Neutral Citation: [2015] IEHC 633

THE HIGH COURT

JUDICIAL REVIEW

[2014 No. 38 J.R.]

BETWEEN

AN TAISCE

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

AND

EDENDERRY POWER LIMITED, BORD NA MÓNA ENERGY LIMITED, BORD NA MÓNA ALLEN PEAT LIMITED, BORD NA MÓNA PLC, MINISTER FOR ENVIRONMENT, COMMUNITY AND LOCAL GOVERNMENT,

IRELAND AND ATTORNEY GENERAL

NOTICE PARTIES

AND

[2014 No. 43 J.R.]

BETWEEN

FRIENDS OF THE IRISH ENVIRONMENT LIMITED

APPLICANT

AND

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 Michael White delivered on the 9th October, 2015

1. By order of the 17th January 2014,The applicant, An Taisce,(hereafter called the first applicant) a non governmental organisation of longstanding, was granted leave to seek:-

> (i). An order of *certiorari* by way of application for judicial review quashing the decision of the 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 An Bord Pleanála planning reference PL19.242226 granted on 19th December, 2013.
>
> (ii) A declaration by way of application for judicial review that the environmental effects of extracting the peat fuel source for the thermal power plant were not properly assessed for the purposes of the Environmental Impact Assessment Directive, 85/337/EEC (as amended) (now quoted as Directive 2011/92/EU (the EIA Directive)) prior to construction and at no point up to and including the present application.
>
> (iii) A declaration by way of application for judicial review that where the environmental effects of extracting the peat fuel source for the thermal power plant were not properly assessed for the purposes of the Directive. The respondent is obliged to ensure the effectiveness of the EIA Directive by subjecting those environmental effects to Environmental Impact Assessment before granting planning permission for the thermal power plant.
>
> (iv) A declaration by way of application for judicial review that the Environmental Impact Assessment conducted by the respondent was inadequate and failed to comply with the EIA Directive.

2. The first applicant issued a motion on 22nd January, 2014, originally returnable for 11th March, 2014, seeking the reliefs. The respondent filed a statement of opposition on 18th June, 2014.

3. The applicant, Friends of the Irish Environment Limited,(hereafter called the second applicant) was granted leave on 22nd January, 2014, to apply for judicial review to seek,

(i) 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 Pleanála reference PL19.242226, which said decision was purportedly made on 19th November, 2013.

(ii) 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 Habitats Directive, 92/43/EEC.

(iii) 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.

(iv) 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.

(v) 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.

(vi) A declaration that the said development is a plan or project not directly connected with or necessary to the management 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.

(vii) A declaration that a screening assessment for an appropriate assessment ought to have been conducted subject to s. 177U of the Planning and Development Act 2000.

(viii) The applicant issued a motion on 23rd January, 2014, returnable for 11th March, 2014. The first named respondent filed a statement of opposition on 18th June, 2014. The second and third named respondents and third named notice party filed a statement of opposition on 4th July, 2014.

History of Planning Permissions for the Thermal Power Plant.

4. In 1998, Edenderry Power applied for planning permission for the construction of a peat fired electricity generating station on the site in Clonbullogue, Co. Offaly. Permission for this development was granted on appeal by the respondent on the 24th of December 1998, Planning reference PL2/98/437.

5. On 12th July, 2005, the Board granted permission for a material change of use of the electricity generating station, to allow for a mix of fuels to be burnt, to include biomass. A further change of use was granted by Offaly County Council on the 30th August 2011, to allow for the storage of biomass on site and an increase in the amount of biomass which could be used to fuel the plant.

6. These permissions were time limited by nature of condition 1.2 attached to the 1998 permission which stated:-

> "This permission shall have effect for the period up to 31st day of December, 2015, unless before the end of that period, a further permission for the continuance of the development beyond that date shall have been granted by the planning authority or by An Bord Pleanála on appeal."

7. On the 30th of April 2013, the first notice party applied for planning permission for the continued use and operation of the power plant. This is the application, the subject matter of these proceedings. It did not involve the construction of any new structures, and was accompanied by and environmental impact statement, (EIS). On 21st June, 2013, Offaly County Council gave notification to grant planning permission. The first applicant appealed. By order of 19th November, 2013, the respondent granted planning permission for the continued use and operation of the plant for a period of ten years from the date of the order, unless prior to the end of that period, planning permission shall have been granted for the retention of the development for a further period.

