THE HIGH COURT

[2017/244 J.R.]

BETWEEN

ELAINE KELLY DUNNE, NOEL MOORE, ANN FLYNN, DAVID KELLY, ANNETTE MCGRATH, MARY LOUGHREY,

LOUISE O'SULLIVAN, CLAIR MOORE, MATT KELLY

AND MICHAEL KELLY

APPLICANTS

AND

OFFALY COUNTY COUNCIL

RESPONDENT

AND

GUESSFORD LIMITED TRADING AS OXIGEN

NOTICE PARTY

JUDGMENT of Ms. Justice O'Regan delivered on the 21st day of May, 2019

Issues

1. Leave was afforded to the applicants to maintain the within judicial review proceedings by order of Mr. Justice Noonan on the 20th March, 2017. All of the applicants reside in Offaly and their application is for an order of *certiorari* quashing the decision of the respondent of the 20th December, 2016 to review a waste permit for recycling and transfer facility operated by the notice party at Barnam, Daingean, Co. Offaly. The notice party had made application to the respondent under the Waste Management Regulations 2007 for a review of the permit granted in 2011 for a five-year period.

2. Several grounds were canvassed by the applicants at the hearing before this Court although not all of same were incorporated within the statement of grounds notwithstanding that at several stages throughout the hearing it was indicated that it was inappropriate of the applicants to attempt to maintain such additional grounds. In this regard this Court is relying on the observations made by Haughton J. in *Alen-Buckley v. An Bord Pleanala* [2017] IEHC 541 when at para. 15 he observed that new arguments were raised but not pleaded sufficiently or at all in the applicant's statement of ground. Judge Haughton was satisfied that the rules of pleading governing judicial review are clear and require the applicants to state specifically each ground advanced and to particularise matters as appropriate.

3. Linking new matters back to generally pleaded grounds is not permissible. In para. 16 Judge Haughton quoted from o.84, r.20 to the effect that new arguments or evidence should be subject matter of an amendment of pleadings without which the court cannot have regard to the submissions which fall outside those pleaded in the statement of grounds.

4. In the events the grounds are to the effect that the respondent granted the permit without carrying out a recording either an environmental impact assessment (hereinafter "E.I.A.") or a screening for same or an appropriate assessment (hereinafter "A.A.") or screening for same. It is further complained that the permit was granted notwithstanding that the notice party did not comply with planning permission and that the respondent failed to provide reasons for its decision and failed to have regard to the applicants' submissions. A further ground is to the effect that the council granted a permit for activities that were excluded from a permit which issued on the 22nd January, 2016 and was subsequently quashed by consent in July, 2016, without explanation or reason.

5. Given that there was different personnel involved I am satisfied that there was no duty nor indeed *jurisprudence* identified by the applicants, to suggest that the respondent had to engage with the decision of the 22nd of January, 2016 and explain any difference in the permit granted.

6. During the course of the hearing it became apparent that two reports each dated the 8th of December, 2016, relied upon by the respondent as part of an effective screening for an A.A. and an E.I.A. were purportedly furnished to the applicants. However, it transpired that it was an incomplete copy of each report which was furnished and indeed the incomplete reports were exhibited in an affidavit on behalf of the respondent suggesting that *inter alia* the incomplete reports were on the public file. In those circumstances an application was made to amend the grounds relative to the complete reports and this application was successful resulting in a further ground relevant to the A.A. screening to the effect that -

> *"reference in the report of the 8th of December, 2016 to control through the implementation of mitigation measures/permit conditions is contrary to EU law."*

The claim of the applicants is fully contested.

Background

7. Planning permission for a waste facility on the instant site was first afforded on the 18th of June, 2010. The site and waste licence was transferred to the notice party on the 28th of March, 2011. The notice party subsequently made an application for an enlargement of the activities on site and applied for planning permission, however, planning permission was refused in this regard on the 13th of September, 2011. It was in the context of this enlarged planning application that a letter issued from the Department of Arts, Heritage & the Gaeltacht on the 27th of July, 2011 wherein it was submitted that a full A.A. and E.I.A. be conducted. Accordingly, that letter is not currently relevant.

8. Initially a waste facility permit issued on the 2nd of February 2007 and was subsequently renewed on the 28th of March 2011 which latter mentioned renewal was a permit for a five-year period expiring on the 14th of December 2015. In advance of the expiry namely on the 18th of September, 2015 a review of the waste permit was sought by the notice party. It is common case that the applicants objected to the review on a number of grounds mentioned in their submissions to the respondent in this regard.

