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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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AND IN THE MATTER OF AN APPLICATION BY EP KILROOT LIMITED FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF THE NORTHERN IRELAND AUTHORITY FOR UTILITY REGULATION (ACTING THROUGH ITS SINGLE ELECTRICITY MARKET COMMITTEE)

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Re EP Kilroot Ltd's Application (No 2) (Ruling on remedy)

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David Dunlop KC and Matthew Corkey (instructed by Carson McDowell LLP) for the Applicant
John Larkin KC and Laura King (instructed by O'Reilly Stewart, Solicitors) for the Respondent
Paul McLaughlin KC and Simon Turbitt (instructed by Tughans LLP) for SONI, a notice Party
Stewart Beattie KC and Philip McEvoy (instructed by Cleaver Fulton Rankin Ltd) for EirGrid, a Notice Party

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SCOFFIELD J

Introduction

[1] Judgment in these proceedings was given yesterday: see [2024] NIKB 105 ("the main judgment"). This ruling should be read in conjunction with that judgment. The applicant's application for judicial review was allowed on one ground, relating to the procedural fairness of the respondent having made the impugned decision without giving the applicant any indication of a new issue which was central to its determination in order for the applicant to engage with that issue. The issue in question was the construction timetable for EPK's project, having regard to the increased complexity of what is now proposed with EPK proposing to complete the project within the terms of its 1973 planning permission, rather than

the 2022 permission which was recently quashed. Albeit this issue fell within the general rejection reason contained within the 23 October FQD (achievement of SC before the commencement of the relevant capacity year), throughout the preceding processes the achievement of SFC and the build period post-SFC had been treated as distinct issues. The applicant was at all times labouring under the impression that it was only the former of these issues which was live during the course of the SEM-C's reconsideration of its application for qualification for the capacity auction. The issue which resulted in the further refusal of its application had not been considered or debated in any detail during the previous aspects of the qualification process.

[2] At para [100] of the main judgment, I said this:

> "Notwithstanding the finding that there was unfairness in the procedure, I am presently minded not to grant any relief other than a declaration to that effect. This is for two reasons, whether taken individually or collectively. First, the evidence provided by the respondent suggests that the additional information (which would have been provided by EPK if the identified unfairness had not arisen) would not have altered the outcome. Second, the public interest in minimising further delay to the auction process, as set out in the affidavit of Mr Downey of EirGrid (on behalf of the SOs) is extremely powerful."

[3] Nonetheless, I considered that it was proper to hear briefly from the parties on the issue of relief. That was particularly so given the recent further delay to the submission end date for the auction, which has been extended from 12 to 17 December. I am also now aware that judicial review proceedings in the High Court in Dublin, relating to the same auction, have resulted in a number of the SEM-C's decisions being quashed, which requires them to be redetermined. That is potentially relevant, at least, to the second of the concerns identified above.

[4] The parties made further brief submissions on the issue of remedy, and the practical implications of any more intrusive relief than a declaration which may be granted, this morning. I am grateful to counsel for those additional submissions. Mr Dunlop KC urged me to quash the impugned decision and order the respondent to reconsider it. Mr Larkin KC resisted that application and submitted that a declaration was adequate in the circumstances, relying on both of the issues which had given rise to my provisional view.

The 'no difference' issue

[5] As is clear from the main judgment, I have only found the applicant's challenge made out on one ground, namely the failure to raise with it the Committee's concerns about SC not being achieved within time by reason of potential delay in the construction process arising from the complexities of the

current iteration of the project. That was made clear to the applicant in the decision letter of 2 December, later supplemented by the disclosure of the SEM-C minutes on 4 December and the third CRMT memo (with the OSC analysis) on 5 December. Albeit in a short timescale, the applicant was able to respond to these concerns during the course of these proceedings. It did so in the second affidavit of Mr Crankshaw, which was lengthy and made a range of points which are summarised in the main judgment (see, in particular, paras [28]-[39]) and were supported by exhibits to the affidavit.

