Oifig an Rialaitheora Pleanála
Office of the Planning Regulator

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Legal Digest

Learning from Litigation

Issue 06: December 2024

Legal Cases:

Carrownagowan Concern Group and Ors v An Bord Pleanála and Ors [2024] IECA 234

Harte Peat Limited v the Environmental Protection Agency, Ireland and the Attorney General [2024] IECA 202

John Conway v An Bord Pleanála and Ors [2024] IESC 34

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Prepared by Fieldfisher for the Office of the Planning Regulator

Oifig an Rialaitheora Pleanála
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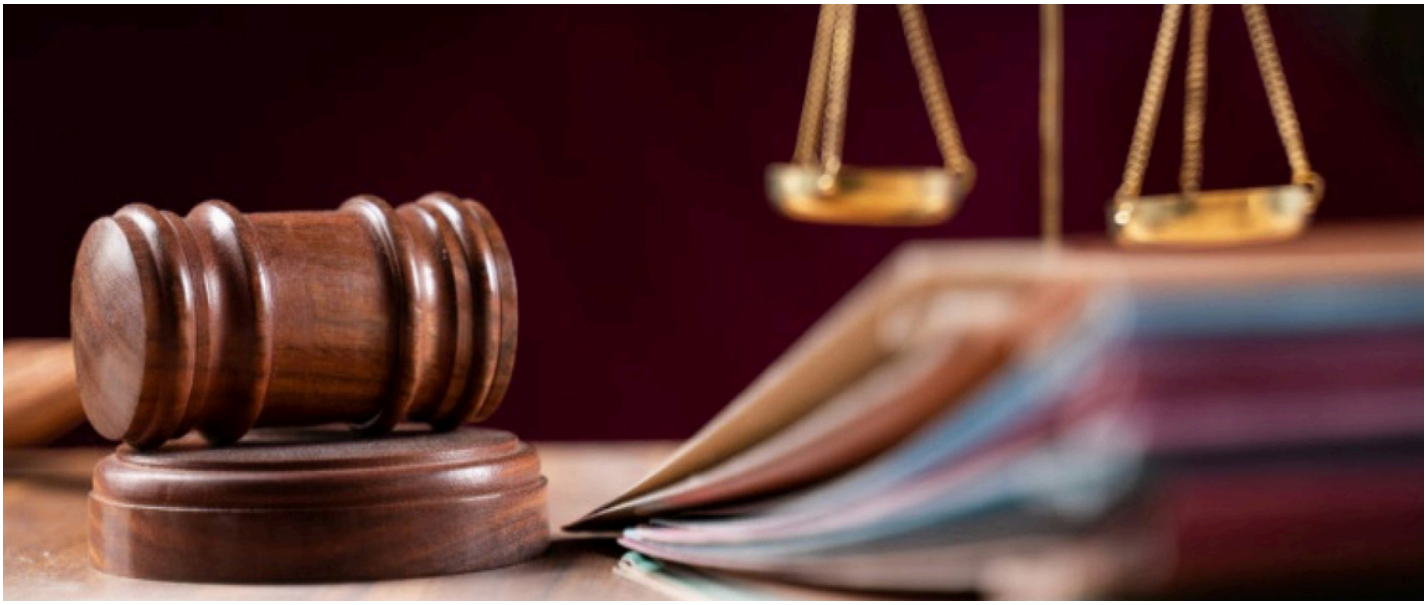
Introduction

The Office of the Planning Regulator (OPR) is pleased to present the sixth edition of the '*Learning from Litigation*' bulletin. This bulletin has been prepared to highlight and disseminate key learnings from the continually evolving planning and environmental case law. It provides information on important precedents, court decisions and emerging trends with an overview of noteworthy planning cases.

The case selection for this edition of the bulletin was made following recommendations received from the Planning Law Bulletin Steering Group. This Group consists of nominees from the Law Society of Ireland's Environmental and Planning Law Committee, An Bord Pleanála, the OPR legal services provider Fieldfisher LLP, the County and City Management Association and the OPR.

The OPR intends that the bulletin will be published on a quarterly basis.

Disclaimer: This document is for general guidance only. It cannot be relied upon as containing, or as a substitute for legal advice. Legal or other professional advice on specific issues may be required in any particular case and should always be sought before acting on any of the issues identified.



Case: Carrownagowan Concern Group, Ute Rumberger and Nicola Henley (the Appellants) **v An Bord Pleanála, Coillte Cuideachta Ghníomhaíochta Ainmnithe, the Minister for Housing, Local Government and Heritage, the Minister for Agriculture, Food and the Marine, Ireland and the Attorney General and Clare County Council; and FuturEnergy Carrownagowan DAC** (Notice Party/Respondent)
Date: 25 September 2024
Citation: [2024] IECA 234
Judge: Costello J.

Background

The appeal concerned the challenge by the Appellants to the grant of permission by An Bord Pleanála (the Board) for a windfarm and associated works located on the Slieve Bernagh mountain (the Windfarm) in Co. Clare. Although Coillte was the applicant for planning permission, all development rights in respect of the proposed Windfarm, which are held as part of an exclusive option for lease agreement, were transferred to FuturEnergy Carrownagowan DAC (FEC).

In November 2020 Coillte lodged a strategic infrastructure application for the Windfarm with the Board. A submission was made to the Board in respect of the application by the Development Applications Unit (DAU) of the Department of Tourism, Culture, Arts, Gaeltacht, Sport and Media. The submission raised issues about the impact of the proposed Windfarm on the Hen Harrier and called for an analysis of proposed forestry planting and tree felling licence applications as part of the cumulative impact assessment.

The Board sought and received this information from Coillte along with a Hen Harrier management plan. The Board's Inspector found any loss of forestry habitat associated with the proposed Windfarm would not be significantly above that which already occurs as a result of forestry operations at the proposed site of the Windfarm. The Board decided to grant planning permission for the Windfarm (the Decision) in September 2022.

The Appellants initiated judicial review proceedings in November 2022. These proceedings sought to quash the Decision and they also sought to challenge all forestry consents granted between 1 June 1988 and the present in the relevant area (the Historic Forestry Consents) for an alleged failure to comply with the Habitats Directive, the Environmental Impact Assessment (EIA) Directive and/or the Birds Directive.

The Appellants contended that if any of the Historic Forestry Consents were invalid, the Decision was also invalid as the Decision is cumulative with the Historic Forestry Consents which were not subject to any or were subject to inadequate EIAs or Appropriate Assessments (AAs).

Coillte and FEC successfully sought to have this element of these proceedings dismissed as any claim in respect of the validity of the Historic Forestry Consents was made out of time.

Six grounds of appeal were brought to the Court of Appeal and the Court was requested to make a reference to the Court of Justice of the European Union (CJEU). Two of these grounds (Core Grounds 4 and 6) were not pursued at hearing. The four grounds that were pursued at hearing are set out hereunder:

1. Whether an issue of EU environmental law could be raised before the High Court when it had not been raised in submissions to the Board (Core Ground 1)
The Appellants argued that the High Court had acted erroneously when it had determined that the Appellants could not raise a failure to comply with the requirements of EU law because this alleged failure was not mentioned in their submissions to the Board.

The Appellants contended that an objector should not be expected to go to the expense of employing experts to carry out environmental assessments and an objector is entitled to rely on decision-makers such as the Board to *"deploy all necessary expertise"* and identify any omissions or defects in the application. Should the decision-maker fail to identify these, the Appellants contended that they were entitled to raise the point for the first time in judicial review proceedings.

