THE HIGH COURT

[2016 No. 758 J.R.]

BETWEEN

BRIAN MCDONAGH

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

AND

GALWAY COUNTY COUNCIL AND
APPLE DISTRIBUTION INTERNATIONAL

NOTICE PARTIES

JUDGMENT of Mr. Justice McDermott delivered on the 12th day of October, 2017

1. The applicant was granted leave to apply for judicial review (Humphreys J.) on 17th October, 2016 in respect of the respondent's decision to grant planning permission to Apple Distribution Ltd. (File Ref. No.: PL07.245518) for the construction of Phase 1 of a Data Centre dated 11th August, 2016. Leave was granted to apply for an order of *certiorari* quashing the direction and decision of the respondent to grant planning permission dated 10th and 11th August 2016 respectively. The applicant represented himself in these proceedings which were transferred to the Commercial Court. By order of the High Court (McGovern J.) perfected on the 2nd December, 2016 it was directed that the case would travel in tandem with related proceedings entitled *Sinead Fitzpatrick and Allan Daly v. An Bord Pleanála & others* [2016/754 J.R.]. Both sets of proceedings were heard by this Court at the same time.

Leave was granted on grounds set out at paras. E(I)(a) to(g) and (j) to (l) in an amended statement of grounds dated 14th October, 2016. The relevant background to the granting of permissions in respect of this development and the reasons and considerations for same are set out in this Court's judgment also delivered today in the *Fitzpatrick* and *Daly* cases.

Locus Standi

2. In his initial application the applicant represented that he had *locus standi* to seek the leave granted "on the grounds of local and conservation interests in the destruction of Forest in the County of Galway".

3. It is submitted that the applicant does not have a sufficient interest for the making of this application as required by s. 50A(3)(b) of the Planning and Development Act 2000, as amended. He did not participate in the planning application process either with Galway County Council or on appeal to An Bord Pleanála. The applicant has 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.

4. It is submitted that the interest described as one deriving from "local and conservation interest in the destruction of forest in the County of Galway" does not provide a sufficient interest for the purpose of the section nor has he been granted leave to advance any grounds in respect of the destruction of forest in County Galway. Leave to apply for judicial review based on issues concerning that matter was effectively refused in that the applicant was not allowed to proceed on ground (e)(i) which stated:-

> "The Statutory Instruction No. 588 of the European Communities (Forest Consent and Assessment) in the afforestation of two alternative sites in

> Counties Roscommon and Wicklow appeared to have been breached. This was brought to the attention of the respondent in appeal."

5. There is no other reference to afforestation in Co. Galway or elsewhere in any other ground upon which leave was granted. Thus, it is clear that he has not hitherto raised any concern or adduced any relevant evidence in respect of the proposed effect of the development on forestry or any other aspect of the environment in Co. Galway.

6. The applicant's address as furnished in these proceedings is Unit 1, Ballymount Cross Business Park, Dublin 24.

7. Furthermore, the applicant did not participate in the planning application before Galway County Council or in the appeal before the Board or at the oral hearings conducted by the Inspector. He did not participate in any respect in the application in respect of the substation and grid connection for which permission was also granted (BA07.00020) as a strategic infrastructure development under s. 182A of the Planning and Development Act 2000 as amended. In these proceedings it is not sought to quash that decision.

8. In *Grace and Sweetman v. An Bord Pleanála* [2017] IESC 10, the Supreme Court considered whether the applicants had a "sufficient interest" within the meaning of s. 50A(3)(b) to challenge a decision of the Board to grant planning permission for a windfarm in County Tipperary. In that case neither applicant had participated in the planning process before the planning authority or An Bord Pleanála.

9. Clarke and O'Malley JJ. delivered a joint judgment on behalf of the court. The court stated that a reasonably liberal approach must be taken to the nature of the interest which must be potentially affected in order to confer standing in environmental cases. A person could have an interest by virtue of proximity to a

proposed development. The degree of proximity required may depend on the scale and nature of the development in question:-

> "6.9 For example, a large scale development having the potential to impact on the amenity of persons within a wide catchment area might well be said to have the potential to have an adverse impact on the legitimate interests of persons living, or perhaps working or otherwise having regular contact with, a significant geographical area. A minor domestic development might well only have an impact on a much more restricted area."

