Neutral Citation: [2014] IEHC 632

THE HIGH COURT

JUDICIAL REVIEW

Record Number: 2014 No. 2014 No.19 JR; 2014 No. 10 COM

IN THE MATTER OF AN APPLICATION UNDER SECTION 50 AND 50A OF THE PLANNING AND DEVELOPMENT ACT, 2000 (AS AMENDED)

BETWEEN:

POL O GRIANNA, GERALDINE UI DHUINNIN, AOIFE NI DHUINNIN, CLIODHNA NI DHUINNIN, BERNADETTE COTTER, TIM O'CONNELL, CAOIMHGHIN O BUACHALLA, PADRAIG D. KELLEHER, ALAN KING, XAK AROO

APPLICANTS

AND

AN BORD PLEANALA

RESPONDENT

AND

CORK COUNTY COUNCIL

FIRST NAMED NOTICE PARTY

AND

FRAMORE LIMITED

SECOND NAMED NOTICE PARTY

JUDGMENT OF MR JUSTICE MICHAEL PEART DELIVERED ON THE 12th DAY OF DECEMBER 2014:

1. The applicants all live close to an area in County Cork where Framore Limited, the second named notice party are proposing to erect 6 wind turbines and associated buildings and infrastructure for which it obtained a planning permission from An Bord Pleanala ("the Board") subject to 17 conditions on the 14th November 2013.

2. Cork County Council ("the Council") had previously decided to grant permission on 18th June 2013 subject to 28 conditions. The applicants, who had lodged observations with Cork County Council outlining their concerns regarding noise and visual impact in July 2012, appealed that grant of permission to An Bord Pleanala, which on the 14th November 2013 made a decision to grant permission for the development subject to a number of conditions.

3. This application for planning permission is one which had to be accompanied by an Environmental Impact Statement ("EIS"), since the Board was required to carry out an Environmental Impact Assessment ("EIA") under to the provisions of section 172(1) of the Planning and Development Act, 2000, as amended ("the Act of 2000"), the development being one which fell within the scope of Part 2, Schedule 5 of the Planning and Development Regulations 2001, as amended.

4. In their 'Abridged Statement of Grounds' dated 14th February 2014 the applicants seek a Declaration that in making its decision the respondent failed to carry out a proper EIA in accordance with the provisions of Section 172 of the Planning and Development Act, 2000, as amended ("the Act of 2000"), as interpreted in accordance with the obligations imposed by Article 3 of Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment. A number of different complaints are made, but, essentially, all (except that related to 'project-splitting') are directed towards establishing that the EIA stated by the Board to have been carried out is a flawed assessment which is not in accordance with its obligations under the Act.

5. Section 171A(1) defines "environmental impact assessment" as "*an assessment, which includes an examination, analysis and evaluation, carried out by a planning authority or the Board, as the case may be, in accordance with this Part and regulations made thereunder, that shall identify, describe and assess in an appropriate manner, in the light of each individual case and in accordance with Articles 4 to 11 of the Environmental Impact Assessment Directive, the direct and indirect effects of a proposed development on the following: (a) human beings, flora and fauna, (b) soil, water, air, climate and the landscape, (c) material assets and the cultural heritage, and (d) the interaction between the factors mentioned in paragraphs (a), (b) and (c)"(*emphasis added). The applicants place considerable emphasis on the words "in the light of each individual case".

Section 172 contains a number of subsections dealing with the requirement that certain applicants must provide an EIA to the planning authority or the Board, as the case may be, and that either of the latter may seek further information from an applicant. Of some relevance to the present application is what is provided for in subsections (1G) to (1J) of section 172 which provide as follows:

> *"(1G) in carrying out an environmental impact assessment under this section the planning authority or the Board, as the case may be, shall consider – (a) the environmental impact statement; (b) any further information furnished to the planning authority for the Board pursuant to subsections (1D) or (1E); (c) any submissions observations validly made in relation to the environmental effects of the proposed development; (d) the views, if any, provided by any other Member State under section 174 or Regulations made under that section.*
>
> *(1H) in carrying out an environmental impact assessment under this section the planning authority or the Board, as the case may be, may have regard to and adopt in whole or in part any reports prepared by its officials or by consultants, experts or other advisers.*

(1I) where the planning authority or the Board, as the case may be, decides to grant consent for the proposed development, it may attach such conditions to the ground as it considers necessary, to avoid, reduce and, if possible, offset the major adverse effects on the environment (if any) of the proposed development.

(1J) when the planning authority or the Board, as the case may be, has decided whether to grant or to refuse consent for the proposed development, it shall inform the applicant for consent and the public of the decision and shall make the following information available to the applicant for consent and the public: (a) the content of the decision and any conditions attached thereto; (b) the evaluation of the direct and indirect effects of the proposed development on the matters set out in section hundred and 171A; (c) having examined any submission or observations validly made (i) the main reasons and considerations on which the decision is based, and (ii) the main reasons and considerations for the attachment of any conditions, including reasons and considerations arising from or related to submissions observations made by a member of the public; (d) where relevant, a description of the main measures to avoid, reduce and, if possible, offset the major adverse effects; (e) any report referred to in subsection (1H); (f) information for the public on the procedures available to review the substantive and procedural legality of the decision, and (g) the views, if any, furnished by other Member States of the European Union pursuant to section 174."

6. The various grounds upon which the applicants rely for seeking an order of certiorari and a declaration that the Board failed to carry out an EIA in accordance with the requirements of section 172 of the Act of 2000 are set forth in their Abridged Statement of Grounds at paragraph E.1 and its various sub-paragraphs.

