Neutral Citation: [2016] IEHC 558

THE HIGH COURT

JUDICIAL REVIEW

[2014 No. 43 J.R.]

BETWEEN

FRIENDS OF THE IRISH ENVIRONMENT

APPLICANT

AN BORD PLEANÁLA,

IRELAND AND ATTORNEY GENERAL

RESPONDENTS

AND

EDENDERRY POWER LIMITED, BORD NA MÓNA PLC. ,

DEPARTMENT OF ARTS HERITAGE AND THE GAELTACHT, ENVIRONMENTAL PROTECTION AGENCY AND AN TAISCE

NOTICE PARTIES

JUDGMENT of Mr. Justice White delivered on the 14th of October, 2016

1. The Applicant has requested the court to revisit a judgment delivered on 9th October, 2015, when it dismissed it's application for judicial review.

2. That judicial review application had been heard with another, that of An Taisce, record number [2014 No. 38 J.R.] decided in favour of that Applicant.

3. The initial court hearing was over a period of five days in July 2015 and a written judgment was delivered on 9th October, 2015.

4. The Applicant had been granted leave to apply for judicial review on the 22nd January, 2014 on the following grounds.

> 1. An Order of *certiorari* by way of application for judicial review quashing the decision of the first named Respondent to grant, to the First Notice Party, planning permission for the continued use and operation of a previously permitted peat and biomass co-fired power plant at Clonbullogue, Co. Offaly under Bord Pleanala reference PL19.242226. Which said decision was purportedly made on the 19th November, 2013.
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> 2. A declaration by way of application for judicial review that the effects of extracting the peat fuel source for the thermal power plant were not properly assessed for the purposes of the Habitats Directive 92/43/EC.
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> 3. A declaration that the first and second named Respondents have failed to fulfil their obligations pursuant to Article 6 of the Habitats Directive to establish necessary conservation measures and to avoid deterioration of natural habitats and disturbance of species in Natura 2000 sites.
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> 4. A declaration by way of application for judicial review that the first named Respondent is obliged to conduct an appropriate assessment pursuant to Article 6 of Habitats Directive in respect of the peat extraction works that will occur directly or indirectly as a result of the proposed development.
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> 5. A declaration by way of application for judicial review that the first named Respondent is required to carry out an appropriate assessment pursuant to Article 6 of the Habitats Directive of the operation of the power plant in combination with the peat extraction works.
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> 6. A declaration that the said development is a plan or project not directly connected with or necessary to the management of a number of Natura 2000 sites but likely to have a significant effect thereon, either individually or in combination with other plans or projects, and therefore should have been subject to appropriate assessment of its implications for the site in view of the site's conservation objectives.
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> 7. A declaration that a screening assessment for an appropriate assessment ought to have been conducted subject to Section 177U of the Planning and Development Act 2000.

5. Initially, the Applicant sought to revisit the judgment on the basis there had been an error of fact in the judgment. This was refined when by letter of 6th November, 2015, the Applicant's solicitors wrote to the other parties setting out the grounds upon which the Applicant was seeking to have the court revisit the judgment.

6. In that letter the Applicant stated it had made a more fundamental argument that the first Respondent had failed to consider at all, the peat extraction associated with the project, and in particular failed to conduct a screening assessment of the peat extraction either as part of the project, or in combination with the project.

7. The letter of 6th November, 2015, to the solicitors for the first respondent went on to state:-

> "It is clear from the above that it is the Board that is under an obligation to consider whether or not the development is likely to have a significant effect on a European site. This inquiry must be undertaken initially by the Board. It is not a matter for the Applicant herein either in the planning process or in the within proceedings to establish what the outcome of such inquiry or screening assessment might be. That is a matter for the Board. The Applicant raised the issue in its submissions to the Board and the Board considered that it was not required to consider the effects of peat extraction as it was a separate and discreet project separately consented. Accordingly it did not consider such effects and did not conduct any screening assessment of such effects." ……. The court has declined all reliefs on the basis of a failure of the

applicant to discharge a burden of proof that there were significant effects arising from the peat extraction on the downstream SACs. Having regard to the foregoing, it is the Applicant's position that there is no such burden. Moreover, the issue of any evidential burden did not arise during the submissions in the case and the applicant did not have the opportunity to address same."

The Jurisdiction of the Court to Revisit its Judgment

The appropriate starting point is the decision of the Supreme Court in *In Re Greendale Developments* [2000] 2 I.R. 514. It was *Held* by the Supreme Court (Hamilton C.J., Denham, Barrington, Lynch and Barron JJ.), in dismissing the application, 1, that the jurisdiction of the Supreme Court was not unfettered and, pursuant to Article 34.4.6 of the Constitution, a decision of the court on a matter raised before it, and in respect of which a final order was made, was final and conclusive.