10. The court summarised principles applicable under Irish domestic law in respect of *locus standi*:-

> 6.11 … it seems that standing in environmental cases involves a broad assessment of whether the legitimate and established amenity or other interests of the challenger can be said to be subject to potential interference or prejudice having regard to the scale and nature of the proposed development and the proximity or contact of the challenger to or with the area potentially impacted by the development in question. Furthermore, that broad assessment should have regard, in an appropriate case, to the legitimate interest of persons in seeking to ensure appropriate protection of important aspects of the environment or amenity generally. …"

11. The court acknowledged that a failure to participate in the permission granting process did not of itself exclude a person from having standing but it could be a factor to be taken into account in an appropriate case. If a person does not have a reasonably close proximity to the development in question or an established connection with a

particular amenity value which may arguably be impaired by the proposed development and fails to participate in the planning or appeal process, a doubt may be cast upon the standing of such persons to bring a challenge of this kind. Further doubt may arise from an absence of any significant explanation as to why they did not participate.

12. In the case of Ms. Grace, the court determined that she had standing because she lived less than 1km from the Special Protection Area (SPA) in issue and had made a number of important life choices based on its status and the amenities of the area (see para. 8.9). On the other hand, Mr. Sweetman could not demonstrate any physical proximity to the site though he had an interest in environmental matters generally. No evidence was adduced that he had any particular interest in the specific amenity value potentially impaired by the development and he offered no real explanation as to why he did not participate in the planning or appeal process. The court did not determine that Mr. Sweetman did not have standing "given that we are satisfied that Ms. Grace has standing" and concluded, therefore, that it was appropriate to consider the merits of the substantive issue. It reiterated that "had he [Mr. Sweetman] participated in the permission granting process or given the court some cogent explanation for non-participation, then it would have been much easier to resolve the standing question in his favour."

13. The court is satisfied that the applicant in this case does not have standing to bring these proceedings. He is not live in physical proximity to the site in issue in Athenry. He is based in Dublin. He did not participate in the planning process before Galway County Council or the Board of Appeal. Indeed, it is not clear as to when the applicant became aware of the observations and submissions to which he refers in his grounding affidavit which were made by others in the planning process. There is no

explanation as to why he did not participate in that process. He was refused leave to apply for judicial review on the one ground related to deforestation set out in the amended statements of ground. There is no evidence to indicate that he had any local and conservation interest in the destruction of forest in County Galway. There is no evidence of any wider interest in the area based on its designation as an SPA as in Ms. Grace's case. The area in issue is not a special area of conservation or special protection area and is not near any such site.

14. For these reasons the court is not satisfied that the applicant has demonstrated a "sufficient interest" to establish his *locus standi* in these proceedings and because of the contents of para. 9 of his affidavit referred to below in which he changed the basis upon which he claims such an interest.

Non-Disclosure

15. An applicant for leave to apply for judicial review must exercise the utmost good faith and make full disclosure of all material facts. The application is made *ex parte*, that is without notice to any of the proposed respondents or notice parties. (see *R.J.G. (Holdings) Ltd. v. The Financial Services Ombudsman* [2012] IEHC 452).

16. The applicant did not disclose in his grounding affidavit that he was the company secretary, director and shareholder of a limited liability company called Ecologic Datacentre Ltd. the registered address of which is the address which he furnished as his own in respect of these proceedings. Until November 2010 Ecologic Data Centre Ltd. was known as Ecolo Datacentre Ltd. Under that name it was the beneficiary of a grant of planning permission from Wicklow County Council for the construction of a datacentre on a 32.84 hectare site at Mount Kennedy Demesne and Tinnapark Demesne, Co. Wicklow (the Wicklow Datacentre Site) in Planning Register Ref: No. 10/2123.

17. Mr. Griffin in a replying affidavit on behalf of Apple states that in these proceedings Mr. McDonagh informed the Commercial Court that he advised the promoters of the datacentre development at Mount Kennedy and Tinnapark which was the subject matter of the grant of permission referred to above to have these proceedings entered in the commercial list but that he had no other involvement with that project.

