

**THE HIGH COURT
JUDICIAL REVIEW**

[2021] IEHC 648
[2021 No. 89 JR]

BETWEEN

BALLYBODEN TIDY TOWNS GROUP

APPLICANT

AND

AN BORD PLEANÁLA, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

SOUTH DUBLIN COUNTY COUNCIL

NOTICE PARTY

JUDGMENT of Humphreys J. delivered on Wednesday the 20th day of October, 2021

1. The Whitechurch Stream catchment area in Rathfarnham has been subject to significant recurring flooding, particularly in 1986 during Hurricane Charley, and in 2007, 2008 and 2011. The area has been identified under the Dodder Catchment-based Flood Risk Assessment and Management (CFRAM) project as being liable to particularly noteworthy flooding during a one in one-hundred year flood event. That is mainly due to low banks, overtopping of existing defences, insufficient floodplain capacity or insufficient capacity at a number of bridges and culverts causing water to back up.
2. With a view to making an application for developing consent for flood alleviation works under s. 177AE of the Planning and Development Act 2000, the council engaged RPS Group Ltd. as consultants who prepared an Environmental Impact Assessment (EIA) screening report, Ecological Impact Assessment Report and Natura Impact Statement (NIS) on 6th July, 2020.
3. On 29th July, 2020, the council engaged in public consultation as set out at s. 6 of the Planning Report.
4. The formal application was then made for flood alleviation works along a 1.5 km section of Whitechurch Stream. The section affected flows south from St. Enda's Park (where the school established by Pádraig Pearse (1879-1916) was located after its move from Cullenswood House, Ranelagh in 1910), and under Sarah Curran Avenue (Sarah Curran (1782-1808), the fiancée of Robert Emmet (1778-1803), lived in the Priory, Rathfarnham, a short distance away), to the confluence with the Owendoher River to the north at the junction of Ballyboden Road with Willbrook Road.
5. The board's inspector, Karla McBride, gave a favourable report on 30th October, 2020 and the board gave a direction to grant permission on 16th December, 2020.
6. The formal decision was made on 17th December, 2020. That decision refers to the habitats directive 92/43/EEC, but not to the EIA directive 2011/92/EU or indeed to any other provision of EU law (although that is not pleaded as a ground of complaint). Unlike normal development consents (s. 40 of the 2000 Act), the legislative procedure here

under s. 177AE does not limit the duration within which it is lawful to carry out the development.

7. Further surveys were then carried out post-consent, in particular in February 2021 and more recently between 22nd June, 2021 and 26th August, 2021.

Points not pursued

8. The applicant informed the court that a number of points were not being pursued. In particular:
 - (i). alleged unlawful reliance on mitigation measures for the purposes of the EIA screening determination;
 - (ii). alleged lack of public participation for the purposes of s. 177AE of the 2000 Act; and
 - (iii). alleged breach of public participation in relation to the Kingfisher (*Alcedinidae*).

Points already rejected

9. The applicant seeks to make two points that have already been rejected in *Save Cork City Community Association CLG v. An Bord Pleanála* [2021] IEHC 50, [2021] 7 JIC 2802 (Unreported, High Court, 28th July, 2021):
 - (i). that the board had no jurisdiction to undertake EIA screening under s. 177AE of the 2000 Act; and
 - (ii). alleged breach of or non-transposition of art. 9a of the EIA directive in such a context.
10. While a spirited attempt was made to reinvigorate these points and to an extent to distinguish *Save Cork City*, I do not think any basis has been made out to revisit the decision or to say that it does not apply here. So while the applicant can be taken to have preserved its position for any hypothetical appeal, in summary these points fail here for the same reasons as they failed in *Save Cork City*. In particular, the fact that the applicant is claiming here that the council carried out the screening rather than the board does not amount to a new point. The logic of the legislation, as explained in *Save Cork City*, is that the council is not the competent authority in such a situation. So insofar as the applicant now in effect argues otherwise, that is just clearly wrong.

Other points that are being made

11. That leaves four points to be dealt with:
 - (i). alleged failure to conduct assessment by reference to cumulative impacts;
 - (ii). alleged inadequate surveys;
 - (iii). alleged use of the incorrect legal test; and
 - (iv). the indefinite nature of the permission.

