Neutral Citation Number: [2009] IEHC 76

THE HIGH COURT

2008 1175 JR

BETWEEN/

CAIRDE CHILL AN DISIRT TEORANTA

APPLICANT

AND

AN BORD PLEANÁLA

AND

IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

SHANNON EXPLOSIVES LIMITED, CLARE COUNTY COUNCIL,

AN TAISCE, TERENCE CORRY, JOHN HURLEY, NOEL CORRY, MARGARET AYRES

NOTICE PARTIES

JUDGMENT of Mr. Justice Cooke delivered on the 6th day of February, 2009

1. This application for leave to apply for judicial review arises out of an appeal (Reference No. PL03.228869), currently pending before the first named respondent ("the Board"), which has been brought by the applicant (amongst others) against a decision, (Register Reference No. 06/2401) of the second of the named notice party ("the planning authority") to grant planning permission to the first named notice party ("Shannon Explosives") for the construction of an explosives factory at Kildysart, County Clare.

2. The applicant was represented by solicitor and counsel when an oral hearing on that appeal opened before an inspector on 21st October, 2008. At the outset of that hearing, counsel on behalf of the applicant, together with the representative of An Taisce, the third named notice party which was also a party to the appeal, raised a preliminary enquiry of the inspector as to the nature and scope of the appeal hearing and, in particular, as to whether it was a *de novo* appeal against the planning authorities' decision, or a review of the substantive and procedural legality of that decision as provided for in Article 10a of Council Directive 85/337/EEC of 27th June, 1985, on the assessment of the effects of certain public and private projects on the environment. (OJ L175, 5.7.1985 p.40). ("The 1985 Directive") Article 10a is inserted in the 1985 Directive by Article 3(7) of Directive 2003/35/EC of the European Parliament and of the Council of 26th May, 2003, providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC. (OJ L156 25.6.2003 p. 17) ("The 2003 Directive")

3. Counsel for the applicant called upon the inspector to rule upon, or to have the Board determine that issue before proceeding further with the hearing. After a suspension of the hearing to enable the inspector to consult the Board, the parties were informed that the Board was unable to provide the clarification or determination sought and that it required, in effect, that the hearing proceed.

4. It is in these circumstances that the applicant seeks leave to apply for a series of reliefs, the objective of which is to procure a determination of the issue as to whether the appeal before the Board is or is not a review procedure for the purposes of Article 10a of the 1985 Directive and to stay the further processing of the appeal until that issue has been resolved.

5. Although it might be questionable whether the present proceeding comes within the scope of s. 50(2) of the Planning and Development Act 2000 ("the 2000 Act") in the absence of any specific question raised as to the validity of any particular decision or act of the Board, this application has been brought and the applicant's written legal submissions have been made, on the basis that the conditions applicable to "s. 50 leave" under s. 50A of that Act must be met.

6. The application has thus been brought against the Board as respondent and on notice to the developer and the planning authority concerned. The remaining notice parties are named as having been parties to the appeal before the Board. Ireland and the Attorney General have also been joined as respondents, although, as no relief is claimed against the State and no issue as to the validity of any Act of the Oireachtas is raised, it is not at all apparent why this was considered necessary or appropriate.

7. Apart from the requests for costs and further relief, the reliefs sought in s. (d) of the Statement of Grounds fall under eight headings, although the first four of these appear to be alternative formulations directed towards the same essential issue, namely, the entitlement of the applicant to a determination, prior to any further step in the appeal, of the issue as to whether the appeal is the review procedure for the purpose of Article 10a.

8. In addition, the applicant seeks leave to apply for a stay, or in the alternative, an injunction, on any further steps in the processing of the appeal, together with, if necessary, an order reconvening the oral hearing and an order by way of a reference for preliminary ruling under Article 234EC.

9. On the assumption that the refusal of the Board, through the inspector, to make the requested determination of this issue or that the refusal to agree not to continue with the hearing on 21st October, 2008, can be characterised as a "decision or other act done" by the Board in the performance of a function under the 2000 Act within the meaning of s. 50(2) of that Act, this Court is not entitled to grant the leave now sought unless, in accordance with s. 50A(3), it is satisfied that the applicant has established "substantial grounds" that the decision or act is invalid and it has demonstrated a "substantial interest" in the matter which is the subject of the application.

