THE SUPREME COURT

Murray C.J. ***531 & 535/04***
Denham J.
Geoghegan J.

Between

ERIC MARTIN

Applicant / Appellant

-v-

An Bord Pleanála, IRELAND
AND THE ATTORNEY GENERAL

Respondents

AND

INDAVER ireland LIMITED

NOTICE PARTY

JUDGMENT of Murray C.J. delivered on the 10th day of May, 2007

This is an appeal from an Order of the High Court of Smyth J. in which he refused the relief sought by the appellant which in essence sought to challenge the decision taken by the first named respondent, hereinafter *"the Board"*, on 3rd March, 2003, granting planning permission to the first named notice party, hereinafter *"Indaver"*, for the development of a waste management and incinerator facility in Duleek, Co. Meath. As the appellant stated in his submissions, he seeks to challenge the lawfulness of the decision of the Board on a number of grounds including that the national legislative provisions on foot of which the decision to grant planning permission was made were incompatible with the obligations imposed on the State by Council Directive 85/337/EEC of 27th June, 1985, on the assessment of the effect of certain public and private projects on the environment as amended by Directive 97/11/EC of 3rd March, 1997, (hereinafter collectively referred to as *"the Directive"*).

Having dismissed the appellant's application the learned High Court Judge certified a question of law for the purposes of an appeal to this Court. I refer to the nature and terms of the question later.

Background facts

The essential facts of the case are not in dispute. The development which Indaver intend to carry out consists of an incinerator waste management facility and associated development. The proposed development is to be carried out on a 25 acre site. The learned High Court Judge described the

development as intended to consist of a range of structures which include a main processing building of 13,480 square metres incorporating a waster reception hall, waste sorting plant, bunker, operation / turbine buildings, boiler, grate furnace, ash bunker, demineralisation unit, boiler feed pumps, flu gas treatment building, solidification unit, Air Conditioning unit, turbine cooler and a 40 metre high stack. In addition it is proposed to have a number of ancillary structures – a pump house building of 200 square metres, recycling and water treatment. The facility will also include a process to recover energy from the waste in the form of steam and electricity, the latter for export to the national electricity grid.

In order to proceed with the construction and operation of the waste management facility Indaver are required by national law to obtain planning permission for the development, in the first instance from the local planning authority and in the event of an appeal, which there was in this case, from the Board. Secondly, it is required to obtain a Waste Licence from the Environmental Protection Agency pursuant to the provisions of the Waste Management Act 1996.

Without both the planning permission and the waste licence it cannot proceed with the development.

Planning permission was granted to Indaver by the local planning authority and the grant of this permission was appealed to the Board by a number of third parties who objected to the proposed development. Indaver also lodged an appeal seeking the removal or modification of a condition in respect of the source or origin of the waste to be disposed of.

When the application came before the Board on appeal the Board had the function of examining the application for permission *de novo*. For this purpose it was also under a duty to carry out an Environmental Impact Assessment. As part of the appeal process an oral hearing was conducted over four consecutive days.

On 27th February 2003, the Board decided to grant permission subject to an extensive range of conditions which included limitations on the origin and volume of waste, the establishment of a community liaison committee, archaeological appraisal, traffic management, water supply and drainage arrangements, noise abatement and monitoring during construction, the prevention of ground water and surface water pollution and a range of other conditions.

It is common case that the development or project in question is of such a nature as to require that an Environmental Impact Assessment (hereafter referred to as *"EIA"*) be carried out prior to any consent being given to the

project to proceed as required by the Directive. Accordingly national legislation must provide for the carrying out of the appropriate EIA.

The obligation to carry out an EIA in a project of the nature involved in this case derives principally from Article 4 paragraph 1 of the Directive which provides that projects listed in Annex I of the Directive should be made subject to an assessment in accordance with Articles 5 to 10. Again, it is common case, that the project in question here falls within Annex I.

The statutory and regulatory measures implementing the Directives in national law have been described by Fennelly J. as a *"statutory maze"* (*O'Connell –v- The Environmental Protection Agency & Ors* [2003] 1 I.R. 530 at 533) but hopefully, because of the net issues which have been raised in this appeal and the common position taken by the parties on certain questions, it will not be necessary to pass through that maze and refer to all the relevant provisions.

The Planning Process

In this case the Board did carry out an EIA before it granted planning permission subject to certain conditions. This is consistent with Article 2(1) of the Directive which requires *"Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment ... are made subject to a requirement for development consent and an assessment with regard to their effects"*.

As the appellant has acknowledged, s. 26(5)(d) of the Local Government (Planning and Development) Act 1963, consistent with the obligations imposed by the Directive, requires the Board, when determining an application on appeal in respect of which an Environmental Impact Statement was submitted by the appellant, to have regard to that statement and to other information relating to the effects of the development on the environment.

An Environment Impact Statement (hereafter referred to as *"EIS"*) is a statement which a developer may be required to submit to a relevant authority so as to provide them with specified information concerning the potential impact of the developer's project on the environment. An EIS is taken into account when the relevant authority is carrying out an EIA. The Directive does not, of course, use the term EIS. It is the term used in national legislation to denote a statement containing the information which a developer may be required to provide as provided for in Articles 5-10 of the Directive.

In this case no issue is taken with the substance of the EIA made by the

Board within the ambit of its statutory competence. Moreover, it is clear, as the learned High Court Judge found, that the EIA conducted by the Board included an assessment of matters which could affect environmental pollution arising from the construction of the relevant plant.

This means in effect that there is no issue concerning the fact that the Board, for the purpose of deciding the planning application for the construction of the facility, carried out an EIA in accordance with its statutory obligations.

However the scope of the EIA carried out by the Board was limited in one particular respect. That limitation is the genesis of the appellant's case. The Board in carrying out an EIA for the purpose of the planning application was precluded from considering any matters relating to *"the risk of environmental pollution from the activity"*, that is to say the activity arising from the operation of the waste management facility once it had been constructed. The underlying rationale for such a limitation on the functions of the Board is that as regards developments or projects which are required to obtain a waste licence from the Environmental Protection Agency (hereafter the *"EPA"*) the risk of *"environmental pollution from the activity"* is a matter to be assessed by that Agency when deciding whether to grant such a licence. This division of responsibility for environmental assessment has, as its purpose, the avoiding of duplication of functions by the Board and the EPA in the case of such development or project. It means that in such a case the Board carries out an EIA for the purpose of the construction element of the project and the EPA carries out an EIA in respect of the activity that will be carried out in the operation of the plant to be constructed.

That limitation on the functions of the Board arose by virtue of the fact that the development in question is one for which a waste licence from the EPA pursuant to the provisions of the Waste Management Act 1996 is required.

