Group Briefing

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# Legal Update: Environmental and Planning Challenges for the Wind Energy Sector

A number of recent cases in the Irish and European Courts have potentially major implications for developers of wind farm projects. This legal update provides a brief summary of these decisions, highlights tripwires arising from them that developers should be aware of at both the pre- and post-planning application stages, and recommends actions to avoid them.

## PRE-PLANNING APPLICATION STAGE

The pre-planning application stage of a project is the crucial point in time when a developer can ensure that the documentation and information it places before the relevant planning authority is legally and technically complete and accurate. This will minimise the risk of delay to a project through requests for further information, appeals to An Bord Pleanála (the "Board") and the, now almost inevitable, High Court judicial review challenge to a planning permission, when granted. For example, the time spent on ensuring the correct habitat surveys have been undertaken (including carrying out the correct number of surveys during the appropriate seasonal timeframe) will reduce the risk of a successful judicial review challenge. Judicial review challenges, even if successfully defended, can significantly delay a project. Judicial review challenges which cannot be successfully defended mean that the relevant planning permission is quashed. At best, the quashed decision may be remitted to the Board for reconsideration. However this adds at least another 18 weeks to the process before a fresh decision is made.

Recently, three particular topics have given rise to litigation in the wind energy sector:

» cumulative impacts/project splitting;

» the Habitats Directive and mitigation measures v compensatory measures; and

» ownership/land take.

We elaborate on each one, in turn, below:

### *Cumulative Impacts/Project Splitting*

The decision of *O Grianna v An Bord Pleanála*[1] (12 December 2014) requires a significant departure from the standard industry practice of dealing with a connection to the grid as a separate matter subsequent to obtaining a grant of planning permission for a wind farm development.

Developers of wind farm projects must now assess all works which will form part of the overall project at planning application stage. This includes the grid connection, the substation, haul routes and any borrow pits. In *O Grianna*, the High Court quashed a planning permission granted by the Board for a 6 turbine wind farm in Co. Cork because the planning application had not included the works required to connect to the grid. This meant that the Board had not assessed the cumulative environmental impacts of these works before granting permission. This was because, as the Board and its inspector accepted, it was not possible to know (and therefore assess) the line of the grid connection, or whether it was above or underground, as these details had not yet been fully developed by the ESB networks, a third party who was not the developer.

The Court, while acknowledging that, until now, it has been standard industry practice to address the grid connection works after permission had been granted for the relevant wind farm development, held that this practice was effectively "project splitting", which was in breach of the Environmental Impact Assessment Directive (the "EIA Directive"). The Court also held that, in this case, applying for planning permission in circumstances where ESB had not yet determined designs in respect of grid connection was "premature".

In light of the decision in *O Grianna*, an applicant seeking planning permission, should ensure that all works that will form part of the overall project are included in its planning application to avoid having its planning permission quashed for falling foul of the requirements of the EIA Directive to assess the "whole project".

1 [2014] IEHC 632

***Habitats Directive and Mitigation Measures v Compensatory Measures***

The application of the Habitats Directive has led to much litigation. In particular, the Court of Justice of the European Union (the "CJEU") has decided, in *Briels v Minister van Infrastructuur en Milieu*[2] (15 May 2014) that, where protected European habitats are concerned, it is not enough for a developer to compensate "after the fact" for the permanent loss of a protected European habitat caused as a result of the proposed project, by providing for the replacement of the protected habitat elsewhere. A developer must instead seek to eliminate or minimise the negative effects that are likely to arise as a result of a project by way of mitigation measures. These measures should inform and be incorporated into the project design from the outset of the project planning phase.

In *Briels*, the Dutch State permitted a project to widen a particular motorway in the Netherlands. In doing so, it approved measures proposed to lessen the inevitable negative impacts of the development on a nearby protected European Site (a SAC containing molinia meadows). The negative impact was the loss of a particular section of these molinia meadows. It was proposed that hydrological improvements would be made which would allow for the development of a larger area of molinia meadows, which would effectively replace the habitat that it was anticipated would be lost. The Dutch State formed the view that, in doing this, the overall conservation objectives for molinia meadows would be maintained.

The CJEU disagreed with this approach. It held that the measures proposed were not aimed at avoiding or reducing significant adverse effects to the molinia meadows. Instead, the measures were compensating "after the fact" for the damage which would be caused by replacing the lost habitat. This did not meet the requirements of Article 6(3) of the Habitats Directive. The CJEU held that these were compensatory measures which replace lost habitat, not mitigatory measures, which prevent or limit damage occurring in the first place. Under the Habitats Directive, these compensatory measures can only be used where it is considered that a project must be carried out for imperative reasons of overriding public interest ("IROPI"), despite any inevitable adverse effects on a protected habitat, and where there is no alternative solution. This is provided for in Article 6(4) of the Habitats Directive and it is a very high threshold for a developer to meet. Before making an application, a developer should confirm whether an application is a standard application or an 'IROPI' application, such as that recently submitted for the Galway Harbour Extension Project.

