Neutral Citation Number: [2005] IEHC 485

**THE HIGH COURT**

**2005 4 MCA**

**IN THE MATTER OF THE PLANNING AND DEVELOPMENT ACT 2000**

**BETWEEN**

**DERRYBRIEN COOPERATIVE SOCIETY LIMITED**

**APPLICANT**

**AND**

**SAORGUS ENERGY LIMITED AND COILLTE TEORANTA**
**AND GORT WIND FARMS LIMITED**

**RESPONDENT**

**Judgment of Ms. Justice Dunne J. delivered on the 3rd day of June, 2005.**

The applicant in this case seeks an interlocutory and/or final order pursuant to the Planning and Development Act 2000 and in particular s. 160 of the said Act restraining the respondents and each of them from commencing and/or continuing the unauthorised development (namely the programme of de-forestation) on their lands in the ownership of the second named respondent comprised within folio 27229, folio 17176F, folio 34119, folio 52971 and folio 54074F situate on the Cashlaundrumlahan Mountain, Derrybrien, Co. Galway and directing the restoration of the said lands to their condition prior to the commencement of the said unauthorised development, inclusive of the replanting of trees on effected areas and the restoration of the pre-existing drainage channels.

The first named respondent is the owner of the lands at Cashlaundrumlahan Mountain comprised in the said folios (hereinafter referred to as "Derrybrien") under and by virtue of a transfer of the property dated the 26th June, 2003. The former owner of the land at Derrybrien is the second named respondent and has been contracted to carry out the removal of trees on the site. The third named respondent is the owner and developer of a wind farm scheme at Derrybrien.

**Background**

The application was grounded upon two affidavits, one of Martin Collins a resident of Derrybrien, Loughrea, Co. Galway and a member and chairman of the plaintiff herein and an affidavit of Steven Dowds a planning consultant engaged on behalf of the applicant herein.

The lands at Derrybrien comprise a site of approximately 345 hectares. A significant part of the lands was forested with lodgepole pine and sitka spruce planted thereon by the second named respondent herein (hereinafter referred to as Coillte).

The first named respondent herein applied for and obtained planning permission on the site for the erection of 71 wind turbines. It will be of assistance to set out in some detail the details in respect of the planning permission obtained in respect of the site at Derrybrien.

> 97/3470 This application was for a wind farm of 23 wind turbines. The application was approved by Galway County Council on 12th March, 1998. Following an appeal to An Bord Pleanála permission was granted subject to conditions on 12th October, 1998. The third named respondent herein (hereinafter referred to as Gort Wind Farms) obtained an extension of the period of the same planning permission until the 31st March, 2005.
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> 97/3652 This was an application by Saorgus for a wind farm of 23 wind turbines. It was also approved by Galway County Council on 12th March, 1998. The decision was again appealed to An Bord Pleanála which granted permission subject to conditions on 12th October, 1998. An extension of the period of the planning permission until 31st March, 2005, was applied for and was granted.
>
> 99/2377 This application by Saorgus was for amongst other things a 110 kv electricity transmission line. Application in regard to this matter was made on 11th June, 1999 and it was approved on 20th September, 1999 by Galway County Council. An extension was obtained by Gort Wind Farms in respect of this permission.
>
> 00/4581 Saorgus applied for a wind farm of 25 turbines in this application. Permission was refused by Galway County Council on the 1st December, 2000. On appeal An Bord Pleanála granted permission subject to conditions on 15th November, 2001.
>
> 02/3560 Saorgus applied to Galway County Council for a change in turbine type. This was approved by Galway County Council on 6th January, 2003.

In January 2003, Saorgus applied for a felling licence in respect of some 263 hectares of the lands at Derrybrien pursuant to the provisions of the Forestry Act 1946. A felling licence was granted by the Minister for Communications Marine and Natural Resources on 20th May, 2003, to Coillte subject to a number of conditions. In June of 2003 the lands comprised in the folios already referred to comprising the Derrybrien site were transferred by Coillte to Saorgus. At the same time Gort Wind Farms obtained from Saorgus a 21 year lease of the wind farm site. On the 2nd July, 2003, work including the removal of trees commenced on site.