Section 54(3) provides as follows:

> *"Notwithstanding section 26 of the Act of 1963 or any other provision of the Local Government (Planning and Development) Acts, 1963 to 1993, where a waste licence has been granted or is or will be required in relation to an activity, a planning authority or An Bord Pleanála shall not, in respect of any development comprising or for the purposes of the activity—*
>
> > *(a) decide to refuse a permission or an approval under Part IV of the Act of 1963 for the reason that the development would cause environmental pollution, or*

(b) decide to grant such permission subject to conditions which are for the purposes of prevention, limitation, elimination, abatement or reduction of environmental pollution from the activity,

and accordingly—

(i) a planning authority in dealing with an application for a permission or for an approval for any such development shall not consider any matters relating to the risk of environmental pollution from the activity;

(ii) An Bord Pleanála shall not consider any appeal made to it against a decision of a planning authority in respect of such an application, or any submissions or observations made to it in relation to any such appeal, so far as the appeal, or the submissions or observations, as the case may be, relates or relate to the risk of environmental pollution from the activity."

Section 98 of the Environment Protection Agency Act 1992 and s. 26(5)(dd) of the Local Government (Planning and Development) Act 1963, as amended, contain provisions in essentially the same terms for developments which require a licence pursuant to the provisions of the Act of 1992. The parties in their submissions were at times at cross purposes as to which of the foregoing sections excluded environmental pollution arising from the activity from the remit of the Board, but nothing turns on this. In any case it is clear that what is required by the developer is a waste management licence and that the relevant provision is s. 54(3) of the Act of 1996. As can be seen, that section imposes restrictions on the Board's function in carrying out an EIA similar to the other provisions referred to.

I think it would be as well to point out here that *"environmental pollution"* in this context has a specific statutory meaning and is defined in s. 5(1) in the Waste Management Act 1996 as meaning:

"'environmental pollution' means in relation to waste, the holding, transport, recovery or disposal of waste in a manner which would, to a significant extent, endanger human health or harm the environment, and in particular –
(a) create a risk to waters, the atmosphere, land, soil, plants or animals,
(b) create a nuisance through noise, odours or litter, or
(c) adversely affect the countryside or places of special interest;"

The statutory process before the EPA

The planning process before the Board is complete the Board having made its decision and granted planning permission to Indaver subject to a whole range of conditions. It is also important to emphasise again that no issue arises concerning the manner in which the Board carried out the EIA in conformity with national legislation which was also consistent with the Directive save the one matter put in issue by the appellant namely the exclusion of the risk of environmental pollution from the licensable activity from its remit.

The Environmental Protection Agency was established with a view to making further and better provision for the protection of the environment and the control of pollution as it is put in the long title to the Environmental Protection Agency Act 1992. This was the Act which established the Agency. The functions of the Agency, as specified in s. 52 of that Act, include the licensing regulation or control of activities for the purpose of environmental protection. The Waste Management Act 1996 confers on the EPA, *inter alia*, the function of deciding whether to grant a waste licence.

It is also the Agency which is charged with the monitoring of the quality of the environment. Further or additional functions in connection with the protection of the environment and in particular the control of pollution may be attributed to the Agency by way of statutory regulations. It also has a role in preparing guidelines for the Minister for the Environment on the information to be contained in Environmental Impact Statements in respect of certain specified developments (i.e. developments to which s. 72(1) of the Act of 1992 apply).

No evidence has been adduced by either party as to the process, in this case, before the EPA insofar as it has occurred, concerning an application for a waste licence. Indeed the appellant criticised the respondents for failing to bring any information before the Court concerning the status and nature of the process. However it seems to me that insofar as evidence relating to the process which actually has or will take place before the EPA with regard to the question of a waste licence is relevant and relied upon by the appellant, the onus is on the appellant to bring forward such evidence.

As regards the statutory functions of the EPA in relation to the grant of refusal of a waste licence it seems to me sufficient for present purposes to note that s. 39(1) of the Waste Management Act 1996 prohibits any person from operating a waste facility such as that envisaged in the plans of Indaver save under and in accordance with a licence, a *"waste licence"*, from the EPA, that is in force in relation to the carrying on of that activity.

The grant of a waste licence is governed, *inter alia*, by s. 40 of the Act of 1996. Subsection 2 of s. 40 imposes on the Agency, the EPA, certain obligations when considering an application for a waste licence.

Subsection 2 of s. 40 provides as follows:

> *" (2) Subject to subsection (5), in considering an application for a waste licence or in reviewing, pursuant to this Part, a waste licence, the Agency shall—*
>
> > *(a) carry out or cause to be carried out such investigations as it deems necessary or as may otherwise be prescribed for the purposes of such consideration or review,*
> >
> > *(b) have regard to—*
> >
> > > *(i) any relevant air quality management plan under section 46 of the Act of 1987, or water quality management plan under section 15 of the Local Government (Water Pollution) Act, 1977, or waste management plan or hazardous waste management plan under Part II,*
> > >
> > > *(ii) (I) any environmental impact statement in respect of proposed development comprising or for the purposes of the waste activity concerned, which is submitted to the Agency under and in accordance with a requirement of, or made pursuant to, regulations under section 45.*
> > >
> > > *(II) any submissions or observations made to the Agency in relation to*

the environmental impact statement,

(III) such supplementary information (if any) relating to such statement as may have been furnished to the Agency by the applicant or licence holder under and in accordance with a requirement of, or made pursuant to, regulations under section 45,

(IV) where appropriate, the views of other Member States of the European Communities in relation to the effects on the environment of the proposed activity,

(iii) such other matters related to the prevention, limitation, elimination, abatement or reduction of environmental pollution from the activity concerned as it considers necessary, and

(iv) such other matters as may be prescribed."

(3)(a) For the purpose of subsection (2) (b) (ii), the Agency shall, other than in the case of an environmental impact statement in respect of development proposed to be carried out by or on behalf of a local authority within the functional area of the authority, have regard to the matters mentioned in the environmental impact statement and any submissions, observations or supplementary information relating to such statement made or furnished to the Agency under and in accordance with a requirement of, or made pursuant to, regulations under section 45, only in so far as they relate to the risk of environmental pollution from the activity in question.

(b) The reference in this subsection to a local authority's functional area is a reference to its

functional area in its capacity as a planning authority.

(4) The Agency shall not grant a waste licence unless it is satisfied that—

(a) any emissions from the recovery or disposal activity in question ("the activity concerned") will not result in the contravention of any relevant standard, including any standard for an environmental medium, or any relevant emission limit value, prescribed under any other enactment,

(b) the activity concerned, carried on in accordance with such conditions as may be attached to the licence, will not cause environmental pollution,

(c) the best available technology not entailing excessive costs will be used to prevent or eliminate or, where that is not practicable, to limit, abate or reduce an emission from the activity concerned,

(d) if the applicant is not a local authority, the corporation of a borough that is not a county borough, or the council of an urban district, subject to subsection (8), he or she is a fit and proper person to hold a waste licence,

(e) the applicant has complied with any requirements under section 53.

It should also be noted that according to s. 2 of the Act of 1996 the purpose for which it was enacted include the purpose of giving effect to certain Community Acts specified in that section and these include Council Directive 85/337/EEC of 27th June, 1985. Therefore there cannot be any doubt but that the EPA in exercising its functions concerning the grant of a waste licence is exercising statutory functions for the purpose of giving effect to the Directive.