Failure to comply with obligations in relation to the Environmental Impact Assessment:
7. The applicants submit that the it is evident from the decision of the Board that in so far as it purports to have carried out an EIA as required by section 172 of the Act of 2000, it failed to do so "in the light of each individual case" as required by both Article 3 of Council Directive 2011/92/EU (the "EIA Directive") and as reflected in the definition of an EIA in section 171A of the Act of 2000 set forth already. It seems to be suggested by the applicants that instead of correctly examining, analysing and evaluating this particular case as far as the effect of noise levels on human beings are concerned, the Board effectively fettered its discretion by simply applying noise limits or other standards recommended under the 2006 Guidelines. In particular they say that the Board in its decision imposed noise limits without carrying out any assessment of the significance of the increase in noise over background noise at this location on human beings living in the vicinity of the proposed turbines.

8. The applicants submit also that in so far as the Board may have relied upon the assessment carried out by the appointed inspector who prepared a report for the Board, and agreed with it for the purpose of its own EIA, the inspector's assessment itself is flawed since he did not carry out an assessment of the significance of the increase in noise over background noise levels at the location of this particular proposed development. They complain that the inspector, and by extension the Board since it "generally adopted" the inspector's report, based his recommendations upon a statement in the 2006 Guidelines to the effect that noise will not "generally" be a problem where the separation distance between turbine and house is greater than 500m, and without having carried out any assessment of the actual anticipated noise impact on existing houses by reference to background noise levels, and that this constitutes a failure to comply with the Board's obligations under section 172 of the Act of 2000 to carry out an EIA in the light of the particular case at hand. In so far as it is argued by the Board that it relied upon the inspector's assessment and generally agreed with it, the applicants submit that that report contains no assessment of the significance of the increase in noise over background noise levels that would affect human beings residing in the vicinity as a result of noise emitted from the turbines, and therefore there has been no conclusion reached by the inspector or the Board as to whether the level of increase in noise would be significant or acceptable, and accordingly there has been no analysis or evaluation by the Board of the direct effects of the proposed development in the context of noise impact on human beings, as is required to be carried out by reference to the definition of "environmental impact assessment" contained in section 171A of the Act of 2000 already referred to.

9. The applicants also maintain that the inspector made a fundamental error in his report, and that this error has carried through to the Board's decision. The error they allege is in relation to what I shall refer to as Location 2. They say that the inspector failed to recognise that Location 2 is a 'low noise environment' according to the noise measurements set forth in the EIS. They state that the background noise levels recorded in relation to Location 2 bring it within the definition of a 'low noise environment' for the purpose of the 2006 Guidelines since the LA90 noise level at that location was measured at less than 30dB(A). That measurement for Location 2 was recorded at 29dB(A). They consider that the Board failed to have regard to the correct noise level measurement (LA90) for the purpose of determining both the background noise levels and the appropriate noise limits to be applied, and instead, erroneously relied upon what are referred to as the LAeq measurements in respect of both Location 1 and Location 2. The LAeq is a measurement which gives an averaged noise level whereas the LA90 measurement gives the noise level found at a location for at least 90% of the period monitored. The 2006 Guidelines recommend that daytime noise levels for a low noise environment should be limited to an absolute level within the range of 35-40 dB(A)LA90, whereas the Board has specified in Condition 12 of the permission that the noise from the wind turbines should not exceed the greater of 43dB(A) LA90, or 5dB(A) above background levels when measured externally.

10. The applicants accordingly submit that, in error, noise levels up to the greater of those two alternatives is permitted, and that either would exceed the 2006 Guidelines level of 29dB(A) LA90 for Location 2 (low noise environment), and therefore that a fundamental error has occurred in relation to the EIA carried out by the Board.

11. Complaint is also made about the failure to apply separate noise limits for day-time and night-time which again is said to be contrary to the Guidelines which state in that regard "*Separate noise limits should apply for day-time and for night-time*". In so far as the inspector has stated in his report that "*in conditions attached to wind farm permissions the Board as a matter of practice uses a fixed night time limit of 43dB(A) or 5 dB(A) above background levels (whichever is the greater)",* the applicants submit that this is contrary to the Guidelines which recommend the 43dB(A) level on its own for night time noise, and they refer to the fact that in relation to day time levels the Guidelines recommend "*a lower fixed limit of 45dB(A) or a maximum increase of 5dB(A) above background noise at nearby noise sensitive locations*" which the applicants say means it is the lower of the two limits which applies.

Board's submissions:
12. In relation to this ground of complaint the Board makes the point that it is an expert body, and that it reached its decision following an assessment of proper planning and sustainable development, and having carried out a proper EIA in accordance with its statutory obligations. In so far as the applicants are saying that the Board failed to carry out an EIA in relation to this "individual case", the Board says that this assertion is manifestly incorrect, and points to the very detailed EIS that was before the Board, as well as the further information that was sought by the Board and which it received, each of which addressed, inter alia, the issue of noise in relation to this particular proposed development. It refers in particular to Request 6 in the Request for Further Information relating to noise which requested further information under six different separate paragraphs (a) to (f), the penultimate of which reads:

"(e) the background noise assessments at identified nearest noise sensitive locations should quantify over 10 minute periods the existing background noise levels having due regard to wind speed, wind direction and rainfall over the same time periods. Wind speed should be measured at, or derived for, the hub height of the proposed turbines. The applicant should also clarify the periods of noise data that were excluded from analysis due to periods of rainfall. Background noise levels as it varies with hub height wind speed should be quantified separately for daytime, evening time and night-time periods with sufficient data present in a wind direction downwind from the proposed turbines to the identified sensitive locations covering a range of wind speeds from the turbine cut-in speed to its rated power. Hub height wind speed should be converted to standardised 10m height wind speed before comparison with predicted and cumulative noise levels at sensitive locations."