On 16th October, 2003, a massive bog burst/land slide at the Derrybrien site occurred causing significant damage to surrounding areas. The initial slide stopped on 19th October, 2003, two and a half kilometres down stream approximately but on 28th October, 2003, following heavy rain the slide continued causing a significant environmental disaster. Construction on the site ceased at that stage. As a result of the landslide/bog burst, work on site stopped and a number of reports were commissioned into the cause of the landslide. I think it is fair to say at this stage that it is acknowledged by Gort Wind Farms that as a result of the report commissioned, it was concluded that there were several contributing factors towards the land slide but that the immediate cause was most probably the ongoing construction works. Tree felling recommenced at Derrybrien in July of 2004 and construction work resumed in November 2004.

**The Issue**

In his affidavit Martin Collins on behalf of the applicant sets out the issue to be determined in this particular case. At paragraph 10 of his affidavit he refers to the fact that as part of the wind turbine project the respondents are engaged in the deforestation of the site. He argues that the respondents need planning permission for de-forestation and that they also require an Environmental Impact

Statement dealing with that issue as part of the planning permission process and that such Environmental Impact Statement is still required. In essence therefore, the question to be decided is whether a separate planning permission is needed by the respondents in order to embark on de-forestation/removal of trees on the site. If planning permission is required, then it follows that further Environmental Impact Assessments would be required in order to comply with the requirements of the relevant E.C. directive.

**The Arguments**
It may be useful at this stage to refer briefly to the European Communities (Environmental Impact Assessment) (Amendment) Regulations 1999 which came into force on the 1st May, 1999. These regulations amended previous relegations by adding to the list of projects which should be subject to Environmental Impact Assessment the following:

> "1 Agriculture, Silviculture and aquaculture.
>
> (b) (iii) de-forestation for the purpose of conversion to another type of land use, where the area to be de-forested would be greater than 10 HA of natural woodland or 70 HA of conifer forest."

Those regulations came into force on 1st May, 1999 and it is common case that if a project requires or involves de-forestation in respect of an area greater than 70 HA of conifer forest then an Environmental Impact Assessment must be provided in relation to such a project.

Relying on the provisions of the 1999 Regulation it is argued on behalf of the applicant that in respect of the planning permissions obtained after the regulations came into force, an Environmental Impact Assessment dealing with de-forestation is required and secondly that as the original planning permissions have been extended on a number of occasions since the regulations came into force insofar as those extensions are concerned they are caught by the 1999 Regulations and therefore at the stage of seeking an extension, an E.I.A. was required in respect of same. So far as this argument is concerned I cannot accept it. It does not seem to me that the effect of the 1999 Regulations can be such as to retrospectively require the submission of an Environmental Impact Assessment for the purpose of obtaining an extension of the time within which the permission can be relied upon. Further it is argued that two of the permissions did not have the necessary Environmental Impact Assessment having been lodged after the date when the 1999 Regulations came into force, the permission comprised in 99/2377 in respect of the installation of a 110 kv electricity transmission line and planning permission no. 02/3560 for a change of turbine type and an increase in blade length in respect of the turbine. The argument made in this regard was that as part of the overall project, such permission necessarily came under the ambit of the 1999 Regulations. It was not argued that that permission of itself involved any deforestation. Again I cannot accept that so far as those permissions were concerned that any E.I.A. under the 1999 Regulations was required. Accordingly, it is clear that the matter at issue relates to the three permissions being 97/3470, 97/3652 and 00/4581.

Of the three relevant planning permissions it was accepted in the course of argument on behalf of the applicant that the first planning permission and the third planning permission relate to parts of the lands at Derrybrien which comprise land covered in forestry. Insofar as the second grant of planning permission the area of land affected by that is largely covered by bog and it was accepted that not being forested the same principles do not apply to that particular planning permission.

In his affidavit, Stephen Dowds the planning consultant on behalf of the applicant argued that the Environmental Impact Statement accompanying the planning permission 97/3470 and the Environmental Assessment accompanying planning permission 00/4581 do not deal with the issue of de-forestation for the purpose of conversion to another type of land use. It was also stated by Stephen Dowds that the E.I.S. submitted with application 97/3470 having referred to impacts on other land uses as a result of the wind farm states that the trees were due to be felled anyway and would not be replanted and yields were low. He says that this confirms the change of land use and the nature of the proposal namely de-forestation but does not contain an assessment of impacts arising out of the de-forestation. He argues that in those circumstances it was his view that planning permission and an Environmental Impact Statement is and was required for the de-forestation and change of use at Derrybrien. A contrary view was taken by the planning consultant, William Murray who swore affidavits dealing with this aspect of the matter on behalf of the respondents.