8. In considering this application, the respondent completed an environmental impact assessment, (EIA) and a screening exercise for the purposes of the Habitats Directive and it is the alleged inadequacy of that assessment and screening that forms the basis of the challenge to the planning permission by way of judicial review.

9. The operation of the power plant is also the subject of an existing integrated pollution prevention and control (IPPC) licence issued by the Environmental Protection Agency (EPA) on 22nd July, 1999,(licence P0482) The IPPC licence has been the subject of a number of technical amendments.

10. In documentation submitted as part of its planning application, the first notice party indicated that it intended to source the peat fuel for the power plant, from bogs licensed to the second and third notice parties, Bord na Móna Energy Limited and Bord na Móna Allen Peat Limited respectively. These bogs are known as the Derrygreenagh Group, Bogs and the Allen Group Bogs respectively. The extraction of peat in these bogs is the subject of two separate IPPC licenses issued by the EPA.

11. The evidence before the respondent about the fuel supply was set out in para. 3.4.1 of the EIS of April 2013, it states:-

> "In terms of supply of peat as a fuel, it is the policy of Bord na Móna not to open any undrained new bogs for the purposes of peat production. There is sufficient remaining capacity from Bord na Móna bogs currently in production, to supply peat to the Edenderry Power Plant for the duration of the facility's design life. It should be noted that prior to the initial construction of the Edenderry plant, a peat resource study was carried out to identify and plan where peat stock would be sourced for the duration of the design life of the power station. These bog areas were subsequently licensed by the EPA for the industrial harvesting of peat and used henceforth to supply fuel to EPL. As this application is being made midway through the design life of the plant, no bogs other than those for which Bord na Móna currently holds licenses, will be used for the remaining lifetime of Edenderry Power Plant. Peat supplied to the power station is currently and will be continued to be sourced from those bogs listed under IPPC licence Reg. No. P0501-01 (Derrygreenagh Group) and Reg. No. P0503-01 (Allen Group). In 2009, Irish Peatland Conservation Council (IPCC) produced a document, entitled Peatlands

of Ireland Conservation Action Plan 2020 – halting the loss of peatland biodiversity during 2009, which lists 736 peatlands of conservation importance in the Republic of Ireland. The two EPA licenses, P0501-01 (Derrygreenagh Group) and Reg. No. P0503-01 (Allen Group) contain a total of 41 distinct bog areas, of which five (Daingean, Derryounce, Lullymore, Timahoe and Lodge) overlap with the sites listed in the IPCC action plan. However, only one of these sites (Lodge) is currently still in production, with production there limited to a specific red-line area detailed in the EPA licence P0503-01 (Allen Group). The priority actions for peatland conservation in Ireland as detailed in the IPCC's document include the phasing out of the burning of peat in power stations and private homes and the replacement of peat with renewable energy technology as part of a Government energy strategy. As highlighted in Chapter 2 of this EIS, it is Government policy to set an initial target of 30% of renewable energy production at Edenderry Power Plant by co-firing with biomass. In addition, it is Bord na Móna's own policy not to open any new un-drained bogs for energy production. As such it is not considered that the continued use and operation of Edenderry Power Plant conflicts with the IPCCs priority action cited above."

12. Appendix 12 of the EIS para. 12.1.3.2 states:-

> "In terms of traffic generation, the majority of the peat arrives on site via the Bord na Móna rail network. Biomass fuels are transported to the site in HGV on the public road network."

Legislative Framework.

13. The relevant legislation is Directive 2011/92/EU of the European Parliament and Council of 13th December, 2011, on the assessment of the effects of certain public and private projects on the environment. This directive is the codification of Council Directive 85/337/EEC of 27th June, 1985, which had been amended on a number of occasions. The relevant article is Article 3 which states:-

> The environmental impact assessment shall identify, describe and assess in an appropriate manner, in the light of each individual case and in accordance with Articles 4 to 12, the direct and indirect effects of a project on the following factors:
>
> (a) human beings, fauna and flora;
>
> (b) soil, water, air, climate and the landscape;
>
> (c) material assets and the cultural heritage;
>
> (d) the interaction between the factors referred to in points (a), (b) and (c).

