[2022] IEHC 482

THE HIGH COURT

JUDICIAL REVIEW

[2021 No. 525 JR]

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTIONS 50, 50A AND 50B OF THE PLANING AND DEVELOPMENT ACT 2000 AND IN THE MATTER OF AN APPLICATION

BETWEEN

DUBLIN 8 RESIDENTS ASSOCIATION

APPLICANT

AND

AN BORD PLEANÁLA, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

CWTC MULTI-FAMILY ICAV (BY ORDER)

NOTICE PARTY

(No. 3)

JUDGMENT of Humphreys J. delivered on Tuesday the 16th day of August, 2022

Subject matter of the dispute

1. The applicant is an unincorporated environmental NGO representing local residents in the Dublin 8 area. The applicant challenges the legality of a decision of An Bord Pleanála (the board) dated 15th April, 2021 granting permission for the construction of 492 build-to-rent apartments, 240 build-to-rent shared accommodation units, a community arts and cultural and exhibitions space, retail, café and office spaces, a crèche and associated site works on a site at South Circular Road, Dublin 8, as well as the demolition of all buildings on site, excluding the original fabric of the former Player Wills factory.

2. The phase of the dispute currently before the court is the preliminary question of whether the applicant has standing and capacity to bring the proceedings. The notice party contends that as an unincorporated association, the applicant lacks such standing and capacity.

Facts

3. In late 2018 or early 2019 an unincorporated organisation known as "Players Please" was founded to articulate concerns in relation to developments being carried out by the notice party.

4. At some point probably around October, 2020, the name "Dublin 8 Residents Association" began to be used by some of the relevant residents, and a credit union account was established in that name on 29th October, 2020.

5. A Facebook page in the new name was set up on 18th November, 2020 alongside a pre-existing separate Facebook page for Players Please which continued in being.

6. On 20th January, 2021, a press release was issued in the name of Players Please which referred to the Dublin 8 Residents Association as having sought judicial review. That was a reference to the case of *Kerins v. An Bord Pleanála (No. 1)* [2021] IEHC 369, [2021] 5 JIC 3102 (Unreported, High Court, 31st May, 2021).

7. On 21st April, 2021, Players Please tweeted that Dublin 8 Residents Association was doing a community Zoom call. That was also listed on Eventbrite.

8. The statement of grounds in the present proceedings was filed on behalf of Dublin 8 Residents Association on 9th June, 2021.

9. The matter was mentioned to the court on 14th June, 2021 and a number of orders were made thereafter allowing amendments to the statements of grounds, including on 28th June, 2021, 5th July, 2021 and 27th July, 2021.

10. On 30th July, 2021, I granted leave to seek judicial review under Order 84 of the Rules of the Superior Courts 1986 as amended on the basis of the fifth amended statement of grounds. That statement lists the address of the applicant as "Players Please, ... South Circular Road, Dublin 8".

11. On 22nd November, 2021, the notice party's solicitors wrote querying the standing of the applicant by reference to its date of establishment.

12. A separate letter was sent querying the funding arrangements for the litigation and seeking detailed information in that regard suggestive of an allegation of maintenance and champerty. The applicant characterises this as a SLAPP (Strategic Litigation against Public Participation) tactic (see European Commission, Proposal for a Directive of the European Parliament and of the Council on protecting persons who engage in public participation from manifestly unfounded or abusive court proceedings ("Strategic lawsuits against public participation") {SWD(2022) 117 final}).

13. On 3rd December, 2021, the applicant replied stating that Dublin 8 Residents Association was formed in the period immediately following the publication of the notice relating to phase 1 of the notice party's development application. There was no reference in that letter to the organisation being a renamed version of Players Please.

14. On 8th December, 2021, the notice party issued a motion to set aside the grant of leave.

15. The applicant then set out a more detailed position on affidavit to the effect that Players Please changed its named to Dublin 8 Residents Association, but retained the old name as "a brand wholly controlled by the association".

16. In *Dublin 8 Residents Association v. An Bord Pleanála (No. 1)* [2022] IEHC 116, [2022] 3 JIC 1106 (Unreported, High Court, 11th March, 2022), I decided that the applicant had not discharged the onus to show on a satisfactory *prima facie* basis that it had been in continuous

pursuit of its objectives for 12 months prior to the proceedings so as to satisfy s. 50A(3)(b)(ii)(II) of the Planning and Development Act 2000. I also decided that the applicant does exist as an environmental NGO and has a functioning committee and a legitimate and sufficient interest in the development to which the judicial review relates (para. 74 of No. 1 judgment), so the issue was whether the applicant had capacity to bring the proceedings as an unincorporated body. I granted an order amending the title of the proceedings and decided in principle to refer certain questions to the CJEU.

