PYLONS, HABITATS AND 'BEST PRACTICE CONSTRUCTION METHODS'

In a recent preliminary judgment of Mr. Justice Hedigan in *Rossmore and Killross v An Bord Pleanála, the State and Eirgrid* (28 August 2014) the Court considered, among other things, the vexed question of whether mitigation should be considered at the screening stage for a proposed project.

Eirgrid had applied to the Board for a section 5 declaration that the construction of new (slightly higher) pylons to replace existing pylons along the same route corridor of a 110kV electricity line, the replacement of the line itself, and the installation of a temporary line while the works were being carried on, are exempted development.

Appropriate Assessment (AA)

The Board screened out the need for an AA and determined that the proposed works were exempted development. The Board concluded that there was no reason to suggest that the works proposed would have any significant effect on the nearby Rye Water Valley SAC, in view of its qualifying interests. In this context, the Board overruled its inspector, who had recommended that an AA should be carried out, due to residual doubts and a perceived lack of detail in the evidence before the Board.

Eirgrid had submitted a screening report which identified a potential indirect impact on water quality within the SAC, but concluded that such impact was unlikely to occur due to the localised and restricted nature of the works and on the basis that '*best practice construction methods*' would be employed. The applicants had submitted a report that argued that indirect impacts could not be ruled out.

The applicants in the judicial review proceedings challenged the Board's decision on the grounds (inter alia) that the Board had erred in law because it took proposed mitigation into account in the screening assessment.

Assessing Mitigation

The Court upheld the Board's decision. It held that the implementation of best practice construction methods should be considered an intrinsic part of a project. The Court held that '*where the mitigating factor in question is an intrinsic part of the work to be carried out it makes no sense that [the Board should not take it into account]*'.

Interestingly, the Court adopted reasoning from an English case from 2008, *Harte District*

Council –v- Secretary of State for Communities and Local Government, which contains very strong statements in favour of considering certain mitigation measures as inherent in the project and therefore part of the screening process.

In the *Harte* case, Mr Justice O'Sullivan held that a competent authority "*is not considering the likely effect of some hypothetical project in the abstract. The exercise is a practical one which requires the competent authority to consider the likely effect of the particular project for which permission is being sought. If certain features (to use a neutral term) have been incorporated into that project, there is no sensible reason why those features should be ignored at the initial, screening, stage merely because they have been incorporated into the project in order to avoid, or mitigate, any likely effect on the SPA".*

In that case, Mr Justice O'Sullivan found no support from the European case law for the statement in the UK AA Guidance that a screening assessment should be carried out in the absence of any consideration of mitigation.

Certainty

With regard to the issue of certainty of the proposed mitigation, Mr Justice O'Sullivan concluded that, "*if the competent authority does not agree with the proponents of the project as to the likely effectiveness of any mitigation measure incorporated into the project, it would not have been able to exclude the risk, on the basis of objective information, that the project will have a significant effect on the SPA, and therefore will require that an appropriate assessment be carried out."*

According to Mr Justice O'Sullivan, if a competent authority is in any doubt, it can ask the applicant for further information, and if it is still not satisfied, it should require an appropriate assessment. The Court went on to say "*as a matter of common sense, anything which encourages the proponents of plans and projects to incorporate mitigation measures at the earliest possible stage in the evolution of their plan or project is surely to be encouraged. What would be the point, from the proponents point of view, of going to the time, trouble and expense of devising specific mitigation measures designed to avoid or mitigate any effect on an SPA and incorporating those proposals into the project, if the competent authority was then required to ignore them when considering whether an appropriate assessment was necessary?"*

'Old School'

There are a number of notable features to the judgment of Mr Justice Hedigan in the *Rossmore and Killross Properties* case. Firstly, the Court adopted an 'old school' approach to judicial review, declining to overturn the Board's decision once it was satisfied that the Board had

evidence before it on which to base its decision.

Secondly, the Court appears to have had little regard to the more stringent requirements laid down by the Courts of Justice of the European Union in the *Sweetman v An Bord Pleanála* (Galway By-pass) case and the more recent *Kelly v An Bord Pleanála* case in the High Court.

Thirdly, the Court freely adopted the reasoning of Mr Justice O'Sullivan in the English case of *Harte* v *Secretary of State*, thereby bringing it within the growing body of relevant Habitats case law in Ireland.

It will be interesting to see how, or whether, the case will influence future screening decisions by the Board and other competent authorities, particularly where there are potential direct effects on a Natura 2000 site. (Both the *Rossmore and Killross* and the *Harte* cases involved potential indirect effects of projects outside of a Natura 2000 site).

Or indeed whether other developers, who are not state undertakings, will get the same benefit of the doubt afforded to Eirgrid in this case as regards implementation of '*best practice construction methods*'.

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