[6] This evidence has been considered by the respondent and both the OSC and SEM-C indicated on oath that the points made by the applicant would not have changed either the OSC recommendation or the Committee's ultimate decision (see paras [43]-[44] of the main judgment). The Committee was and is simply unpersuaded that the project will achieve SC on time on the basis of the present materials. The SOs were essentially unable to offer a meaningful view on this issue.

[7] Mr Dunlop submitted that, as a responsible public authority, the SEM-C must have an open mind if it comes to reconsider the matter with the benefit of additional information. He drew attention to the extremely limited timescale within which Mr Crankshaw's second affidavit was produced, which he described as a "matter of hours" after having received all of the relevant disclosure from the respondent. He further submitted that the applicant now has a greater understanding of the issues of concern to the respondent and would be in a position to provide further information relevant to its consideration within a very short timescale but, for instance, providing additional independent confirmation of some of the points made by Mr Crankshaw.

[8] Having reflected upon the authorities, Mr Dunlop has done enough to persuade me that it would be wrong to refuse additional relief on this ground alone. The starting position is that a decision reached by means of a procedure affected by unfairness will usually be set aside. Even accepting Mr Larkin's submission that the unfairness identified in this case is at the lower end of the range, the general position is that a party such as the applicant should have their rights and interests affected only by a decision which respects any requirements of procedural fairness in that particular context. As Mr Dunlop pointed out, this is also a decision which potentially affects the applicant's commercial interest in a very significant way and which relates to the potential investment of many millions of pounds.

[9] The suggestion that a fair procedure would have made no difference to the outcome was considered in *R v Chief Constable of the Thames Valley Police, ex parte Cotton* [1990] 1 IRLR 344. In that case Bingham LJ gave the following, now oft-cited, guidance:

> "While cases may no doubt arise in which it can properly be held that denying the subject of a decision an adequate opportunity to put his case is not in all the circumstances

unfair, I would expect these cases to be of great rarity. There are a number of reasons for this:

(1) Unless the subject of the decision has had an opportunity to put his case it may not be easy to know what case he could or would have put if he had had the chance.

(2) As memorably pointed out by Megarry J in *John v Rees* [1970] Ch 345 at 402, experience shows that that which is confidently expected is by no means always that which happens.

(3) It is generally desirable that decision-makers should be reasonably receptive to argument, and it would therefore be unfortunate if the complainant's position became weaker as the decision-maker's mind became more closed.

(4) In considering whether the complainant's representations would have made any difference to the outcome the court may unconsciously stray from its proper province of reviewing the propriety of the decision-making process into the forbidden territory of evaluating the substantial merits of a decision.

(5) This is a field in which appearances are generally thought to matter.

(6) Where a decision-maker is under a duty to act fairly the subject of the decision may properly be said to have a right to be heard, and rights are not to be lightly denied. Accordingly if, in the present case, I had concluded that Mr. Cotton had been treated unfairly in being denied an adequate opportunity to put his case to the Acting Chief Constable, I would not for my part have been willing to dismiss this appeal on the basis that it would have made no difference if he had had such an opportunity (although the court's discretion as to what, if any, relief it should grant would of course have remained)."

[10] Even assuming the decision will *probably* be the same after consideration of additional information, that is insufficient: see *R (Smith) v North Eastern Derbyshire Primary Care Trust* [2006] EWCA Civ 1291, at para [10]. Probability is not enough. The respondent should show that the decision would "inevitably have been the same" and the court should not stray from its proper province of reviewing the propriety of the decision-making process into the forbidden territory of evaluating the substantive merits of the decision. Bearing in mind the limitations in the exercise of Mr Crankshaw addressing the matter on affidavit within a short timescale in the context of this litigation, I cannot be satisfied to the very high standard required that a fair procedure would inevitably have made no difference.

