THE HIGH COURT

COMMERCIAL

[2016 No. 728 J.R.]

BETWEEN

NORTH KERRY WIND TURBINE AWARENESS GROUP

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

AND

KERRY COUNTY COUNCIL, IRELAND, ATTORNEY GENERAL AND STACKS MOUNTAIN WINDFARM LIMITED

NOTICE PARTIES

JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 9th day of March, 2017.

1. The applicant has been granted leave to apply for judicial review in which it seeks, *inter alia*, an order of *certiorari* quashing the grant of permission by the respondent of a proposed development comprising the construction of ten wind turbines and ancillary works at; Ballyhorgan South, Lixnaw; Ballyhorgan East, Lixnaw; Irramore, Listowel; Lissahane, Listowel; and, Muckenagh, Lixnaw in the County of Kerry ("the wind farm"). The application for planning permission was lodged on 16th January, 2014, and was accompanied by an Environmental Impact Statement ("E.I.S.") and a Natura Impact Statement ("N.I.S."). Kerry County Council refused permission on 8th October, 2014, and an appeal was lodged by the fourth named notice party ("S.M.W.L.") with the respondent ("The Board") on 4th November, 2014.

2. On 16th February, 2015, Kerry County Council adopted the Kerry County Development Plan 2015 – 2021 which came into effect on 16th March, 2015.

3. The inspector appointed by the Board to assess the application produced a report dated 28th May, 2015, which recommended that further information be sought by the Board, from S.M.W.L. in respect of the application. On 27th August, 2015, the Board sought further information pursuant to s. 132 of the Planning and Development Act 2000 (P.D.A. 2000). On 27th October, 2015, S.M.W.L. submitted its response to the request for further information to which included a further revised N.I.S. and an addendum to the previously submitted E.I.S..

4. On 24th March, 2016, the inspector produced a second report and on 15th July, 2016, the Board gave its decision to grant planning permission for the wind farm.

5. On 10th October, 2016, the applicant was granted leave to apply for judicial review.

Grounds of Challenge

6. The applicant raises three principal grounds of challenge namely:-

> (i) the Board failed to carry out and/or record any proper Appropriate Assessment (A.A.) contrary to national and European law;
>
> (ii) the Board failed to carry out and/or record any proper Environmental Impact Assessment (E.I.A.) under national/European law; and,
>
> (iii) the Board failed to record any determination under s. 37(2) of the P.D.A. and has failed to give any reasons or considerations for its determination pursuant to s. 37(2)(c) of the Act.

7. The applicant relies heavily on the decision of Finlay Geoghegan J. in *Kelly v. An Bord Pleanála* [2014] IEHC 400. In her judgment the learned judge adopted the decision of the C.J.E.U. in *Sweetman and Ors. v. An Bord Pleanála* (Case C-258/11) where the court stated at para. 44:-

> "So far as concerns the assessment carried out under Article 6(3) of the Habitats Directive, it should be pointed out that it cannot have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the protected site concerned…It is for the national court to establish whether the assessment of the implications for the site meets these requirements."

8. At para. 39 of her judgment, Finlay Geoghegan J. stated:-

> "Section 177V(1) must be construed so as to give effect to Article 6(3) of the Habitats Directive, and hence, an appropriate assessment carried out under the section must meet the requirements of Article 6(3) as set out in the C.J.E.U. case law. If an appropriate assessment is to comply with the criteria set out by the C.J.E.U. in the cases referred to, then it must, in my judgment, include an examination, analysis, evaluation, findings, conclusions and a final determination."

9. The Board and S.M.W.L. accept the principles set out in Kelly and, for reasons set out later, they argue that they have met the test set out therein. At para. E(5) in the statement of grounds, the applicant says that the Board was unable or not permitted to assess the likely significant effects of the wind farm and the grid connection (and the cumulative effects of same) as permission was not sought for the connection. The Board and S.M.W.L. rely on the decision in *Ó Gríanna v. An Bord Pleanála* [2017] IEHC 7. I am satisfied that this case disposes of any issue raised by the applicant under that ground and there is no necessity that a grid

connection must be included in the planning application for the purpose of seeking consent in order for an E.I.A. to be carried out; rather, the E.I.A. requires information on the grid connection to enable a full E.I.A. to be carried out and for the Board to assess the likely significant impact of the wind farm and grid connection as a whole.

