[2020] IEHC 259

**THE HIGH COURT**

**[2019/223 JR]**

**BETWEEN**

**JAMES KAVANAGH**

**APPLICANT**

**AND**

**AN BORD PLEANÁLA**

**AND**

**IRELAND AND THE ATTORNEY GENERAL**

**RESPONDENTS**

**AND**

**HIGHFIELD SOLAR LIMITED**

**AND**

**WICKLOW COUNTY COUNCIL**

**NOTICE PARTIES**

**JUDGMENT of Mr. Justice Brian O'Moore delivered on the 29th day of May, 2020.**

1. On the 5th of December 2017 the First Notice Party ("Highfield") applied to the Second Notice Party (Wicklow County Council) for Planning permission for the development of a Photovoltaic (PV) solar farm and associated works. The parties agree that the nature of the development is broadly set out at pages 6 and 7 of the Ecological Impact Statement prepared for Highfield, and exhibited at "JK5" to the affidavit of the Applicant (Mr. Kavanagh) grounding this application for judicial review.

2. On the 13th of June 2018 Wicklow County Council made a decision to grant planning permission in respect of the proposed development; Mr. Kavanagh appealed this decision to the First Respondent ("the Board") by letter of his solicitors dated the 10th of July 2018. While there are several grounds of appeal, I will concentrate on the ground relevant to the judicial review as opened before me.

3. At paragraph 6 of the letter appealing the decision of Wicklow County Council, the following is stated:-

> "The development is of such a size and scale as to require an Environmental Impact Assessment given the extent of the lands which comprise a Site area of 59 hectares, the extent of the residential development so close to the site with 14 dwellings within 200-250m of the site, and a significant number as close as 150m, the present [sic] of existing established authorised land use which is incompatible with the proposed activity and in particular the Stud Farm Activities on our clients lands which cannot be reconciled with or continued if the development proposed is built. This is a large industrial development in a rural area, generating at peak a significant output of electricity and even if the thresholds are not exceeded as per Schedule 5, Part 2 paragraph 3(a) of the Planning and Development Regulations the precautionary principle must apply and the development must be subject, even as a sub-threshold development, to an Environmental Impact Assessment."

4. The Board appointed an Inspector to report to it on the issues raised in the appeal. That Inspector, Ms. Emer Doyle, reported to the Board on the 4th of January 2019. In that

report, the Inspector expressed the following view on the need for an Environmental Impact Assessment ("EIA"):-

> "The appellant considers that the development is of a size and scale as to require an Environmental Impact Assessment.
>
> Schedule 5 of the Planning and Development Regulations 2001, (as Amended), sets out Annex I and Annex II projects which mandatorily require an EIS. Part 1, Schedule 5 outlines classes of development that require EIS and Part 2, Schedule 5 outlines classes of development that require EIS but are subject to thresholds. I have examined the Part 1, Schedule 5 projects and I do not consider that a solar farm is included in any of these project descriptions. I have also examined the Part 2, Schedule 5 projects and although I note that while there are some projects under Paragraph 3 'Energy Projects' which relate to energy production, I do not consider that these projects would be applicable to a solar farm as proposed. In reaching this conclusion I have regard to the other recent solar farm developments before the Board, where a similar conclusion was reached in each case."

5. By Direction dated the 13th of February 2019, the Board decided to grant permission for the development. In doing so, the Board stated:-

> "The Board decided to grant permission generally in accordance with the Inspector's recommendation [...]"

6. In making its determination, it is clear that the Board accepted the view of the Inspector that this class of development did not require an EIA.

7. The Board Order in respect of the appeal is dated the 21st of February 2019. Mr. Kavanagh applied for, and obtained, leave to seek judicial review of the decision by Order of the 29th of April 2019.

8. While a number of grounds were pleaded by Mr. Kavanagh, at the hearing his Counsel made it clear that the only issue before me related to the contention that the provisions of the Planning and Development Regulations 2001 ("the Regulations") and/or the Environmental Impact Assessment Directive required an EIA to be carried out in respect of the development. An associated argument was advanced, rather diffidently, that if a solar energy development of this scale was excluded from the provisions of the Regulations then the Second Respondent (Ireland) had failed adequately to transpose the obligations of Council Directive 2014/52/EU into Irish law.

9. It should also be noted that, at the opening of the hearing before me, I was informed that the same issue had been canvassed in an earlier hearing before McDonald J. However, given that the parties were ready to proceed with Mr. Kavanagh' s application for judicial review the consensus was that I should go ahead with the substantive hearing. In particular, there was always the possibility that the matter before McDonald J. might be decided on some other point. As it happens, the judgment of McDonald J. decides the

central issue in the Kavanagh proceedings; that decision, *Sweetman v. An Bord Pleanála* [2020] IEHC 39, is one to which I will shortly return.

