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EIA

Division of competences to carry out EIA

In Commission v Ireland, the ECJ recently held that the division of competences to assess environmental impact statements between the EPA and the Planning Appeals Board did not ensure that Directive 85/337/EC on environmental impact assessment was properly transposed. This was a problem in the Irish system for some years. However the High Court had addressed it in one particular case viz *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. (The board mistakenly took the view that this was a matter within the exclusive jurisdiction of the EPA).

What is the review procedure under Article 10a of the EIA Directive (as inserted by Directive 2003/35/EC) ?

Planning permissions in Ireland are granted by local planning authorities. There is an appeal to a Planning Appeals Board which is an independent administrative tribunal. It was argued that an appeal to the Planning Appeals Board would constitute the review procedure envisaged by Art 10A but the High Court in *Cairde Chill an Disirt Teoranta v An Bord Pleanála* [2009] I.E.H.C. 76; [2009] 2 I.L.R.M. 89. Cooke J. held that the Board's decision was the development consent and that the review procedure is a judicial review. The court held:

> The judicial review by the High Court is precisely the procedure envisaged by Article 10a in that the High Court has jurisdiction to quash the decision of the Board if it is shown to be vitiated by any material irregularity in the Board's procedures leading to its adoption or by any material error or failure on the Board's part in applying correctly the substantive criteria and conditions of proper planning and sustainable development governing the assessment of the proposed development."

"Sufficient" interest requirement for locus standi

There has been a problem relating to the test for *locus standi* to challenge environmental decisions. Directive 2003/35/EC requires than a person challenging the merits of a decisions have a sufficient interest in the matter. Irish law requires an applicant for judicial review to have a *substantial* interest **and** substantial grounds. The ECJ appeared to accept in Case C-427/07 that standing in art 10A is a matter for the procedural autonomy of Member States when the Irish requirement was challenged although it could be argued that the court did not really address the issue.

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The case of *Treacy v. Cork County Council* [2009] I.E.H.C. 136 provides an example of the new Irish requirement that a person challenging a planning decision must have a ***substantial*** interest in the matter and substantial grounds. Hedigan J. ruled that the owner of a holiday home some distance from the permitted development did not have a substantial interest. The court also rejected an argument that the (alleged) loss of a right of appeal to An Bord Pleanála could convert an otherwise insubstantial interest to a substantial interest. And in *Treacy v. An Bord Pleanála* [2010] I.E.H.C. 13 MacMenamin J. stated that the "substantial interest" requirement meant that an applicant for judicial review cannot rely on a ground that could have been but was not raised during the course of the proceedings before the decision-maker. Note however that the ECJ Case C–263/08 *Djurgården-Lilla Värtans Miljöskyddsförening* (Swedish underground power cables) suggests, on one reading, that a requirement for "prior participation" in the administrative stage of decision-making is inconsistent with the provisions of Art.10a.

> "[…] members of the public concerned, within the meaning of Article 1(2) and 10a of Directive 85/337, must be able to have access to a review procedure to challenge the decision by which a body attached to a court of law of a Member State has given a ruling on a request for development consent, regardless of the role they might have played in the examination of that request by taking part in the procedure before that body and by expressing their views

Default (Tacit) Planning Permissions

In Abbeydrive Development Ltd v Kildare County Council [2010] IESC 8, the Supreme Court held that there could not be a default planning permission in a case where EIA was involved. In Irish law, an applicant for planning permission is deemed to have received it if the planning authority does not decide on the application within a given time frame. In that case, the applicant applied for planning permission for a housing development. The planning authority did not make a decision within the statutory time frame. Abbeydrive claimed permission in default i.e. what the ECJ would call a tacit permission. The Supreme court initially held that it was entitled to this but after it had given its judgement and before it made its final order, an NGO appeared before the court alleging that it had been misled by the planning authority which told it that the application for the housing development had been withdrawn and therefore had been deprived of its procedural rights to participate in the decision. It argued that since EIA was required for the development, there could be not, as a matter of EU law be default permission. [This matter had been stated in a textbook written by Yvonne Scannell in 2005 and in Simons on Planning and Development Law in 2006] The Supreme Court held that the circumstances in this case were exceptional because EU law was involved, that there could be no default permissions for an EIA development as a matter of EU law and it sent the matter back to the High Court to review its decision and make a final decision on the matter.

Precautionary principle

Hygeia Chemicals Ltd -v- Irish Medicines Board [2010] IESC

The Irish Medical Board (IMB) which approves medicines and pesticides for sale announced that from October 2002, sellers of ship dip (anthelmintics containing liquid organo phosphate used for worm infestations in sheep) would be required to recall any products which did not use new closed delivery systems, or similar, aimed at reducing operator exposure to the concentrate . The applicant challenged this unsuccessfully in the High Court and then appealed to the Supreme Court. According to the appellant's argument, IMB was required to establish, in the exercise of the jurisdiction which it has concerning veterinary medicinal products, that the product in question is *"harmful under the conditions of use stated at the time of application for authorisation or subsequently* "before the product could be taken off the market. It alleged that the decision taken was based on new packaging ideas produced by two competitors in the same veterinary pharmaceutical industry, rather than on up to date scientific studies of the type required and that, *inter alia*, the decision was a misapplication of the precautionary principle. Having quoted extensively from *Pfizer Animal Health,* [2002] ECR II/ 3318. The Supreme Court agreed. Although it held that was not necessary to enumerate the several ways in which the application of the precautionary principle was deficiently applied, it was concerned about the lack of excellence, independence and transparency in the scientific basis for the IMB decision as well as the absence of available and real technical or scientific standards against which to judge the inadequacy of Hygeia's existing products.

