

# THE SUPREME COURT

171 & 176/02

*Keane C.J.*

*McGuinness J.*

*Hardiman J.*

*Geoghegan J.J.*

*Fennelly J.*

**BETWEEN**

**COLLETTE O'CONNELL**

**Applicant**

**and**

**THE ENVIRONMENTAL PROTECTION AGENCY**

**Respondent**

**and**

**DUNGARVAN ENERGY LIMITED and  
IRELAND AND THE ATTORNEY GENERAL**

**Notice Parties**

**JUDGMENT delivered on the 21st day of February 2003, by FENNELLY J., [Nem Diss].**

The applicant appeals to this court from the judgment of Butler J in the High Court, refusing her application for Judicial Review by way of certiorari of a decision of the respondent (hereinafter called "the Agency") granting an Integrated Pollution Control Licence (hereinafter called "the licence"). Under European Community law, Member States must ensure that applicants supply certain information, called an Environmental Impact Statement (an "EIS"), regarding the effects on the environment, including pollution, of development projects and that this information be assessed by means of an Environmental Impact Assessment (an "EIA"). The applicant complains that, in this case, there was no EIS, and, thus, no EIA. This, she says, was by reason of the incorrect transposition into Irish law of the relevant directives. The applicant says

that the planning authority and An Bórd Pleanála (“the Board”) did not obtain an EIS because they, rightly, considered that they had no power to do so insofar as environmental pollution is concerned. She says that the Agency did not do so because they, wrongly, thought they had no such power.

It is necessary to steer through what counsel has aptly described as a statutory maze in order to uncover the effect of the regulations implementing the State’s European Union obligations. Thankfully, counsel has provided the Court with a map. At the end of the day, nonetheless, the case turns almost entirely on the contention that section 98 of the Environmental Protection Agency Act, 1992 (“the act of 1992”) prevented the planning authority or An Bórd Pleanála from asking for an EIS covering pollution matters.

### **The Facts**

Thesio Limited (“Thesio”), a joint venture company between Rolls Royce Power Ventures Limited, an English Company, and Dellware Limited, wish to build a combined cycle gas turbine power generation plant (“the power plant”) at Shandon, Dungarvan, Co. Waterford. The chosen site is adjacent to the town where creamery operations had been carried on for many years, most recently by Waterford Foods.

In order to carry out the development, Thesio had to obtain planning permission. In addition, the heat input of the proposed power plant would exceed 50 MW. This brought it above the threshold laid down in Part IV and the First Schedule to the act of 1992 so that it required an integrated pollution control licence from the agency. This division of function between planning and pollution-control licensing is at the root of the entire case.

The planning authority, Dungarvan Urban District Council, made a decision granting planning permission on 30th March 2000. No EIS had accompanied the application. The application related to a power plant with an output of 105 MW and a possible maximum heat

output of 240MW. Under the relevant regulations (in its most recent form, Class 2(a) of Part I of the First Schedule to the European Communities (Environmental Impact Assessment) Regulations, 1999) (“the 1999 EIA Regulations”), an EIS is not mandatory for a thermal power station, unless the heat output will be 300 MW or more. The planning authority could have sought an EIS, if they had considered that the development would have a significant effect on the environment, but they did not do so.

The applicant appealed to the Board, which had the same power as the planning authority to demand an EIS. The Board’s inspector reported in a document headed, “*E.I.S. Recommendation- E.I.S. not submitted.*” This document contained boxes to be ticked or not depending on the view being taken. The inspector noted that the development could be of a class for which an EIA was required, by reference to the relevant regulations and that the activity to be permitted was “*licensable under the Environmental Protection Agency Act, 1992.*” He added a note to the effect that “*under Article. 18 of the 1999 Planning Regs IPC cases no longer automatically require EIS.*” He added that, in his view, an EIS was not mandatory and that the development would not come within the scope of Article 56(2). The Board, in its direction dated 30<sup>th</sup> August 2000, having referred to the inspector’s report, decided to grant permission in accordance with the inspector’s recommendation and also ruled:

*“having regard to S98 and the nature and extent of existing development on the site, the Board considered that, in the context of Article 56(2) of the 1994 Regulations, the proposed development would not have a significant effect on the environment.”*

Thus, there was no EIS or EIA in the context of the planning process.

Thesio applied to the Agency for the necessary Integrated Pollution Control Licence.

It is agreed that the Agency has no express statutory power to demand an EIS, though, where one

has been supplied to the planning authority, the regulations provide that notice of it must be given to the Agency. At any rate, no EIS having been produced during the planning process and, the Agency believing that they had no power to demand one, no EIS was supplied to the Agency.

The Agency granted the licence on 3<sup>rd</sup> January 2001, pursuant to section 83 of the Environmental Protection Act, 1992 (hereinafter “the act of 1992”).

### **The Proceedings**

By order dated 2<sup>nd</sup> March 2001, McKechnie J, in the High Court, granted leave to the applicant to apply for Judicial Review of the decision of the Agency.

Not all the grounds upon which leave was granted remain relevant. In particular, it has not seriously been contended that the decision of the Agency was irrational in the *Wednesbury* sense. The principal grounds can be summarised as follows:

- The licence sought was likely to have a significant effect on the environment;
- Accordingly, an EIS was required;
- The planning authority and the Board were precluded by section 98 of the act of 1992 from considering environmental pollution not only while making decisions to grant or refuse planning permission but also, and crucially, in considering whether to demand an EIS;
- Consequently, in order to give effect to the mandatory requirements of the European Community directives, the Court should interpret the powers of the Agency as including a power to demand an EIS;

- In the event that neither the planning authority, the Board nor the Agency have power to demand an EIS, the State is in breach of its obligations under European Community law;
- The Agency failed to have regard to the impact of the proposed license on a designated Special Area of Conservation or Special Protection Area and failed to comply with its obligations under the European Communities (Natural Habitats) Regulations 1997 (S.I. 194/97).