13. Framore's detailed response of April 2013 to this Request includes a response to the above request at (e). Relevant to the question of whether the Inspector in his report, and the Board by generally agreeing with and adopting the inspector's report, failed to carry out an EIA because it failed to take proper account of the fact that Location 2 (otherwise referred to as H13) came within the category of a 'noise sensitive location' is part of the response to (e) which appears at page 24 of 62 of that response. It is there stated:

"The noise impact assessment contained in the EIS concluded that there was no negative operational impact expected from the Derragh Windfarm when assessed against the noise limits contained within the Department of Environment Heritage and Local Government (DoEHLG) 2006 Wind Energy Guidelines. The predicted noise levels at the modelled noise sensitive locations (NSLs) or receivers (all dwellings in this assessment) were less than 40 dB LA90 for fourteen of the eighteen locations, and indeed, as such, were less than the fixed daytime and night-time fixed limits. At the nearest NSLs (H1,H13,H14, and H18) all the predicted noise levels were less than the daytime fixed limit of 45 dB(A) and where baseline monitoring identified periods of 'quiet background noise' i.e. LA90 levels less than 30 dB, the predicted levels were less than the 35–40 dB LA90 fixed limit range. The night-time fixed limit of 43 dB(A) was exceeded at NSLs H13, H14 and H18 for a single modelled wind speed of 8 m/s.

It is worth noting that the exceedance at this wind speed was only 1 dB greater than the 43 dB LA90 limit.

More importantly, these NSLs will never experienced the predicted noise emission of 43dB(A) at 8 m/s or indeed, the other predicted noise levels at the other wind speeds. The noise prediction standard, ISO 9613 Attenuation of Sound during Propagation Outdoors, models all NSLs as if they were downwind of all noise sources at the same time. In reality, the turbine layout requires a range of wind directions from north–north westerly through to easterly for the NSLs to be downwind of all the turbines simultaneously which cannot occur." [emphasis added]

14. This is a point taken up by Tim Cowhig on behalf of the second named notice party (Framore Limited) in his verifying affidavit sworn on 7th March 2014 where at paragraph 18, having referred to certain noise level measurements in relation to Location 1 and Location 2, and in particular the fact that the LA90 noise level at Location 2 was measured at 29dB, he refers to what isstated in the EIS in relation to Location 2, namely:

"the predicted noise levels are compliant except at 8 m/s wind speed of where turbine noise is predicted at 44 dB(A) and the limit is 43 dB(A). While this does indicate that a non-compliance could occur at a wind speed of 8 m/s (standardised to 10m), it is unlikely that such a non-compliance will occur as the predicted noise level assumes all turbines running a maximum rated power and all upwind of the respective receiver. It is not possible for receiver H13 [i.e. Location 2] to be downwind of all the turbines simultaneously due to its location relative to the turbines, therefore this location will never be subject to the full noise emission at 8 m/s as predicted in the model. Similarly, receivers H14 and H18 will not exceed 44 dB(A) at 8 to 9 m/s for the same reason."

15. The Board has submitted, as has Framore Limited, that it clear from a consideration of all the material which was before the Board including the EIS, the Further Information received, the submissions made and responses thereto, when taken together, that the Board's consideration of this material for the purposes of its EIA was in relation to this individual development, and that no evidence has been adduced to establish that the Board has not carried out an EIA in accordance with its obligations. The Board in its decision has stated that it carried out an EIA. The onus is on the applicants to establish that this is not a correct statement, and in my view they have failed to do so. There is ample evidence from within the materials before the Board and in the Board's own decision that a proper EIA was carried out..

16. The Board has not erred by generally adopting the inspector's report for the purpose of its own EIA. In fact it has not adopted it in its entirety, as can be seen by the variation in a couple of the conditions. There is no evidence to support the contention made that the Board erred in relation to its assessment in relation to Location 2 (H13). Even though the inspector's report refers to the LAeq measurement and not the LA90, as pointed out by the applicant, when addressing the level of background noise, and on the face of it therefore failed to consider Location 2 on the basis that it was a low noise environment (being less than 30 dB(A) LA90, and even though the inspector's report was generally adopted by the Board, it is entirely insufficient to indicate the sort of fundamental error on the part of the Board which should result in the Board's decision being quashed, when all the material is taken into account. The Board was entitled to take into account in its EIA the matters referred to in paragraphs 13 and 14 for example. It cannot in my view be said that the Board failed in its statutory duty in this regard by not slavishly adhering to the Guidelines recommendation in relation to a low noise environment. It was entitled to see the Guidelines as just that, i.e. guidelines. It is entitled to take other matters into account in relation to its consideration of the Guidelines, and how to apply them or not as the case may be, and to agree with what was stated in the EIS, namely that as a matter of actual fact the levels cannot not be exceeded because as Mr Cowhig has averred by reference to the EIS and the Franore response to the request for Further Information: "*it is not possible for receiver H13 [i.e. Location 2] to be downwind of all the turbines simultaneously due to its location relative to the turbines, therefore this location will never be subject to the full noise emission at 8 m/s as predicted in the model*."

Having read and considered the material that was before the Board, and having considered also the affidavits filed by the parties, and considered the legal submissions made in relation to this Ground put forward for quashing the decision of the Board, I am satisfied that the ground does not succeed.