It is equally clear from subsection 2(b) above and Article 13 of the Waste Management (Licensing) Regulations 1997 (S.I. No. 133 of 1997) (as amended) that the applicant for a waste license is required to provide the EPA with an EIS and that the EPA is required to carry out an EIA in relation

to the application for the license including the risk of *"environmental pollution from the activity"*. Moreover, by virtue of Article 32 of the Local Government (Planning and Development) Regulations 1994 (S.I. No. 86 of 1994) a planning authority is required to notify the EPA of a planning application where the development comprises or is for the purpose of an activity in relation to which a waste licence is required. The notification to the EPA must include a copy of an EIS. In a case in which the EPA has been notified of a planning application pursuant to Article 30 the planning authority must notify the EPA of its decision on the application within three working days of the decision.

The issues

As the appellant emphasised in the course of this appeal, the issues raised derive from the extent to which this division of responsibility between the Board and the EPA adequately gives effect to the requirements of the Directive and if not, whether the permission granted by the Board should be declared to be an invalid permission. Also in the appellant's view an effect of this statutory division of responsibility is that it is impossible to ensure that an 'integrated EIA', as required by the Directive, is properly carried out. On the other hand the position of the respondents is that since the EPA also carries out an EIA, the combination of the assessment conducted by the Board and by the EPA together constitutes a valid integrated assessment in conformity with the Directive.

I have summarised in very broad terms the position of the parties before setting out the specific points of law which have been raised in the appeal, which I do below, in order to highlight at this stage that it is the involvement of two agencies in the consent or permission process for the development to proceed and the so-called division of responsibilities between them with regard to the making of an EIA which is fundamental to those issues.

The specific issues

This appeal is founded on a certificate granted by the learned High Court Judge in which he certified that the decision in the case involved a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to this Court on that point of law.

The point of law certified by the learned High Court Judge was stated in the following terms:

> *"Has the State in and through the statutes and regulations transposed into Irish law European Directive 85/337/EEC and 97/11/EC."*

The point of law as certified by the learned High Court Judge is in general and abstract terms without any reference to the actual issues between the parties in this case. Taken at its face value it could involve a roving examination of the entire spectrum of national legislation in relation to all the provisions of the Directive which in turn could involve the Court in examining questions that were hypothetical or outside the ambit of the proceedings in the High Court. This is of course something which this Court, as a Court of final appeal and not of first instance, cannot do and which the relevant statutory section providing for a certificate clearly does not contemplate it should do. More importantly, it clearly was not the intention of the learned High Court Judge that this Court should be asked to engage in such a hypothetical and roving exercise. For this reason it is desirable that points of law certified by the High Court for the purpose of an appeal of this nature should specify the particular point or points of law in issue. Undoubtedly any point of law so certified will fall to be interpreted in the light of the judgment of the High Court on the issues and the parties' submissions with regard to same. For the purpose of the present appeal it is possible, in that context, to identify the questions of law in issue and indeed the appellants, in their submissions, have identified three points of law which the High Court certificate was intended to cover, concerning the application of the Directive and validity of the decision of the Board.

The three legal issues relevant to this appeal were set out in the submissions of the appellant in the following terms:

> *" (a) Does a grant of planning permission constitute "development consent" within the meaning of the Directive?*
>
> *(The appellant contends that the planning permission constitutes the development consent for the purposes of the Directive. This was denied by the State respondents, who contend that the development consent comprises the carrying out of an EIA by the Board and, in a case such as this where a waste licence is required, the assessment which the State contends the EPA would carry out.)*
>
> *(b) If the development consent comprises the EIA conducted by the Board and the alleged assessment conducted or to be conducted by the EPA (the appellant does not accept that the EPA necessarily does in fact conduct such an assessment) is the assessment conducted "at the earliest possible stage in the decision-making process" as the Directive requires?*
>
> *(c) If the assessment required by the Directive to be conducted comprises the EIA undertaken by the Board and the EIA allegedly undertaken or to be undertaken by the EPA, does this structure satisfy the Directive requirement for an integrated assessment?"*

"Development Consent"

In substance the first issue is whether the decision of An Bord Pleanála dated 3rd March, 2003, granting planning permission to Indaver must be considered as the only decision which is a *"development consent"* within the meaning of the Directive to the exclusion of any role subsequently played by the EPA in deciding whether it should grant a waste licence for the operation of the plant in question.

If the appellants are correct in their contention then they must succeed on this point of appeal because it is common case that however extensive the functions of the Board may be in assessing the environmental impact of the project they do not extend to assessing the risk of environmental pollution arising from the activity which is comprised in the factors referred to in Article 3 of the Directive. That is a matter for the EPA.

A *"development consent"* means, according to Article 1 of the Directive:

> *"The decision of the competent authority or authorities which entitles the developer to proceed with the project".*

The appellant accepts that a development consent within the meaning of the Directive is capable of comprising the decision of more than one competent authority, as Article 1 makes clear. That creates a difficulty, to say the least, for his proposition that the decision of the Board alone constitutes the development consent.

However, the appellant contends that the decision of the Board to grant planning permission clearly entitles the developer to *"proceed with the project"* insofar as the planning permission entitled the developer to construct the plant. Admittedly, he says, the planning permission does not authorise the developer to operate the plant. It cannot carry out any of the intended activity in the plant until it obtains a licence from the EPA. It does mean, nonetheless, that the developer can *"proceed"* and construct the plant even if it is on the basis that it will never function unless it gets a waste licence.

It was also submitted that since it is the planning permission which permits the developer to proceed with the project, even if it is only as to construction, the planning permission must be deemed to be the one and only development consent within the meaning of the Directive and any subsequent decision of the EPA to grant a license which would permit the constructed plant to operate cannot be considered to be a development consent in conjunction with the decision of An Bord Pleanála.

As already mentioned, Article 1.2 makes it manifestly clear that the

development consent may consist of decisions of two or more authorities which are competent to carry out the procedures required by the Directive in relation to EIA.

As Article 1 also makes clear a *"development consent"* is one which permits a developer to proceed with the project, not simply part of the project. Article 1.2 defines project as meaning:

> *" - the execution of construction works or of other installations or schemes,*
> *- other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources:"*

It is common case that for certain projects the need for an EIA is left to the discretion of the competent authority and that need may be determined through a case by case examination or thresholds or criteria set by the Member State. It is also the case that certain projects, being those listed in Annex I of the Directive, must always be the subject of an EIA (see Article 4 of the Directive).

The proposed development of Indaver is governed by the mandatory requirements of the Directive as regards an EIA since it is a waste disposal installation and *"waste disposal installations"* are expressly referred to in Annex I. It is the fact that it involves the disposal of waste in its operation that makes the proposed development a project within Annex I.

I cannot find any rational basis for separating the development scheme in question into two projects consisting of the construction and its operation. As noted above the fact that it is an installation which will engage in the activity of waste disposal is a key element which defines the 'project'.