Substantial Grounds: the applicant's argument.
10. The essential ground advanced by the applicant can be summarised as follows. According to the applicant, Article 10a of the Directive creates an obligation on the Member States to ensure that members of the "public concerned" can challenge "the substantial or procedural legality" of decisions of a planning authority granting development consent, by means of a review procedure before a court of law or before another independent and impartial tribunal established by law.

11. This review procedure, it is argued, is a distinct and different procedure from that of the appeal procedure before the Board which is provided for under s. 37 of the 2000 Act. As the amending provisions of the 2003 Directive and Article 10a in particular, have not been transposed into Irish law, the applicant is entitled to rely on that provision as directly effective and thereby to assert a right of access to such a review of the planning permission which is the subject of this proceeding.

12. Furthermore, because this review procedure has not been provided for by domestic implementing measures, the applicant cannot know if the proceeding now before the Board and the hearing which has been convened are for the sole purpose of the 2000 Act or additionally constitute the review which fulfils the obligation of Article 10a.

13. The applicant argues that its position as objector and appellant is materially different depending on whether the proceeding before the Board and the inspector takes one form or the other and it is impossible for it to prepare for and participate in the hearing without having a decision on that issue. It claims that it is entitled, as it was put, to "know the rules of the game" and thus to know in advance the case it would be entitled to make at the hearing. It claims to be entitled to know if, by participating in the oral hearing, it will exhaust its right to an Article 10a review or whether, as it is expressed in para. 10 of the Statement of Grounds, "that right remains after the determination by the board whereby (sic) the applicant is still entitled to a review procedure before a court of law."

14. The applicant asserts that it would be required to make materially different arguments and to raise materially different issues in the context of a review procedure as compared with those that would arise under a *de novo* appeal under s.37 of the 2000 Act. It points out that in previous judicial review proceedings which it had commenced but later withdrawn, it had questioned the legality of the decision by Clare County Council to grant permission "having regard to the non-compliance by the developer with a further information request within the time permitted by the regulations." Alternatively, if, as had been suggested, the procedure before the Board was both an appeal and the review envisaged by Article 10a, the applicant was entitled to a determination to that effect and to an indication as to "the operation of such a procedure". (Para. 15 of the Statement of Grounds)

15. Finally, the applicant points to the fact that before the inspector, Clare County Council too had asked for clarification on this issue as it considered that its position would be different depending on the type of procedure. In the normal case of an appeal its role was merely that of an observer. In a review of the legality of its decision on the other hand, it would become, in effect, a respondent.

Substantial Grounds: finding of the Court
16. The essential ground raised by the applicant turns upon the proposition that Article 10a of the 1985 Directive creates in its favour an enforceable right of access to a form of review procedure to challenge the disputed planning decision which is distinct from that which it has initiated in its appeal under s. 37 of the 2000 Act.

17. In considering whether this proposition has any substance, it is important to bear in mind first a distinction underlined by Clarke J. in his judgment in *Sweetman v. An Bord Pleanála & Ors* [2007] I.E.H.C. 153, where he compares the circumstances of that case with those considered by Kelly J. in his judgment in *Friends of the Curragh Environment Ltd v. An Bord Pleanála*. [2006] I.E.H.C. 243.

18. Under the 2000 Act, a planning permission and thus a "development consent" decision for the purposes of the Directive, can come about by means of two distinct procedures. In the more frequent case, a private developer applies for a planning permission to the relevant planning authority and, depending on the outcome, the resulting decision may be appealed to the Board under s.37 of the 2000 Act by the developer or by a third party. The Board's determination of the appeal leads to a new decision to grant or refuse planning permission which replaces that of the planning authority. The decision of the Board is amenable to judicial review before the High Court. The case before Kelly J. fell into this category.

19. In certain cases, however, where the development is to be undertaken by a local authority, the application for permission is made at first instance to the Board itself with the result that the only recourse available against the resulting decision is judicial review before the High Court. This was the type of case considered by Clarke J. in the *Sweetman* case.