In order to avoid breaching European law, it is key that developers and their technical advisors understand the difference between mitigation measures which seek to avoid or minimise potential damage (which is what is required by the Habitats Directive), and compensatory measures which must only be used where it is known that permanent and irreparable damage will be caused to a European Site or protected species as a result of a proposed development, which is allowed to proceed for imperative reasons of overriding public interest.

***Land Take/Ownership***

From a project planning perspective, where a developer does not own all or some of the lands which are to be included in its application for permission, the decision of the High Court in *McCallig v An Bord Pleanála*[3] (24 January 2013) outlines what form of written consent should be secured from the relevant landowner(s). The requirement to obtain consent arises under Article 22(2)(g) of the Planning and Development Regulations 2001, as amended. Under this particular provision, an applicant for permission must either be the legal owner of all the land the subject of the application, or have written consent from the owner(s) of every part of the land(s) subject to the application.

Mr Justice Herbert provided what might be described as a novel 'good, better and best' approach to the form that landowner consent should take:

- ***The Good Approach:*** a multiparty list of named owners, each of whose land is separately identified, and which is signed either by the owner or by a stated agent acting on their behalf. This approach was identified as being more prone to error and misstatement, and Mr Justice Herbert did not provide any detail on how the lands should be identified.
- ***The Better Approach:*** a form of consent identifying the land in respect of which the consent is given, by reference to parcels drawn and distinguished on a map or plan submitted by the applicant for permission, signed by a stated agent. The Court stated that, particularly in cases of incapacity or disability, this may be the only option available to a party to demonstrate consent.
- ***The Best Approach:*** an individual consent bearing the personal signature of the owner and which identifies the land in respect of which the consent is given, by reference to parcels drawn and distinguished on a map or plan submitted by the applicant for permission.

In *McCallig*, consent was not provided in all cases, and where it was provided, it was deemed inadequate. The effect of this was that the court held that any aspect of the decision of the Board that purported to grant planning permission in respect of, or affect in any way, the lands (or any part of the lands) of the applicant who had challenged the decision, was void.

## GRANT OF PERMISSION AND POST-PERMISSION

After an application for planning permission has been submitted to the relevant planning authority, a developer must still remain live to the potential issues that may arise both during the decision making process, and subsequent to a grant of permission. The following cases highlight some issues that have arisen at this stage of a project.

***Appropriate Assessment***

The Irish High Court in *Kelly & Ors.*

2 Case C-521, Judgment of the Court (Second Chamber)

3 [2013] IEHC 60

*v An Bord Pleanála*[4] (25 July 2014) considers the application of the Habitats Directive, and provides clarity on how a consenting authority should undertake an Appropriate Assessment ("AA"). It requires a very stringent and comprehensive analysis to be carried out when considering AA and in conducting and recording decisions in respect of both Phase 1 Screening for AA and Phase 2 AA.

In *Kelly*, Ms Justice Finlay Geoghegan concluded that the Board had not lawfully conducted an AA in accordance with Article 6(3) of the Habitats Directive. She held that, in order to be lawfully conducted an AA:

- Must identify, in the light of the best scientific knowledge in the field, all aspects of the development project which can, by itself or in combination with other plans or projects, affect the European site in the light of its conservation objectives. This clearly requires the decision maker to carry out both examination and analysis and to carefully record same.
- Must contain complete, precise and definitive findings and conclusions and may not have lacunae or gaps. The requirement for precise and definitive findings and conclusions requires examination, analysis, evaluation and the making of a complete decision. Further, the reference to findings and conclusions in a scientific context requires the decision maker to make findings following analysis and to draw conclusions following an evaluation of those findings, each in the light of the best scientific knowledge in the field.
- May only include a determination that the proposed development will not adversely affect the integrity of any relevant European site where, upon the basis of complete, precise and definitive findings and conclusions made , the consenting authority (in this case the Board) decides that no reasonable scientific doubt remains as to the absence of the identified potential effects.

A developer has little or no control over the examination and analysis undertaken by a consenting authority. However, it is entirely within a developer's control to ensure that the EIS and/or NIS has no gaps and that the science relied upon in the EIS and/or NIS (particularly where mitigation measures are proposed) is the best scientific knowledge in the field. This means that the relevant consenting authority has all the necessary information put before it to allow it to conduct an adequate AA in accordance with law, and protects against a successful judicial review challenge.

