IRELAND 2008

Yvonne Scannell

Some Major Developments in 2008

Case Law

EIA

All the information required by the EIA Directive does not have to be in the EIS itself.

In *Klohn v An Bord Pleanala* :[2008] IEHC 111 McMahon J. in the High Court held that the EIA Directive required an adequate EIA process which does not require the original EIS itself to fulfil all the requirements as to content in the Directive. He considered that EIA was a process during which information required by the Directive could be assembled from other sources for assessment.

Court postpones judgment on position where ECJ interprets obligations under EIA Directive differently to Irish court

In *Kenny v Trinity College* [2008] IEHC 320, the plaintiff had lost a challenge to the adequacy of an EIS because the High Court, (although it determined that the EIS was adequate) had ruled in an earlier case - *Kenny v An Bord Pleanala* No.1 [2001] IEHC 146 - that a court should not concern itself with the qualitative nature of an EIS because this was a largely matter for the regulatory planning authority and a matter which courts would only examine in very exceptional cases. Costs were awarded against the plaintiff. After the ECJ ruling in *Commission v Ireland* Case C-215/06 (where the ECJ ruled, *inter alia,* at para 104 that an EIS for a windfarm on a bog was inadequate because the EIS did not examine the issue of soil stability) the plaintiff applied to the High Court for an order to nullify the costs orders made against him basically because he considered that *Kenny v An Bord Pleanala* No.1 was wrongly decided in the light of the ECJ ruling. As a result, he argued that the development carried out was unlawful. Clarke J. while inferring that procedural rules might militate against the plaintiff was "mindful of the fact that preventing a party from having access to the courts is a significant step." Consequently he allowed the plaintiff time to "recast his proceedings in a way which makes his claims arguable".

EIA may be carried out jointly by multiple competent authorities. A development consent may consist of two or more consents.

Supreme Court refuses to postpone hearing of a case because the Commission announces that it is taking infringement proceedings.

In *Martin v An Bord Pleanala* [2007] I.E.S.C. 23 ([2007] 2 I.L.R.M. 401) one of the main grounds for a claim that planning permission for an incinerator was invalid was that the Planning Board had failed to carry out what the plaintiff stated should be an integrated EIA which he alleged was required by the Directive. In that case an assessment of the land use aspects of a proposed incineration project was carried out by the Planning Appeals Board and an assessment of the emissions from the activity (which is a waste activity) was carried out by the Environmental Protection Agency. The Supreme Court held that the "development consent" for the purposes of the EIA directive could consist of the decisions of more than one competent authority. The words of Article 2 para 3 of the Directive itself envisaged that there could be more than one competent authority. The court refused to refer the matter to the ECJ for a preliminary ruling. The European Commission announced by Press Release in October 2007 that it was taking Article 226 infringement proceedings against Ireland for failing to transpose the EIA Directive properly. This infringement process had commenced in 2005. The Commission stated that action was being taken "*because of weaknesses in Irish legislation splitting decision making between Irish planning authorities and Ireland's Environmental Protection Agency, there are risks that outcomes required by the [EIA Directive*] will *not always be achieved."* Because of this, two sets of objectors to another incinerator project promoted by the same developer asked the High Court to postpone the hearings in their cases pending the outcome of the ECJ proceedings. They argued that an adjournment was required in order to avoid a conflict between Irish and EC law in deference to the primacy of Community law and the Court of Justice as the ultimate authority on the interpretation of Community law. The High Court refused to do this and they appealed that decision to the Supreme Court. In *O'Leary v An Bord Pleanala and others and Ringaskiddy & District Residents'Association v the Environmental Protection Agency and others* [2008] IESC 55, the Supreme Court upheld the High Court decision and refused to adjourn the cases because (i) it had no notice of the legal basis of the Commission's proceedings, (ii) the proceedings had not actually been commenced by the Commission although infringement action had been initiated as long ago as 2005 and nobody knew when they would be commenced and (iii) it was merely speculative that there would be a conflict between the decisions of the Irish courts and the ECJ. While noting that there could be other reasons for its decision, it considered that the interests of justice towards the respondent and notice parties (the developer) required that an adjournment be denied.

Costs

The discretion of the Irish courts in the matter of awarding costs ensures compliance with Directive 2003/35/EC but provision should be made for making better arrangements.