18. It is clear from the evidence before the court and the exhibits contained in the affidavits of Mr. Griffin that Folios 36738F and 21790F set out the ownership of lands the subject matter of that planning permission. They indicate that the lands are in the ownership of Mr. Brian McDonagh, Mr. Maurice McDonagh and Mr. Kenneth McDonagh as sole owners as tenants in common of the lands. Mr. Stephen Griffin was advised by the applicant that the lands had been sold to a Malaysian property developer but this transfer was not at the time of the swearing of the affidavit reflected in the land registry folios. I am satisfied that Mr. McDonagh's position as owner of the lands, company secretary and advisor to the promotors of the datacentre were material facts which should have been disclosed to the High Court in the leave application.

19. Mr. Griffin avers that since early 2015 Mr. McDonagh sought to market his lands with benefit of planning permission to Apple to meet its datacentre requirements. A number of emails were exhibited concerning this matter.

20. Mr. Stephen Griffin is an associate director of Ove Arup and Partners Ireland who are engaged to prepare and lodge the planning application for the datacentre development at Athenry. He was approached by Mr. McDonagh on 21st October by telephone. In his affidavit he outlines a conversation in which Mr. McDonagh asked whether "in the light of the judicial proceedings" which had been initiated in respect

of the Athenry development at that time he could make it known to Apple that there was a site in Co. Wicklow which had the benefit of planning permission for a datacentre development. He was advised that the site was now owned by a Malaysian property developer.

21. It is clear from the Inspector's report that submissions were made to the Board by some appellants and observers that the Wicklow datacentre was a more suitable site for the proposed development than the subject site near Athenry. This became an issue in the appeal and the Wicklow site was considered by the Inspector as one of the alternative locations for the proposed development in a number of paragraphs of his report referred to in Mr. Clarke's affidavit. A submission was made specifically in respect of the Wicklow datacentre as an alternative in a submission by one of the appellants Mr. Larkin.

22. The applicant relies upon Ground E(k) that An Bord Pleanála failed to give due consideration to the energy requirements required for datacentres not yet developed but which had been granted planning permission by An Bord Pleanála in Ireland. This was said to have rendered "previous permissions unworkable because of the strain on the national grid". The applicant's involvement in the Wicklow project involved an application for planning permission to Wicklow County Council which was successful. It had been the subject of an application to the High Court to quash a decision of An Bord Pleanála overturning that grant of permission, which was also successful. These are relevant matters which ought to have been placed before the High Court at the leave application.

23. Mr. McDonagh in his replying affidavit of the 28th February, 2017 at para. 7 asserts that he now "affirms" or "discloses" his past and present involvement in Ecologic Datacentres. He also asserted that such involvement was "not strictly

relevant to these proceedings". He then outlines that he obtained a degree of knowledge and practical experience related to the planning and environmental issues surrounding the siting of new datacentres in Ireland because of his involvement with that centre including the needs of large datacentres and access to primary and backup power sources. He states that he considered himself an expert concerning these matters as they pertain to large datacentres. He stated:-

> "9. My sufficient interest in the instant case is therefore based wholly on my prior and current involvement with the Ecologic Datacentres Development and my knowledge gained therefrom."

24. The court is not satisfied that the asserted basis of his "sufficient interest" in the present proceedings based on his involvement with Ecologic Datacentres Development and the knowledge gained therefrom is a sufficient basis upon which to initiate these proceedings under section 50(A)(3)(b). Furthermore, the court is satisfied that there has been significant non-disclosure and lack of candour in these proceedings by Mr. McDonagh in relation to his interest in challenging the decision to permit the development the subject matter of these proceedings. This has not been satisfactorily explained and was a relevant and significant matter to the consideration of the leave application. The court would therefore on the basis of the applicant's non-disclosure and lack of candour exercise its discretion to refuse the relief claimed.

The Grounds

25. Ground E(i)(j) seeks relief on the basis that the granting of planning permission "completely ignored the issues raised by An Taisce in their letter to An Bord Pleanála dated the 7th April, 2016 acknowledged by An Bord Pleanála on the 12th April, 2016". The applicant submits that An Bord Pleanála erred in not giving due consideration to the issues raised in this correspondence. The applicant relies

upon a letter sent by An Taisce to An Bord Pleanála concerning the Strategic Infrastructure Application (Ref: VA002O) which is the application in respect of the substation which would supply the power to operate the Phase 1 development which is the subject of the application for permission which is challenged in these proceedings. The grant permission in respect of the substation itself is not challenged in these proceedings.