Butler J, in a judgment of 25<sup>th</sup> April 2002, dismissed the application for Judicial Review. He held that, under Irish law, the responsibility for conducting an EIA and for demanding an EIS rested on the planning authority and the Board respectively. The applicant's argument regarding section 98 of the act of 1992 was mistaken. That section prevented the planning authority and the Board from considering matters of environmental pollution *only* when making the substantive planning decision. This did not apply, at the earlier stage, where it was necessary to consider whether to require an EIS. He also rejected the argument relating to the protection of natural habitats. He found that the Agency had, in fact, sought the necessary information on this point and had formed the view that the activity to be licensed would not have significant effects.

### **The Appeal**

It is convenient, before dealing with the appeal to set out the terms of section 98(1) of the act of the act of the act of 1992. It reads as follows:

**“98.—(1)** *Notwithstanding section 26 of the Act of 1963, or any other provision of the Local Government (Planning and Development) Acts, 1963 to 1991, where a licence or revised licence under this Part 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 the 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.*

It was common case that the proposed power station would not exceed the heat-output threshold of 300MW, which would have made an EIS mandatory. Equally, it was not in dispute that the designated national authority must make a judgement as to whether an EIS should, nonetheless, be required because of likely effects on the environment. In addition, the appellant claimed that the development would involve water abstraction in excess of a threshold of 2 million cubic metres. This, if correct, would bring it above a mandatory threshold, laid down, as a matter of the exercise of a national discretion, by a distinct heading (Class 10(I)) of Part II of the First Schedule to the 1999 EIA Regulations.

Mr Paul Sreenan, Senior Counsel, for the appellant, centred his argument almost entirely on the effects he claimed for section 98 of the act of 1992. He said that the record showed that the Board had rightly, at all stages, interpreted the section as precluding it from considering any polluting effects on the environment. He acknowledged that the view taken by the Board could not have any bearing on the correct interpretation of the section, a matter falling to be decided as a matter of law. Indeed, even if the Board had been incorrect in their interpretation of their powers, that error would not avail the appellant, who had not taken any proceedings to contest the validity of the decision of the Board within the two-month period now allowed by law for that purpose. Even if some of the regulations regarding the Agency and the planning authorities appeared to give power to the latter to seek an EIA, they could not prevail against the words of the statute.

Mr Sreenan contended that, based on his contention for the preclusive effect of section 98 on the Board, there would be no provision in Irish law requiring that an EIS be provided, where a statutory authority was considering the licensing of an activity with the potential to pollute the environment and, furthermore, no body at all charged with the task of evaluating, in an integrated way, all risks to the environment. Since that result would be patently contrary to Community law, the Court was obliged, as established in the case law, to give effect

to the directives in Irish law. This could only be done by implying, in the act of 1992, a power for the Agency to seek an EIS and to conduct an EIA. Since there had been no EIA in this case, no consideration had been given to the risks of environmental pollution, including the inter-relation of the proposal with other matters such as water abstraction, disturbance of ground water, power lines and gas supply.

Mr Eamonn Galligan, Senior Counsel, also for the applicant, argued, in the alternative, that the Agency did, in fact, have power to seek an EIS. This he based on Articles of the Environmental Protection Agency (Licensing) Regulations, 1994 (S.I. 85/94). Article 12 provides that, “*where an application for planning permission for development comprising or for the purposes of the activity is required to be accompanied by an environmental impact statement,*” the application to the Agency for a licence must, in addition to other matters, be accompanied by at least 15 copies of the environmental impact statement. Article 14 obliges the Agency to consider the EIS, “*insofar as the risk of environmental pollution is concerned.*” Mr Galligan also argued that the Agency had not complied with its obligations in respect of the protection of habitats, particularly the Regulations governing them mentioned above.

Mr Michael Collins, Senior Counsel, on behalf of the Agency, presented a detailed analysis of what, with commendable understatement, he described as the “*statutory maze.*” He explained regulations adopted from 1989 to 1999. He contended that, as held by Butler J, the statutory function of seeking an EIS and of conducting an EIA was conferred on the planning authority and the Board respectively. They are not merely empowered but obliged to consider, in cases where it is not mandatory, whether an application for planning permission should be accompanied by an EIS. The Board, contrary to the argument of the appellant, decided that there was, in this case, no need to call for an EIS, as they considered that there was no significant risk of effects on the environment. The Board has all the powers of the planning authority including the power to seek an EIS. Mr Collins did not accept that the development involved a water

abstraction exceeding the threshold of 2 million cubic feet, or that the appellant had produced any evidence to that effect. In any event, the question of water abstraction was a matter for the Board to consider and they had done so. Furthermore, section 98, properly construed, does not bear the interpretation placed upon it by the appellant. With regard to habitats, an appropriate assessment was carried out.

Mr Frank Clarke, Senior Counsel, for Thesio, the first-named Notice Party, said that it was central, from the point of view of Thesio, that no EIS was requested by the competent planning authorities and that the planning permission could not now be attacked. Furthermore, it must now be assumed that the Board correctly exercised its powers. While supporting the interpretation of section 98 adopted by the learned High Court judge, he argued that, the existence of any ambiguity would require that Irish law be interpreted, in accordance with the appellant's contention, so as to bring it into conformity with European Community law. Where this can be done in a number of different ways, it is more appropriate that it be done by interpreting the powers of the planning authority so as to enable them seek an EIS in respect of all matters, including pollution of the environment, rather than by interpreting the powers of the Agency by interpolating an additional power, which neither the governing statute nor the Regulations confer. However, the correct and more appropriate view of section 98 is that there is, in Irish law, provision for an integrated assessment, in accordance with the directives and the relevant criteria which they require to be taken into account. It is provided that the planning authority has the sole power of considering whether an EIS should be demanded in respect of all matters.