14. This article is now incorporated in an Act of the Oireachtas, at Section 171A of the Planning and Development Act 2000, as inserted by the Planning and Development (Amendment) Act 2010.

15. Council Directive 92/43/EEC of 21st May, 1992, on the conservation of natural habitats and of wild fauna and flora, has been transposed into Irish law by the European Communities (Natural Habitats) Regulations 1997 S.I. 94/97. The relevant articles are

> 6.1 for special areas of conservation, Member States shall establish the necessary conservation measures involving, if need be, appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitats types in Annex I and the species in Annex II present on the sites.
>
> 6.2 Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, insofar as such disturbance could be significant in relation to the objectives of this Directive.
>
> 6.3 Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

Article 6.3 has been transposed into Irish legislation by Section 32, Part IV of SI 94/97.

GENERAL MATTERS.

16. A number of arguments have been put forward by the applicants and replied to by the respondent and the notice parties, which the court does not have jurisdiction to deal with.

17. This Court is bound by the parameters of the orders of Peart J. granting leave to bring the judicial review proceedings. This Court has no jurisdiction to impugn the IPPC licenses granted in respect of the peat extraction from the relevant bogs, nor is a collateral attack on the legality of these licences permitted. It does not have jurisdiction to determine if the peat extraction is exempted development, because that issue is outside the parameters of the leave orders.

18. There is also a factual dispute, or a dispute about the interpretation of facts.

19. Para. 34 of the respondent's legal submissions, states:-

> "Furthermore, the operation of the plant in accordance with the planning permission is not contingent on fuel being supplied from the relevant bogs. The developer is not required to source fuel from these bogs and is not restrained from sourcing fuel from other entities and/or locations."

20. This is repeated at para. 5.19 of the legal submissions of the 4th notice party which states:-

> "There is no condition attached to the permission requiring that the peat used as a fuel source for the power plant be

sourced from any particular peat source.

The applicant in the An Taisce proceedings has adduced no evidence to suggest that the extraction of peat from any particular source is wholly contingent upon the operation of the power plant."

21. Those submissions run completely counter to the acknowledged facts in this case. . The objective reality is that the peat source for this power station from its initial commencement has derived from the licensed bogs under the control of the 2nd and 3rd notice parties. The respondent was assured by the relevant notice parties that this would continue to be the case. In addition the peat is transported by a rail network under the exclusive control of the 4th notice party.

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

23. The submission of the first applicant relates to an interpretation of Directive 2011/92/EU, and an alleged remedial obligation of the respondent to address prior deficiencies in the environmental assessment history of the peat bogs. That applicant, acknowledged it was not making any point on the transposition of the directive into Irish law. The applicant has relied on certain acknowledgments of the second, third and fourth notice parties in the Environmental Impact Statement, which I have already outlined about the source of the peat.

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.

26. There is also a reference in the Inspector's report to the Long Derries special area of conservation (site code 00925).

27. The respondent's inspector's report refers to the River Barrow and River Nore SAC and notes, that it is located circa 14km to the south of the power plant and that the Long Derries special area of conservation is located circa 5.2km to the north east of the power plant.

28. The respondent supported by the first and second notice parties has argued that this applicant has failed to adduce any evidence to support its contention and relies on the provisions of the judgment in *Harrington v. An Bord Pleanála* [2014] IEHC 232, a judgment of O'Neill J, which I will return to.

The Remedial Obligation to Carry Out an Environmental Impact Assessment on the Derrygreenagh Group of Bogs and the Allen Group of Bogs which were the subject of Environmental Protection Agency Licenses P0501-01 and P0503-01'

29. Before dealing with the submission of the first applicant, in respect of the current obligation of the respondent to carry out an Environmental Impact Assessment on the impact of the peat extraction, the court wishes first to consider the second element of the applicant's submission that the respondent was under a remedial obligation to address the prior deficiencies in the environmental assessment history of the peat bogs.

30. It is the applicant's case that at the time licenses P0501-01 and P0503-01 were issued, the Environmental Protection Agency was not empowered by Irish law to require an applicant to submit an Environmental Impact Statement. While this has now been remedied in the aftermath of a Court of Justice judgment in Case C50/09 Commission v. Ireland, the applicant notes that the first notice party has not been requested to submit an Environmental Impact Statement on the environmental impacts of peat extraction from either of these bog groupings.

