EVERSHEDS SUTHERLAND

Athenry application may finally bear fruit for Apple

The decision provides further clarity for tech giants and developers of phased projects

The judgments handed down by Mr Justice McDermott on 12 October rejecting two judicial review challenges[1] provide further clarity not only for tech giants engaged in developing data storage centres but also for developers who have sought planning permission for the first stage of a development which may form part of a larger project for which permission has not yet been sought.

McDermott J upheld the decision of An Bord Pleanála ("**the Board**") to grant planning permission to Apple Distribution Limited ("**Apple**") for the development of the first phase of a data centre in Athenry.

Background

Apple's application was for the construction of a single data centre in Athenry, the first of eight contemplated as part of an overall development or master plan. The applicants were granted leave to apply for judicial review in August and October 2016 in respect of the Board's decision to grant planning permission to Apple for the construction of phase one of a data centre. The two sets of related proceedings progressed in tandem and were heard by the Commercial Court, with the judgments of McDermott J being handed down on the same day.

Obligation to carry out and record and EIA?

Apple submitted an Environmental Impact Statement ("**EIS**"), however, the Board requested further information on the basis that the EIS did not present a logical and clear overview of the potential future impacts arising from the overall development. The Board requested that the EIS be revised to clearly set out the impacts arising from the development as a whole comprising the data centre and sub-station and grid connection or in other words both the impacts arising from phase one of the development and those arising with future phases of development. Apple submitted a revised EIS to address the issues raised by the Board and the Court was satisfied that there was substantial detail set out in the revised EIS in respect of the overall development or master plan.

An inspector was appointed by the Board to provide a report in respect of the application and the Board subsequently decided to grant permission for the proposed development, having completed an Environmental Impact Assessment ("**EIA**") in relation to the proposed development.

The applicants claimed that the Board failed to record the EIA that it carried out and that there was no record of any assessment of the likely environmental impacts of the project conducted by the Board as required by section 172(1J) of the Planning and Development Act 2000, as amended (the "**Act**"). It was submitted that the Board had a duty to identify the direct and indirect effects of the proposed development on the matters set out at section 171A of the Act.

The inspector's report, however, was expressly adopted by the Board and the Court stated that it is *"well established that if the Board accepted the inspector's report and did not deviate from it or reject any of its conclusions the Board is taken as in effect adopting the inspector's report."* The Court was satisfied that the Board's decision together with the inspector's report constituted an adequate record of the EIA carried out by the Board.

Project splitting

The applicants argued that the proposal for phase one was really part of a larger development and involved a degree of project splitting. They argued that if the development did not progress beyond phase one, the site would not be suitable and the grant of permission would significantly underuse the site. It was submitted that the EIA for the project ought to have included an assessment of the impact that the construction of the eight data halls would have. The Court took the view that if the remaining data halls were developed by Apple, it would have to apply for planning permission in respect of any such development and that in turn would require an EIA.

It was submitted by the applicants that the Board had an obligation to assess the likely effects of the development as a whole and the potential need to increase power generation and upgrade grid infrastructure to accommodate the development. The applicants argued that by limiting the EIA to phase one of the development, the Board was restricting the practical importance of the EIA or rendering it meaningless. They argued that the project for the purposes of the EIA in this case was the whole development and not just the first data hall.

[1] Sinead Fitzpatrick and Allan Daly v An Bord Pleanála 2016 No. 754 JR and Brian McDonagh v An Bord Pleanála

The Board submitted, however, that the first data hall is a standalone development and is not dependent upon the completion of any of the future data halls which are proposed in the master plan. Importantly, the single data hall can operate on its own and its functionality will not be dependent on the building of the remaining data halls in future. The Court was satisfied that there was no obligation to carry out an EIA of the entire master plan which was not the subject of the planning permission application.

The Court considered that the Board took into account in the EIA "as far as practically possible" any current plans to extend the specific project in hand. It stated that:

> *"Future contingencies and occurrences in relation to future aspects of the project have been extensively explored and considered in the course of this process. It is abundantly clear that the possible future expansion requirements of the developers were considered."*

The Court stated that the question is whether the proposed project in respect of which permission has been granted, can operate on a standalone basis. The Court distinguished the decision in O'Grianna[2] in which it was held that there was a necessary second phase to the project which was to connect the windfarm to the national grid and therefore that an impermissible "project splitting" had occurred. In holding that this case was not a project splitting case, McDermott J stated that:

> *"In this case the first phase of the project is on a far more limited scale than that envisaged in O'Grianna. This is not a project splitting case. Each additional phase of the development will require planning permission and an additional EIA which will assess at that particular time the potential effects of the particular phase of development on the environment in all its aspects on the basis of information known at that time, including information gleaned from the operation of phase one. I am satisfied therefore that it is a standalone project and that the decision in O'Grianna is not applicable to the circumstances of this case."*

Locus Standi

The McDonagh judgment is notable for the commentary in relation to an applicant's right to bring a judicial review application in circumstances where the applicant does not live near the proposed development for which planning has been granted.

Two main factors were considered by the Court in concluding that the applicant did not have sufficient interest for the purpose of making this application as required by Section 50A(3)(b) of the Act:

1. Whether the applicant participated in the planning process in the first place; and
2. Whether the applicant has a reasonably close proximity to the proposed development.

Firstly, the applicant in this case did not participate in the planning application process either with Galway County Council or on appeal to the Board and secondly the applicant had no connection with the proposed development in that he is not resident in the area where it is located nor will he personally be affected by it.

McDermott J referred to the Supreme Court decision earlier this year in Grace and Sweetman[3] in which the Court considered whether the applicants had a "sufficient interest" for the purposes of the 2000 Act to challenge a decision of the Board to grant planning permission for a windfarm in County Tipperary. Neither applicant in that case had participated in the planning process before the planning authority or the Board. The Court acknowledged that a failure to participate in the planning process did not of itself exclude a person from having standing but that it could be a factor to be taken into account in an appropriate case.

The Court was satisfied in this case that the applicant, Mr McDonagh, did not have the requisite standing to bring the proceedings as he did not live in physical proximity to the proposed development in Athenry and he had not participated in the planning process before Galway County Council and the Board.

The Court also refused to consider the submissions of the applicant on a particular point where the applicant had not been granted leave to apply for judicial review on that ground. This serves as a reminder that a Court will only permit an applicant to argue a ground on which he or she was granted leave and it will not allow an applicant to adapt that ground to advance an entirely different case.

Conclusion

The decision will be welcomed by large tech companies with a presence in Ireland given the global demand for data storage facilities, the difficulties in locating suitable sites for data storage centres, and the economic and operational rationale for the clustering of data storage capacity on one site. In distinguishing the O'Grianna decision, the Court also provided further clarity to developers on the issue of whether an application for planning permission will be considered by a Court as project splitting.

Permission to appeal is being sought by local residents Sinead Fitzpatrick and Allan Daly in respect of the decision. We will be keeping a close eye on any developments.

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[2] O'Grianna v An Bord Pleanála [2014] IEHC 632
[3] Grace and Sweetman v An Board Pleanála [2017] IESC 10

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