17. In *Dublin 8 Residents Association v. An Bord Pleanála (No. 2)* [2022] IEHC 467 (Unreported, High Court, 12th August, 2022), I addressed certain procedural matters.

18. I now make the formal order for reference.

Relevant provisions of EU law

19. The most pertinent provisions of EU law are as follows:

(i). Article 47 of the Charter of Fundamental Rights, which provides as follows:

"**Right to an effective remedy and to a fair trial**

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice."

(ii). Article 1(2) of directive 2011/92/EU, as amended, which *inter alia* defines the "public concerned" for the purposes of environmental impact assessment as follows:

"(e) 'public concerned' means the public affected or likely to be affected by, or having an interest in, the environmental decision-making procedures referred to in Article 2(2). For the purposes of this definition, non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest;"

(iii). Article 11 of directive 2011/92/EU, as amended, which provides *inter alia* as follows:

"1. Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned:

(a) having a sufficient interest, or alternatively;

(b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition;

have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive.

...

3. What constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice. To that end, the interest of any non-governmental organisation meeting the requirements referred to in Article 1(2) shall be deemed sufficient for the purpose of point (a) of paragraph 1 of this Article. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of point (b) of paragraph 1 of this Article.

..."

(iv). Article 9 of the Aarhus Convention, which provides *inter alia* as follows:

"...

2. Each Party shall, within the framework of its national legislation, ensure that members of the public concerned

(a) Having a sufficient interest

or, alternatively,

(b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition,

have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.

What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organization meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above. Such organizations shall also

be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above.

...

3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

..."

(v). Council Decision 2005/370/EC of 17th February, 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters, OJ L 124, 17.5.2005, p. 1–3.

Relevant provisions of domestic law

20. The most pertinent provisions of the Planning and Development Act 2000 as amended are as follows:

(i). Section 50(6) provides as follows:

"(6) Subject to subsection (8), an application for leave to apply for judicial review under the Order in respect of a decision or other act to which subsection (2)(a) applies shall be made within the period of 8 weeks beginning on the date of the decision or, as the case may be, the date of the doing of the act by the planning authority, the local authority or the Board, as appropriate."

(ii). Section 50A(3) provides inter alia as follows:

"The Court shall not grant section 50 leave unless it is satisfied that —

...

(b) (i) the applicant has a sufficient interest in the matter which is the subject of the application, or

(ii) where the decision or act concerned relates to a development identified in or under regulations made under section 176 , for the time being in force, as being development which may have significant effects on the environment, the applicant —

(I) is a body or organisation (other than a State authority, a public authority or governmental body or agency) the aims or objectives of which relate to the promotion of environmental protection,

(II) has, during the period of 12 months preceding the date of the application, pursued those aims or objectives, and

(III) satisfies such requirements (if any) as a body or organisation, if it were to make an appeal under section 37(4)(c) , would have to satisfy by virtue of section 37(4)(d)(iii) (and, for this purpose, any requirement prescribed under section 37(4)(e)(iv) shall apply as if the reference in it to the class of matter into which the decision, the subject of the appeal, falls were a reference to the class of matter into which the decision or act, the subject of the application for section 50 leave, falls)."

(iii). Section 50A(4) provides as follows:

"A sufficient interest for the purposes of subsection (3)(b)(i) is not limited to an interest in land or other financial interest."

21. Section 9(9) of the Planning and Development (Housing) and Residential Tenancies Act 2016 provides:

(9) The Board shall make its decision under this section on an application under section 4 —

(a) where no oral hearing is held, within 16 weeks beginning on the day the planning application was lodged with the Board or within such other period as may be prescribed under subsection (10),

(b) where an oral hearing is held, within such period as may be prescribed.

22. In addition it is a general rule of the Irish common law system, not set out in statute, that apart from any exceptional category recognised by law or provided for expressly, only natural and legal persons may sue and be sued. In the context of a case such as the present, that means that effectively means that unless EU law was to have the effect that this applicant can maintain the proceedings, then it would not be entitled to do so because it is an unincorporated body that does not benefit from any purely domestic exception to the general law.