31. The applicant relies on a Court of Justice decision, C27/09; *Brussels Hoofdstedlijk Gewest v. Vlaams Gewest (Brussels Airport)*, this case was a reference for a preliminary ruling. The airport authority had submitted an environmental permit application for the continued operation and alterations to the airport involving the addition of parcels of land. Prior to this the infrastructure of Brussels national airport had undergone alteration works without an Environmental Impact Assessment, being carried out.

32. The court at para. 37 stated:-

> "If it should prove to be the case that, since the entry into force of Directive 85/337, works or physical interventions which are to be regarded as a project within the meaning of the directive were carried out on the airport site without any assessment of their effects on the environment having been carried out at an earlier stage in the consent procedure, the national court would have to take account of the stage at which the operating permit was granted and ensure that the directive was effective by satisfying itself that such an assessment was carried out at the very least at that stage of the procedure."

33. The applicant submitted "obligation on the national court" referred to in the first instance the consent authority that is the respondent and that it was a positive obligation on the respondent to address a serious oversight in the Environmental Impact Assessment regime either historically or continuing prior to granting planning permission.

34. The respondent, in reply, noted that the remedial obligation had its origins in the decision of the Court of Justice C201/02, R(on the application of *Wells v. Secretary of State for Transports, Local Government and the Regions*, referring in particular to para 65, which stated:-

> "Thus, it is for the competent authorities of Member States to take, within the sphere of their competence, all the general or particular measures necessary to ensure that projects are examined in order to determine whether they are likely to have significant effects on the environment and, if so, to ensure that they are subject to an impact assessment (see, to this effect, Case C-72/95 *Kraaijeveld and Others* [1996] ECR I-5403, paragraph 61, and *WWF and Others*, cited above, paragraph 50). Such particular measures include, subject to the limits laid down by the principle of procedural autonomy of the Member States, the revocation or suspension of a consent already granted, in order to carry out an

assessment of the environmental effects of the project in question as provided for by Directive 85/337."

35. Among other submissions in response, the respondent argued that a remedial obligation can only be exercised or discharged "within the sphere of competence" of the relevant decision maker. The respondent is only competent – in the sense that it only has jurisdiction – to determine the appeal before it, i.e. the application for permission for the proposed development, namely the continued use of the power plant, on the development site. In that context, it does not have jurisdiction to assess entirely separate developments on separate sites which are not the subject matter of applications or appeals before it. The respondent submitted that the applicants reliance on the Brussels airport case was entirely misplaced, as the remedial obligation was to address a failure to carry out an Environmental Impact Assessment in respect of the physical alteration of the airport itself and it arose in the context of the application to use that very same airport.

36. The court is considering the legality of the planning permission for the power plant. It is not considering the legality of peat extraction on the relevant bogs. It has already decided that it has no jurisdiction to impugn the EPA licenses or to consider if the peat extraction is exempted development. The relevance of the peat bogs to the application before this Court is that it supplies the fuel source for the power plant and to that extent, in applying Article 3 of the directive, should the respondent have taken into consideration, the indirect effects on the environment of this extraction.

37. The respondent had no responsibility to remedy the alleged deficiencies of the Environmental Protection Agency in the licensing of the bogs. These were separate developments on separate sites, albeit connected to the power plant as its main source of fuel and only source of peat.

Alleged Transposition Failure and case against Ireland and the Attorney General.

38. In paras. 20, 21 and 22 of the statement required to ground an application for judicial review, the first applicant contended that domestic legislation did not properly transpose the Directive 85/337/EEC codified in Directive 2011/92/EU. The first applicant did not make any submissions on this matter in the course of the hearing.

39. The second applicant in its statement required to ground an application for judicial review at paras. 9, 10 and 11, made general allegations against the second respondent as follows:-

> "9. The second named respondent is under an obligation pursuant to Article 6 above, *inter alia*, to avoid the deterioration of habitats and the disturbance of species in the special areas of conservation. The second named respondent has failed to discharge this obligation. The second named respondent has failed to establish a system of regularisation of peat extraction to ensure the obligations under the Habitats Directive are complied with, this is contrary to its obligation under European law.
>
> 10. The second named respondent has failed to establish a system of regularisation or development consent whereby the direct, indirect and cumulative effects of development proposals are properly assessed for the effects on the Natura network contrary to European law.
>
> 11. The first and second named parties are state owned and controlled. The second respondent has failed to ensure that its activities and in particular the continued use of the power station at Edenderry and the associated harvesting of peat is properly carried out in accordance with European law and only carried out after a full and proper assessment of its effects on the Natura 2000 network."