Mr Michael Cush, Senior Counsel, for Ireland and the Attorney General, the second-named Notice Party, pointed out that the directives clearly accepted that there could be more than one body involved in the process of conducting an EIA. Section 98 should be construed, in accordance with its ordinary meaning, as not precluding the planning authority or the Board from

seeking an EIS. The prohibition relates only to considering questions of environmental pollution at the planning-permission decision stage. Mr Cush contended that the word, “accordingly,” as well as the place of the two sub-paragraphs numbered (i) and (ii) indicate a hierarchy of meaning within the section. These subparagraphs are consequential or subsidiary. The Oxford Dictionary gives “*appropriately*” or “*consequently*” as alternatives to “*accordingly*.” The Court should not expand the meaning of sub-paragraphs (a) and (b), but should treat the sub-paragraphs (i) and (ii) as amplifications of the earlier words.

I will refer in greater detail to this aspect of Mr Cush’s submissions, when I come to analyse the section. The scheme, he said, in place since 1989, when the first directive on environmental impact assessment was implemented in Irish law meant that the planning authorities and the Board only were responsible, because it was they who had to consider matters of pollution of the environment. The act of 1992 conferred no function in relation to seeking an EIS on the Agency. Section 98, if construed in the manner contended for by the appellant, would have the effect of depriving the planning authorities of their existing functions in respect of environmental impact assessment, while the governing act would have failed to assign it to the agency. Such a result should only be accepted, if the construction was clear and unambiguous.

### **Analysis**

It is an important fact that, as is common case, the decisions of the planning authority and of the Board are now immune from challenge. It is, of course, the case that there was no EIS. However, if the planning authority or the Board, having power to do so, were bound to demand one, either because it was mandatory or, in the proper exercise of their discretion, the fact that there was no EIS would not be the result of any defect in the law. On that hypothesis, no EIS would have accompanied the application because the competent authorities had wrongly

exercised their powers. In the present circumstances, the absence of an EIA would flow from the failure of the appellant to challenge the relevant planning decisions in time. In that situation, moreover, there would be no question of Ireland having failed correctly to transpose the directives.

For the same reason, it is clear that it is not strictly necessary to decide whether the Board, in the paragraph quoted from their direction of 30<sup>th</sup> August 2000, were stating that they had no power to seek an EIS, in cases where an Integrated Pollution Control Licence was required, or that, on the facts, they did not consider one to be necessary. My own view is that the statement of the Board can only mean that they gave consideration to the question of whether an EIS was necessary. It appears that the inspector thought an EIS, apart from not being mandatory, was not necessary. The concluding words of the Board's direction say that "*the proposed development would not have a significant effect on the environment.*" The legal provisions referred to do not suggest that any meaning different from their ordinary meaning be given to those words.

As has been seen, the appellant says that section 98(1) prohibits all planning authorities and the Board from considering the risk of environmental pollution, not only at the time of making a decision on the relevant planning application or appeal, but also at every earlier stage and, in particular, when deciding whether to seek an EIS. A planning authority may, of course, seek an EIS, but the appellant's contention is that, in deciding whether to do so, it may not have regard to the risk of environmental pollution. That result would patently make a nonsense of the whole notion of environmental impact assessment, for the very reason advanced by the appellant. There would be no integrated consideration of the inter-reaction of polluting and other environmental effects. Without section 98, the appellant accepts that the statutory and regulatory scheme obliges and authorises the competent planning authorities (including the Board) and not the Agency to call for an EIS, where appropriate, and to conduct an EIA.

It is not possible, nonetheless, to examine the meaning of section 98, without entering the statutory maze of directives and the statutes and regulations, which have transposed them into Irish law. I will endeavour to set out a number of simple sequential propositions.

### **The Directives Permit the EIA to be conducted by one or more National Authorities**

The Council has adopted two directives concerning environmental impact assessment, one before and one after the passing of the act of 1992. The primary implementation of the directives have been effected by three EIA Regulations, respectively in 1989, 1994 and 1999, which avail of the power, conferred by section 3 of the European Communities Act, 1972, to amend statutes by such orders. Many of the statutory amendments thus actually made confer power on the relevant minister to adopt secondary legislation in the normal sense by means of statutory instruments.

Council Directive 85/337/EEC of 27 June 1985 *on the assessment of the effects of certain public and private projects on the environment* (O.J. L175, p. 40) recites that:

- *development consent ... should be granted only after prior assessment of the likely significant environmental effects [of development projects];*
- *appropriate information [should be] supplied by the developer, which may be supplemented by the authorities and by the people who may be concerned;*
- *projects belonging to certain types have significant effects on the environment and these projects must as a rule be subject to systematic assessment;*
- *projects of other types may not have significant effects on the environment in every case and... these projects should be assessed where the Member States*

*consider that their characteristics so require.*

Giving effect to that objective, Article 2.1 of the directive imposed a general obligation on Member States expressed in the following terms:

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

*These projects are defined in Article 4.”*

[Note: words in square brackets added in 1997.]