In Peter Sweetman v An Bord Pleanala, Ireland, the Attorney General and Clare County Council Clarke J, took a more *communitaire* view than other judges of the meaning of "costs" for the purposes of Directive 2003/35/EC. He held the costs referred to meant "costs" as conventionally understood (i.e. all the costs of proceedings including lawyers' fees, not mere court costs) but held that the requirements as to costs in the Aarhus Convention and in Article 9(3) of Directive 2003/35/EC are not infringed because of the discretion which Irish courts have in relation to the award of reasonable costs. Some time later *in Rosborough and Another v Cork City Council* [2008] IEHC 94 where the validity of waste charges was unsuccessfully contested, Clarke J. observed: "it is regrettable that no adequate system is in place to consider making provision, in appropriate cases, for the costs of parties who may find themselves caught up in litigation which has a significant degree of public importance but which is, so far as that party is concerned, of only a very small scale indeed." Clarke J.s again expressed his concern about costs in *Kenny v Trinity College* [2008] IEHC 320 where he clarified what he meant in *Sweetman* and stated that nothing that he had said in *Sweetman* should be interpreted to imply that there may not be obligations on the court under Directive 2003/35/EC, in an appropriate case, to limit (whether prospectively or at the time when costs are being considered) the amount of costs which might be awarded. In substance, therefore, he said that the decision in *Sweetman*, on this point, amounted to a finding that reasonable costs can be awarded in the manner normally adopted in Ireland, that is to say costs following the event (i.e. the losing party must pay taxed costs) in most cases. Clarke J. considered that this would be compatible with Directive 2003/35/EC. Advocate General Kokott appeared to considered likewise in Commissin v Ireland although he considered that there should be an obligation on the courts (not a mere discretion) to ensure that costs are not prohibitively expensive. It is difficult to understand how the AG came to this conclusion. In most Irish cases where non-transostion of a Directive is alleged (and this is a common argument in most environmental cases), an applicant for judicial review will be fighting a lone battele against at least three parties i.e. the regulatory authority who granted a licence/planning permission, the State and the developer, all parties who are routinely separately represented and all of whom have access to the resources to pay lawyers.

A *sufficient interest?*

Most environmental challenges to environmental decisions are by way of judicial review under section 50 of the Planning and Development Act 2000. This requires an applicant for judicial review to have a *substantial* interest in

the matter and substantial grounds before he or she will be given leave to apply for judicial review. (Formerly, applicants only had to show a "sufficient" interest in the matter. This is still the position for judicial reviews under most other Environmental legislation.). Aarhus and Directive 2003/35/EC speak of applicants with a *sufficient* interest having a right to challenge decisions. The Supreme Court, in *Harding v. Cork County Council* [2008] I.E.S.C. 27, considered the criteria by reference to which a person may be said to have a "substantial interest" in the context of the legislation prior to 2006 amendments to the Planning and Development Act 2000. The court decided that in order to prove a substantial interest under section 50, an applicant must prove a peculiar and personal interest of significant weight which is affected by or connected with the development in question. The EC Commission considered that this test was incompatible with Directive 2003/35/EC and brought infringement proceedings against Ireland for not transposing the Directive properly. Advocate General Kokott in *Commission v Ireland*[1] has advised the ECJ that the Directive leaves it to the Member States to define 'sufficient interest', without laying down any mandatory minimum standard and he appears to consider that the test adopted in the Supreme Court complies with the Directive.

Access to Information

Even cabinet documents must be made available

In a recent decision[2] the Information Commissioner ruled that information concerning Cabinet discussions on Ireland's greenhouse gas emissions should be made available pursuant to the provisions of the EU Directive on Access to Environmental Information[3] ('Directive 2003/04' and that restriction on the provision of information on the grounds of 'cabinet confidentiality' in the Irish Regulations conflicted with Directive 2003/04.

Legislation

The Environmental Liability Bill 2008, when enacted, will together with the European Communities (Environmental Liability) Regulations 2008 give effect to Directive 2004/35/EC on environmental liability.

The Sea Pollution (Control of Anti- Fouling Systems on Ships Regulations 2008 give effect to the International Convention on the Control of Harmful Anti-Fouling Systems on Ships 2001.

The Waste Management Act (Certification of Unlicensed Waste Disposal and Recovery Activities) Regulations 2008 require historic unlicensed local authority waste disposal sites operated between 1977 and 1996 to be registered with local authorities who will carry out a screening risk assessment and determine what if any remedial measures are required. This

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1 Case C- 427/07, 15 January 2009.

2 Decision CEI/07/0005, Mr. Garry Fitzgerald B.L and The Department of An Taoiseach.

3 Directive 2003/04/EC [2003] O.J. L 41/26.

determination will be assessed by the EPA which will assess the adequacy of the measures proposed and may specify additional measures. The local authority must obtain a certificate of authorisation from the EPA and complies with its requirements. The regulations are relatively undemanding probably because the activities concerned are public sector activities. They were passed partly to comply with ECJ rulings and also to transpose Directive 2006/12 on waste and Directive 80/68/EC on dangerous substances discharged to groundwaters.

The Chemicals Act 2008 provides for the implementation and enforcement of certain EU Regulations and Directives. These include the Reach and Detergents Regulations and the Regulation on the Import and Export of Dangerous Chemicals and the Seveso Directive.