The new issue raised by the Appellants was the allegation that the Board had not carried out a cumulative/in-combination assessment of the Windfarm and the Historic Forestry Consents. The Appellants alleged that environmental assessments had not been carried out for the Historic Forestry Consents under the EIA Directive, the Habitats Directive and the Birds Directive. The Appellants also maintained that the Board was obliged to verify that the Historic Forestry Consents complied with the requirements of EU law in this regard, in particular by requesting Coillte to provide all assessments conducted in respect of forestry activities since the time such assessments became mandatory.

The Court of Appeal agreed with the High Court in rejecting this argument, finding that it was *"factually unsustainable"* as the Appellants were all local residents and forestry had been carried out in that area since the 1980s, yet no information was sought by them in respect of any forestry activity until March 2023. While it was acknowledged that the Appellants did not have all of the information that they sought, they had at all times sufficient information from which *"highly focused questions could be asked"*.

Furthermore, the Court of Appeal observed that the Appellants were aware of the proposed development from March 2018, when Coillte commenced public consultation with local residents in relation to the proposed Windfarm. In addition, the Appellants had lodged objections to the planning application that was submitted by Coillte to the Board in November 2020. The Court of Appeal also noted that the submission of the DAU and further information submitted to the Board by Coillte made reference to the impacts of forestry on the environment yet submissions made by the Appellants did not comment on the forestry activities or call on the Board to identify whether the Historic Forestry Consents had been assessed. The Appellants did not explain their failure to engage with this point at the planning application stage or when earlier opportunities arose such as when applications for forestry consents were publicised.

The Court of Appeal also found that the Appellants had not provided sufficient detail in respect of their legal arguments which purported to assert a remedial obligation regarding environmental assessments. On the basis that the Appellants did not make the argument in bringing their judicial review proceedings that the Windfarm formed part of, or was a continuation of, a forestry-related project, it was not open to them to make such an argument now. The Appellants also failed to identify any case law which supported the assertion that there is an obligation to remedy a previous failure to carry out an EIA or AA regarding one project which is different from and unrelated to the one for which permission is sought. Simply because the Windfarm was to be located on a site which would continue to be used for forestry activities was not enough to create a remedial obligation in respect of environmental assessments.

The Court of Appeal also found that while there is scope for a remedial obligation to arise where environmental assessments have not been carried out, this does not mean that in every case where the local environment has been affected by prior development the decision-maker must examine the possibility of a historic breach of environmental assessment obligations. The Court of Appeal found that the argument that a decision-maker must check all prior development consents in respect of the site for which an application for permission has been made, in order to identify if there were any earlier omissions or defects in earlier grants of permission, was a far-reaching and unsupported position.

The Court of Appeal further confirmed the decision of the High Court that the Appellants were not entitled to an extension of time to challenge the Historic Forestry Consents directly.

2. The requirements of EU law cannot be set aside on the basis they are difficult to apply (Core Ground 2)

The Appellants contended that the High Court's finding that the Board did not have an autonomous obligation to analyse the environmental assessments carried out as part of the Historic Forestry Consents was a breach of EU law in that the High Court had set aside the requirements of EU law on the basis it was difficult to apply in this instance. The High Court had observed that this would have amounted to a substantial undertaking spanning decades of consents.

The Court of Appeal found that the Appellants had misread the finding of the High Court here, noting that:

(i) the High Court had rejected their argument on the basis that the Appellants had not called on the Board to consider an *"extended form of assessment"* of the adverse effects of forestry activity; and

(ii) the Board was not subject to a remedial obligation in respect of environmental assessments in circumstances where there was no such evidence or argument before the Board.

The Court of Appeal held that it was clear that the High Court had pointed out that the autonomous obligation that the Appellants contended the Board held was unworkable and that it was not a requirement of EU law. The Court of Appeal found that describing this task as *"obviously unworkable"* did not mean that the High Court had found that the requirements of EU law may be set aside because they are difficult to apply.

3. The Appellants are entitled to wide access to justice and that principle is undermined where commercial interests are considered paramount (Core Ground 3)

The Appellants submitted that the High Court found that the commercial context of planning law is a mitigating factor against granting an extension of time to challenge the validity of projects carried out without the requisite environmental assessments.

The High Court found that the Appellants had not established that they were not aware of the forestry activity in the area. The High Court stated that being aware of the forestry activity would have put the Appellants on notice of the Historic Forestry Consents, but they did not take any steps to seek further information on this before going on to reference the commercial context of the time limit applicable to planning cases. Accordingly, an extension of time to challenge the Historic Forestry Consents was rejected.

The Court of Appeal found that this ground was misconceived and that the Appellants' right to wide access to justice was not undermined by commercial interests being considered paramount. It was held that the fact that commercial considerations may be considered by a court does not undermine the Appellants' right to wide access to justice.

4. Discovery in relation to the Historic Forestry Consents (Core Ground 5)
Discovery is a process where the parties to a case are required to disclose relevant documents to the other parties. The High Court refused the Appellants' Motion for discovery here because it was in support of grounds which had been refused and therefore it no longer had any basis.

The Appellants argued that the evidence sought by way of discovery was necessary to show why their claim was well founded and should not be struck out.

The Court of Appeal found that this was an incomprehensible argument and that discovery can never be either relevant or necessary where a claim has already been struck out as there is no issue to which it could be relevant or necessary.

Request for a preliminary reference to the CJEU
The Court was asked to refer two questions to the CJEU, as follows:

a) Is the procedure in Irish law for invoking the remedial obligation in relation to failure to carry out a prior assessment under the EIA Directive (2011/92) and Habitats Directive (92/43) sufficiently clear and precise, so that individuals may ascertain unequivocally what their rights and obligations are and may take steps accordingly, in order to comply with the principle of legal certainty in European Union law?

The Court of Appeal held that the procedure in Irish law for invoking the remedial obligation was not an issue in these proceedings and refused this request on the basis that it is well established that it is not appropriate to make a reference to the CJEU where the alleged issue is hypothetical.

b) Is a state owned company entitled to claim that the difficulty of identifying documents establishing compliance (or non-compliance) with the assessment obligations under the EIA Directive, Habitats Directive and Birds Directive, are a good reason to refuse leave to challenge that compliance in circumstances where the splitting of a forest into over 300 individual parcels of land for purposes of authorisation is the source of that difficulty?

In refusing this request, the Court of Appeal held that project splitting was not one of the issues pleaded in this case and the difficulty in identifying documents requested by the Appellants was not an issue in these proceedings.

Key Takeaways

- Members of the public are entitled to rely upon the expertise of the decision-maker to identify omissions and defects in an application if the omissions or defects relate to the application being considered by the decision-maker.

- A remedial obligation may arise, where permission is granted for a project, where there was a failure to carry out EIA or AA. However, this does not mean that the decision-maker must carry out an enquiry into the possibility of a historic failure by other projects to carry out EIA or AA on the application site where these projects are different from and unrelated to the project under consideration by the decision-maker.

- A planning authority is not deprived of their jurisdiction to grant planning permission for a development where a different and unrelated development may be subject to a remedial obligation where that remedial obligation falls outside of the planning authority's competence.

- Applicants must adhere to the case in respect of which they seek leave to take judicial review proceedings. Raising new issues in affidavits or written submissions cannot have the effect of adding those points to judicial review proceedings which have already been initiated unless an amended statement of grounds has been permitted by the Court.

- Commercial interests are a relevant consideration when assessing an application to extend the time limit allowed to initiate judicial review proceedings. The right to *"wide access to justice"* is not undermined by taking commercial considerations into account.