The directives proceed, throughout, in accordance with the nature of a directive, as an instrument respecting the principle of subsidiarity, and, thus, on the footing that their objects are to be achieved through the various and diverse competent bodies in and in accordance with the laws of the Member States. For example, Article 1.2, defines “*development consent*” as “*the decision of the competent authority or authorities which entitles the developer to proceed with the project.*” Similarly, Article 2.2 provides:

*“2. 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.”*

The respondents have emphasised, and it is not in dispute, that the directives leave it to the Member States to decide whether the entire EIA procedure be conducted by one or several national bodies, as demonstrated by the addition, by the 1997 Directive, of a provision covering the very situation which arises in the present case:

*“2a. Member States may provide for a single procedure in order to fulfill the requirements of this Directive and the requirements of Council Directive 96/61/EC of 24 September 1996 on integrated pollution prevention and control...”*

[The Directive of 1996, referred to here required Member States to control pollution by means of a single permit rather than separate ones for water, air and noise pollution. Article 2.8 of that Directive also spoke of *“the authority or authorities or bodies responsible under the legal provisions of the Member States..”*]

Article 2.2a permits but does not oblige the Member States to lay down a single procedure for planning and pollution matters.

Article 3 provides that an EIA must identify, describe and assess the direct and indirect effects of a project, in particular on human beings, fauna and flora, soil, water, air, climate, landscape, the inter-action between these factors and on material assets and cultural heritage

Article 3, therefore, represents a comprehensive general statement of the central environmental concerns. Here they delineate the essence of the EIA which Member states must conduct. They are crucial to the EIS, the EIA and to this case.

Article 4, both in its 1985 wording and as amended in 1997 (Council Directive 97/11 EC of 3 March 1997... (O.J. 14.3.97 No. L73/5)) gives effect to the recited distinction between

the cases where an EIS is mandatory and those where it becomes so only upon an assessment of the characteristics of the proposed development. It provides, following amendment:

*“Article 4*

1. *Subject to Article 2 (3), projects listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10.*
2. *Subject to Article 2 (3), for projects listed in Annex II, the Member States shall determine through:*
  - (a) a case-by-case examination,*
  - or*
  - (b) thresholds or criteria set by the Member State*  
*whether the project shall be made subject to an assessment in*  
*accordance with Articles 5 to 10.*  
*Member States may decide to apply both procedures referred to in (a)*  
*and (b).*
3. *When a case-by-case examination is carried out or thresholds or criteria are set for the purpose of paragraph 2, the relevant selection criteria set out in Annex III shall be taken into account.*
4. *Member States shall ensure that the determination made by the competent authorities under paragraph 2 is made available to the public.”;*

The directives do not, of course, use the term EIS. This shorthand term, appearing in national legislation, represents the sort of information which Articles 5 to 10 of the directives require to be provided.

The amending directive of 1997 also amended the Annexes to the 1985 directive. Although the power plant, proposed by Thesio, fell below the wattage threshold which would have made an EIA mandatory under Annex I of the Directive, it is covered by a heading in Annex II (both 1985 and 1997 versions): “*Industrial installations for the production of electricity, steam and hot water.*” Thus, this is what is called a “*sub-threshold*” case, where consideration has to be given to likely effects on the environment. The dispute concerns whether the planning authorities, or the Board, can exercise that function.

From 1985, in any event, the basic requirement of Article 2 of Directive 85/337/EEC was that projects be assessed where they were “*likely to have significant effects on the environment.*” As noted above, however, Article 4.2 of the 1997 directive added an obligation to have regard to “selection criteria” listed in a new Annex III. The complex way in which that obligation has been introduced into Irish law will be discussed later.

The principal features of the Directive of 1985 were transposed into Irish law in 1989. None of the 1997 amendments materially altered its structure, though it will be necessary to refer to the (1997) Annex III criteria.

**Ireland transposed the directives by providing for the relevant EIA tasks to be performed by the competent planning authorities (including the Board)**

The first transposition measure was the European Communities (Environmental Impact Assessment) Regulations, 1989 (S.I. 349/1989) (“the 1989 EIA the Regulations”). This was, in turn, amended by the European Communities (Environmental Impact Assessment) (Amendment) Regulations, 1994 (S.I. 84/1994) and by the 1999 EIA Regulations. As already stated, these instruments were adopted pursuant to section 3 of the European Communities Act,

1972. They amended several parts of the Local Government (Planning and Development) Act, 1963 (“the act of 1963”).

Section 25 of the act of 1963 gives power to the Minister, now the Minister for the Environment, to regulate the basic machinery for application for and grant of planning permission. Section 25(2) (c), for example, gave power to make Regulations prescribing the information, which applicants for planning permission must supply. The 1989 and 1994 Environmental Impact Assessment Regulations, by amendments to the planning acts, authorised the Minister to regulate further the information to be supplied so as to give effect to the 1985 Directive. In general terms, such further planning regulations could deal with the following matters:

that an EIS must be submitted

- enabling planning authorities to require applicants to submit an EIS
- the contents of an EIS
- enabling planning authorities to rule on the adequacy of an EIS
- the making of submissions by others
- the making available of EIS for purchase.

In fact, no regulations were adopted pursuant to these powers until 1994 and, therefore, until after the act of the act of 1992.

### **The Planning Authorities became obliged to have regard to the EIS and EIA**

While section 25 of the act of 1963 dealt with regulatory and procedural aspects of planning applications, section 26 contains the key statement of the matters which planning

authorities must consider when making their decisions. Article 8 of the 1989 Regulations, as amended in 1994, also amended section 26 of the act of 1963. It inserted a new subsection (1A) into section 26 requiring a planning authority, when deciding on an application, to have regard to any EIS and any supplementary information or observations concerning the effects of the proposed development on the environment.

Article 8 introduced a corresponding provision requiring the Board to have regard to environmental impact statements and related matters when determining an appeal.