In order to proceed with the development both planning permission and a waste licence are required from the Board and the EPA respectively. Both are required to carry out an EIA having regard to the comprehensive EIS lodged by the developer. As pointed out above Council Directive 85/337/EEC of 27th June, 1985, is expressly cited in s. 2 of the Waste Management Act 1996 as one of the Community Acts to which the Act is intended to give effect and it is clear that in addition to the Board the EPA is a competent authority for the purpose of the Directive.

It is also interesting to note that Article 5 of the Directive provides that in projects which must, like the one in this case, be subject to an EIA by virtue of Article 4, Member States shall ensure that the developer supplies certain information concerning the project, that is to say information specified in Annex IV of the Directive. The information which a developer is required to

provide pursuant to Annex IV, and which is intended to facilitate the EIA by the competent authorities, does not distinguish between the construction phase of a project and its activity. Moreover Article 5 also provides that Member States shall ensure that, if the developer so requests the competent authority shall give an opinion on the information to be supplied by it in accordance with the foregoing requirement. It goes on to say that *"Member States may require the competent authorities to give such an opinion irrespective of whether the developer so requests"*. That provision, entirely consistent with the other provisions of the Directive, having clearly envisaged that an EIA may be carried out by more than one authority in respect of the same project, provides that in such a case each of the authorities may be required to provide an opinion to the developer on the information to be supplied by it.

Thus, the provisions of Article 5 further underline the fact that any EIA may be carried out by more than one competent authority in relation to one particular project and that the decisions of those authorities may comprise the development consent.

It seems to me wholly artificial and unreal to seek to divide the development in this case into two, as the appellant seeks to do, thus requiring two development consents. To regard it as two projects would do violence to ordinary language. It is manifestly clear that the project in this case is for a *"waste installation"*. Its consent to proceed depends on planning permission in the first instance and a waste licence in the second instance. In the circumstances I think it would be absurd to consider that planning permission on its own constitutes *"development consent"*.

In these circumstances it seems to me that the *"development consent"* in the circumstances of this case must be considered to comprise the decision of An Bord Pleanála and the decision of the Agency (assuming that a license is granted). Accordingly, this ground of appeal is not well founded. By way of addendum to my conclusion on this issue I refer to my observations later in this judgment on the English case of *R. –v- Secretary of State for the Environment & Ors, ex p. Greenpeace Ltd & Anor* [1994] 4 All E.R. 352. That case is relied on by the appellant in addressing the second issue but in fact contradicts his position on this issue.

"Earliest possible stage"

On the second issue calling in question the decision of the Board, the applicants have argued that the EIA required under the Directive must be carried out at the earliest possible stage in the decision-making process. In the context of the present case it was contended that a comprehensive EIA which included the risks of environmental pollution from the activity should

have been done by the Board before it made its decision.

For this proposition the appellant relied primarily on two legal precedents the first of which is the decision of the Court of Justice in *Wells –v- Secretary of State for Transport, Local Government and the Regions* (case *C-201/202)* [2004] E.C.R. I - 00723 and an English case entitled *R. –v- Secretary of State for the Environment, ex p Greenpeace Ltd*[1994] 4 All E.R. 352.

With regard to the *Wells* case counsel for the applicant relied on the following passage in the decision of the Court of Justice commencing at para. 50:

> *"As provided in Article 2(1) of Directive 85/337, the environmental impact assessment must be carried out "before consent is given".*
>
> *According to the first recital in the preamble to the directive, the competent authority is to take account of the environmental effects of the project in question "at the earliest possible stage" in the decision-making process.*
>
> *Accordingly, where national law provides that the consent procedure is to be carried out in several stages, one involving a principal decision and the other involving an implementing decision which cannot extend beyond the parameters set by the principal decision, the effects which the project may have on the environment must be identified and assessed at the time of the procedure relating to the principal decision. It is only if those effects are not identifiable until the time of the procedure relating to the implementing decision that the assessment should be carried out in the course of that procedure …*
>
> *In a consent procedure comprising several stages, [the assessment of the environmental effects] must, in principle, be carried out as soon as it is possible to identify and assess all the effects which the project may have on the environment."*

On the basis of the foregoing it was submitted that the planning application was the earliest possible stage in the decision-making process for the project in issue in this case and therefore the point at which a comprehensive EIA should have been carried out. Accordingly the process adopted by the Board pursuant to national legislation was in contravention of the requirements of the Directive since its consideration of the risks of environmental pollution extended to those arising from the construction phase only and not from the

activity.

In the *Wells* case the Court of Justice was essentially concerned with the provisions of s. 22 of a United Kingdom Act, The Planning and Compensation Act 1991, which laid down a special set of rules permitting the resumption of mining operations in respect of old mining permissions which had been granted in 1946.

At para. 14 of its decision the Court of Justice explained:

> *"Section 22(3) of the Planning and Compensation Act 1991 provides that if no development has, at any time in the period of two years ending on 1 May 1991, been carried out to any substantial extent, operations may not resume until 'the conditions to which the [old mining] permission is to be subject' have been determined and registered in accordance with section 22(2). On the other hand, if no application for registration is made before 25 March 1992, the old mining permission will cease to have effect (section 22(4) of the Act and paragraph 1(3) of Schedule 2 thereto)."*

At para. 19 the Court of Justice stated:

> *"Under the Town and Country Planning (Assessment of Environmental Effects) Regulations 1988, mining permissions granted pursuant to the Town and Country Planning Act 1990 are subject to environmental impact assessment in accordance with Directive 85/337. The regime prescribed in section 22 of the Planning and Compensation Act 1991 for old mining permissions was not, on the other hand, considered to be subject to such an environmental impact assessment procedure."*

The essential question with which the Court was concerned with here was whether a decision pursuant to the United Kingdom Act of 1991 determining new conditions or approving certain matters reserved by the new conditions, which allowed mining operations to recommence, constituted development consent within the meaning of Article 1(2) of Directive 85/337 and thus that an EIA must be carried out.

I do not consider it necessary to go into the details of the rules or process under which these decisions were taken pursuant to the United Kingdom Act of 1991. Suffice it to say that the Court of Justice decided, contrary to the submission of the United Kingdom government, that *"decisions such as the decision determining new conditions and the decision approving matters reserved by the new conditions for the working of [the quarry in question] must be considered to constitute as a whole, a new 'consent' within the meaning of Article 2(1) of Directive 85/337."* (Paragraph 47). Therefore it

rejected the submission that no EIA was required for such decisions.

