THE HIGH COURT
JUDICIAL REVIEW

[2021] IEHC 783
[2020 No. 480 JR]

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 50, 50A AND 50B OF THE PLANNING AND DEVELOPMENT ACT 2000
AND IN THE MATTER OF AN APPLICATION

BETWEEN

PADDY MASSEY

APPLICANT

AND

AN BORD PLEANÁLA, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

RWE RENEWABLES IRELAND LIMITED (BY ORDER)

NOTICE PARTY

JUDGMENT of Humphreys J. delivered on Tuesday the 21st day of December, 2021

1. In early 2016 the notice party began land acquisition and work on assessment of environmental and ecological feasibility and on constraints assessment for a proposed windfarm in West Waterford and East Cork.

2. By letter dated 25th May, 2018, McCarthy Keville O'Sullivan, on behalf of the developer, wrote to An Bord Pleanála requesting a determination as to the strategic infrastructure development (SID) status of a proposed 25-turbine windfarm.

3. Pre-planning meetings took place on 20th August, 2018 and on 11th June, 2019.

4. On 25th March, 2020, the notice party's advisers wrote to the board seeking a conclusion of the SID status process and referred to a reduced number of turbines of 17 (11 in Waterford and 6 in Cork).

5. On 15th April, 2020, the board's inspector reported, recommending that the development be classed as having SID status. At para. 3.1 she said that the proposed development was "17 no. wind turbines … of 150 metres in height producing in excess of 50MW of power with the Cork cluster comprising of 6 turbines and the Waterford cluster comprising of 11 turbines". One could quibble with whether the inspector should have said "output" of power rather than "producing" power, but the statement of grounds here does not specifically challenge this part of the inspector's report and indeed para. 3.1 does not seem to be explicitly referred to at all in the amended statement of grounds.

6. I don't think that the generic pleas in the amended statement are sufficiently specific to allow the decision to be quashed merely on the basis of arguably loose wording in this single paragraph of the inspector's report, especially having regard to the fact that she referred correctly to the statutory term of "output" at para. 9.1.1 of the report.

7. On 15th May, 2020, the board directed that the application should be given SID status, and that decision was notified on 28th May, 2020.

8. McDonald J. granted leave for the present proceedings, which seek *certiorari* of that decision, on 23rd July, 2020.

9. As will be clear from the foregoing, the proceedings challenge a preliminary decision and hence are in principle premature, especially where the substantive decision has yet to actually be made. Had the opposing parties sought the dismissal of the proceedings without prejudice to any challenge to the final decision, I would almost certainly have made that order. Not only do they not seek that, but the notice party actively requested that this challenge be determined. So on that basis I am doing so, but obviously that is not a precedent for hearing proceedings that would otherwise be premature, and even consent of the parties can hardly be determinative given the pressure on the court system.

10. I should note at this juncture that on 29th November, 2021, the relief against the State (which essentially related to non-transposition and statutory validity by reference to the requirements for public participation in the preliminary jurisdictional process) was adjourned to be dealt with at a later stage if necessary.

The legislation

11. Section 37A of the Planning and Development Act 2000 allows the board to decide that a given development is SID. If so, an application for permission is to be made directly to the board and not to a council. The relevant heading of SID development is the 11th indent of the 7th schedule of the 2000 Act as substituted by s. 78(a) of the Planning and Development (Amendment) Act 2010, which encompasses "[a]n installation for the harnessing of wind power for energy production (a wind farm) with more than 25 turbines or having a total output greater than 50 megawatts."

Is the development an installation?

12. The applicant contends that this development is not "an installation" because it is spread over two separate locations. There are two important initial points. Firstly, the notice party's affidavits, particularly that of Brendan Heneghan, Chartered Mechanical Engineer, and Jimmy Green, Planning Consultant, were not subjected to cross-examination on behalf of the applicant, who obviously bears the burden of proof. Secondly, the 2000 Act explicitly envisages that an SID application could straddle more than one local authority as set out expressly in s. 37G(10).