Alleged failure to conduct assessments by reference to cumulative impact of other developments

12. The problem for the applicant here is that the potential for cumulative impacts from the flood defence works in conjunction with other developments was considered in the EIA report and the NIS. Those documents adopt a clear methodology for cumulative impact assessment: see s. 6.3.5.2 of the NIS and s. 6.5 of the EIAR.
13. The NIS states that a search was conducted of planning applications within the vicinity of the development using the South Dublin County Council planning portal map viewer and the Department of Housing, Planning and Local Government EIA portal map viewer. The search was limited to the five-year period preceding the report and excluded retention applications, incomplete, withdrawn and refused applications. A table setting out the relevant projects with potential for in combination effects is provided at table 6-14. A search of An Bord Pleanála's website to identify SID or SHD developments was also undertaken.
14. In respect of the developments so identified, these are analysed and commented on in table 6-14. The upshot was that there was a conclusion of an absence of developments giving rise to in-combination effects with the works in question.
15. The applicant now, armed with the wisdom of hindsight, claims that some developments were not considered without having put those to the board at the relevant time. That unfortunately is an exercise in gaslighting the board, in the sense of manipulatively moving the goalposts by criticising somebody for the outcome of their having done something without having given that person a fair opportunity to do it correctly by making one's point at the time that that thing was due to be done. The sort of retrospective criticism that is now being engaged in is always possible. The applicant has not established any effective challenge to the board's methodology and certainly did not do so at the relevant time and I do not see how it can legitimately succeed on this point now in those circumstances. While there are exceptions to the principle that you have to first put your point (traversed elsewhere: *Reid v. An Bord Pleanála* (No. 1) [2021] IEHC 230, [2021] 4 JIC 1204 (Unreported, High Court, 12th April, 2021)), they don't apply here.

Alleged inadequacy in otter and bat surveys

16. Grounds 20 - 23 recite certain essentially factual allegations that inadequate surveys were conducted. Those statements do not amount to a legal ground. A legal ground has to postulate a basis for an entitlement to relief by reference to some identified legal provision or doctrine and an explanation as to how that gives rise to an entitlement to the remedy sought.
17. The only attempt to do so is in a single sentence, the first sentence of ground 24: "It is the Applicant's case that the Board did not have sufficient survey information before it to reach a conclusion for the purposes of Articles 4 & 12 of the Habitats Directive."
18. The ground regarding bats is slightly more elaborate, but not hugely so. Ground 28 says that "[i]t is the Applicant's case that the Board did not have sufficient survey information

before it to reach a conclusion for the purposes of Articles 4 & 12 of the Habitats Directive. It is further the Applicant's case that insofar as the Board was obliged to assess the impacts on bats (including roosting, resting and foraging grounds) and to reach a conclusion consistent with the test in Article 4 & 12. It did neither of these."