23. Also relevant is the rule in Irish caselaw that an NGO that meets the test for standing conferred by art. 1(2)(e) of the directive is thereby conferred with capacity to seek a judicial remedy. This is not set out in statute but was an interpretation adopted by the Supreme Court in *Sandymount & Merrion Residents Association v. An Bord Pleanála* [2013] IESC 51, [2013] 2 I.R. 578. No such rule has been recognised by the Irish courts in respect of bodies that qualify under article 11(1)(a) of the EIA directive.

24. A final procedural provision of particular relevance is Order 15 of the Rules of the Superior Courts, which gives the court a general discretion to substitute parties (see in particular rules 2 and 13) but the text of the rules is silent as to whether this can or should be done after the limitation period has expired. Irish caselaw is unclear, inconsistent and contradictory on this point (as set out in the No. 1 judgment).

Questions of European law arising

25. As discussed in the No. 1 judgment, it seems to me that seven questions of European law arise in the proceedings, that these relate to the interpretation rather than application of EU law, that these questions are necessary for the decision of this court, that the answers to these questions are not *acte clair* or *acte éclairé*, and that I consider it appropriate in all circumstances to make a reference to the Court of Justice of the European Union under art. 267 TFEU.

The first question

26. The first question is:

> **Does art. 11(1)(a) of directive 2011/92/EU read in conjunction with Article 47 of the Charter of Fundamental Rights and/or art. 9(2) to (4) of the Aarhus Convention as approved on behalf of the European Community by Council decision 2005/370/EC have the effect that where an environmental NGO meets the test for standing set out in that provision, the NGO concerned is to be regarded as having sufficient capacity to seek a judicial remedy notwithstanding a general rule in the domestic law of a member state which precludes unincorporated associations from bringing legal proceedings?**

27. The applicant's position is that an NGO is to be regarded as having sufficient capacity to seek judicial review where it satisfies the test at Article 11(1)(a) of Directive 2011/92/EU.

28. The State respondents' position is that the requirement under Articles 1(2) and 11 of the EIA Directive and under Articles 2(4) and (5) and 9(2) to (4) of the Aarhus Convention is that non-governmental organisations which promote environmental protection and comply with the requirements under national law are to have standing to seek judicial review. This requirement is satisfied by section 50A(3)(b)(ii) of the Planning and Development Act 2000, as amended. There is no requirement as a matter of EU law that the provisions of national law in respect of the legal capacity of non-governmental organisations to bring proceedings must be disapplied where a non-governmental organisation does not come within the definition of "the public concerned" contained in Article 1(2)(e) of the EIA Directive and Article 2(5) of the Aarhus Convention.

29. The notice party's position is that where neither the EIA Directive nor European Union Law generally establish any rules in relation to the criteria to be met by an association wishing to establish legal capacity, it is for Member States to establish those rules subject to the principles of equivalence and effectiveness. The EIA Directive only requires standing to be

given to natural or legal persons, and in accordance with national legislation or practice, their associations, organisation or groups and non-governmental organisations promoting environment protection and meeting any requirements under national law. The EIA Directive does not require the disapplication of general provisions of domestic law in relation to legal capacity to confer standing on a body with no such legal capacity.

30. My proposed answer to the question is "Yes". Article 11(1)(a) of directive 2011/92/EU read in conjunction with Article 47 of the Charter of Fundamental Rights and/or art. 9(2) to (4) of the Aarhus Convention does not draw a distinction between standing and capacity, and the clear intention is that a body that meets the test arising from the directive should be entitled to bring proceedings. Whether the domestic law of a particular member state categorises that entitlement as a question of standing or capacity or both is irrelevant. Allowing a member state to erect obstacles in national law to the bringing of proceedings by a body that otherwise qualifies under article 11(1)(a) of directive 2011/92 would undermine the effective and uniform application of the directive.

31. The reason for the reference of this question is that if the question is answered Yes then the notice party's preliminary objection to the proceedings fails.

The second question

32. The second question is:

If art. 11(1)(a) of directive 2011/92/EU read in conjunction with Article 47 of the Charter of Fundamental Rights and/or art. 9(2) to (4) of the Aarhus Convention as approved on behalf of the European Community by Council decision 2005/370/EC does not have the effect set out in the first question in general circumstances, does it have that effect in circumstances where the domestic law of the member state concerned provides that an NGO that meets the test for standing conferred by art. 1(2)(e) of the directive is thereby conferred with capacity to seek a judicial remedy?

