NEUTRAL CITATION NUMBER [2012] IEHC 324

THE HIGH COURT

[2011 No. 1079 J.R.]

IN THE MATTER OF SECTION 50 OF THE PLANNING AND DEVELOPMENT ACT 2000 (AS AMENDED)

BETWEEN

JOHN KEANE

APPLICANT

AND

AN BORD PLEANALA

RESPONDENT

AND

PWWP DEVELOPMENT LIMITED

NOTICE PARTY

JUDGMENT of Mr. Justice Hogan delivered on the 18th July, 2012

1. In these judicial review proceedings the applicant, Mr. John Keane, challenges a decision of An Bord Pleanála ("the Board") on 14th September 2011 granting the notice party, PWWP Development Ltd. ("PWWP"), planning permission for a windfarm development at Cloontaa, Claremorris, Co. Mayo pursuant to leave granted by this Court (Peart J.) on 8th November, 2011. Mr. Keane is a farmer who lives in the locality of the proposed development. His case in essence is that the permission is defective in that no proper environmental impact assessment ("EIA") was carried out in the manner required by the provisions of the Planning and Development Regulations 2001 ("the 2001 Regulations"). The issue arises in the following way.

2. In 2009, PWWP, applied to Mayo County Council for planning permissions to construct seven wind turbines (along with associated works). This application was further revised by additional public notices received by the planning authority on 23rd December, 2009, the most significant change being the reduction in the number of turbines from seven to four.

3. Permission was ultimately granted for this development by Mayo County Council in July, 2010 (albeit subject to 31 conditions) and by the Board in September 2011, subject to extensive conditions which I will detail presently. The turbines are, however, enormously heavy and they have to be hauled by road from either the port of Foynes or Killybegs to their final destination in rural Mayo between Claremorris and Ballyhaunis. Mr. Keane's concern, in particular, is that the local access roads and bridges in the immediate vicinity of the site will not be able to take the strain of these enormous loads and that these roads and bridges would be damaged in the process.

4. In that regard, it should be noted that the Council had specifically requested PWWP to supply a further Environmental Impact Statement and this was provided in December, 2009. A further survey was supplied in May, 2010 which, for example, listed the various local roads and bridges to be traversed along the various possible routes. While the material showed that the preliminary calculations indicated that the shear and moment capacity of the arches of the bridges should be adequate to meet the load demands which will be imposed by the turbine and crane delivery requirements, a more detailed survey in this regard was duly required. The planning authority had also requested further details in relation to possible road widening and improvement works.

5. With this in mind, condition 5 of the Board's permission required the developer to carry out a condition survey of the roads and bridges along the haul route both before and after the construction of the wind farm development:-

> "A conditioned survey of the roads and bridges along the route shall be carried out by a qualified engineer at the developer's expense both before and after construction of the wind farm development. The extent and scope of survey should be agreed in writing with the planning authority prior to the commencement of the development. Reason: to assess the impact of the development on the public road network in the area."

6. Condition 16 required Mayo County Council to carry out a road and bridge survey "on haul routes to the development before and after construction". It further provided that "any damage caused by the haulage vehicles shall be repaired immediately by Mayo County Council", with the cost borne by the developer". Condition 26 further required the developer to provide a cash deposit or bond with an insurance company or such other security as the planning authority might deem acceptable in order "to secure the satisfactory maintenance/repair of any damage caused to the existing public road network as a result of the proposed development".

7. These issues had been fully assessed by the enormously impressive and comprehensive report which was prepared by the Board's Inspector in December 2010. In this report the Inspector concluded:-

> "It is envisaged that the loads can reach the N17 via the Killybegs or Fownes without undue hindrance. Two accesses to the site are investigated (routes B & C) -either are deemed to be technically feasible. The access arrangements therefore have been subject to detailed investigation and strengthening works have been identified, particularly along the routes in close proximity to the site. It is acknowledged that a preliminary inspection is required in relation to a number of bridges along the route. Despite what is asserted in the grounds of appeal, the details of the two haul routes were given careful consideration in the revised EIS and subsequent additional information on behalf of the applicant. It is reasonable, therefore, than any clarification details in relation to this issue are dealt with by way of condition."

8. As it happens, PWWP ultimately agreed that the wind turbines would be delivered by route C, even though this involves the traversing of a level railway crossing. By letter of 10th June, 2010, Iarnród Eireann agreed to specific risk mitigation measures with

regard to this particular crossing.

9. Returning to the report, the Inspector went on to observe that the environmental impact statement which had been prepared by PWWP contained the necessary information to enable the planning authority to make a decision "in relation to the potentially significant impacts of the proposed development on the environment". The Inspector further expressly stated that he considered that the EIS satisfied the requirements as set out in the 6th Schedule of the 2001 Regulations.

