[2023] IEHC 496

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. 4)

JUDGMENT of Humphreys J. delivered on the 8th day of August, 2023

Judgment history

1. 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 made an order under O. 15, r. 13 RSC substituting CWTC Multi-Family ICAV as notice party in lieu of DBTR-SCR1 Fund, a Sub-Fund of the CWTC Multi-Family ICAV, such substitution to be on the basis that the ICAV is acting on behalf of the sub-fund; and decided in principle to refer the questions identified in the judgment to the CJEU.

2. In *Dublin 8 Residents Association v. An Bord Pleanála (No. 2)* [2022] IEHC 467, [2022] 8 JIC 1203 (Unreported, High Court, 12th August, 2022) I gave certain procedural directions regarding the reference.

3. In *Dublin 8 Residents Association v. An Bord Pleanála (No. 3)* [2022] IEHC 482, [2022] 8 JIC 1601 (Unreported, High Court, 16th August, 2022) I made the formal order for reference.

4. I am now dealing with a request from the CJEU for further information.

Facts

5. 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.

6. 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.

7. 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.

8. 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).

9. 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 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.

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

Procedural history

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

12. 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 21st and 28th June, 2021, 5th July, 2021 and 26th July, 2021.

13. 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".

14. 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.

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

16. 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}).

17. 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.

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

Relief sought in the notice party's motion

19. The procedural matter before the court at present is the notice party's motion to set aside the order granting leave, in which the following reliefs are sought:

> "1. An Order pursuant to the inherent jurisdiction of the High Court setting aside the grant of leave to apply for judicial review made by Order of 30 July 2021 in respect of decision of An Bord Pleanála of 15 April 2021 to grant planning permission for the construction of 492 build to rent apartments, 240 build to rent shared accommodation units, community arts and cultural and exhibition space, retail/café/office uses a creche and associated development at the site of the former Player Wills factory at the South Circular Road, Dublin 8
> 2. Such further or other order as this Honourable Court may deem fit
> 3. An Order providing for the costs of and incidental to this application".

Procedure subsequent to notice party's motion

20. 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".

21. The notice party's motion to set aside leave was heard on 14th and 18th February, 2022, when judgment was reserved. During the hearing the applicant made considerable mention of the fact that the notice party was misdescribed in its own application as being a sub-fund of an ICAV, whereas the ICAV was the legal entity. The following exchanges at the hearing are among the more notable in that regard:

22. On p. 59 onwards:

> "[COUNSEL FOR THE NOTICE PARTY] MR MULCAHY: Then turning to, finishing on a high note, Judge, the uncomfortable position for me about the name of the Notice Party. The Court has referred to Order 15 Rule 13 and obviously the first part of Order 15 Rule 13 is the critical part which refers to, you know, the power of the Court to substitute or to insert parties in order to ensure that the actual issues are addressed and it can do it of its own motion or on a motion by the parties. But Mr. Bland frankly overstates his case and also seems to have missed what Mr. Moran has said in his first affidavit. He refers as if the CWT multi-family ICAV, that that weren't referenced in the Notice Party or that they were in the background. They are not in the background, they are in the title of the proceedings, Judge. Mr. Bland is correct that DBTR-STR1 Fund was the Applicant for planning permission and it is and I accept explicable that that's why he joined a party in that name to the proceedings. At paragraph 5 of Mr. Moran's affidavit, he says: 'The title of the Notice Party is in fact CWT Multi-Family ICAV, which acts on behalf of its subfund DBTR-SCR1. The description of the Notice Party in the proceedings...' The Court has this, it's at tab 2.
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> MR. JUSTICE HUMPHREYS: Yeah. That's what I was thinking of, it was that acknowledgment, if you like, what I was thinking of when I was discussing this with Mr. Bland.
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> MR. MULCAHY: Mr. Bland made great play of the fact that we were afraid to make that acknowledgment, lest it be used against us in the proceedings and there was no explanation how this occurred and the Court was to treat it as he colourfully presented, it was an application by a pool of money. But in fact all you have is the identification of the relevant legal entity the CWTC multi-family ICAV and the, mis-transposition of how they should properly be described in the planning permission and, therefore, in these proceedings.
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> Allied with what I say about; look, if Mr. Bland doesn't have capacity to bring the proceedings, you never get to any of these issues, never get to complain about these issues.
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> MR. JUSTICE HUMPHREYS: This is Mr. Pinker's burden tennis coming again here now.
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> MR. MULCAHY: I'm not so sure about that, Judge, and maybe it is a bit of that but meetings don't commence.

MR. JUSTICE HUMPHREYS: You're right, I mean in one sense you're right but in the other sense what I'm dealing with is the motion right now but, anyway, look I get the [...] your point.
MR. MULCAHY: I understand that, Judge, but in any event I say; look in light of the huge amount of case law which the Court will be aware of, sort of summarised by Barniville J in CHASE, it's not an argument which has any legs ultimately in any event but the Court doesn't need to decide it for the purpose of this application. It can, if it feels necessary, exercise its jurisdiction under Order 15 Rule 13 and notwithstanding Mr. Bland's apparent assumption that we wouldn't explain what had happened on affidavit or wouldn't say; look, this is the wrong way round on affidavit, that is precisely what we have done."

23. On p. 52 onwards:
"MR. JUSTICE HUMPHREYS: Okay. Well, it doesn't sound like it's massively disputed at the moment. Thanks for now ... Look, Mr. Mulcahy, unless you say something to correction we know you're acting on behalf of the subfund, the correct Notice Party surely would be surely the ICAV simpliciter or am I missing something?
MR. MULCAHY: Well maybe so, Judge, in which case maybe there should be a substitution. You will see Mr. Moran identifies himself as a director of CWTC multi-family ICAV acting on behalf what's described. Effectively it's just whether the -- it's not two entirely independent things which are at issue. One is a slight what I would say misdescription of the correct legal entity in the Notice Party, in the same way limited was the misdescription in that application.
MR. JUSTICE HUMPHREYS: I suppose I am more interested in getting it correct, something that has limited liability, it doesn't have legal personality.
MR. MULCAHY: I certainly have no difficulty and I'm happy to invite the Court to change the name of the Notice Party to CWTC multi-family ICAV. That is kind of a leap into the unknown, Judge, because what consequence that has for my motion, you know Mr. Bland will make his arguments but I don't really think it's of any moment in my view.
MR. JUSTICE HUMPHREYS: Yeah.
MR. MULCAHY: I would be happy for the Court to make whatever order it needs to in order to be satisfied that it has got it right. Certainly Mr. Moran clearly identified himself as a director and the Court understands the reasons why, of the Multi Family ICAV.
MR. JUSTICE HUMPHREYS: No, absolutely. I mean the affidavit is, if anything I understand why it's just slightly, it's worded differently from the Notice of Motion. The Notice of Motion refers to it just being brought on behalf of the Notice Party, et cetera. Again that might be just drafting.
MR. MULCAHY: Take that as my --
MR. JUSTICE HUMPHREYS: Okay. Look all these things seem non-problematic until we get to it. You know I know Mr. Bland isn't really sort of contemplating Armageddon scenarios but I mean why doesn't the same sort of facility apply to him? In other words I mean, you know, why couldn't he rectify his Applicant problem by a similar mechanism if he has an Applicant problem?
MR. MULCAHY: Would that be, Judge, that would be substitution.
MR. JUSTICE HUMPHREYS: Yeah, of the members or the Committee or something. He would have to tell you who they are I suppose but you know who the Committee are, that's something.
MR. MULCAHY: Well, he has --
MR. JUSTICE HUMPHREYS: Take it as a question but I'm just wondering do you get a windfall benefit out of all this as a result of some kind of minor sort of procedural slip up by the Applicants if it is a slip up. That's a question, let me just think about that. [The registrar] wanted to come back on this.
THE REGISTRAR: Judge, I have had a look at the Notice of Motion and the orders that have been generated in this matter so far and the Notice Party is identified as a subfund of the CWTC multi-family ICAV already. So, I don't know if that is of any use.
MR. JUSTICE HUMPHREYS: Yeah, I think that's the problem because the subfund isn't a legal entity. I think that's the issue. ... we will come back to that. Mr. Bland will obviously have to weigh in on this as well. What do you think, Mr. Mulcahy, is it a bit sort of nuclear that you successfully hand tripped the Applicant over the precise naming of who is bringing the case the unincorporated association of and their members, therefore you don't have to face the merit at all. Is that bit of a windfall or not?
MR. MULCAHY: Frankly, Judge, it is yeah. That is the basis of the application but it's what's contemplated by the legislation. It's what's contemplated by Irish law. You can't bring a case if you have no capacity, somebody against whom you bring a case where you have no capacity is entitled to say you have no case and you can't continue with it and in

circumstances where there is the time limit in play, it's not a simple case of saying; well, let's substitute something else entirely. The decision was made to take it in the name of this organisation. That is clear on the affidavits, no objection has been made that it should be taken in somebody else's name. As with every such application, Judge, or every application that is made to this Court, I want to have my cake and eat it. There's no point having cake unless you get to eat it, Judge. I say that if Mr. Bland's client is unfortunately taking proceedings without satisfying and still being unable to satisfy the statutory criteria, then the consequence for that is that the proceedings should be dismissed. Judge, that is my application."

