THE HIGH COURT

COMMERCIAL

[2014 No. 647 J.R.]

[2014 No. 170 COM]

BETWEEN

JOHN CALLAGHAN

APPLICANT

AND

AN BORD PLEANÁLA, IRELAND AND ATTORNEY GENERAL

RESPONDENTS

AND

ELEMENT POWER IRELAND LIMITED, ELEMENT POWER IRELAND AND NORTH MEATH WIND FARM LIMITED

NOTICE PARTIES

JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 20th day of February, 2015

1. This is an application for discovery and a protective costs order. Very extensive discovery is sought against the respondents and notice parties in these judicial review proceedings. The notice parties are engaged in the development of wind farms and wish to construct 46 turbines on three clusters of lands at Emlagh near Kells, Co. Meath. By letter dated 30th May, 2014, the first named notice party initiated the pre-application consultation procedure described under s. 37B of the Planning and Development Act 2000, as amended, in relation to the proposed wind farm project.

2. Section 37B(1) of the Act provides that, in respect of certain classes of development which may comprise *"Strategic Infrastructure Development"* (*"SID"*):-

> *"(1) A person who proposes to apply for permission for any development specified in the Seventh Schedule shall, before making the application,*

enter into consultations with the Board in relation to the proposed development." [Emphasis added]

3. Following the conclusion of the pre-application consultations entered into between the first named notice party and the Board, at its meeting held on 11th September, 2014, the Board considered the report of its Inspector, together with the documents and submissions on file. On 12th September, 2014, the Board served notice that it was *"of the opinion that the proposed development falls within the scope of paragraphs 37A(2)(a) and (b) of the Act. Accordingly, the Board has decided that the proposed development would be strategic infrastructure within the meaning of s. 37A of the Planning and Development Act 2000, as amended".*

4. As a result of that designation by the Board, it followed that any application for permission for the proposed development must be made directly to the Board under s. 37E of the Act rather than to the local Planning Authority.

5. The decision which is impugned by the applicant in these proceedings is that decision made by the Board that the proposed Emlagh wind farm development is a Strategic Infrastructure Development within the meaning of section 37A.

6. Following the SID designation, an application for planning permission was made to the Board by North Meath Wind Farm Limited (the third named notice party) on 6th October, 2014. The first notice party is the majority shareholder in the third notice party. The applicant has made no submissions or observation on that application since it was lodged on 6th October, 2014. A decision on the application is due in April 2015.

Discovery in Judicial Review

7. In *Sheehy v. Ireland* (Unreported, High Court, 30th July, 2002), Kelly J. said that discovery in judicial review proceedings *"ought to be the exception rather than the rule"*. A party in judicial review proceedings will not be permitted to raise unsubstantiated assertions and then seek to find evidence through the discovery process. This type of fishing expedition is something the courts in this jurisdiction have always sought to discourage. See *K.A. v. Minister for Justice & Ors* [2003] 2 I.R. 93 and *Carlow Kilkenny Radio Limited v. B.C.I.* [2003] 3 I.R. 528. In *Fitzwilton v. Judge Alan Mahon* [2006] IEHC 48, Laffoy J. said:-

> *"primarily by reason of the nature of the process, the relief afforded and the issues which arise in judicial review proceedings, the practical application of the principles may result in discovery being less frequently ordered in judicial review proceedings than in other civil proceedings."*

8. In *Evans v. University College Cork* [2010] IEHC 420 at para. 6, Hogan J. stated:-

> *"In addition, it should be noted that as judicial review is normally concerned with procedural matters rather than substance, this will inevitably limit the range of documents which are both relevant and necessary in judicial review matters."*

9. This legal position is accepted by all parties to the application and as the starting point from which the application for discovery should be approached.

10. Even the most cursory consideration of the discovery request made by the applicant shows that it is extraordinarily extensive in its terms and will impose a very significant burden on a party obliged to comply with it. It is accepted by the respondents and the notice parties that if there is a clear factual dispute on the

affidavits which would have to be resolved in order to properly adjudicate on the application for judicial review, then discovery may be necessary. It is also accepted that if a document which ought to have been before the decision maker was not before it or that a document which ought not to have been before the decision maker was before it that discovery might be necessary. The respondents and notice parties argue that neither situation arose in this case.

11. It is essential to look at the application for discovery in the light of the decision being impugned in these judicial review proceedings. There has been no development consent or no permission to develop granted by the Board. All that had happened is that on 12th September, 2014, the Board made a declaration that the proposed development, if carried out, would fall within s. 37A(2)(a) and (b) or in other words that it would fall within the ambit of *"strategic infrastructure"*.

Discovery sought against the Notice Parties

Category 1: Landowners/Stakeholders Agreement and Related Matters

12. In this category the applicant seeks:-

(i) all or any agreements and/or contracts entered into by the Notice Parties, their servants or agents with landowners/stakeholders/third parties over whose lands it is proposed to construct this development together with any landowner/stakeholder/third party consent and/or *"near neighbour"* agreement signed with such parties; and

(ii) brochures and/or marketing materials and/or annual cash flow projections produced by the Notice Parties, their servants or agents for the purposes of encouraging landowners and respective stakeholders to sign contracts.

This request is based on a bald assertion that the first notice party furnished inaccurate information to the Board as to the strategic economic importance of the proposed development. No evidence has been produced by the applicant in support of that assertion insofar as subcategory (i) above is concerned. With regard to subcategory (ii), the applicant seeks this information in order to test the veracity of the alleged assertions of the Notice Parties that *"the project would lead to substantial economic advantage and significant revenue to landowners/stakeholders"*.

I refuse this category of discovery on several bases. In the first place the discovery sought is irrelevant having regard to the issues in the judicial review and secondly, it amounts to a pure fishing exercise in order to try and ascertain if there is evidence to support a mere assertion on the part of the applicant and to test the veracity of assertions by the notice party which are not disputed by any factual evidence in the applicant's affidavit.