Having so decided the Court of Justice, for the purpose of giving a complete answer to the national court in that context, then went on to consider the time at which an EIA should be carried out. In doing so it stated as follows:

> *" 50. As provided in Article 2(1) of Directive 85/337, the environmental impact assessment must be carried out 'before consent is given'.*
>
> *51. According to the first recital in the preamble to the directive, the competent authority is to take account of the environmental effects of the project in question 'at the earliest possible stage' in the decision-making process.*
>
> *52. Accordingly, where national law provides that the consent procedure is to be carried out in several stages, one involving a principal decision and the other involving an implementing decision which cannot extend beyond the parameters set by the principal decision, the effects which the project may have on the environment must be identified and assessed at the time of the procedure relating to the principal decision. It is only if those effects are not identifiable until the time of the procedure relating to the implementing decision that the assessment should be carried out in the course of that procedure."*
> (Emphasis Added)

It was in that context that the Court of Justice went on in the next paragraph to state:

> *"In a consent procedure comprising several stages, that assessment must, in principle, be carried out as soon as it is possible to identify and assess all the effects which the project may have on the environment."*

In short, the *Wells* case was concerned with a particular UK statutory scheme governing the revival of old mining permissions the consent procedure for which involved *"a principal decision"* and *"an implementing decision"* which could not extend beyond the parameter of the former. These were characteristics of the English law in question and the question fell to be addressed where no environmental impact examination had taken place at any point.

The situation in this case is quite different.

The process which arises under Irish law in the context of this case does not in any sense involve *"a principal decision"* followed by *"an implementing

decision which cannot extend beyond the parameters set by the principal decision". As a matter of Irish law the decision of An Bord Pleanála could not be characterised as a *"principal decision"* in the sense of the *Wells* decision nor any decision of the EPA on a license an *"implementing decision"*. On the contrary a refusal to grant a license by the EPA would mean there was no consent to the project and it would not proceed. Alternatively, the EPA could impose conditions which reduced substantially the scope or size of the project allowed to proceed. I would also note, as the respondents have pointed out, in any given case concerning a project of this nature a waste licence could be granted before a planning application is decided.

Both decisions, that of the Board and any decision of the EPA, are substantive distinct decisions neither of which determine the other.

Accordingly the passage from the *Wells* decision relied upon by the appellant is not applicable to the consent process under Irish law.

That is of course not to say for a moment that national legislation should not be interpreted in the light of the provision in the Directive referring to the environmental effects of projects being taken into account, as it is put, at the earliest possible stage and that the EIA must be carried out before development consent is granted. Before I give specific consideration to those provisions I propose to address the other case relied upon by the appellant.

As already indicated that is the case of *R. –v- Secretary of State for the Environment, and ex p Greenpeace Ltd* [1994] 4 All E.R. 352 which is a decision of the High Court of England and Wales.

In a sense it is a little surprising that the applicant should rely on this particular authority since it seems to me to run counter to the earlier argument made by the appellant concerning *"development consent"* rather than support his argument under this issue.

That case concerned an English company known as British Nuclear Fuels plc (BNFL), which carried out the business of reprocessing spent nuclear fuel, obtained, in 1983, full planning permission to construct a thermal oxide reprocessing plant, known as Thorp, on its site.

Following completion of its plant in 1992 BNFL applied for new or further authorisations for the discharge of radioactive waste to sea and air. A body called the Inspectorate of Pollution and a Government Ministry were involved in considering that application as they had responsibility for regulating the disposal of radioactive waste. They prepared draft

authorisations which they made available for public consultation. Following a statutory process of public consultation eventually, in December, 1993 the relevant Secretary of State and the Ministers concerned granted the new authorisation pursuant to an Act known as the Radioactive Substances Act 1993.

The decision to authorise was challenged before the High Court of England and Wales on several grounds. Much of these are not relevant to this case, concerning such matters as the proper exercise of a statutory discretion by the Ministers concerned.

The relevant issue that did arise was one as to whether Council Directive EEC/85/337 applied to the decision to grant authorisation for these particular emissions because, if so, no EIA having taken place in accordance with that Directive, the decision, it was submitted, had to be set aside.

It was not in dispute that BNFL had obtained planning permission for its project, the construction and operation of an installation to reprocess spent nuclear fuel prior to the coming into effect of the Directive. It was also common case that the Directive did not apply to projects which were granted permission to proceed (or projects that were "*in the pipeline"*) prior to coming into force of the Directive. That was the reason that no EIA pursuant to the Directive was carried out for that project and the reason indeed why the High Court in that case was to conclude that there was no obligation for an EIA to be carried out. It is to be noted that the factual matrix of that case is quite different from the present one.

In any event, with a view to getting over that particular difficulty the applicants in that case submitted, in what was the nub of their argument, as cited by the trial Judge at page 376:

> *"… that the construction of THORP was one project and that the bringing into of operation of the processes within THORP thereby causing emissions was a second. Mr. Collins submits that each project is within the wide expression in para. 3(h) of Annex II of the directive: 'Installations for the reprocessing of irradiated nuclear fuels'. Unless the applicants can identify two separate projects in this way, their case under the directive must fail. If there was only one project then its commencement predated the 1985 directive and the directive does not apply to it."*

In dealing with this submission the judgement noted that:

> *"The directive applies to the assessment of the environmental effects of 'public and private projects which are likely to have significant effects on the environment'. 'Project' is defined as*

> *'the execution of construction works or of other installations or schemes' and 'other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources' (art 1.2)."*

The applicant in that case further argued that discharges into the environment of ionising radiations constituted an intervention in the natural surroundings within the meaning of that Article. Thus, it was contended that the operation of Thorp was a second and separate project to which the Directive applied.

In rejecting the submissions of the applicant the judgment in that case stated at 377:-

> *"The definitions in art 1.2 of the directive must be read with Article 2.1 and 4 which identify the project to which the directive applies. THORP falls within Annex II, para. 3(h); it is an installation 'for the reprocessing of irradiated nuclear fuels'. It is a distortion of art 1.2 to treat the bringing into operation of Thorp as an intervention 'in the natural surroundings and landscape' (Article 1.2). Projects of this nature are identified in Annex II, paras. 1 and 2 under 'Agriculture' and 'Extracted industry'."*

Then comes the specific passage relied upon by the appellants in this case:

> *"I accept the respondents' submission that the whole thrust of the directive is to require an environmental impact assessment at the outset, that is to say 'at the earliest possible stage in all the technical planning and decision-making process' (see preamble to the Directive). Article 2.1 moreover requires member states to make an environmental impact assessment 'before consent is given'. This is in accordance with the preamble which refers to 'development consent'. Development consent means 'the decision of the competent authority … which entitles the developer to proceed with the project' (art 1.2). In my judgment such consent in this case means the decision of the competent authority which entitles the developer to proceed with the execution of the installation 'for the reprocessing of irradiated nuclear fuels' (Annex II, para. 3(h)). It is a distortion of language to regard the authorisation of emissions as such a decision. That decision was the Town and Country Planning (Windscale and Calder Works) Special Development order 1978…"*

That ends the passage cited and relied upon by the appellant in this case. It is somewhat inaccurate in its reference to the first recital in the preamble which refers to *"the need to take effects on the environment into account at*

the earliest possible stage in all the technical planning and decision-making processes". But that is perhaps of no moment in that case because the reference to the time for carrying out an EIA was entirely *obiter* and the trial Judge was simply making reference to a contention by the respondents in general terms. It was *obiter* because he went on to decide that whatever the Directive may mean it had no application to the project in question as properly identified, the permission for which predated the coming into effect of the Directive.