***Letters of Comfort may be insufficient***

In *Bailey v Kilvinane Wind Farm Ltd*[5] (27 September 2013) a wind farm developer was given a 'letter of comfort' from the planning authority that it had no objection to certain minor modifications to the plans as permitted under a planning permission granted by the Board for the erection of four wind turbines (of which three were built). The developer built out the wind farm with these minor modifications, which included changing the precise location of the individual wind turbines, their height, and the length of the blades. Some years later, two neighbouring landowners submitted a "section 5 referral" to the planning authority, and appealed the section 5 determination to the Board. They asked for a determination as to whether the modifications constituted development or whether they were exempted from the requirement to obtain planning permission. The Board held that the modifications approved of by the planning authority and made by the developer did not come within the scope of the planning permission. A third objector then took a section 160 planning injunction seeking an order of the High Court directing the developer to remove the turbines. Ultimately, the High Court, in the exercise of its discretion under section 160, refused to grant the order. In doing so, it took into account the fact that the developer had acted in a *bona fide* manner and had sought the planning authority's approval for the modifications in advance.

This decision is relevant at the pre-construction and funding stages of a project. Minor modifications to a decision of the Board cannot generally be approved by a planning authority, as they have no power to do so. Developers will need to assess on a case by case basis how modifications to a consented project should be dealt with. Banks, at funding stage, may, depending on the specific circumstances involved, not be satisfied to accept a 'letter of comfort' where a minor modification to a wind farm development is proposed. Also, as can be seen from *Kilvinane*, such letters generally do not protect against third party objectors seeking injunctive relief either preventing the development from starting, halting it, or looking to have it taken down. Again, at a minimum this may, at best, cause delays to key project deadlines, and at worst prevent the development being funded or proceeding.

## CONCLUSION

Process and procedure driven case law is being applied to increasingly complex decision making, particularly where EIA and AA is concerned. Our competent authorities are being challenged with increasing frequency on these areas. Developers, insofar as they can, need to assist the relevant consenting authorities to make their way through the maze without losing their way. The path is signposted, but is becoming increasingly arduous as lawyers are effectively developing and redeveloping tests and rules to meet new standards being set through case law, with which engineers, architects and scientists must comply.

Based on the recent European and Irish case law, every developer should take the following key actions, where relevant:

1. Where possible, choose land that is at least 15km from a European site.
2. Where possible, choose land which is not in multiple-ownership.
3. Where some private land is to be included in a planning application, ensure that the best form of written consent is obtained from the landowner(s).
4. Ensure that all relevant seasonal habitat surveys are undertaken at the relevant times of year and for at least two years prior to submitting your planning application.

4 [2014] IEHC 400

5 [2013] IEHC 509

5. Determine whether your proposed development would bring about a permanent and irreparable loss of a European site / protected habitat. If so, prepare an 'IROPI' planning application, as opposed to a 'standard' application.
6. Ensure that your technical experts are using the best science available in the field (particularly where protected habitats are involved) when compiling the EIS / NIS.
7. Ensure that the legal tests set out in legislation and European and Irish case law for EIA and AA are considered by your technical experts when preparing the EIS / NIS and that the correct language is used by them in their conclusions drawn in the EIS / NIS.
8. Ensure that your technical experts prepare an NIS if there is any possibility that the proposed development could have significant effects on a European site, in light of its site conservation objectives.
9. Ensure that the NIS is a stand alone document, separate to both the EIS and the Natura Impact Screening Statement.
10. Ensure that there are no conflicts, contradictions or inconsistencies between the EIS and NIS, and that they reference each other.
11. Ensure that the description of your development is correct and includes information on haul routes, internal roads, sub-station and grid connection location and form in your planning application.
12. Ensure that the EIS / NIS include in their assessment all built and consented plans and projects for the purposes of the assessment of the overall cumulative effect of your project, in combination with these plans and projects on the environment. Before submission of the EIS / NIS, ensure that any projects which have been consented since the initial preparation of the EIS are either captured or, if that is not feasible, ensure that the relevant planning authority is made aware of the relevant consented development, so that its impact can be cumulatively assessed with your development.
13. Ensure that the mitigation measures proposed to avoid or reduce a likely significant effect on the environment (EIA) or to entirely avoid an adverse impact on the integrity of a European site, having regard to its site conservation objectives (AA), are specifically referenced and factored into the initial project description and are detailed, precise and proven.
14. Ensure that the EIS / NIS does not propose that certain mitigation matters be left over for agreement with the relevant planning authority post-grant of permission. Both the EIA and Habitats Directive require planning authorities / An Bord Pleanála to determine in advance of granting permission, whether the proposed development is likely to have significant effect on the environment and / or a European site in light of its conservation objectives. Permission may still be granted even if a proposed project will have significant effects on the environment. However, there is an absolute prohibition on permission being granted under Article 6(3), where a proposed project will adversely affect the integrity of a European site, in light of its site conservation objectives. Instead, an IROPI application must be made under Article 6(4).
15. Where you wish to make modifications to your consented project, consider whether they require additional approval and what form of approval is appropriate.

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