The Attorney General v. Open Door Counselling Ltd. (No. 2) [1994] 2 I.R. 333 applied. *Application of Woods [1970] I.R. 154* and *Belville Holdings Ltd. v. Revenue Commissioners [1994] 1 I.L.R.M. 29* distinguished. *R. v. Bow Street Magistrate, Ex p. Pinochet (No. 2) [1999] 2 W.L.R. 272* considered.

2. That where a final order was made and perfected, it could only be interfered with (i) in special or unusual circumstances; (ii) where there had been an accidental slip in the judgment as drawn up; or (iii) where the court itself found that the judgment as drawn up did not correctly state what the court actually decided and intended.

Belville Holdings Ltd. v. Revenue Commissioners [1994] 1 I.L.R.M. 29 applied.

8. The test laid down by Hamilton C.J. had its origins in the Supreme Court decision of *Bellville Holdings Limited v. Revenue Commissioners* [1994] 1 ILRM 29:- Finlay CJ stated

"There is, however, I am satisfied, a wider and more fundamental jurisdiction in a court to amend an order which it has previously made, even though that order is in the form of a final order and has been perfected.

We have not been referred to, nor have I been able to discover, any decision of this Court or of the Irish courts dealing with this question.

The position and principles appear, however, to be accurately stated in the judgment of *Romer J in Ainsworth v. Wilding [1896] 1 Ch 673*, where, at p. 677, he stated as follows:

> So far as I am aware, the only cases in which the court can interfere after the passing and entering of the judgment are these:
>
> (1) Where there has been an accidental slip in the judgment as drawn up, in which case the court has power to rectify it under O. 28, r. 11;
>
> (2) When the court itself finds that the judgment as drawn up does not correctly state what the court actually decided and intended.

Having referred to the decision of the Court of Appeal in *In re Swire 30 ChD 239, Romer J* quoted from the judgments in that case as follows at p. 678:

> Cotton LJ says: 'It is only in special circumstances that the court will interfere with an order which has been passed and entered, except in cases of a mere slip or verbal inaccuracy, yet in my opinion the court has jurisdiction over its own records, and if it finds that the order as passed and entered contains an adjudication upon that which the court in fact has never adjudicated upon, then, in my opinion, it has jurisdiction, which it will in a proper case exercise, to correct its record, that it may be in accordance with the order really pronounced.'
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> Lindley LJ says: 'If it is once made out that the order, whether passed and entered or not, does not express the order actually made, the court has ample jurisdiction to set that right, whether it arises from a clerical slip or not.'
>
> And Bowen LJ says: 'An order, as it seems to me, even when passed and entered, may be amended by the court so as to carry out the intention and express the meaning of the court at the time when the order was made, provided the amendment be made without injustice or on terms which preclude injustice.'

I am satisfied that these expressions of opinion validly represent what the true common law principle is concerning this question. I would emphasise, however, that it is only in special or unusual circumstances that an amendment of an order passed and perfected, where the order is of a final nature, should be made by the court. The finality of proceedings both at the level of trial and, possibly more particularly, at the level of ultimate appeal is of fundamental importance to the certainty of the administration of law and should not lightly be breached."

9. The matter was also dealt with in *L.P. v. M.P.* [2002] 1 I.R. 219, when Murray J. cited *Greendale Developments Limited* and stated:-

> "It follows from the foregoing judgments that the courts have an inherent jurisdiction to amend or set aside a final order in exceptional circumstances where those circumstances clearly establish that there has been a fundamental denial of justice through no fault of the parties concerned and where no other remedy, such as an appeal, is available to those parties. … Otherwise, I confine myself to saying that the exceptional circumstances which could give rise to the inherent jurisdiction of the court must constitute something extraneous going to the very root of the fair and constitutional administration of justice."

10. In summarising the jurisdiction, Haughton J. in *People Over Wind v. An Bord Pleanála* [2015] IEHC 356, summarised the principles and stated:-

> "I accept the law is as set out earlier in this judgment. It follows that my decision should only be reconsidered or reviewed –

(1) in 'special or unusual circumstances' or 'exceptional circumstances';

(2) if the point sought to be raised is of sufficient importance;

(3) if the point, if valid, would as a matter of probability have affected the outcome of the case;

(4) if the point is not one that could have been raised in the High Court by a party who had the opportunity to argue it.

I am also mindful of the public policy requirements of finality and certainty of court decisions in the interests of the administration of the law. This may also be an aspect of the Rule of Law in the wider sense that public policy requires respect for the finality and enforcement of decisions of the courts. This justifies a high threshold for any party seeking to reopen a decision of the Court, and of course the onus is on that party to satisfy the Court that it is appropriate to reopen its decision. This, as Denham J. observed in *Greendale*, is a heavy onus."