The trial Judge then went on to conclude further:

> *"Thus I conclude that on a true construction of the directive, the construction of THORP and the bringing into operation of THORP and consequent discharges were and are one project. That project predated the directive. The directive does not apply to the project. The Ministers were therefore not under a legal duty to provide and make available an environmental impact assessment complying with the provisions and standards laid down in the directive before the grant of the authorisation. The applicants' submissions in this regard therefore fail."*

Given the facts and circumstances of that case, including the fact that there was no issue before that Court as to the point in time when an EIA should be carried out, I do not think it contributes one way or another to the present issue under consideration in this case which falls to be decided in the light of the terms of the Directive itself.

Before moving on from that case I would point out that, as can be readily seen, the interpretation given to the Directive in that case runs directly counter to the contention made with regard to the first point of law in this appeal by the appellant, namely, that Indaver's project for the construction and operation of a waste disposal installation could be broken into two projects so that the proposal for its construction could be treated as one project and its operation on construction as a second project. That judgment rejects any interpretation of 'project' which excludes its activity or operation. However I did not feel it necessary to make a reference to this particular case when dealing with that particular point.

Having dealt with the two cases referred to by the appellant and which were the principal planks for his argument on the issue as to when an EIA should be carried out there is one other subsidiary point made on behalf of the appellant to which I would like to refer.

The appellant pointed out that there is a mandatory requirement on the planning authority to identify the environmental effects at the start *"since*

the planning authority / the Board must decide whether those effects are such as to necessitate calling for an EIS". In fact the Board in this case did not have to make any such assessment in order to decide whether an EIS was necessary since it was mandatory under national legislation, as required by the Directive, that an EIS be provided by the developer having regard to the nature of the project and provisions of Article 4 and Annex I of the Directive, as referred to earlier. In any event I do not think anything of substance turns on the point.

In the end, apart from a reliance on the judgments in the two cases to which I have referred and which I do not consider to be of significant relevance, the appellant's argument was more in the nature of a simple assertion that the Directive, by its terms, requires that a comprehensive EIA should have been carried out at the earliest possible stage which in turn means that the Board did not fulfil the obligations as required by the Directive. I now turn to what really is the nub of this issue – the relevant terms of the Directive.

The Directive and the timing of an assessment

The Directive provides for the implementation of procedures at national level to evaluate the effects of certain projects on the environment prior to projects going ahead with a view to *"preventing the creating of pollution or nuisances at source, rather than subsequently trying to counteract their effects"*. (See Recital I of 85/337/EEC.) (When referring to the Recitals, I identify the relevant Directive, 85/337/EEC and the amending Directive, 87/11/EC because although the substantive provisions can be referred to in consolidated form and as being one Directive they each have their separate Recitals.) As Advocate General Elmer pointed out in *European Commission –v- Federal Republic of Germany* (*C-431/92) [1995] ECR 1-2189 at para. 35 "It must be emphasised that the provisions of the directive are essentially of a procedural nature."*

The one and only explicit reference to the point at which an EIA should be carried out is contained in Article 2.1 of the Directive, as inserted by the amending Directive 97/11/EC, 3rd March, 1997, which provides:

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

This is the only substantive provision dealing with the point in time at which an EIA should be carried out.

It reflects the only reference to such a point of time in the Recital to that Directive (97/11/EC) which states:

> *"Whereas projects for which an assessment is required should be subject to a requirement for development consent; whereas the assessment should be carried out before such consent is granted;"*

Article 2.1 is again consistent with Recital 2 of that amending Directive which states:

> *"Whereas, pursuant to Article 1.30 r. (2) of the Treaty, community policy on the environment is based on the precautionary principle and on the principle that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay;"*

Recitals in Directives are not substantive provisions but they do, to put it in general terms, set out the legal basis for a Directive and in particular set out their policy basis and their policy objectives. They are there for important interpretive aids of the substantive provisions.

What Article 2.1 and the Recitals to which I have referred make clear is that the fundamental objective of the Directive in this context is that the effects of a project on the environment should be assessed prior to any decision to give development consent that is to say, consent to proceed with the project, in order that threats to the environment can be rectified at source and that the polluter principle is applied.

As I have already concluded in relation to the first issue in this appeal the consent in question can comprise the decision of more than one authority competent or responsible for performing duties, such as the carrying out of an EIA, arising from the Directive (Article 1.3 *"the competent authority or authorities shall be that or those which Member States designate as responsible for performing the duties arising from this Directive"*.)

In short, once the competent authorities have carried out an EIA before development consent is given the terms of Article 2.1 of the Directive are complied with. That is the plain meaning of the Directive.

The applicant has, of course, relied on Recital I of the Directive (85/337/EEC) from which he borrowed the phrase *"at the earliest possible stage"*. Before addressing that point I wish to put the foregoing provisions in context.

Article 5.1 of the Directive provides that *"In the case of projects which,*

pursuant to Article 4, must be subjected to an Environmental Impact Assessment in accordance with Articles 5 to 10," which is the position of the project with which this case is concerned *"Member States shall adopt the necessary measures to ensure that the developer supplies in an appropriate form the information specified in Annex IV in as much as:*

> *(a) the Member States consider that the information is relevant to a given stage of the consent procedure and to specific characteristics of a particular project or type of project and of the environmental features likely to be affected; ..."* (Emphasis added)

Article 5.2 provides that:

> *"Member States may require the competent authorities to give* [an opinion on the information to be supplied by the developer] *irrespective of whether the developer so requests."*

Thus each competent authority may be required to advise the developer as to the extent of the information which he is required to provide concerning the environmental impact of the project and which is relevant to the stage at which that authority is engaged in the consent process.

These provisions underscore the fact, if it needs underscoring, that the competent authorities, whether they be two or more, responsible for obligations deriving from the Directive must, in the circumstances referred to, require the developer to provide information necessary to the carrying out of an EIA. As Article 5 expressly states that environmental information is that relevant to the given stage of the consent procedure. This is why Article 5.2 provides for the imposition on those authorities, and not just an authority engaged at the first stage of the procedure, to advise the developer of the information required of them for the purpose of the EIA process.

This is all consistent and can only be consistent with the fact that different competent authorities will exercise their responsibilities deriving from the Directive in relation to an EIA at different stages or points of time in the process and procedures leading ultimately to a development consent. The obligation imposed on a competent authority is to require the developer to provide such information that is relevant to the particular stage.

The first Recital is referred to by the appellant in support of his argument that the entire EIA should have been carried out by the Board at the planning permission stage is in the following terms:

> *"Whereas the 1973(4) and 1977(5) Action Programmes of the*

> *European Communities on the Environment, as well as the 1983(6) Action Programme, the main outlines of which have been approved by the Council of the European Communities and the representatives of the Governments of the Member States, stress that the best environmental policy consistent in preventing the creation of pollution or nuisances at source, rather than subsequently trying to counteract their effects; whereas they affirm to take effects on the environment into account at the earliest possible stage in all the technical planning and decision-making processes; whereas to that end, they provide for the implementation or procedures to evaluate such effects;"*

As can be seen from that text the reference there is to certain affirmations in several Action Programmes on the Environment the main outlines of which have been approved by the Council of the European Union and the Member States.

