proceedings

BY CONSENT

The COURT DOTH GRANT

1. An Order of *Certiorari* quashing the decision of the First Named Respondent dated the 31<sup>st</sup> day of August 2022 bearing Case Reference ABP-312146-21 granting permission for works to facilitate an expansion of the disposal capacity at the existing Bauxite Residue Disposal Area in the townlands of Aughinish East and Aughinish West and Island Mac Teige and Glenbane West



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and Fawnamore at or adjacent to Aughinish Island Askeaton in the County of Limerick on the ground that the Board failed to take into account the submission of An Taisce dated the 4<sup>th</sup> day of February 2022

2. An Order remitting this matter to the First Named Respondent to be determined in accordance with law such remittal to take effect from the point in time immediately following receipt of the last submission on the application being a submission from Tom Phillips & Associates on behalf of Aughinish Alumina Limited received by the Board on the 6<sup>th</sup> day of July 2022
3. An Order for the Applicant's costs of the proceedings (including reserved costs) incurred to the date of this Order as against the First Named Respondent such costs to be adjudicated in default of agreement

And the COURT DOTH DIRECT that all reliefs against the Third Fourth and Fifth Named Respondents be and the same are hereby struck out with no further order

CATRÍONA MCGRATH  
REGISTRAR  
Perfected: 29/06/2023

FP Logue Solrs  
Solicitor for the Applicants

Philip Lee LLP  
Solicitor for the First Named Respondent

William Fry LLP  
Solicitor for the Second Named Respondent

The Chief State Solicitors Office  
Solicitors for the Third Fourth and Fifth Named Respondent

Leahy Reidy LLP  
Solicitor for the Sixth Named Respondent



An Taisce – The National Trust for Ireland  
Notice Party