THE HIGH COURT

[RECORD NO. 2016 263 JR]

IN THE MATTER OF S. 50 OF THE PLANNING AND DEVELOPMENT ACT 2000, AS AMENDED

BETWEEN

MICHAEL HOEY

APPLICANT

AND

AN BORD PLEANALA

RESPONDENT

AND

ROSSDERRA FARMS LTD

NOTICE PARTY

AND

LAOIS COUNTY COUNCIL

NOTICE PARTY

AND

ENVIRONMENTAL PROTECTION AGENCY (EPA)

AND DEPARTMENT OF ARTS HERITAGE AND THE GAELTACHT

NOTICE PARTIES

JUDGMENT of Ms. Justice O'Regan delivered on the 6th day of December 2018

Issues

1. By order of the 25th April 2016 the applicant was afforded leave to maintain the within judicial review proceedings wherein the applicant seeks an order of *certiorari* quashing two decisions of the respondent both made on the 2nd March 2016, the first of which related to the construction of one pig house together with all ancillary structures at Graigueafulla, Clonaslee, Co. Laois (Board reference No. PL 11. 245607) and the other in relation to two pig houses together with ancillary structures at Corbally, Clonaslee, Co. Laois (Board reference No. PL 11.245605). Ancillary declaratory relief is also claimed.

Preliminary Matters

2. The grounds upon which reliefs are sought are set out in Para. (e) of the statement of grounds of the 25th April 2016. There are eighteen enumerated grounds.

3. In respect of Ground 1 it is argued that the respondent erred and acted in breach of Article 6 of Council Directive 92/43/EEC of the 21st May 1992 ("Habitats Directive") in the manner in which it conducted the appropriate assessment for both planning applications. However, such alleged errors or breaches have not been amplified in ground 1. This ground is impermissibly vague (See *R.O. (an infant) v. Minister for Justice & Equality* [2015] 4 IR 200 at p. 208 and *J.U. (Bangladesh) v. Minister for Justice and Equality* [2018] IEHC 301 at Para. 12. See also, S.I. 691/2011 Regulation 3).

4. Similarly, in respect of Ground 10, it is argued that the respondent erred and acted in breach of Council Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment and/or s. 171 A of the Planning and Development Act 2000 (presumably intended to refer to s. 171 (1) of the Planning and Development Act 2000). It appears grounds Ground 10 is also impermissibly vague.

5. Of the remaining grounds within the statement of grounds seeking the relief, the following grounds appear to me to be immaterial, namely: -

(a) Ground 13 refers to Article 5 of the Habitats Directive which in turn deals with the requirement of a developer to submit alternate measures in order to avoid, reduce or possibly remedy an identified significant adverse effect of a proposed development. However, as there was no such adverse effect found to exist, Article 5 is not relevant.

(b) In Ground 14, a complaint is made that there has been a breach, by the first named notice party in its submitted application, of Article 22 (2) (g) of the Planning and Development Regulations 2001, by reason of a failure to include valid letters of consent from landowners whose lands would be subject to the land spreading of slurry. However, the impugned decisions do not involve the grant of permission for land spreading of slurry but rather the construction of certain pig units. Article 22 (2) (g) provides that where the applicant is not the legal owner of the land or structure concerned, the written consent of the owner to make the application must be forthcoming. As the relevant applications for planning permission did not involve an application for land spreading, the consent of the owners of the lands upon which the manure might be spread is not captured by Article 22 (2) (g), aforesaid, in the context of the within proceedings.

(c) In Ground 15, it is complained that the respondent erred in concluding that land spreading of slurry does not require planning permission. Assuming that planning permission is required for the land spreading of slurry, nevertheless as such land spreading was not the subject matter of the applications for planning permission this is not a proper ground to seek to condemn the decisions of the 2nd March 2016. In this regard in *Ó Gríanna & Ors. v. An Bord Pleanala* [2017] IEHC 7, McGovern J. in an application relevant to a windfarm and grid connection, was satisfied that there is no requirement in law that requires a developer to seek consent for both permissions at the one time – what is required is that the board would carry out an EIA of the proposed development taking into account the cumulative effect of that for which consent is sought.

6. During the course of rebuttal submissions on behalf of the applicant on the second day of the hearing, the applicant applied to amend his statement of grounds to include further grounds relevant to the failure of the respondent to interact with and agree an outcome with the EPA.

7. Having regard to the provisions of O. 84, r. 23, the judgment of Fennelly J. in *Andrew Keegan v. Garda Siochána Ombudsman Commission* [2012] 2 IR 570 at Para. 30 *et seq* and the fact that the EPA communicated with Laois County Council by letter of the 21st January 2016 to the effect that the agency could not issue a determination relating to the development until a planning decision has been made (without any challenge thereafter being maintained by the applicant in respect of this position adopted by the EPA) the application to amend the grounds of claim was refused.