As I have already indicated the requirement in relation to an Environmental Impact Assessment in respect of de-forestation did not come into effect until 1st May, 1999. Accordingly it is my view that an E.I.A. dealing with de-forestation was not required for the first application for planning permission. Insofar as the second application in 1997 is concerned I have already said that it related to lands on which there was no forestry and again, the issue of an E.I.A. dealing with de-forestation does not arise. The final planning permission which is of relevance is that in relation to 00/4581. An Environmental Assessment (so-called) was furnished with that application. In the course of his affidavit, Mr. Dowds sets out a number of matters which he argues amount to deficiencies in the Environmental Impact Statement and the Environmental Assessment i.e. the E.I.S. accompanying 97/3470 and the Environmental Assessment accompanying 00/4581. Indeed he criticised the Environmental Assessment accompanying 00/4581 because it is incorrectly titled. He states that this Environmental Assessment is subject to the same criticism as the detailed criticism set out by him in respect of the earlier Environmental Impact Statement. On that basis he deposes that there is and was no Environmental Impact Statement drawn up for the de-forestation project on the Derrybrien site.

In his replying affidavit Mr. William Murray sets out that whilst an E.I.S. was not required with application no. 97/3470 it was best practice as recommended under Department of Environment Wind Farm development guidelines issued to planning authorities. He makes the argument in his affidavit that the complaint about the issue of forestry made by Mr. Dowds concerning the adequacy of the Environmental Impact Statements constitutes a retrospective objection to planning permission, which was not advanced at the time of the planning application.

Having considered this particular point it seems to me that there is force in the argument made by Mr. Murray in his affidavit. If there was a deficiency either in the earlier Environmental Impact Assessment or the Environmental Statement prepared in respect of the later application for planning permission it would have been open to the applicant's predecessor and indeed to any of the local residents to object to the planning permissions sought on that ground. If, notwithstanding any objection that could have been made, planning permission had been granted then it would have been open to the applicant or its predecessors or any of the residents to judicially review the decision by which planning permission was granted. This did not happen. I have come to the conclusion that in questioning the validity of the Environmental Impact Statement and Environmental Assessment as it is referred to in respect of the 00/4581 planning permission that the applicant herein is in effect attempting to retrospectively object to the planning permission or, perhaps more accurately, seeking to challenge the validity of the permissions granted. Clearly this cannot be done now. The time for making such a challenge to the validity of the permissions has long since passed.

This does not conclude the matter. The second argument on behalf of the applicant is that the removal of trees is not covered by the

grant of planning permissions in respect of the three relevant permissions. This issue is dealt with in the affidavit of Brian Ryan sworn herein on behalf of the third named respondent on the 10th February, 2005 at paragraph 7 of his affidavit:

> "As appears from the affidavit of Stephen Dowds, when the solicitors for the residents raised the issue of forestry in May, 2004, which was the first time that they did so, they were informed that legally the removal of the trees constituted harvesting and not de-forestation. I understand that this is a legal issue for the determination of this honourable court. Nonetheless, in meeting this application for judicial review, Gort Wind Farms Limited has engaged a planning consultant, Mr. William Murray, who has examined all the relevant files and advised that in fact the removal of the trees formed part of the development for which planning permission was sought and granted. As such I am advised and believed that irrespective of whether planning permission was required for 'de-forestation for the purpose of conversion to another type of land use where the area to be deforested would be greater than ... 70 hectares of conifer forest', or not, the felling of the trees is not unauthorised development."

This seems to me to be the core question at the heart of these proceedings, whether planning permission was required for removal of the trees.

