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Environment and Planning Summer Case Update 2015

People Over Wind, Environmental Action Alliance Ireland -v- An Bord Pleanála & ors

A dispute over a proposed windfarm in Co. Laois has dominated the planning judicial review sphere in recent months, with 3 separate judgments issued by the High Court over the course of 7 weeks.

At the core of the issue was the decision of An Bord Pleanála ("ABP") in 2014 to grant permission for an 18 turbine wind farm, overturning the decision of Laois County Council to refuse permission.

Two environmental NGO's failed to have ABP's decision overturned in the Commercial Court.

However, following a judgment on 20 June 2015, the matter is set to be further reviewed by the Court of Appeal, with the High Court certifying that People Over Wind had raised issues of exceptional public importance which were material to the original decision to uphold ABP's grant of permission and which were in the public interest to have determined on appeal.

While a hearing by the Court of Appeal is not likely until towards the end of the year, the judgments delivered so far merit close scrutiny as they consider fundamental aspects of the Appropriate Assessment ("AA") process in particular.

IN THIS UPDATE

READ ABOUT THE ONGOING JUDICIAL REVIEW EPIC – PEOPLE OVER WIND V AN BORD PLEANÁLA

IN BRIEF GIVES YOU AN UPDATE ON TWO MORE IMPORTANT PLANNING CASES

WELCOME

Welcome to this Environment and Planning summer case update from Philip Lee. Please get in touch if you would like to know more about what we have covered.

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

Judgments available on courts.ie

1.The original decision on Judicial Review

On 1 May 2015 Haughton J delivered a lengthy and comprehensive judgment considering numerous grounds of challenge against ABP's grant of permission.

As a preliminary matter, he determined that the Applicants were precluded from raising an argument in relation to an alleged failure by ABP to fully consider the grid connection. This argument only emerged as a result of the *O'Grianna* decision. Haughton J was satisfied that the Applicants had not raised this ground implicitly in their grounds of challenge, had not in fact received leave on this ground and accordingly were not entitled to raise a new argument at a later stage.

The first ground properly raised related to the **adequacy of the EIS**, with the Applicants asserting that it was deficient in parts and failed to properly describe the proposed development and its effects, a defect which was not remedied by ABP. This argument was rejected, with the Court highlighting the discretion of ABP as to the adequacy of the information, and the ability of its own expertise and knowledge to fill any deficit in the documents submitted. The Court applied the well-established standard of review set out in *O'Keeffe v ABP* in relation to the adequacy of EIS – that it would be necessary for the Applicants to establish that the Board "*had before it no relevant material which would support its decision*". That was not the case here.

People Over Wind further contended that **the EIA** conducted was inadequate in a number of respects. However, after examining the EIA with regard to visual impact, noise impact, shadow flicker and haul routes, the Court was satisfied that ABP had ample evidence to make its determinations on these matters and gave full and proper reasons for departing from its Inspector's views and recommendations on these issues.

Haughton J then went on to consider the **adequacy of the AA**, and concluded that ABP had carried out a proper AA of the proposed development, which "*engaged with all observations and included sufficient findings, examinations and analysis.*"

He deemed that ABP was entitled to approve the development, once satisfied that it would not adversely affect the integrity of the European Site in question (the River Barrow and Nore SAC), and that ABP was not required to be satisfied that the development would have a positive or restorative effect on the Nore Freshwater Pearl Mussels' habitat in line with a NPWS objective.

The Court was also satisfied that the **mitigation measures** would protect the integrity of the SAC, and that ABP was entitled to leave the technical details of same over to agreement between the planning authority and the developer.

In addition, the Court held that ABP had carried out the AA in light of the **best scientific knowledge available**. The Applicants sought to adduce new evidence from an environmental scientist, Dr Moorkens, in respect of the Nore Freshwater Pearl Mussel. However Haughton J determined that the Court was compelled to disregard such evidence insofar as it contained new evidence that was not before the Board.

After dismissing a number of ancillary grounds, the judicial review application was refused. The case was then adjourned to allow the parties consider the judgment.

2.Decision not open for reconsideration

Following the dismissal of the Applicants' challenge, People over Wind took a further action, predicated on the fact that the Department of Arts, Heritage and the Gaeltacht, and in particular The National Parks and Wildlife Service, had not been served with notice of the original appeal to ABP. This was contrary to Article 69 of the Planning and Development Act ("PDA") Regulations, which requires a planning authority to notify a person who has made a submission on a planning application of an appeal of the decision on that application.

The Applicant asked the Court to reconsider its judgment in light of this non-notification, or in the alternative, to grant an Order allowing People over Wind to amend its grounds of review to include the failure of the planning authority and/or ABP to notify the Department of the appeal to ABP. The Applicant was unsuccessful on both grounds.

In relation to the first relief sought, Haughton J. was not satisfied that the Applicant had satisfied the high threshold required to re-open a decision of the Court.

- *Firstly,* the Department had been made a Notice Party at the commencement of the proceedings, and even when it became aware of the non-notification of the appeal to ABP, it still took a conscious decision not to participate.

  This was in stark contrast to the case of *Abbeydrive Developments v Kildare Co Co*, which the Applicant had relied on, where An Taisce applied to the Supreme Court to be represented after it became aware that an application for permission had not in fact been withdrawn as it had been informed.

- *Secondly,* Haughton J was not convinced that his decision would have been different if the argument had been raised in the JR proceedings. While he acknowledged that he had drawn attention to the fact that the Department had not made a submission, this was said to be merely mentioned in neutral manner and it did not form part of the reasons for his decision.

