[2023] IEHC 644

THE HIGH COURT
JUDICIAL REVIEW

[2020 No. 1030 JR]

IN THE MATTER OF SECTION 50 OF THE PLANNING AND DEVELOPMENT ACT 2000, AS AMENDED

BETWEEN

ECO ADVOCACY CLG

APPLICANT

AND
AN BORD PLEANÁLA

RESPONDENT

AND
KEEGAN LAND HOLDINGS LIMITED

NOTICE PARTY

AND
AN TAISCE – THE NATIONAL TRUST FOR IRELAND AND CLIENTEARTH AISBL (BY ORDER)

AMICI CURIAE

(No. 3)

JUDGMENT of Humphreys J. delivered on Wednesday the 22nd day of November, 2023

Judgment history

1. In *Eco Advocacy CLG v. An Bord Pleanála (No. 1)* [2021] IEHC 265, [2021] 5 JIC 2704 (Unreported, High Court, 27th May, 2021), I rejected the applicant's domestic law points and decided to refer certain questions relating to EU law.

2. In *Eco Advocacy CLG v. An Bord Pleanála (No. 2)* [2021] IEHC 610, [2021] 10 JIC 0406 I made the formal order for reference.

3. In its Judgment of 15 June 2023, *Eco Advocacy*, C-721/21, ECLI:EU:C:2023:477, the CJEU addressed the questions referred.

4. I am now dealing with the balance of the case in the light of those answers.

Facts

5. The action is a challenge by way of judicial review of the validity of a permission, granted by the respondent An Board Pleanála to the notice party developer, for a housing development in Trim, Co. Meath. The proposal is for the construction of 320 dwellings at Charterschool Land, Manorlands, in the vicinity of the River Boyne and River Blackwater Special Area of Conservation (SAC) and Special Protection Area (SPA).

6. A pre-planning meeting took place between the notice party and the local authority, Meath County Council, on 3rd September, 2019.

7. A first appropriate assessment (AA) screening report was prepared in November 2019.

8. On 20th December, 2019, the notice party lodged an application for a pre-planning opinion as to whether the development would constitute strategic housing development.

9. On 13th February, 2020, the developer held a pre-planning meeting with the board and on 2nd March, 2020 the board decided that the application needed further consideration or amendment.

10. On 7th April, 2020, conservation objectives for the River Boyne and River Blackwater SAC were adopted by the National Parks and Wildlife Service.

11. A second AA screening report was prepared in June 2020.

12. The formal planning application was submitted on 8th July, 2020.

13. The design provides that during the operational phase of the site, surface water run-off will be collected below ground in attenuation storage tanks. They will operate in conjunction with suitable flow control devices which will be fitted to the outlet manhole of each attenuation tank. A class 1 bypass separator will be installed on the inlet pipe to all tanks in order to treat the surface water and remove any potential contaminants prior to entering the tank and ultimately prior to discharge. The water will outfall to a stream around 100 metres south of the development, a tributary of the Boyne.

14. The Boyne itself is approximately 640 metres to the north of the development. It is part of the River Boyne and River Blackwater SPA (reference number 004232) for which a qualifying interest is the Kingfisher (Alcedo atthis) [A229].

15. The River Boyne and River Blackwater SAC (reference number 002299) is approximately 700 metres north of the site. The qualifying interests are Alkaline fens [7230], Alluvial forests with Alnus glutinosa and Fraxinus excelsior (Alno-Padion, Alnion incanae, Salicion albae) [91E0], Lampetra fluviatilis (River Lamprey) [1099], Salmo salar (Salmon) [1106] and Lutra lutra (Otter) [1355].

16. An environmental impact assessment ("EIA") screening report was prepared dated July 2020 as well as an ecological impact assessment which included a number of proposed mitigation

measures. A habitats directive screening report was also submitted which concluded that there would be no impact on Natura 2000 sites.

17. The applicant and other bodies made submissions on the application.

18. On 11th August, 2020, a submission was made on behalf of An Taisce (the National Trust for Ireland, a statutory planning consultee and the first *amicus curiae* added by order of the court) noting the potential for impact on the European sites.