**A. The EIA Directives.**

10. The EIA Directive, in its original form (85/337/EEC) contains recitals which set out the need for the assessment of the environmental effects of certain public and private projects. Particular emphasis was placed on these recitals by Counsel for Mr. Kavanagh. The relevant recitals read as follows:-

> "Whereas general principles for the assessment of environmental effects should be introduced with a view to supplementing and coordinating development consent procedures governing public and private projects likely to have a major effect on the environment;
>
> Whereas development consent for public and private projects which are likely to have significant effects on the environment should be granted only after prior assessment of the likely significant environmental effects of these projects has been carried out; whereas this assessment must be conducted on the basis of the appropriate information supplied by the developer, which may be supplemented by the authorities and by the people who may be concerned by the project in question;
>
> Whereas the principles of the assessment of environmental effects should be harmonized, in particular with reference to the projects which should be subject to assessment, the main obligations of the developers and the content of the assessment;
>
> Whereas projects belonging to certain types have significant effects on the environment and these projects must as a rule be subject to systematic assessment;
>
> Whereas projects of other types may not have significant effects on the environment in every case and whereas these projects should be assessed where the Member States consider that their characteristics so require; […]"

11. However, it is of great importance that the Directive then goes on to require an EIA be carried out in respect of carefully defined types of projects. The obligations placed on Member States by the Directive are limited by reference to the classes of projects or developments set out in the Annexes, and do not extend beyond them. This is why the emphasis by Mr. Kavanagh on the scale of the Highfield development is misplaced; if the development does not fall within the classes listed in the Annexes then an EIA is not required. This is also why the submission that the obligations of any of the EIA Directives are not adequately transposed is fundamentally flawed; as is obvious, the Regulations reflect (in all material respects) the analogous provisions of the relevant Directive. In those circumstances, the argument that there has been inadequate transposition is without foundation.

12. Article 4 of the 1985 Directive provided as follows:-

"1. Subject to Article 2 (3), projects of the classes listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10.

2. Projects of the classes listed in Annex II shall be made subject to an assessment, in accordance with Articles 5 to 10, where Member States consider that their characteristics so require. To this end Member States may *inter alia* specify certain types of projects as being subject to an assessment or may establish the criteria and/or thresholds necessary to determine which of the projects of the classes listed in Annex II are to be subject to an assessment in accordance with Articles 5 to 10."

13. Annex I, clause 2 read:-

> "Thermal power stations and other combustion installations with a heat output of 300 megawatts or more and nuclear power stations and other nuclear reactors (except research installations for the production and conversion of fissionable and fertile materials, whose maximum power does not exceed 1 kilowatt continuous thermal load)."

14. It is clear that the Highfield development does not fall within Annex I.

15. Annex II (of the 1985 Directive) provided as follows:-

"3. Energy industry

(a) Industrial installations for the production of electricity, steam and hot water (unless included in Annex I).
(b) Industrial installations for carrying gas, steam and hot water; transmission of electrical energy by overhead cables.
(c) Surface storage of natural gas.
(d) Underground storage of combustible gases.
(e) Surface storage of fossil fuels.
(f) Industrial briquetting of coal and lignite.
(g) Installations for the production or enrichment of nuclear fuels.
(h) Installations for the reprocessing of irradiated nuclear fuels.
(i) Installations for the collection and processing of radioactive waste (unless included in Annex I).
(j) Installations for hydroelectric energy production."

Paragraph 3(a) of the 2014 Directive now reads "Industrial Installations for the production of electricity, steam and hot water (projects not included in Annex I)" but nothing turns on this change. The structure set down in the 1985 Directive, where relevant to these proceedings, remains materially unchanged notwithstanding the 1997, 2011 and 2014 Directives.

16. Mr. Kavanagh's case is that paragraph 3(a) catches all installations which produce either (1) electricity or (2) both steam and hot water.

17. There are a number of reasons why this is an unconvincing interpretation of the sub clause.

18. Firstly, and possibly least importantly, it would be an extraordinary use of language. I can understand the person drafting 3(a) using the three words entirely disjunctively (so that the installation produced electricity or steam *or* hot water) *or* entirely cumulatively (so that the institution produced electricity *and* steam *and* hot water) but I think it very unlikely that anyone would try to express themselves by using the three terms in a manner initially disjunctive and then cumulative. It must be one or the other.