Balance of grounds of claim

8. In Ground no. 2 it is complained that both the board and its inspector concluded that land spreading of slurry did not require planning permission and they did not consider the locations where the spreading of slurry would occur. This ground incorporates a further complaint that the Natural Impact Statement (NIS) of the first named notice party did not consider and/or evaluate the impact of land spreading of slurry arising from the proposed development.

9. Assuming that planning permission for the spread of slurry is required by individual landowners and notwithstanding that there is a statement contained within the decision of the respondent to the effect that no planning permission for such spread of slurry is required, this statement of itself was not pivotal to the conclusions of the respondent. The issue of the spreading of slurry arose in the context of an assessment of the cumulative effect of granting planning permission for the development of the pig farms. In these circumstances, I am satisfied that whether or not planning permission for the land spread of slurry was required it was not under consideration by the respondent.

10. Even assuming that the NIS did not contain details, as required by s. 177 (t) of the Planning and Development Act 2000, nevertheless it is clear from the documents which were before the respondent in advance of making its decision, in particular, the Environmental Impact Statement (EIS), compiled by the first named third party, that details of the relevant third party farmers who would purchase manure from the intended developed pig farms were identified at Appendix 1 and the location of the farmland areas of such customers was identified in Appendix 6 of that EIS. Given that the application for certiorari relates to the decision of the respondent I am satisfied that there was clear evidence before the respondent to the effect that the identity of the relevant purchasing customers and the location of their farmlands was indeed considered.

11. There was evidence before the board pursuant to the content of the EIS to the effect that should the development be afforded permission then there would be a 15% reduction in the output of manure and furthermore that the quality of the manure would be considered organic as opposed to having a high chemical content as prevails at present. In the event therefore :-

> (a) consistent with the views expressed by McDermott J. in *Sweetman v. An Bord Pleanala* [2016] IEHC 277, at Para. 88 when he stated: -
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> > *"I am satisfied that a reading of the EIS and the Inspector's report gives a complete understanding of the Board's decision and the reasons for the relevant findings concerning the effect of the development on the environment."*

and

> (b) the decision of the Supreme Court in *Connelly v. An Bord Pleanala* [2018] IESC 31 where at Para. 9.2 it was stated: -
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> > *"The reasons may be found anywhere, provided that it is sufficiently clear to a reasonable observer carrying out a reasonable enquiry that the matters contended actually formed part of the reasoning. If the search required were to be excessive then the reasons could not be said to be reasonably clear."*

I am satisfied that the respondent did consider and evaluate the impact of land spreading of slurry.

12. Under Ground 3 it is complained that the NIS did not consider totally or at all the effects of the development on the integrity of special areas of conservation ("SAC") and in particular the River Barrow and River Nore SAC.

13. Given, again, that it is the decision of the respondent that is impugned as opposed to the content of the NIS it is clear that there was before the respondent, in the form of Appendix 13 of the EIS, full consideration of the SAC's in the immediate vicinity of the proposed development and the development of the receiving lands of the slurry, ground 3 is not sufficient to secure an order of certiorari.

14. In Ground 4 it is complained that the respondent erred insofar as it concluded that land spreading of slurry was separate or extraneous to the application for the proposed development and did not consider it to be part of the project. In fact, as aforesaid, it is clear that the cumulative effect of the project including the land spread of slurry was considered in detail. Furthermore, as aforesaid, if indeed the spread of slurry requires planning permission, this was not part of the planning application which was before the respondent and to that extent can be considered to be separate or extraneous from the application which was before the respondent (See *Ó Gríanna* as quoted at Para. 5 hereof).

15. Ground 5 complains that the respondent erred in assessing that the proposed development would not adversely affect the integrity of any European site. It suggests that the respondent was not in a position to reach this conclusion on the basis of the information before it.

16. This complaint arises in the context of the land spreading of slurry as is evident from the content of Ground 5. The complaint therefore is an effective repeat of one of the sub – issues contained in Ground 2 as dealt with above. In addition, I am satisfied that the respondent body is a specialised body as identified by the Supreme Court in *Henry Denny Sons (Ireland) Ltd. v. Minister for Social Welfare* [1998] 1 IR 34 and therefore is entitled to curial deference. There is sufficient evidence before the respondent to enable the respondent to come to its conclusions without such conclusions being considered to be irrational in the legal sense.

17. In Ground 6 it is claimed that the respondent erred in including that the recipients of the slurry have an obligation to comply with S.I. 31 of 2014 and that this would provide sufficient comfort prior to the granting of planning permission. The applicant has failed to put forward any grounds to support an assertion that this was in fact an error on the part of the respondent.