In the course of their submissions, counsel on behalf of the applicant argued that the development in the relevant planning permissions involved not only the construction of wind farms consisting of the wind turbines, service roadways, control houses/transformer compounds and anemometry masts but also the de-forestation of 263 hectares out of the entire 345 hectare site involving the felling of some 115,600 trees approximately and that the same comprises "development as provided for by s. 3 of the 1963 Act" and should have been the subject of an application for permission and set out as such in the site notices for the developments and published notices which require the same to set out the nature and extent of such developments. In this context it was argued that while the use of land for the purpose of forestry is or was an exempted development, de-forestation is not an exempted development, in particular de-forestation for the purposes of conversion to another type of land use, and that the same constitutes both the carrying out of works and a material change of the use of the land. It was also argued that insofar as the environmental assessment accompanying Permission 00/4581 is concerned that the planning application did not refer to de-forestation for the purpose of conversion to another type of land use where the area to be de-forested was in excess of 70 hectares of conifer forest and that the environmental assessment did not address this aspect of the development, namely deforestation, properly as required by the relevant regulations. In that context it is argued that as permission was not sought or obtained for the de-forestation for the purpose of conversion to another type of land use i.e. a material change of the use of the land the development therefore constitutes an unauthorised development as defined in s. 2 of the Planning and Development Act, 2000.

While the argument of the applicant in this regard is again tied up with the adequacy of the environmental impact assessments and indeed the issue as to whether the original planning applications were properly described in the planning notices (both on site and as published) it seems to me that the question here raised on behalf of the applicant is whether or not the planning applications were such as to disclose the fact that the construction of the wind farm involved the removal of trees.

It should be noted that in this regard it was argued on behalf of the applicant that the respondents could not rely on the provisions of s. 4(1)(a) of the 1963 Act which provides as follows:-

> "The following shall be exempted developments for the purpose of this Act:
>
> > (a) Development consisting of the use of any land for the purposes of agriculture or forestry (including afforestation), and development consisting of the use for any of those purposes of any building occupied together with land so used."

Reference was also made to s. 4(1)(i) of the Planning and Development Act 2000 which now provides as follows:

> "Section 4
>
> > (1) the following shall be exempted developments for the purpose of this Act:
> >
> > (i) development consisting of the thinning, felling and replanting of trees, forests and woodlands, the construction, maintenance and improvement of non-public roads serving forests and woodlands and works ancillary to that development, not including the replacement of broadleaf high forest by conifer species."

It is accepted by the applicant that the use of land for the purpose of forestry was exempted development pursuant to s. 4(1)(a) of the 1963 Act and also as provided for by the provisions of s. 4(l)(i) of the 2000 Act. However, the point is made that in this regard the respondents cannot claim to come within the definition of forestry as the nature of the development taking place at Derrybrien is not forestry but, on the contrary, de-forestation.

I think it is fair to say that the provisions contained in the 2000 Act are somewhat more limited in the form of exemption given than the 1963 Act. It should be noted that the 2000 Act came in to operation so far as Section 4 is concerned on the 11th March, 2002. Insofar as the respondents may seek to rely on statutory exemption pursuant to the 1963 Act, which in my view is the applicable Act, then it is argued that the onus of establishing that the statutory exemption is available rests on the respondents, see *Lennon v. Kingdom Plant Hire Limited,* (Unreported, High Court, Morris J., 13th December, 1991).

Further insofar as the respondents may wish to rely on the statutory exemption it is argued that they must clearly and unambiguously be within the statutory exemption in regard to what is proposed and in this regard the applicant relies on the decision of Finlay C.J. in *Dillon v. Irish Cement Limited,* (Unreported, Supreme Court, 26th November, 1986). Finally, reference was made to the decision in the case of *Kildare County Council v. Goode* [1999] 2 I.R. 495 in which Keane J., having referred to the decision of Finlay P.(as he then was) in the case of *In Re Viscount Securities Limited* [1976] 112 I.L.T.R 17 where he described the definition of a development as falling into two broad categories, namely, one consisting of works in the sense as defined of building, demolition, extension, alteration, repair or renewal and the second category being a change of user excluding such change as emanates from the act of building, demolition, extension, alteration or repair, stated as follows:-

> *"However, Finlay P went on to point out that these two categories were 'not necessarily always exclusive and sometimes inevitably overlapping...'*
>
> *It should also be remembered that the case was concerned with an entirely different subject, i.e. the right of a developer refused permission on admittedly compensatable grounds to be paid such compensation and the need to*

*adopt a strict and, from one point of view, somewhat artificial construction of the relevant provisions so as to avoid a conflict with the private property provisions of the Constitution: see Central Dublin Development Association Limited & Ors. v. The Attorney General* 109 ILTR 69 *and East Donegal Co-operative v. Attorney General* [19701 I.R. 317.