Two remaining important provision of the 1989 the regulations are relevant. Article 24 reads:

*“Development of the classes set out in Part I and Part II of the First Schedule is hereby specified for the purposes of these Regulations.”*

Article 24 is an important link in the complex chain, which I will trace later. Its reference to the classes of development listed in Parts I and II of the First Schedule, means that it applies only to cases for which an EIS is mandatory. The headings in Part I reflect Annex I of the Directive, making an EIS mandatory as a matter of Community Law. Part II reflects Annex II and, inter alia, makes an EIA mandatory for cases exceeding lower thresholds set by the State, in the exercise of the discretion conferred by Article 4.2 of the 1985 Directive. One of these is a threshold of 2 million cubic metres annually for water abstraction. The appellant filed an additional affidavit on that point at a late stage of the judicial review proceedings in the High Court. It is based on a document sent on behalf of Thesio to the Agency. This document gives a figure for daily water usage of about 5,800 cubic metres, which would exceed 2 million annually. The document, however, mentions use but not water abstraction. In a replying affidavit sworn on behalf of Thesio, it is stated that abstraction would not exceed the threshold. The burden of proof

is on the applicant, who has not been able to produce any evidence of the intended level of water abstraction. In any event, the question of water abstraction does not come within the jurisdiction of the Agency. Even if an EIS had been mandatory for exceeding the water-abstraction threshold, it would have been a matter for the planning authority or the Board to deal with it. Their decisions have nor been challenged.

Article 25 provides:

*“An environmental impact statement for the purposes of these Regulations or of any enactment as amended or adapted by these Regulations shall contain the information specified in paragraph 2 of the Second Schedule and may also contain the information specified in paragraph 3 of that Schedule.”*

Paragraph 2 of the Second Schedule lists, inter alia, all of the basic environmental considerations found in Article 3 of the directive. In this way, the State, when transposing the directive, ensured that an EIS would contain all material referable to the fundamental environmental matters set out in Article 3 of the 1985 directive as constituting an EIA. The European Communities (Environmental Impact Assessment) (Amendment) Regulations , 1999 (S.I. 93/1999) substituted new Schedules for the First and Second Schedules to the 1989 EIA Regulations but retained all the elements based on Article 3 of the 1985 Directive. These provisions, in the 1989 EIA Regulations, depended, however, for their effect on the adoption of regulations by the Minister prescribing for the submission and scrutiny of an EIS. Each of these provisions became effective from the adoption of three sets of regulations in 1994.

At the date of passing of the act of the act of 1992, it is clear that, although the necessary Regulations to give full effect to the 1985 Directive had not yet been adopted, the

intended statutory scheme was that all aspects of the implementation of the Directive were to occur within the planning process.

**Planning authorities and the Board were no longer to consider environmental pollution after the act of 1992**

Article 6 of the European Communities (Environmental Impact Assessment) (Amendment) Regulations (S.I. 84/1994) (“the 1994 EIA Regulations”) made important changes to this scheme, in order to reflect the change effected by section 98(1) of the act of 1992.

Firstly, it inserted into section 26 (1A) of the act of 1963 a new sub-paragraph (b) affecting planning authorities:

- “(b) Notwithstanding paragraph (a) of this subsection, a planning authority shall, in dealing with an application for permission for the development of land where the development comprises or is for the purposes of an activity to which a licence under Part IV of the Environmental Protection Agency Act, 1992 (No. 7 of 1992) is required, have regard to the matters referred to in the said paragraph*
- (a) only insofar as those matters do not relate to the risk of environmental pollution from the activity.”; [the letter (a) makes no sense and seems otiose]*

The same provision, Article 6 of the 1994 EIA Regulations, introduced a corresponding provision, subsection 5(dd), into section 26(5) of the act of 1963, regarding the Board:

- “Notwithstanding paragraph (d) of this subsection, the Board shall, in determining on appeal an application for permission for the development of land where the*

*development comprises or is for the purposes of an activity in relation to which a licence under Part IV of the Environmental Protection Agency Act, 1992 (No. 7 of 1992) is required, have regard to the matters referred to in the said paragraph (d) only insofar as those matters do not relate to the risk of environmental pollution from the activity."*

From that time, therefore, the planning authority and the Board had to exclude environmental pollution when considering the grant or refusal of planning permission.

**The Agency became obliged to have regard to any EIS submitted with an application for a licence**

The 1994 EIA Regulations also amended sections 83 and 87 of the act of 1992. The effect of the changes to section 83 can be briefly stated. The Agency, when considering an application for a license, must "*have regard*" to any EIS "*submitted with the application,*" and to any submissions or further information it receives about it. In particular, the Agency must have regard to "*any further information or particulars submitted in relation to the [EIS] in compliance with a notice given under regulations under section 87.*" Section 87 is amended so as to provide that the Minister may make Regulations:

*"(d) specifying the submissions, plans, documents, and other information and particulars, including environmental impact statements, to be forwarded to the Agency or other specified person by applicants, licensees, objectors, or other persons within such periods as may be specified,*

- (e) *requiring applicants, licensees, objectors or other persons to furnish to the Agency or any other specified person, within such period as may be specified, such additional information or particulars relating to applications, including environmental impact statements, or reviews as the Agency may request,";*

Thus, contemporaneously with the exclusion of consideration of environmental pollution, in the making of planning decisions, the Agency acquired the specific obligation to consider the contents of an EIS and the power to seek further information, where one has been supplied to a planning authority.

### **Three sets of Regulations in 1994**

The Minister for the Environment adopted three sets of regulations in 1994.