26. The applicant submits that An Taisce raised four issues in respect of site selection, the project's impacts on climate change and energy demand, the obligation on the Board to assess the direct and indirect effects on energy demand in climate change under Article 3 of the EIA Directive and the evaluation of climate change effects under the Environment Impact Assessment Directive.

27. The court is satisfied that this ground is misconceived. The submission made by An Taisce was in respect of the application for the power supply development. In addition, at para. 5.4 of the Inspector's report in respect of that development the Inspector summarised An Taisce's position. The court is satisfied that all of the issues raised in An Taisce's letter were addressed in the course of the Inspector's consideration of the Phase 1 data hall development and the power supply development. These issues were considered together and the submissions raised in that letter are very extensively addressed in the Inspector's reports in respect of both applications.

28. The Inspector at para. 8 of the report indicates that the application for the power development should be considered in conjunction with that relating to the Phase 1 development application appeal. There is no doubt having considered the Inspector's reports in both cases that the Inspector fully considered and addressed the

issues raised by An Taisce in the letter. The court considers the ground advanced on this basis to be completely without merit.

29. In his submissions the applicant claimed that the Inspector identified significant impacts on energy demand on climate if the project were to proceed. He complains that the Board carried out no assessment of the direct and indirect effects of these significant impacts and fails to identify the main measures to mitigate the likely significant effects contrary to the EIA Directive. He submits that there is no consideration given to this matter in the decision of the Board which he alleges did not carry out the assessment required by the EIA Directive. This matter has been fully considered in the *Fitzpatrick v. Daly* judgment in respect of the grounds advanced in that case in which the court has rejected similar submissions.

30. The applicant also submits that the Inspector failed to take into account that the datacentre and the Phase 1 development are in essence one project. He claims that there is a functional interdependence between them. He therefore submits that the decision in *An Taisce v. An Bord Pleanála* [2015] IEHC 572 applies and that the decision to grant permission in respect of the Phase 1 development should be quashed. These matters have already been considered and similar arguments rejected in the *Fitzpatrick v. Daly* case.

31. The applicant also contends that there will be direct or indirect effects of the additional energy demand required for the project. He submits that this will give rise to possible grid reinforcement and/or additional power generation and that the Board is obliged to assess same and any mitigation measures necessary as a result and any impact of such energy demand on greenhouse gas generation and national emission targets to comply with the EIA Directive but has not done so.

32. All of these matters have been addressed in the *Fitzpatrick v. Daly* decision delivered today and grounds properly advanced in that case were rejected by this Court.

33. It is clear from the written submissions made by Mr. McDonagh that he is seeking to argue a point in respect of the absence of an EIA or a properly conducted EIA as a ground upon which the decision to grant permission for the Phase 1 development ought to be quashed. However, he was not granted leave to apply for judicial review on that ground. He was only permitted to argue a ground based on an alleged failure to consider the issues raised in the An Taisce letter. The court is satisfied that there was no such failure and is further satisfied that the applicant cannot use or adapt that ground to advance an entirely different case.

34. Ground E(i)(d) claims that "the granting of State aid by the Irish government to Apple was investigated by the European Commission". It is contended that the further granting of a State aid in the planning process was made known to the respondent and ignored and that no reference was made to State aid in the granting of the planning permission.

35. This matter is addressed at para. 2 of the verifying affidavit of 27th September, 2016 and elaborated upon at paras. 24 to 28 of Mr. McDonagh's affidavit on the 28th February, 2017.

36. Mr. McDonagh is relying on the European Commission's State aid case against Apple in respect of tax matters (Case No.: SA.38373). He admits in the affidavit that the case involving taxation does not specifically relate to the granting of planning approval in this case but maintains that the Board had an obligation to ensure that the grant of approval would not be construed as a further grant of State aid to

Apple. This is entirely irrelevant to the planning application issue to be considered in the application for the Phase 1 development.