24. At p. 67 onwards the applicant replied to this:

"[COUNSEL FOR THE APPLICANT] MR. BLAND: First, Judge, I do think that and again it is wholly inappropriate for a strike out leave application to be brought in such a disorderly manner by a party or by someone that isn't a legal entity that requires the Court to save it of its own motion. That there should have been, if it's possible to go down Mr. Mulcahy should have brought his motion grounded on affidavit as soon as the proceedings issued, would have said there was an error, explain the error and asked the Court to, if not substitute, join the ICAV as a Notice Party. It has failed to do that, brought its application and now into the second day we're discussing means by which the application could be saved. Judge, I have to say if the application is to be saved by such relief or if the Court is against me so that substitution is required on an existential basis and then my cause of action would be extinguished unless I apply for substitution. Well then, Judge, I need to take instructions and I would like the opportunity to do so before the Court determines the matter so as to be able to take the opportunity, if so instructed, to apply to amend, to substitute an applicant with sufficient capacity and interest, if the Court is against me on all of the matters; and unlike Mr. Mulcahy I am asking the Court for that opportunity to make that application. I am not putting it on the Court to try and save me although I would, it's formally appropriate that I would make that application. Again we are then in a situation where this should be left to the full hearing of the action. Now we are talking about motion within motion of a summary application where leave should not be struck out but if that is where we go and the proceedings are saved by way of substitution with retrospective, conferring retrospective capacity saving the motion for Mr. Mulcahy, well then, Judge, I ask for exactly the same substitution conferring retrospective capacity.

MR. JUSTICE HUMPHREYS: Okay, sorry, just one second. (Pause). Okay, Mr. Bland, thanks for bearing with me there. So is that pretty much essential at this point?

MR. BLAND: Yes, I think, there is much I would like to say in response to Mr. Mulcahy but I can't say that there is anything new that I understand other than his response to his lack of capacity which is to say that; well, that can be saved by substitution of a new Notice Party who can then take over his motion. I don't have a difficulty, Judge, if the Court was to give this lifeline to Mr. Mulcahy, which I don't say it should, but if the Court was minded to do that, that it would seem that there is no purpose of doing it other than to give retrospective capacity to the motion and I would just simply ask if the Court was minded otherwise to extinguish the case the opportunity to apply for the same relief with exactly the same consequence. I appreciate Mr. Mulcahy wants all the cake. The cake in fairness should be divided in the middle. If the Court was going to be indulgent to a pool of money without capacity by giving it retrospective capacity well then, in my respectful submission, we are a lot more deserving candidate."

25. In reserving judgment, I said on p. 70 of the transcript:

"MR. JUSTICE HUMPHREYS: Okay. Thanks very much, Mr. Mulcahy. Thank you both and all the lawyers involved. (Inaudible) in this instance I try and really feel obliged to specify what it is I'm reserving Judgment on which as I see it in the moment I suppose is very broadly whether I should of my own motion change the title of the proceedings to have the ICAV listed as the Notice Party rather than the subfund and what the effect of that is and whether the (b)(ii) has been satisfied here and then, if not, we're into (b)(i) and the EU law and I have no idea what that – I suppose those are the very, very broad items. So, look, I hope that is satisfactory, if not tell me now, otherwise I will proceed in that way."

26. I hope it is reasonably clear from the transcript that an overall view of the hearing indicates that I did not make the substitution order "of my own motion" in the strong sense of it not being prompted, facilitated or welcomed by the party benefiting from that order. It was only of my own motion in the much weaker sense of there being no particularly formal application. However, any reasonable construction of the notice party's position indicates that an invitation to the court to make the order with reference being made to O. 15 r. 13 RSC is equivalent in all practical respects to an application for such an order.

27. In the No. 1 judgment, 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 (incorrectly referred to as s. 50B in para. 16 of the original version of the No. 3 judgment, although that is now being corrected). 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.

28. On 21st March, 2022, the formal order on foot of that judgment was made. That order has never been questioned, and reads as follows:

"JUDICIAL REVIEW

2021 No 525 JR

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

AND IN THE MATTER OF AN APPLICATION

MONDAY THE 21st DAY OF MARCH 2021

BEFORE MR JUSTICE HUMPHREYS

BETWEEN/

DUBLIN 8 RESIDENTS ASSOCIATION

APPLICANT

AND

AN BORD PLEANÁLA IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

DBTR-SCR1 FUND, A SUB-FUND OF THE CWTC MULTI-FAMILY ICAV

NOTICE PARTY

Upon Notice of Motion of Counsel for the Notice Party filed on the 8th day of December 2021 and coming before this Court for hearing on the 18th day of February 2022 in the presence of Counsel for the Applicant and Counsel for the Notice Party seeking the following reliefs "

1. An Order pursuant to the inherent jurisdiction of the High Court setting aside the grant of leave to apply for judicial review made by Order of 30 July 2021 in respect of decision of An Bord Pleanála of 15 April 2021 to grant planning permission for the construction of 492 build to rent apartments, 240 build to rent shared accommodation units, community arts and cultural and exhibition space, retail/café/office uses a creche and associated development at the site of the former Player Wills factory at the South Circular Road, Dublin 8
2. Such further or other order as this Honourable Court may deem fit
3. An Order providing for the costs of and incidental to this application"

Whereupon and on reading the said Notice of Motion and the Affidavits submissions and exhibits filed by Counsel for the parties in respect of the said Notice of Motion

And on hearing said Counsel

The Court was pleased to reserved judgment

And the Decision of the Court having been advised to the parties electronically on the [11]th day of March 2022 and the detailed reasons for the said Decision having been set out in the Judgment of the Court delivered electronically to the parties on the 11th day of March 2022

And the matter coming before the Court this day for submissions of Counsel for the Applicant and Counsel for the Notice Party in respect of the proposed timetable set forth in the judgment of the Court delivered on the 11th day of March 2022

IT IS ORDERED under O. 15, r. 13 RSC that CWTC Multi-Family ICAV be substituted as notice party in lieu of "DBTR-SCR1 Fund, a Sub-Fund of the CWTC Multi-Family ICAV" such substitution to be on the basis that the ICAV is acting on behalf of the sub-fund the title hereof to be duly entered in the Central Office of the High Court with the proper officer to give effect thereto

IT IS ORDERED THAT the Notice Party file submissions by Friday the 29th day of April 2022 with the Applicant to file submissions three weeks thereafter with the State to file submissions two weeks after the filing of the Applicant's submissions with the Court noting the First Named Respondents reserving of its position in respect of the filing of submissions

IT IS FURTHER ORDERED THAT the Applicant lodge soft copy books of all pleadings judgments orders and index thereto with the List Registrar within 28 days of the delivery of the judgment and order for reference for transmission to the CJEU

AND THEREUPON THE COURT adjourning these proceedings for mention to the Commercial Planning and Strategic Infrastructure Development List on Monday the 20th day of June 2022 at 10:15 o'clock in the forenoon in order to facilitate the consideration of the making of a reference to the Court of Justice of the European Union [CJEU] pursuant to Article 267 of the Treaty on the Functioning of the European Union

...
REGISTRAR
Perfected 23 March 2022

O'Connell and Clarke
Solicitors for the Applicant
Philip Lee
Solicitor for the First Named Respondent
Chief State Solicitors Office
Solicitor for the Second and Third Named Respondent
Arthur Cox
Solicitor for the Notice Party"

29. As noted above, in the No. 2 judgment, I addressed certain procedural matters and in the No. 3 judgment, I made the formal order for reference.

Questions referred

30. The questions referred were:

(i) 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?

(ii) 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?

(iii) 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?

(iv) 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).

(v) 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.

(vi) 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.

(vii) 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.

Procedure subsequent to the reference

31. Following the formal order for reference, the matter was accepted by the CJEU as Case C-613/22 *Dublin 8 Residents Association v. An Bord Pleanála*.

32. On 27th March, 2023, the Registry of the CJEU wrote to the Principal Registrar providing copies of written observations made by the parties, specifically by:

(i) the European Commission;
(ii) Ireland and the Attorney General;
(iii) Hungary;
(iv) the applicant; and
(v) the notice party.

33. The request with which we are now concerned makes particular reference to the submissions of the Commission on the third question, which are as follows:

> "The third question
>
> 23. The third question seeks to ascertain whether a capacity of the NGO may arise from the fact that, in the present case, the applicant in the main proceedings participated in the administrative procedure prior to the adoption of the contested measure.
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> 24. The referring court does not specify whether that participation took place on the basis of a right of the NGO to public participation or whether it is a mere factual circumstance.
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> 25. If the participation of the NGO in the administrative procedure was granted on the basis of Article 6 of the EIA Directive and Article 6 of the Aarhus Convention, which enshrines the right of the public concerned to participate in the process of preparing and adopting a decision approving a project having significant effects on the environment, then national law cannot prevent such a NGO which has exercised that right from challenging before the national court the decision resulting from the corresponding administrative procedure.
>
> 26. However, to the extent that participation in the administrative procedure derives from rights other than the EIA Directive, it is no longer covered by Article 11(1) of the Directive. The Court held that by making 'express reference solely to the public participation provisions of that directive, the EU legislature must be regarded as having intended to exclude […] challenges based on any other rules set out in that directive and, a fortiori, on any other legislation, whether of the European Union or the Member States."
>
> 27. It follows that if the NGO participated in the procedure without having a right to do so, then this participation also cannot give rise to an access to justice under Art. 11(1) EIA-Directive.
>
> 28. Consequently, the Commission proposes to reply to the first three question that Article 11(1)(a) of the EIA Directive, read in conjunction with Articles 47 of the Charter of Fundamental Rights and Article 9 (2) and (4) of the Aarhus Convention, does not preclude national law to require an association, such as the applicant in the main proceedings, whose members fall within the category of members of the 'public concerned' within the meaning of Article 1(2)(e) of the EIA Directive, and who has participated in the administrative phase of the development consent process, to be a legal person in order to be able to bring legal proceedings."

34. On 29th June, 2023, the Registry of the CJEU wrote to the Principal Registrar of the High Court enclosing a "request for information", requesting a reply "as rapidly as possible, preferably before the 04/09/2023". This is set out in the Appendix alongside the answers.

35. Article 101(1) of the Rules of Procedure of the CJEU states that

> "Without prejudice to the measures of organisation of procedure and measures of inquiry provided for in these Rules, the Court may, after hearing the Advocate General, request clarification from the referring court or tribunal within a time limit prescribed by the Court."

36. The formal request specified that the reply should be "maximum 8 pages if at all possible". The text of the questions, and the answers, are set out in an appendix to this judgment.