[11] On balance, therefore, in light of further reflection I would not withhold a quashing order on the basis that it is inevitable that the SEM-C will reach the same decision if required to reconsider the matter and EPK has a further (short) opportunity to address the key issue of concern.

The timing issue and the public interest

[12] I remain, however, very concerned about the second issue mentioned in para [100] of the main judgment. The public interest in minimising further delay to the auction process is extremely powerful. Mr Broomfield's evidence in the first judicial review dealt in depth with the difficulties which may arise if candidate units were qualified which later failed to deliver their awarded capacity. In these proceedings, I have been provided by EirGrid (on behalf of the SOs) with much more evidence in relation to the prejudice to third parties and the public interest which can or will arise by interference with, or upset to, the auction timetable. Mr Broomfield has averred that the concerns he has outlined in relation to the importance of running the T-4 auction as soon as possible "are becoming increasingly and alarmingly pressing". The reasons for this concern are spelt out with greater particularity and force in paras 24-52 of the affidavit of Mr Downey of EirGrid which was filed in the course of these proceedings.

[13] Some of the points Mr Downey makes are as follows:

(a) The gate opening for the auction has already been amended from 21 November to 3 December. Any further delay is likely to cause prejudice both to third-party stakeholders and the public interest.

(b) Any further delay is likely to impact the critical path for delivery of qualified applicants which would result in increases in the levels of non-delivery and in non-performance risks. In particular, there will be participants with plant and machinery orders or engineering contracts on hold awaiting the outcome of the auction. Delays of several weeks or months on such orders may result in provisional orders or contracts lapsing. At a minimum, delay will be disruptive for participants and may result in additional costs.

(c) A much more critical, unquantifiable risk is that significant further delay may result in qualified participants electing to withdraw from the auction or to participate in it and secure capacity contracts only to voluntarily terminate at a later stage, when it becomes clear that they cannot meet shortened deadlines. The nature of significant performance bonds is such that the loss of several weeks may elevate the risk of failing to achieve delivery of capacity within the allotted times to an unacceptable degree.

(d) Delay to capacity auctions as a result of legal challenge may dampen market appetite for participation in such auctions on the basis that the published timelines cannot be confidently relied upon. Generally, both public and market participant confidence in the capacity auction process is eroded by delays.

(e) Delay to the auction schedule also imposes additional burdens on the SOs which in turn impact their timelines for delivery of supplementary steps which must follow the auction.

(f) These impacts are likely to give rise to consequential impact upon electricity customers as a result of participants increasing their bids to recoup costs incurred by delays, with a higher final clearing price ultimately being passed on to electricity consumers. Where participants drop out of the auction process, this increases the risk that the auction fails to procure the capacity required to meet security of supply for the relevant capacity year, ultimately resulting in significantly increased cost to customers.

(g) In the event that the applicant was successful in these proceedings and the matter was remitted for further reconsideration by the SEM-C, there would be a range of potential knock-on effects which cannot be predicted with certainty. In addition to the time taken for the reconsideration process, if the applicant was to be qualified for the auction, a range of further steps would then require to be taken (which are outlined in para 46 of the affidavit). These would give rise to further delay and would likely result in other qualified participants wishing to adjust and resubmit their bids. This may require the endpoint for the period of submission to be extended.

[14] Mr Downey's affidavit concludes by saying that the impact of any specific period of delay cannot be predicted with certainty. Any degree of delay is inimical to commercial certainty and may diminish the confidence of potential providers of capacity. He avers that it is "very important to commercial predictability and the long-term public interest that disruption to energy auction timelines is kept to an absolute minimum". A delay of 4-8 weeks could lead to a significantly increased level of risk that an appreciable number of qualified participants may no longer be in a position to successfully deliver. If the delay were to exceed this, Mr Downey's evidence is that this could critically compromise the effectiveness of the auction process.

