IRELAND

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Major Developments in 2009

EIA

Supreme Court defers order until EIA question resolved

Abbeydrive Developments Limited v Kildare County Council [2010] I.E.S.C. 8

Section 34 of the Planning and Development Act 2000 provides that a person who applies for planning permission will be entitled to the permission if the planning authority does not make its decision within a given time frame. Permissions granted under section 34 are known as default permissions. The ECJ in Commission v Ireland unsurprisingly held that default or tacit permissions were in general incompatible with the EIA Directive which envisages *prior* assessment of the projects for which EIA were required. This would generally be impossible in the case of default permissions. In *Abbeydrive*, the planning authority had not given the requested planning permission in time so the developer sought default permission. He was successful in his action in both the High Court and the Supreme Court **[2009] I.E.S.C. 56,**which both held, somewhat reluctantly, that he was entitled to a default permission. Some months later and before the Supreme Court had perfected its order, An Taisce, an environmental NGO, applied to the Supreme Court claiming that it had been wrongfully excluded from participating in the decision making procedure on the project, that as an NGO it should have standing to challenge the legality of the decision and that section 34 was incompatible with EC law, and specifically the EIA Directive, because projects which were subject to EIA would not be subjected to a prior assessment of their environmental impacts. The Supreme Court ruled that "in the exceptional and unusual circumstances" of the case, it would defer making a final order until the sole issue of the compatibility of the section 34 default permission with the EIA Directive was resolved by the High Court and that An Taisce should have standing before the court. This decision goes very far in ensuring respect for EU law.

Access to Justice

Case C-427/07 *Commission v Ireland*

The complaint in this case was that Ireland had not properly transposed some of the access to justice obligations set down in Article 10a of Directive 85/337/EC on environmental impact assessment (EIA). This requires member States to provide

access to justice in environmental matters and spells out what this implies. There have been numerous instances where the Irish courts adjudicated on access to environmental justice issues and concluded, disingenuously in some cases, that Irish law (more specifically section 50 and 50A of the Planning and Development Act which is a template for many other such clauses in environmental legislation) complied with article 10A. So, for example, the High Court in *Friends of the Curragh*[1] and in *Kavanagh v Ireland.*[2] interpreted the "costs" in Aarhus which may not be prohibitively expensive to mean mere court costs, not the full costs of litigation. And in *Sweetman v. An Bord Pleanàla and Ors [2007 I.E.H.C. 153* it concluded that the requirement that persons challenging planning decisions must have a "substantial" interest in the matter can be recalibrated to read "sufficient" interest if this is necessary to comply with EC obligations. Ireland's compliance with Article 10a was questioned in *Commission v Ireland*. The ECJ held that 'substantial interest' requirement in section 50 and 50A of the Planning and Development Acts 2000 to 2006 (PDA) and the narrow scope of judicial review under Irish administrative (O'Keeffe v An Bord Pleanala [1993] 1 I.R. 39) are sufficient to provide for the review of the 'substantive' legality of contested decisions as required by Article 10a [1].[3] It also considered that Ireland had adequately transposed the Article 10a [5] 'timeliness' requirement for speedy decisions because sections 50A (10) and (11) of the Planning Act require the courts to determine a judicial review 'as expeditiously as possible consistent with the administration of justice". But it held that the Article 10a[5] requirement that the costs of the review procedure should not be 'prohibitively expensive' were not met by the Irish courts' discretion to award costs to meritorious public interest litigants because a mere discretionary practice cannot be regarded as valid implementation of an EC obligation. The Article 10a requirement against prohibitively expensive costs should have been prohibited by legislation. However, the ECJ was itself unclear as to what the expression costs includes and x in xx DULJ at considers that it is not certain that the ECJ ruling extends to an applicant's own

