

**THE HIGH COURT
JUDICIAL REVIEW**

[2021] IEHC 700
[2020 No. 563 JR]

IN THE MATTER OF THE PLANNING AND DEVELOPMENT ACT 2000 AS AMENDED

BETWEEN

SAVE CORK CITY COMMUNITY ASSOCIATION CLG

APPLICANT

AND

**AN BORD PLEANÁLA, THE MINISTER FOR HOUSING, LOCAL GOVERNMENT AND
HERITAGE, IRELAND AND THE ATTORNEY GENERAL**

RESPONDENTS

AND

CORK CITY COUNCIL

NOTICE PARTY

(NO. 2)

JUDGMENT of Humphreys J. delivered on Tuesday the 16th day of November, 2021

1. In *Save Cork City v. An Bord Pleanála (No. 1)* [2021] IEHC 509, [2021] 7 JIC 2802 (Unreported, High Court, 28th July, 2021), I dismissed an application for *certiorari* of the board's decision and granted a declaration, while adjourning one relief against the State generally with liberty to re-enter.
2. The applicant now seeks leave to appeal pursuant to s. 50A(7) of the Planning and Development Act 2000.
3. I have considered the law in relation to leave to appeal including the decisions in *Lancefort Ltd. v. An Bord Pleanála* [1998] 2 I.R. 511, *Arklow Holidays Ltd. v. An Bord Pleanála* [2006] IEHC 102, [2007] 4 I.R. 112, *Glancre Teoranta v. An Bord Pleanála* [2006] IEHC 250, [2006] 7 JIC 1302 (Unreported, High Court, MacMenamin J., 13th July, 2006), *Harding v. Cork County Council* [2006] IEHC 450, [2006] 11 JIC 3001 (Unreported, High Court, Clarke J., 30th November, 2006), *Arklow Holidays Ltd. v. An Bord Pleanála* [2008] IEHC 2 (Unreported, High Court, 11th January, 2008), *Dunnes Stores v. An Bord Pleanála* [2015] IEHC 387, [2015] 6 JIC 1805 (Unreported, High Court, McGovern J., 18th June, 2015), *Callaghan v. An Bord Pleanála* [2015] IEHC 493, [2015] 7 JIC 2405 (Unreported, High Court, Costello J., 24th July, 2015), *Buckley v. An Bord Pleanála* [2015] IEHC 590, [2015] 9 JIC 1601 (Unreported, High Court, 16th September, 2015), *S.A. v. Minister for Justice and Equality (No. 2)* [2016] IEHC 646, [2016] 11 JIC 1404 (Unreported, High Court, 14th November, 2016), *Heather Hill Management Company v. An Bord Pleanála* [2019] IEHC 820, [2019] 12 JIC 0502 (Unreported, High Court, Simons J., 5th December, 2019), *Halpin v. An Bord Pleanála* [2020] IEHC 218, [2020] 5 JIC 1501 (Unreported, High Court, Simons J., 15th May, 2020), *Rushe v. An Bord Pleanála* [2020] IEHC 429, [2020] 8 JIC 3101 (Unreported, High Court, Barniville J., 31st August, 2020), *Dublin City Council v. An Bord Pleanála* [2021] IEHC 34, [2021] 1 JIC 2801 (Unreported, High Court, 28th January, 2021), *Dublin Cycling Campaign CLG v. An Bord Pleanála* [2021] IEHC 146, [2021] 2 JIC 2508 (Unreported, High Court, McDonald J., 25th February, 2021), *An Taisce v. An Bord Pleanála (No. 2)* [2021] IEHC 422, [2021] 7 JIC 0205 (Unreported, High Court, 2nd July, 2021),

Hellfire Massy Residents Association v. An Bord Pleanála (No. 2) [2021] IEHC 636 (Unreported, High Court, 13th October, 2021).

4. Insofar as reference is made in the caselaw to it not being appropriate to reargue the case when seeking leave to appeal, that is a valid consideration in some cases (particularly if the losing party does no more than that), but one mustn't make too much of it. An argument made by a would-be appellant seeking to demonstrate uncertainty arising from the judgment is often functionally indistinguishable from an argument that the judgment was wrong, so positing reasons why the judgment was incorrect by reference to objective legal materials or arguments is not in itself a problem at this stage of the procedure. Conversely, if a would-be appellant can't come up with any plausible basis for saying that the judgment was in fact wrong, and has to take refuge in nebulous claims that it is merely novel or wide-ranging, that is normally disqualifying since no real uncertainty can be said to arise.
5. The applicant made an attempt to argue that the *Arklow Holidays* approach is in tension with the desirability of specificity in the question to be certified as referred to in *S.A. v. Minister for Justice and Equality*, as if that point was new, but such an argument has previously been made and fully addressed, and reasons have been given as to why a degree of specificity in the question is desirable, in *Clifford v. An Bord Pleanála (No. 2)* [2021] IEHC 642, [2021] 10 JIC 1502 (Unreported, High Court, 15th October, 2021) at paras. 3 to 9. The applicant here made no attempt to engage with that analysis.