40. On submissions made during the hearing, the court could not discern any arguable case against the second and third respondent and the second applicant was invited on a number of occasions, to allow the second and third respondent to be released from the proceedings but declined to do so. It is not appropriate to make any order against the second and third respondents in the second applicant's proceedings.

The Interpretation of Section 171A of the Planning and Development Act 2000, as inserted by the Planning and Development (Amendment) Act 2010, giving effect to Directive 2011/92/EU, the updated version of Council Directive 85/337/EEC.

41. The essence of the first applicant's submissions is that the respondent has a current obligation to include in its environmental impact assessment (EIA) the environmental effects of extracting the peat fuel source for the thermal power plant and that these are a direct and indirect effect of the plant within the terms of the directive. It is accepted that these effects were not subject to EIA by the respondent before granting planning permission. The applicant submits that in interpreting the relevant section, the court should consider: (i) the broad scope of the directive; (ii) the broad purpose of the directive; (iii) the obligation on domestic courts to give effect to that purpose; and (iv) the obligation to take into account the reality of the project.

42. The applicant relies on Article 2 of the directive to illustrate its broad scope. which states:-

> "Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, *inter alia*, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects. These projects are defined in Article 4."

43. The applicant also relies on the Courts of Justice decisions:-

- C72/95, *Kraaijevld & Or*, paras. 31, 39
- C435/97 *WWF & Ors*, para. 40
- C2/07 *Abraham & Ors*, Liege airport, para. 32
- C275/09 *Brussels Hoofdstadelijk Gewest & Ors*, para 29

44. In arguing that the directive has a broad scope, the applicant has relied on Case C420/11 *Leth v. Austria*. Paragraph 34 of that judgment states:-

"In that respect, it follows from the third and eleventh recitals in the preamble to Directive 85/337 that the purpose of that directive is to achieve one of the European Union's objectives in the sphere of the protection of the environment and the quality of life and that the effects of a project on the environment must be assessed in order to take account of the concerns to contribute by means of a better environment to the quality of life."

45. The applicant also relies on a passage from the United Kingdom, House of Lords decision, *Berkeley v. Secretary of State for the Environment* [2000] 3 AER 897 where Lord Hoffman at para. 8 of his judgment stated:-

"Perhaps the best statement of this aspect of an EIA is to be found in the U.K. government publication *'Environmental Assessment: A Guide to the Procedures'* (HMSO 1989) at p.4:-

'The general public's interest in a major project is often expressed as concern about the possibility of unknown or unforeseen effects. By providing a full analysis of the project's effects, an environmental statement can help to allay fears created by lack of information. At the same time it can help to inform the public on the substantive issues which the local planning authority will have to consider in reaching a decision. It is a requirement of the Regulations that the environmental statement must include a description of the project and its likely effects together with a summary in non-technical language. One of the aims of a good environmental statement should be to enable readers to understand for themselves how its conclusions have been reached, and to form their own judgments on the significance of the environmental issues raised by the project.'

A court is therefore not entitled retrospectively to dispense with the requirement of an EIA on the ground that the outcome would have been the same or that the local planning authority or Secretary of State had all the information necessary to enable them to reach a proper decision on the environmental issues.

Although section 288(5)(b), in providing that the court 'may' quash an *ultra vires* planning decision, clearly confers a discretion upon the court, I doubt whether, consistently with its obligations under European law, the court may exercise that discretion to uphold a planning permission which has been granted contrary to the provisions of the Directive. To do so would seem to conflict with the duty of the court under article 10 (ex article 5) of the EC Treaty to ensure fulfilment of the United Kingdom's obligations under the Treaty. In classifying a failure to conduct a requisite EIA for the purposes of section 288 as not merely non-compliance with a relevant requirement but as rendering the grant of permission *ultra vires*, the legislature was intending to confine any discretion within the narrowest possible bounds. It is exceptional even in domestic law for a court to exercise its discretion not to quash a decision which has been found to be ultra vires: see Glidewell L.J. in *Bolton Metropolitan Borough Council v. Secretary of State for the Environment* (1990) 61 P. & C.R. 343, 353. Mr. Elvin was in my opinion right to concede that nothing less than substantial compliance with the Directive could enable the planning permission in this case to be upheld."