9. The respondent conducted a site inspection on the 20th of September, 2016 and subsequently a screening for an A.A. and a screening for an E.I.A. (asserted by the respondent) was the subject matter of reports of the 8th of December, 2016. A waste facility permit application report issued on the 20th of December, 2016 and on page 2 of that report it is recorded that the respondent carried out an A.A. screening in conjunction with the E.I.A. screening.

10. This suggests that the relevant screening was carried out in advance of the report of the 20th of December, 2016.

11. The respondent wrote to the notice party by letter of the 20th of December, 2016 and wrote to the applicants by letter of the 21st of December, 2016 which letters are identical save in the letter of the 21st of December, 2016 the letter concludes with the statement to the effect that the relevant permit is available for viewing at Offaly County Council during hours therein specified.

12. The letter to the notice party from the respondent of the 20th of December, 2016 appears to comprise the decision of the respondent in respect of the application and is brief in particular if one excludes the conditions attached to the permission. The letter states as follows:-

> *"I refer to the application by Guessford Limited to review waste facility permit… Having reviewed the application, under article 35 of the above regulations, Offaly County Council have decided to grant a review of permit… The attached permit…with conditions refers.*
>
> *In accordance with article 35(9) of the above reference regulations the council outline the following reasons for its decision."*

Thereafter conditions 1-9 inclusive attached to the permit are discussed. The letter then concludes with a request to insure all conditions of the permit are read.

13. In the full copy of the screening report for an A.A. of the 8th of December, 2016 page 12 is included (this page in fact was not initially part of a copy report furnished to the applicants). This page incorporates s.G entitled "*Finding of no Significant Impacts*". The page appears to be set out as incorporating standard questions on the left-hand side with site specific answers on the right-hand side.

14. Under the heading "*The Assessment of Significance of Effects*" a standard query on the left-hand side is to the effect "*explain why these effects are not considered significant*" (although in the preceding paragraph it is suggested that the project is not likely to affect the European site). The answer provided is as follows:-

> *"Due to current and proposed activities at the facility and the proximity to the designated areas the impacts are limited and all can be controlled through the implementation of appropriate mitigations (sic) measures/permit conditions".*

15. On page 11 of the report of the 8th of December, 2016 it is stated:-

> *"Due to the current and proposed activities and proximity to designated areas it is determined that the waste facility site would not have a negative impact on the surrounding protected areas. There are a number of permit conditions which must be adhered to, this will mitigate against any potential negative impact".*

16. The Notice Party's permit is limited to an annual disposal at the facility of 24,500 tonnes. It is common case that this is under the 25,000 tonne threshold which would under the regulations require a mandatory E.I.A. The respondents argue however that the screening exercise was carried out to determine whether or not a full E.I.A. was required.

17. The respondent further acknowledged that under Article 6(3) of Council Directive 92/43/EEC (known as the Habitats Directive) the carrying out of an A.A. assessment is required. In this regard, Article 6(3) envisages a two-stage process namely at stage one it is necessary to screen the process to ascertain whether or not the development is likely to have a significant effect on a European site and protected species. If at this stage of the process it is found that there is such a likelihood, then the matter proceeds to a stage two full A.A. investigation whereas if at stage one it is found that there is no likelihood of an impact on a European site then the stage two investigation is not required. In this regard the report of the 8th of December, 2016 concludes with page 12 section G herein before referred.

18. Under article 18(4)(d) of the Waste Management Facility Permit Regulations of 2007 it is provided that a local authority shall not grant a waste facility permit unless it is satisfied that the facility is compliant with planning or is exempt from planning permission under s.5 of the P&E Act 2000.

19. The relevant planning permission for the facility is dated the 18th of June, 2010.

20. At para.10 of the affidavit of Mr. Glover on behalf of the respondent of the 16th of October, 2017 it is recorded that on the 11th of April, 2017 the planning department of the respondent conducted and unannounced inspection of the facility following which the planning department of the respondent concluded the facility was compliant with its planning permission.

21. Following the institution of the within judicial review proceedings, further proceedings under s.160 of the P&D Act 2000 have been maintained by the within applicants asserting non-compliance with the planning permission which application has not yet been heard by the court.

Screening for A.A. and User of Mitigation Measures

22. There is some controversy in the within proceedings as to what documents in particular comprise the screening for an A.A. (it is asserted in the affidavit of Mary Hussey of the 30th of January, 2019 on behalf of the respondent that the report of the 8th of December, 2016 was only a part of the screening process and this assertion is also comprised in written submissions to the court and initial oral submissions to the court. On the other hand, the waste facility application permit report at page 2, as aforesaid, suggests that the appropriate assessment screening was already conducted by the respondent. On the assumption that this report was prepared in advance of the decision of the respondent it is hard to understand how the report of the 20th of December, 2016 or indeed the decision of the respondent of the 20th of December, 2016 comprised part of the assessment process). It is nevertheless clear that the report of the 8th of December, 2016 was either pivotal in or about the screening process or indeed comprised the screening process in conjunction with the prior site inspection.