Applicant's proposed first question of exceptional public importance

6. The applicant's proposed first question is: "Did the Court apply the correct test in concluding that there was no requirement to subject the whole set of works comprised in the LLFRS to EIA?"
7. The vague and discursive nature of the question is a poor start. It does not attempt to assert what the correct test is, leaving the potential appeal free to mutate in any direction. The premise of the question derives from para. 79 of the No. 1 judgment which notes that the works form part of a wider set of possible works which the inspector referred to as a "masterplan". If my experience is anything to go by, the trial judge normally learns something during the leave to appeal process, when one sees the judgment analysed by all parties, not just the applicant. In the present case, the council in effect suggests that this sentence should have referred to "some of these works" rather than "these works" *simpliciter* because the public realm element is independent of the flood relief works. I accept that correction, but it doesn't make any difference to the conclusion.
8. Essentially three points are made in paras. 79 and 80 of the No. 1 judgment.
9. Firstly, one cannot do a full environmental impact assessment (EIA) of the wider works because there is no formal application before the decision-maker, so full EIA unmoored from a specific application doesn't arise. Unfortunately, while the applicant disagrees with that, it has not explained why the law is uncertain by reference to some tenable argument for a different approach. This conclusion seems to me to follow from the Supreme Court decision in *Fitzpatrick v. An Bord Pleanála* [2019] IESC 23, [2019] 3 I.R. 617, and at least

in this case, the applicant hasn't shown how EU law may have evolved to require a different conclusion, so there is not really any purpose to further appellate clarification.

10. The second point made was the lack of sufficient relationship between the project here and the wider works. At para. 79 of the No. 1 judgment I said that the present project did not seem to have the sort of necessary interaction with the wider works that would render full EIA mandatory. The applicant says that I did not articulate reasons for that. Strictly speaking, that demand falls into the category described by Munby L.J. in *In re A & L (Children)* [2011] EWCA Civ 1611, para. 35: "there is no obligation for a judge to go on and give, as it were, reasons for his reasons"; and at para. 43: "[t]he fact that [the] Judge ... did not deal in his judgment with every matter to which [counsel] draws attention does not of itself invalidate either his reasoning or his conclusions." That being said, if the applicant thinks it's unclear, I drew on the fact that the board formed that view as set out in the inspector's report at paras. 11.3.1 and 11.3.2 stating that the development could be considered to be "a stand-alone project which formed part of an overall masterplan but which was functionally and legally independent of the said masterplan (LLFRS)". That conclusion has to have some weight and I didn't think the applicant had displaced that (as can be seen, the demand for reasons for one's reasons can go on forever, but I will stop there).
11. Insofar as it is alleged that there is a tension with the judgment of the CJEU in Case C-142/07 *Ecologistas en Acción-CODA v. Ayuntamiento de Madrid* (Court of Justice of the European Union, 25th July, 2008, ECLI:EU:C:2008:445), this case was considered in the No. 1 judgment and in *Fitzpatrick*.
12. Emphasis is placed on the statement in para. 45 of *Ecologistas*: "As regards the projects at issue in the main proceedings, it is clear from the order for reference that they are all part of the larger project 'Madrid calle 30'. It is for the referring court to verify whether they must be dealt with together by virtue, in particular, of their geographical proximity, their similarities and their interactions." The applicant argues that I referred only to interactions rather than proximity and similarities, but that is the error of reading a judgment like a statute. Proximity and similarities are forms of "interaction" in the wide sense, which is the sense I meant. Interaction is clearly the wider and all-encompassing concept.
13. Thirdly, I made the point at para. 80 of the No. 1 judgment that the applicant's interpretation would be impractical. The applicant remains consistent in that it stands over the impractical implications of its argument. Unfortunately, I still do not see why this is not a relevant basis for leave to appeal or why any uncertainty arises. The law should not impose pointless or impractical obligations (*Reid v. An Bord Pleanála (No. 2)* [2021] IEHC 362, [2021] 5 JIC 2705 (Unreported, High Court, 27th May, 2021), *Hellfire Massey v. An Bord Pleanála (No. 1)* [2021] IEHC 424, [2021] 7 JIC 0201 (Unreported, High Court, 2nd July, 2021)). Law is an instrument of governance, it is about people not just theories, it is a system that has to be made to work. It is not a doll's house for lawyers or an academic idea factory. That isn't a disregard of principle – it *is* principle, the principle being that law must be practicable. Nor is it an inappropriate departure from neutrality – judicial neutrality