46. The applicant in submitting that there is an obligation on domestic courts to give effect to that purpose relies on an extract of a judgment of Barrett J. in *Environmental Protection Agency v. Harte Peat Limited & Ors* [2014] IEHC 308, a judgment which is presently under appeal. The judgment states at para. 35:-

"Clearly the legislative intent of the Oireachtas in this regard was to adopt a rigorous environmental impact assessment regime. In the context of the above query it appears to the court that if it is to give effect to the purpose of the EIA Directive and also to accord with the clear legislative intent of the Oireachtas in terms of establishing a robust and stringent environmental impact assessment regime, it must answer the above question in a manner that affords the greatest protection to the environment."

47. In reliance on its submission that the court must take into account the actual reality of the project, the court has cited *Arklow Holidays Limited v. An Bord Pleanála* [2006] IEHC 15, a judgment of this Court of 18th January, 2006. Under the heading, at para. 6, assessment of whole of the project, Clarke J. dealt with the application of an Environmental Impact Assessment to the totality of a project.

48. At para. 6.2, he stated:-

"It is, of course, necessary to note that there is a distinction between the EIS (which is a document prepared by the developer and submitted to the planning authority) and the environmental impact assessment ('EIA') which is the process required, as a matter of EU law, of the competent authority (in this case the planning authority) prior to the grant of development consent. It is clear that, as a matter of EU law, it is open to the competent authority to supplement any information submitted on behalf of the developer with its own enquiries. In that context the focus under this ground must be on the manner in which the Board assessed the environmental impact of the project as a whole and in particular the manner in which it assessed the environmental impact of those aspects of the project which were not specifically dealt with in the EIS."

49. At para. 6.8, he states:-

"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 wastewater 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 wastewater 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 arguably 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. On that basis I am satisfied that there are arguable grounds, sufficient for the purposes of leave, for the proposition that the process engaged in by the Board in assessing the environmental impact of this project taken as a whole was flawed by reason of the failure to adequately identify the impact of those aspects of the project excluded from the EIS and in particular, notwithstanding the finding that the environmental impact of those aspects taken by themselves might not be significant, to consider the cumulative effect of all impacts."

50. The respondent in response to the alleged current obligation to carry out an EIA in respect of peat extraction submitted that planning permission was sought for the continued use and operation of the power plant and the development for the purpose of the

planning application was confined to the site of the power plant. Furthermore, the operation of the plant in accordance with planning permission is not contingent on fuel being supplied from the relevant bogs. The developer is not required to source fuel from these bogs, and is not restrained from sourcing fuel from other entities and/or location.

51. It was further submitted that the underlying purpose of an EIA is the early assessment of the likely environmental effects of a project in the course of a process that may lead to the grant or refusal of development consent. The consent granted should be shaped and conditioned by the outcome of the assessment. In circumstances where the peat was already licensed by the Environmental Protection Agency since 2000, it is unclear what purpose the applicant believes its assessment in the context of the power plant would serve. A refusal of planning permission to extend the life of a power plant would not and could not require the cessation of peat extraction of the bogs.

52. The respondent submitted that the applicants were, in reality, making a project splitting type argument, to the effect, that peat extraction ought to have been included in the application and/or the assessment carried out by the Board.

53. The respondent relied on an opinion of the Advocate General C. Gulmann, in case C396/92, *Bund Naturschutz in Bayern*. The respondent cited paras. 71, 72 and 73 of that opinion which state:-

> 71. "The important question in the present connection is not, however, which projects are to be subject to an environmental impact assessment. It is whether, in connection with the environmental impact assessment of the specific project, there is an obligation to take account of the fact that the project forms part of a larger project, which is to be carried out subsequently, and in the affirmative the extent to which account has to be taken of that fact. The subject matter and content of the environmental impact assessment must be established in the light of the purpose of the directive, which is at the earliest possible stage in all the technical planning, and decision making processes to obtain an overview of the effects of the projects on the environment and to have projects designed in such a way that they have the least possible effect on the environment. That purpose entails that as far as practicably possible, account should also be taken in the environmental impact assessment of any current plans to extend the specific project in hand."
>
> 72. "For instance, the environmental impact assessment of a project concerning the construction of the first part of a power station, should accordingly, involve the plans to extend the station's capacity fourfold when the question of whether the power station's site is appropriate as being assessed. Similarly, when sections of a planned road link are being constructed, account must be taken in connection with the environmental impact assessment of the specific projects of the significance of those sections in the linear route to be taken by the rest of the planned road link. There is neither reason nor basis for a more specific determination of the scope of that obligation in the present case."