20. To the extent that Article 10a requires to be accommodated in Irish law, therefore, it will fall to be applied to both of those types of decision or development consent and different considerations may arise in the case where the only permission decision is that of the Board at first instance and the only review is that of the High Court.

21. Next, in considering the applicant's argument that it is entitled to rely upon the direct effect of Article 10a as a non-transposed provision of the 2003 Directive, it is also important to recall a number of the legislative characteristics of directives in Community law. Obviously, in accordance with Article 249EC, a directive is binding "as to the result to be achieved upon each Member State to which it is addressed "but that it leaves "to the national authorities the choice of form and methods". While the Member State is obliged to ensure that the provision is implemented so that the legislative objective of the directive is fully and effectively achieved in practice, this does not always require that the text of the Community text be transposed as such by enactment as a domestic act or regulation at national level. This not infrequently the case where the legislative purpose is to harmonise divergent regimes or processes in a particular sector in the Member States or to lay down minimum standards to be attained in a given field.

22. It is particularly the case where the objective of harmonisation is sought to be achieved in stages and where compromises may have been made to accommodate divergent views amongst the Member States as to how quickly they are able or prepared to adapt to the new procedures or the higher standards. The existing regimes of some Member States may already contain measures which surpass the agreed objective. Others may wish to move faster than the pace currently agreed and therefore to adopt domestic standards which go beyond the minimum for which there is current legislative consensus. They may be free in Community law to do so, provided the national measures thus adopted do not indirectly hinder the achievement of the legislative objective, infringe some principle of Community law or create barriers which have the effect of partitioning the market in that Member State.

23. It does not necessarily follow, therefore, from the existence of the Member State's obligation in Community law to ensure that a directive is fully and effectively implemented that the text of each individual directive must always be mechanically transposed into an appropriate piece of national legislation.

24. A number of particular aspects of the circumstances of the present case are relevant in that regard. First, the 2003 Directive is a further step in a process that began with the Directive in 1985. The 1985 Directive was adopted on the basis of Articles 100 and 235EC (now Articles 94 and 308 respectively,) at a time prior to the incorporation in the Treaty of the specific policy and competence in matters relating to the environment, now contained in Articles 174 to 176EC. Amongst its express objectives was the necessary approximation of national laws in order to eliminate disparities between the laws in force in the various Member States with regard to the assessment of the environmental effects of public and private projects. (See the second recital to the 1985 Directive.)

25. Secondly, in the amendments to the 1985 Directive that have been adopted in the intervening years, the role of members of the public in the processes of surveillance of the environmental effects of such projects has been gradually increased. As originally adopted the Directive contained no definitions of "the public" or of "the public concerned" and the involvement of the public was effectively limited to the obligation of a Member State to ensure that requests for development consent and the environmental impact assessment information supplied by the developer were made available to the public so that the public had an opportunity to "express an opinion" before the project was initiated.

26. Council Directive 97/11/EC of 3rd March, 1997, modestly strengthened the role of the public by making it mandatory that the developer apply for development consent and by requiring that the application and information supplied by the developer be made available to the public within a reasonable time to enable the opinion to be expressed before the development consent is granted. It is only in the 2003 amendments that the role of the "public concerned" as participants in the environmental decision-making procedures is given a formal and defined basis.

27. In essence, the result which Article 10a requires the Member States to ensure is that national planning procedures enable members of the "public concerned" (as now defined in Article 1(2) of the 1985 Directive,) to challenge decisions, acts or omissions which come within the scope of the directive's public participation provisions by means of a procedure for review of their "substantive or procedural legality" and to do so before either a court of law or before another independent and impartial body established by law.

28. In this regard, the third aspect of the circumstances under consideration in the present case that is clearly relevant is that long before the adoption of the 2003 Directive, this Member State already had in place a comprehensive set of procedures for the review of planning permission decisions granted by planning authorities in the form of the appeal to the Board under what is now s. 37 of the 2000 Act and the entitlement to apply for judicial review under O. 84 of the Rules of the Superior Courts.