33. The applicant's position is that an NGO has the capacity to seek judicial review where domestic law provides that an NGO meets the test for standing conferred by Article 1(2)(e). The NGO is conferred with capacity to seek a judicial remedy. To summarise their position, it appears to follow that likewise a conferral of standing for the purposes of article 11(1)(a) must also impliedly confer capacity.

34. The State respondents' position is that a non-governmental organisation which meets the test for standing conferred by Article 1(2)(e) of the EIA Directive is one which promotes environmental protection and meets the requirements under national law. The requirements a non-governmental organisation must meet under Irish law are set out in section 50A(3)(b)(ii) of the Planning and Development Act 2000, as amended, which requires that, in order for a non-governmental organisation to have standing: (i) its aims or objectives must relate to the promotion of environmental protection; and (ii) it must have, during the period of 12 months preceding the date of the application, pursued those aims or objectives. A non-

governmental organisation which satisfies these requirements would have standing as a matter of Irish law in accordance with section 50A(3)(b)(ii). It is for Member States to set the rules by which unincorporated associations, including environmental non-governmental organisations, are conferred with legal capacity, subject to the principles of equivalence and effectiveness.

35. The notice party's position is that article 1(2)(e) of the EIA Directive limits the definition of the public concerned to the public affected, or likely to be affected by or having an interest in environmental decision making procedures. A non-governmental organisation promoting environmental protection will be deemed to have such an interest only where it meets the requirements under national law. It is for Member States to set the rules by which unincorporated associations are conferred with legal capacity, subject to the principles of equivalence and effectiveness.

36. My proposed answer to the question is that this question does not arise having regard to the answer to the first question, but if it does arise the answer is "Yes". The vagueness and lack of statutory definition in relation to the question of capacity to sue in Irish domestic law does not satisfy the EU law principle of legal certainty in the context of implementation of directive 2011/92 (see the academic opinion cited at para. 78 of the No. 1 judgment). The Irish courts have created a rule without statutory basis that a body that complies with the legislation enacted for the purposes of article 1(2)(e) is thereby conferred not just with standing but with legal capacity to sue. Legal certainty requires that in the absence of any express provision to the contrary, the entitlement to sue of bodies that qualify for the purposes of article 11(1)(a) should be not less favourable. Otherwise, attributing a lack of capacity to a body such as the applicant here would create an insufficiently foreseeable obstacle in national law to the bringing of proceedings by a body that otherwise qualifies under article 11(1)(a) of directive 2011/92 (in effect, a trap for the unwary, as suggested by academic opinion), would violate the right to an effective remedy and undermine the effective and uniform application of the directive.

37. The reason for the reference of this question is that if the question is answered Yes then the notice party's preliminary objection to the proceedings fails.

The third question

38. The third question is:

If art. 11(1)(a) of directive 2011/92/EU read in conjunction with Article 47 of the Charter of Fundamental Rights and/or art. 9(2) to (4) of the Aarhus Convention as approved on behalf of the European Community by Council decision 2005/370/EC does not have the effect set out in the first question in general circumstances, does it have that effect in circumstances where the domestic law of the member state concerned and/or procedures adopted by the competent authority of the member state concerned have enabled an environmental NGO which would not otherwise

have legal capacity in domestic law to nonetheless participate in the administrative phase of the development consent process?

39. The applicant's position is that where domestic law and/or the procedures adopted by the competent authority provide for an environmental NGO to participate in the administrative phase of the development of said process, it thereafter has legal capacity to seek a judicial review remedy arising from the subsequent decision.

40. The State respondents' position is that neither the Aarhus Convention nor the EIA Directive requires that an environmental non-governmental organisation, which does not meet the standing requirements of national law to bring judicial review proceedings, be conferred with standing so to do merely because it was permitted to make submissions during the administrative decision-making consent process. Rather, the requirement is that non-governmental organisations which promote environmental protection and comply with the requirements under national law are to have standing, which requirement is met by section 50A(3)(b)(ii) of the Planning and Development Act 2000, as amended.

41. The notice party's position is that participation in the administrative phase of the development consent process has no effect on the conditions for access to a judicial review procedure. The EIA Directive leaves Member States a significant discretion both to determine the conditions for the admissibility of actions and the bodies before which such actions may be brought. The requirements for legal capacity to take any action before the domestic courts is a matter for Member States to determine subject to the principles of equivalence and effectiveness.