It seems patently clear that Article 2.1 of the Directive in expressly requiring that an EIA is carried out before a consent is given to any project is a substantive provision which gives effect to the objectives of that Recital as well as others.

It is clear from the Directive that the procedural process leading up to a development consent may have successive stages where at each stage the relevant competent authority makes a decision (which may involve giving a permission or consent even if not a consent to proceed i.e. a development consent) which taken with other decisions will comprise the 'development consent', the consent to proceed with the project. At each such stage the developer may be required, as Article 5 provides, to provide environmental information *"relevant to the 'given stage of the consent procedure'"*. Where there are such successive stages that requirement enables that competent authority to *"take effects on the environment into account at the earliest possible stage in the technical planning and decision-making processes"* (emphasis added) namely when the matter is first submitted to the competent authority for its decision. Then that competent authority is in a position to commence from the outset its examination of the environmental effects of the project relevant to the stage with which it is engaged.

In conclusion on this point I return, at the expense of repetition, to the two substantive provisions of the Directive namely Article 1.3 and Article 2.1 both of which explicitly provide for and require respectively more than one body being involved in the process leading to a development consent and that an EIA be carried out before a consent is given.

This is precisely what the relevant statutory provisions in this case ensure. It

is an essential function of each of the competent authorities to examine the environmental effects of the project once they receive an application concerning a project such as is in question here. They must do so before a consent is given. In my view it runs counter to the explicit terms and purposes of the Directive to suggest that the procedure followed by the Board conflicted with any requirement of the Directive.

Accordingly I consider the appellant's argument on this issue should be rejected.

"Integrated assessment"

The appellant contends that by virtue of the statutory division of responsibilities between the Board and the EPA it is not possible for an *"integrated assessment"* of the effects of the project on the environment to take place as required by the Directive. There is a deficiency in the process, he submits, because no one body carries out a global assessment.

As previously mentioned Article 3 of the Directive requires the EIA to be carried out so as to take into account the direct and indirect effects of a project on specified environmental factors which are:

" - human beings, fauna and flora;
- *soil, water, air, climate and the landscape;*
- *material assets and cultural heritage;*
- *the interaction between the factors mentioned in the first, second and third indents."*

The first matter to note is that the term *"integrated assessment"* does not appear at all in the Directive. The term has been used to refer to the fourth indent above, namely, an examination of the interaction between the other factors mentioned. It has not been claimed, and on the contrary it has been established, that the Board carried out a comprehensive EIA, including the interaction between the factors referred to as far as the construction of the plant part of the project is concerned, to the exclusion only of the risk of environmental pollution, as defined in the statutory provision cited earlier in this judgment, related to the activity of the proposed installation.

It is also clear from the statutory functions of the EPA, when considering whether to grant a waste licence, and from its statutory procedures, that the EPA is required, at the very least, to carry out an EIA which includes taking account of all the relevant factors and the interaction between them, for the purpose of assessing the risk of environmental pollution arising from the activity of the proposed plant.

In short, all of the factors referred to in Article 3 of the Directive, and the

interaction between them, are examined as required by the Directive and the interaction between them at each stage of the consent process by the relevant competent authority namely the Board and the EPA respectively. The Board carries out an 'integrated assessment' insofar as the construction of the project is concerned and the EPA carries out an 'integrated assessment' insofar as the activity stemming from the operation of the plant is concerned.

It is also relevant to note that nowhere in the Directive is it in any sense suggested that one competent body must carry out a 'global assessment' nor a 'single assessment' of the relevant environmental factors and the interaction between them. Those terms simply do not appear in it.

On the contrary the Directive, having specifically envisaged that more that one authority may be responsible at different stages for exercising obligations arising from the Directive expressly acknowledged in Article 2.2 that the *"environmental impact assessment may be integrated into the existing procedures for consent to projects in the Member States, or, failing this, into other procedures or into procedures to be established to comply with the aims of this Directive"*. In so stating, it is manifestly clear that the Directive did not envisage that that so-called integrated assessment, that is to say the interaction between the various factors, could only be carried out by one competent authority with global responsibility for that.

On the contrary the amending Council Directive 97/11/EC inserted para. (a) into Article 2.2 in the following terms:

> *"Member States may provide a single procedure in order to fulfil the requirements of this Directive ... on integrated pollution prevention ..."*

This provision is permissive and was obviously designed to introduce a clause which allowed Member States to provide for a single procedure for the purpose of giving affect to the Directive but in no sense altered the existing provisions which envisage that two or more authorities may be competent for the purpose of fulfilling the requirements of the Directive. Indeed, since a requirement of an integrated assessment in the sense referred to by the appellant was a requirement of Directive 85/337/EEC there would have been no need for the insertion of the amending paragraph if the appellant's contention as to the requirement of a global assessment by one authority was correct.

In his submissions on this point the appellant was *"not objecting to the fact that two distinct bodies are involved in the process"* but the Directive did not permit the absence of a single *"integrated assessment"* by one body.

It seems to me that it would be absurd to interpret the Directive so as to suggest that in permitting two or more competent bodies to carry out an EIA of the factors referred to in Article 3, including the interaction between them, by each body at the relevant stage of the process with which it was concerned, that nonetheless it was intended that there must be one body only that carries out an assessment of all the factors as if there was only one stage in the process and it was the only body making the assessment. This would run contrary to the plain meaning of the provisions and scheme of the Directive.

Moreover, having regard to those provisions of the Directive and given that the Directive is essentially procedural in nature (see citation above of the Opinion of Advocate General Elmer In Commission –v- Germany) if the Directive intended that there could only be one *"global"* assessment of the relevant environmental factors and their interaction by one body it would have stated so. But, as I say, it states the contrary.

On the basis of any reasonable view of the provisions of the Directive alone it seems to me clear that the contention of the appellant with regard to a global integrated assessment is unfounded.

However, before concluding finally on this point I wish to address the appellant's reliance on the judgment of Fennelly J., in the decision of this Court, in *O'Connell –v- Environmental Protection Agency* [2003] 1 I.R. 530. I think the appellant's reliance on that case was misconceived and that the learned High Court Judge was entirely correct in distinguishing that case from the issues in this case even though the judgment contains a very valuable analysis of the complex statutory and regulatory provisions governing this whole process. The appellant relied, *inter alia*, on a passage from Fennelly J.'s judgment, at 555, in which it was submitted he had held that it would be necessary to interpret s. 98, of the Environmental Protection Agency Act, 1992, as:

> *"…not prohibiting the competent planning authorities from giving effect to the Directives (by having regard to the entire range of possible effects on the environmental and deciding whether an environmental impact assessment should be called for)…"*

That statement, it must be said was made in relation to a discretionary decision of the Board as to whether an EIS should be supplied by the developer, when an EIS is not mandatory. It does not relate to the actual carrying out of an assessment by a competent authority or authorities.