37. The request included reference to Article 94 of the Rules of Procedure of the CJEU, which provides as follows:

> "Article 94 Content of the request for a preliminary ruling
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> In addition to the text of the questions referred to the Court for a preliminary ruling, the request for a preliminary ruling shall contain:
>
> (a) a summary of the subject matter of the dispute and the relevant findings of fact as determined by the referring court or tribunal, or, at least, an account of the facts on which the questions are based;
>
> (b) the tenor of any national provisions applicable in the case and, where appropriate, the relevant national case-law;
>
> (c) a statement of the reasons which prompted the referring court or tribunal to inquire about the interpretation or validity of certain provisions of European Union law, and the relationship between those provisions and the national legislation applicable to the main proceedings."

38. Reference was also made to paragraphs 14 to 16 of the Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (OJ 2012 C 338, p. 1), which provide as follows:

> "14. The request for a preliminary ruling may be in any form allowed by national law, but it should be borne in mind that that request serves as the basis of the proceedings before the Court and is served on all the interested persons referred to in Article 23 of the Protocol on the Statute of the Court of Justice of the European Union ('the Statute') and, I particular, on all the Member States, with a view to obtaining any observations they may wish to make. Owing to the consequential need to translate it into all the official languages of the European Union, the request for a preliminary ruling should therefore be drafted simply, clearly and precisely by the referring court or tribunal, avoiding superfluous detail. As experience has shown, about 10 pages are often sufficient to set out adequately the legal and factual context of a request for a preliminary ruling and the grounds for making the reference to the Court.
>
> 15. The content of any request for a preliminary ruling is prescribed by Article 94 of the Rules of Procedure of the Court and is summarised, by way of a reminder, in the annex hereto. In addition to the text of the questions referred to the Court for a preliminary ruling, the request for a preliminary ruling must contain:
>
> — a summary of the subject matter of the dispute in the main proceedings and the relevant findings of fact as determined by the referring court or tribunal, or, at the very least, an account of the facts on which the questions referred are based,
>
> — the tenor of any national provisions applicable in the case and, where appropriate, the relevant national case-law, and
>
> — a statement of the reasons which prompted the referring court or tribunal to inquire about the interpretation or validity of certain provisions of EU law, and the relationship between those provisions and the national legislation applicable to the main proceedings. In the absence of one or more of the above, the Court may find it necessary, notably on the basis of Article 53(2) of the Rules of Procedure, to decline jurisdiction to give a preliminary ruling on the questions referred or dismiss the request for a preliminary ruling as inadmissible.
>
> 16. In its request for a preliminary ruling, the referring court or tribunal must provide the precise references for the national provisions applicable to the facts of the dispute in the main proceedings and for the provisions of EU law whose interpretation is sought or whose validity is challenged. Those references must, as far as possible, include both the exact title and date of adoption of the acts containing the provisions concerned and the publication references for those acts. When referring to case-law, the referring court or tribunal is also requested to mention the European Case Law Identifier (ECLI) of the decision concerned."

39. The request was forwarded to me on 6th July, 2023, and I directed that the matter be listed on 10th July, 2023. On that date the parties were given a week to prepare draft replies and the matter was adjourned until 17th July, 2023. Perhaps inevitably, no wording was agreed and in particular the notice party objected to the applicant's proposal to include factual contentions. In the circumstances, on 17th July, 2023 I allowed the parties to put in affidavits without prejudice to

whether they would be ultimately admitted by the court, and listed the matter for hearing on 24th July, 2023 to formulate the answers to the CJEU's request. The matter was heard on that date, when judgment was reserved on the question of the form of the replies.

40. Since the request received from the CJEU I have had the benefit of a number of documents from the parties:

(i) joint response from the notice party and State to questions;
(ii) applicant's reply to questions;
(iii) applicant's written submissions;
(iv) notice party's written submissions;
(v) State's written submissions;
(vi) affidavit of Orla Clarke of 20th July, 2023 on behalf of applicant; and
(vii) affidavit of Laura Rafferty of 20th July, 2023 on behalf of notice party.

41. It will be apparent from previous judgments that the opposing parties have left no stone unturned in their quest to prevent the applicant from making its substantive case to the court. Everything that could be challenged has been challenged, although what has made unravelling the present matter particularly heavy going is that such challenges have not all been laid out in clearly numbered propositions but have been embedded and one might almost say in some instances skilfully camouflaged within the opposing submissions such that digging them out to examine them in the light of day has been a painful task of almost archaeological proportions.

42. The danger with such an almost indiscriminate battery of objections is that an approach of this type can occasionally smack of protesting too much, and can stimulate an instinctive equal and opposite reaction. I will address these objections one by one insofar as required for present purposes.

Whether the court should admit further affidavit evidence at this stage

43. While both opposing parties objected to further evidence, the State's objection was the most developed and merits particular mention.

44. The State's submissions begin promisingly enough: "Under Article 267 TFEU, the CJEU does not have jurisdiction to interpret the laws of the Member States with binding effect for the national court", citing Broberg and Fenger, *Preliminary References to the European Court of Justice*, 3rd ed. (Oxford, Oxford UP, 2021),p. 121, para. 4.2.

45. Any assessment of the facts is a matter for the national court: Case C-142/07, *Ecologistas en Accion-CODA v. Ayuntamiento de Madrid* (Court of Justice of the European Union, 25th July, 2008, ECLI:EU:C:2008:445), paras. 47 – 51. Reliance is placed on Nowak (ed.), Lenaerts, Maselis & Gutman, *EU Procedural Law* (Oxford, Oxford UP, 2014), p. 233-234, para. 6-21, where the learned authors state: "[u]nder settled case-law, in the context of preliminary ruling proceedings, the Court of Justice is not entitled to rule on facts or points of national law, or to verify whether they are correct. Likewise, it is not for the Court to identify the provisions of national law relevant to the dispute, to give a ruling on their interpretation, or to decide whether the referring court's interpretation is correct. These matters fall within the exclusive jurisdiction of the national court."

46. While not quoted by the State here, the learned authors go on to say however that "[t]hat said, there is nothing to prevent the Court from spelling out its own understanding of the facts and points of national law as its starting point for its 'useful' (i.e. specific) interpretation of the applicable provisions and principles of Union law. The Court of Justice may also ask the national court or the government concerned to elucidate certain facts and/or points of national law and take account of them in the judgment giving a preliminary ruling".

47. The State's submission is that "[t]hus, differences in respect of national law or the factual circumstances of or surrounding the main proceedings remain under the sole jurisdiction of the national courts": Case 36/79 *Denkavit Futtermittel*, para. 12. "For this reason, the CJEU will, as a point of departure, base itself upon the referring court's presentation of the facts in the main proceedings when answering the questions the subject of the reference". Lenaerts *et al* is to that effect, although here the State cite Broberg and Fenger, p. 327, para. 3.3.3.1.

48. The State's submissions continue: "Moreover, the CJEU cannot disregard the facts as contained in the order for reference, as it has a duty to ensure that those that are entitled, as a matter of primary EU law, to submit observations under Article 23 of the Statute of the CJEU can do so effectively", citing Case C-352/95 *Phytheron International SA v. Jean Bourdon SA* (Court of Justice of the European Union, 20th March, 1997, ECLI:EU:C:1997:170), paras. 9-14, Case C-675/17 *Ministero della Salute v Hannes Preindl* (Court of Justice of the European Union, 6th December, 2018, ECLI:EU:C:2018:990), paras. 22-25; Case C-44/17 *Scotch Whiskey Association*, *v. Michael Klotz* (Court of Justice of the European Union, 7th June, 2018, ECLI:EU:C:2018:415) paras. 23-24.

49. The State goes on to say that: "With regard to supplementary factual information presented in the written observations made to the CJEU in the course of a reference procedure, although the CJEU may have regard to it where it is agreed, it will not do so as concerns disputed facts. Thus, as Broberg and Fenger aptly observe in this regard: 'As a clear rule, the Court of Justice will only base

its ruling on the additional factual information brought forward in the preliminary procedure if the new information is undisputed by all who submit observations in the preliminary case.'".

50. But to be clear, that is not the issue here. That only relates to where additional facts are offered by the parties before the CJEU, not by the referring court.

51. The submission goes on: "The same restraint applies regarding additional, *clarificatory* information that the CJEU may, as in this case, seek from the referring court in accordance with Article 101 of the Rules of Procedure ...".

52. However that is clearly incorrect. Seeking factual clarification would be totally pointless if the additional factual material presented by the domestic court in reply would be disregarded if any party disagreed with it. While there are clear limits to the introduction of new facts by parties, such limits don't apply to findings of fact made by the referring court in response to a request for clarification. "The same restraint" does not and self-evidently cannot apply if the CJEU asks the referring court for further factual clarification.

53. The State refers to Broberg and Fenger at p. 337 to the effect that the CJEU "regularly" uses art. 101 to seek clarification. However, at p. 287, the learned authors strike a curiously different note: "[u]nder Article 101 of the Rules of Procedure, the Court of Justice may, after hearing the Advocate General, request clarification from the referring court. ... The possibility to request clarification from the referring court under Article 101 is rarely used". The State submission goes on to note that this procedure has been availed of, for example, in Case C-33/18, *V v. Institut national d'assurances sociales pour travailleurs indépendants, Securex Integrity ASBL* (Court of Justice of the European Union, 6th June, 2019, ECLI:EU:C:2019:470.), paras 25-26 and Joined Cases C-327/16 and C-421/16 *Marc Jacob v. Ministre des Finances et des Comptes publics* and *Ministre des Finances et des Comptes publics v. Marc Lassus* (Court of Justice of the European Union, 22nd March 2018, ECLI:EU:C:2018:210) para. 36.