23. Domestic and EU case law are relevant in determining the test to be applied at the screening portion of the A.A. process in

particular where such screening process determines that a full A.A. is not required. In the instant circumstances the Habitats Directive (92/43/EEC) of the 21st of May, 1992 is the starting point. Thereafter cases such as Waddenzee (case 127/020), *Sweetman and Others v. An Bord Plenála* (case C258/11) and *People over Wind and Peter Sweetman v. Coillte Teoranta* (case C323/2017) provide guidance from the CJEU as to the threshold requirement in the screening process and the incorporation of mitigation measures. In this jurisdiction cases such as *Kelly v. An Bord Pleanála* [2014] IEHC 400 and *Connolly v. An Bord Pleanála* [2018] (a judgment of the Supreme Court of the 17th of July, 2018) are also relevant.

24. Helpfully the issues now under consideration were the subject matter of a portion of a judgment of Mr. Justice Barniville of the 8th of February, 2019 of *Kelly v. An Bord Pleanala and Aldi Stores Ireland Limited* (2019 IEHC 84) in which case the applicants challenged the screening for appropriate assessment carried out by the respondent pursuant to Article 6(3) of the Habitats Directive and the relevant provision of the planning legislation. The applicants claimed that the Board took into account mitigation measures at the screening stage for appropriate assessment which is impermissible under Article 6(3) as interpreted by the CJEU in P*eople over Wind and Sweetman v. Coillte Teoranta* case C-323/17 (para. 36 of the judgment). The asserted mitigation measure in that matter was the sustainable urban drainage systems (SUDS) methods incorporated into the project design.

25. In *Waddenzee* (case C-127/04) the CJEU considered the meaning of the test of "*likely to have a significant effect"* and was satisfied that the necessity to move to the stage two process (that is a full appropriate assessment) arises "*following from the mere possibility that such an effect attaches to that plan or project*" (see para. 41 of the CJEU judgment). The court relied on the precautionary principles to guide the test so that -

> *"such a risk exists if it cannot be excluded on the basis of objective information that the plan or project will have significant effects on the site concerned… in case of doubt as to the absence of significant effects such an assessment must be carried out."* (para.44)

26. In Advocate General Sharpston's opinion on the 22nd of November, 2012 in the case of *Sweetman v. An Bord Pleanála* (case C-258/11) notwithstanding that the case refers to the 2nd stage of the A.A. test (the carrying out of an A.A. was necessary and could not be screened out) the Advocate General did at para. 46 consider further the concept of "*likely to have an effect"* and equated same to capable of having an effect. Furthermore, the Advocate General at para. 48 of the opinion of the 22nd of November, 2012 indicated that the concept of "significant" was such that projects that had no appreciable effect are excluded. At para. 49 it is indicated that the threshold was very low with a requirement of an assessment on the basis of best scientific knowledge in the field. It is acknowledged at para. 50 that a higher threshold subsists at the stage two process. At para. 51 the necessity to apply the precautionary principle is again stated where there is uncertainty as to a risk. The stage two element of the process can only be ruled out if convinced that the plan will not adversely affect the integrity of the site.

27. At para. 44 of the ultimate judgment which is dated the 11th of April, 2013 it is stated that screening must contain complete precise and definite findings and conclusions capable of removing all scientific doubt. It is for the court to determine if the assessment meets these requirements.

28. In *People over Wind* (case C-323/17 a judgment of the 12th of April, 2018) the CJEU was satisfied that in the screening stage there is a probability of a risk if it cannot be excluded on the basis of objective evidence (see para. 34) and measures to avoid or reduce the relevant effect is more appropriate at the stage two portion of the process rather than at the screening portion.

29. In this jurisdiction in the case of *Kelly v. An Bord Pleanala and Others*, a judgment of Ms. Justice Finlay Geoghegan of the 25th of July, 2014 the opinion of Advocate General Sharpston in *Sweetman v. An Bord Pleanála*, of the 22nd of November, 2012, was quoted with approval and applied in relation to the low threshold involved in stage one - the screening process (see para. 30 of that judgment). At para. 39 the court indicated that in order to comply with CJEU criteria assessment must include an examination, analysis, evaluation, findings, conclusions and a final determination. The applicants argue that so too must the screening process. At para. 48 it is indicated that failure to carry out a proper or lawful A.A. under Article 6(3) deprives the authority of jurisdiction.