Failure to have regard to the 2006 Guidelines in breach of Section 28 of the Act of 2000:

12. Section 28(1) and (2) of the Act of 2000 provide:

"(1) The Minister may, at any time, issue guidelines to planning authorities regarding any of their functions under this Act and planning authorities shall have regard to those guidelines in the performance of their functions.

(2) where applicable, the Board shall have regard to any guidelines issued to planning authorities under subsection (1) in the performance of its functions." (emphasis added)

The applicants submit that the Board was therefore required to have regard to the 2006 Guidelines when making its decision, and they say that it failed to do so since it either disregarded the Guidelines or misinterpreted them, and in either case cannot be properly said to have had regard to them. They say that the Board failed to have regard to the Guidelines because (a) it failed to have regard to the specific absolute daytime noise limit of 35-40 dB(A) recommended in the Guidelines in respect of a "low noise environment" for the reasons which I have already set forth above, and (b) the Board failed to have regard to the LA90 noise measurements to which the Guidelines refer as the relevant descriptor for the purposes of determining both the background noise levels and the appropriate noise limits to be applied, and instead, relying on the inspector's report, the Board relied upon the LAeq noise measurements for Location 1 and Location 2.

13. It is the LA90 measurements which, according to the 2006 Guidelines, are relevant for determining the existing background noise levels and the existing noise environment. In that regard, the applicants have referred to page 29 of the Guidelines. Having discussed the aerodynamic noise (swish) caused by rotator blades passing through the air, and purely mechanical noise created by the generator, the gear-box and other mechanical elements within a cover or housing (the nacelle), the advances in design and technology which have reduced noise emissions, and the effect of higher and lower wind speeds in masking to a greater or lesser extent (as the case may be) noise caused by the wind turbines, the Guidelines state as follows:

"Noise impact should be assessed by reference to the nature and character of noise sensitive locations. In the case of wind energy development, a noise sensitive location includes any occupied dwelling house, hostel, health building or place of worship and may include areas of particular scenic quality or special recreational amenity importance. Noise limits should apply only to those areas frequently used for relaxation or activities for which a quiet environment is highly desirable. Noise limits should be applied to external locations, and should reflect the variation in both turbine source noise and background noise with wind speed. The descriptor, which allows reliable measurements to be made without corruption from relatively loud transitory noise events from other sources, should be used for assessing both the wind energy development noise and background noise. Any existing turbines should not be considered as part of the prevailing background noise.

In general, a lower fixed limit of 45dB(A) or a maximum increase of 5dB(A) above background noise at nearby noise sensitive locations is considered appropriate to provide protection to wind energy development neighbours. However, in very quiet areas, the use of a margin of 5dB(A) above background noise at nearby noise sensitive properties is not necessary to offer a reasonable degree of protection and may unduly restrict wind energy developments which should be recognised as having wider national and global benefits. Instead, in low noise environments where background noise is less than 30dB(A), it is recommended that the daytime level of the LA90, 10min of the wind energy development noise be limited to an absolute level within the range of 35–40dB (A).

Separate noise limits should apply for day-time and for night-time. During the night the protection of external amenity becomes less important and the emphasis should be on preventing sleep disturbance. A fixed limit of 43 dB(A) will protect sleep inside properties during the night.

In general, noise is unlikely to be a significant problem where the distance from the nearest turbine to any noise sensitive property is more than 500 metres. Planning authorities may seek evidence that the type(s) of turbines proposed will use best current engineering practice in terms of noise creation and suppression"(my emphasis).

14. I note in passing, and as noted by Ellen Morrin in her affidavit in support of the Board's Statement of Opposition, that the first named applicant, Pol O Grianna, in his grounding affidavit sworn on his own behalf and on behalf of all the other applicants and with their authority, has sworn in paragraph 4 thereof that "*the applicants are all residents in the townlands of Derragh, Eachros, Gortnabinne and Rathgaskig, Ballingeary, County Cork whose properties are located at distances between 527m and 1800m from the proposed turbine development …"* (my emphasis).

15. Finally under this ground, the applicants submit that where the Board departed from the 2006 Guidelines, it was obliged to give its reasons for doing so.

16. The onus is on the applicants to establish that the Board failed to have regard to the 2006 Guidelines. In my view they have failed to discharge that onus. Firstly, the materials before the Board, including the inspector's report were replete with references to the Guidelines. Secondly, The Board's decision itself on page 2 thereof specifically states that it had regard to those Guidelines. I accept of course that a Board cannot simply in some purely formulaic way recite that it had regard to the Guidelines when there is clear evidence from the Decision that it cannot have done so, and still be considered to have complied with its obligations under section 28 of the Act of 2000. But we are not dealing with such an extreme and improbable situation as that. The Board in this case has stated that it had regard to the Guidelines, and it is evident from the materials before it, including the inspector's report relied upon heavily by the Board, and the Decision itself, that it did so. The fact that it has not slavishly followed the Guidelines does not indicate that it has not had regard to them as it is required to do.

17. The second limb of the applicant's ground in relation to section 28 is that the Board has misinterpreted the Guidelines, and in so far as that is so, should be considered to have had regard to them. The applicants say that the inspector in his report used the LAeq measurement for Location 1 and Location 2 instead of the LA90 measurement, and that this led to the Board ignoring the Guidelines in relation to the fixing of a noise limit recommended for a low noise environment in relation to Location 2. In fact it is apparent from the Board's decision that it considered the Guidelines when including Condition 12 in relation to any noise sensitive location, and I note that the limit is set by reference to the LA90 measurement and not the LAeq. I do not regard the fact that the inspector referred to the LAeq measurement rather than the LA90 measurement as indicating such a misinterpretation of the Guidelines as to compel a conclusion that proper regard cannot have been had to the Guidelines. I have dealt with the reality of that issue in relation to the previous ground considered.