19. Contextually, it is important to note that the case is significantly different *from An Taisce v. An Bord Pleanála* [2021] IEHC 254, [2021] 4 JIC 2003 (Unreported, High Court, 20th April, 2021), where there was a claim of inadequate evaluation of evidence regarding an impact on a European site under art. 6 of the habitats directive (see para. 24 identifying the points made there). Here, the survey point is not identified as an art. 6 point at all, just a point under arts. 4 and 12 of the habitats directive. But those provisions are addressed to Member States, not to individual competent authorities. No obligation on the board to "reach a conclusion", as is put in the applicant's pleadings, is imposed directly by arts. 4 or 12. That gives rise to a requirement for the pleadings to specify how such an obligation is imposed indirectly. Or indeed more fundamentally to specify what the obligation is – reach what conclusion consistent with arts. 4 and 12?
20. The applicant in essence has not specified the route map in the pleadings by which the court gets to the relief sought. It has simply in effect asserted "Article 12 therefore *certiorari*". That is fundamentally inadequate. In oral submissions the applicant relied on the European Communities (Birds and Natural Habitats) Regulations 2011 (S.I. No. 477 of 2011), but those are nowhere pleaded in the statement of grounds. The gist of the point now sought to be made seems to be that art. 12 imposes a directly effective obligation on all State competent authorities to reach a conclusion that scientifically complete surveys have been carried out as an implicit consequence of the implied obligation to reach a conclusion that the grant of a development consent would not envisage anything that could if carried out give rise to a contravention of art. 12, notwithstanding that there is a separate legislative system for art. 12 licences. The need for the applicant to neutralise the predictable reply that this is dealt with in other legislation is potentially leading us down a path to an argument that the two systems need to be structurally related – the point at issue in *Hellfire Massy Residents Association v. An Bord Pleanála* [2021] IEHC 424, [2021] 7 JIC 0201 (Unreported, High Court, 2nd July, 2021) – but even saying that shows how totally vague and undeveloped the pleadings are here and therefore how potentially capable of mutation and reconfiguration further down the line. A superficially similar point was also launched in *Waltham Abbey Residents Association v. An Bord Pleanála (No. 1)* [2021] IEHC 312, [2021] 5 JIC 1002 (Unreported, High Court, 10th May, 2021), but there was pleaded with considerably more specificity and also as a point under the EIA directive, which is not the case here.
21. So to the extent that reliance was placed in oral argument on the need for surveys for the purposes of EIA screening, that is a totally distinct point from the one pleaded. Indeed, the pleadings are totally silent on whether it is alleged that art. 12 has direct effect or how it otherwise imposes obligations on the respondent here. The points made by the applicant simply cannot be read into the pleadings. And indeed to allow that to be done would be unfair to the respondents and would open up so many possible scenarios that

the case could become endlessly mutating, not just at the level of the High Court, but also on appeal or even further appeal therefrom.

22. Specificity and particularity is required under O. 84, r. 20(3) RSC, a requirement that was considered by Barniville J. in *Rushe v. An Bord Pleanála* [2020] IEHC 122, [2020] 3 JIC 0502 (Unreported, High Court, 5th March, 2020). Barniville J. noted that the express articulation of the requirement of specificity was introduced by the Rules of the Superior Courts (Judicial Review 2011) (S.I. No. 691 of 2011) and that this principle was in line with that laid down by Murray C.J. in *A.P. v. Director of Public Prosecutions* [2011] 1 I.R. 79, at para. 5: "In the interests of the good administration of justice it is essential that a party applying for relief by way of judicial review sets out clearly and precisely each and every ground upon which such relief is sought. The same applies to the various reliefs sought."
23. Barniville J. stated at para. 108: "These passages from the various judgments delivered by members of the Supreme Court in *A.P.* set out the obligations on an applicant who seeks judicial review to set out clearly and precisely each ground upon which each relief is sought in the proceedings and make clear that the order giving leave to seek the various reliefs on the grounds set out in the statement of grounds is what determines the jurisdiction of the court to conduct the review ... It is not open to an applicant to advance new arguments during the course of the hearing which go beyond the scope of the ground or grounds upon which leave was granted or to raise new grounds. These requirements, which are now reflected in O. 84, r. 20(3), are intended to ensure not only procedural fairness for the opposing parties in the judicial review proceedings, but also to avoid ambiguity or confusion as to the issues before the High Court, both for that Court itself and in the context of any appeal from the judgment of the High Court." That pertinent observation reinforces my concerns about the potentially endlessly mutating nature of the pleadings here.
24. Very helpfully for present purposes, Barniville J. emphasised that the complexity of the area of European planning law made it particularly important that the applicant's case was precisely pleaded, saying at para. 113 that: "In my view, these pleading obligations imposed upon an applicant in planning judicial review proceedings are particularly important where those cases involve issues of very considerable complexity and give rise to issues under EU Directives, such as the Habitats Directive and the EIA Directive. It is especially important in those types of cases, involving such complex issues, that the applicant's case is clearly and precisely pleaded in order that the parties opposing the application (whether they be the respondents or the notice parties or both) are clearly aware prior to the hearing of the application for judicial review of what precisely the case is. Such precision is also required, as Murray C.J. pointed out in *A.P.*, to ensure that there is no doubt, ambiguity or confusion as to what the applicant's case is before the High Court, in the context of any appeal from the judgment of that Court to the Court of Appeal or the Supreme Court. It is not appropriate that a case brought on a particular basis, in which reliefs are sought on stated grounds is, when the case comes on for hearing, transformed into one in which different or additional grounds are sought to be

advanced in support of the reliefs sought or new and additional reliefs are sought. Such a course would be unfair on the parties opposing the application for judicial review and on the court.”