37. Mr. McDonagh also contends that the property which is the subject of the planning decision has been in the ownership of Coillte a State owned company since 1935. It is submitted that the transfer of this site from use on behalf of the Irish State as forestry to private ownership involves an improper State aid and provides an advantage to Apple on a selective basis which eliminated and distorted competition in the datacentre industry sector. It is conceded that the transfer of the forest into Apple's ownership was not strictly a matter under the Board's purview but it is submitted that the Board had an obligation to ensure that they were not participating or enabling a legal State aid to occur by virtue of their actions. It is alleged that the purchase should have been questioned to ensure the acquisition process did not violate European and domestic law in respect of State aid. This ground is without merit. The Inspector records in his report the information that Apple is expected to pay Coillte the full commercial value of the land subject to obtaining a grant of planning permission.

38. Ground E(i)(f) contends the planning contribution fee demanded by Galway County Council from Apple was not in accordance with fees outlined in Galway County Council document "Development Contributions Scheme 2010 under s. 48 Planning and Development Act 2000 (as amended)". The contribution fee was imposed by Galway County Council as a condition on the granting of planning permission. However, the Board's decision to grant permission on appeal operated "to annul" the decision of the Council. The condition challenged no longer applies. The Board did not impose the same condition in the permission granted. At Condition No. 19 it imposed a condition requiring that a financial contribution be

agreed with and paid to the planning authority in accordance with the planning authority's development contribution scheme and that in default of agreement the matter would be referred to the Board for determination. The court accepts that the point is therefore entirely moot.

39. Ground E(i)(g) concerns a complaint that Apple's considered that the proposed site for a data storage centre should be at least 320km from a nuclear facility. The site in Athenry is 282km from the nearest nuclear facility and it was submitted that this was made known to the respondent on appeal and that the building of the datacentre "gives way to serious concerns over the sterilisation of lands for the datacentre use on the east coast of Ireland and other locations throughout Europe". It is abundantly clear from the Inspector's report that the Inspector fully considered Apple's submissions in relation to this matter. The Inspector noted that criteria requiring the 320km distance from a nuclear facility and 80km from any major petrol chemical storage site were questioned during the course of the hearing and were in his opinion excessively restrictive. He noted that this particular criterion had the potential to exclude all east coast sites notwithstanding the fact that a number of Apple datacentres in the United States were located within 320km of nuclear facilities as were Google and Facebook facilities in Ireland. This matter was fully considered in respect of site location at paras. 12.1.17 to 12.1.19 of the Inspector's report on the datacentre development. There ground has no substance.

40. In ground E(i)(k) the applicant claimed that respondent failed to give due consideration to the energy requirements required for datacentres not yet developed but granted planning permission by An Bord Pleanála in Ireland thereby making previous permissions unworkable because of the strain on the national grid. In his affidavit of 28th February, 2017 Mr. McDonagh elaborates on the basis upon which

this ground is advanced. He complains of the absence of engineering analysis of the full roll-out of the masterplan in respect of the data protection centre as it affects the national grid. Essentially he advances the argument that the Board had an obligation under the EIA Directive to evaluate the potential requirement for grid re-enforcements due to the datacentre and complains that the Inspector simply approved the connection and deferred analysis of the effects thereof until some unspecified future date. This is yet another attempt to advance a ground in respect of which leave was not granted. The court is satisfied that this ground is without substance and is also satisfied that the Board considered the effects of the proposed development on energy supply generally insofar as that was practicable. The energy demand in respect of the development of Phase 1 which was the subject matter of the application could be met by existing capacity in the national grid. In addition, any further issues relating to energy demand and its effects on the national grid, climate change or greenhouse gas emissions will be a matter to be considered in further applications for planning permission which will be required if any new phase development is proposed at which stage a further EIA will be required.

Conclusion

41. The court is satisfied that the applicant has no *locus standi* to bring these proceedings. The court is also satisfied that even if there were any merit in the application it should be refused in the exercise of the court's discretion by reason of non-disclosure and lack of candour in the initial leave application. The court has also considered the submissions which made by the applicant in respect of the grounds upon which leave was granted and is satisfied that there are without substance. The application is therefore refused.