13. "Install" is defined in the *Shorter Oxford English Dictionary* (3rd ed., Oxford, Oxford University Press, 1944, 1973), vol. 1, p. 1084 as including "[t]o place (an apparatus, a system of lighting, heating, or the like) in position for service or use", giving a date of 1867 for that meaning. That does not support an unduly inflexible interpretation. The question of whether something is an installation is not simply one of whether it is at a single place; one can also ask whether it is part of a single system. Constituting an installation thus requires either a meaningful physical connection that makes the two parts of the development function as a single system, or alternatively close physical proximity. Even assuming that the locations here are insufficiently proximate, there is a physical connection between the two parts of the development. The two sites are 1.66 km apart at their closest, and a cable of a length of approximately 2.12 km connects the two clusters of the

development. All power generated from the development will be brought back to the Waterford part of the project to a single substation for export to the national grid. One cannot say that it has been established that this is a completely artificial connection or some sort of ruse to avoid the application of normal planning procedures. Rather, this does seem to be a meaningful physical connection making the entire project a single system.

14. I should clarify that a unity of management processes or other abstract or non-physical connections (like shared personnel or contractors) would most certainly not make two developments into a single installation if they would not otherwise be so. And indeed if the only physical connection between the two parts of the project involved two separate substations which each exported power to the national grid (thus meaning that the only physical connection was *via* the national grid itself), that would not be a meaningful connection because on that basis nearly any structure could be part of the same installation as any other structure. But here there is a meaningful physical connection and, in the circumstances, a single system and a single installation.

Does the development have a total output greater than 50 megawatts?

15. For the purpose of answering whether the development meets the "output greater than 50 megawatts" test, it may be helpful to attempt to highlight the distinction between energy and power. Energy is the capacity for doing work, whereas power is the rate at which energy is transferred. These two concepts involve two different units of measurement. A megawatt hour is a unit of energy equal to the work done by a power of 1 megawatt in 1 hour. Whereas a megawatt (MW) is a unit of power equal to 1 million watts. A number of definitions of a "watt" were canvassed, although for consistency I will refer to that in the *Shorter Oxford English Dictionary*, vol. 2, p. 2515: "1882. [f[rom] name of James *Watt* (1736-1819), the inventor of the modern steam engine.] Physics. A unit of activity or power (used chiefly with ref. to electricity), corresponding to the rate of work represented by a current of one ampère under a pressure of one volt."

16. The affidavit of Mr. Heneghan states at para. 11 that it would be understood in the industry that the concept of "a total output greater than 50 megawatts" would mean the "total output of power" and not "some average energy output value over an arbitrary time period." At para. 12 he says that "invariably" in the industry output is calculated by reference to "rated power output" of each turbine as set by the manufacturer multiplied by the number of turbines (impliedly assuming that the same type of turbines arise in the development concerned).

17. There are three essential problems with the applicant's interpretation that one would have to have regard to the actual likely energy generation in practice:

    (i). The applicant's complaint that the statutory test was not met here inherently involves looking at the actual energy likely to be generated by the turbines as opposed to their power capacity. That subtle switch from power to energy contradicts the language of the statute, which expresses itself in terms of units of power (MW), not units of energy.

(ii). The applicant's test involves an extremely complicated exercise to decide whether something is SID. That contradicts the really simple process that is implied by the first limb of the test, which is whether the windfarm has more than 25 turbines. It would not make a lot of sense in the context of such a simple test for that first limb to read in a meaning to the second limb of the indent which would involve a highly convoluted test.

(iii). Mr. Heneghan avers that the simpler meaning of rated power output would be clearly understood in the industry. That is an evidential proposition which has not been challenged by cross-examination or otherwise displaced.

18. Having regard to the foregoing, the 17 turbines here with a rated power output of at least 3 MW (which was the minimum specified by the developer prior to the board's decision) would have a total power output of at least 51 MW, exceeding the 50 MW threshold for SID. The board's decision is therefore not invalid under this heading.

Did the applicant submit sufficient information?

19. Whether information is sufficient depends on the purpose for which it is required. Information that may be sufficient for a preliminary decision might not be sufficient for a final decision. If what is being supplied is only for the purposes of a preliminary jurisdictional assessment, the information is sufficient if it demonstrates that the jurisdiction has been met, even if other matters are not addressed. Having regard to the foregoing, it is clear that the information supplied was adequate. Supplying details of the connection between the two sites and information regarding the rated power output of the turbines and the number of turbines was sufficient for the purposes of the 11th indent to the 7th schedule of the 2000 Act. That is consistent with the finding of Haughton J. in *Callaghan v. An Bord Pleanála (No. 2)* (Uncirculated, *ex tempore*, High Court, 28th March, 2017).