applies as between the parties but not, all other things being equal, as between arguments that facilitate the system of governance from working for the public benefit, and those that bring it to a juddering halt. Any more than the court should be neutral as between arguments that vindicate rights and those that nullify them. Adhering to the mission statement of the courts to “uphold the Constitution and the laws” is not a failure in neutrality, and upholding the constitutional order favours practical interpretations, everything being equal. The applicant’s submissions argue that “[a]pplying a [t]est of ‘not a practical interpretation’ will tend to encourage the splitting of projects.” While I don’t want to encourage the inappropriate splitting of projects, there has got to be some sort of onus on an applicant to show how the obligation it seeks to impose on planning decision-makers can actually be made to work in practice. The applicant hasn’t done that here, but that doesn’t mean it can’t be done on the facts of some other case.

Applicant’s proposed second question of exceptional public importance

14. The applicant’s proposed second question of exceptional public importance is: “Was the Court correct to reach the view that jurisdiction to conduct EIA screening can properly be read in to section 177AE by necessary implication from s. 177AE(15)?”
15. In fairness to the applicant, the form of that particular question is acceptably specific, although unfortunately it doesn’t meet the other criteria. Insofar as the applicant makes a general assertion that the decision has “profound” implications for local authorities, that is an exaggeration. But in any event, the fact that a decision has consequences does not matter for the purposes of leave to appeal unless some uncertainty about it has been demonstrated.
16. As the board puts it in submissions, “[t]he judgment simply addresses a question of statutory interpretation which arises in the context of a limited type of development carried out by local authorities.” Fundamentally, the applicant has not explained why my decision about the applicability of s. 177AE(15) could be incorrect, and, as the council points out, the applicant’s argument results in a catch-22 situation whereby an EIA screening assessment could not properly be carried out at all. That would be a breach of EU law, whereas the interpretation I adopted is a harmonious one. That is a conventional approach in the EU law context. The real problem here is that the applicant hasn’t shown any plausible basis why I was wrong about this. Thus there can be no real uncertainty.
17. Insofar as the applicant goes on to argue about the implications of the decision where the board considers that an EIA report should have been submitted, I made it clear at para. 49 of the No. 1 judgment that I didn’t have to decide what happens in that situation, a situation that didn’t arise here. Therefore, any question about that point cannot be a basis for leave to appeal in this case, although obviously that question could be considered in some other case where it actually arises on the facts.

Applicant’s proposed third question of exceptional public importance

18. The applicant’s proposed third question of exceptional public importance is: “Is a respondent or notice party entitled to raise during oral submissions an argument not pleaded and not relied on in the Inspector’s report, the decision or even the written

submissions? Is this consistent with the Aarhus requirement that legal procedures be fair and equitable? Is this consistent with a right to fair procedures under Article 40.3 and equality before the law under Article 40.1 of the Constitution?"