[1] [2006] IEHC 243
[2] [2007] IEHC 389
[3] In *Sweetman v. An Bord Pleanála* [2008] 1 I.R. 277, Clarke J. held that the procedures for reviewing administrative decisions in Irish Law were capable of meeting the standards required by the Directive. So also did *Usk and District Residents Association v. An Bord Pleanála* [2009] I.E.H.C. 346, (Unreported, High Court, MacMenamin J., 8th July, 2009; *Cairde Chill an Disirt Teoranta v. An Bord Pleanála* [2009] I.E.H.C. 76 and

legal costs although she notes that the Kokott's view was that Article 10a[5] that costs should mean all the legal costs. This latter view was endorsed by the UK Court of Appeal in *Morgan and Baker v. Hinton Organics* [2009] EWCA Civ 107

Finally the ECJ held that Ireland had failed to make available to the public practical information on access to administrative and judicial review procedures as required by Article 10a[6] because 'the mere availability' of general information on the rules governing access to judicial review and the possibility of access to case law on the internet cannot be regarded as 'sufficiently clear and precise' to ensure that 'the public concerned is in a position to be aware of its rights on access to justice in environmental matters'

This case illustrates once again a systemic failure by competent authorities in Ireland to transpose environmental directives properly. While Ireland did not lose on the Article 10a [1] issue in that a "substantial" interest requirement was deemed equivalent to a "sufficient" interest because the ECJ did examine the *quality* of transposition it is surely incompatible with the requirement for legal certainty reiterated by the court itself in *para* 55 that ordinary people are expected to know that "substantial "as interpreted by the Supreme Court in *Harding v Cork County Council* has a different meaning if a case involves EIA or an IPPC licence. Nonetheless, the case may have some influence in reducing the enormous costs of environmental litigation and in motivating the courts to be more efficient in the manner in which they are conducted.

Extent of requirements of Article 10a

Cairde Chill Disirt Teoranta v. An Bord Pleanàla, Ireland and the Attorney General and Ors –6 February, 2009.

Held

(i) **Article 10a** Article 10a does not require a Member State to ensure access to a procedure for a review of the merits of the development project for which a development consent had been granted but of the legality of the decision only.

(ii) (ii) *"In essence, the result which Article 10a requires the Member States to ensure is that national planning procedures enabled 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 Directives public participation provisions by means of a procedure for review of their 'substantial or procedural legality' and to do so before either a court of law or another independent and impartial body established by law."

(iii) *Article 10a does not require that a person concerned can challenge the substantivie and procedural merits of a decision in the High Court where the Irish planning system provides for an initial appeal against a local planning authority's decisions to the Planning Appeals Board*

Inadequate EIA carried out

Usk and District Residents Association Ltd. v. An Bord Pleanála [2009] I.E.H.C. 346 where the High Court ruled that An Bord Pleanála had erred in failing to assess the environmental impacts of the construction of a landfill liner for cells where waste was to be deposited. The Board took the view that this was a matter of pollution control which should be dealt with by the EPA. The court held that this was wrong.

SEA

SEA required for changes in zoning which could affect a European site

In Farrell v. Limerick County Council,[4] the elected members of a planning authority ignored the advices of their professional advisers and county manager against the rezoning and directed the county manager to do so. The county manager refused, inter alia because he considered that they had not complied with their obligations under the Strategic Environmental Assessment Directive to subject the proposed rezoning to SEA, had not subjected the proposed changes to public consultation and had not given proper reasons for the decision to rezone in their resolution and had not ensured respect for Article 6(3) of the Habitats Directive by ensuring that the plan was subjected to an appropriate assessment. The court held that the resolution was invalid. The onus thus lay on the elected members to explain the rationale for their resolution, and the High Court ruled that the reasons for making the proposed changes must be stated in the resolution itself. On the facts, the elected members had failed to do this.

Local authorities may not create waste monopolies

Neurendale Ltd t/a Panda Waste Services -v- Dublin City Council & Ors [2009] IEHC 588.