54. The State then makes the following very magnanimous observation: "Broberg and Fenger note, however, that this procedure can cause procedural problems for the referring court, *i.e.* how to treat and respond to the request without infringing the procedural rights of the parties to the main proceedings [citing Case C-6/05 *Medi-pac Kazantzidis AE v. Venizeleio-Pananeio (PE.S.Y. KRITIS)* (Court of Justice of the European Union, 14th June, 2007, ECLI:EU:C:2007:337)]. This Honourable Court, by adopting here the approach it has, permitting the parties before it to make both written and oral observations to it regarding what they consider should be its answers to the questions raised in the CJEU's request for clarification, has been commendably meticulous in ensuring full respect for the procedural rights of the parties to the main proceedings."

55. Ultimately the problem for the opposing parties as to the admission of Ms Clarke's affidavit is that there is no rule of European or domestic that prohibits new evidence in response to a request from the CJEU for factual clarification. Indeed, in a context where the answering of questions by the CJEU is predicated on the facts being fully clarified, it is virtually essential for any arguable ambiguity of the evidence to be addressed, if needs be by new evidence.

56. The State's submission goes on to say that "[t]urning to the admissibility of supplementary factual information in response to a request for clarification from the CJEU under Article 101 of the Rules of Procedure, the State Respondents submit, in the light of the foregoing, that this a matter which falls to be determined in accordance with national law, subject to the obligation to ensure that the procedural rights of the parties to the main proceedings are respected." I agree, and there is no domestic rule precluding further evidence if it is necessary to clarify factual matters.

57. The State then submits that "[i]t is important to note, however, that it is well settled that the reference procedure is not to be used for advisory opinions to be delivered on general or hypothetical questions; rather, it must be necessary for the effective resolution of a dispute concerning EU law arising in the main proceedings" (citing Joined Cases C-203/15 and C-698/15 *Tele2 Sverige AB v Post- och telestyrelsen* and *Secretary of State for the Home Department v Tom Watson, Peter Brice, Geoffrey Lewis* (Court of Justice of the European Union, 21st December, 2016, ECLI:EU:C:2016:970), paras. 126-133). But that isn't in dispute. The State goes on to say that "[c]onsequently, only facts that are relevant to the questions referred ought to be included in the responses to the questions posed by the CJEU". That isn't in dispute either.

58. The kicker comes when the State yokes to these obvious propositions the following: "Disputed assertions of fact, which do not have an evidential basis in the materials before the CJEU on foot of the reference already made to it, i.e. in the order for reference and/or documents from the existing file before the referring court at the time of the reference and transmitted at that time to the CJEU, ought not be included by the referring court in its response to a clarificatory request to it from the CJEU under Article 101 of the Rules of Procedure." That is unfortunately just assertion, does not follow from the previous two sentences, and contradicts the earlier concession that the admission or otherwise of new evidence is a matter for domestic law – which here doesn't preclude such admission.

59. In all of the circumstances I consider it appropriate to receive the evidence of Orla Clarke and Laura Rafferty. This in fact helps the opposing parties to some extent because as will become apparent this means that O. 15 r. 2 can't apply.

Whether the applicant participated on the basis of Article 6 of the EIA directive

60. The Commission's view was that it appeared from the information provided by the referring court that Irish law takes a restrictive approach to allowing unincorporated organisations or associations to bring legal actions before a court in judicial review, but the reference did not provide information whether such organisations or associations may have legal personality for other purposes.

61. The Commission is correct that the Irish law takes a restrictive approach to allowing unincorporated bodies, which lack legal personality, to bring legal actions save where otherwise provided for in law. Even when they can bring such actions, this does not confer legal personality, and such associations remain in law equivalent to their members. However administrative bodies and administrative procedures do not generally impose a requirement to have legal personality such as would prevent unincorporated bodies from participation in administrative processes. Thus, Irish domestic practice allows unincorporated bodies to participate in administrative procedures where this is permitted by the administrative body concerned or in the administrative procedure concerned. This does not confer legal personality but it does amount to a right to participate.

62. Where the administrative procedures of a body, such as An Bord Pleanála, are so operated as to afford such a general right as a matter of practice, any individual unincorporated body would have an enforceable legal right to be treated in an equal manner by being allowed to participate in the process, as a matter of domestic law by reference to equality before the law and fair procedures. Thus the participation of the applicant in the administrative process was not a mere "factual circumstance" or a situation of having "participated in the procedure without having a right to do so". It was as a matter of legal right by virtue of the conjunction of the administrative practice with an enforceable right to equality of treatment.

63. The permissive approach to public participation in the planning process as set out in Irish law serves the important purpose of giving full effect to Article 6 of the EIA directive (2011/92/EU), and Article 6 of the Aarhus Convention, which enshrines the right of the public concerned to participate in the process of preparing and adopting a decision approving a project having significant effects on the environment.

64. It therefore follows that the participation of the Dublin 8 Residents Association did occur on the basis of Article 6 of directive 2011/92 (likewise the participation of Ms Kerins the proposed substitutee).

65. The notice party argues that such participation was not on the basis of art. 6 because it was not on any basis due to a lack of capacity. That is a misunderstanding – the procedure allowed for unincorporated bodies to participate. It was thus doing so as of right rather than this being something it simply got away with.

66. If that was as of right, then it must have been pursuant to art. 6 of directive 2011/92.

67. It is submitted in response to this that "[t]he participation of the Dublin 8 Residents Association did not occur on the basis of Article 6 of Directive 2011/92/EU. Rather, the Applicant sought to rely on section 50A(3)(b)(ii) of the Planning and Development Act 2000, as amended, which confers jurisdiction on Environmental NGOs." But the two are not contradictory. The 2000 Act in this respect gives effect to the EIA directive. Participation was also in reliance on national law giving effect to Article 6 of the EIA directive. Section 50A is about participation in legal proceedings challenging the outcome, not about participation in the administrative process.

68. It is further submitted that "[i]n the Judgment of 11 March 2022, the Referring Court concluded that the Dublin 8 Residents Association did not meet the national law requirements in section 50A(3)(b)(ii)(II) of the Planning and Development Act 2000, as amended, such that, as a matter of national law, it did not have capacity to participate in the main proceedings. Consequently, it was neither 'public' nor 'public concerned' for the purpose of Article 1(2)(d) or (e) of Directive 2011/92/EU when it participated during the administrative phase of decision-making in the development consent process and its participation therein was not based on the Directive. Thus, the participation of the Dublin 8 Residents Association did not occur on the basis of Article 6 of Directive 2011/92/EU." But that doesn't at all follow. The word "[c]onsequently" is a misconception. The fact that the applicant didn't have capacity under a particular provision of national law to bring legal proceedings doesn't mean that it didn't have capacity to participate in the administrative process.

Rules that could potentially support a substitution of the applicant

69. No less than five "lifelines" (the applicant's phrase) came up in submissions as a jurisdictional basis for a possible amendment of the party listed as applicant. These are as follows:

(i) O. 15 r. 2. This is discussed further below.

(ii) O. 15 r. 13. This is also discussed below.

(iii) O. 28 r. 12. The leading procedural textbook, Delany and McGrath on Civil Procedure (4th ed., Roundhall, 2018) at para. 6-64 provides as follows:

> "A wider jurisdiction to correct errors including errors in the names of parties is conferred by Order 28, rule 12 which provides that the court may at any time and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceedings with all necessary amendments made for the purpose of determining the real question or issue raised by or depending on the proceedings. In *O'Brien v Reilly* [[2014] IEHC 514, [2014] 10 JIC 3101 (Unreported, High Court, Herbert J., 31st October, 2014)] this rule was relied on by Herbert J to amend the title of the proceedings to correct an error in the name of the first defendant."

However, it can reasonably be concluded that O. 28 r. 12 RSC has no application to judicial review. The power to amend pleadings is specifically provided for in O. 84 r. 23(2), and this displaces any more general rule about amendment of pleadings as such. Whether it displaces O. 15 in relation to correction of the names of parties is another matter.

(iv) O. 84 r. 23(2). However, the applicants have not (as yet anyway) made any (conditional) application under this rule.

(v) The applicant also wanted to rely on an inherent jurisdiction but didn't identify any caselaw relevant to such a hypothetical jurisdiction. For the purposes of the reference such a jurisdiction can be disregarded in the absence of any identification of its existence or scope.

70. Thus the only rules that need to be discussed for present purposes are O. 15 rr. 2 and 13 RSC.

Whether O. 15 r. 2 RSC is capable of applying here

71. Order 15, r. 2 RSC permits the substitution of a party where an action has been commenced in the name of the wrong person as plaintiff or where it is doubtful whether it has been commenced in the name of the right plaintiff. The Court may, if satisfied that the action has been so commenced through a *bona fide* mistake and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as may be just. Order 15, r. 2 has no application where there has been no *bona fide* mistake (see also *Sandy Lane Hotel Limited v Times Newspapers Limited* [2014] 3 IR 369).

72. As held by Edwards J. in *Waldron v. Herring* [2013] 3 IR 323:

> "Order 15, r. 2 is, in this Court's view, intended to apply in situations where an action is commenced in which, by reason of a bona fide mistake, the wrong person is named as plaintiff. That this is the position is clear from cases such as Southern Mineral Oil v. Cooney (No 2) [1999] 1 I.R. 237 and BV Kennemerland Groep v. Montgomery [2000] 1 I.L.R.M. 370. No such situation arises here. There was no mistake."

73. Paragraph 17 of the affidavit of Orla Clarke states as follows:

> "The Court has sought clarification as to the instructions given by my client and the advices furnished to it. I can confirm that the decision to issue these proceedings in the name of the NGO was deliberate and conscious, in that it was not the result of a slip of the pen or a clerical error of that nature. That decision was premised on the legal advice that the association had capacity and standing to act. There was not any direct consideration prior to the issue of the proceedings as to whether the association had, for the full extent of a period of 12 months preceding the date of the application, pursued aims or objectives which related to environmental promotion, and I beg to refer to the Affidavit of Sinead Kerins of the 21st of December, 2021 when produced. If the advice given as to standing and capacity was mistaken, I confirm that this was a genuine and bona fide error."