It was pointed out by counsel for the appellant, that in *O'Connell* it was held that it would be unacceptable if the effect of s. 98 (for which s. 54(3) of the

Waste Management Act 1996 is the parallel provision in this case) was to preclude the planning authority from having regard to all forms of pollution in considering whether to require an EIS of the developer. It was submitted that the application of the logic adopted by Fennelly J. in respect of the earlier stage of considering whether an EIS was necessary should apply equally to the later stage of actually carrying out of an EIA.

As regards the *O'Connell* case one must first of all look at what was in issue in that case.

In the *O'Connell* case the project concerned was not one for which an Environmental Impact Assessment (EIA) was mandatory. It therefore fell to the planning authority in the first instance and An Bord Pleanála on appeal, to adopt the case-by-case examination as provided for in national legislation and as envisaged in Article 4.2 of the Directive (cited above) in order to determine whether an EIS should be provided by the developer in the circumstances of the case. In that case the Board (whose decision was not in issue) had been required to decide whether in the circumstances of the case an environmental assessment should be carried out and if so require the developer to supply an EIS. On the other hand if it decided that there was no need for such an assessment no EIS was required of the developer. That was the initial stage of the functions of the Board as regards an EIA.

The next step would have been to actually carry out an EIA in accordance with its statutory functions but only if it had decided that such was necessary in the course of its examination of the application at the initial step. In fact, in that case the Board did not consider that an EIA was necessary and therefore no EIS was requested or supplied. In the present case of course an EIS was supplied as an EIA by the Board was mandatory but nothing turns on that in this context.

In the *O'Connell* case a licence was required by the developer from the EPA pursuant to the Act of 1992 as the proposed development was above the threshold laid out in that Act. No EIS was supplied to the EPA in the course of the application for the licence. The applicants sought judicial review of the decision of the EPA to grant the licence on the basis that, as it was in respect of a development which would, it was contended, have a significant effect on the environment, an EIS should have been required; that s. 98 of the Environmental Protection Agency Act 1992 precluded a planning authority and the Board from considering environmental pollution <u>both</u> when deciding whether to grant or refuse a planning permission <u>and</u> when considering whether to demand an EIS the Court should interpret the powers of the EPA as including that one demand an EIS otherwise the State was in breach of its obligations under the Directive.

As Fennelly J. point out (at p. 533) the case turned almost entirely on the contention that s. 98 of the Environmental Protection Agency Act 1992 prevented the planning authority or An Bord Pleanála from asking for a comprehensive EIS covering all pollution matters. This was on the basis that s. 98 of the Act prevented the Board when actually carrying out an EIA from considering the risks to environmental pollution arising from the activity of the project. It was contended for the applicant that since the Board could not have regard to such matters when actually carrying out an assessment it was precluded from having regard to environmental pollution arising from the activity when it was considering, as a first step, whether an EIS should be sought from the developer. On this basis counsel for the applicant contended that there would be no provision in Irish law requiring that a comprehensive or integrated EIS be provided when the competent authority was considering the licensing of an activity with a potential to pollute the environment from that activity; and no body at all charged with the task of evaluating, in an integrated way, all risks to the environment, for the purpose of taking the first step of requiring an EIS to be provided. Since that result would be patently contrary to community law, it was submitted, the Court was obliged to imply into the Act of 1992 a power of the EPA to seek an EIA. (See Fennelly J. at [2003] I.I.R. 530 at 537)

After an exhaustive examination of the *"maze"* of legislation and regulations the Court rejected the applicant's contention.

It is important to note that it was at all times pointed out by Fennelly J. that where the Board actually carried out an EIA in relation to the kind of project in question it was precluded by s. 98 from considering the risk of environmental pollution arising from the activity which was reserved to an assessment to be carried out by the EPA in the course of an application for a licence for the activity. That division of responsibilities is the same as applies in this particular case it being s. 54(3) of the Act of 1996 which has the same effect as s. 98 of the Act of 1992 in that respect. At no stage in the course of the judgment was that apportionment of responsibility regarding an EIA in that manner called in question.

What Fennelly J. held, on what he considered to be the proper construction of the relevant legislation and the regulations, was that the s. 98 restriction on the Board at the actual EIA stage did not extend or apply to the earlier stage when, it had to consider whether an EIS was necessary and that in exercising its discretion for that purpose it was entitled to look at all aspects of the project including the potential impact on the environment from the activity. Thus it was entitled to demand a comprehensive or integrated EIS from the developer. The issue only arose in the form which it did because there was in fact an apportionment or division of function between the Board and the EPA, the same as the apportionment of functions in this case,

which was not, as I have mentioned, called in question. Fennelly J. concluded, at 555:

> *"Here, however, I do not think the words can have been intended by the legislature to refer to the stage when the planning authority has to consider whether to call for an environmental impact statement."*

In going on to further conclude that *"Section 98 does not, in my view, bear the meaning propounded on behalf of the applicant"*, he was confirming that the words excluding the risk of environmental pollution arising from the activity from the remit of the Board applied only at the stage when the actual environmental assessment was being carried out but not at that earlier stage when deciding whether or not to call for an EIS. At no stage was the division of responsibility between the two bodies at the later EIA stage criticised.

In this case we are only concerned with the later EIA stage.

In my view the learned High Court Judge was quite correct in distinguishing the *O'Connell* case from the present case, *inter alia*, on the basis that in the *O'Connell* case it was simply decided who or what was the body or authority authorised to call for an EIS and the scope of its power in doing so.

The issue arose in the *O'Connell* case precisely because there is a division of functions between the two competent authorities in the actual carrying out of an EIA. If there had been no such division and there was one single body carrying out a global assessment at the stage of an actual EIA then the issue in that case would not have arisen. The *O'Connell* case concluded that the relevant statutory provisions were consistent with the Directive.

The appellant has submitted that because this Court in the *O'Connell* case interpreted the relevant statutory provisions and regulations as permitting the Board to call for an EIS which was comprehensive or integrated in all respects we should now hold that there should be one body entitled to carry out one single comprehensive environmental assessment subsequent to the EIS being provided. Apart from the fact that to hold such an approach as mandatory would be in clear conflict with the provisions of the Directive I fail to see its logic as an interpretation of the *O'Connell* case. In fact it would be to turn the *O'Connell* case on its head. For this reason I do not consider that that case has any material bearing on the issue raised by the appellant and certainly does not lend support to his contentions.

For the reasons set out above I consider that the submission of the respondents, that the combination of the assessments carried out by the

Board and the EPA together meet the requirements of the Directive with regard to the EIA prior to consent, to be correct and that this ground of appeal also fails.

Final Conclusions

In relation to each of the above issues which I have addressed, I have found that the meaning and intent of the Directive is clear. In advancing the three points which he did it seems to me that the appellant is clutching at straws in his opposition to the decision made by the Board. The appeal should be dismissed. I do not see any reasonable scope for doubt on these issues. Having regard to the decision of the Court of Justice in *Cilfit* –v- *Minister della Scniti (Case C – 283/81) [1982] ECR 3415* and the criteria which it sets out I am quite satisfied that there is no necessity to make a reference to the Court of Justice pursuant to Article 234 of the Treaty.

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