*The decision, accordingly, does not, in my view, lend any support to the argument advanced on behalf of the developers in the present case. The activities on the land before October 1st, 1964 constituted both the carrying out of works and a material change in the use of the land. Since there was clear evidence on which the learned trial judge was entitled to find that the use in question had long been abandoned before the present operations began and that, in any event, the present operations constituted a significant intensification of that use, it follows that permission was required."*

In the course of the arguments made herein on behalf of the respondents it was urged that in seeking relief under s. 160 of the Planning and Development Act, 2000 that the onus is on the applicant to prove that it is entitled to such relief. Reference was made to a number of decisions which stress the limits of this type of injunctive proceeding. See *Mahon & Ors. v. Butler & Ors*. [1997] 3 I.R. where it was stated by Denham J. as follows:-

*"The planning code should be construed strictly. Actions can and do have grave financial and social repercussions. The Oireachtas has legislated to give powers to planning authorities and to members of the public in certain circumstances. Section 27 is written in clear and plain language. It is not for the courts to legislate. If there is a lacuna in legislation then it is appropriate to indicate that gap - but not to fill it. If there is a policy decision in the legislation then that is a matter for the Oireachtas."*

Reference was also made to the decision of Murphy J. in the case of *Waterford County Council v. John A. Wood Limited* [1999] 1 I.R. 556.

Having referred to the reliance placed by the applicant on the fact that since 1999 it is a requirement of Irish planning legislation that the submission of an E.I.S. is required in respect of any development consent for a development consisting of deforestation for the purpose of conversion to another type of land use where the area to be de-forested would be greater than 70 hectares of coniferous forest it is pointed out that a development consent may take different forms and a number of examples are given in this regard including a planning permission, a tree felling licence and so on. It is argued that the change in the law brought about by E.C. Regulations of 1999 does not effect a change in the law requiring that all consents or permissions for developments previously approved but not yet implemented must now be considered void. Emphasis is based on the fact that it is not the removal of trees that requires an E.I.S. but the removal of trees together with a conversion to another type of land use. Reference is made to the fact that Mr. Dowds in his affidavits concedes that wind farm development in areas used for forestry necessarily involves the removal of trees. However, the stance of Mr. Dowds in referring to de-forestation as a development separate and distinct from the development of a wind farm permitted by the various planning permissions of note in these proceedings is criticised. It is argued that as planning permission has been granted for the development of wind farms then in those circumstances it is clear that another type of land use has been sanctioned. Reference is also made to the fact that Environmental Impact Statements were submitted as part of the process of applying for the various permissions. It is pointed out that in the course of these proceedings the only matter with which issue was taken is the issue of de-forestation. There is no objection to the construction of roads, the laying of services and so on and so forth in relation to the creation of the wind farm. The only issue in respect of which relief has been sought relates to de-forestation.

The question was then posed as to whether planning permission was required for the removal of trees and in this regard it was argued that the fact that an E.I.S. is required "before development consent is given" does not necessarily mean that planning permission is required. The relevant consent may be a tree felling consent. Finally, on this particular point it was stated that notwithstanding that planning permission had been given for the removal of trees, it was necessary also to have a tree felling licence.

The final issue raised on behalf of the respondents was in relation to the construction of the planning permissions which are relevant in this particular case. It was argued that the applicants have not addressed questions of what was to take place in the development of the sites at Derrybrien in other words, what part of the development is separate from that which involves de-forestation, does that encompass the creation of roads, hubs, and so on, required for the development of the wind farm. Insofar as the construction of planning permissions is concerned it was submitted on behalf of the respondents that it is well settled that planning documents are to be interpreted in their ordinary meaning as understood by persons with no particular expertise or legal training. Reference was made to the Supreme Court decision in the case of *XJS Development Limited v. The Corporation of Dun Laoghaire* [1987] I.L.R.M. 659, where planning documents were considered:

*"To state the obvious, they are not Acts of the Oireachtas or subordinate legislation emanating from skilled draftsmen and inviting the accepted canons of construction applicable to such material... They are to be construed in their ordinary meaning as it would be understood by members of the public, without legal training as well as by developers and their agents, unless such documents, read as a whole necessarily indicates some other meaning."*

Reliance was also placed on the decision of the Supreme Court in *Readymix (Eire) Limited v. Dublin County Council* (Unreported, Supreme Court, July 1974) where it was stated that a planning permission:

*"... must be construed objectively as such and not in the light of subjective consideration special to the applicant or to those responsible for the grant of the permission. Where the permission recorded in the register is self-contained, it will not be permissible to go outside it in construing it. But where the permission incorporates other documents, it is the combined effect of the permission and such documents that must be looked at in determining the proper scope of the permission. Thus because in the present case the permission incorporated by reference, the application for permission together with the plans lodged with it, it is agreed that the decision so notified must be construed by reference not only to its direct contents but also the application and the plans lodged."*

On this basis it is submitted that the planning permissions refer to the plans and particulars lodged which include the E.I.S. and the particulars given as to the nature and extent of the development. As the Environmental Impact Statements furnished in this particular case have to be considered as part of the planning application it is argued that the decision must be construed by reference thereto. Those documents refer to the removal of the trees and the fact that they would not be replaced and accordingly that amounts to de-forestation for the purpose of conversion to another type of land use. It is thus argued that planning permission has been granted for the same. Finally, reference was made to the judgment of Finlay C.J. in the case of *K.S.K. Enterprises v. An Bord Pleanála* [1994] 2 I.R. 128, where he stated:-

*"From these provisions it is clear that the intention of the legislature was greatly to confine the opportunity of persons*

*to impugn by way of judicial review decisions made by the planning authorities and in particular one must assume that it was intended that a person who has obtained planning permission should at a very short interval after the date of such decision in the absence of a judicial review, be entirely legally protected against subsequent challenge to the decision that was made and therefore presumably left in a position to act with safety upon the basis of that decision."*

Thus, the respondent contended that what the proceedings sought to do was to single out the removal of trees from the overall permission in respect of the construction of the wind farm. It was argued that the removal of trees was in fact something contemplated by the permission granted and that a necessary component of the wind farm project was being separated out of the permissions granted. It was argued that this simply could not be done.

Finally, in reply, it was stated that the gist of the applicant's argument in this case is that at all times permission was needed for de-forestation. It was argued that this is not a pipeline situation. It was accepted that in the course of considering the extent of the planning permission in the case that the E.I.S. must be considered but again argued that it was difficult to construe the permissions involved as including deforestation. It was argued that one could interpret the permissions as meaning the removal of trees for the purpose of erecting turbines, hub bases, roads, etc. but that one would not expect from the permissions that all trees were to be removed. In other words it was argued that it was a step too far to construe reasonably the permissions as involving the removal of all the trees on the Derrybrien site.

**Conclusions**
Much of the argument in this case centred round the use of the word "deforestation". Notwithstanding a certain amount of variety in the terminology used in the affidavits and in correspondence, for example, see para. 7 of the affidavit of Brian Ryan referred to above, it is clear that what is involved could not be described as "harvesting". Harvesting implies the gathering of a crop that has reached maturity. Having regard to the Environmental Impact Statements in this case, not all of the forestry at Derrybrien could be so described. Equally, the fact that the tree felling licence requires the further planting of trees at other sites does not convert what is taking place into "harvesting". Accordingly, in my view, the removal of trees could not be described as anything other than de-forestation.

I have already made it clear that notwithstanding the fact that much of the argument in this case turned on the adequacy or otherwise of the Environmental Impact Statements filed with the applications for planning permission. I have made it clear that the introduction of the 1999 E.C. Regulations which gave effect to the E.C. Directive of 1997 did not impose retrospectively an obligation to furnish a further Environmental Impact Statement to deal specifically with the impact of de-forestation by the development at Derrybrien save in the case of the last of the three relevant permissions. So far as the last permission is concerned, I have also made it clear that any challenge to that permission based on the alleged inadequacy of the Environmental Impact Statement is not permissible. To hold otherwise would amount to an attack on the validity of the existing permissions notwithstanding that the time for challenging those permissions by way of judicial review is long past.

The crux of the case is whether or not the permissions at issue make it clear from an objective point of view that the scope of the permissions includes the removal of trees and the change of the use of the land from forestry to wind farm.

The permissions in this case were granted "in accordance with the documents lodged". It is clear that the documents lodged include the Environmental Impact Statements.

Reference is made to extracts from the Environmental Impact Statements in the affidavit of William Murray sworn herein on the 10th February 2005 and at para. 10 of the affidavit he notes that at p. 6 of the first of the Environmental Impact Statements the following description of the proposed development is set out:

> "Construction
>
> The construction of a wind farm requires the making of some sections and the upgrading of all roads on the site. This is followed by removal of the forestry (carried out by the landowner), excavation of foundations, pouring of concrete, the erection of the turbine towers and the installation of the generator and ancillary equipment on the towers."