74. On the basis of that averment it seems to me that such a decision is not the sort of mistake that would mean that O. 15 r. 2 is capable of applying here. That provision is not about a considered, deliberate decision, on legal advice, made in the knowledge that the correct plaintiff had a right of action but on the basis of opting not to name that person, that turns out to be problematic at a later stage when the proceedings run into choppy legal waters. Order 15 r. 2 is more about a mistake as to the facts, or as to the correct legal identity of the party holding the right of action, or about some other less than fully conscious error; not about a deliberate decision to name a particular applicant where that decision must have been made in the actual knowledge that another potential applicant had a right of action but that it was thought undesirable for her to be named as the moving party. This isn't a case where the plaintiff didn't realise that some other person was a proper plaintiff. The applicant obviously must have known that Ms Kerins had standing but thought that it also had standing. Hence I must hold that O. 15 r. 2 RSC has no potential application and I will inform the CJEU accordingly.

Whether O. 15 r. 13 RSC is capable of applying here because these are public law proceedings

75. The opposing parties submit that "Order 15, rule 13 only applies to private law actions and does not apply to public law actions, including an application for Judicial Review of an administrative decision (*BUPA Ireland Limited v. The Health Insurance Authority & ors* [2006] 1 I.R 201, *Dowling and Ors v. Minister for Finance* [2013] IESC 58 [[2013] 12 JIC 1902 (Unreported, Supreme Court, Fennelly J., 19th December, 2013)] and *Dowling & Ors v. Minister for Finance* [2022] IECA 22 [[2022] 1 JIC 3102 (Unreported, Court of Appeal, Binchy J. 31st January, 2022)])".

76. First and most obviously, this totally contradicts the submission made by the notice party itself when the question of amending its name was raised, as set out on the transcript above. It would be improper to permit such a *volte face* at this stage given that the notice party itself introduced O. 15 r. 13 to the discussion and sought to rely on it.

77. The tenor of the *BUPA* decision is that Order 15 r. 13 does not set out the test for joinder of notice parties having regard the test now set out in O. 84 r. 22(2).

78. BUPA does not decide (and nor does either *Dowling* case) that Orders 15 rr. 2 or 13 do not apply to public law proceedings. What they decide is that the test for adding notice parties is not that in O. 15 r. 13 but that in O. 84 r. 22(2).

79. The notice party is over-interpreting para. 39 of *Dowling* per Fennelly J. in the Supreme Court:

> "39. This Court, in BUPA, was primarily of the view that the judicial review rules provided the framework for the decision and that the High Court judge in that case had been mistaken in considering the matter in the light of Order 15, Rule 13 and the decision in Barlow v Fanning, cited above. It concluded, nonetheless, that, even if Order 15 were to be treated as applicable, VHI should still be joined because the Court was 'strongly of the view that this case does involve exceptional circumstances and that the continued presence of the notice party in the proceedings is 'necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the cause or matter'.(page 214)"

80. The words "the decision" mean the decision to join or not to join a notice party.

81. At para. 42, Fennelly J. says:

> "42. I am satisfied that the application to set aside a Direction Order has all or almost all of the indicia of an application for judicial review. It has few, if any, of the characteristics of a civil action. If a choice were to be made between the application of Order 15 and Order 84, the latter would have to apply. Since the Act is silent on the matter and s. 11(2) provides the only guidance by saying that the court 'may give such directions with regard to the hearing of the application as it considers appropriate in the circumstances,' it seems to me that order 84 must be applied by analogy. It follows that an applicant for an order pursuant to s. 11 should serve the notice of motion and grounding affidavit on 'all persons directly affected…'".

82. But this means only insofar as OO. 15 and 84 conflict.

83. Similarly in the Court of Appeal *Dowling* decision Binchy J. says at para. 50:

> "50. The appellants submit that the trial judge applied the test applicable to such applications in public law proceedings, and that in doing so he fell into error. The appellants contend that these are private law proceedings and that they are not an 'offshoot' of the 2011 Direction Order proceedings in the same way as were the proceedings before O'Malley J. in which she joined the respondents as notice parties to the proceedings. The appellants rely on the fact that the within proceedings seek orders pending the determination not just of the 2011 Direction Order proceedings, but also of the Constitutional proceedings, which they claim are private law proceedings and not public law proceedings."

84. That was a case about whether a notice party should be joined, and again the issue there was whether that should be done by reference to O. 15 or O. 84. The notice party ignores or over-interpret the words "such applications in public law proceedings" – "such applications" means applications to add notice parties. That doesn't have the effect that no provision of O. 15 r. 13 can apply to public law proceedings.

85. Indeed if it had purported to exclude O. 15 r. 13 altogether that would create some significant gaps in the express text which would have to be filled by the broad power of amendment. The opposing parties say that there is nothing in O. 84 which expressly allows for the substitution of the applicant for Judicial Review for another party where the applicant otherwise lacks legal capacity. However, the illogical lacuna that would be created if there were no such power is a reason for reading O. 15 r. 13 (or perhaps O. 84 r. 23(2), although that doesn't fall for current consideration) as enabling such an order to be made in judicial review.

86. The caselaw relied on does not say what the notice party and State say it says. There is nothing in the rule to exclude public law actions and no logical reason to exclude such a procedure from public law. What the caselaw says is that the criteria for joining a notice party in a judicial

review are to be as set out in O. 84 not O. 15 r. 13. That is very limited and specific and only arises because O. 84 sets out a different basis for joining notice parties. It does not amount to a blanked exclusion of O. 15 r. 13 from public law or judicial review specifically.

87. The assertion that O. 15 r. 13 does not apply to public law, confidently repeated almost *ad nauseam* and allegedly backed up by impressive authority, is fallacious. The allegedly supportive authorities don't say that and don't support that. For good measure that assertion brazenly contradicts the notice party's previous submissions in relation to its own position.

88. Order 84 does not displace all other rules of court, but only insofar as they are inconsistent with that provision. So Order 15 r. 13 can apply to judicial review subject to any more express rules on particular matters in relation to judicial review, such as the joining of notice parties which is governed by O. 84 not O. 15 r. 13. Similarly, general rules of court on amendment of pleadings under O. 28 are also displaced by specific rules on amendment of judicial review under O. 84.

Whether O. 15 r. 13 RSC is capable of applying here because of the nature of the applicant

89. Order 15 r. 13 RSC does not provide for the substitution of parties save in place of parties improperly joined when the proceedings were commenced (*Irish Bank Resolution Corporation v. Lavelle* [2015] IEHC 321, 2015 WJSC-HC 13636, [2015] 5 JIC 2115 (Unreported High Court, Baker J., 21st May, 2015). That is essentially the situation here.

90. *O'Rafferty v. Rickard* (1920) 54 ILTR 195 is a century-old case of no real relevance. It related to an unusual situation where a single individual who carried on business under a firm or trade name died prior to the issue of a writ. It was held that his personal representative could not sue in the firm's name. A writ issued in these circumstances was a nullity and could not be amended as there was no plaintiff. That seems to be equivalent to saying that the cause of action died with the plaintiff. If that is not the case, and if some person could have brought the action notwithstanding the death of the plaintiff prior to the proceedings, it is very doubtful if such a hyper-technical approach would be followed today. In any event there does not seem to have been reference to the rule corresponding to what is now O. 15 r. 13 RSC.

91. Insofar as the opposing parties assert that "[t]hus, Proceedings which issued by a particular entity are a nullity and cannot be saved by the replacement of that entity with some or all of its members", that does not remotely follow, is illogical, and is without any basis in law.

92. It is submitted in opposition that "[e]ven if Order 15, rule 13 applied to the proceedings, the Dublin 8 Residents Association could not avail of that jurisdiction as it only permits the substitution of a Plaintiff where the Plaintiff was improperly joined to the proceedings. The Dublin 8 Residents Association were not improperly joined to the proceedings as there was a conscious decision taken by the members of the Applicant association for the proceedings to be commenced by the Association and not by its, or any of its, individual members." But again that doesn't remotely follow. The concept of "improperly" is objective. Merely because something is done consciously and deliberately doesn't make it proper. In the event that it is ultimately held that the applicant doesn't have standing, then that party would have been improperly joined, even bearing in mind that that was a conscious decision.

Whether O. 15 r. 13 RSC is capable of applying here because there is no applicant to seek substitution

93. The notice party made the hollow nit-picking submission that because the applicant association does not have legal capacity, there is nobody who is capable of applying to make the substitution of Ms Kerins as applicant.

94. That objection can be dismissed immediately.

95. The affidavit of Orla Clarke states as follows:

> "9. According to my attendance note (the Applicant could not afford to share the expense of the stenographer engaged by the Notice Party), counsel for the Notice Party addressed the Court regarding his client's locus standi. My note reflects his submission to say 'uncomfortable position for me - name of Notice Party. Order 15 Rule 13 - power of the Court to insert party', Furthermore, my note also reflects counsel stating to the Court that he is 'happy to invite the Court to amend name and how it might affect my Motion.'
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> 10. Furthermore, I say that my attendance note reflects that counsel for the Applicant also somewhat inelegantly addressed the Court in the context of Mr. Mulcahy's suggestion to amend the name of the Notice Party to say 'if the Court gives a lifeline to Mr. Mulcahy, I would ask that to apply for the same relief with the same consequences.'
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> 11. I say that in the course of the hearing on the 18th of February this Honourable Court queried why Ms. Kerins did not take this case in her own name. Counsel for the Applicant submitted to the Court that the case would be 'a lot of pressure' on her as the sole applicant and therefore it was considered to be more appropriate for the association to be the Applicant. The Applicant had been advised Dublin 8 Residents Association can proceed on the basis of sufficient interest. In his 'pot and kettle' submission to the Court, counsel for the Applicant communicated that, if lifelines were needed (on the basis of mistakes as to

> capacity to act in litigation), he would seek the same relief. This was clearly intended, and I believe was understood, to be an application for the substitution of Ms Kerins if the Court held against the Applicant as to its capacity. Counsel had instructions from Ms Kerins to make this application in the alternative.
>
> 12. I say that these submissions during the hearing are reflected in the Judgment of the 11th March 2022 at paragraph 35: 'it seems to me that the present case is a good example of where the power to substitute the correct party is the obvious and correct thing to do. The applicant said that it would be unfair if this was done and if the applicant was not given a similar opportunity to have its own legal identity rectified. I am by no means ignoring that point, but it arises at a later stage of the process.'"