19. On 31st August, 2020, the CEO of the council reported on the application.

20. Both submissions are included in exhibit KC1 at tab 5. As regards the council, a memorandum from its heritage officer was prepared entitled "Comments Screening Statement for Appropriate Assessment and EcIA for residential development Charterschool Land, Manorlands, Trim, Co. Meath" and dated 30th August, 2020.

21. It begins by dealing with terrestrial habitats and bats. Among the key points made were as follows:

(i) habitats on the site are not used by qualifying interests in the associated European site;
(ii) no assessment of the extent and cumulative impact of hedgerow removal was undertaken;
(iii) the bat survey period was late in the active season for bats and does not provide information on bat usage during the spring when maternity roosts are active;
(iv) the bat presence was dominated by Common pipistrelles followed by Soprano pipistrelles, with a limited level of other species including Leisler's bat and Myotis species;
(v) the bat assemblage was a feature of local higher importance;
(vi) a number of mitigation measures were outlined in the ecology impact assessment at para. 6.1;
(vii) these mitigation measures should be implemented under the supervision of a suitably qualified ecologist and bat specialist;
(viii) hedges and trees should not be removed during the nesting season; and
(ix) preventative measures should be detailed within the construction environment management plan to ensure that non-native invasive species are not introduced into the site. These measures should follow the national roads authority document (The Management of Noxious Weeds and Non-Native Invasive Plant Species on National Roads, 2010) and take cognisance of the Best Practice Management Guidelines produced by Invasive Species Ireland (Maguire et al 2009).

22. As regards water treatment, the author of the report noted the water being piped from an attenuation tank on the site to a stream 100 metres south of the site, being a tributary of the River Boyne. She went on to say: "in relation to the Appropriate Assessment the Board should satisfy themselves of the efficacy of the SUDS Strategy and surface water management on the site to ensure that there will be no significant effects (direct or indirect) on the qualifying interest of any Natura 2000 sites (European sites), either individually or in combination with any other plans or projects".

23. The Chief Executive's report is dated 31st August, 2020 and is issued under s. 8(5)(a) of the Planning and Development (Housing) and Residential Tenancies Act 2016. Section 7.13 of the report, as one might normally expect, repeats the heritage officer's concerns *verbatim*.

24. Turning to the submission of An Taisce, a submission dated 11th August, 2020 prepared by Ms Phoebe Duvall, Planning and Environmental Policy Officer, noted the potential for impact on the spawning habitat for trout and potential impact on European sites.

25. The submission stated as follows: "A stream runs approximately 100m from the site boundary and flows into the River Boyne. The Boyne is not only an SAC- and SPA-designated site as mentioned previously, but also supplies the drinking water for Trim. An Taisce has concerns that the water quality in this stream could be degraded as a result [of] the proposed works – the intention as per the plans is to have storm drains sending surface water to the stream that would be partially filtered in attenuation tanks. We note that this stream is likely to be a spawning ground for trout and submit that the potential ecological deterioration of the stream was not adequately considered in the Ecological Impact Assessment". It is also worth specifically noting that An Taisce's comment that the filtration was only "partial" does not seem to have been specifically resolved subsequently.

26. On 6th October, 2020, the board's inspector reported recommending that permission be granted and concluding, following the EIA and AA screening, that a full assessment was not required.

27. The template used by the inspector in annex A of her report uses a format for EIA screening that differs in material respects from annex III of the EIA directive.

28. Turning then to the way in which the submissions from An Taisce and the council were addressed by the inspector, section 12 of her report deals with appropriate assessment. Paragraph 12.1 notes the screening submission. Paragraph 12.2 describes the development and para. 12.3

notes the proximity of European sites and qualifying interests. Paragraphs 12.4 and 12.5 describe the conservation objectives of the European sites. Paragraph 12.6 notes the location of the Kingfisher along the Boyne and Blackwater system and says that no habitats associated with this species are identified on the site. It contends that the design of the surface water treatment takes account of the scale and nature of the proposed development and says that a road be constructed operated "in accordance with standard environmental features associated with a residential development". It asserts that it would not have the potential to have a significant impact on the water quality and hence qualifying interests of the SAC and SPA.