- If materials relevant to a decision were not considered by the decision-maker then that fact on its own is sufficient evidence in judicial review proceedings. This means discovery is not required for these materials. If the materials which are alleged were not considered by the decision-maker are not relevant to the decision then they are not relevant or necessary in judicial review proceedings and should not be sought via discovery.

A link to the full judgment can be found **here.**

Case: Harte Peat Limited v the Environmental Protection Agency, Ireland and the Attorney General
Date delivered: 31 July 2024
Citation: [2024] IECA 202
Judge: Faherty J.

Background

This was an appeal of a judgment of Ms. Justice Phelan of the High Court relating to peat extraction activity carried out by Harte Peat Limited (Harte Peat) on a number of bog lands in counties Westmeath, Cavan and Monaghan. The judgment concerned two related matters.

1. The first matter was Harte Peat's application for judicial review of the Environmental Protection Agency's (EPA's) decision to refuse to consider an application made by Harte Peat for an Integrated Pollution Control (IPC) licence.

The High Court found partially in favour of Harte Peat in respect of this refusal on the basis that it considered that the EPA had not adequately communicated the reasoning for its decision. In short the High Court determined that:

a) the EPA had not set out why it deemed that its power to conduct an EIA was inadequate for EU law purposes; and

b) how it had determined that planning permission was required for the activity proposed under the IPC licence application.

The High Court ultimately considered that it would not be appropriate to quash the EPA's decision and send it back to the EPA because the EPA would reach the same decision, namely that it was obliged to refuse to consider the licence application as planning permission was required for the activity in question. Therefore, the High Court determined that the EPA's error in law was not sufficiently serious to quash the EPA's decision to refuse to consider the IPC licence application.

2. The second matter was an application made by the EPA for an injunction under Section 99H of the Environmental Protection Agency Act 1992 (the 1992 Act) to prohibit peat extraction on specified bog lands. The High Court granted the injunction sought by the EPA. Subsequently, Harte Peat appealed the High Court judgment to the Court of Appeal.

In the intervening period between the High Court judgment and the Court of Appeal judgment, Harte Peat sought a stay on the injunction which would suspend the operation of the High Court injunction pending the decision of the Court of Appeal (the Court). This stay would remove the prohibition on peat extraction activities ordered by the High Court on an interim basis until the Court of Appeal made a decision on the matter, at which point the injunction would be re-imposed should the Court agree with the High Court. If the Court went on to overturn the decision of the High Court, the injunction would be removed on a permanent basis. This stay was refused by the Court, finding that the balance of justice lay in favour of the injunction remaining in place. A relevant factor was that the peat extraction in question was significant and there was a risk of irreversible environmental damage in breach of Irish and EU legislation should the Court go on to decide to uphold the High Court decision.

Grounds of Appeal

The two main grounds of appeal considered by the Court were:

a) whether the EPA's decision to refuse to consider Harte Peat's application for an IPC licence was valid; and

b) whether the High Court correctly interpreted the definition of the class of activity for which the EPA was granted an injunction (i.e. *"the extraction of peat in the course of business which involves an area exceeding 50 hectares"* which can be found in Class 1.4 to the First Schedule to the 1992 Act).

Issue 1: The EPA's Refusal to Consider the IPC Licence Application

Under current planning legislation, peat extraction in a new or extended area of 10 hectares requires planning permission and peat extraction which would involve a new or extended area of 30 hectares or more is subject to mandatory Environmental Impact Assessment (EIA).

Section 87(1B) of the 1992 Act states that where an application is made to the EPA for a licence in relation to an activity involving development or proposed development for which a grant of planning permission is required, an applicant is required to submit to the EPA either:

a) confirmation in writing from a planning authority or An Bord Pleanála that an application for planning permission for that activity is currently under consideration; or

b) a copy of a grant of permission for that activity.

Where such an application is made to the EPA but does not comply with Section 87(1B), the EPA is required to refuse to consider that application as per Section 87(1C) of the 1992 Act.

In October 2019 Harte Peat lodged an IPC licence application for a total licence area of 73.33 hectares and a stated extraction area of c.49 hectares. This application was lodged against a backdrop of a complicated factual and legal history.

In November 2020, the EPA decided to refuse to consider Harte Peat's application for an IPC licence on the basis that no copy of an application for or grant of planning permission had been submitted with Harte Peat's application for the licence.

Harte Peat maintained that its activities do not require planning permission because they constituted pre-1964 development and as such were excluded from the requirement to obtain planning permission under the Local Government (Planning and Development) Act 1963 and were outside of the scope of the Planning and Development Act 2000 (the 2000 Act).

Harte Peat claimed that the peat extraction activities did not require planning permission or separate EIA throughout the planning process, meaning Section 87(1C) of the 1992 Act did not apply. The Court observed that there was a *"dearth of … evidence"* to support this claim while also noting that the EPA did not engage with this claim in the High Court.

While Harte Peat accepted the scale and location of peat extraction involved meant that EIA was required as a matter of EU law, it contended that this was a function of the EPA as part of the licencing process rather than something which had to be carried out as part of the planning process.

Harte Peat accepted that because EIA was required this meant it was obliged to obtain development consent.[1] However, Harte Peat's position was that an IPC licence would have amounted to the development consent necessary for the purposes of EU law as the EPA could have carried out every step necessary to protect the environment in considering the application as an EIA Report (EIAR) had been supplied with the IPC licence application. Harte Peat accepted that it did not comply with Section 87(1B) of the 1992 Act but argued that this was because it did not require planning permission.

The EPA contended that Harte Peat was required to obtain a grant of planning permission and that Harte Peat's IPC licence application could not be considered in the absence of a grant of planning permission or evidence that an application for planning permission was currently under consideration by the planning authority. The EPA's position was that the scale of peat extraction activity was such as to have met the threshold of being likely to have significant effects on the environment, albeit the EPA could not identify the precise point in time upon which this threshold was met.

The Court found that the matter in dispute related to differing interpretations of how the requirements of EU law are accommodated in the context of the IPC licence application process. Harte Peat argued this could be done within the framework of the IPC licence application to the EPA. The EPA contended that prior engagement with the planning process was a prerequisite to the licencing application process.

1. Under the EIA Directive, '*development consent*' is defined as the decision of the competent authority or authorities which entitles the developer to proceed with the project. Pursuant to Article 2(1) of the EIA Directive, projects likely to have significant effects on the environment are required to be subject to EIA before development consent is given.

Having considered the EIA Directive, the Court found that peat extraction activity that is likely to have a significant effect on the environment is subject to a requirement for development consent and EIA. The Court also considered at what stage in the process the EIA should be conducted. The EPA and the Attorney General (who had participated in the proceedings upon request of the Court made at the initial hearing of the appeal) contended that the EPA was:

a) not empowered to carry out the EIA here; and

b) that it was to be conducted as part of the planning regime on the basis that a peat extraction activity on an area over 30 hectares requires planning permission and the requirement for planning permission is not removed when the peat extraction activity surpasses the 50 hectares' threshold.

The EPA and the Attorney General argued that Harte Peat's claim that the activity commenced pre-1964, and thus removed the need for any planning permission, would not comply with EU law as it would allow a project which requires EIA to proceed without the necessary assessment, being EIA as part of the planning permission process.

The Court noted that the relevant cut-off date for the purpose of compliance with EU law is the date when the requirement for development consent arose. This was 27 June 1998 which was the deadline for implementing the EIA Directive. After this, any peat extraction activity involving a new or extended area of 50 hectares or more required EIA. Subsequently the threshold for peat extraction under Irish law was revised downwards to provide that extraction on an area in excess of 10 hectares required planning permission and peat extraction on an area in excess of 30 hectares required EIA.

