

## Planning & environmental Case law update

Connelly v An Bord Pleanála  
and Ors [2018] IESC 31

August 2018



### 1. Background

The Supreme Court decision arose from a planning application in respect of a proposed windfarm development in County Clare, consisting of 6 wind turbines and associated works. Clare County Council initially rejected planning permission for the proposed windfarm in 2011, however in 2014, An Bord Pleanála (the “**Board**”) granted the planning permission. The developer provided the Board with a detailed response to the Notice issued pursuant to Section 132 of the Planning and Development Act 2000 together with a Natura Impact Statement (“**NIS**”). The Board was satisfied that the developer, a Notice Party in the case, addressed the concerns which were previously raised by the Board.

Ms Connelly, a local resident, brought judicial review proceedings challenging the decision of the Board. The High Court (Barrett J.) (*Connelly v. An Bord Pleanála* [2016] IEHC 322) decided to quash the decision of the Board granting permission. It is in respect of that decision of Barrett J. that the Board appealed to the Supreme Court.

The Board’s decision to grant the planning permission for the windfarm occurred following a process involving an Inspector’s report and further information thereafter supplied by the developer. The Board was satisfied that the new information provided was sufficient to address the concerns it previously had. The proposed development was redesigned subsequent to the preparation of that report and the relevance of the Inspector’s report was therefore questioned.

The Board was also satisfied that the information before it was adequate to undertake an Environmental Impact Assessment (“**EIA**”) and an Appropriate Assessment (“**AA**”) in respect of the proposed development.

In the High Court case, Ms Connelly raised four key objections to the decision of the Board. She claimed that the Board failed:

1. to carry out and/or record any screening assessment for AA, contrary to national and European law
2. to carry out and/or record any proper AA under national and European law
3. to carry out and/or record any proper EIA under national/European law
4. to consider or have regard to its obligations under section 37(2) of the Planning and Development Act 2000.

In considering the argument that the Board had failed to carry out and/or record any proper EIA as required by national and EU law, Barrett J found that in relying upon quite generic reasoning and a rather contrary report that related to a different development, the Board did not comply with the requirement to give a proper “*evaluation of the direct and indirect effects of the proposed development*”.

The High Court found that the Board had breached its obligations regarding the recording of the screening assessment of the AA, the AA itself and the EIA in its decision. The High Court considered that the cumulative effect of these breaches was such that the order sought to quash the decision of the Board should be granted.

The Board felt that the threshold set by the High Court in respect of the reasoning requirements for a planning decision maker were very high. The Board was granted leave to bring a leapfrog appeal to the Supreme Court.

## 2. Supreme Court decision

### Adequate reasons

The Supreme Court had to consider whether or not adequate reasons were provided by the Board in respect of its decision. Having analysed some of the recent case law on this issue, the Supreme Court identified two requirements in respect of the adequacy of any reasons given by a decision maker:

1. Any person affected by a decision is at least entitled to know in general terms why the decision was made.
2. A person is entitled to have enough information to consider whether they can or should seek to avail of any appeal or bring a judicial review of the decision.

As a consequence of these requirements, where the reasons for a decision are not included in the text of the decision itself, they must be capable of being readily determined by any person affected by the decision.

### Inspector's report

The Supreme Court held that an interested party would, as a result of reading the decision of the Board together with the Inspector's report and documents referred to therein, have sufficient information to inform themselves as to why the Board came to the conclusions which it did and also to consider whether there was any basis for challenging the Board's conclusions. The Supreme Court disagreed with the High Court's analysis on this issue and held that the reasons given were adequate to meet the requirements of national law.

According to Mr Justice Clarke the reasons given by the Board in the decision must be seen in the context of the Inspector's report, including the matters on which the Inspector did not express concern, together with the problematic issues identified by the Inspector and the manner in which those issues were addressed in the additional information supplied including the NIS.

Clarke CJ was of the opinion that *"the trial judge imposed too exacting a standard in respect of reasons"* and that *"the law does not require a level of reasoning which goes beyond that required to afford an interested party reasonable information as to why the decision was made and whether it can be challenged"*.