- On 13<sup>th</sup> April 1994, the Minister adopted the 1994 EIA Regulations, just described, pursuant to section 3 of the European Communities Act, 1972. Thus it enabled the Minister for the Environment to adopt the next two regulations;
- On the same day, the Minister adopted, pursuant to the general power to make regulations conferred on him by section 6 of the act of 1992, but also and more relevantly, pursuant to sections 3, 83 and 87 of that act, as amended the same day by the 1994 EIA regulations, the Environmental Protection Agency Regulations (S.I. 85/1994).
- On 14<sup>th</sup> April 1994, the Minister adopted, pursuant to a number of provisions of the planning acts, but more specifically, pursuant to such provisions as amended by the 1989 and 1994 EIA regulations, the Local Government

(Planning and Development) Regulations, 1994 (S.I. 86/1994) (“the 1994 planning regulations”).

In order to discern the ultimate meaning and effect of these provisions, as they relate to the consideration of the issues in this case, it is necessary to read and cross-reference many of the interlocking provisions of the three sets of Regulations. As will be seen, some of the regulations of greatest relevance to the present case can only be understood following reference to provisions in other related instruments. Complex is merely the mildest term that can be applied. It is regrettable that rules of law intended to regulate processes in which individual members of the public are supposed to be able to take part cannot be written in a more accessible form.

Nonetheless, it is possible, following laborious study, and according due respect to the ingenuity of the draftsman, to arrive at a clear conclusion concerning the allocation of functions between the planning authorities and the Agency, in respect of the whole EIA process. It becomes clear, upon reading the three sets of regulations adopted almost contemporaneously, governing related matters, that they were intended to operate together.

**Wherever an EIS is mandatory, there must be one accompanying the Planning Application**

Article 24 of the 1994 planning regulations provides that a planning application must be accompanied by an EIS where the development “*is of a class for the time being specified under Article 24 of the Environmental Impact Assessment Regulations, or under any provision amending or replacing the said Article 24....*” Article 25 reinforced this obligation by empowering the planning authority to insist that an applicant comply with Article 24.

As I have already pointed out, the cross-reference to Article 24 of the 1989 Regulations means that it applies only to cases where an EIS is mandatory, whether because the Directive directly so provides or because Ireland has decided to make it so. It does not apply to this case, because the power station does not reach the 300MW threshold and it has not been shown that it exceeds the 2 million water-abstraction threshold.

It is a matter of note, in this case, that Article 24(1) of the 1994 planning regulations (i.e. Article 24 of this Regulation of 1994, not the Article of the 1989 EIA Regulation, bearing the same number), originally contained a sub-paragraph (b). That provision covered cases, in which, regardless of the thresholds, a licence under part IV of the act of 1992 was required, thus making an EIS mandatory in all such cases. This was, however, deleted by Article 10 of the Local Government (Planning and Development Regulations, 1999 (S.I. 92/1999). This deletion explains the observation, correctly made by the planning inspector, that “.... *IPC cases no longer automatically require EIS.*”

Nonetheless, it is worth noting that Article 24 of the 1994 planning regulations does not exclude environmental pollution effects from the EIS, where one must be supplied. This follows from the manner in which, as I have explained, the concerns of Article 3 of the 1985 Directive are included in the regulations prescribing the contents of and EIS.

**In sub-threshold cases, the planning authority must require an EIS, where it considers that development is likely to have a significant effect on the environment**

Article 26 of the 1994 planning regulations deals with cases which do not exceed the thresholds for a mandatory EIS, but have potentially significant environmental effects. These are called “*sub-threshold cases.*” It provides:

*“Where a planning authority receives a planning application in respect of any development which would be of a class referred to in Article 24(1) (a) but for not exceeding a quantity, area or other limit for the time being specified in relation to that class.....and where they consider that the development would be likely to have significant effects on the environment, they shall require the applicant to submit an environmental impact statement..”*

Thus, where consideration has to be given, in a sub-threshold case, to the question of whether a proposed development would be likely to have significant effects on the environment, which is the criterion for deciding whether the planning application should be accompanied by an EIS, it is the planning authority which must make that judgement. Moreover, the planning authority is required to consider all environmental effects, including pollution. I have explained how the EIA Regulations, most recently that of 1999, prescribe that the environmental concerns, comprehensively set out in Article 3 of the 1985 Directive, be dealt with in the contents of an EIS

**The Board is similarly obliged to consider whether to require an EIS in sub-threshold cases**

Article 56 of the 1994 planning regulations is crucial on the facts of this case and was central to the decision of the learned trial judge. It requires the Board, on appeal, where the planning authority has not sought an EIS to exercise the same judgement, as that just described, in sub-threshold cases. Where the appeal relates to a sub-threshold development, Article 56(2) says:

*“...where the planning authority did not require the applicant, in accordance with Article 26, to submit an environmental impact statement, the Board shall, where it considers that the development would be likely to have significant effects on the environment, require the applicant to submit to the Board an environmental impact statement.”*

**The Planning Authority or the Board must have regard to the selection criteria**

Article 4.3 of the 1985 Directive, as amended, requires Member States to “take into account...the relevant selection criteria set out in Annex III..” both when setting national thresholds and when considering, on a case-by-case basis, whether the likely effects on the environment are such as to lead to the conclusion that an EIS should be required.

The 1999 EIA Regulations added a new Article 27 of the 1989 Regulations:

*“The criteria set out in the third schedule are hereby specified for the purposes of this Article”*

Strangely, however, the Article specifies no such *purposes*, creating, as counsel said “a mystery” about this provision. However, Article 11 of the Local Government (Planning and

Development) Regulations, 1999 (S.I. 92/1999) inserted a new paragraph (1B) in Article 26 of the 1994 Planning Regulations , which solves the mystery.