The Court found that there was compelling evidence that peat extraction activity was being carried out on areas well in excess of the 30 hectares' threshold. It was noted that there is a considerably higher threshold set by the 1992 Act for the requirement on peat extractors to obtain a licence from the EPA where the peat extraction activity exceeds 50 hectares than there is for obtaining a grant of planning permission under the 2000 Act.

Ultimately, the Court agreed with the EPA that it would be incoherent to find that when seeking to carry out peat extraction activities on an area of below 50 hectares an applicant must apply to the planning authority for development consent but that when seeking to carry out peat extraction activities from an area of above 50 hectares the EPA then becomes the appropriate authority. Instead, the role of the EPA is an additional requirement on top of that of the planning authority, meaning that, in addition to requiring planning permission, peat extraction on an area involving 50 hectares or more requires an IPC licence. The Court found that this was sufficient reason to uphold the decision of the EPA to refuse to consider Harte Peat's IPC licence application.

The Court then turned to Harte Peat's argument that an IPC licence would have amounted to development consent for the purposes of EU law and that the EPA is authorised to undertake the required EIA. The Court disagreed with this, finding that the functions and responsibilities of the EPA are narrower than those of a local authority or An Bord Pleanála when authorising development.

In addition, the Court found that where peat extraction is concerned, there are aspects of the activity which are required to be assessed as part of an EIA under the planning regime and the 1992 Act does not make provision for these aspects. The EPA's function is focused on environmental pollution and controlling emissions from the relevant activity and the EPA has no remit to consider certain matters falling under the planning regime such as proper planning and sustainable development.

Furthermore, the licensing regime under the 1992 Act makes no provision for retrospective consent or the carrying out of retrospective or remedial environmental assessments. The legislature has prescribed the planning authorities as the requisite authority to conduct EIA in respect of peat extraction exceeding 30 hectares and the EIA envisaged under the 1992 Act was never intended to act as an alternative to this where peat extraction activities exceeded 50 hectares.

As regards Harte Peat's claim that its activities do not require planning permission because they constituted pre-1964 development and as such were excluded from the requirement to obtain planning permission, the Court found that, while accepting that this claim required a degree of interrogation which was not carried out by the EPA, this was an implausible argument and that Harte Peat *"singularly failed to put before the High Court any actual evidence"* that this was the case. Furthermore, the Court found it entirely implausible that Harte Peat's activities remained within the parameters of whatever use it was exercising pre-1964 and held that the ordinary planning rules applied to the extent that Harte Peat's extraction activities post-1964 went beyond established pre-1964 use works.

Issue 2: The Interpretation of Class 1.4 to Schedule 1 of the 1992 Act
In the High Court, the EPA contended that Harte Peat was carrying out peat extraction activity in the course of business involving an area exceeding 50 hectares and this required an IPC licence, planning permission and the carrying out of an EIA.

Harte Peat did not have an IPC licence or planning permission. Harte Peat argued that the area of its peat extraction did not exceed 50 hectares and thus was not subject to licencing. The High Court determined that the 50 hectares' threshold had been met. The High Court also noted that Section 99H of the 1992 Act was broadly analogous to Section 160 of the 2000 Act albeit there was one important distinction, being the use of the present tense in Section 99H of the 1992 Act whereas Section 160 of the 2000 Act was *"more widely drawn"* in that it referred to past, present and future actions. The High Court was satisfied that Harte Peat was carrying out an activity in contravention of the 1992 Act, being peat extraction in the course of business in an area exceeding 50 hectares, and granted an injunction pursuant to Section 99H of the 1992 Act.

In the Court of Appeal Harte Peat argued that the jurisdiction of the Court under Section 99H of the 1992 Act was limited to an activity which *"is being carried on in contravention"* of the 1992 Act and that the evidence in the High Court showed that Harte Peat had confined its activity to an area below 50 hectares at the time the application for an injunction under Section 99H was made.

Harte Peat submitted that if the Court of Appeal found against it on the first issue in these proceedings, which it did, this meant it was for the local authority to take action to prevent Harte Peat's activities and the EPA did not have the necessary standing.

The EPA argued that there was an intention for Harte Peat to extract from certain areas involved in the proceedings in the future. The EPA argued that two other areas, separated by a road, comprised a single bog which exceeded the 50 hectares' threshold and, while one of those areas was exhausted since 2015, the peat extraction being carried out on the other area affected that entire area. The EPA also pointed out that the High Court had noted that commercial peat extraction typically involves an operator working on one discrete area of the peat lands under their control at any given time. The EPA argued that a narrow interpretation of the words *"is being carried on"* in Section 99H would allow a developer to move from one area to another and frustrate the objectives of the legislation.

The Court of Appeal found that the issue to be determined was whether the High Court correctly determined that the 50 hectares' threshold was met for the purposes of granting an injunction under Section 99H of the 1992 Act. This meant that it had to be established that the area where the peat extraction activity *"is being carried on"* by Harte Peat exceeded 50 hectares at the time the injunction was applied for. The Court of Appeal found it noteworthy that Section 99H of the 1992 Act is phrased differently to Section 160 of the 2000 Act. In the Court of Appeal's view, the wording of Section 99H, *"is being carried on"*, gave the EPA a limited power to stop an activity as this indicates the activity in question is a *"thing or process that is actively occurring at the time the injunction is being sought at a particular site or location"*.

The Court of Appeal accepted entirely that areas of peatland which were contiguous and technically and hydrologically connected are relevant factors in determining whether there is an activity being carried on for the purposes of assessing whether a licence is required, in the context of an injunction under Section 99H of the 1992 Act.

However, the Court of Appeal held that these factors cannot be the sole determinant of whether an injunction should be granted. The Court of Appeal's view was that it would have to be established as a matter of fact that at the time the injunction was applied for commercial peat extraction was being carried on in those areas that exceeded the 50 hectares' threshold or, alternatively, that the peat extraction activity being carried on in one area was *"a continuation of a process whereby Harte Peat had successively engaged in the fractioning of its lands to sub-threshold levels … from which it could reasonably be inferred that this was being done in an attempt to keep peat extraction below 50 hectares, and thus avoid statutory overview by the EPA"*. However, the Court of Appeal held that none of this had been established.

The Court of Appeal determined that it had not been established by the EPA that at the time the injunction was applied for commercial peat extraction on an area exceeding 50 hectares was being carried on and the injunction should not have been granted under Section 99H of the 1992 Act. However, the Court of Appeal acknowledged that any person, including the EPA, could apply for an injunction under Section 160 of the 2000 Act in respect of the peat extraction activities which it found required planning permission.

Key Takeaways

- Decisions should be adequately reasoned having regard to the provisions of the relevant legislation and the reasons should be communicated by the decision-maker.

- Where a developer claims that its activities do not require planning permission because they constitute pre-1964 development and are excluded from the application of the 1963 Act and remain outside the scope of the 2000 Act, those activities must remain within the parameters of whatever activities were being undertaken pre-1964 and a Court may seek evidence to substantiate any claims of pre-1964 use and the extent of the activities being undertaken.

- The EPA does not have the requisite powers to grant *'consent'* for development or to assess and condition certain aspects of development by reference to the full range of criteria applicable under the planning code relating to the proper planning and sustainable development of the area where the development is occurring.