Birds Directive

Hosey & Ors -v- Minister for Environment & Ors

This case involved an allegation that the Minister for the Environment failed to transpose the provisions of the Birds by failing to ensure that the requirement of the Directive that birds are not hunted during the periods of their greatest vulnerability, such as reproduction, the return migration to the nesting areas, and the raising of chicks, is effective in the State. In particular, it was contended that by authorizing the hunting of certain named birds during the period of their reproductive cycle, the State has breached directly effective provisions of EC law and/or has failed to provide for the proper transposition of EC law." The Minister had given a licence for dog trialling to which the applicants objected. The court found that the obligations had been properly transposed and that the evidence produced by the applicants was not sufficient to prove that dog trialling (which the court held was hunting within the meaning of the Birds Directive) would disturb the birds.

Habitats Directive

Sweetman -v- An Bord Pleanála & Ors [2010] IEHC 53
In this case the applicant claimed that the decision made to permit an EIA road was irrational because:

> "(i) There were no conservation objectives in relation to a European site set by the Minster or some such authority. In the absence of such conservation objectives the Board could not properly assess the possible impact on the immediate environment.
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> (ii) There was a scientific doubt raised in the inquiry by Ms. Dubsky and that should have been such as to create a reasonable scientific doubt such that the authority could not grant permission (see *Waddenzee* above).
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> (iii) A stepwise approach to making the decision was not adopted as a result of which the Board did not ask itself the right question, i.e. was there a reasonable scientific doubt.

The Court held that the decision was not irrational and that (i) it was sufficient if the conservation objectives for the site are established in the course of the Environmental Impact Assessment (EIA) and (ii) that were set out in the Environmental Impact Statement (EIS), t and (iii) that it would not upset the Board's assessment of the case thereby implying that a stepwise approach to decision-making (whereby the Board should ask itself if there is a scientific doubt first) was unnecessary. It must be observed that an *ad hoc* determination of conservation objectives does not seem to the author comply with the Directive or the principles of legal certainty or rules of natural justice.

Freedom of Information

An Taoiseach -v- Commissioner for Environmental Information [2010] IEHC 241.This case concerned whether a decision taking at a meeting of the government should be catagorised as "*the proceedings of a public authority*", or as "*internal communications*" of a public authority for the purposes of Art 4(1)(e) of the Directive 2003/4/EC on freedom of access to environmental information . The court (O'Neill J) held that "applying the natural and ordinary meaning of these terms as used in Art 4.2[a] in the Directive, would in my opinion result in a conclusion that Art 4.2[a] did not and was not intended to apply to meetings of the government such as and in so far as these are provided for in our Constitution and laws."

Legal Costs

It is a requirement of Art.10a of the EIA Directive that the review procedure not be "prohibitively expensive". The European Court in Case C–427/07 *Commission v. Ireland* had criticised Ireland for failing to put in place legislative measures to give effect to this aspect of Art.10a. The discretion which the Irish courts have in respect of awarding costs is not sufficient to ensure that costs are not prohibitively expensive nor does a mere discretion provide the degree of specificity, precision and clarity sufficient to satisfy the need for legal certainty which is required when Directives conferring individual rights are transposed. In practice, Irish courts had frequently declined to follow the normal rule of awarding costs to the winning party if the loser had been acting in the public interest but NGOs and persons so acting could never be sure that the couts would do this.

New legal provisions to comply with EU law on legal costs were introduced for EIA cases under the Planning and Development (Amendment) Act, 2010. A new section, s.50B, has been enacted which provides:.

> "(2) Notwithstanding anything contained in Order 99 of the Rules of the Superior Courts and subject to subsections (3) and (4), in proceedings to which this section applies, each party (including any notice party) shall bear its own costs."

There are a number of exceptions to the normal rule that each party bears its own costs. Section 50B (3) provides as follows.

> "(3) The Court may award costs against a party in proceedings to which this section applies if the Court considers it appropriate to do so—
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> (i) because the Court considers that a claim or counterclaim by the party is frivolous or vexatious,
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> (ii) because of the manner in which the party has conducted the proceedings, or
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> (iii) where the party is in contempt of the Court."

Subsection 50B(3) addresses the circumstances in which costs might be awarded *against* a party. Subsection 50B (4) approaches the issue from the other end, and addresses the circumstances in which costs might be awarded in *favour* of a party, as follows.

> "(4) Subsection (2) does not affect the Court's entitlement to award costs in favour of a party in a matter of exceptional public importance and where in the special circumstances of the case it is in the interests of justice to do so."

Simons [1]has pointed out that "Somewhat surprisingly, the two subsections do not dovetail neatly. For example, an applicant who has brought proceedings which raise a matter of "exceptional public importance" would appear to be entitled to an order of costs in his favour: however, on a literal

[1]Simons G., Intensive Course on Planning Law, Trinity College, Dublin , 2010

reading of subsection 50B(3), it may be difficult to identify the party *against* whom such an order for costs is to be made. None of the three criteria set out in subsection 50B (3) touch on the importance of proceedings, and unless a respondent can be shown to have acted improperly, the court might not have jurisdiction to award costs against that party."

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