PHILIPLEE

DUBLIN | BRUSSELS | SAN FRANCISCO

ENVIRONMENT AND PLANNING CASE UPDATE

SPRING 2015

The judicial review of development consent decisions continues apace and the Courts have issued a number of significant judgments since our last general update with a particular focus on environmental assessments. We look at a selection of these decisions

The Extension of the Special Costs Rules in Environmental Cases

The Environment Miscellaneous Provisions Act 2011 introduced special costs rules, for certain environmental litigation, which depart from the usual principle that the loser pays. Subject to limited exceptions, a party who initiates proceedings to which the Act applies does not have to pay the defendant's costs even if they are unsuccessful. A recent judgment of the new Court of Appeal in ***McCoy v Shillelagh Quarries (February 2015)*** means that these rules are more far reaching than was previously thought to be the case. Section 4(1) of the Act provides that the special costs rules apply to civil proceedings instituted by a person -

"(a) for the purpose of ensuring compliance with, or the enforcement of, a statutory requirement or condition or other requirement attached to a licence, permit, permission, lease or consent specified in subsection (4), or

(b) in respect of the contravention of, or the failure to comply with such licence, permit, permission, lease or consent,

and where the failure to ensure such compliance with, or enforcement of, such statutory requirement, condition or other requirement referred to in paragraph (a), or such contravention or failure to comply referred to in paragraph (b), has caused, is causing, or is likely to cause, damage to the environment"

The question which the Court had to consider was whether it was sufficient to bring the case within the scope of s. 4(1) that the proceedings concerned the enforcement or compliance with a statutory requirement simpliciter, or whether they had to be concerned with the enforcement or compliance with "a statutory requirement or condition or other requirement" attached to a "licence, permit, permission, lease or consent" specified in s. 4(4).

The Court of Appeal upheld the High Court's decision that the reference to "statutory requirement" in s. 4(1)(a) is a free standing one which is distinct and separate from proceedings designed to ensure the compliance with or

IN THIS ISSUE

WELCOME

Welcome to the Philip Lee Case Update. If you would like to know more about anything we have covered, or any other environment and planning matter, please do not hesitate to contact us.

Contact details for the team can be found at the end of this publication.

enforcement of a condition or other requirement of a licence, permit or other consent. This has potentially far reaching implications as the special costs rules apply to cases concerning the enforcement of statutory requirements where the failure to comply with them could lead to environmental pollution and arguably extends beyond environmental and planning legislation as traditionally understood.

Notice Requirements, Cumulative Assessments, Screening and AA

In ***Ratheniska v An Bord Pleanala (January 2015)***, the High Court dismissed a challenge to the Planning Board's approval of the Laois-Kilkenny Reinforcement Project, an electricity transmission infrastructure project. In a lengthy and useful judgment for project developers, the Court considered, amongst other things, statutory notification requirements and the assessment of cumulative impacts, screening and appropriate assessment (AA).

Firstly, the Court rejected the argument that the statutory notices published by EirGrid were invalid as they did not disclose an alleged increase in the operational voltage in the electrical line. The development was adequately described in the notices with the Court also commenting that too much detail could defeat the purpose of publication which was to notify the public of the general nature and location of the development and to direct them to locations where the full application could be reviewed. Even if there was such a discrepancy, it fell into the category described in *Monaghan UDC v. Alf-a-Bet Promotions Ltd* as being of:

> *"...so trivial, or so technical or so peripheral, or otherwise so insubstantial that...the prescribed obligation has been substantially, and therefore adequately, complied with."*

The Court also held that the EIA was sufficient and re-affirmed that the O'Keeffe standard of review continues to apply to challenges to planning decisions. As regards cumulative impacts, the potential of the project to enable the development of future wind farms was not a consideration that the Board were required to have regard to when carrying out the EIA:

> *"Cumulative assessment surely requires that the development be assessed in the light of existing and permitted development in the relevant area. It cannot involve deliberation on possible future development which may be at the concept, design or the early planning stage and which may not yet have been authorised."*

It was accepted that there may be exceptional cases in which a development which has not yet been permitted must be considered, but as a general rule this was not necessary as it "would enter the realms of speculation". The revised EIA Directive, which will come into force in May 2017, also only refers to completed and approved projects for the purposes of cumulative assessments.

The Court went on to consider issue relating to screening and AA picking up on the *Rossmore* and *Kelly* judgments in 2014(considered in our August 2014 briefing). It reaffirmed that the Board could have regard to and assume that best practice construction management techniques would be used when screening out the need for an AA in respect of a nearby SPA. As regards the AA which was carried out in relation to two other European Sites, the Court rejected the argument that the Board had failed to carry out an AA. It distinguished Kelly (where the Board had disagreed with its Inspector on potential impacts) and held that the Board was entitled to adopt and rely on the Inspector's Report. It was not necessary for the Board's decision to set out again the same examination and analysis. This would be "pointless and unnecessary". The Court was also clearly influenced by the Applicants' failure to present any scientific or indeed any evidence to the Board relating to the adequacy of the screening assessment and NIS submitted by EirGrid.