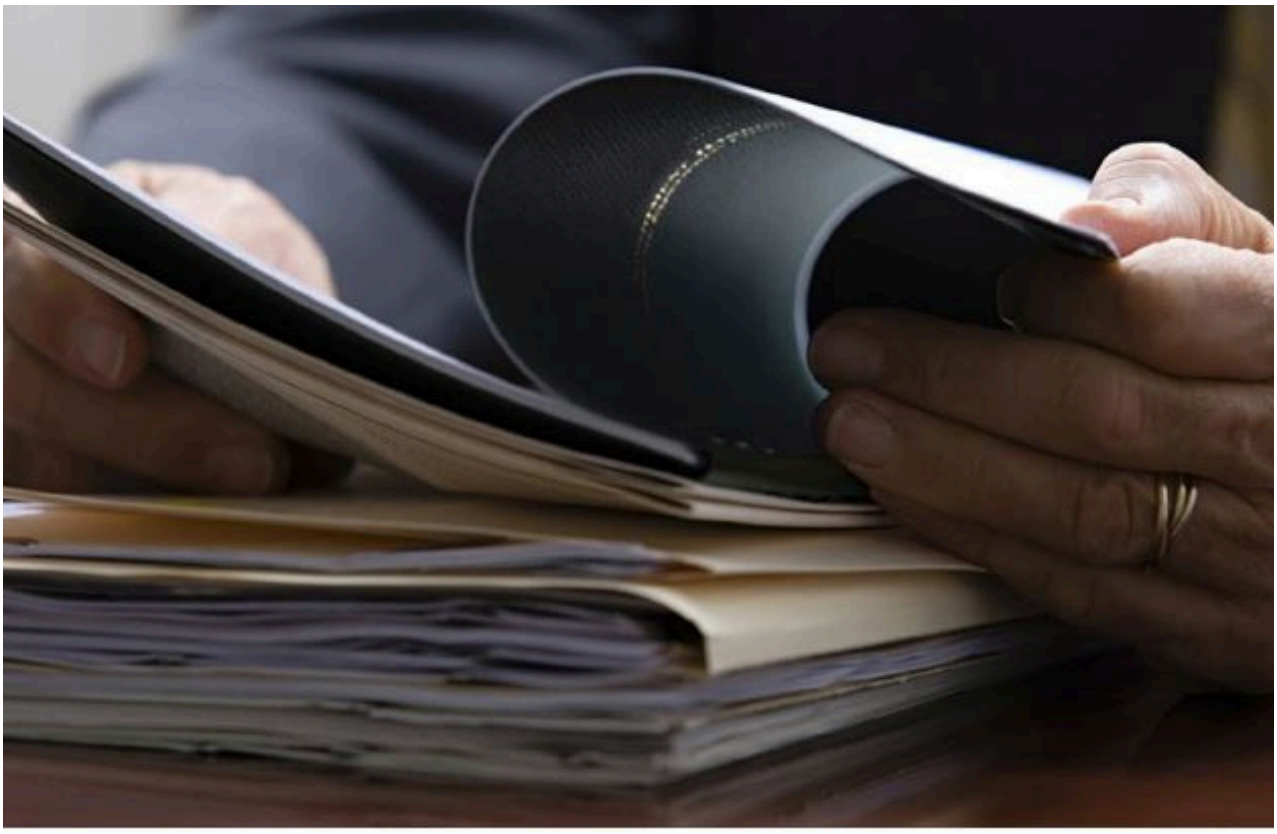
- EIA conducted by the EPA in the context of a licensing process is more limited than EIA conducted under the planning code and the EPA's statutory function in this regard is restricted within the remit of its powers.

- In order to successfully obtain an injunction under Section 99H of the 1992 Act, the EPA is required to establish that the "*activity is being carried on*" in contravention of the requirements of the 1992 Act at the time of application for the statutory injunction. However, Section 160 of the 2000 Act provides that "*where an unauthorised development has been, is being or is likely to be carried out or continued*" the High Court or Circuit Court may on the application of a planning authority or any other person (including the EPA) grant an injunction requiring any person to cease unauthorised development.

- The Courts are generally favourably disposed to granting injunctions where there is a risk of adverse environmental consequences and a failure to enforce Irish and EU environmental law.

- The EPA has no direct control or regulating authority in respect of a peat extraction area under 50 hectares.

A link to the full judgment can be found **here.**



Case: John Conway v An Bord Pleanála, the Minister for Housing, Local Government and Heritage, Ireland and the Attorney General and Silvermount Limited (Notice Party)
Date: 23 July 2024
Citation: [2024] IESC 34
Judges: Collins J., Donnelly J., O'Donnell C.J., Hogan J., Dunne J.

Judgments: Hogan J. delivered the principal judgment with whom the other judges agreed as to the result. Separate concurring judgments were also delivered by O'Donnell C. J., Dunne J., Collins J., and Donnelly J.

Background
The proceedings concerned the challenge by John Conway (the Applicant) of the decision to grant permission by An Bord Pleanála (the Board) to Silvermount Ltd (the Notice Party) for a Strategic Housing Development (SHD) comprising 545 build-to-rent apartments, commercial, retail and office units, a childcare facility, ancillary residents' facilities and associated site works at Concorde Industrial Estate, Naas Road, Walkinstown, Dublin 12.

The Board granted permission in material contravention of the Dublin City Development Plan 2016-2022 on the basis that the proposed development was in compliance with Specific Planning Policy Requirement (SPPR) 3 of the Urban Development and Building Height Guidelines for Planning Authorities (December 2018) and SPPRs 4, 5, 7 and 8 of the Sustainable Urban Housing: Design Standards for New Apartments – Guidelines for Planning Authorities (December 2020).

The Applicant challenged the Board's decision primarily on the basis that Section 28(1C) of the Planning and Development Act 2000 (as amended) (the 2000 Act) breached Articles 15.2.1° and 15.2.2° and/or breached Articles 28A.1 and 28A.2 of the **Constitution** on the basis that Section 28(1C) of the 2000 Act:

- limits the powers of the Minister to make policies;
- grants overly broad administrative powers to the Minister; or
- that the SPPRs were beyond the powers of the Minister.

The Applicant further alleged that the Minister had acted beyond the powers in Section 28(1C) in respect of the specific SPPRs in issue.

It is worth noting that during the hearing of the proceedings in the High Court it was agreed by the parties that the Board and the Notice Party would be released from the proceedings and the Applicant would not seek to have the planning permission quashed. The Applicant agreed, however, that he would be bound by the factual context in which the proceedings were commenced. In this context he referred to the alleged delegation of legislative power by reference to the SPPRs made by the Minister which the Board relied upon in making its decision on the SHD application. In summary, the proceedings related to the constitutionality of Section 28 (1C) of the 2000 Act and the SPPRs made thereunder.

In the High Court, J. Humphreys rejected the Applicant's challenge and the Applicant appealed to the Supreme Court, having been granted leave by the Supreme Court to do so.

Legislative Context
Under Section 28(1) of the 2000 Act, the Minister has the power to issue guidelines to planning authorities regarding any of their functions under that Act and planning authorities are required to have regard to those guidelines in the performance of their functions.

Section 28(1C) gives the Minister the power to include in such guidelines SPPRs with which planning authorities, regional assemblies and the Board are required to comply in the performance of their functions. SPPRs are therefore legally binding in contrast to the *'have regard to'* standard which applies to Section 28 guidelines more generally.