11. The Applicant has not pointed to any error of fact in this Court's original judgment. The essence of the Applicant's submission is that the court failed to address a specific legal argument in respect of the requirement of the first Respondent to conduct a screening assessment.

12. The only issue of fact unclear to the court was set out at para. 79 of the original judgment when the court referred to two site synopsis documents, River Barrow and River Nore, site code 002162 and River Boyne and River Blackwater, site code 002299, which were referred to in the affidavit sworn by Mr. David Healy on behalf of the applicant on 22nd January, 2014. The court in its original judgment had presumed that these had been prepared by Mr. Healy and thus, were documents generated by the Applicant. It transpired at the hearing of the Application to review the judgment that this documentation was prepared by the National Parks and Wildlife Service of the Department of Arts, Heritage and the Gaeltacht, the third notice party.

13. In the letter of 6th November, 2015, from the solicitors for the Applicant to the solicitors for the first Respondent, it is asserted that the issue of any evidential burden did not arise during the submissions in the case and the Applicant did not have the opportunity to address same. This was repeated in the outline legal submissions on behalf of the Applicant at para. 6 which stated:-

"The submissions did not address the burden of proof as this issue did not arise in the oral submissions."

14. The assertion in the letter of 6th November, 2015, and the outline legal submissions in writing and the oral submissions, that the issue of the burden of proof, was not addressed, is incorrect. In the Statement of Opposition of the first Respondent of 18th June, 2014. Paragraph 12 stated:-

"The Board denies that its decision in this regard failed in any way to comply with the requirements of the Habitats Directive. Without prejudice to the generality of the foregoing, the Board would rely in this regard in the following grounds of opposition:-

(i) Neither the Applicant nor the Appellant (An Taisce) advanced any evidence to the Board to suggest that either the proposed development would be likely to have any impact on the Barrow, Nore European site, which is over 14km from the proposed development, and accordingly, the Applicant lacks standing to claim that the Board failed to take account of such effects, and there is no evidence to support the argument which it seeks to make, nor is it open to the Applicant to seek to mends its hand by adducing evidence at this stage in the procedure which it could have advanced to the Board during the appeal.

(ii) The only evidence which was before the Board related to the impact on global climate change of omissions of greenhouse gases to air, and such issues fall within the remit of the Environmental Protection Agency and national and European measures relating to climate change.

(iii) The Board was required to screen the development before it to see if it was likely to have significant effects on the European site, and if it was, to carry out an appropriate assessment of the proposed development, the subject matter of the appeal before it. The proposed development was the continued use and operation of the power plant, which is located at some considerable distance approximately 14 kilometres from the River Barrow, River Nore SAC. The conclusion that the continued use and operation of the power plant was not likely to have significant effects on any European site was, therefore, reasonable and rational."

15. At para. 81 of the outline written submissions on behalf of An Bord Pleanála, it stated:-

"81. If as here there is nothing to suggest that the project under assessment, the continued operation of the power plant is likely to have effects on the River Nore and River Barrow SAC, then there are no effects to be assessed cumulatively, jointly or in combination with other projects such as the peat extraction. Indeed it is striking notwithstanding the assertion that the peat extraction should have been subject to an Appropriate Assessment whether as part of the power plant project or cumulatively with it, the Applicant has singularly failed to put before the Court even the most basic evidence to support this proposition. It is not even readily apparent from the papers where the areas of bog of concern to the Applicant are either relative to the power plant or relative to the European sites. This makes the argument extraordinarily abstract and it is submitted of no practical merit.

82. In the premises of the foregoing, the screening conducted by the Board for the purpose of the Habitat Directive was fully compliant with the requirements of that Directive. The Board's conclusion that the proposed development, the continued operation of the power plant was not likely to have significant effects on any European sites was more than reasonable on the basis of the material before it, and Friends of the Irish Environment have failed to discharge the onus of proof to establish that the decision of 19th November, 2013, was unlawful and ought to be set aside."

16. Again, at the hearing of the original application on 7th July, 2015, counsel for the first Respondent in submissions stated:-

"The second basic proposition which again is largely forgotten on the Applicant's submissions is that the onus of proof is on the Applicant. They can't just make an assertion and then complain An Bord Pleanála hasn't disproved it. That's effectively what has been happening in this case. Mr. Collins went so far as to express himself as disappointed that the Board was expecting the Applicant to prove his case. But that's the law; the Applicant is asserting that something is unlawful for a reason which includes an alleged failure in an earlier statutory process, so the Applicant has to prove that

alleged failure. This is again something which one might have thought was so obvious that it didn't need stating but since the approach the Applicant has taken as contrary to that, I wonder if I could hand up a fairly recent decision of Mr. Justice Charleton as the Judge of this Court. It is July 2010, the case of *Westin v. An Bord Pleanála* [2010] IEHC 255."