96. I do not understand this (or Ms Clarke's averment at para. 17) as meaning that there was no legal advice about the criteria at all but simply that the extent of such consideration did not necessarily expressly address all of the issues that subsequently came up in the proceedings. All lawyers should be familiar with that feeling. Hindsight is perfect vision in many contexts.

97. I would also add that I didn't particularly feel there was anything inelegant about counsel's submission – the meaning was clear enough.

98. The critical point under the present heading is that counsel had instructions from Ms Kerins to make the application. Whether one wants to characterise it more properly as an application by the applicant or by Ms Kerins herself is academic and semantic. The doing of justice doesn't hinge on such trivialities. One way or the other the application was one that has to be capable of being made – a party doesn't always have a right to succeed but there must always be a route into court to make one's point.

99. An analogy is the situation that arose in *Pablo Star Media Limited v. EW Scripps Company* [2015] IEHC 828, 2015 WJSC-HC 23153, [2015] 12 JIC 2114 (Unreported, High Court, 21st December, 2015) where a company director was heard on whether he had a right to represent the company (he didn't). But to refuse to hear him would defeat the possibility of the point being made at all.

100. So a person with no standing can nonetheless in principle apply to the court for the limited purposes of being removed from the case to be replaced by a person with standing. Alternatively the latter person can make the application. What does it matter? Either option is legally permissible. Here, counsel had instructions from both.

Whether O. 15 r. 13 RSC is capable of applying here because of the time problem

101. The more significant potential problem for the applicant in relation to O. 15 r. 13 is whether such an application should be refused by reference to delay and more specifically the time period of 8 weeks to bring the challenge.

102. Caselaw is largely focused on adding new defendants, rather than new plaintiffs.

103. As regards new defendants/ respondents, O. 15 r. 13 suggests that any substitution under that rule would not be retrospective and time is still running. The rule provides:

> "… Every party whose name is so added as defendant shall be served with a summons or notice in manner hereinafter mentioned, or in such other manner as the Court may direct, and the proceeding as against such party shall be deemed to have begun only on the making of the order adding such party."

104. Caselaw indicates that the jurisdiction in Order 15 r. 13 should not be exercised to add a defendant where the claim is manifestly statute barred (*Allied Irish Coal Supplies v. Powell Duffryn International Fuels Limited* [1998] 2 I.L.R.M. 61), but that if the time problem is disputable then the defendant can be joined with the time issue to be argued later (*O'Connell v. Building and Allied Trades Union* [2012] 2 IR 371, which related to adding a new co-defendant).

105. In *O'Reilly v. Granville* [1971] I.R. 90, a case under O. 15 r. 13, a new defendant was added reserving the statute issue to a later date. Walsh J. (dissenting on the potential relevance of the statute even at that later point) said:

> "In my opinion, the adding of a defendant is not the bringing of a new action but is a step in an existing action. The provisions of r. 13 of Order 15 to the effect that every party whose name is added as a defendant shall be served with a summons or notice, and that the proceedings against such party shall be deemed to have begun only on the service of such summons or notice, relate only to determining the point from which the times for entering an appearance and a defence etc. shall be measured. It is significant that this particular provision relates only to the adding of a defendant. This exception indicates that it was never within the contemplation of the rule that, in effect, the adding of a new party in general would be equivalent to the commencement of an action in respect of that party. If it were otherwise, the position arising on the addition of a plaintiff would produce a very anomalous result. In so far as the Statute of Limitations is concerned, the addition of a plaintiff after the expiration of the limitation period appropriate to the particular cause of action could be just as embarrassing for the defendant as the addition of a defendant after the expiration of

> the same period, and yet the rule omits any reference to the proceedings having been begun only upon the addition of such new plaintiff so far as the defendant is concerned. In my view, the provisions of r. 13 of Order 15 give no support to the defendant's contention.
> If a party is joined either as a plaintiff or as a defendant to an action already begun then that party must be treated as having been a party from the time the action was commenced. Otherwise there would be created a completely unreal situation of one action being treated as divisible into several actions, of which one or more was commenced at a different time from the other or others.
> It is my opinion that when an application of this nature comes before a judge and it is indicated to him, in opposition to the application, that the party opposing it would wish to raise the Statute of Limitations or would do so if a separate action were begun in respect of the applicant, it is a matter for the judge then to consider whether on the facts of the case justice would be served by adding the party or not. If, in the result, the judge takes the view that justice would be served by adding the party, then he should order accordingly even though the result might be to effectively deprive the opposing party of the benefit of the Statute of Limitations. The Statute of Limitations does not exist for the purpose of aiding unconscionable and dishonest conduct, and I fully agree with the view expressed by the Chief Justice that, in the circumstances of this case, if the Statute of Limitations were to be invoked it would be for the purpose of sustaining and maintaining unconscionable and dishonest conduct."

106. As Walsh J. pointed out, O. 15 r. 13 is silent as to whether any prospective effect to a new party also applies to new plaintiffs/ applicants. His view was that it did not. The learned authors of Delany and McGrath on Civil Procedure (4th ed. Roundhall 2018) comment at para. 6.61 that O. 15 r. 2 is also silent in this regard:

> "In contradistinction to Order 15, rule 13 which expressly provides that, where an order is made, 'the proceeding as against such party shall be deemed to have begun only on the making of the order adding such party', rule 2 is silent as to whether, when an order is made substituting a plaintiff, the proceedings are regarded as having commenced when originally instituted or when that order is made. This issue is important because it determines whether the proceedings may be statute barred and whether the court has a discretion to refuse to make an order pursuant to rule 2 on the basis that the Statute of Limitations has clearly run."

107. They also indicate the contradictory authorities regarding this issue in the O. 15 r. 2 context:

> "6-61 ... In *BV Kennemerland Groep v Montgomery* [[1999] 12 JIC 1001, [2000] 1 ILRM 370] Geoghegan J held that, under rule 2, the court has a discretion to refuse to make such an order on the grounds that it would be futile in practice if the action would be statute barred beyond any doubt. However, a different view was expressed on an obiter basis by Clarke J in *Wicklow County Council v O'Reilly* [[2006] IEHC 265, [2006] 2 JIC 0803 (Unreported, High Court, Clarke J., 8th February, 2006)]. In the course of his judgment, he explained the different circumstances in which Order 15, rule 2 and rule 13 (considered in more detail below), apply. He stated that an order pursuant to rule 2 will only be made where there has been a bona fide mistake and that '[i]n such special circumstances the Statute of Limitations will not apply'.
> 6-62 More recently, in *Sandy Lane Hotel Ltd v Times Newspapers Ltd*, Hardiman J seemed to indicate that a defendant could object to the substitution of a plaintiff pursuant to rule 2 on the basis that the proceedings would be statute barred but his comments were obiter and made without any reference to authority. The fact that a defendant might contest an application on this basis seems to have also been accepted by Kearns P in the subsequent decision of the High Court in *Sandy Lane Hotel Ltd v Times Newspapers Ltd*. In this case. in which the plaintiff sought an order pursuant to rule 2, Kearns P declined to exercise his discretion to refuse to make such an order on the basis that the claim was statute barred as this was not the case in the matter before the court. In the course of his judgment Kearns P also usefully summarised the requirements which must be satisfied in order for a plaintiff to secure an order pursuant to Order 15, rule 2. These were that the mistake which occurred in the naming of the plaintiff was a bona fide one, that an order mandating the addition or substitution of a plaintiff was 'necessary for the determination of the real matter in dispute', that the underlying cause of action remained the same and that should the court grant the order sought, no prejudice or injustice would be suffered by the defendant."

108. Of relevance is the decision in *Wicklow County Council v. O'Reilly* which appears to indicate that in the case of a *bona fide* mistake, one can rely on O. 15 r. 2 and the statute of limitations (or other time restrictions) will not apply, whereas in any other case one can rely on O. 15 r. 13, but the statute could apply (at least in relation to a new defendant):

"7. Reference was made at the hearing to *In Re Southern Mineral Oil Limited* [1999] 1 I.R. 237, where Shanley J had to consider an application to add or substitute parties. It is clear that the application in that case was based on two separate rules, that is to say Order 15, rule 2 and Order 15, rule 13. The application under Order 15, rule 13 failed because the cause of action against the proposed added defendants would have been statute barred. In that regard Shanley J followed the followed the decision of the Supreme Court in *O'Reilly v Granville*. On the separate reliance on Order 15, rule 2, Shanley J said:

> 'As to O. 15, r. 2, of the Rules of the Superior Courts there is a similar, but not identical, rule in the English Rules of the Supreme Court; O. 20, r. 5(1), (2) and (3) provide as follows:
>
> > '(1) Subject to Order 15, rules 6, 7 and 8 and the following provisions of this rule, the court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.(2) Where an application to the court for leave to make an amendment mentioned in paragraphs (3), (4) or (5) is made after any relevant period of limitation current at the date of issue of the writ has expired, the court may nevertheless grant such leave in the circumstances mentioned in that paragraph if it thinks it just to do so. (3) An amendment to correct the name of a party may be allowed under paragraph (2), notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or, as the case may be, intended to be sued.'.
>
> The effect of these rules was considered in the English case of *Evans Ltd. v. Charrington & Co. Ltd.* [1983] Q.B. 810, where Donaldson L.J., in the Court of Appeal said at p. 821:
>
> > 'In applying O. 20, r. 5(3), it is in my judgment important to bear in mind that there is a real distinction between suing A in the mistaken belief that A is the party who is responsible for the matters complained of, and seeking to sue B, but mistakenly describing or naming him as A and thereby ending up suing A instead of B. The rule is designed to correct the latter and not the former category of mistake. Which category is involved in any particular case depends upon the intentions of the person making the mistake and they have to be determined on the evidence in the light of all the surrounding circumstances.'.
>
> In the more recent case of *Re: Probe Data Systems* [1989] B.C.L.C. 561, the Secretary of State for Trade and Industry in England and Wales applied to the court under the Rules of the Superior Courts, O. 20, r. 5(3) for leave to amend an originating summons to substitute himself as applicant instead of the official receiver. Millet J., refusing the application, said at p. 563:
>
> > 'At first sight it may appear that in order to substitute a new plaintiff there are only two requirements which must be satisfied. First, that the mistake sought to be corrected was a genuine mistake; and second, that it was not misleading or such as to cause any reasonable doubt as to the identity of the intended plaintiff. That is not the case, for not every mistake can be corrected by amendment under O. 20, r. 5(3). The mistake must have been a mistake as to the name or identity of the intended party'.'