42. My proposed answer to the question is that this question does not arise having regard to the answer to the first question, but if it does arise the answer is "Yes". Again it is relevant that the vagueness and lack of statutory definition in relation to the question of capacity to sue in Irish domestic law does not satisfy the EU law principle of legal certainty in the context of implementation of directive 2011/92. Where a body has in law or in fact been allowed to participate in the administrative phase of the procedure, as here, the right to an effective remedy in the context of directive 2011/92 precludes a rule of domestic procedure that would prohibit such a body from taking judicial proceedings. If the courts of the member state concerned were permitted to subsequently attribute a lack of capacity to a body that has actually been allowed to participate in the administrative phase of the proceedings, such a situation would create an insufficiently foreseeable obstacle in national law to the bringing of proceedings by a body that otherwise qualifies under article 11(1)(a) of directive 2011/92, would create a trap for the unwary contrary to the principle of legal certainty, would violate the right to an effective remedy and would undermine the effective and uniform application of the directive.

43. The reason for the reference of this question is that if the question is answered Yes then the notice party's preliminary objection to the proceedings fails.

The fourth question

44. The fourth question is:

> **If art. 11(1)(a) of EIA directive 2011/92/EU read in conjunction with Article 47 of the Charter of Fundamental Rights and/or art. 9(2) to (4) of the Aarhus Convention as approved on behalf of the European Community by Council decision 2005/370/EC does not have the effect set out in the first question in general circumstances, does it have that effect where the conditions set by the law of the member state concerned in order to enable an NGO to qualify for the purpose of art. 1(2)(e) are such that it the required period of existence of an NGO in order to so qualify is longer than the statutory period for determination of an application for development consent, thus having the consequence that an unincorporated NGO formed in response to a particular planning application would normally never qualify for the purposes of the legislation implementing art. 1(2)(e).**

45. The applicant's position is that an NGO has the capacity to seek a judicial remedy where the conditions set by law of a Member State in respect of the period of existence of that NGO is longer than the statutory period for the determination of the application for development consent, and where an unincorporated NGO formed in response to a particular application would normally never qualify for the purposes of the legislation implementing Article 1(2)(e).

46. The State respondents' position is that there is no requirement, either in accordance with the Aarhus Convention or the EIA Directive, that the provisions of national law which confer standing on environmental non-governmental organisations, so as to deem them as forming part of "the public concerned", must facilitate the formation of a non-governmental organisation for the purpose of bringing a challenge to a particular planning application. On the contrary, the objective of the Aarhus Convention, to which the EIA Directive gives effect as a matter of EU law, is to confer standing on environmental non-governmental organisations which give expression to the collective interest and protect general objectives.

47. The notice party's position is that where neither the EIA Directive nor European Union Law generally establish any rules in relation to the criteria to be met by an association wishing to establish legal capacity, it is for Member States to establish those rules subject to the principles of equivalence and effectiveness. The EIA Directive does not require Member States to establish the rules in relation to the standing or capacity of unincorporated associations by reference to any individual development consent process for a specific development proposal.

48. My proposed answer to the question is that this question does not arise having regard to the answer to the first question, but if it does arise the answer is "Yes". Any national procedural rules that apply to proceedings for the purpose of directive 2011/92 must satisfy the principles of equivalence and effectiveness. The rule that an NGO must exist for a 12 month period does not satisfy either criterion. Firstly it renders the bringing of proceedings impossible or unduly difficult for an NGO that is in effect formed in response to a particular planning application, especially a strategic housing development application such as this one where the board is

obliged by law to decide the application within 16 weeks. Secondly while the rule has a superficial equivalence of application to purely domestic planning law, it does not have an equivalence with the standing of NGOs in any other domestic law context, whose rights to sue are not generally dependent on the length of time for which they have been established.

49. The reason for the reference of this question is that if the question is answered Yes then the notice party's preliminary objection to the proceedings fails.

The fifth question

50. The fifth question is:

Does art. 11(1)(a) of EIA directive 2011/92/EU read in the light of the principles of legal certainty and/or effectiveness and/or in conjunction with Article 47 of the Charter of Fundamental Rights and/or art. 9(2) to (4) of the Aarhus Convention as approved on behalf of the European Community by Council decision 2005/370/EC have the effect that a discretion created by a provision of national procedural law of a member state to allow the substitution of an individual applicant or applicants who are members of an unincorporated association in lieu of the unincorporated association itself must be exercised in such a way as to give full effect to the right of access to an effective judicial remedy such that that substitution could not be precluded by reason only of a rule of domestic law regarding limitation of time for the bringing of the action concerned.