[15] In relation to the timing issue Mr Dunlop relied upon a number of matters. First, he submitted that his client would "move heaven and earth" to deal with any further process as expeditiously as possible. Second, he informed me that his client had already provided detailed technical information and calculations to the SOs which would expedite further consideration of the construction timeline by Jacobs, if that was to be pursued. Third, he submitted, in terms, that the amendments which had already been made to the auction timetable (particularly as a result of the related proceedings in Dublin) meant that there was adequate time for further reconsideration in this case and that an order requiring such reconsideration would not, or would not necessarily, give rise to any additional delay.

[16] The third of these points was made by reference to para 49 of Mr Downey's affidavit (sworn before the amendment to the auction submission end date referred to at para [3] above) which is in the following terms:

> "I believe that a possible adjustment [of the date for commencement of the submission of bids into the auction] of beyond 12 December would likely translate, in practical terms, into an effective delay of 3-4 weeks to the auction results from the current position, taking into account the Christmas holiday period and the necessary regulatory reviews and approvals. This might correspond to an overall delay of six weeks from the originally intended scheduling."

[17] I asked Mr Beattie KC on behalf of Eirgrid for further information as to the meaning and implications of this averment as matters currently stand. This has been addressed in a further, short affidavit from Mr Downey sworn today. Its key point is that, in his opinion, there can be no further extension of time without the consequences he was concerned about in the paragraph quoted above. The new affidavit also discloses the following. In correspondence of 9 December, the EirGrid Chief Operations Officer had already advised the RAs that 17 December is the latest date that could be accommodated without a significant increase in risk as any move beyond that would put the auction in the New Year. The critical dates have already been amended twice; and there is already a 30-day delay to the date for the final capacity auction results. The latest extension which has been made is at increased operational risk; and any further issue or difficulty which arises will impact the SOs' ability to comply with the capacity auction completion date. On balance, the SOs considered the risks inherent in the extension to 17 December to be acceptable; but any extension beyond that means that the auction will not take place until the New Year. In short, the bid submission end date is already at the limit of what can be tolerated. This has not yet given rise to the effective delay of 3-4 weeks Mr Downey feared; but any further delay will do so.

[18] Although limited detail is available, I understand that the reconsideration process ordered by the High Court in Dublin is such that the applicants for qualification who brought those proceedings must provide any additional representations by sometime tomorrow (Thursday 12 December) and a further decision from the SEM-C is required by 2:00pm on Monday 16 December. Mr Beattie expressed concern about the ability of the SOs to provide any further input required from them within that timescale.

[19] At the hearing this morning, I also discussed with the parties the feasibility of obtaining the expert technical input of Jacobs (which the SOs had indicated they would need before providing a properly informed view on the construction timeline) within the time currently available. That assumes that, upon any reconsideration, the respondent seeks additional input from the SOs (or from Jacobs directly). Mr McLaughlin KC informed me that the SOs would not provide additional advice or input unless specifically requested to do so by the RAs.

[20] There are significant impediments to Jacobs providing comprehensive input within the time available. Albeit the technical detail provided recently by EPK has been transmitted to Jacobs, the relevant individuals are based in Australia and the time difference between the two jurisdictions impedes communication to some degree. On EirGrid's analysis it is likely to be a number of days from now before their advice is provided and, even then, they may seek further information or raise further queries which will take further time to address. If that takes a week overall, this pushes the Jacobs input beyond the current date for closure of bid submissions. Mr McLaughlin also informed me that, if meaningful input from the SOs' was sought, independently of any issue in relation to Jacobs' input, this was likely to take up to a week and there was no guarantee that it could be provided before then.

[21] In response, Mr Dunlop said that there were a range of "moving parts" and that, with at least some time available, his client should not be completely shut out from a further opportunity to make additional representations. Mr Larkin emphasised that the SOs' recent position paper confirms that the project has changed materially from what was originally proposed and submitted that it was not realistically possible for this to be assessed in detail by 17 December.