8. On the basis of those authorities it seems clear to me that Order 15, rule 2 and its English near equivalent is concerned with an amendment to the name of a party, even if this would have the effect of substituting another party. Such an order would only be made where there has been a bona fide mistake of the type identified in the example cited in Evans. In such special circumstances the Statute of Limitations will not apply. However, where the more general jurisdiction under Order 15, rule 13 is relied on, it is not necessary to establish such a bona fide mistake, but the Statute of Limitations will apply, with the action only commencing as against the joined party as at the date of joinder.

9. There is no issue under the statute in this case. Therefore this application falls to be considered under Order 15, rule 13. In those circumstances it is not necessary to establish a bona fide mistake such as would justify an amendment of the name of a defendant rather than a removal and replacement. In those circumstances I should follow the ordinary principle: that all necessary parties should be joined and that any consequences of their

joinder at this stage can be dealt with by appropriate directions or in relation to the costs incurred by their original non-joinder."

109. However, that was a case about substituting a defendant and adding a new defendant rather than substituting a plaintiff, so the issue remains somewhat unclear as a matter of Irish domestic law.

110. There is a lot to be said for Walsh J.'s humane and far-sighted approach, and I would respectfully follow that, including by analogy, in respect of a substitution of a plaintiff/applicant, if I were reasonably confident that it represented the current Irish domestic legal position. Confidence in the Irish legal position is hard to come by in this area however.

111. I don't need to decide at this point whether the conditional application under O. 15 r. 13 should be refused on the basis of delay or time. But one can say that there is support in Irish domestic caselaw for the proposition that delay or time would be a factor to be considered in any application for substitution under Order 15 rule 13.

112. As against that, of potential importance here is that the applicant is not seeking to substitute a completely different party – it is seeking to substitute one of its own members, in circumstances where the applicant body is in law its members and was so all along. That is also a factor to be considered.

113. Nonetheless, the domestic legal position is sufficiently confused and unclear that one could not be unduly confident that the time problem would not ultimately be held to defeat such an application, or to defeat the merits of the case even if such a substitution were formally allowed. This could arise because refusal of a substitution is meant to happen only if the case is *clearly* statute barred – if it is only *arguably* statute-barred (or otherwise precluded by time), then the case can proceed with the substitution but the defendants can defeat the case on a time basis if they make out that defence at the trial. If that is the law, there are clearly situations where this can cause massive unfairness and injustice and give a meritless windfall benefit to objecting parties. One can only wish that Walsh J.'s position had been followed more generally and a more flexible "interests of justice" test adopted.

114. That problem is the basis of the fifth question.

Whether the notice party should have been substituted under O. 15 r. 13 RSC

115. Insofar as I understood their submission and subject to correction in that regard, the notice party now appears to be saying, perhaps on mature reflection, that its correct name should have been substituted by virtue of O. 84 r. 22(2) RSC, not O. 15 r. 13, relying on the argument as to the alleged exclusion of O. 15 from applying to public law as discussed above. But there is no such exclusion.

116. The conclusion is that as a matter of Irish law, O. 15 r. 13 RSC does apply to the correction of the name of a party in judicial review (as opposed to the addition of a notice party), and the correction of the name of the notice party here under that provision was correct.

Whether there is an application for substitution by the applicant

117. A major point of contention was whether the applicant had made any application for substitution in this case. In part this is a matter of interpretation of the transcript of the earlier hearing. In addition to that however the applicant clarified its position at the hearing on 24th July, 2023.

118. Some faint-hearted reliance was placed on the lack of a notice of motion. This is irrelevant.

119. An application for substitution of a party in proceedings is in practice normally made by formal notice of motion, but this is not essential. Domestic Irish law allows a court to permit an application to be made without the formality of a notice of motion even if such a notice of motion is normally necessary.

120. Irish law does not preclude a conditional application, such as an application for a particular relief it and to the extent that it is necessary, or an application for a particular relief on a conditional basis in the event that some other application is refused.

121. My conclusion on a reading of the transcript is that the applicant did make a conditional application for substitution, albeit with a possible caveat as to instructions. However this has now been clarified and the applicant has now expressly made a conditional application – conditional that is on it being wrong about its own standing. The applicant clarified that that was not mere notice of an intention to make such a future application.

122. The fact that the applications were made in course of the hearing without a notice of motion is irrelevant because that is not an indispensable legal necessity.

123. Insofar as it is suggested that the questions regarding substitution are "hypothetical, and therefore ... inadmissible, for example because, as the defendants maintain, the requests for substitution were not submitted", this is incorrect.

124. That said, if the opposing parties maintain their objection and were to persuade the CJEU not to answer these questions, it may assist the CJEU if the referring court were to make clear that it would propose to make a second reference in the event that the other questions are answered

adversely to the applicant such that the conditional substitution application thereupon becomes a non-conditional substitution application. The referring court would not be overly inclined to see this as the most convenient way of dealing with the issue but that is ultimately a matter for the CJEU.

Whether the proposed substitutee Ms Kerins has standing

125. It wasn't totally clear to me how strongly any objection to Ms Kerins' standing as such was pressed in the end, but I had better deal with the issue all the same.

126. The Commission's comments at paras. 38 and 39 of their observations are confirmed, namely that It follows from paragraph 65 of the Referral that the individual applicants in the case at hand (i.e. the members of the association that is applicant in the main proceedings) did have the possibility of bringing an action against the contested decision.

127. It isn't disputed that Ms Kerins herself made a submission on 28th January, 2021. She is listed in the inspector's report as having done so and hence it is clear that she would have had standing to challenge the decision herself.

128. I confirm that the action in the main proceedings is the only legal action brought within the time limits against the permit to carry out the project in question. Accordingly, should that action be declared inadmissible, there would be no access to justice against the decision authorizing the project in question before the Referring Court.

129. I should formally record a finding of fact on the evidence that Ms Kerins is a member of the association applicant in the main proceedings, and falls as such within the scope of Article 11(1) of the EIA Directive, being a person likely to be considered, as a resident in the area where the project at issue in the main proceedings is supposed to be carried out, and as a person who made a submission during the administrative procedure, as a member of the public concerned under Article 1(2)(e) of the EIA Directive.

Whether there is appropriate consent from Ms Kerins to act as an applicant

130. Order 15, rule 13 states *inter alia* that: "No person shall be added as a plaintiff suing without a next friend, or as the next friend of a plaintiff under any disability, without his own consent in writing thereto".

131. Thus the consent of the party who is to be added pursuant to Order 15, rule 13 is required in advance of their being joined to the proceedings.

132. Paragraph 11 of the affidavit of Orla Clarke states relating to the application to substitute Ms Kerins as an applicant: "Counsel had instructions from Ms Kerins to make this application in the alternative."

133. It follows inexorably from that that Ms Kerins has consented to act as an applicant.

134. Admittedly the court was perhaps originally given the impression that any application was subject to instructions but all of that has been clarified now.

135. Insofar as the opposing parties assert that "there is no evidence before the High Court that any members of the Dublin 8 Residents Association gave any such consent", that is incorrect and is contradicted by the affidavit of Ms Clarke.

Whether all members of an association need to consent to a substitution

136. In order to apply under Order 15, rule 13 RSC, there are no formal requirements regarding consent by a certain number of members of Dublin 8 Residents Association being necessary to apply for substitution or consent to it.

137. The notice party submits that all members must apply. This is not expressly or impliedly a requirement of the rules. In practice such a requirement would make substitution impossible or excessively difficult.

Order

138. For the foregoing reasons, it is ordered that:

(i) the affidavits of Orla Clarke and Laura Rafferty be admitted;

(ii) the reply set out in the appendix to this judgment be transmitted to the CJEU as the reply of the court to the request for information; and

(iii) the costs associated with the reply to the request for information including the costs of written submissions and draft replies be reserved.

APPENDIX

Case C-613/22, Dublin 8 Residents Association

Reply of the Referring Court to Request for information by the CJEU (in bold below)

I. In the context of the 5th to 7th questions for a preliminary ruling, the CWTC Multi-Family ICAV, the Irish Government and the Commission raised objections as to the admissibility of those questions. In order to enable the Court of Justice to address the issue of admissibility raised, the referring court is invited to provide the following information:

First, the referring court in Case C-613/22, Dublin 8 Residents Association, is requested to provide the Court of Justice with the text of Order 15, rules 2 and 13, of the Rules of the Superior Courts, in the version applicable in the main proceedings.

Following the receipt of the request for information, the referring court admitted further evidence from the parties in response to that request. The applicant's additional evidence was objected to by Ireland and the Attorney General and by the developer, but the referring court admitted it on the basis that such admission was governed by national procedural rules rather than European Union law and that such procedural rules did not prohibit further evidence. On the basis of that evidence the referring court has concluded that Order 15 rule 2 of the Rules of the Superior Courts (RSC) does not apply. Therefore this provision can be disregarded by the CJEU for the purposes of the reference and is not addressed further in this reply.