Category 2: Purported Project Splitting

13. The allegation of *"project splitting"* is not supported by any evidence produced by the applicant. In any event, it is irrelevant to the issue that the court has to decide in the judicial review application and the material sought in this category amounts to a fishing exercise with a view to challenging material set out in the affidavits of Mr. Kevin O'Donovan when no evidence to the contrary has been offered by the applicant who has merely made assertions. I refuse that category.

Category 3: Connection to Grid

14. These categories of documents are sought to support mere allegations not any conflict of fact and relate to the applicant's allegation of project splitting. It amounts to an impermissible attempt to go behind affidavits sworn by Mr. Kevin O'Donovan in order to test the veracity of statements made by him in the absence of any contrary evidence produced by the applicant. It also requires the notice parties to discover sensitive commercial information which is irrelevant and unnecessary. I refuse this category.

Category 4: *"Green Wire"* Export Project

15. In this category, the applicant seeks an extensive amount of documentation across twelve subcategories based on a mere assertion that the applicant believes that renewable energy to be produced by the Emlagh Wind Farm will be used for export and not for connection to the Irish National Grid notwithstanding the fact that Mr. Kevin O'Donovan has sworn on affidavit that the purpose was for connection to the National Grid and the documentation exhibited in the affidavit supports his assertion. The applicant has adduced no evidence to the contrary but a mere assertion. The documents are not relevant to the issues in the judicial review nor are they necessary to resolve the issues arising therein. I refuse this category.

Category 5: Companies Documentation Re Notice Parties and other Entities

16. The final category of documentation sought comprises three subcategories, each of which are sought against seven different entities. Some of the entities identified are not party to the proceedings. The subcategories sought as against the notice parties are as follows:-

(i) copy memoranda and articles of association of each;

(ii) certificates of incorporation; and

(iii) details of shareholders and/or shareholding agreements between the said companies.

Subcategories (i) and (ii) are readily available from the Companies Registration Office (CRO). In any event, the relevance of the documents having regard to the issues arising in the judicial review is not apparent. So far as the other matters as set out in subcategory (iii) were concerned they are not relevant to the issues in the judicial review. I refuse this category of discovery.

Discovery sought against the Board

17. Eight categories of discovery are sought against the Board. The discovery sought is extremely wide-ranging. Again this request has to be considered in the light of the decision challenged which was a mere designation by the Board that the proposed development, if carried out, would be *"strategic infrastructure"*. This was a limited conclusion which determines the way in which the application should proceed. At this stage, no decision has been made by the Board as to whether or not to grant permission. The Board has already deposed to what documents were before it when it made its decision. The discovery sought seeks far more documentation than was, in fact, before the Board when it made its determination on the pre-application consultation procedure provided for in s. 37B of the Act.

18. The applicant raises no factual dispute on affidavit such as would entitle him to the type of discovery he seeks against the Board. What he is seeking is material in order to make a case based on assertion and not on any evidence as set out on affidavit. Some of the documents that he seeks are publicly available and it would be quite unnecessary for the Board to make discovery of those documents. So far as any other documents are concerned, the applicant has not shown that they are necessary to resolve any factual issues in dispute or that they are necessary for the resolution of the

judicial review which simply relates to whether or not the decision of the Board on the pre-application consultation process leading to a determination that the proposed development comprises strategic infrastructure can be impugned.

19. Mr Chris Clarke, the secretary to the Board has sworn an affidavit in which he states that the applicant has been furnished with the file containing the body of papers that were before the Board when it took its decision. The applicant has also been furbished with information pursuant to the 2007 Regulations containing internal administrative emails which are not placed on the file. The file is available for public inspection. A court will have to determine whether, based on the information the Board had before it, the decision which it made on the pre-application consultation can be impugned. The further documents sought by the applicant by way of discovery are not necessary or relevant and I refuse the application in respect of each category. As is the case in the application for discovery against the notice parties, I am satisfied that the discovery sought is largely a fishing exercise based on mere assertions by the applicant which are not supported by any fact as set out on affidavit.

Protective Costs Issue

20. The applicant seeks an order that s. 50B of the Planning and Development Act 2000 (as amended), and/or the Aarhus Convention and/or Council Directive 2011/92/EU applies to these judicial review proceedings and/or that the aforesaid provisions relating to costs protection for an applicant in cases relating to the protection of the environment applies to interlocutory applications brought in these proceedings including applications for discovery.

21. The judgment of Charleton J. in *J.C. Savage Supermarket Limited & Des Becton v. An Bord Pleanála* [2011] IEHC 488, sets out the legislative history of s. 50B and the extent of its application. I accept the analysis of Charleton J. in that case.

I am satisfied that s. 50B does not apply to these proceedings. The decision which has been challenged does not meet any of the criteria in that section. The decision was simply a determination of the Board under special provisions introduced by the Planning and Development (Strategic Infrastructure) Act 2006 and amounted to no more than a determination by the Board that a proposed development referred to therein, if carried out, would fall within s. 37A(2)(a) and (b) that is to say it was *"strategic infrastructure"* [Emphasis added]. Nothing the Board has determined had anything to do with EIA. The EIA Directive and the Public Participation Provisions contained therein arise and relate only to the development consent process which is outside the scope of the judicial review. The various bases on which a protective costs order are sought are all designed to ensure that no unnecessary impediment by way of costs is put in the way of parties who seek to challenge decisions to grant development consent. Since this judicial review concerns a preliminary designation of the nature of the proposed development as SID neither the Aarhus Convention nor the Council Directive 2011/92/EU applies to this application. I refuse the application for a protective costs order.

Approved 20-02-17