25. For the avoidance of doubt, there are exceptions to the requirement of completely detailed particularity where the point being made is nonetheless acceptably clear (see *Atlantic Diamond Ltd. v. An Bord Pleanála* [2021] IEHC 322, [2021] 5 JIC 1403 (Unreported, High Court, 14th May, 2021), *Eco Advocacy CLG v. An Bord Pleanála* (No. 1) [2021] IEHC 265, [2021] 5 JIC 2704 (Unreported, High Court, 27th May, 2021), *Sweetman v. An Bord Pleanála* [2021] IEHC 390, [2021] 6 JIC 1601 (Unreported, High Court, 16th June, 2021), and *Hellfire Massy*) or possibly where the point is an elaboration of EU law points that are adequately referenced (*Eco Advocacy* (No. 1) and *Eco Advocacy CLG v. An Bord Pleanála* (No. 2) [2021] IEHC 610 [2021] 10 JIC 0406 (Unreported, High Court, 4th October, 2021), but I think the pleadings here are so vague that neither of those situations properly applies.
26. In order to comply with the requirement that applies in the present circumstances, the pleadings would have had to explain and state positively how as a matter of law the alleged obligation under art. 12 arose and what that obligation was and how it was not complied with, or, as referred to above, provide a route-map from the provision relied on to the relief claimed. But this essential information is so completely lacking as to render this ground wholly unacceptable as a basis for any finding that the decision here is invalid by reason of inadequate surveys.

Alleged use of incorrect legal test regarding art. 12 of the habitats directive

27. Ground 24, in its second sentence, alleges that: “It is further the Applicant’s case that insofar as the Board appeared to reach a conclusion of no significant effect it applied the test appropriate for Article 6(3) of the Habitats Directive and not the correct test for Annex IV & 12.”
28. However, the same problems arise. I note in passing that the reference to “Annex IV & 12” is a piece of mis-drafting, it implies the word “Annex” before “12”, but should of course refer to art. 12. However, this plea overall is dependent on the argument that the board was obliged to apply some form of “test” under annex IV and art. 12, and as noted above that argument is not remotely properly articulated on the pleadings.

Indefinite nature of the permission

29. The applicant claims that it is not lawful under the habitats directive to allow for an indefinite permission because such a permission could be activated at any future time, even if ecological circumstances had changed. The problem arises because s. 177AE does not place a time limit on the duration of permissions granted under it. The applicant’s pleadings are unfortunately somewhat confused on the issue as to which of four categories of legal consequence applies - whether this is a *certiorari* point, a statutory invalidity point by reference to the Constitution, an invalidity point by reference to EU law or a non-transposition point. This situation underlines the absolutely essential need for parties to clearly think through the legal issues to their logical conclusions before

finalising pleadings. While the amended statement of grounds here is a relatively modest 3,601 words, mere volume of words does not substitute for the avoidance of confusion in the necessary identification, separation and elaboration of the issues. To untangle the matter we need to address the four possible legal consequences of the point separately.