Alleged failure to carry out and/or record any proper Appropriate Assessment contrary to national and European law

10. Having considered the decision of the Board and the material relied on by it, it is clear to me that the respondent did conduct an A.A. prior to making its decision to grant the permission. In making that decision it had before it the N.I.S., the further additional and supplemental documentation received during the application which included the revised N.I.S., the submissions on file and the inspector's reports. All of this information was sufficient to enable the respondent to assess the potential impact of the proposed wind farm development on all relevant European sites. Although the applicant alleges that the respondent failed to carry out an A.A. this is clearly wrong. At p. 4 of the decision it states:-

"The board considered the Natura Impact Statement submitted with the planning application, the further supplemental and additional information received in relation to the revised Natura Impact Statement including grid connection, the documentation submitted at appeal stage, the submissions on file and the inspector's report and completed an Appropriate Assessment of the implications of the proposed development for European sites where there is a likelihood of significant effects. The board considered that the information before it was adequate to allow the carrying out of an appropriate assessment.

> In completing the assessment, the board considered, in particular, the likely direct and indirect impact arising from the proposed development both individually or in combination with other plans or projects, the mitigation measures included as part of the proposed development and the Conservation Objectives for these European Sites. The board concurred with the inspector's view (paras. 12.13.1 and 12.13.2 of Addendum Report dated 24th March, 2016) that, on the basis of the detailed mitigation measures proposed, significant impact on the qualifying interests associated with the Lower Shannon Special Area of Conservation (002165) and Stacks to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle Special Protection Area (Site Code 004161) are not likely.
>
> In completing the Appropriate Assessment, the board accepted and adopted the Inspector's Appropriate Assessment in respect of the potential effects of the proposed development on the aforementioned European Sites, having regard to the sites' Conservation Objectives. In overall conclusion, the board was satisfied that the proposed development would not adversely affect the integrity of the European sites in view of the sites' Conservations Objectives."

11. It could not be more clear that the decision of the Board recorded the fact that it carried out an A.A.. Nevertheless, the applicant maintains that it did not do so on the basis that it relied upon and adopted the reports of the inspector who conducted a screening for A.A. but did not conduct an A.A.. It is clear that in conducting the A.A., the Board had regard to, and adopted, the inspector's A.A. screening assessment in respect of the potential effects of the proposed developments on European Sites having regard to the sites' conservation objectives. The Board did not rely solely on the inspector's reports but also had regard to all the material before it when conducting the A.A., especially the N.I.S. and revised N.I.S.. Unlike the case of Kelly which turned on the fact that there was a clearly identifiable lacuna in the information before the Board, there was no such lacuna in this case nor was one identified by the applicant.

Alleged failure to carry out and / or record any proper Environmental Impact Assessment
12. The E.I.S. which accompanied the planning application addressed and appraised the environmental impact of the wind farm. In a request for further information on 27th August, 2015, the Board sought further information on the environmental impact of the wind farm, including the grid connection, and sought a revised E.I.S. to assist it in carrying out an assessment of the environmental impact of the windfarm including the grid connection. An E.I.S. addendum was then submitted in which the environmental impact of the grid connection was addressed and appraised.

13. In *Ahern v. An Bord Pleanála* [2015] IEHC 606, Noonan J. stated, at para. 23, that:-

> "The Board is not required to separately identify, describe and assess the direct and indirect effects of the proposed development within its decision where these matters are contained within an E.I.S. which the Board considers is sufficient to enable it to carry out an E.I.A.."