18. The parties have referred to the judgment of Quirke J. in *McEvoy v. Meath County Council* [2003] 1 I.R. 208. That was a case where the applicant had sought to quash the respondent's decision to make and adopt a development plan for County Meath on the basis that the council had failed to have due regard to the strategic planning guidelines for the greater Dublin area as required by law. Section 27 of the Act of 2000 at the relevant time required the council to have regard to those strategic planning guidelines when making and adopting its development plan, but Quirke J. held that the phrase "have regard to" did not require it to rigidly follow the Guidelines, and that it could even depart from them for bona fide reasons consistent with the proper planning and development of its functional area. He also went on to state that "*if it had been the intention of the Oireachtas that section 27(1) should be construed*

as imposing upon planning authorities an obligation to 'comply' with regional planning guidelines then the enactment rendered subs. (2) of the same section superfluous". Subs. (2) at the time provided that "*the Minister may, by order, determine that planning authorities shall comply with any regional planning guidelines in force for their area, or any part thereof, when preparing and making a development plan ……".* One can see in relation to the present case that while the Oireachtas had required that Guidelines be had regard to, it has not gone further and required that they be adhered to in every respect. It clearly could have done so if it had so wished. I am satisfied that despite the matters relied upon and argued by the applicants, it is clear from the evidence that the Board had regard to the 2006 Guidelines in accordance with its obligations under section 28.

19. The applicants have also argued that the Board's decision is flawed because neither the inspector nor the Board gave any reason for departing from the 2006 Guidelines, and that the Board was obliged to do so. However, I do not consider the Board's decision departs in any material or significant way from the Guidelines. I have already held that the Board is not obliged to slavishly or rigidly follow and apply the Guidelines, and it follows that it may exercise some discretion in relation to the Guidelines. This is consistent with the requirement that regard be had to them. But secondly, there is no statutory obligation on the Board to give reasons for not following a particular guideline even if it was the situation that they had been departed from. Section 28 imposes no requirement to give any such reasons. Other sections of the same Act do provide that where an authority or the Board is departing from a recommendation of a delegated person such as an inspector, it must include a statement of the main reasons for having done so – see for example section 34(10(b), and also section 37(2) (c) where the main reasons and considerations must be given where the Board decides to grant a permission even though it materially contravenes the development plan. The obligation under section 28 does not go that far.

Project-Splitting:
15. The applicants submit that the Board has failed to carry out an EIA in relation to the overall project of which the construction of the wind turbines is only the first stage, since there is a necessary second phase, namely the works necessary to connect the wind farm to the national grid. It is submitted by the applicants that the cumulative effect of the entire development on the environment should have been the subject of the Board's EIA, and that an impermissible 'project-splitting' has occurred thereby invalidating the decision-making process. They make the point that the connection to the national grid is a fundamental part of the overall development as, without such connection, the wind farm cannot operate, and that the two stages should be considered as a single project and be assessed as such on a cumulative basis before it can be seen as complying with the EIA Directive.

16. The EIS submitted with the planning application by the developer made reference at paragraph 3.1.2 thereof to the fact that a connection to the national grid would in due course be necessary, including the statement that "*it is not possible to determine the line or form (overhead or underground) of the grid connection at this stage as the design will be undertaken by ESB Networks*". The applicants say that whatever form the connection takes, whether overhead or underground, there are inevitable and significant consequences for the environment, and that the Board was required to consider these when considering the first stage of the development, in order to avoid the possibility of 'project-splitting', which in the applicants' submission is contrary to both Irish and EU law. They say that because the EIS did not contain any information as to the environmental impact of the second stage relating to the connection to the national grid, the Board was prevented from giving any consideration to that factor, or the cumulative effect of both stages of the development, as is required under the Directive.

17. In so far as the Board and Notice Party may argue that the impact of the second stage can be considered at some later stage and that it was unnecessary for its impact to be considered by the Board when considering the present application, the applicants have made the point that it is quite possible that the connection to the national grid would constitute exempted development under Part 1, Schedule 2 of the Planning and Development Regulations 2001, as amended, and therefore there may well be no opportunity available for an EIS to be submitted in relation to the cumulative effects of the development under challenge and its connection to the national grid, as no further planning application would be required. They say that it is not sufficient for the developer in its EIS to simply state that the line and form of the connection is not yet known, and therefore cannot be assessed, and that the Board ought not to be permitted to treat the works related to the grid connection as an entirely separate project, but rather as an integral part of the subject development.

18. The EIS submitted by the developer stated the following regarding the connection of the proposed turbines to the national grid:

> *"The grid connection from the proposed turbines will be via underground cable connections to the on-site substation. The cables will be buried adjacent to the site tracks where possible. The location of the proposed substation is shown on Figure 3.1. The developer has a grid connection offer as part of the Commission for Energy Regulation (CER) Gate 3 processing group. It received a connection offer (DG418 and DG419) on 30th June 2011 from ESB Networks. The connection offer states that the electricity generated at Derragh Wind Farm will connect to the national grid at a 110 kV substation at Coomataggart. The grid connection will operate at 20 kV. It is not possible to determine the line or form (overhead or underground) of the grid connection at this stage as the design will be undertaken by ESB Networks. A 20 kV overhead line is usually constructed with a single wooden pole and does not typically require steel lattice masts. It is of relatively low impact and does not normally require planning permission."*