30. Firstly as regards *certiorari*, leaving aside in consequence of statutory invalidity, this point could only go to the validity of the decision if the directive was directly effective in this respect. The applicant has not pleaded that it is directly effective. But even if it had, any implied rule as to the duration of development consent is not sufficiently clear, precise and unconditional as to be capable of having direct effect.
31. It is true that in Case C-127/02 *Landelijke Vereniging tot Behoud van de Waddenzee v. Staatssecretaris van Landbouw, Natuurbeheer en Visserij* (Court of Justice of the European Union, 7th September, 2004, ECLI:EU:C:2004:482), the court said that even if the habitats directive had not been transposed the national court “can determine whether the limits on the discretion of the competent national authorities set by that provision have been complied with”. But that is assuming that we know what “the limits on the discretion of the competent national authorities” are. The alleged implied limit regarding duration is not clear, precise and unconditional.
32. Secondly, turning to unconstitutionality, the wording of the pleadings is curiously roundabout. Relief 3 claims “[a] declaration that the Section 177AE procedure provided by the Planning and Development Act 2000 (to the extent that it is not capable of bearing a conforming construction) and (*sic*) is invalid and incompatible with the requirements of fair procedures and natural and constitutional justice.”
33. The reference to “the s. 177AE procedure provided by the Planning and Development Act 2000” is incorrect and inappropriate and it is a curiously coy sort of referencing. If you want to challenge a statute you need to specify what precise sections or provisions are challenged. This formulation suggests that something in the way of a “procedure” above and beyond s. 177AE is being challenged, moreover a procedure provided by the 2000 Act, not s. 177AE itself. If that is not the case then the ground should refer simply to the invalidity of s. 177AE, not some form of procedure “provided by the Planning and Development Act 2000”. That is somewhat by-the-way because ultimately this constitutional declaration wasn’t pursued.
34. Thirdly, as regards invalidity by reference to European Union law, relief 3 seeks a declaration that the section is invalid by reference to the EIA directive, but that has also been withdrawn.
35. Also under this heading, relief 4 seeks “[a] declaration that the Section 177AE procedure provided by the Planning and Development Act 2000 (to the extent that it is not capable of bearing a conforming construction) is invalid and incompatible with Article 6(3) of Directive 92/43/EEC (‘the Habitats Directive’)”.

36. The problem with the EU law invalidity argument is that there is nothing specific in s. 177AE to which the applicant takes exception. It is purely a case of an omission (moreover the omission of a provision that is omitted from the directive and can only be impliedly read in on the applicant's case). The complaint is the absence of a clause providing a time limit. That complaint, in the context here, is a transposition argument, not a validity argument. There was a belated attempt to argue that the words "and incompatible" were somehow not a validity challenge, but that is unacceptably strained word-play. That is clearly a validity challenge in context and could in no way be construed as a transposition point. The argument made has the consequence that a faithful word-for-word transposition of a directive would be wholly invalid because of a failure to anticipate an obligation that would at some future point be held to be implied by the directive but nowhere stated in it. That is totally implausible. If such an implied obligation comes to be identified then there may (or may not) be a transposition issue, but the notion that the statute is wholly invalid in such circumstances doesn't hold water.
37. Fourthly and finally, one then looks to any potential non-transposition arguments, but the problem here is that relief 3A is extremely limited in scope seeking "[a] declaration that the Second and Third Respondent have failed to transpose Article 9a of the EIA Directive and/or in the alternative that Article 9a is directly effective."
38. There is simply no argument pleaded that s. 177AE fails to transpose art. 6 of the habitats directive. Thus, the pleadings fail to claim the declaration that would have been essential to the central point that the applicant sought to make in oral submissions. That is unfortunate, but given the indispensability of the requirement to plead one's case with precision I think it is sufficient to dispose of the claim under this heading. The catch-all formula of seeking a declaration of rights and duties can't be stretched to cover such a situation – it can cover general legal clarifications but not invalidity of law or general measures, ECHR incompatibility or non-transposition (this is explicit in para. 6(5)(b) and (c) of High Court Practice Direction HC107). That is for good reason - the essential principle of the separation of powers requires that where a court is being asked to go beyond ordinary assessment of legality of disputed individual matters, and get involved in the legal adequacy or validity of legislation or similar measures of general application, the precise relief sought must be particularised beyond doubt in advance.
39. That being said, one can't altogether dismiss the merits of the point as unarguable should it be properly pleaded in some future case, and, notwithstanding that there may be particular legitimate needs for flexibility in the public sector context, one might possibly see arguments for some (potentially renewable) limitation on the duration of s. 177AE permissions needing to be put in place. While for present purposes one can leave that to the consideration of the relevant authorities, they possibly shouldn't take quite the same level of comfort from a walkover victory as they might have had from a knockout.

Order

40. For the foregoing reasons, the proceedings are dismissed.