At p. 10 of the Environmental Impact Statement the following is stated:

> "Forestry is at present the major land use in the area but changes in forestry practice mean that when these trees are harvested replanting will not occur due to low yields from forests planted on blanket bog. These trees are due to be harvested in the near future and there will be no conflict with present land use. A switch from forestry to wind energy is likely to become a common change in land on high blanket bogs in Ireland."

On pages 25/26 of the Environmental Impact Statement dealing with the effects of the development on flora the following is stated:

> ". . . with time the absence of forestry will allow regeneration of a representative bog area. It is also clear from the planning application form that the entire area comprised in the relevant planning permission is the subject of the development."

Insofar as the second planning permission is concerned the land use there was turbary and obviously that does not involve the removal of forestry but again dealing with the construction of the wind farm it was stated in the Environmental Impact Statements accompanying the said application:

> "Construction and operation of the wind farm can occur together with other land uses on the same site. Turf cutting is at present the major land use in the area and can continue after construction of the wind farm."

Finally, insofar as the third application is concerned p. 10 of the E.I.A. which accompanied that in the section headed description of the proposed development stated as follows:

> "Construction
>
> The construction of a wind farm initially requires the provision of access to the turbine locations through the removal of existing forestry and construction of predominantly floating roads (due to depth of peat on site). This is followed by removal of the remaining trees (carried out by the present land owner, Coillte), followed in turn by excavation and pouring of concrete for foundations".

On page 16 it goes on to state:

> "Forestry is at present the major land use in the area but changes in forestry practice mean that when these trees are harvested replanting will not occur due to lower yields from forests planted on blanket bog. These trees are due to be harvested in the near future and there will be no conflict with present land use. A switch from forestry to wind energy is likely to become a common change in land on high blanket bogs in Ireland."

Finally on pages 34/35 the following is stated:

> "The planting of forestry on the site has already allowed significant drainage and this would not be significantly increased by the construction of a wind farm. Compared to current forestry, the construction of a wind farm would involve minimal effects on botanical quality and with time, the absence of forestry will allow the regeneration of representative bog flora."

In his affidavit sworn on the 25th February 2005, Mr. Dowds on behalf of the applicant takes issue with the interpretation of Mr. Murray's analysis in this regard. He states at para. 13 thereof as follows:

> "The respondents are seeking to rely on the planning permissions and E.I.A.s relating to the wind farm which in my view do not in any meaningful way deal with the de-forestation."

He goes on to say at para. 19 that as Mr. Murray has criticised the fact that no submissions were made at the time of the planning applications concerning the removal of the trees he argues that "this was hardly surprising given that no planning application was made for de-forestation and no indication was given as to the scale of the de-forestation". He concluded by stating that what was taking place at Derrybrien was not harvesting but de-forestation.

I have already indicated above that I agree with that point of view so far as the definition of de-forestation is concerned but that does not assist me in determining the issue I have identified. As the environmental impact statements in this case were furnished as part of the planning applications I have no doubt whatsoever that they must be considered as part of the documentation that must be looked at in determining the proper scope of the permission; it then becomes necessary to consider whether viewed objectively the documents as a whole could be said to make it clear that the proposed development involved the removal of all the forestry at the Derrybrien site in respect of the relevant applications. I should just note at this point that reference was also made to various plans and drawings in this regard but I do not place any particular reliance on the plans and drawings as they did not appear to me to be of great assistance in determining this issue. Having considered the matter carefully and in particular in the light of the matters set out in the Environmental Impact Statements I have come to the conclusion that on a reading of the Environmental Impact Statements attached to the various permissions it was quite clear that the proposed development envisaged the removal of the forestry thereon and the change of use on the lands from forestry to use as a wind farm. I can come to no other conclusion.

In the circumstances I am not satisfied that the applicants have made out the case that the de-forestation of the lands at Derrybrien is an unauthorised development. I have no doubt that but for the catastrophic events of the 16th October 2003, these proceedings would not have commenced. The concerns of the Applicant are understandable but it is to be expected that the steps taken by the Respondents will ensure that there will not be a recurrence.