19. The Inspector merely notes in this regard at para. 9.13.9 of his report:

> *"Having regard to the scale of the project and the need to obtain a connection to the national grid (something that may be beyond the control of the applicant), it would be appropriate to allow a 10-year planning permission as sought by the applicant. This is not unusual in relation to wind farm applications."*

20. In its submissions, the Board refers to the fact that it addressed the issue of the connection to the national grid at Condition 4 of the Board's decision which states: "*This permission shall not be construed as any form of consent or agreement to a connection to the National Grid. Reason: in the interest of clarity*." The second named Notice Party pleads that the precise grid connection that will be available to it is outside its control and will be the subject of further consideration, including with regard to its environmental impact, at some stage in the future when the plans and specifications for that connection have become clear. The Court has not been provided with any evidence of any attempt which may have been made to get a design for the grid connection from ESB Networks, so it can be presumed that there has been no such attempt as yet.

21. The Board accepts that so-called 'project-splitting' must be avoided so as to ensure that objectives of the EIA Directive are not frustrated. But central to the Board's argument is that in the present case the subject development and the later connection of that development to the national grid do not constitute one project, but rather are separate projects in respect of which their respective environmental impacts may be assessed at the relevant time. It says that when the separate project in relation to the grid connection becomes the subject of a consent application, the cumulative effects of that development will be assessed, including by reference to its cumulative effect with the subject development, and in that way, even if the entire project is considered to be a

single project, the effects of both will be assessed. The Board makes the additional point that no development requiring an EIA can be exempted development by virtue of the amendment (by substitution) of section 4 of the Act of 2000 which now provides:

> *"(4) Notwithstanding paragraphs (a), (i), (ia) and (l) of subsection (1) and any regulations under subsection (2), development shall not be exempted development if an environmental impact assessment or an appropriate assessment of the development is required".*

22. Accordingly, it is submitted, any connection to the national grid would have to be assessed so that consideration was given to the direct and indirect effects of the connection to the national grid, both in and of itself as well as cumulatively with the subject development, and where there was likely to be a significant environmental effect an EIA would be required under Part X of the Planning and Development Regulations 2001, as amended. It makes the point that if it was not considered that there would, even cumulatively, be any significant environmental effects from the second phase, then no environmental prejudice would exist. In this way, it is submitted that the objectives and provisions of the EIA Directive will be fulfilled in relation to the future connection of the subject development to the national grid, notwithstanding that at the present time the plans and details relating to the future connection are not yet known, and therefore have not as yet been the subject of an EIA.

23. Notice Party (Framore) supports the submissions made on behalf of the Board. It refers to the fact that where no proposals have yet been formulated by ESB Networks for the grid connection design, it simply was not possible for it to include a consideration of same in its EIS, and consequently it was not possible for the Board to assess the potential environmental impact of the works associated with that phase of the development. Framore also refers to the Planning Guidelines which at para. 4.3 state in this regard that "*the planning authority should note that it may not be possible, due to reasons outside the applicant's control, to provide information on indicative grid connections at the pre-planning consultation or planning application stage of the wind energy development*". One should note, however, the context of that statement which appears from the following paragraph which states: "*It is therefore inappropriate for the planning authority or An Bord Pleanala on appeal to attach conditions to planning permissions for wind energy developments in regard to the location of the connection to the grid. In these instances, a separate application for grid connection will be necessary*" [my emphasis]. It refers to the fact that the inspector in his report noted that the connection to the national grid is a matter outside the control of the developer, and that accordingly by generally adopting the inspector's report, the approach taken by the Board in relation to the environmental impact of the connection to the national grid was appropriate, and in accordance with the Guidelines.

24. Framore have referred to the Opinion of Lord Hodge in the Outer House, Court of Session, Scotland in *Skye Windfarm Action Group Limited v. Highland Council* [2008] C.O.S.H.19 in support of its submission that where there are two phases involved in a development, even where the second is integral to the overall project, it will not always be the case that the EIA must encompass the cumulative environmental effects of the overall project, and that each case must be considered on its own particular facts in order to decide whether those cumulative effects are such that the matters should be considered together. In Skye, Lord Hodge noted that it was not disputed between the parties that certain 'borrow pits' from which aggregate was to be extracted to provide on-site roads, and for which a separate planning application was lodged, were part of the overall wind farm project, and that normally their cumulative impact should have been considered as part of the EIA. However, he went on to state that he was not satisfied that it was illegal to separate the borrow pits from the assessment of the wind farm, noting that previous assessments carried out in 2002 and 2006 had not identified any significant environmental effects of the borrow pits whether considered alone or cumulatively with the wind farm. In those circumstances he saw "*no practical reason for an environmental impact assessment of the borrow pits other than in the context of the wind farm application*." He noted that his approach was consistent with the approach taken by Advocate General Gulmann in *Bund Naturschutz in Bayern v. Freistaat Bayern* (Case C-396/92) [1994] ECR 1 – 3717, namely that each case will be fact-sensitive as to whether the case must be considered cumulatively with a related application.