*“A planning authority shall, where it is deciding pursuant to this Article whether a proposed development would or would not be likely to have significant effects on the environment, have regard to the criteria specified for the purposes of Article 27 of the European Communities (Environmental Impact Assessment) Regulations, 1989.”*

Thus, the planning authority, making the judgment already referred to under Article 26 of the 1994 Planning Regulations on likely effects on the environment, they must have regard to the specified criteria. They are contained in the new Third Schedule to the 1999 EIA Regulations, which list a number of matters under the headings of characteristics and location of the proposed development, and the characteristics of its potential impacts. For present purposes, it is important that the criteria include, for example, size, cumulation with other development, use of natural resources, production of waste and pollution and nuisances.

Mr Galligan, on behalf of the appellant, objected that Article 11 of the 1999 Planning Regulations could not affect or amend section 98 of the act of 1992. It must be remembered, however, that the “mysterious” Article 27 of the 1999 EIA Regulations has the status of a statute, being adopted pursuant to the European Communities Act, 1972. The selection criteria, which it enacts, come from Annex III of the 1997 Directive. It refers to the power to specify these criteria. Article 11 effectively does this. It does not purport to amend section 98(1) of the act of 1992. Insofar as the selection criteria have any effect, this derives from the 1994 EIA Regulations. It seems to me that all of these linked provisions are designed to give effect to the Directive. I do not accept, therefore, that Article 11 purports to amend or affect the act of 1992.

Where an EIS accompanies a planning application, in a case requiring a licence, it must, as has been seen, be sent to the Agency, which has the power to seek more information.

An EIS, submitted to a planning authority, must comply with Article 25 of the 1989 Regulations, as amended. Paragraph 2 of the Second Schedule to the 1999 EIA Regulations reflects, in slightly different words, the “*aspects of the environment likely to be significantly affected by the proposed development...*” They are:

- “human beings, fauna and flora,
- “soil, water, air, climatic factors and the landscape,
- “material assets, including the architectural and archaeological heritage, and the cultural heritage,
- “the inter-relationship between the above factors..”

I have explained how the contents of a EIS, as so prescribed, find their origin in Article 3 of the 1985 Directive. Clearly, a competent authority, whether a planning authority or the Board, in considering whether a proposed development is likely to have significant effects on the environment, will have regard to the matter which an EIS must contain. Such an authority must also, in considering how to exercise its powers, do so in such a manner as to give effect to the relevant provisions of European Community law.

A planning authority must also give notice of any EIS it receives to the Agency, where the development comprises activity requiring a licence.

There are separate provisions regarding the seeking of further information. Article 28 of the 1994 planning regulations obliges the planning authority to consider the adequacy of an EIS and to require further information, but they must exclude from their consideration “*the risk of environmental pollution.*” In that respect, the function of evaluating an EIS and seeking further information is conferred on the Agency by Article 14 of S.I. 85 of 1994.

The complex of regulations, as I have described them, contain a coherent scheme for the EIS and EIA. An EIS is furnished, in the first instance only to the planning authority. In sub-threshold cases, the planning authority considers whether there should be an EIS. When doing so, it will need have regard to the selection criteria set out in the Third Schedule the 1999 EIA Regulations and to consider what would be in an EIS, as specified in the second Schedule. To the extent that the appellant submits that a later act of secondary legislation cannot amend an earlier statutory provision, this cannot, in any event apply to the 1999 EIA Regulations. They have the status of a statute, having regard to the fact that they were adopted pursuant to section 3 of the European Communities Act, 1972 and have the status of a statute. The assignment of these tasks to the planning authority means that a single competent body must consider the likely environmental effects (including polluting effects) of a proposed development in an integrated way.

Even in cases involving a licence, the Agency cannot, therefore, require an EIS. However, where there is an EIS in a case involving a licence, it must be provided to the Agency and the Agency may seek further information.

The foregoing suffices to show that Mr Galligan's argument for the existence of an independent power of the Agency to seek an EIS is incorrect. It is clear that the Agency's function under S.I. 85 of 1994 is merely to be provided with an EIS, where *An application for planning permission.....is required to be accompanied by*" an EIS.

### **Section 98(1) of the act of 1992**

I turn then to the question of the meaning of section 98(1). The words of subparagraphs (a) and (b) refer, in clear terms, to two principal matters, which the planning authority or the Board have power to decide. They are:

- the refusal of a permission or an approval under Part IV of the Act of the act of 1963
- the imposition of conditions on the grant of a permission.

In either of these cases, a planning authority or the Board may not have regard to the risk of environmental pollution. These words, taken on their own, are not apt to preclude these authorities from having regard to these matters, when exercising any of their other powers. I can see the possible force of the argument that the EIA process, if it were not relevant to any decision that the planning authorities could make, would be pointless. Put at its highest, it could be said that, even though the plain words seem restricted to the two acts of refusal of permission and the imposition of conditions, it would be absurd to confer on an authority power to gather and consider material for no ultimate purpose. Accordingly, it might be said, the plain or primary meaning of the words should be rejected.

However, this “futility” argument will fail, if it can be shown that there is a plausible reason or point in the primary meaning. I think that the combined facts of the existence of the 1985 and 1997 Directives and their transposition into Irish law by the 1989, 1994 and 1999 EIA Regulations constitute an adequate answer. The statutory scheme in existence at the date of the relevant decisions in this case envisaged the planning authority and the Board taking steps to ensure that an EIS would be provided and that its adequacy be considered, and for the making of regulations to that effect.

The question then arises whether, as strongly contended by the appellant, the part of the wording of section 98 following the word, “*accordingly*,” lead to a different conclusion.