19. Secondly, if 3(a) is either entirely cumulative or entirely disjunctive in the use of these terms, the more likely construction is that the instillation is one which produces electricity and steam and hot water. There was certainly no evidence before the Court that there were or are industrial installations which produced steam alone or hot water alone, either as a part of the energy industry or otherwise. On the other hand, as Counsel for the Board submitted, the burning of fossil fuel to release heat, in turn allowing water to be boiled to produce steam which creates electricity is something of which we are all aware not only as a matter of general knowledge but also through the Opinion of Advocate General Tanchev in *Cristal Union* (Case C-31/17, Opinion delivered on the 22nd of February 2018). The cumulative interpretation therefore reflects a real form of production in the energy industry, rather than the ethereal possibilities summoned up by the alternative construction suggested by Counsel for Mr. Kavanagh.

20. Thirdly, if 3(a) catches all installations producing electricity, there would be no reason for 3(j). Any harmonious interpretation of clause 3 of Annex II requires that the argument of Mr. Kavanagh on this point be rejected; it would have been otiose for the institutions propagating the Directive to have included sub clause 3 (j) at all if the case made for Mr. Kavanagh is correct.

21. Fourthly, and in a similar vein, one of the amending directives (97/11/EC) added to paragraph 3 of Annex II the following category:-

> "Installations for the harnessing of wind power for energy production (wind farms)."

22. Wind farms produce electricity. If 3(a) covers all installations producing electricity, it is difficult to see why the new provision referring to wind farms was required at all in 1997. It is also worth noting that the 1997 Directive involved significant amendments to the earlier Directives; this would inevitably have involved a careful consideration of the provisions of the Directives as they stood, and makes it less likely that a sub clause was added which, if Mr. Kavanagh is right, would have been both meaningless and unnecessary. While Counsel for Mr. Kavanagh submitted that this amendment should not be taken into account in interpreting 3(a), he did so on the somewhat general basis of a concern about retroactivity. I think that this concern is misplaced; however, I should say that I would have come to the same view on interpretation in the absence of the third and fourth reasons which I have listed.

23. On these third and fourth reasons, I note that 3(a) refers to "industrial" installations and the paragraphs relating to hydroelectricity and wind power refer more generally to installations; however, I do not feel that this qualification undermines the fact that these other sub clauses would serve no purpose if sub clause 3(a) has the meaning ascribed to it on behalf of Mr. Kavanagh. In addition, I do not think that the presence of those other paragraphs is explained by the different thresholds of output applied to them by Ireland.

24. Fifthly, in *Commission v. Ireland* (Case C-215/06, Judgment delivered on the 3rd of July 2008), the Commission made a case against Ireland that an EIA was required for the grant of planning permission for a wind farm not because of the provisions of 3(a) of Annex II but because of the provisions of a range of other classes of the Annex (relating to peat extraction, the extraction of minerals and road construction).

25. At paragraph 96 of the Judgment, the CJEU states:-

> "Moreover, while it is common ground that installations for the harnessing of wind power for energy production are not listed in either Annex I or Annex II to Directive 85/337, it is not disputed by Ireland that the first two phases of construction of the wind farm required a number of works, including the extraction of peat and of minerals other than metalliferous and energy-producing minerals, and also road construction, which are listed in Annex II to that directive, respectively in point 2(a) and (c) and in point 10(d)."

26. It is clear that the position taken by all parties, without any reservation on the part of the Court, in *Commission v. Ireland* was that the production of electricity (by wind farms) did not fall within paragraph 3(a) of Annex II; that position is entirely inconsistent with the central argument made by Mr. Kavanagh in these proceedings.

27. Counsel for Mr. Kavanagh did rely upon the judgment of the CJEU in *Comune di Castelbellino* ( Case C-117/17, judgment delivered on the 28th of February 2018). In that case, the Court referred to paragraph 3(a) as one "which covers projects for industrial installations for the production of electricity not included in Annex I". However, the context of this isolated comment suggests that the Court was not redefining paragraph 3(a) or in any way pulling away from the approach in *Commission v. Ireland*. On the contrary, in the context of distinguishing between Annex I and Annex II the Court has made a truncated reference to the scope of paragraph 3(a). If the Court intended, in this almost casual allusion to paragraph 3(a), to clarify that the paragraph caught all electricity production, it would certainly have stated so expressly and (in so doing) would presumably have addressed why this unlikely construction of paragraph 3(a) is the correct one.