54. The respondent accepted that the Advocate General's observations were, in general terms, but noted the example of a subsequent extension of the existing plant on the same site was useful, as his focus was on a subsequent extension of the existing plant on the same site, and there was nothing in the opinion to suggest that the extraction of peat as a fuel source on entirely separate sites should be assessed cumulatively as part of the power plant project.

55. The respondent also relies on *R (Burridge) v. Breckland DC* [2013] EWCA Civ. 228, the Court of Appeal. Two planning permissions were granted on the same day to the same developer for a biomass renewable energy plant and a combined heat and power plant respectively. The court stated:-

> "The present situation comes into that category. The two proposed developments were functionally interdependent and can only be regarded as an 'integral part' of the same development. They cannot be treated otherwise than as a single project or development and were actually considered by the committee on the same day and on the basis of cross-referenced reports. The geographical separation of something over 1km does not, in my judgment, defeat that, particularly given the link provided by the pipeline. Not only was 0445(the combined heat and power project) inevitably part of a more substantial development (Swale BC), it was considered by the committee at the same time as 1372 (the biomass renewable energy plant)."

56. The respondent argued that in the application before this Court, the key requirement of functional interdependence was absent.

57. The respondent cited *O'Grianna v. An Bord Pleanála* [2014] IEHC 632, a judgment of Peart J. on the basis that the learned judge applied the functional interdependence test at para. 27 of his judgment, where he stated:-

> "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…. 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."

58. The first, second and fourth notice parties in their submission have supported the arguments put forward by the respondent in respect of *Bund Naturschutz in Bayern BV v. Freistaat Bayern* C396/1991, it is submitted that the opinion of Advocate General Gulmann, was applied by the Irish courts in *O'Connell v. O'Connell* (Unreported, High Court, Finnegan J., 29th March, 2001) and Friends of the Curragh Environment Limited v. An Bord Pleanála [2006] IEHC 390.

59. The first, second, third and fourth notice parties further submitted that the respondent did not accept the arguments raised by the first applicant, regarding the failure of the EIS to address the direct and indirect effects of the project. They further argued that the question of whether something can be characterised as a direct or indirect effect of a particular development is a question of fact to be heard by the respondent in exercise of its specialist planning function. The decision of the respondent in this regard is, therefore, subject to the standard of review as set out in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39, as confirmed by Haughton J. in *Ratheniska Timahoe and Spink (Rts) Substation Action Group v. An Bord Pleanála* [2015] IEHC 18. The first applicant has not shown the decision of the respondent was unreasonable.

Conclusion

60. The court is satisfied that the scope and purpose of Article 3 of the directive encompassed in Irish legislation is broad. The court's decision has to be based on factual reality rather than theoretical construct.

61. Section 171A is clear and unambiguous. For the purpose of these proceedings, the relevant parts are: "in the light of each

individual case" and "the direct and indirect effects".

62. This is not a project splitting case. The thermal power plant, the subject of the planning permission application and the bogs from which the power station derives the vast majority of its raw material are separate sites.

63. This thermal power plant was constructed, close to Midland bogs for the generation of electricity by burning peat, of which there was a plentiful supply,

64. This is borne out by the statements I have already quoted from the EIS when the first, second, third and fourth notice parties accepted that historically all of the peat supplied to the power station had been supplied from designated licensed bogs and will continue to be so supplied. This peat is supplied directly by rail under the exclusive control of the fourth notice party.

65. Theoretically if the supply of peat ceased from these bogs, the power plant could still operate but there would be a necessity to transport the peat by the road network. That was not the planning application before the respondent and if that happened and continued, an issue would arise about material change of use. The respondent contends that functional interdependence means that one project, is part of the other and cannot survive without it. That is not an interpretation I would place on it. There is functional interdependence as the power plant relies for the vast majority of its raw material on the designated bogs.