10. In the direction accompanying its decision the Board clearly adopted the views of the Inspector as to the adequacy of the EIS in that his views as "to the assessment of environmental impacts carried out by the Inspector" were duly noted. In this regard, therefore, the Board duly complied with Article 111(1) of the 2001 Regulations. The real question, therefore, is whether the Board's assessment in this regard is objectively sound in law.

The 2001 Regulations

11. Article 94 of the 2001 Regulations provides that an EIS shall contain:-

> "(a) the information specified in paragraph 1 of Schedule 6,
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> (b) the information specified in paragraph 2 of Schedule 6 to the extent that –
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> > (i) such information is relevant to a given stage of the consent procedure and to the specific characteristics of the development or type of development concerned and of the environmental features likely to be affected, and
> >
> > (ii) the person or persons preparing the EIS may reasonably be required to compile such information having regard, among other things, to current knowledge and methods of assessment, and
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> (c) a summary in non-technical language of the information required under paragraphs (a) and (b)."

12. The Sixth Schedule of the 2001 Regulations provides in paragraph I that the EIS shall contain:-

> "A description of the proposed development comprising information on the site, design and size of the proposed development.
>
> > (b) A description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects.
> >
> > (c) The date required to identify and assess the main effects which the proposed development is likely to have on the environment.
> >
> > (d) An outline of the main alternatives studied by the developer and an indication of the main reasons for his or her choice, taking into account the effects on the environment."

13. It is important to recall that the 2001 Regulations transpose into domestic law the State's obligations under the former Environmental Impact Assessment Directive 1985 (Directive 85/337/EEC). (This Directive has now been replaced by its codifying successor, Directive 2011/92/EU). The scope and object of the Directive as declared in Article 1 of the 2011 Directive is to apply "to the assessment of the environmental effects of those public and private projects which are likely to have *significant* effects on the environment". (My emphasis). The entire object of the Directive is to enable planning authorities to be armed with the necessary information as will "enable them to take a decision on a specified project with a comprehensive understanding of the project's likely significant impact on the environment": see *Hereford Weight Watchers Ltd. v. Hereford Council* [2005] EWHC Admin 191, per Elias J.

14. Viewed objectively, it is difficult to see how the likely effects complained of could be regarded as having potentially significant effects on the environment. Even assuming that matters turned out for the worse, the impact is likely to be confined to damage to local bridges and access roads. While such an outturn would have to be regretted, such damage is, in principle, at least, reversible and, furthermore, the developer would be liable for these costs. The potential impact is further minimised by the fact that condition 16 requires the Council to conduct a road survey both before and after the turbines have been hauled over the road network.

15. Specifically, it is hard to imagine that the proposed development would, under any circumstances, have any lasting or potentially irreversible consequences for the environment. It is true that not all the potential impacts of this development can be anticipated and it may well be that these impacts might have been more precisely delineated if a more detailed survey of the roads and local bridges had been conducted in the manner urged by the applicant. But the Board clearly thought - and was entitled to think- that it had sufficiently anticipated the range of adverse consequences which might be presented in the present case, even if the very worst were to befall the project and, furthermore, it had sought to take appropriate ameliorative and risk mitigation measures in the process. After all, the entire purpose of both the Directive and the transposing Regulations was that this range of possible consequences was in view of the decision maker prior to the award of the planning permission.

16. In this regard, I propose to follow the approach taken by Clarke J. in *Sweetman v. An Bord Pleanála* [2008] I I.R. 277. Here the applicant maintained that the existing EIS was inadequate to address the impact of a proposed road scheme which traversed part of the Burren in Co. Clare and, specifically, part of a candidate special area of conservations ("cSAC"). This argument was rejected by Clarke J. in words which also seem apposite to the present case ([2008] 1 I.R. 277, 306):-

> "It seems to me that on a fair reading of the Inspector's report, the Inspector was satisfied that the fact that the road was to be built on an embankment and had specific remediation measures, which he mentions, for diverting water from the road development in an appropriate way, led to the conclusion that it was unlikely that there would be any significant impact on the cSAC. The fact that certain marginal doubts were expressed about this does not alter that underlying conclusion. There was more than ample material in the EIS from which the Inspector could reach that conclusion. While raising the issue in general terms Mr. Sweetman did not put forward any specific evidence or argument to An Bord Pleanála to suggest that the conclusions in the EIS were incorrect.
>
> It would, therefore, appear to be appropriate to characterise the decision of the Inspector as amounting to a decision that the risk of any adverse consequences was so small that it did not warrant refusing the application but that, for an