28. Sixthly, I agree with the State that the drafting history of Annex II supports the view that I have formed about its scope. The State argues that the 1985 Directive was amended in 1997 (as I have already noted), was further amended and consolidated with the public participation directives in 2011 (by Directive 2011/92/EU) and the 2011 Directive was

amended in 2014. In the Commission Staff Working Paper on the amendment of the 2011 Directive, it is stated:-

> "Certain types of projects tend to become more frequent in the EU and may be associated with significant environmental impacts, for example solar farms, and desalination plants. They are not explicitly covered by the current EIA Directive, therefore their potential environmental impacts may not be systematically assessed and mitigated, which may represent a threat for the environment."

29. Notwithstanding this observation contained in a 2012 document, solar farms were not included as a separate category in the 2014 Directive nor was any clarification included in the 2014 Directive to the effect that solar farms fell within paragraph 3 (a). While by no means a decisive consideration, this aspect of the drafting history is consistent with the view that the legislative bodies did not intend solar farms to fall within Annex II.

30. In this analysis, I have focused on the wording used in the 1985 Directive, though I have noted and (where appropriate) referred to the amendments to that instrument, culminating in the 2014 Directive. I have applied the 2011 Directive as amended in 2014. This approach reflects the way the case was argued before me.

31. For the reasons I have set out in this portion of the judgment, I find that solar farms do not fall within the classes of projects listed in Annex I or Annex II of the 2014 Directive.

32. In deciding this issue, I have considered not just the factors listed earlier in this judgment but also the other specific arguments made on behalf of Mr. Kavanagh. I want to refer here to three such arguments.

33. It is submitted that the use of a comma and the use of the word "installations" in paragraph 3(a) mean that the relevant portion of the paragraph is to be read disjunctively. Apart altogether from what I have said at paragraph 18 about the disjunctive interpretation suggested by Mr. Kavanagh, I think that this approach risks distorting the proper meaning of the paragraph by overemphasising particular elements without looking at the wording as a whole. The use of the plural "installations" is consistent with either meaning contended for by the parties; equally, the use of a comma does not in my view have the impact suggested by Mr. Kavanagh and none of the various authorities cited in support of this argument actually assist. In particular, I do not think it correct to say that In *Re Finnegan (A Debtor)* [2019] IEHC 66 McDonald J. found that the use of a comma suggests a disjunctive interpretation; Paragraph 66 of that judgment makes it plain that the sense of the text, rather than the punctuation, is likely to determine if a passage is to be read disjunctively.

34. Separately, great reliance was placed on the decision of the CJEU in *Kraajeveld* (Case C-72/95; judgment delivered on the 24th of October 1996), which emphasises the "wide scope and broad purpose" of the 1985 Directive; this argument was made in conjunction with a submission that a finding that a development of this scale did not require an EIA would subvert the requirement of Article 2 of the Directive that:-

"Member States shall adopt all measures necessary to ensure that, before development consent is given, projects likely to have significant effects on the environment by virtue, *inter alia*, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects on the environment. Those projects are defined in Article 4."

35. This argument ignores the last sentence of Article 2. While the purpose of the EIA Directives is relatively open textured, in that they are designed to secure appropriate environmental assessment for certain projects, the way in which this purpose is to be achieved is carefully defined and limited. A project which could have a significant effect on the environment is nonetheless not caught by Article 2 unless it also falls within Article 4. It is an illogical and circular argument to suggest that a project which does not fall within Article 4 should nonetheless be found to do so by reference back to Article 2. While it is uncontroversial that the purpose of a legal instrument can and should be taken into account in construing its provisions, here the meaning of Article 4 is so plain that its scope cannot be artificially extended in the manner proposed on behalf of Mr. Kavanagh.

36. Finally, in his reply, and for the first time, Counsel for Mr. Kavanagh relied on paragraph 3(b) of Annex II, which provides;-

"(b) Industrial installations for carrying gas, steam and hot water; transmission of electrical energy by overhead cables."

The submission was that, as there was no such thing as an installation for carrying gas, steam and hot water, then 3(b) must be construed as referring to gas on the one hand and steam and hot water on the other hand. There was no evidence to support this submission. Therefore the proposed interpretation of 3(b) does not, in my view, assist in a proper and meaningful interpretation of 3(a).

**B. The Regulations.**

37. In the light of these findings, I will now consider (at considerably less length) what is described at paragraph 2.15 of the written submissions from Mr. Kavanagh's lawyers as "the issue at the heart of these proceedings..." This is whether the development falls within the category described at Schedule 5 Part 2 paragraph 3 (a) of the Regulations.

38. Part 2 of the Regulations is the equivalent of Annex II of the 2014 Directive. Under the heading "Energy Industry" at paragraph 3 the following classes of developments are listed:-

"3. Energy Industry

(a) Industrial installations for the production of electricity, steam and hot water not included in Part 1 of this Schedule with a heat output of 300 megawatts or more.