66. The important word in the section applying the relevant Article is "indirect". In assessing indirect effects there has to be a limit or the effects will be too remote.

67. The section does put a limit on indirect by stating that it is "in the light of each individual case". There is confusion about the function of the court in this application. It has to determine if the respondent had to take into account the indirect effects on the environment of the power plant's major source of fuel supply. The court is not concerned with the operation of the bogs per se.

68. From any reasonable application of the objective facts of this project, there are possible indirect effects of the use of peat from these bogs on the environment.

69. The difficulty is that the respondent excluded completely the consideration of the indirect effects, when considering the planning application for the extension of life of the power plant.

70. The concern expressed in the submissions by the first, second, third and fourth notice parties that the court may unnecessarily interfere with the planning process and disregard the principles in *O'Keeffe v. An Bord Pleanála*, is an important matter.

71. It is not appropriate for the court to interfere in the determination of the planning application. However, the court has to intervene if the interpretation of the relevant Article is misinterpreted by the appropriate authority.

72. The fact that the designated bogs had a separate licensing regime in place is not, in itself, a reason to exclude the peat extraction from consideration. The respondent in exercise of its function was entitled to examine the indirect effects on the environment of the peat extraction in the context of its consideration of the planning application for the continued use of the power station or in the context of applying more stringent conditions to its use. The respondent is entitled to take the licenses into account.

73. The court is of the opinion that the respondent has interpreted the relevant legislation applying Article 3 of the directive too narrowly. The first named applicant is entitled to a declaration in accordance with para. 3 of the order for leave of 17th January, 2004, that is a declaration that where the environmental effects of extracting the peat fuel source for the thermal power plant were not properly assessed for the purposes of the EIA Directive, the respondent is obliged to ensure the effectiveness of the EIA Directive by subjecting those environmental effects to Environmental Impact Assessment before granting planning permission for the thermal power plant.

74. If other orders are required the court will address that in due course.

The Application of the Second Applicant.

75. The court has serious concerns about the application of the second applicant. Order 84, rule 20(3) of the Rules of the Superior Courts requires an applicant for judicial review to state his or her grounds of challenge precisely giving particulars where appropriate, it states:-

> "It will not be sufficient for an applicant to give as any of his grounds for the purpose of paragraphs (ii) or (iii) or sub rule 2(a), an assertion in general terms of the ground concerned, but the applicant should state precisely each such ground, giving particulars where appropriate and identify in respect of each ground the facts or matters relied upon in supporting the ground."

76. In *Harrington v. An Bord Pleanála* [2014] IEHC 232, O'Neill J. stated, at paras 45 and 46,

> "45. … 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 Pleanála, Westin v. An Bord Pleanála and Lancefort Ltd. v. An Bord Pleanála* clearly establishes that the applicant carries the burden of proof of establishing the grounds in respect of which leave for judicial review was granted.
>
> 46. … 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, on 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."

77. I have already differentiated between the nature of the application of the first applicant and the second applicant and referred to the documents relied on by the second applicant in advancing the reliefs for judicial review.

78. I am not satisfied with the assertion in the affidavit of David Healey at para. 9 of his affidavit sworn on 22nd January, 2014. This assertion is relied on in the written legal submissions of the second applicant at paragraphs 4, 13 and 22.

79. I have already emphasised that the submissions made by the second applicant relate to further downstream consequences of the extraction of peat on the designated peat bogs. The only documents generated by the second applicant, other than the inspector's report and the National Parks and Wildlife Service Conservation objectives for the River Barrow and River Nore SAC 002162, are the submission to An Bord Pleanála of 12th August, 2013, and the two site synopsis documents which I presume have been prepared by Mr. Healey but that is not clear.

80. The first respondent has objected to the application based on the dicta of O'Neill J., the second respondent has relied on the provisions of the Rules of the Superior Courts and that no case, has been made out against the second and third respondent.

81. The second applicant falls substantially short of the standard I would expect to sustain its argument. I accept that it may not be well resourced financially but that does not excuse its failure to put before the court, cogent material by way of expert analysis on affidavit of the case it is making about the Habitats Directive.

82. I am not satisfied to grant the second applicant any of the relief sought.

83. I do not consider it appropriate to refer any issue to the Court of Justice for a preliminary ruling pursuant to article 234.