29. Finally, it is not disputed that the 1985 Directive together with the amendments adopted at Community level prior to 2003 have been transposed and effectively implemented in Irish law. The 1985 Directive was initially transposed by the European Communities (EIA) Regulations 1989 and subsequently incorporated into primary legislation in Part X of the 2000 Act together with the Planning and Development Regulations 2001.

30. It is to be noted that in Article 1 of the 1985 Directive, the term "development consent" is defined as meaning "the decision of the competent authority or authorities which entitles the developer to proceed with the project." In the scheme of the Irish planning process this means that in a case such as the present one, as in the case considered by Kelly J. referred to above – an application made in the first instance to a planning authority and appealed to the Board – there are two points at which a possible "development consent" in that sense may arise. If no appeal is taken against the decision of the planning authority, its decision is the "development consent" which authorises the developer to proceed. If there is an appeal, however, that decision is rendered redundant and is fully superseded by the new decision of the Board on the determination of the appeal and it is that decision alone which authorises the developer to proceed.

31. In the circumstances of the present case, the court therefore considers that the issue as to whether the 2003 Directive is of direct effect such that it can be invoked by the applicant against the Board and the planning authority, is not immediately relevant. This is so because the applicant's claim of entitlement to that effect is based on the mistaken assumption that Article 10a seeks to create a procedure for challenge to the legality of a first instance decision to grant planning permission distinct from that of an appeal to the Board under s. 37 of the 2000 Act. In the judgment of the Court that is not effect or intention of the amendment.

32. It is important to note a number of particular provisions of Article 10a in that context. First, the "review procedure" to which the public concerned is to be given access is not limited to one before a "court of law". It may be provided, at the choice of the Member State, by "another independent and impartial body established by law." Secondly, the second sentence of the Article provides that "Member States shall determine at what stage the decision, acts or omissions may be challenged." Thirdly, the provisions of the Article do not "exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures, where such a requirement exists under national law".

33. It can be observed in passing that in Irish law it is undoubtedly the case that the Board is "an independent and impartial body established by law" having regard to the basis on which it is constituted and to the terms and conditions on which its members are appointed and by which they and the employees of the Board are bound under parts VI and VII of the 2000 Act. (See in that regard the observations of Lynch J. in the Supreme Court on the corresponding provisions of the earlier legislation then in force in his judgement in *Lancefort v. An Bord Pleanála* (No.2) [1999] 2 I.R. 270)

34. Thus, it is clear that in order to satisfy the objective of Article 10a in a planning regime which already provides for a two stage process comprising a first instance decision and an administrative appeal leading to the full substitution of a new decision, is that whichever decision transpires to be the "development consent" which authorises the developer to proceed to execute the development, is open to challenge as to its substantive and procedural legality before either a court or an independent body of the kind described.

35. Where, as in the present case, the objector has initiated the administrative appeal, it is the decision of the Board which will constitute the "development consent" for the purpose of the Directive and that decision, when it is made, is clearly amenable to judicial review before the High Court if the necessary grounds are shown to exist. The judicial review by the High Court is precisely the procedure envisaged by Article 10a in that the High Court has jurisdiction to quash the decision of the Board if it is shown to be vitiated by any material irregularity in the Board's procedures leading to its adoption or by any material error or failure on the Board's part in applying correctly the substantive criteria and conditions of proper planning and sustainable development governing the assessment of the proposed development.

36. Article 10a does not require the Member States to ensure access to a procedure for review of the merits of a development project for which a development consent has been granted but of the legality of the decision made on the application for that consent; both as regards the legality of the procedures of the deciding authority in reaching its decision and as regards its correct application and compliance with the substantive provisions of the laws and regulations governing the appraisal of the application for development consent.

37. It is true, as the applicant points out, that because the decision made on appeal by the Board replaces that of the planning authority, it may no longer be able, once the appeal is determined, to rely on the procedural irregularities it claims to have identified on the part of the planning authority and which it is alleged render its decision unlawful. That is not, however, in the court's judgment, something which the "review procedure" of Article 10a is intended to facilitate, whether the 2003 Directive is regarded as of direct effect or is implemented in domestic law in the future. As indicated, it is only the final authorising decision in the process which constitutes the "development consent" for this purpose and it is that decision alone which is required to be amenable to the review of substantive and procedural legality.