- *Thirdly,* Haughton J found a degree of acquiescence on the part of the Applicant in not discovering the failure to notify at an earlier stage, particularly given that they had inspected the planning file and should have been able to deduce from the file (or from a subsequent FOI request if necessary) that the required notification had not been made.

- *Finally,* it was deemed that the issue was not of sufficient importance to grant the Applicant's request. In contrast to *Abbeydrive*, where An Taisce raised an issue that went to the heart of the decision to grant permission, it could not have been said here that the failure to notify would clearly have affected the outcome.

Haughton J also refused the Applicant's request to allow it amend its statement of grounds, highlighting once again that the non-notification should have been discovered at an earlier stage, and thus the requirements of s50(8)(a) PDA were not satisfied as the circumstances which gave rise to the delay were not outside of the Applicant's control.

3.Leave to appeal granted

On 19 June 2015, Haughton J granted People over Wind leave to appeal his decision dismissing the judicial review. The judge was satisfied that the environmental group had raised a number of points of exceptional public importance with regard to the conduct of AA which required clarification.

The issues raised relate broadly to three aspects of AA, namely

(i) the relevance of conservation and restoration objectives for a species and its habitat
(ii) the best scientific evidence
(iii) the treatment of mitigation measures.

The first substantive issue was whether Article 6(3) of the Habitats Directive imposed an obligation on ABP, in conducting an AA, not only to ensure that the proposed development would not have an adverse effect on the integrity of a European Site and a protected habitat or species (here the Nore Freshwater Pearl Mussel), but also to go further and show that the development would not adversely affect the objective of restoration of a protected habitat or species from unfavourable to favourable conservation status.

This was considered by Haughton J to be a novel point which had not been previously addressed.

The Court then turned to consider the extent of the requirement of a competent authority to consider the "best available scientific evidence" when conducting an AA. The issue arose out of the new evidence averred to by Dr Moorkens in an affidavit sworn following ABP's decision.

Haughton J was satisfied that two related issues arose in this context:

- the extent to which ABP has a duty to ascertain whether it has possession of the best available scientific evidence and
- whether the court can consider additional scientific evidence or whether it was constrained to consider only the matters considered by ABP on appeal

These were issues which were material to the Court's original decision, and ones which were deemed desirable in the public interest to be determined by way of an appeal.

Finally Haughton J considered whether it was permissible under the Habitats Directive to leave the mitigation measures to be employed to be dealt with as post consent conditions.

His judgment had determined that ABP was entitled to leave the details of mitigation measures to subsequent agreement between the developer and the planning authority.

However, he also considered that there was some uncertainty in the law in this respect given that his judgment was based on principles established in planning cases, which did not concern AA or the Habitats Directive. Thus he was satisfied that there was a legitimate question as to what extent it was lawful for the details of mitigation measures to be left to post consent agreement in AA cases.

The decision of the Court of Appeal on this matter (and query also the European Court on a reference) will be keenly anticipated given the wider ramifications of any determination on these issues.

Given the importance of the issues certified for appeal, the full text of the questions referred is set out below.

1. RESTORATION

Do Part XAB of the Planning and Development Act, 2000 (as amended) and/or Article 6(3) of the Habitats Directive impose an obligation on An Bord Pleanála in conducting an appropriate assessment to ensure that the proposed development would not adversely affect a National Parks and Wildlife Service objective of *restoration*, from unfavourable to favourable conservation status, of a protected habitat and species in a candidate Special Area of Conservation situated outside the proposed development site?

2. BEST SCIENTIFIC EVIDENCE

(A) What obligation, if any, is on An Bord Pleanála, to seek or procure the best scientific evidence in carrying out an appropriate assessment?

(B) In light of the scientific evidence that was before An Bord Pleanála with regard to the Nore Freshwater Pearl Mussel, in carrying out its appropriate assessment was An Bord Pleanála entitled to regard this as the best scientific evidence for the purposes of deciding the appeal?

(C) In reviewing the decision of An Bord Pleanála in respect of appropriate assessment was the Court constrained only to consider matters that were before An Bord Pleanála or was it entitled or obliged to have regard to the new or additional evidence in the affidavit of Dr. Evelyn Moorkens sworn on 23rd January, 2015 with regard to the Nore Freshwater Pearl Mussel?

(D) If so, does this evidence demonstrate a lacuna in the best scientific evidence put before An Bord Pleanála such that its decision should be quashed or remitted for further consideration?

3. MITIGATION MEASURES

Where a proposed development is likely to adversely affect the integrity of a European Site but such affect may be avoided by mitigation measures to what extent, if at all, is it lawful for the detail of such measures to be left over by An Bord Pleanála for post consent agreement between the developer and named authorities?

IN BRIEF

The pre-application consultation procedures for strategic infrastructure applications were upheld in **Callaghan v An Bord Pleanála** (High Court 11 June 2015). The High Court dismissed the Applicant's arguments that the absence of public participation in this process breached his rights to fair procedures or the public participation requirements of the EIA Directive. In its findings, the Court concluded that the pre-application process which determined whether or not development was SID did not form part of the EIA process. (A decision on an application for leave to appeal is awaited.)

In **Dunnes Stores v An Bord Pleanála and South Dublin County Council** (High Court 18 June 2015), the High Court refused leave to appeal its decision that s.37(1)(b) of the Planning and Development Act precluded a judicial review challenge of a decision of a planning authority after the Board has made its decision. The Board's decision replaced that of the planning authority and the Court had accordingly refused to grant the Applicant leave to seek a judicial review of the planning authority's decision in addition to that of the Board

GET IN TOUCH

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