In the circumstances Clarke CJ held that the reasoning of the Board in this case was adequate and insofar as the High Court judgment held otherwise he would reverse the judgment.

### EIA and AA

Clarke CJ also concluded that there was adequate information available to allow a party to assess whether a proper EIA had been carried out and reversed the decision of the High Court insofar as it found otherwise in this regard.

The Supreme Court reiterated the High Court's view that the failure by the Board to give adequate reasons for requiring a full AA was not a sufficient ground in itself to render the permission granted invalid.

### Validity of the AA

Clarke CJ referred to the four distinct requirements identified in the judgment of Finlay Geoghegan J in *Kelly v. An Bord Pleanála [2014] IEHC 400* which must be satisfied for a valid AA decision which is a necessary pre-condition to a planning consent where an AA is required.

- i. First, the 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.
- ii. Second, there must be complete, precise and definitive findings and conclusions regarding the previously identified potential effects on any relevant European site.
- iii. Third, on the basis of those findings and conclusions, the Board must be able to determine that no scientific doubt remains as to the absence of the identified potential effects.
- iv. Fourth and finally, where the preceding requirements are satisfied, the Board may determine that the proposed development will not adversely affect the integrity of any relevant European site.

The Supreme Court agreed with the High Court's assessment of the validity of the AA and agreed that the High Court was correct to view the planning permission as invalid due to the failure of the Board to make complete, precise and specific scientific findings which justify its conclusion.

Although in many respects the Court was satisfied that the Board had provided sufficient reasoning for their decisions it was found that in respect of the AA, the decision by the Board nor the materials referred to in the Board's decision could be *"shown to contain the sort of complete, precise and definitive findings which would underpin a conclusion that no reasonable scientific doubt remained as to the absence of any identified potential detrimental effects on a protected site having regard to its conservation objectives"*.

As a result, Clarke CJ upheld the decision to quash the permission granted in this case *"because of the failure to make the sort of findings which the jurisprudence of the CJEU requires to be made as part of a valid AA"*.



### 3. Judgment in respect of the final order and costs

The Supreme Court delivered an ex tempore judgment in relation to the final order and the costs of the proceedings on 30 July. Clarke CJ made an order remitting the matter back to the Board to determine the planning application. In doing so, it was noted that *“there was no challenge to the process which took place before the Board up to the point when as a result of the Inspector’s Report, the Board decided to seek further information and a NIS”*.

The Court adopted the reasoning used in *Veolia Water* which requires the Court to decide whether the applicant has to come to court to achieve something which they could not otherwise have achieved or whether a defendant or respondent had to come to court to resist a claim found to be unmeritorious.

While Clarke CJ considered that there were a number of significant issues raised, which would have undoubtedly added to the costs of the proceedings, on which Ms Connelly failed, the Court acknowledged that Ms Connelly succeeded in the High Court proceedings and obtained the relief sought, being to quash the planning permission and also succeeded on appeal. Applying the *Veolia Water* principles to the facts of this case, Ms Connolly was granted 75% of the costs of the proceedings in the High Court and the appeal to the Supreme Court.

### 4. The impact of the decision

The Supreme Court decision provides further clarity on the issue of what will and what will not be considered to be adequate reasons in respect of a decision of the Board.

While the Board was unsuccessful in its appeal of the High Court decision, the reversal of certain aspects of the High Court judgment and the comments of Clarke CJ will provide some comfort to the Board in respect of its obligations to provide adequate reasons for its decisions.

It is hoped that the decision will lead to a greater level of consistency when it comes to decisions of the Board and that it will result in a reduction of similar challenges being successfully brought which may prevent the development of similar projects in future.

A greater level of accountability has been placed on the Board in respect of its decision making practices which is positive for those involved in the development of windfarms or indeed any building or development project.

The decision serves as an important reminder of the requirements for an AA to be considered legitimate.

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