25. It is worth noting that in Skye the initial wind farm application had included within its scope certain proposals to excavate stone but that the developer at that point had made no decision as to the source of material for the construction of the site words. The initial planning permission granted contained a condition which required the developer, before the development commenced, to submit detailed proposals for the sourcing of materials including any necessary planning applications. Thereafter, two separate planning applications for the borrow pits were lodged, but the developers asked for what is referred to as a "screening opinion" as to whether the applications for the borrow pits would require an EIA. The developer was informed that the planning authority "*opined that such an assessment would not be required*". Lord Hodge noted that no challenge had been taken to that screening opinion. Three years later, a second amended proposal was lodged by the developer which included an assessment of the cumulative impact of the wind farm and the borrow pits. In their amended proposal, the developer give a summary of the cumulative impacts of the wind farm and the borrow pits and concluded by stating that they had not identified any likely significant cumulative environmental effects over and above the assessed environmental effects of the wind farm. That conclusion was not challenged by the petitioners in the case. Lord Hodge in those circumstances indicated that there had been no breach of the Regulations in relation to the borrow pits as anybody entitled to do so, had not been deprived of an opportunity to comment on the environmental assessment in relation to the borrow pits, and he concluded also that "*because of the screening opinion, the borrow pits were not EIA applications".* But one should note that at paragraph 76 of his opinion, Lord Hodge stated:

> *"[76] It is undisputed that the borrow pits formed an integral part of the wind farm development and Swale Borough Council and BAA plc support the view that part of a development in such circumstances should not normally be considered in isolation. But I am not satisfied that it was illegal to separate the borrow pits from the assessment of the wind farm. The initial assessment end 2002 and the August 2006 assessment did not identify any significant environmental effects of the borrow pits whether considered alone or cumulatively with the wind farm. It is consistent with Advocate General Gulmann's approach in Bund Naturschutz that the court should look at the particular circumstances of each case in deciding whether a cumulative assessment is needed to fulfil the purposes of the Directive. While, as Mr Campbell argued, the cumulative effects of the wind farm and the borrow pits are cumulative, I see no practical reason for an environmental impact assessment of the borrow pits other than in the context of the wind farm application.*
>
> *[77] In any event the problem, if such it was, was remedied. Having received legal advice and reconsidered to the matter, the respondents appear to have encouraged AMEC to present a cumulative assessment in the second amended proposal. AMEC presented that assessment. The respondents were able therefore to consider the cumulative impact of the wind farm and the borrow pits before the grant of planning permission to the wind farm.*
>
> *……..*
>
> *[79] The 1999 Regulations are concerned with achieving a proper environmental assessment in which the public have the opportunity to participate. In this case, in contrast with the circumstances in BAA plc, the unchallenged conclusion of*

the cumulative impact assessment was that the borrow pits would not give rise to any significant environmental effects beyond those identified in the assessment of the wind farm. I am not satisfied that there has been any failure to assess cumulative environmental effects or that democratic participation in the assessment has been thwarted in any way. The challenge appears to be a technical one rather than one with substantive content and I am not persuaded that the technical challenge is justified. The 1999 regulations are not designed to create an obstacle course for a developer or a planning authority. This ground of challenge fails."

26. I consider that the decision in Skye is distinguishable from the present case in so far as there was in fact an assessment made at an earlier screening stage that there were no significant environmental impacts deriving from the borrow pits such that a cumulative assessment was required, and that opinion was not challenged. But Lord Hodge was able to take comfort also from the fact that the authority requested the developer to provide a cumulative assessment, and that was provided and considered. I do not think it is authority for any general proposition that even though one development is integral to a second there is nothing illegal about separating one from the other, and thereby avoid a cumulative assessment of significant environmental effects of both. Each case will have to be considered in the light of its own specific facts, and as I have said, the Skye facts are very different from the facts in the present case where it has been stated by the developer, and apparently accepted by the inspector and the Board, that it was not possible at the time the application was being considered for the potential environmental effects of the works required in order to make the connection to the national grid to be included in an EIS and then assessed, as the route/design for that connection was not known precisely at the time, and in any event it was a matter outside the control and knowledge of the developer at the time, being a matter for ESB Networks to determine. Therefore, unlike the Skye case, there has not been any assessment of the potential environmental impact of that second phase of the wind farm development at all. There have been some views expressed that it is unlikely that there would be any significant impact to the environment by the works required for the connection to the national grid, but it cannot be said that there has been an assessment as such, since the details have not yet been made available.

27. I am satisfied that the second phase of the development in the present case, namely the connection to the national grid, is an integral part of the overall development of which the construction of the turbines is the first part. This is not a case such as in *R (Littlewood) v. Bassetlaw District Council* [2008]'s E.W.H. C. 1812 where the development in question was a stand-alone project within a larger Master Plan development, the full details of which had not yet been finalised. In that case it was held that phase 1 was not dependent or reliant upon the completion of any other part of the master plan, and therefore the cumulative effects of the entire master plan did not need to be assessed. The present case is different. The wind turbine development on its own serves no function if it cannot be connected to the national grid. In that way, the connection to the national grid is fundamental to the entire project, and in principle at least the cumulative effect of both must be assessed in order to comply with the Directive. In this regard the applicants have referred to the judgment of Clarke J. in *Arklow Holidays Limited v. An Bord Pleanala and others* [2006] IESC 15, albeit a judgment on the question only as to whether the applicants had established substantial grounds for their challenge to a decision to grant permission for the development of a waste water treatment plant, inter alia on the ground that "*the environmental impact statement submitted by the Urban District Council in support of its application for planning permission omitted from its considerations any potential impact on the environment of all aspects of the project other than those directly connected with the waste water treatment plant itself*". What had been omitted was any assessment of the environmental impact of certain aspects of the project which were outside the waste water treatment plant itself, the inspector taking the view in his report that by virtue of the fact that the rising mains and pumping stations were not located in environmentally sensitive areas, they were unlikely to have a significant environmental impact and therefore did not consider that the Board should require a new E.I.S. In deciding that a substantial ground had been raised in this regard by the applicants, Clarke J. stated:

"It may well have been within the competence of the Board to take the view that the potential environmental impacts of those aspects of the project outside the waste water treatment plant itself were much less significant than those from the plant. It may well also have been within the competence of the Board to take the view that the impacts that might be associated with those aspects outside the waste water treatment plant itself were not, of themselves, significant. However, what is required to be assessed is the totality of the impact of the project taken as a whole. It is, therefore, at least arguable sufficient for the purposes of leave, that aspects of a project which might not have impacts which would be significant in themselves might, when taken on a cumulative basis, and when added to the impacts of other aspects of the same project, give rise to an overall view that the environmental impacts taken as a whole were such as should lead to a refusal of development consent or, indeed, the imposition of more stringent conditions."