14. He went on to state that there was no legal requirement in the Planning and Development Acts that the Board must state in writing within its own decision what the E.I.A. comprises and that once it is clear from the terms of the decision and the documents referred to how the E.I.A. was arrived at that this satisfies the obligations of the Board under s. 172 of the P.D.A. 2000. I am satisfied that this is a correct statement of the law.

15. The applicant argued that the E.I.A. conducted was inadequate because of an alleged failure to deal with the issue of noise. In the course of the hearing it became clear that noise ceased to be an issue in the permission. The inspector in his first report recommended a refusal of permission based on the likelihood of noise at sensitive receptors but in his second report, reversed his previous view on the basis of a reappraisal of the *Wind Energy Development Guidelines for Planning Authorities* as promulgated by the then Department of Environment, Heritage and Local Government in 2006. The inspector was entitled to do so and has set out in clear terms the reasons for this in the second report. Both of these reports were before the Board when it granted permission and are explicitly referred to in the decision as follows:-

> "The concern of the inspector in his initial report regarding noise was noted. However, the board adopted his subsequent amended conclusion with respect to noise in his Addendum Report whereby the inspector was satisfied that the noise level would generally comply with national guidelines and would be acceptable."

16. The applicant also alleged that the E.I.A. conducted by the respondent was inadequate on the basis of its alleged failure to deal with the issue of noise in that the respondent ought to have established a standard interpretation of noise guidance in respect of wind farms to apply in its assessment of these developments. The applicants did not cite any legal basis for this. In any event, the Board is required to have regard to the *Wind Energy Development Guidelines for Planning Authorities* pursuant to s. 28 of the P.D.A. 2000. These guidelines contain standards in respect of noise and wind farms, and were considered by the inspector and in turn by the Board in adopting his amended conclusions.

17. The applicant contends that the noise condition imposed by the permission differs from the deliberations of the inspector but there was, in fact, no specific recommendation made by the inspector as to noise conditions.

18. It was notable that, apart from this issue of "noise" raised by the applicant, there was nothing of substance raised by it in terms of any particular environmental concern or impact.

19. A similar issue concerning alleged failure to carry out a proper E.I.A. was raised in *Timahoe v. An Bord Pleanála* [2015] IEHC 18 and was rejected by Haughton J. He stated that he was:-

> "[S]atisfied firstly that the Board did undertake a comprehensive E.I.A. in relation to this aspect of the Development and that this is recorded in the body of the decision where the Board stated that it was satisfied that the information available on file was adequate to allow an E.I.A. to be completed. It is also apparent from a reading of the decision as a whole that the Board considered and assessed the E.I.S., the Inspector's Report (where an assessment of the E.I.S. and this issue was carried out by the Board's nominated officer) and other relevant documentation. The Board also expressly confirms that in forming its view it had regard to listed and publicly available documents of a scientific or guidance nature relevant to this issue."

20. Timahoe is authority for the proposition that the court's scrutiny of an E.I.A. cannot simply involve a focus on the decision of the Board itself but must also take into account an assessment of the E.I.S., and the inspector's report and other documentation before it and upon which it relied.

21. *In Ahern v. An Bord Pleanála* (supra para. 13), Noonan J. stated at para. 22:-

> "However, there is no requirement in the P.D.A. that the Board must state in writing within its own decision what the E.I.A. comprises and it seems to me that once it is clear from the terms of the decision and the documents therein referred to how the E.I.A. was arrived at that this satisfies the Board's obligations under s. 172. Subsection (1D) and (1E) mandate the Board to consider whether the E.I.S. identifies and describes adequately the direct and indirect effects on the environment of the proposed development and if it does not, to obtain from the applicant such further information as it requires to enable it to carry out an E.I.A.."

22. He went on to state at para. 23 that:-

> "The Board is not required to separately identify, describe and assess the direct and indirect effects of the proposed development within its decision where these matters are contained within an E.I.S. which the Board considers is sufficient to enable it to carry out an E.I.A.. In the present case, C.D.L. [Cork Dockyard Holdings Limited] provided a comprehensive E.I.S. which the Board were entitled to adopt, as did its Inspector, particularly in the absence of any contrary evidence on the traffic issue."