Given the conclusion I have already reached about sub-paragraphs (a) and (b), I am prepared, in principle, to accept that this is the correct approach. I agree that the ordinary

meaning of “*accordingly*” is that it refers to matter which follows logically from an initial proposition. Nonetheless, it is necessary to consider the content of the two sub-paragraphs, lest their meaning clearly expanded the range of the prohibition in the earlier part. Sub-paragraph (ii) corresponds closely with the meaning of the earlier sub-paragraphs. The Board is not to “*consider any appeal ..., 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.*” Here the prohibition is closely linked to the consideration of the decision that the Board has to make on the appeal itself. I do not think these words go further than those in (a) and (b).

In the case of the planning authority, the language is different. It says that “*...in dealing with an application for a permission or for an approval for any such development [the planning authority] shall not consider any matters relating to the risk of environmental pollution from the activity;*” “*Dealing*” is a word of broad import. One could well see that, in another context, it might refer to any and all stages of the handling by the planning authority of an application for planning permission. 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 EIS. Several points lend support to this view.

Firstly, a broad interpretation of “*dealing*” seems in conflict with the meaning I have given to “*accordingly*.” It would go beyond the terms of sub-paragraphs (a) and (b). Secondly, it would be inconsistent with the language used by sub-paragraph (ii) relating to the Board. Thirdly, apart from the possible generality of the word, “*dealing*,” there is no positive indication that the sub-paragraph (i) was intended to cover the EIA procedure. Finally, quite direct support for the narrower meaning, in this particular context, can be derived from the language of section (1A) of the act of 1963 as inserted by the 1989 Regulations. Where it speaks of a planning authority “*dealing with an application for permission for the development of land in respect of*

*which an environmental impact statement was submitted,*” the context concerns only consideration *after* the receipt of an EIS and, thus, necessarily the decision stage. In fact, as suggested at the hearing, sub-paragraph (i) of section 98 may have been following this wording.

I have reached the foregoing conclusion upon an analysis of the wording of the section, construing it as a matter of Irish law, pursuant to the normal canons of construction. Section 98 does not, in my view, bear the meaning propounded on behalf of the appellant. Moreover, I would, if necessary, accept Mr Clarke’s submission, on behalf of Thesio. It is common case that Irish law implementing directives should be construed in the light of the obligations imposed on the State by the provisions of the directives and with a view to giving effect to Community law. However, it is a matter for the national court to decide how that result is to be achieved. When applying national law, whether adopted before or after the directive, the national court called upon to interpret that law must do so, as far as possible, in the light of the wording and the purpose of the directive so as to achieve the result which it has in view. (See, for example *Dorsch Consult* (Case C-54/96 [1997] ECR I-4961). It is more natural to interpret an existing provision of the law, even in the event of ambiguity, so as to make that meaning conform to Community law than to insert a provision into a particular national law so as to give it a meaning it does not naturally bear. In this case, it would be preferable to interpret section 98 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 environment and deciding whether an EIS should be called for) rather than to insert a new provision conferring that power on the Agency, by implication, at some undetermined place in the act of 1992. The first course would do less violence to the statutory words.

I also accept that it is more consistent with the objective of the directives that a single authority be charged with giving comprehensive consideration to the likely effects of a development on the environment, for the purpose of deciding whether there should be an EIA.

The competent authority performing that function is in a better position to take into account the interaction, required by Article 3 of the 1985 Directive, between the different environmental considerations.

Therefore, I would reject the appellant's submission that section 98(1) prevented the planning authority or the Board from taking environmental pollution into account in deciding whether there should be an EIS. Thus, there was no failure to transpose the directives. The failure, if any, of the planning authority or the Board to seek an EIS was within their powers, which have not been contested.

### **Protection of Habitats**

Finally, I consider the complaint that the Agency did not give proper consideration to the effects of the activity to be permitted by the licence would have on habitats. There is, in close proximity to the site, a Special Protection Area designated pursuant to Council Directive *on the conservation of wild birds* of 2<sup>nd</sup> April 1979 (O.J. L 103 of 25<sup>th</sup> April 1979) the Wild Birds Directive of 1979). That Directive was amended and extended by Directive 92/43 of 21st May 1992 *on the conservation of natural habitats, and of wild fauna and flora* (O.J. L 206 22nd July 1992 page 7), (known as "*the habitats Directive*"). Article 6.3 of the Habitats Directive imposes an obligation on Member States:

- "3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the*

*implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.”*

Regulations to give effect to the State’s obligations pursuant to these directives are found in the European Communities (Natural Habitats) Regulations, 1997. Article 32(1) of those regulations provides:

*“Where an operation or activity or an established activity to which an application for a licence or a revised licence or a review of a licence or revised licence, as appropriate, under any of the enactments set out in Part II of the Second Schedule applies is neither directly connected with nor necessary to the management of a European site or likely to have a significant effect thereon either individually or in combination with other operations or activities or established activities a local authority, the Board or the Environmental Protection Agency shall ensure that an appropriate assessment of the environmental implications for the site in view of the site’s conservation objectives is undertaken.”*

Thisio submitted to the Agency, as part of the material accompanying its application for a licence, a report from an ecological consultant on the “*Proposed Combined Cycle Power Station at Dungarvan...*” under the heading, “*Flora and Fauna.*” This report considered the possible effects of the proposed power plant on the Dungarvan harbour SPA, already mentioned as well as on five other provisional National Heritage Areas within a ten-kilometre radius. The

expert reported that no adverse effects were to be expected. The Agency was entitled to accept the accuracy of this report, as they did. It is not contended that the decision of the Agency was irrational in the sense in which that term is used in applications for judicial review.

This ground of appeal must also be rejected.

I would, therefore, dismiss the appeal.