Finally, in relation to costs, after consideration of s 182B(5A) of the Planning and Development Act 2000 it was held that the Board enjoyed absolute discretion as to what costs to award, including, as in this case, granting nil costs to the Applicants in the proceedings in respect of the submissions they made to the Board. In the *Ratheniska* case the court identified certain instances where developers may seek to avoid considering the cumulative effects of a project through "artificial slicing" of the development. Similar issues were considered by the court in greater detail in another recent case:

Failure to Consider Grid Connection Fatal to Wind Farm Permission

In ***O'Grianna v An Bord Pleanala (December 2014)*** , the High Court quashed the decision of the Board granting planning permission for a 6 turbine wind farm in Cork on "project splitting" grounds. The Court held that the Board had failed to ensure that the connection to the grid was considered as part of the EIA process prior to granting permission for the turbines and ancillary infrastructure.

In the developer's EIS it was stated that it was not possible to determine the line or form of the grid connection at that stage as the design will be undertaken by ESB Networks. The Board had accepted this position, and had included in the grant of planning permission a condition stipulating that the permission should not be construed as any form of consent or agreement to a connection to the National Grid.

The Court held that grid connection is an integral part of a wind farm project and cannot be considered to be a separate project, despite the fact that it is substantially designed and within the control of a third party, ESB Networks. The Court accepted that grid connection details were not available to the developer at the time the application was made, but held that, 'in principle at least', the cumulative effects of phase 1 and 2 must be assessed before consent is given, in order to comply with the EIA Directive:

> "*it seems to me that the fact that the developer is at the mercy of ESB Networks as far as the details of the plans for* that *connection to the grid is concerned, cannot absolve the developer from compliance with the Directive in every respect*".

With regard to the difficulty faced by the developer unable to provide grid connection details at the time of the planning application, the Court stated that:

> "*it points to a* prematurity *in the seeking of permission for the construction of the wind farm ahead of the detailed proposals for its connection to the national grid from ESB Networks*".

This judgment indicates that a developer must either wait until sufficient details of grid connection are known and can be incorporated in the EIA for the whole project, or must include in the EIA details of every potential grid connection option, and subject each alternative to an EIA, including a consideration of cumulative impacts. This judgment is going to cause various developers in the energy sector, and possibly others, considerable difficulty.

A supplemental judgement is awaited on whether the planning application can be remitted to the Board for further consideration or a new application must be submitted.

Personal Nature of Waste Licences

A recent judgment has been handed down which waste licence holders and others who may be operating licensed facilities should be cognisant of. In ***Environmental Protection Agency v Midland Scrap Metal Company (January 2015)*** the High Court confirmed that a waste licence is personal to the licence holder of the licence, so that only the licensee can carry out the activities identified in the licence.

In this case Greenstar had originally carried out waste activities at a facility in Tallaght under a waste licence granted to them. They ceased these activities, without ever formally surrendering the licence, and a few years later Midland Scrap Metal occupied the facility and commenced waste activities on the premises. The EPA subsequently prosecuted Greenstar for breaches of conditions of the licence and MSM for operating without one.

The High Court upheld the finding of the District Court that MSM were guilty of carrying out waste activities without a waste licence and rejected MSM's argument that it was entitled to rely on Greenstar's licence. After examining the relevant provisions of the Waste Management Act, the Court concluded that "a decision to grant a licence depends on a range of circumstances which are entirely personal to the applicant." The intention of the legislation was to ensure that only persons or entities vetted in advance by the regulator could carry out certain waste treatment activities, and holding otherwise "would comprehensibly undermine the purpose of the licensing regime".

Standards for Screening and AA

In ***Rossmore Properties v An Bord Pleanala (November 2014)*** Justice Hedigan refused the Applicants leave to appeal an earlier judgment to the Supreme Court, and confirmed a number of issues relating to the screening and AA process under Habitats legislation.

The Applicants sought leave on the basis that the Court's judgment was at variance with the High Court decision in *Kelly v An Bord Pleanala*, where the Court held that the well-established case-law relating to the extent of reasons required in planning cases did not apply to determinations in respect of AA where the discretion afforded to the Board is significantly narrower than the discretion afforded the Board in respect of "planning decisions". The Court, however, distinguished the *Kelly* case in so far as it related to a stage two AA, in contrast to the stage one screening assessment which was at issue here. The Court held that screening decisions required much less elaborate reasoning than what was required for a stage two AA and *Kelly* did not apply.

The Applicants also sought leave to appeal the question of what criteria the Board must apply at screening stage and in particular whether an AA is needed where there is a "possibility" of significant effects. The Court refused leave to appeal this question as the law in this area was well established following Waddenzee holding that the criteria is "likelihood or probability, not possibility" of significant effects.

ABOUT US

Philip Lee is a leading business law firm with offices in Dublin, Brussels and San Francisco. Our approach to our clients is clear. Their goals are our goals. Working in partnership, we aim to deliver first class legal services and advice to support our clients in achieving their aims. Alice Whittaker and Rachel Minch lead the Environment and Climate group. They have a unique combination of expertise in this area, acting for both project developers and regulatory authorities. Rachel is an experienced litigator with an emphasis in judicial review. Alice advises on energy, environment and infrastructure projects.

If you require advice or would like further information please contact Rachel or Alice

Rachel Minch
PARTNER

rminch@philiplee.ie

@Rachel_Minch

Alice Whittaker
PARTNER

awhittaker@philiplee.ie

@WhittakerAlice