In respect of the Constitution, the key provisions in issue were:

- Article 15.2.1° which provides that the sole and exclusive power of making laws for the State is the responsibility of the Oireachtas;
- Article 15.2.2° which allows for the creation of subordinate law-making bodies;
- Article 28A.1 which recognises the role of local government in providing a forum for the democratic representation of local communities, in exercising and performing at local level powers and functions conferred by law and in promoting by its initiatives the interests of such communities; and
- Article 28A.2 which provides for directly elected local authorities as may be determined by law and that their powers and functions shall, subject to the provisions of the Constitution, be so determined and exercised and performed in accordance with law.

The Main Points Argued by the Applicant

1. Whether Section 28(1C) of the 2000 Act Infringes Article 15.2.1° of the Constitution
The thrust of the Applicant's argument was that the power given to the Minister under Section 28(1C) to issue binding SPPRs was contrary to Article 15.2.1° as it amounted to an unconstitutional delegation of legislative power.

The Applicant argued that Section 28(1C) confers on the Minister the power to make SPPRs with which the planning authority and the Board must comply, when there are no principles and policies contained in the 2000 Act which limit or sufficiently limit the power of the Minister under Section 28(1C) to formulate policies.

The Supreme Court identified seven questions to be answered as part of an overall holistic consideration of the legislative provision at issue. These questions helped the Supreme Court to determine whether the power conferred on the Minister by Section 28 (1C) was consistent with Article 15.2.1°. These guiding questions were:

- Does the 2000 Act contain sufficient principles and policies that govern the exercise of the Minister's power in Section 28(1C)?
- Does the 2000 Act set boundaries, in the sense of defining rules of conduct, or guidelines?
- Does the 2000 Act have defined subject matter and contain basic conditions of fact and law?
- Is the legislative purpose of Section 28(1C) discernible by identification of objectives or outcomes as well as principles?
- Is the power delegated to the Minister sufficiently defined?
- Does the exercise of the delegated power contain sufficient safeguards?
- Has the Oireachtas relinquished its constitutional role?

The Court found that the wording of Section 28(1C) places significant constraints upon the Minister and found that the guidelines must relate exclusively to planning policy and the performance of the functions conferred on local authorities and the Board. Further, the Court found that the Minister's powers must be exercised within the confines of the 2000 Act and any guidelines must relate to proper planning and sustainable development. The Court noted that the 2000 Act contains numerous highly prescriptive rules, regulations and statutory standards many of which derive from EU law and that Section 28(1C) sets definite boundaries and has a defined subject matter.

The Court considered that the legislative purpose of Section 28(1C) is discernible: it is to enable the Minister to set national standards in relation to a range of highly technical planning considerations regarding matters such as urban density, transport connectivity, the avoidance or urban sprawl and building heights. The Court also found that Section 28(1C) does not empower the Minister to make important policy choices of a kind that are often considered the hallmark of legislative power and does not empower the Minister to change other law.

The Court also noted that Section 28(1C) is primarily addressed to public bodies rather than directly to private law entities and that it does not create criminal offences and does not regulate or impact on aspects of private law nor does it impact on fundamental rights.

The Court therefore found that Section 28(1C) satisfied the requirements of the first six questions set out above. In respect of the seventh question, namely whether by delegating this power to the Minister there had been an abandonment by the Oireachtas of its constitutional role, this gave rise to much more detailed consideration by the court and resulted in some divergence between the different judges as to their reasoning for same although they were all agreed on the ultimate answer.

The Court noted in relation to the seventh question that the existence of democratic accountability and publicity were key considerations. In this regard, the Court found that the publication requirements in Section 28(5) and Section 28(7) of the 2000 Act were sufficient to meet constitutional standards. Any guidelines made under Section 28, including those containing SPPRs, have to be laid before the houses of the Oireachtas and have to be published by the Minister. While the Houses cannot formally approve or nullify any guidelines, the Minister who makes the guidelines is answerable to Dáil Eireann and therefore appropriate democratic supervision was in place.

The Court therefore rejected the argument that Section 28(1C) of the 2000 Act infringed Article 15.2.1° of the Constitution and found that it did not amount to an unconstitutional delegation of legislative power.

2. Whether Section 28(1C) of the 2000 Act Infringes Article 28A of the Constitution

The Applicant argued that Section 28(1C) was unconstitutional as it conferred overly broad administrative powers and is contrary to the rule of law under the Constitution as it bestows a vague and unlimited discretion or disproportionate power on the Minister to make binding policies which restrict the powers of local authorities and the Board. Further the Applicant alleged that Section 28(1C) was contrary to Article 28A.2 of the Constitution which provides that the power of directly elected local authorities shall be exercised and performed in accordance with law.

The Court noted that Article 28A reinforces the democratic quality of local government and that Article 28A.1 arguably implies that certain definite powers which might appropriately be exercised at local government level will be conferred on such bodies by law. The Court found that the Oireachtas could not strip Article 28A.1 of any real meaning and, for example, decline to grant local authorities any real or substantial powers at all.

However, the Court considered the changes effected by Article 28A are relatively modest and that the State remains a unitary State (i.e. a state governed as a single entity where central government holds most or all of the governing power) and there was no intention that local authorities should have a kind of autonomous or unfettered power beyond the reaches of the Oireachtas.

The Court cited a number of examples of the extent of central government statutory controls over the policy aspects of the planning process including in the development plan making process whereby development plans are required to be consistent, as far as practicable, with amongst other things the National Planning Framework and the Regional Spatial and Economic Strategies. The Court concluded that Section 28(1C) was another form of central government control in respect of the planning process and therefore decided that it did not infringe Article 28A.1 of the Constitution.

Ultimately, the Court concluded that the Oireachtas was fully entitled to ensure that local authority powers are exercisable in a manner which conform to national policy and for this purpose to enable the Minister to give directions to local authorities of the kind found in Section 28(1C), i.e. SPPRs.

The Court therefore rejected the argument that Section 28(1C) of the 2000 Act infringed Article 28A.1 of the Constitution.

3. Whether the SPPRs in question were beyond the powers of the Minister under Section 28(1C)

The Court held that the Applicant had not identified anything in the relevant provisions of the Building Height Guidelines which were applied by the Board in the SHD decision which might be said to be beyond the powers of the Minister under Section 28(1C). The appeal was therefore refused and the decision of the High Court was upheld.