38. It is entirely compatible with the objective of Article 10a that the planning regime of the Member State should provide an administrative appeal procedure in advance of the stage at which the "development consent" becomes operative and it is open to a Member State to require that that appeal be exhausted before any judicial review be invoked.

39. It must also be pointed out that, in any event, as the applicant's own conduct at the earlier stage in the history of this litigation shows, (see para. 14 above), and as section 50(2)(a) of the 2000 Act (as amended in 2006) recognises, the Irish planning system and legislation do not in fact exclude judicial review of the substantive and procedural legality of the first stage decision of a planning authority.

40. The first stage decision of a planning authority to grant permission is in principle amenable to judicial review by the High Court. However, it is well settled law that, the remedy of *certiorari* being a discretionary one, where the legislature has put in place an administrative and quasi-judicial scheme which envisages only limited recourse to the courts, the remedy should only issue against the first stage decision where it is shown that the statutory appeal remedy is inadequate and unsuitable to meet the complaints of illegality raised against the initial decision. (See: *State (Abenglen Properties Ltd) v. Dublin Corporation* [1984] 1 I.R. 381: *McGoldrick v. An Bord Pleanála* [1997] 1 I.R. 497) Subject, therefore, to the discretion of the High Court to decide in the circumstances of a given case that the alternative remedy of the s. 37 appeal, is the more appropriate and suitable one, such a decision is amenable to such a review procedure.

41. It follows that the court considers that the assumption on which the present application for leave is effectively based is mistaken, namely, that Article 10a guarantees a right of access for members of the "public concerned" who have a "sufficient interest" to a judicial review procedure in respect of all first-instance decisions to grant planning permission made by a planning authority irrespective of the existence of a right to an administrative appeal and reconsideration of such decisions.

42. Accordingly, as the applicant has appealed the decision of Clare County Council to grant permission to Shannon Explosives, the "development consent" which is required to be amenable to a procedure for review of its substantive and procedural legality will be the decision of the Board on that appeal. That being so, the arguments advanced on this application for leave do not, in the court's judgement raise any arguable, reasonable or weighty ground to the effect that the pending proceeding before the Board in this case constitutes the "review procedure" envisaged by Article 10a. If that Article did require to be accommodated to the Irish planning system upon the basis that it is of direct effect – which this Court considers highly doubtful – the pending proceeding falls to be treated as a preliminary review by an administrative authority as recognised in the fourth paragraph of that provision.

43. The fact that the appeal to the Board is treated as a rehearing of the original application for permission does not preclude the applicant invoking the procedural irregularities it claims to have identified in the initial stage before the planning authority as reasons why the Board should come to a different decision. In the court's judgment, however, Article 10a does not require a Member State to ensure access to a procedure for review of the procedural legality of an initial decision on a planning application in advance or in lieu of a possible review of such a decision before an administrative authority whose own decision is then amenable to review before a court of law as regards its substantive and procedural legality.

44. Even if it were to be assumed that Article 10a falls to be treated as directly effective in this jurisdiction since 25th June, 2005, and further, that judicial review of a decision of the Board on appeal under O. 84 of the Rules of the Superior Courts does not adequately satisfy the requirements of the Article because, for example, of the constraints imposed on access to the High Court by s. 50A(3) of the 2000 Act, the only consequence in the circumstance of the present case would be that the issue raised by the applicant before the Board's inspector is premature and could only fall to be considered, if at all, on the occasion of an application to review the Board's appeal decision.

45. Thus the answer to the question raised by the applicant (see para. 14 above) as to whether by participating in the pending oral hearing it will exhaust its right to an Article 10a review procedure, is that it will not. Its right to a review procedure before a court of law remains but it will lie, as it has done heretofore, against the decision of the Board on the appeal.

46. For these reasons the court considers that no substantial ground has been raised in support of the reliefs proposed to be claimed in the statement of grounds and that no issue accordingly arises for determination as to the possible alteration of the scope, nature or purpose of the hearing still outstanding before the inspector. The application for leave will therefore be refused.