23. These principles have been accepted in *Dunnes Stores v. An Bord Pleanála* [2016] IEHC 226 and similar principles are to be found in *Sweetman v. An Bord Pleanála* [2016] IEHC 277. I adopt these principles as a correct statement of the law.

24. What these authorities show is that if a reading of the E.I.S. and inspector's report gives a complete understanding of the decision of the Board and the reasons for its findings concerning the effect of the development in question on the environment, that is sufficient.

25. In *People Over Wind v. An Bord Pleanála* [2015] IEHC 271, Haughton J. stated at para. 148:-

> "It is expressly clear from…the decision that the Board completed an E.I.A.. It is equally clear that the Board records in that section its conclusion and decision that the proposed development 'would not be likely to have significant effects on the environment'. This is the record of its decision/determination and no further record is required under domestic or European law."

26. There was no dispute between the parties to this application that current jurisprudence confirmed that the perspective from which a planning decision must be looked is that of an intelligent person who has taken part in the appeal or had been appraised of the issues which had arisen before the Board. The respondent submits that such an interested person must be understood to have read the documents which were before the Board and I accept that submission.

27. I am satisfied that when the decision of the Board is judged by that standard, the applicant's complaint that the Board failed to carry out and/or record any proper E.I.A. under national or European law does not stand scrutiny.

Alleged material contravention of the Development Plan

28. The applicant alleges that the Board failed to have any or any proper regard to the objectives of the Kerry County Development Plan at objective EP-12 which provides as follows:-

> "Not to permit the development of windfarms in areas designated 'open to consideration' in the Tralee and Listowel Municipal Districts until 80% of the turbines with permissions in those areas, on the date of adoption of the Plan, have either been erected or the relevant permission has expired or a combination of both and the cumulative affect (sic) of all permitted turbines in the vicinity of the proposal has been fully assessed and monitored."

29. It is important to note that the planning authority in refusing permission did not do so on the basis of material contravention. Indeed, it could not have done so on the basis of objective EP-12 as it had not come into force when the matter was before it.

30. The Board's inspector was of the view that the proposed development was a material contravention of the Development Plan by reference to objective EP-12.

31. Section 37(2)(a) of the P.D.A. 2000 permits the Board to grant permission even if there is, in its view, a material contravention of the Development Plan. The decision of the Board clearly records that it examined county level policy in relation to renewable energy and considered that the policy cited in objective EP-12, conflicted with other policies in the Wind Energy Strategy for the county, and with other polices in the County Development Plan that are supportive of the deployment of greater levels of wind farms. The Board considered that objective EP-12 was impractical in terms of implementation and would create an unacceptable level of uncertainty in relation to when any future developments might be permitted. Furthermore, the Board considered that it would run contrary to national policy and guidance in relation to increasing renewable energy penetration. It therefore, considered that it would not be reasonable or appropriate to refuse planning permission on the basis of objective EP-12. In my view, the decision of the Board is clear in its meaning and the decision sets out quite clearly why it granted permission notwithstanding that it would involve a material

contravention of the Development Plan. It did so by reference to documents identified in its decision.

32. The applicant relies on s. 37(2) of the P.D.A. 2000 but this only arises in specific circumstances where the planning authority has decided to refuse permission on the grounds of material contravention. In this case, that did not happen. Indeed, it could not have happened because objective EP-12 had not yet come into force when the matter was before the planning authority.

33. While there is no legal requirement on the Board to expressly recite that it is determining to grant permission in material contravention of the County Development Plan, it is clear from reading the decision that it did so and gave extensive and cogent reasons for doing so.

34. For the reasons expressed above, I reject the applicant's challenge to the decision of the Board based on material contravention grounds.