17. The court prior to making its determination in respect of the Applicant's judicial review, differentiated the judicial review application of the First and Second Applicants. An Taisce had separately sought judicial review and had been granted leave in proceedings [2014 No. 38 J.R.] and separately the Applicant in proceedings, record number [2014 No. 43 J.R.], had been granted leave to bring judicial review.

18. In the administration of the case, it was either agreed or ordered that these applications would be heard together. However, the court stated in its judgment as follows:-

"22. The court wishes to differentiate between the judicial review application of the first and second applicants.

24.The evidential burden on the second applicant is different. The applicant is relying on the provisions of a separate Directive 92/43/EEC, on the conservation of natural habitats of wildlife and flora in special areas of conservation. It submits that the extraction of peat on the bogs supplying the power plant is likely to have significant effects on the River Barrow and River Nore, special area of conservation (SAC C-002162) and the River Boyne special area of conservation (SAC,2299).

25.The second applicant relies on the affidavit of David Healey, an environmental consultant sworn on 22nd January, 2014, which exhibits the respondent's inspector's report, a written submission of Friends of the Irish Environment of 12th August, 2013, to the respondent, a site synopsis of the River Barrow and River Nore, special area of conservation (002162), a site synopsis of the River Boyne and Blackwater SAC,, and the National Parks and Wildlife Service Conservation Objects, River Barrow and River Nore SAC 002162."

19. The applicant is now making a submission to the court with hindsight and with the benefit of the court's determination. However, the court did not make a determination in the Applicant's judicial review having decided that it did not meet the appropriate standard required to *prima facie* prove its case. There has been no error of fact in the judgment. The applicant made certain assertions about the causal connection between the operation of the power station, the extraction of peat and its effects downstream at a distance of 14km to the European site. The Applicant adduced no primary evidence whatsoever.

20. The central and core argument of the Applicant in the original proceedings was that there was a significant effect on the European sites.

21. The applicant has significantly refined its legal argument to that made in the original judicial review proceedings to confine itself exclusively to the argument that the first Respondent ought to have carried out a screening assessment to determine. whether peat extraction was likely to have a significant effect on a European site. The court accepts that it did not address that issue specifically.

22. The first Respondent did carry out a preliminary screening assessment for the purposes of the Habitat Directive. The first Respondent has always accepted that this screening assessment was for the purposes of assessing the effect of the operation of the power plant and not the peat extraction on any European site.

23. At para. 76 of the original written submission the first Respondent, stated:-

> "Friends of the Irish Environment have pointed to no likely significant effects of the operation of the power plant per se on the River Barrow and River Nore SAC. In this regard it is to be recalled that as noted by O'Neill J. in *Harrington v. An Bord Pleanála*. The submission then proceeded to recite paras. 45 and 46 of that judgment."

24. The court has to approach the application in this case by considering the state of evidence prior to drawing its conclusions in its judgment of 9th October, 2015.

25. The court relied on the dicta in *Harrington v. An Bord Pleanála* [2014] IEHC 232, in respect of the burden of proof. O'Neill J stated commencing at paras 45 and 46,

45"Although the procedure in the appeal before the respondent was not an adversarial one, there is no doubt that the procedure in this judicial review is undoubtedly adversarial, and the onus of proof resting upon the applicant in these proceedings is well-settled. The foregoing *dicta* from the cases of *O'Keeffe v. An Bord Pleanala*, *Westin v. An Bord Pleanala* and *Lancefort Ltd. V. An Bord Pleanala* clearly establish that the applicant carried the burden of proof of establishing the grounds in respect of which leave for judicial review was granted."

46"I have come to the conclusion that the respondent did not fail in any way in its duty to conduct an appropriate inquiry, as required of them by statute, by failing to carry out their own independent ecological assessment. The applicant failed to adduce any evidence whatsoever to support her contention that the site in question was a priority habitat, warranting, on the basis of the "precautionary principle", the elimination of "scientific doubt" by the carrying out of an independent ecological assessment. Thus, in these judicial review proceedings, I am quite satisfied that the applicant has failed to discharge the onus of proof resting on her to establish that the respondent failed in its legal duty, as she contends, in that regard."

26. At most, what the Applicant has asserted is that the court did not address a particular aspect of the Applicant's original submissions which I would identify as a legal rather than a factual issue.

27. There is discretion vested in a court on an Application for judicial review whether to grant the relief sought or not. The court exercised that discretion in its view, in a fair and reasonable way. It was entitled to come to the conclusion that the Applicant had not established the burden of proof required of it.

28. There are no exceptional circumstances which would require the court to revisit its judgment of 9th October, 2015, and accordingly, the court will not alter it.