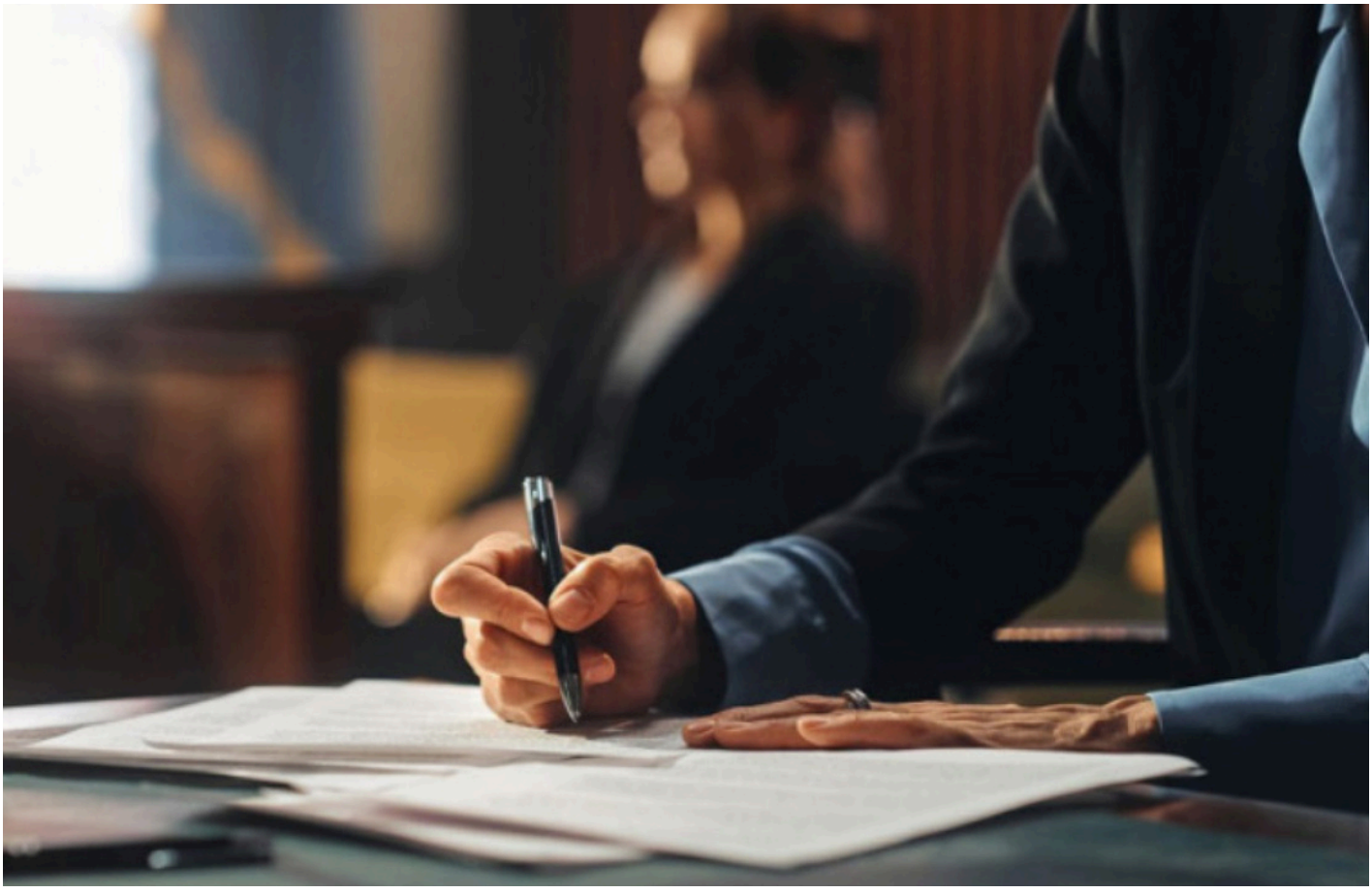
Key Takeaways

- Matters specified in SPPRs relate to highly technical and complex aspects of planning policy.
- SPPRs can only be made by the Minister for the purposes of proper planning and sustainable development.
- There are significant central government statutory controls over the planning process including in the making of development plans and SPPRs are another form of central government control in this respect.
- Any delegation of power in legislation must be consistent with Article 15.2.1° of the Constitution.
- The case law on Article 15.2.1° has developed from a traditional principles and policies test to a more holistic consideration. There are broadly seven non-exhaustive criteria to take into account when considering any alleged unauthorised delegation of power.

- Article 28A.1 implies that certain definite powers which might appropriately be exercised at local government level will be conferred on such bodies by law.

- The State remains a unitary State and local authorities do not have autonomous or unfettered powers beyond the reach of the Oireachtas

A link to the judgment can be found **here.**



Case: Michelle Hayes v the Environmental Protection Agency and the Minister for the Environment, Climate and Communications, Ireland and the Attorney General and Irish Cement Limited (Notice Party)**; Sue Ann Foley v the Environmental Protection Agency, Ireland and the Attorney General and Irish Cement Limited** (Notice Party)
Date delivered: 24 June 2024
Citation: [2024] IECA 162
Judge: Butler J.

Background

This was an appeal of a judgment of Mr. Justice Twomey of the High Court which upheld the granting of a revised Industrial Emissions Licence by the Environmental Protection Agency (EPA) to Irish Cement Limited (ICL) for its cement plant at Castlemungret, Co. Limerick. The revised licence permitted ICL to incinerate waste both as a fuel and a raw material to be used in the licensed activity. Two separate challenges were brought by Ms. Hayes and Ms. Foley (the Applicants) and these were heard together in both the High Court and Court of Appeal and a single judgment was delivered in each court.

The Applicants appealed against the judgment of the High Court which upheld the EPA's decision.

Scope of Review

One of the first issues considered by the Court of Appeal (the Court) was the scope of the Court's jurisdiction to judicially review the decision of an expert decision-maker such as the EPA. The Court noted that in general when examining a judicial review of this nature, a court must consider:

- whether the decision is legally correct;
- whether the decision-maker has followed fair procedures in reaching the decision;
- whether all relevant material has been properly considered and all irrelevant material excluded; and
- whether sufficient reasons have been provided to explain the decision made.

If all of those requirements are satisfied then the court may look to see if there was material before the decision-maker upon which any factual conclusions could reasonably be based. This does not however involve the court assessing the weight of the evidence preferred by the decision-maker against the weight of any contrary evidence and importantly is not a merits-based review.

The Court identified an exception to these general rules where the decision includes a challenge to an Appropriate Assessment (AA). The Court determined that it may not be sufficient for a court to simply satisfy itself that there was some evidence before the decision-maker on which the decision can be said to have been reasonably based. That is because the onus is on the decision-maker in carrying out an AA to ascertain beyond reasonable scientific doubt that the development will not have adverse effects on any EU site. To achieve this certainty, the decision-maker's assessment must be complete and must not have any gaps. In those circumstances, the court must be satisfied that the rejection of any contrary evidence and the explanation for such a rejection, if any, does not create a gap in the context of reasonable scientific certainty as a result of which the assessment will not be complete.

The Court further noted that in conducting this examination, it has to be borne in mind that the decision-maker possesses a level of expertise regarding the subject matter of the assessment which the court does not have. The extent to which the decision-maker has provided reasons for its conclusions on any disputed aspect of an AA will inform the scope of the court's examination. The Court also recognised that the EPA is an expert decision-making body in a highly specialised field. On this basis there is a need for deference to be shown by the court to the analysis carried out by the EPA in the licence review application.

Grounds of Appeal
There were a substantial number of grounds of appeal but the key issues raised are summarised as follows:

Which version of Directive 2011/92/EU, as amended by Directive 2014/52/EU (the Environmental Impact Assessment (EIA) Directive) applied to the licence review process
The 2011 EIA Directive was amended in 2014. The 2014 EIA Directive contained transitional arrangements which identified when the new provisions would apply in processes which had been commenced prior to the date by which the 2014 EIA Directive had to be implemented in domestic law. An EIA carried out after the date of transposition, which did not benefit from the transitional arrangements, would have been required to be carried out pursuant to the requirements in the 2014 EIA Directive. Otherwise, it would be deficient.

The EPA's licensing process, in this specific case, straddled the implementation date. The EPA applied the provisions of the 2011 EIA Directive without amendments on the basis that the Environmental Impact Statement (EIS) had been submitted to the EPA prior to the cut-off date.

The Applicants argued that because the EPA had sought further information in relation to the EIS from ICL after the cut-off date, this in effect deemed the original EIS deficient and therefore the amended 2014 EIA Directive had to be applied.

The Court found that the question to be answered here was not when the EPA validated either the application or the EIS but when ICL submitted an EIS which contained all the required information. The Court held that ICL had satisfied this requirement and therefore the unamended 2011 EIA Directive had been correctly applied.