28. It seems to me that the fact that the developer is at the mercy of ESB Networks as far as the details of the plans for that connection to the grid is concerned, cannot absolve the developer from compliance with the Directive in every respect. Presumably at some future date all of the grid connection details will be ascertained, so that a decision can be made as to whether there will or will not be any significant environmental impact either on its own, or cumulatively with the wind turbine development itself. The question is whether that cumulative assessment, or even a decision as to whether any such cumulative assessment is required at all, should be made prior to permission being granted for the first stage of the development (i.e. the construction of the turbines), or whether the construction of the turbines can be allowed to proceed, and then in due course when the details of the connection to the national grid are known, a cumulative assessment of the environment mental impact of both can be carried out – running the risk from the developer's point of view, that in the event that he proceeds with the construction of the turbines, it would be all in vain should there be a negative cumulative assessment when it comes to considering the connection to the national grid.

29. If, in the latter event, where a decision is made by the authority to refuse permission for the connection to the national grid in view of a perceived significant environmental impact cumulatively, and the first phase had at that stage already been completed and was ready to be operated once the connection to the national grid was completed, there would be a significant prejudice to the developer such that it would probably make no commercial sense to proceed with the completion of the turbines until such time as a connection to the national grid was guaranteed by a relevant permission. For that reason, Framore submits that in reality there is nothing to prevent a cumulative assessment of the environmental impact of the connection to the national grid being carried out later when the details are known. They point also to the fact that the planning permission itself, which they have already obtained, makes it clear that the granting of that planning permission is not to be taken as any assurance that a connection to the national grid will be permitted. But, it must be borne in mind that Condition 4 is not a condition which makes the construction of the turbines conditional upon the consent being given for the connection to the national grid.

30. The applicants on the other hand fear that if the turbines are erected pursuant to the present permission, it would be more difficult for the authority to refuse permission in respect of the connection to the grid. In other words, the fear is that Framore would be seen to have "*a foot in the door*" such that any objections that the applicants might raise in relation to the second phase would be less likely to succeed than if the project was assessed cumulatively now before the developer has invested heavily in phase 1. In this regard, the applicants also refer to the fact that in the EIA Directive at recital 2 thereof that is stated:

"pursuant to Article 191 of the Treaty on the Functioning of the European Union, Union policy on the environment is

> *based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should, as a priority, be rectified at source and that the polluter should pay. Effects on the environment should be taken into account at the earliest stage in all the technical planning and decision-making processes" [Emphasis added].*

The applicants submit that the "earliest stage" is now, and prior to permission being granted for phase 1, and that otherwise there a risk that the requirements of the Directive will be avoided by no cumulative assessment of the overall project being carried out, particularly where it is probable that phase 2 on its own will be seen as exempted development requiring no planning consent.

31. The respondent in its written submission has stated:

> *"57. For the Applicants" case to have any merit, it must be on the basis that the development and the national grid connection constitute the one "project" and thus, that such a project has been granted development consent in defiance of the EIA Directive because such has arisen prior to a complete EIA.*
>
> *58. If, of course, the subject matter development and the future connection to the national grid are viewed as one project, then it stands to absolute reason that development consent has not been given for that project. Indeed, Condition 4 is clear on this."*

32. In that regard, I have already concluded that in reality the wind farm and its connection in due course to the national grid is one project, neither being independent of the other as was the case on *R (Littlewood) v. Bassetlaw District Council* [supra] for example. The Board's submissions are very much predicated on the contrary argument, and on the fact as submitted also by Framore that at this point in time there have been no proposals formulated by ESB Networks for the design and route of the connection to the national grid. That argument does not, it seems to me, justify treating phase 1 as a stand-alone project when in truth it is not. Rather, it points to a prematurity in the seeking of permission for the construction of the wind farm ahead of the detailed proposals for its connection to the national grid from ESB Networks. I appreciate that Framore have indicated that it simply is not possessed of the necessary information in this regard and could not include it in its EIS. But that does not mean that given more time and further contact with ESB Networks it could not be achieved so that it could be included in an EIS which addressed the impact of the environment of the total project "at the earliest stage". It may mean that the developer must wait longer before submitting its application for planning permission. But it seems to me likely at least that even if a phase 1 permission is granted with a condition such as Condition 4 contained therein, no sensible developer would complete phase 1 of the development without having been granted permission for the connection to the national grid, or without having been assured that the connection phase is exempted development. In that way, it is difficult to see any real prejudice to the developer by having to wait until the necessary proposals are finalised by ESB Networks so that an EIS for the entire project can be completed and submitted, and so that a cumulative assessment of the likely impact on the environment can be carried out in order to comply with both the letter and spirit of the Directive.

33. I will therefore grant the reliefs at D1 and D2 of the Abridged Statement of Grounds dated 14th February 2014.