19. The really fundamental problem with this submission is pointed out by the council at para. 27 of its submissions as follows: "... the proposed question ignores the role of the Court in an exercise of statutory interpretation. Once the Court is squarely seised of an issue as to the proper interpretation of a statutory provision—and on the pleadings in this case it was so seised—the Court must strive to arrive at the correct interpretation in law, and can explore, in exchanges with counsel during oral submissions, different dimensions of the proper interpretation of the Statute. This is part and parcel of our common law system, and once which would tend to be significantly negated or reduced by the Applicant's proposed question. There is no authority for the approach the Applicant seems to be contending for, and nothing to suggest that there is uncertainty in relation to the questions posed within proposed point of law no. 3."
20. In short, the court cannot be forced to give a wrong interpretation to a statute simply because no party sets out the precisely correct interpretation on its pleadings.
21. The second problem with this question is that issue *was* joined on this point. A respondent is not obliged to spell out on the pleadings every sub-reason as a matter of law for denying an applicant's claims. To that extent there is an asymmetry between the pleading requirements on applicants and those on respondents, but that is legitimate and balances the asymmetry that exists whereby applicants only have to win on one point whereas respondents have to win on all points, reinforced in the planning context whereby applicants have special costs protections but respondents don't.
22. A respondent *does* have to actively articulate some positive point like a pleading objection, or a positive defence like time-limits or acquiescence or some new point of material fact that has not been pleaded by the applicant, but in terms of responding to the applicant's pleas of fact and law, a respondent can simply deny them globally in the statement of opposition and flesh that out in submissions whether written or, as more particularly arose here, oral. That is expressly reflected in Practice Direction HC107, para. 6(9). The fact that a point doesn't feature in written submissions is irrelevant because a party's submissions arise from the totality of its materials and contributions, written or oral, not from one item in isolation.
23. The third problem in relation to this question is that the premise is not correct. The State's statement of opposition *did* expressly refer to s. 177AE(15) at para. 24: "Further, in accordance with Section 177AE(15), the applicability of Section 177AE does not preclude the applicability of Section 175." It's implicit in that that the EIA process can be incorporated.
24. The applicant claims that latitude to develop the pleadings was not applied fairly, but I do not accept that. It is not unfair that a party may have to deal with a potentially winning point from the other side, provided that the point is acceptably clear either in the pleadings

as they stand or as they would stand as proposed to be amended, which doesn't arise here. Here, s. 177AE(15) is expressly relied on by the State respondents, so even ignoring the other fundamental problems with the applicant's submission here, it is not unfair to find for the respondents on this point. Admittedly in certain circumstances a party might need an adjournment to deal with a point raised in argument that it did not anticipate, but no such application was made here. The cry of unfairness is just an afterthought.

25. The applicant relies on *Eco Advocacy CLG v. An Bord Pleanála (No. 1)* [2021] IEHC 265, [2021] 5 JIC 2704 (Unreported, High Court, 27th May, 2021), at para. 25 regarding the need for equality of arms. But that point was made in a completely different context, namely where a respondent or notice party was seeking to make a pleading objection. If respondents want to make pleading objections against applicants, they need to make them clearly in their statements of opposition so that applicants can consider whether to seek to amend the pleadings. That is a distinct category of objection that needs to be spelled out, and does not in any way mean that respondents have to spell out every point they are going to make in support of a denial of the applicants' claims, or have the implication that the court must give a statute an incorrect interpretation because respondents do not state the correct interpretation, were that to be the case.
26. The applicant also argued in reply that the decision would facilitate bodies in not worrying about whether they had jurisdiction and in rationalising that after the event at the hearing. That sounds alarming, but it assumes that an applicant is entitled to remain completely passive in judicial review proceedings. If an applicant thinks that a decision-maker has given something less than a full account of the decision-making process, she can apply to the court for appropriate orders or directions, which may include a requirement to make disclosure or discovery, swear an affidavit or a further affidavit, or produce a deponent for cross-examination: see the principles of law discussed in *R. v. Lancashire County Council, ex parte Huddleston* [1986] 2 All E.R. 941 at 945, *Secretary of State for Foreign and Commonwealth Affairs v. Quark Fishing Ltd.* [2002] EWCA Civ. 1409, *Tweed v. Parades Commission for Northern Ireland* [2006] UKHL 53, [2007] 1 A.C. 650, *Treasury Holdings v. National Asset Management Agency* [2012] IEHC 66, [2012] 3 JIC 2201 (Unreported, High Court, Finlay Geoghegan J., 22nd March, 2012) at paras. 126 and 127, *McEvoy v. Garda Síochána Ombudsman Commission* [2015] IEHC 203, [2015] 3 JIC 1602 (Unreported, High Court, McDermott J., 16th March, 2015), *R. (Citizens U.K.) v. Secretary of State for the Home Department* [2018] EWCA 1812 at para. 106, *R. (Hoareau) v. Secretary of State for Foreign and Commonwealth Affairs* [2018] EWHC 1508 (Admin) at para. 20.
27. If an applicant does nothing to explore any omissions in a respondent's account evidentially, it is hard to see how, at or after the hearing, a court can realistically investigate any factual allegation relating to the decision-maker's alleged failure to, for example, articulate how it viewed its own jurisdiction, or otherwise address the decision-making process.

Order

28. For the foregoing reasons I do not need to deal with the public interest limb of the test.
29. The order will be that leave to appeal be refused.