"*Fit and Proper Person*" Requirement

As part of the licence review process the EPA has to establish that the applicant for a licence is "*a fit and proper person*" under Section 84 of the Environmental Protection Agency Act 1992 (the 1992 Act). If the applicant has:

- technical expertise;
- financial resources; and
- no previous convictions for environmental offences,

they are deemed to be fit and proper. However, if the applicant has previous convictions for environmental offences, the EPA has a discretion to regard the applicant as "*fit and proper*" despite the previous convictions. That is what the EPA decided in this case.

The Applicants alleged that the EPA had failed to give reasons for determining that ICL met the "*fit and proper*" requirement. The Court noted that the extent of reasons required depends on the context in which the decision was made and that the adequacy of the reasons should be assessed from the standpoint of an intelligent person who has taken part in the process. The Court found that the reports of the inspector and EPA chairperson suggested three reasons for the EPA's decision in this regard, namely:

- the nature of the convictions,
- the fact that the EPA considered ICL to be a "*fit and proper person*" to continue to hold the existing licence despite the previous convictions, and
- the conditions attached to the revised licence.

The Court considered that the reasoning obligation on the EPA on this issue was relatively light and concluded that the treatment of the "*fit and proper person*" requirement in the inspector's and the chairperson's reports provided, just about, sufficient reasons.

Appropriate Assessment (AA) – Output and Reasons

The Applicants alleged that it was not possible to ascertain where the EPA's AA was to be found nor what the contents of that AA were. There were a number of documents potentially making up the EPA's decision including the inspector's report, the chairperson's report of the oral hearing, the proposed licence and the final licence.

The Court noted the need for the decision-maker in AA to reach conclusions on the submissions made to it and for the statement of reasons for the decision to enable those who made submissions to understand why those conclusions had been reached.

The Court acknowledged that the decision-maker is not necessarily required to address each submission made to it in its statement of reasons.

The Court noted that where expert evidence relevant to the issues arising in the process is adduced by any party, that evidence must be considered by the decision-maker and if the evidence is not accepted, it must be apparent from its reasoning process why that was the case. The Court said it is important to bear in mind that an AA is a process. The Court highlighted that this process leads to conclusions but during the process issues may be raised, responded to and dealt with by or on behalf of the decision-maker in a way which means that a concern expressed at an earlier stage in the process may no longer be live at the point where the conclusion is reached.

The Court rejected the argument that it could not be readily identified where the AA was to be found. In light of the terms of the licence itself and the express adoption of the inspector's report and the report of the chairperson of the oral hearing, the Court was satisfied that the EPA's AA could be found in a combination of the licence and those reports read together.

Air Emissions
Issues relating to complex scientific modelling, analysis and evaluation were also raised by the Applicant (Ms. Foley) who sought to rely on expert evidence submitted during the licensing process in order to assert that the EPA had failed to eliminate all reasonable scientific doubt for the purposes of AA with regard to air emissions.

The Court commented that, given the highly technical and complex nature of the evidence involved, this was the type of situation in which considerable deference must be afforded by the Court to the EPA as an expert decision-maker.

Overall, the Court was satisfied that the EPA had engaged with the assessments in considerable detail, that the issues raised by the Applicant's expert had been extensively addressed. The Court commented that it should be very slow to assume that the EPA has failed to appreciate and deal properly with the significant points made by the Applicant's expert. The Court therefore found that the issues identified by the Applicant did not give rise to gaps in the EPA's analysis which could be said to give rise to a reasonable scientific doubt.

Chromium VI
The Applicant (Ms. Hayes) also raised complex scientific issues in the context of the AA. Chromium occurs naturally in a number of forms but it is emitted from certain industrial processes in non-natural form as Chromium VI. According to the evidence which was presented to the EPA, Chromium VI is toxic to humans and a known carcinogen.

The Applicant alleged firstly that the entire assessment was deficient because it did not use the correct baseline for Chromium VI which according to the Applicant involved assessing the site as if the existing activity did not exist.

This argument was rejected by the Court as being absurd. The Court found that it was correct for the EPA to approach the analysis of requested revisions to a licence by considering the effects the alterations to the existing licensed activity would have compared to the effects of the activity operating under the existing licence.

The Applicant also alleged that the EPA was wrong to accept evidence given at the oral hearing by ICL's expert regarding the measurement of background levels of Chromium VI in total chromium. The Court noted that it was in effect being asked to decide that the EPA was wrong to act on foot of the uncontradicted expert evidence of ICL and to accept that the decision-maker should have preferred expert evidence that was not actually given at the oral hearing and which only came to light during the judicial review proceedings. The Court found that the Applicant had failed to discharge the evidential burden on her to show that the EPA could not have been satisfied as to the absence of scientific doubt or that it made a legal error in treating itself as being so satisfied. The Applicant had not submitted expert evidence at the oral hearing, had not challenged ICL's expert on her evidence at the oral hearing and had not sought to cross-examine ICL's expert in the judicial review proceedings.

Treatment of Bryophytes in the AA

The Applicant (Ms Hayes) alleged that the AA was inadequate as it did not consider the effect of proposed emissions on bryophytes and that no bryophyte survey was carried out.

Bryophytes are a group of plants which include mosses and liverworts which are particularly sensitive to pollutants dispersed by air such as nitrous oxide, sulphur dioxide and ammonia.

The Applicant alleged that in her submissions to the EPA during the licensing process she had identified the impact on bryophytes as a pathway for adverse impact on the integrity of the lower Shannon Estuary Special Protection Area (SPA) and Special Area of Conservation (SAC). The Applicant argued that it was irrelevant that bryophytes are not qualifying interests for those designated sites.

The Court agreed with the Applicant that the designation of a site for the protection of a habitat necessarily requires a broader consideration of typical species present on the site than does the designation of a site for the protection of a particular species. However, this does not make it mandatory to include all undesignated but typical habitats and species in every AA. There must be a connection established between the species which is not designated and the implications of the proposed development for the conservation objections of the protected site.

The Court found that the Applicant had failed to establish such a connection and found that the EPA was entitled to place significant reliance on the work done by the National Parks and Wildlife Service in relation to site conservation objectives. The Appeals were refused and the decision of the High Court upheld. The Applicants have since sought a certificate for leave to appeal to the Supreme Court.

Key Takeaways

- The Court in judicial review is not conducting a merits-based review. Instead, the Court is examining whether the decision made is legally correct and this includes a review of whether the decision-maker has followed fair procedures in reaching the decision, whether all relevant material has been properly considered and all irrelevant material excluded and whether sufficient reasons have been provided to explain the decision made.

- The normal irrationality standard in judicial review, which dictates that a Court may only quash a decision where it is satisfied that the decision-maker did not have any relevant material before it that supported the decision made, may be more nuanced when reviewing the legality of a decision made in respect of an AA given the requirement to ascertain the absence of effects on an EU site beyond reasonable scientific doubt.

- In highly technical areas, the Court should give a degree of deference to expert bodies in relation to the analysis they have carried out.

- An AA does not have to be contained in a singular document and can be contained across multiple documents where those are referred to in the decision expressly or by necessary implication.

The judgment provides a very helpful summary of the legal requirements for EIA and AA and the differences between the two at paragraphs 104-122 and this is recommended reading for any practitioners operating in these areas.

A link to the full judgment can be found **here.**

These case summaries were prepared by members of the Planning and Environmental Department of Fieldfisher Ireland LLP (Craig Farrar, Rory Ferguson, and Jonathan Moore).

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