20. Insofar as it is argued that full particulars of the turbines were not submitted, the board can only go on what it has at the pre-application stage. If the application eventually made is different to such an extent that the statutory criteria are not met at that point, the board would have to reject the application. Admittedly, Haughton J. left this open in *Callaghan (No. 2),* but it seems to me to be an inescapable conclusion that the board could not grant an application where the jurisdictional prerequisites to consider it were not met, so it would simply have to reject the application on grounds of lack of such jurisdiction.

21. As far as sufficient information is concerned, if an applicant said that it would have "approximately" 17 turbines, with "approximately" 3MW rated power each, that would not be sufficient. If on the other hand it said that it had "at least" 17 turbines with "at least" 3MW rated power each, that *would* be sufficient. It is not necessary at the stage of the jurisdictional determination for final details (such as the make and model of turbines to be supplied) as long as it is clear that what is involved would be at least at the level that would reach the threshold. The letter of 25th March, 2020 positively states that the output would be in excess of 50MW. In addition, the record of the first consultation with the developer on 30th August, 2018 notes that the turbine in question "will be a 3-4 megawatt machine."

That is "sufficient information" given the limited matter the board has to consider at the s. 37A jurisdictional stage.

Did the board correctly apply the test to the information supplied?

22. Having regard to the foregoing it is also clear that the board correctly applied the test. It is not simply a question of the criteria being met "because the board says so", as the applicant incorrectly submits. The board had a clear basis in the developer's material to so find. The suggestion that the board did not ask itself the right question is based on a misunderstanding.

23. Insofar as complaint is now made that the board did not explicitly ask what is the test for an installation, and that consequently we are only having that discussion at the trial of the action, that illustrates a recurrent misconception on the part of applicants. If a decision is otherwise legally valid, it does not become invalid because the decision-maker did not write an essay or enter into a jurisprudential word-by-word analysis of the relevant statutory provisions. Of course a decision-maker has to consider the application and to do so in the terms and context of the legislation. But it doesn't have to get into jurisprudential depths, reach for the Constitution, or try to define every word. Inherent in the board's decision is that it considered that the development was "an installation", and, as it happens, I think that is lawful. There wasn't anything at that point in the process making installation-or-not an issue, so it wasn't necessary for the board to have discussed it explicitly.

24. For good measure, the applicant did not evidentially explore the board's consideration of the test, for example by seeking directions from the court requiring the board to put on affidavit what its understanding of the test was as of the date on which it made its decision. An applicant cannot be completely passive in judicial review, and, in the absence of such evidential exploration, one cannot hold there to have been some infirmity in the decision-making process under that heading.

25. Ultimately the point now made is that the board failed to anticipate an objection that the applicant was later to make, and failed to pre-emptively address such a point expressly. But the board is not at fault for failing to engage in "inspired legal clairvoyance", to adopt the (if I may respectfully say so) elegant and quotable phrase of O'Donnell J. in his seminal judgment in *The People (D.P.P.) v. J.C*. [2015] IESC 31, 2017 1 I.R. 417 at para. 53.

26. Complaint is also now made that speculation is required as to how the inspector arrived at the figure of over 50MW. But again, the applicant has not done anything to explore that evidentially. In the absence of anything else to show how the figure was arrived at, one can reasonably assume that the inspector's conclusion is based on the information submitted. I don't see how the decision can be invalid for not expressly setting out how the figure was determined by the inspector, especially where the applicant has adopted a passive approach and has not sought information from the board in that regard or asked the court to direct a full account of the decision-making process.

27. Insofar as a reasons argument is launched, based on *Connelly v. An Bord Pleanála* [2018] IESC 31, [2018] 2 I.L.R.M. 453, one has to have regard to the essentially *ex parte* nature

of the application for a determination that the development was SID. It is natural for reasons to be read in conjunction with the material submitted by the developer in such a context. While the applicant calls this "abdication", "box-ticking" or "rubber stamping", that is over-dramatic. Assuming that the material doesn't demonstrate any inadequacy on its face as seen by a reasonable expert, the board is entitled to accept the developer's submission if all other things are equal. Subject to any EU law requirement to the contrary, which was not specifically argued here, the court is entitled to read the developer's submission so accepted as supplementing any reasons that are expressly articulated.

Order

28. Accordingly, the order will be:

(i). that the proceedings are dismissed save as to the extent that they are dependent on the case against the State; and

(ii). that the case against the State will remain adjourned generally with liberty to re-enter; and in that regard, it may be more appropriate to deal with that case if it becomes necessary alongside any proceedings arising out of the substantive planning decision in due course.