30. Insofar as the formulation of the test to be applied by Ms. Justice Finlay Geoghegan is concerned this test was cited with approval by Clarke C.J. in *Connelly v. An Bord Pleanála and Others* at para. 8.14.

31. In the judgment of Mr. Justice Barniville in *Kelly* of the 8th of February, 2019 aforesaid the court at para. 68 identified the principles to be applied in the screening stage for an A.A. (stage one screening) including that there is a necessity to move on to stage two with the existence of a mere probability that such an effect exists and in line with the precautionary principle a risk will be found to exist if it cannot be excluded on the basis of objective information. At bullet point 7 the court indicated that the possibility of there being a significant effect triggers the stage two process and it is only necessary to determine that there "*may be*" such an effect. Bullet point 8 indicates that it merely has to be shown that there is a possibility that such a significant effect is likely. At bullet point 9 the court indicated that the significant effect is made in the light of the characteristic and specific environmental conditions of the site concerned, that is, that the significant effect is essentially case specific. The court indicated that although the test was very low nevertheless a threshold must be met before one moves to the stage two A.A. phase.

32. At para. 99 Mr. Justice Barniville suggests that the correct approach for the court to take is to consider the substance of the reports and not to approach what is said in the reports with an excessive degree of formulism – the assessment is not to be overly pedantic. It is required that the court must examine the substance of what is said in the report rather than focus on the use and non-use of particularly statutory words. The screening obligation will be complied with where it is clear from the substance of the reports that the risk of the development having a significant effect on the European site concerned can be excluded on the basis of objective information.

33. At para. 132 Mr. Justice Barniville clarified that the CJEU in the case law aforesaid was considering cases where the relevant measures were intended to avoid or reduce the harmful effects of a particular development on a European site or sites which are potentially significantly affected by the development at issue therefore measures which are so intended are ruled out from consideration at the stage one screening stage.

34. Applying such tests, the court in that *Kelly* decision was satisfied that the SUDS measures were not mitigation measures as defined by the CJEU in *People over Wind* as they were not intended to avoid or reduce the harmful effect of the proposed development on any European site rather are required in all new developments in the greater Dublin area to mitigate the impact of the development on the aquatic environment.

35. Turning specifically therefore to the A.A. screening report of the 8th of December, 2016, it is noted that it is a 12-page document. There is a description of the waste facility and associated activities together with an identification of the relevant Natura

2000 site or sites. Of the eight sites identified at page 6, page 7 goes on to provide that due to the scale of the project and distance to the designated site such site is not relevant for assessment. At page 10 it is indicated that there are no potential cumulative impacts arising from the proposed waste authorisation. At page 11 it is indicated that the waste facility site will not have a negative impact on the surrounding protected areas and that there are a number of permit conditions which must be adhered to which will mitigate against any potential negative impact. The report concludes with section G which incorporates the aforesaid statement to the effect:-

> *"Due to current and proposed activities at the facility and the proximity to the designated areas the impacts are limited and all can be controlled through the implementation of appropriate mitigation measures/permit conditions."*

36. Having regard to all of the foregoing in my view it cannot be said that the screening report confirms that there are no doubts as to the absence of significant effects (see *Waddenzee* at para. 44). Nor can it be said that the substance of the Report is such that significant effect has been excluded (para. 99 of Kelly, 2019).

37. Although in portions of the report it is indicated that there are no significant effects nevertheless section G of the report at the very least is equivocal as to significant effect and suggests that there are limited impacts on designated areas which can be controlled through the implementation of mitigation measures or permit conditions. It appears to me inappropriate that mitigation measures would be availed of in the screening report to avoid a full stage two A.A.

38. Furthermore, as to whether or not the mitigation measures mentioned in section G of the report could properly be said to be mitigation measures not connected to the European site or sites is far from clear given that:-

> a) this statement is made in the context of proximity to Raheenmore bog SAC
>
> and
>
> b) the author's decision not to enumerate either the impacts, although limited, on the site or indeed the mitigation measures or permit conditions contemplated to deal with such impact.

39. It appears to me having regard to the totality of the screening report of the 8th of December, 2016 that same has not in fact without the aid of mitigation measures ruled out the possibility of a significant effect on the adjacent Raheenmore bog SAC.

Reasons

40. As aforesaid the applicants have complained that the decision of the respondent lacks reasoning insofar as the decision incorporates a determination to review the relevant waste permit.

41. The respondent argues that the starting point to determine whether or not the decision lacks reason is the fact that the statutory framework under which the decision is made requires reasons to be given in respect of any conditions to be attached to the permit and reasons to be given where the authority determines not to renew the permit. However, the legislation is entirely silent on any necessity to afford reason for the granting of a permit.