Other Matters

35. I will now deal with a number of other discrete issues that arose in the course of the hearing. The applicant alleges that the planning authority, the applicant and the developer have all determined that the development is likely to have a significant effect on a number of European sites. As a result, the development was "screened in" for Stage 2 A.A.. The applicant complains that, rather than conduct such a Stage 2 A.A. as legally required, it appears that the inspector has "screened out" the development for A.A. It alleges that accordingly a Stage 2 A.A. is required as it cannot be ruled out beyond reasonable scientific doubt that the development will not have a significant effect on a European site.

36. The second report of the planning officer of the 6th October, 2014, restated the prior conclusions that a Stage 2 A.A. was required both in relation to the lower Shannon S.A.C. and Stacks S.P.A. and proceeded to set out an A.A. report which concluded that there would be no adverse effect on those European sites having regard to the mitigation proposed. When the matter came before the Board, the inspector agreed with the planning authority's decision to "screen out" the following European sites; the Moanveanlagh Bog Special Area of Conservation (site code 002351), Kerry Head Special Protection Area (site code 004189), the River Shannon and River Fergus Estuary Special Protection Area (site code 004077). The inspector also agreed with the planning authority and the developer that the remaining two sites (Lower Shannon S.A.C. and Stacks S.P.A.) should be considered further and identified the likely impacts and the significance of the potential risks to those sites of the proposed development. Having evaluated these potential effects, the inspector concluded that there would be no likely significant effect on any European site. Nevertheless, the Board proceeded to what had been described in the documents before the planning authority has a "Stage 2" A.A. in respect of these two sites.

37. The decision of the Board shows that it accepted the substantive conclusions of the inspector in terms of the actual impact and effect of the proposed developments and its associated mitigation measures in this case. The Board indicated that it was proceeding to carry out a Stage 2 A.A. as a precautionary measure. In effect, it reached the same conclusion as the inspector and did so pursuant to a "Stage 2" A.A., in order to address concerns that a Stage 2 A.A. was required for this development and that mitigation measures should not be considered at the earlier screening stage.

38. The Board accepted that with a consideration of the mitigation measures proposed there is no likely significant effect on the European sites referred to.

39. I find no merit in the point raised by the applicant on the "Stage 2" AA. It is an overly technical point of no substance. In *Berkeley v. Secretary of State of Environment* [2001] 2 A.C. 603 Lord Hoffman recognised the importance of a purposive approach to the Directive and he said that a balance had to be struck between ensuring effectiveness and avoiding an overzealous response to cases of minor non-compliance.

40. In *Antoine Boxus & Ors. v. Région wallonne* C-128/09, C-129/09, C-130/09, C-131/09, C-134/09 and C-135/09, Advocate General Sharpston said at para. 79:-

> "The E.I.A. Directive is not about formalism. It is concerned with providing effective E.I.As for all major projects; and, in its amended form, with ensuring adequate public participation in the decision making process."

In my view the comments of Advocate General Sharpston are a useful guide for our courts in reviewing planning decisions involving the E.I.A. directive and I adopt them.

41. The other issue raised by the applicant was the relevance of the decision of Barrett J. in *Connolly v. An Bord Pleanála* [2016] IEHC 322. The court was informed that the Board had petitioned the Supreme Court with a view to reviewing the test by which decisions of the Board should be viewed. I refused the applicant's application for an adjournment of this case pending the outcome of that matter. Having accepted the line of authority outlined earlier in this judgment I saw no reason why this hearing should be adjourned pending the outcome of the reference to the Supreme Court. It will be a matter for that court to determine whether the Connolly decision imposes an unreasonable burden on the Board and falls outside the standards required by the other jurisprudence referred to herein.

Conclusions

42. The decision of the Board meets the test set out in Kelly and the other case law which is referred to herein. There is, in my view, no conflict between Kelly case the other cases I have referred to; rather, they are complementary.

43. I am satisfied that the decision of the Board was clear and properly reasoned and was made in accordance with law.

44. For the reasons which I have set out above, I am satisfied that the applicant is not entitled to an order of *certiorari* on any of the grounds raised.