51. The applicant's position is that Article 11(1)(a) of Council Directive 2011/92/EU provides for a discretion such as to allow the substitution of an individual applicant or applicants who are members of the incorporated association in lieu of the unincorporated association itself and must be exercised in such a manner as to give full effect to the right of access to an effective judicial remedy such that the substitution could not be precluded by rule of domestic law regarding limitation of time.

52. The State respondents' position is that no application was made pursuant by the Applicant in these proceedings for the substitution of the members of Dublin 8 Residents Association as applicants in the proceeding. In these circumstances, this question does not arise for determination in this case and is hypothetical. Moreover, there is no challenge in this case to the compatibility of section 50A(3)(b)(ii) of the Planning and Development Act 2000, as amended, which provides for the requirements under national law which an environmental non-governmental organisation must meet in order to be deemed to have a sufficient interest, with EU law. Without prejudice to the foregoing, it is for the legal system of each Member State to lay down the procedural rules which govern the substitution of parties in legal proceedings, subject only to the principles of equivalence and effectiveness. There is no requirement, as a matter of EU law, that national law be interpreted so as to permit the substitution of a different party as applicant where judicial review proceedings are commenced by a non-governmental organisation which does not meet the requirements under national law to be deemed to have a sufficient interest for the purpose of Article 11 of the EIA Directive.

53. The notice party's position is that there is no application for the substitution of a party pending before the High Court and the Dublin 8 Residents Association have not established that they either meet the national law criteria for the substitution of a party nor have they sought to argue or demonstrated that they would be entitled to an extension of time to bring such an application. European Law does not mandate the exercise of a national law discretion to substitute a party in any particular manner where an unincorporated association elected to commence proceedings in circumstances where it did not meet the requirements of national law and where the proceedings could have been, but were not, maintained by individual members of the association. It is compatible with European Law to lay down reasonable time limits for bringing proceedings in the interests of legal certainty and the operation of a time limit to preclude the substitution of a party is not incompatible with European Law.

54. My proposed answer to the question is "Yes". The required judicial remedy in respect of alleged breaches of EU law must be effective, and that principle has the consequence that a domestic court in exercise of the requirement to read domestic law in a manner compatible as far as possible with EU law and with the Aarhus Convention including the right to an effective remedy should exercise a discretion to substitute an applicant in whatever way vindicates that right to an effective remedy. The question is not hypothetical because it is potentially determinative of the notice party's motion.

55. The reason for the reference of this question is that irrespective of the answers to the other questions, if the court should disregard domestic caselaw in order to permit any necessary substitution then the notice party's motion must fail because an applicant can be substituted in a way that would defeat any possible objection based on standing or capacity.

The sixth question

56. The sixth question is:

> **If art. 11(1)(a) of EIA directive 2011/92/EU read in the light of the principles of legal certainty and/or effectiveness and/or in conjunction with Article 47 of the Charter of Fundamental Rights and/or art. 9(2) to (4) of the Aarhus Convention as approved on behalf of the European Community by Council decision 2005/370/EC does not have the effect referred to in the fifth question in general circumstances, does it have that effect particularly in the light of the principle of effectiveness in circumstances where the action was brought by the original applicant within the time fixed by domestic law and where the grounds of challenge on which the right of access to a judicial remedy was sought by the substituted applicant remained unchanged.**

57. The applicant's position is that where an action is brought by the original applicant within the time fixed by domestic law and where the grounds of challenge on which the right of access to judicial remedy was sought by a substituted applicant remains the same, Article 11(1)(a) has the effect of permitting the substitution of a member of the group in lieu of the original

applicant as to give full effect to the right of access to an effective judicial remedy and such that the substitution could not be precluded by a rule of domestic law in respect of the action.