(b) Industrial installations for carrying gas, steam and hot water with a potential heat output of 300 megawatts or more, or transmission of electrical energy

by overhead cables not included in Part 1 of this Schedule, where the voltage would be 200 kilovolts or more.

(c) Installations for surface storage of natural gas, where the storage capacity would exceed 200 tonnes.

(d) Installations for underground storage of combustible gases, where the storage capacity would exceed 200 tonnes.

(e) Installations for the surface storage of fossil fuels, where the storage capacity would exceed 100,000 tonnes.

(f) Installations for industrial briquetting of coal and lignite, where the production capacity would exceed 150 tonnes per day.

(g) Installations for the processing and storage of radioactive waste not included in Part 1 of this Schedule.

(h) Installations for hydroelectric energy production with an output of 20 megawatts or more, or where the new or extended superficial area of water impounded would be 30 hectares or more, or where there would be a 30 per cent change in the maximum, minimum or mean flows in the main river channel.

(i) Installations for the harnessing of wind power for energy production (wind farms) with more than 5 turbines or having a total output greater than 5 megawatts."

39. For the reasons I have given, solar farms such as the one proposed by Highfield do not fall within Annex I or Annex II of the EIA Directives, in any of their forms. As McDonald J. observes in *Sweetman v. An Bord Pleanála* (at paragraph 35 of the judgment) Part 1 and Part 2 of Schedule 5 of the 2001 Regulations "mirror the provisions of Annex I and Annex II to the EIA Directive". While there are differences in the language of the relevant paragraphs of the Regulations as opposed to the analogous paragraphs of the Directive (notably by reference to output) it has not been suggested that these thresholds determine the basic question as to whether solar farms are covered by Part 2 of Schedule 5. I find that, for the reasons I have already given in deciding the scope of the 2014 Directive, that solar farms for the production of electricity are not included among the installations defined at Schedule 5 Part 2 Paragraph 3(a) of the 2001 Regulations.

40. I am conscious that I have come to the same conclusion on this issue as did McDonald J. in *Sweetman*. That judgment was delivered on the 31st of January 2020. Subsequent to its delivery, I offered the parties the opportunity to address me on the judgment should they wish to do so. At a brief hearing before me in February, I was informed by Mr. Kavanagh's Counsel that I should be aware that a pleading point had been made to McDonald J. in the context of the relevant argument. I have considered that issue (described at paragraph 37 of *Sweetman*) and have concluded that it in no way differentiates the issue before the McDonald J. from the issue before me, nor does it in any way dilute the precedent value of *Sweetman*. Notably, Counsel for Mr. Kavanagh did not seek to address me in any way on the substance of the judgment in Sweetman; in particular, he did not take advantage of the opportunity I afforded the parties to explain how or why *Sweetman* could be distinguished from Mr. Kavanagh's case. Less

surprisingly, the other parties also did not wish to address me on the decision in *Sweetman*; the Board in particular was content merely to bring the judgment to my attention.

41. I should also say that I respectfully agree with the reasoning of McDonald J. on this issue, which is set out from paragraph 35 to paragraph 50 of his judgment.

**C. Transposition.**

42. Finally, there is the claim that the State did not transpose the obligations of the 2014 Directive into Irish law.

43. In the Statement of Grounds, it is alleged (at paragraph 31) that:-

> "In the alternative Part 2 of Schedule 5 insofar as it excludes industrial installations for the production of electricity through solar panels is inconsistent with the obligations contained in the EIA Directive 2014/52/EU and the Second Named Respondent has failed to transpose the obligations under the Directive into Irish law."

44. I have found that the 2014 Directive does not require an EIA to be carried out in respect of planning applications for the construction and operation of solar farms. It follows that, inasmuch as the State has not made such a requirement part of Irish law, there is no failure on the part of the State to give effect to the provisions of the 2014 Directive.

**D. Article 267 TFEU**

45. Towards the end of the hearing, I canvassed the views of the parties as to whether I either should or must seek the assistance of the CJEU in respect of any issue raised before me. The view of Mr. Kavanagh's team was that I should; the uniform view of all other parties was that I should not.

46. I have decided that there is no need for me to seek the assistance of the CJEU by referring any aspect of this dispute to it. The issue of EU law as to the scope of the Directive is sufficiently clear for it to be decided by me without any such reference; that is particularly so given the approach of the parties and the Court in *Commission v. Ireland*. It is also relevant that McDonald J. has dealt with an identical issue, with similar arguments, and come to the same conclusion without any need to refer any question to the CJEU.

47. I will therefore dismiss Mr. Kavanagh's application for judicial review. I will hear the parties in due course on the question of costs.