> abundance of caution, it was appropriate to impose a monitoring requirement so that, not only the local authority but the public generally, could be made immediately aware of any unexpected consequences. Of course at a time when any such adverse consequences occurred the road would in fact have been built and could not, in all probability, be undone. Therefore the judgment as to whether the project was to go ahead at all necessarily involved assessing the level of risk of adverse consequences. It would appear that that risk was found to be extremely small and thus not such as would justify refusing the project. In those circumstances it seems to me that the question of whether any additional measures were required on top of the monitoring was more than within the technical judgment of the Inspector and An Bord Pleanála who came to consider his report the Inspector considered any inappropriate factors, failed to consider any appropriate factors, or came to an unreasonable decision on the materials. Likewise the same applies to the Board. Even applying a more stringent test (if it be so required) of manifest error it is difficult to see how the decision could be said to show a manifest error."

17. I believe that the same can be said with regard to the present case, not least given that the Inspector's report had plainly identified the main environmental risks presented by the proposed development and the measures taken to ameliorate these risks.

18. It is not here necessary to express any concluded view as to whether the review of the exercise of the Board's discretion in a case such as this should be governed by the test enunciated in *O'Keffee v. An Bord Pleanála* [1993] 1 I.R. 39 or whether the somewhat more relaxed "manifest error test" should be applied in view of the approach taken by the Supreme Court in *SIAC Ltd. v. Mayo County Council* [2002] IESC 39, [2002] 3 I.R. 148, a public procurement case. As Clarke J. seemed to hint in *Sweetman*, the case for applying the manifest error test would seem to be a powerful one in this context, not least given that the relevant discretionary powers vested in the Board with regard to the environmental impact assessment contained in the 2001 Regulations cannot be regarded as purely autonomous, autochthonous items of secondary legislation, but rather derive their root of title from the 1985 Directive (or, for that matter, the codified 2011 version of that Directive).

19. In *SIAC* the Court of Justice seemed to doubt that where the *O'Keeffe* test could properly be applied in the case of discretionary powers deriving ultimately from EU Advocate General Jacobs had thought that this test was too extreme a test for review of administrative action, not least in the context of whether there was an effective remedy.

20. The same can probably be said - at least by analogy- in the present case. But even if the standard of review applied in European administrative law- namely, that of manifest error - were to be applied to the present case, I cannot think that it really avails the applicant. Acknowledging fully, as Fennelly J. observed in SIAC, that the description "manifest", should "not be equated with any exaggerated description of obviousness" and that a "study of the case-law will show that the Community Courts are prepared to annul decisions, at least in certain contexts, when they think an error has clearly been made", no basis has been presented on which it could be said that the Board had not properly examined the materials and the law. Nor could it be said that the Board arrived at conclusions which could not be fairly defended on their substantive merits, insofar, indeed, as such are encompassed (if at all) within the scope of the manifest error test.

21. Finally, I should say that I cannot agree that the present case is comparable with Case C-215/06 *Commission v. Ireland* [2008] E.C.R. 1-000. In that case the Court of Justice held that our system of retention permission violated the terms of the 1985 Directive in that, as the Court out it (at para. 58):-

> "A system of regularisation, such as that in force in Ireland, may have the effect of encouraging developers to forgo ascertaining whether intended projects satisfy the criteria of Article 2(1) of Directive 85/337 as amended, and consequently, not to undertake the action required for identification of the effects of those projects on the environment and for their prior assessment. The first recital of the preamble to Directive 85/337 however states that it is necessary for the competent authority to take effects on the environment into account at the earliest possible stage in all the technical planning and decision-making processes, the objective being to prevent the creation of pollution or nuisances at source rather than subsequently trying to counteract their effects."

22. In other words, the Court stressed that the object of the Directive was to oblige developers to make an advance assessment of risk via an environmental impact assessment, so that ascertainable risks would be taken into account by the planning process. That objective was set at naught by our *post hoc* system of regularisation of retention permission.

23. The present case is a very different one. As we have already noted, the range of known risks was identified in advance. Neither the Directive nor the Regulations ordain that there shall be no permission granted because there are some environmental risks, for if that were the case all construction activity would have to cease. The object is rather to identify and assess the range of risks presented by the development application, identifying where appropriate risk mitigation measures. This is what has been done in the present case, or, at least, the Board was lawfully entitled so to think based on its own assessment of the ample material before it.

Conclusions

24. It follows, therefore, that, for the reasons stated, I must dismiss this challenge to the validity of the Board's decision to grant permission in the present case.