Order 15 rule 13 RSC provides as follows:

> **"No cause or matter shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the names of any parties improperly joined, whether as plaintiffs or as defendants, be struck out and that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added. No person shall be added as a plaintiff suing without a next friend, or as the next friend of a plaintiff under any disability, without his own consent in writing thereto. Every party whose name is so added as defendant shall be served with a summons or notice in manner hereinafter mentioned, or in such other manner as the Court may direct, and the proceeding as against such party shall be deemed to have begun only on the making of the order adding such party."**

Second, the referring court is requested to explain the formal and substantive criteria for the application of Order 15, rule 2 and Order 15, rule 13 of the Rules of the Superior Courts, notably by providing an answer to the following questions:

An application for substitution of a party in proceedings is in practice normally made by formal notice of motion, but this is not essential. In the absence of any statutory requirement (and here there is no such requirement), domestic Irish law allows a court to permit an application to be made without the formality of a notice of motion even if such a notice of motion is normally used in any given procedural context.

Irish law does not preclude a conditional application, such as an application for a particular relief it and to the extent that it is necessary, or an application for a particular relief on a conditional basis in the event that some other application is refused.

Order 15 rule 13 RSC can apply to judicial review subject to any more express rules on particular matters in relation to judicial review, such as the joining of notice parties which is governed by Order 84 RSC not Order 15 rule 13 RSC.

Order 15, rule 13 RSC does not provide for the substitution of parties save in place of parties improperly joined when the proceedings were commenced (*Irish Bank Resolution*

Corporation v. Lavelle **[2015] IEHC 321). The concept of "improperly" is objective. In the event that it is held that the applicant is held not to have standing then it would have been improperly joined on the facts here, even bearing in mind that that was a conscious decision made on legal advice.**

There is support in Irish domestic caselaw for the proposition that delay or time would be a factor to be considered in any application for substitution under Order 15 rule 13 RSC and thus there are substantial grounds for considering that any time problem might ultimately be held to defeat such an application, or perhaps more importantly, to defeat the merits of the case even if such a substitution were formally allowed. However the domestic legal position is confused and unclear and the caselaw is not all mutually consistent.

On the issue of standing, the referring court takes the liberty of drawing the attention of the CJEU to a typographical error in the original version of the judgment of 16th August, 2022 making the order for reference. The reference to a lack of standing under section 50B of the Planning and Development Act in paragraph 16 of that judgment should be to paragraph 50A of that Act. Nothing turns on that for the purposes of the reference. The judgment is being amended to correct that.

1) Does either Order 15, rule 2 or Order 15, rule 13, of the Rules of the Superior Courts apply in a situation where the initial applicant has no legal personality and thus does not have sufficient capacity to seek a judicial remedy?

A person with no standing can in principle apply to the court for the limited purposes of being removed from the case to be replaced by a person with standing. Alternatively the latter person can make the application. Either option is legally permissible. Here, counsel had instructions from both to make the application.

2) Have the applicant in the main proceedings, i.e. the Dublin 8 Residents Association, or one or more of its members, made an application pursuant to either Order 15, rule 2, or Order 15, rule 13, of the Rules of the Superior Courts?

Prior to the reference the applicant did make a conditional application for substitution, albeit with an apparent caveat as to instructions. However this has now been clarified and the applicant has now expressly made a conditional application. That is conditional on it being wrong about its own standing. The applicant clarified that that was not mere notice of an intention to make such a future application.

The fact that the applications were made in course of the hearing without a notice of motion is irrelevant because that is not an indispensable procedural necessity. The court can dispense with that and did so here.

It may assist the CJEU if the referring court were to indicate that if the opposing parties maintain their objection and were to persuade the CJEU not to answer the fifth to seventh questions, the referring court would be minded to propose to make a second reference in the event that the other questions are answered adversely to the applicant such that the conditional substitution application thereupon becomes a non-conditional substitution application. The referring court was not altogether minded to see this as the most convenient way of dealing with the issue but that is of course a matter for the CJEU.

3) Is such an application necessary for the referring court to issue an order under those provisions? May the referring court proceed to apply, of its own motion, either Order 15, rule 2, or Order 15, rule 13, of the Rules of the Superior Courts, in the main proceedings?

Order 15 rule 13 RSC expressly allows the court to act of its own motion. It states that the jurisdiction may be exercised "either upon or without the application of either party".

4) In order to substitute the applicant in the main proceedings, in application of either Order 15, rule 2 or Order 15, rule 13, of the Rules of the Superior Courts, is it necessary that the person which is to be substituted or added to the proceedings as an applicant consents to the substitution? Have the members of Dublin 8 Residents Association or at least one of its members, given consent in the main proceedings?

The consent of the party who is to be added pursuant to Order 15, rule 13 RSC is required in advance of their being joined to the proceedings.

Paragraph 11 of the affidavit of Orla Clarke states relating to the application to substitute Ms Kerins as an applicant that counsel had instructions from Ms Kerins to make this application in the alternative.

It follows inexorably from that that Ms Kerins has consented to act as an applicant.

This is confirmed if confirmation be necessary by the renewed application made to the referring court following the request for information.

5) In order to apply either Order 15, rule 2 or Order 15, rule 13, of the Rules of the Superior Courts in the main proceedings, is it necessary that a certain number of members of Dublin 8 Residents Association apply for substitution or consent to it?

In order to apply under Order 15, rule 13 RSC, there are no domestic Irish legal requirements regarding consent by a certain number of members of Dublin 8 Residents Association being necessary to apply for substitution or consent to it.

II. In the context of the third question for a preliminary ruling, taking into account the doubts expressed by the European Commission in points 24 et seq. of its written observations, the referring court is invited to clarify whether the participation of the applicant in the main proceedings took place on the basis of Article 6 of Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (OJ 2012 L 26, p.1) or on another legal basis.

The applicant association is in law equivalent to its members.

The members of the association that is the applicant in the main proceedings, including Ms Kerins, did have the possibility of bringing an action against the contested decision.

Ms Kerins herself made a submission on 28th January, 2021. She is listed in the inspector's report as having done so and hence it is clear that she would have had standing to challenge the decision herself.

The action in the main proceedings is the only legal action brought within the applicable time limits against the permit to carry out the project in question. Accordingly, should the action be declared inadmissible, there would be no access to justice against the decision authorising the project in question before the referring court.

Ms Kerins is a member of the association which is the applicant in the main proceedings, and falls as such within the scope of Article 11(1) of the EIA Directive, being a person likely to be considered, as a resident in the area where the project at issue in the main proceedings is supposed to be carried out, and as a person who made a submission during the administrative procedure, as a member of the public concerned under Article 1(2)(e) of the EIA Directive.

Irish law takes a restrictive approach to allowing unincorporated organisations or associations, which lack legal personality, to bring legal actions save where otherwise provided for in law. Even when they can bring such actions, this does not confer legal personality, and such associations remain in law equivalent to their members. However administrative bodies and administrative procedures do not generally impose a requirement to have legal personality such as would prevent unincorporated bodies from participation in administrative processes. Thus Irish domestic law allows unincorporated bodies to participate in administrative procedures where this is permitted by the administrative body concerned or in the administrative procedure concerned. This does not confer legal personality but it does amount to a right to participate.

Where the administrative procedures of a body, such as An Bord Pleanála, are so operated as to afford such a general right as a matter of practice, which is the situation here, any individual unincorporated body would have an enforceable legal right to be treated in an

equal manner by being allowed to participate in the process, as a matter of domestic Irish law by reference to equality before the law and fair procedures. Thus the participation of the applicant in the administrative process was not a mere factual circumstance or a situation of having participated in the procedure without having a right to do so. It was as a matter of legal right by virtue of the conjunction of the administrative practice with an enforceable right to equality of treatment.

The permissive approach to public participation in the planning process serves the purpose of giving full effect to Article 6 of Directive 2011/92 and Article 6 of the Aarhus Convention, which enshrines the right of the public concerned to participate in the process of preparing and adopting a decision approving a project having significant effects on the environment.

It therefore follows that the participation of the Dublin 8 Residents Association in the administrative process did occur on the basis of Article 6 of Directive 2011/92 and likewise the participation of Ms Kerins the proposed substitutee. Participation was also in reliance on national law giving effect to Article 6 of Directive 2011/92.

For all relevant purposes, the attention of the High Court is drawn to the provisions of Article 94 (b) and (c) of the Court's Rules of Procedure as well as to the requirements set out in paragraphs 14 to 16 of the Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (OJ 2012 C 338, p. 1).

The provisions referred to have been borne in mind at all times. The referring court avails itself of the opportunity to express its thanks to the CJEU for the facility of addressing the request for information. While the preliminary reference procedure is of course primarily a pan-European dialogue between the CJEU, relevant member states and other states, relevant institutions, and the parties, it is also a dialogue between the domestic and European court. Such a dialogue is made considerably more fruitful by an opportunity being given to the domestic court to respond to issues that have arisen in the written observations of the parties. The referring court welcomes the invocation of such a procedure in the present case which has been very helpful in clarifying its own thinking and which it is hoped will assist the CJEU. The referring court would respectfully welcome any increased use of such a procedure in future cases to enable it to contribute more meaningfully in the deliberations of the CJEU in any given case where issues not already specifically addressed by the referring court are raised in the written observations of parties before the CJEU. If the CJEU will permit the referring court to say so, the latter would respectfully associate itself with the suggestion made at paragraph 30 of European Parliament resolution of 9 July 2008 on the role of the national judge in the European judicial system, referred to by Broberg and Fenger on Preliminary References to the European Court of Justice, 3rd ed. (Oxford, Oxford UP, 2021), p. 287, n. 79, to the effect that the CJEU might "consider all possible improvements to the preliminary ruling procedure which would involve the referring judge more closely in its proceedings, including enhanced possibilities for clarifying the reference …".