[22] As appears from the above, there are significant difficulties with obtaining additional input from the SOs and/or Jacobs without further delay to the auction timetable, which the court is keen to avoid in the public interest and in the interests of third parties for the reasons set out in Mr Downey's evidence. One probably needs to proceed on the basis that such input is unlikely to be available. In turn, that may decrease the likelihood of a different outcome in the course of the reconsideration process. If additional input from the SOs or Jacobs is available at all, this will likely be provisional, caveated or incomplete. Nonetheless, I cannot wholly exclude the possibility of a different outcome upon reconsideration, which might be in the public interest if it ultimately resulted in increased competition in the capacity

auction (the RAs having been persuaded that SC of EPK's project is in fact achievable within time) which in turn may be in the public interest.

[23] Although there is a risk that, in the event that EPK's candidate unit was considered to qualify, this may result in some further delay to the auction process (by reason of the need to inform other bidders of its entrance and permit them to alter their bids in response) that risk arises in any event by virtue of the fact that the High Court in Dublin has already required the respondent to reconsider its decision in relation to other applicants' generator units. The risk arising from increased delay has to be balanced against the potential benefit of increased competition in the auction, although I acknowledge that the assessment of this balance is complex, since increased delay may result in other bidders dropping out thereby decreasing competition.

[24] I also accept there to be force in Mr Larkin's submission that there is an air of unreality about the prospect of EPK simply accepting a further decision, after a further process, which still resulted in its non-qualification for the auction. Its repeated challenges on the grounds of irrationality and its evidence seeking to undermine the expertise of the respondent suggests otherwise. Any further challenge may give rise to yet further uncertainty. In that event, however, there is a high likelihood that the court would refuse relief, whether interim or final, which would give rise to any further delay in the auction timetable in view of the increasing risk of fatally undermining the whole process.

Conclusion

[25] The competing factors discussed above mean that the exercise of the court's discretion in relation to relief in this case is far from straightforward. The timing issue is the one which is critical. On balance, I have concluded that the appropriate course is to quash the respondent's decision of 2 December and order a further reconsideration of this within a timetable which (as far as one can predict) should do no further damage to the auction timetable than has already arisen by reason of recent developments. In the final analysis, I consider it would be unduly harsh to refuse such relief to EPK because of the time pressure under which all parties are now operating, when a significant factor giving rise to the present situation is that time has been used up by two decision-making processes which the court has found to have been unfair.

[26] I therefore intend to make an order quashing the respondent's decision impugned in these proceedings; remitting the matter to the SEM-C for further consideration; and again, disapplying section E.9.4.7 of the CMC for that purpose. That order will include directions that any further representations from EPK be submitted by 10:00am tomorrow, Thursday 12 December; and that the outcome of the further determination required by the respondent be communicated to the SOs and the applicant as soon as practicable but, in any event, before 2:00pm on Monday 16 December 2024 (with reasons to follow as soon as practicable thereafter).

[27] This relief seeks to provide a further opportunity for the applicant to supplement the materials it has filed in the course of these proceedings but only within a limited timescale, recognising (i) the work which is likely to already have been undertaken in this regard; (ii) the time which the OSC and SEM-C will need to analyse such material; and (iii) the burden which is already upon the OSC and SEM-C to assess the other applications which have been remitted to them for reconsideration. It is further designed to result in no additional delay than arises in any event, or may be likely to arise in any event, from the remedy granted by the Irish High Court.

[28] The extent to which the SOs' and/or Jacobs' input into the reconsideration process may be sought or provided are matters for the SEM-C and SOs to consider in light of all of the circumstances and any further developments of which the court may be unaware. For the reasons given in the main judgment (see paras [70]-[76]; and see also para [210] of the previous judgment), the absence of such input is unlikely, of itself, to give rise to any illegality provided there is a rational basis for it not being sought; although there is an obvious interest in any fresh decision being taken on as fully informed a basis as possible within the limited time available.