Panda was a waste management, collection, recovery and disposal company. It collected waste under permits in the four Dublin local authority areas. The four local authorities made a joint waste management plan for the Dublin region. A variation of the plan provided that all waste collected in the from single dwelling households (other than those in purpose built apartment blocks) would be carried

[4] [2009] I.E.H.C. 274.

out by the local authorities or that the local authorities will make arrangements by way of a public tendering process for the collection of such household waste (which may be on a geographical or area basis. The reason for this was to ensure that waste collected would be diverted from landfill and sent to an incinerator which the local authorities were jointly developing with another company. The effect of the variation would be to create a monopoly in waste collection for the local authorities. Panda challenged the legality of the variation. The court held, inter alia:

(i) that the local authorities are undertakings for the purposes of the Competition Act 2002 who are dominant in each of their respective areas and collectively dominant in the greater Dublin area in the market for the collection of household waste;

(ii) The Variation was an agreement between undertakings or concerted practice within the meaning of s. 4 CA 2002 for which there was no objective justification or particular efficiencies

(iii)The variation was an agreement or concerted practice which would substantially influence the structure of the market to the detriment of competition, or would significantly strengthen the position of the local authorities on thee market.

(iv)The Variation is *ultra vires* the powers granted under the Waste Management Act 1996 since it clearly goes beyond what could have been contemplated by the Oireachtas in seeking to re-monopolise the market for household waste collection;

(v) The Variation would not have an appreciable effect on *inter* State trade, thus Articles 10, 81, 82, 86 of the EC Treaty are not applicable; if however it did, the above findings with regard to ss. 4 and 5 would equally apply, where so capable of application; .

<u>Access to correspondence between the EU Commission and Ireland re infringements of EC law not allowed</u>

Peter Sweetman v. An Bord Pleanàla, Ireland and the Attorney General and the Minister for the Environment, Heritage and Local Government - Judgment delivered by Mr. Justice Kelly delivered on the 3rd day of April 2009.

Held: the court would not order discovery of correspondence between the EU Commission and Ireland relating to the transposition of Directive 2003/35/EC. Such documentation was privileged. The court held that access to the documents was neither relevant nor necessary. In addition, *Worldwide Fund for Nature v. Commissioner of the European Community C-105/95* supported the view that such

documentation was clearly confidential under the heading of protection of public interest, even where a period of time has lapsed since the closure of the investigation."

Habitats

AN BORD Pleanála partially approved the €137 million Galway city bypass development (with the exception of a connection between Gortatleva and An Baile Nua for habitats reasons) which it considered would be an appropriate solution to the identified traffic needs of Galway city and surrounding area after finding the impact of the project on Lough Corrib candidate Special Area of Conservation (cSAC) site while it would have a severe adverse localised impact, the integrity of the site would not be affected. The section approved by the Board would pass through the Lough Corrib candidate SAC designated for the limestone pavement a priority habitat under the Directive. The site as originally proposed amounted to c. 185 hectares and an extended area proposed for inclusion amounted to c. 85 hectares. It was generally agreed that the proposal would result in the removal and loss of c. 1.5 hectares of limestone pavement from the extended area of the site. The Court observed that there was in fact no significant scientific disagreement as to the impact of the proposal on the site. The issue rather was how an impact that everyone agreed would occur should be labelled or categorised.This decision has been referred to the ECJ for a preliminary ruling. .

Hands Accross the Corrib Ltd -v- An Bord Pleanála [2009] IEHC 600

The High Court while accepting that the views of an expert State body was entitled to the greatest respect rejected the argument that that the Planning Appeals Board was obliged to accept the view of the National Parks and Wilflife Service (which is responsible for biodiversity in Ireland) that a project would adversely affect the integrity of the site. To reject the views of an organisation of that stature was, the NGO argued, to ignore the obligation to apply the precautionary principle as well as the obligation to permit projects to proceed only where no significant scientific doubt remained in relation to them. Noting that all the experts agreed that there would be an adverse impact on the site but disagreed that this would affect its integrity, the court ruled that it would not second guess the decision of the Board . A similar decision was

made in Sweetman -v- An Bord Pleanála & Ors [2010] IEHC 53 where the High Court deferred to the expertise of the Board in assessing scientific risk.