18. In Ground 9 it is complained that the decision was contrary to the requirement of Article 6 of the Habitats Directive which requires

that any appropriate assessment cannot have a lacuna. The applicant relies in particular on the judgment of Finley Geoghegan J. in *Kelly v. An Bord Pleanala* [2014] IEHC 400. In that matter, the inspector came to a conclusion which the Board ultimately disagreed with, however the decision of the Board did not identify the basis for excluding or overcoming the concerns expressed by the inspector. In the instant matter, the Board adopted the inspector's report and therefore there is no difference between the two. The fact that there is a difference between Laois County Council's assessment and An Bord Pleanala's assessment does not create a lacuna as of course the reason to pursue any appeal would be the hope that the appellant body would come to a different conclusion to the first instance body. If such a different conclusion amounts to a lacuna, then no successful appeal decision could survive.

19. Ground 10 is a repeat of the complaint previously made in the grounds to the effect that the assessment before the board did not include an assessment of the indirect effect of the proposed development namely the land spreading of slurry. The issue has already been dealt with above.

20. Ground 17 again complains that land spreading of slurry was not considered because the Board concluded that planning permission was not required. This ground is a repeat of previous grounds submitted by the applicant.

21. Ground 18 is to the effect that it is stated that land spreading of slurry is a fundamental component of the project and should therefore have been assessed. As previously indicated, I am satisfied that the matter of land spreading was indeed assessed and considered by the inspector and the Board having regard to the documents which were before the respondent prior to its decision.

Additional submissions
22. During the course of the hearing of the matter before the court, the applicant laid particular stress on the fact that he alleges that full compliance with Case 50/99 *Commission v. Ireland*, had not been honoured. The applicant asserts that the CJEU ruled in that matter that the granting of planning permission separately from the granting of an IPC licence (by the EPA) did not constitute an appropriate transposition of Article 3 of the EIA Directive 85/337/EEC. The applicant further complains that the practice of the grant of planning permission separate to the grant of the IPC licence has not been corrected. However, this complaint does not arise within the confines of the statement of grounds and constitutes an entirely separate and distinct basis of challenge. The respondent asserts that an amended application was processed before Faherty J. to include such a claim in the statement of grounds. However, Faherty J. refused to allow the amendment on the basis that no explanation was forthcoming as to why the ground was not included in the initial statement of grounds. The applicant disputes that this was the nature of the amendment he sought. Nevertheless, he has not advanced to this Court any basis as to why this complaint was not made at the time of seeking leave in April 2016. The comments above, relevant to the application to amend the statement of grounds, are particularly significant in relation to this assertion on the part of the applicant. In addition in *Keegan v. Garda Ombudsman Commission* (2012) IESC 29 Fennelly J at Para. 30 *et seq* deals with amendments to statements of grounds and at Para. 36 he noted that the courts are reluctant to admit new grounds which amount to an entirely new cause of action.

23. The applicant also raised the role of the National Parks and Wildlife Services ("NPWS") and their involvement in the planning process, and complains that an effective agreement should have been available between the respondent, the NPWS and the EPA prior to the decision of the 2nd March 2016. This again is an additional ground not included in the statement of grounds and indeed the appropriate parties being the EPA and the NPWS were not afforded any prior notice of complaints to be levied against them in the context of the within hearing prior to the commencement of the hearing.

24. The applicant asserts that the decision of the respondent is inconsistent with a decision of the respondent in a third party application for planning permission in the past. However, I am of the view, having regard to: -

> (a) In that matter adequate information had not been provided to enable the board to complete an Environmental Impact Assessment whereas the inspector's report and the Board were satisfied that a proper Environmental Impact Assessment was available in the instant circumstances; and
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> (b) The issue of consistency has not been raised in the statement of grounds;

and accordingly the applicant cannot succeed in this complaint in this regard.

25. The applicant complains that currently there is no adequate control mechanism to ensure that slurry generated is disposed of in a regulated sustainable manner and that there is no data available to ascertain whether the lands available for what is accommodating pig farms is suitable. It is not clear how the applicant can levy this complaint as against An Bord Pleanala either generally or within the context of the decisions of the 2nd March 2016. Again, however, this issue is not raised in the statement of grounds.

26. The applicant has raised the provisions of derogation provided by Article 6 (4) of the Habitats Directive. However, as such a derogation was not necessary, it is impossible to understand how any argument in this regard can be considered valid.

27. The applicant states that before a valid decision to grant and refuse a development is made that it is necessary to examine the planning history and relies on the decision of Hedigan J. in *Harrington v. An Bord Pleanala & Ors.* [2010] IEHC 428. The applicant, in my view, misunderstands the judgment of Hedigan J., in that matter, when he was satisfied that the Board was entitled to have regard to the current planning status of a site; this does not amount to a direction or finding that at law it is necessary prior to granting or refusing development consent to examine the planning history.

Conclusion
28. I am not satisfied that the applicant has discharged the burden of proof required to secure an order of *certiorari* in respect of either of the decisions of the 2nd March 2016 or to secure the relevant declaratory relief sought in the statement of grounds, and in the circumstances the relief sought by the applicant is refused.