58. The State respondents' position is that it is a matter for the legal system of each Member State to lay down the procedural rules which govern the substitution of parties and the application of time limits in this context, subject to the principles of equivalence and effectiveness. The CJEU has repeatedly held that it is compatible with EU law to lay down reasonable time limits for bringing proceedings in the interests of legal certainty, and that such time limits are not liable to make it in practice impossible or excessively difficult to exercise the rights conferred by EU law. EU law does not require that procedural rules provided for as a matter of national law be displaced to facilitate the substitution of a party in place of a non-governmental organisation which does not meet the requirements under national law to be deemed to have a sufficient interest. These requirements are provided for by section 50A(3)(b)(ii) of the Planning and Development Act 2000, as amended, and there is no challenge to the validity of this provision on the basis that it is incompatible with EU law.

59. The notice party's position is that the operation of time limits and the rules in respect of the substitution of a party are a matter for Member States to determine subject to the principles of equivalence and effectiveness. It is compatible with European Law to lay down reasonable time limits for bringing proceedings in the interests of legal certainty and European Law does not require those time limits to be set aside to facilitate an unincorporated association who does not meet the requirements of national law.

60. My proposed answer to the question is that this question does not arise having regard to the answer to the fifth question but if it does arise the answer is "Yes". To allow domestic procedural requirements to preclude the substitution of an applicant where the challenge was initiated within time and where the grounds remained unchanged would render the exercise of EU law rights unduly difficult and would contravene the principle of effectiveness. The question is not hypothetical because it is potentially determinative of the notice party's motion.

61. The reason for the reference of this question is that if the answer to the question is Yes then the notice party's application must fail because an applicant can be substituted in a way that would defeat any possible objection based on standing or capacity.

The seventh question

62. The seventh question is:

If art. 11(1)(a) of EIA directive 2011/92/EU read in the light of the principles of legal certainty and/or effectiveness and/or in conjunction with Article 47 of the Charter of Fundamental Rights and/or art. 9(2) to (4) of the Aarhus Convention as approved on behalf of the European Community by Council decision 2005/370/EC does not have the effect referred to in the fifth question in general circumstances, does it have that effect if the domestic law of the member state concerned regarding the application of limitation periods in such situations is unclear and/or

contradictory such that an applicant does not enjoy legal certainty prior to bringing proceedings as to whether such substitution is permissible.

63. The applicant's position is that where it is found that domestic law regarding the application of limitation periods in respect of the substitution or the addition of a plaintiff is unclear and/or contradictory and is such that the applicant does not enjoy legal certainty prior to the bringing of proceedings as to whether such substitution is permissible, the domestic law provision must be exercised in such a way as to give full effect to the right of access to an effective judicial remedy, and the provision of domestic law must be construed as precluding the substitution of a member of the environmental NGO for that of the original applicant.

64. The State respondents' position is that no application was made by the Applicant in these proceedings to substitute the members of Dublin 8 Residents Association as applicants. Accordingly, this question does not arise for determination in these proceedings and is hypothetical. Without prejudice to the foregoing, national law regarding the application of limitation periods where an application is made to substitute a different party as applicant in judicial review proceedings is not unclear or contradictory and, as such, there is no question of a breach of the principle of legal certainty. The relevant provisions of national law are addressed below.

65. The notice party's position is that there is no application for substitution pending before the High Court and the Dublin 8 Residents Association have not asserted that the proceedings were brought by the association because of any absence of certainty in relation to the operation of domestic rules on the substitution of parties. The identity of the party who brought the judicial review proceedings was a matter in the control of the members of the Dublin 8 Residents Association, who elected to bring the proceedings as the association rather than as individual members. There was nothing in domestic law precluding individual members from bringing a challenge to the impugned grant of development consent.

66. My proposed answer to the question is that this question does not arise having regard to the answer to the fifth question but if it does arise the answer is "Yes". By virtue of section 50(6) of the 2000 Act, an applicant has 8 weeks to bring proceedings challenging a planning consent. There is unclear, conflicting and inconsistent Irish caselaw as to whether the substitution of one applicant for another applicant is caught by such a limitation period: see the academic opinion and conflicting authorities referred to at para. 83 of the No. 1 judgment. This inconsistent Irish caselaw contravenes the principle of legal certainty. In those circumstances, it would contravene EU law to apply domestic legislation to preclude such substitution if it were necessary. The question is not hypothetical because it is potentially determinative of the notice party's motion.

67. The reason for the reference of this question is that if the answer to the question is Yes then the notice party's application must fail because an applicant can be substituted in a way that would defeat any possible objection based on standing or capacity.

Order

68. Accordingly, the order will be that the questions set out in this judgment be referred to the CJEU pursuant to article 267 TFEU.