42. Added to the foregoing statutory background however is the fact that the application for the permit was clearly contested by the applicants therefore the respondent had before it, prior to making a decision, an application by the notice party in support of the renewal of the permit together with submissions by the applicant seeking a decision by the respondent to refuse a renewal of the permit.

43. In *Malek v. Minister for Justice, Equality and Law Reform* [2012] IESC 59 the Supreme Court set out the current requirements or duty to give reasons in respect of an administrative decision. Reasons are necessary in order to identify to the relevant party why a particular decision has been made so that the party can understand the decision made against him so as to enable him to consider judicial review or future reshaping of an application. The need to give reasons is based upon the principle that all decision makers must act fairly and rationally. Fennelly J. at para. 74 of his judgment stated that:-

> *"The developing jurisprudence of our own courts provides compelling evidence that, at this point, it must be unusual for a decision maker to be permitted to refuse to give reasons. The reason is obvious. In the absence of any reason, it is simply not possible for the applicant to make a judgment as to whether he has a ground for applying for a judicial review of the substance of the decision and, for the same reason, for the court to exercise its power. At the very least, the decision maker must be able to justify the refusal".*

44. In *Connolly* aforesaid, Clarke C.J. at para. 13.5 stated that a decision will not be invalid provided that the reasonable observer would be able to understand with reasonable clarity what the Board was deciding and why. The reason for the decision can be comprised within the decision itself or in other materials which clearly must be taken by express reference or by necessary inference to identify the reasons.

45. The content of the decision of the 20th of December, 2016 has already been highlighted. The letter refers to the application of the notice party and goes on to state that having reviewed the application the respondent has decided to grant a review and the relevant permit with relevant conditions is attached. It is then stated that pursuant to Article 35(9) (which requires reasons for the imposition of conditions) the council outlined the reasons which followed for its decision. The balance of the decision referred to conditions 1-9 inclusive and the reasons therein mentioned. There are no reasons whatsoever as to why the application of Guessford was preferred over the counter submissions on behalf of the applicants but in the absence of such reasons either within the decision itself or the only other document referred to within the decision namely the application of Guessford or the permit which issued or indeed any other document identified by the Respondent, then, as per the judgment of Fennelly J. in *Malek* aforesaid it is impossible for the applicants to make a judgment as to whether or not they have grounds for applying for judicial review on the substance of the decision being the determination to grant a review of the permit.

46. In *Connolly* aforesaid para. 9.2 of the judgment of Clark C.J. has indicated that the reasons can be found in the decision or in other documents expressly referred to the decision or indeed anywhere provided that it is sufficiently clear to a reasonable observer carrying out a reasonable enquiry that the matters contended actually form part of the reasoning. If the search required where to be excessive then the reasons could not be said to be reasonably clear. The respondent effectively suggests that having regard to the totality of the documents which were before the respondent namely the application of the notice party, the submissions of the applicant, the screening assessment of the 8th of December, 2016, the report of the 20th of December, 2016 it is clear that the respondent preferred the arguments of notice party over that of the applicants. That is certainly clear however as to why those

arguments were preferred and the applicants' submissions rejected is not in my view reasonably clear.

Outstanding Grounds
47. Given the site inspection (unannounced) and finding of the Respondent's planning section to the effect that there are no breaches of planning by Guessford, together with the fact that the s.160 proceedings were initiated after, and not before, the impugned Decision, there is in my view insufficient evidence before the Court to demonstrate a breach of Art.18 of the 2007 Regulations in respect of Planning Compliance.

48. The lack of reference to the Applicant's submissions in the body of the Decision does not support the Applicants' contention that the Respondent did not have regard to such submissions (see para. 207 of *Kelly*, 2019 IEHC 84).

49. In the circumstances the Applicants have not discharged the necessary burden of proof to secure the requested relief based on either of the foregoing grounds.

Conclusion
50. I am satisfied that the screening assessment undertaken which appears to comprise the site inspection and the report of the 8th of December, 2016 involved mitigation measures which possibly effect reducing the impact on a European site and therefore a full A.A. assessment (stage two phase) was required to be undertaken prior to any decision being made. Further, in the circumstances, such screening did not in my view confirm that there are no doubts as to the absence of significant effects on the Raheenmore Bog SAC. In the events therefore the respondent lacked the relevant jurisdiction to review the relevant permit. In addition the reasons for the grant of the review of the permit are not reasonably clear.

51. On the basis of the foregoing I am satisfied that the applicants are entitled to an order quashing the decision of the 20th of December, 2016 so that the matter should be remitted to the respondent.