29. Reference is made to the An Taisce submission, following which the inspector comments: "[t]rout is not listed as a qualifying interest for the River Boyne and River Blackwater SAC. I do not consider there is potential for any impact on the River Boyne through any hydrological connections via surface, ground and waste water pathway and therefore no potential for any significant adverse impact from the proposed development, on the qualifying criteria of River Boyne and River Blackwater SAC."

30. The conclusion of no impact is repeated at para. 12.7 in relation to both European sites and it is concluded at para. 12.8 that appropriate assessment is not required following the screening exercise.

31. In the report, there are a variety of conditions proposed, for example ultimately condition 14 which requires the SUDS system to be agreed with the council. The submissions were not all individually addressed.

32. On 22nd October, 2020, the board gave a direction to grant permission generally in accordance with the inspector's recommendation and on 27th October, 2020 permission was formally granted by decision of the board under the strategic housing development procedure.

33. The board didn't spell out in what documents exactly contained the reasoning for the purposes of EIA and AA. It seems to have been the intention that the reasoning is contained in the inspector's report, appendix A of that document, and the reports submitted by the developer where referred to by the inspector, which presumably was intended to be a form of adoption of that material.

Procedural history

34. On 14th January, 2021, I granted leave in the present proceedings, the primary relief sought being an order of *certiorari* directed to the decision of 27th October, 2020. Statements of opposition were filed on 5th February, 2021.

35. The matter was heard on 23rd to 25th February, 2021, and at the conclusion of the hearing I permitted the applicant to put in a further formal affidavit exhibiting an additional document (the statement of grounds in a separate but relevant set of proceedings) subject to further follow-up written submissions and replies.

36. Following further submissions I reserved judgment and in the No. 1 judgment, I rejected certain preliminary objections to the challenge and then rejected the challenge insofar as it was based on domestic law. I also rejected certain EU law points. I decided in principle to refer the remaining EU law questions to the CJEU under art. 267 TFEU.

37. When the matter was listed for mention on 12th July, 2021 the solicitor for An Taisce and ClientEarth indicated a willingness to be heard as *amici curiae*. On the applicant's application, I joined those parties as *amici* on 27th July, 2021. The *amici* did get involved in the reference, although they have not resurfaced after the matter has been resumed by the referring court following the CJEU judgment.

38. As noted above, in the No. 2 judgment I made the formal order for reference. That was in the context that only a limited amount of the applicant's case remained live at that point.

39. Following the judgment of the CJEU, written submissions were delivered and the balance of the case was heard on Friday 17th November, 2023 when judgment was reserved.

The state of the applicant's case at the time of the reference

40. In the No. 1 judgment, having rejected the domestic law points, I identified the following issues of EU law:

(i) whether mitigation measures should be disregarded at the EIA screening stage - I decided that that point is *acte clair* against the applicant;

(ii) lack of discussion of the issues in EIA screening – I decided that this point was not adequately pleaded but I proposed to refer a question to the CJEU as to whether it should be considered notwithstanding defective pleadings;

(iii) relevance of the EIA directive to the pre-planning stage – I held that there was a lack of specific pleading that can't be cured by any proposed reference;

(iv) whether the competent authority improperly took account of mitigation measures under the habitats directive – this point was held to be pleaded and was referred;

(v) whether there is a requirement to expressly respond to all expert points made during the AA screening process – this point was held to be pleaded and was referred; and

(vi) identification of precise reasoning of competent authority – I decided that this point was not adequately pleaded but that was addressed by the question to the CJEU as to whether it should be considered notwithstanding defective pleadings.

41. So points (i) and (iv) were rejected at that stage, leaving the remaining four possible issues as being live ones for further consideration after the reference.

42. The questions referred were:

"(1) Does the general principle of the primacy of EU law and/or of cooperation in good faith have the effect that, either generally or in the specific context of environmental law, where a party brings proceedings challenging the validity of an administrative measure by reference, expressly or impliedly, to a particular instrument of EU law, but does not specify which provisions of the instrument have been infringed, or by reference to which precise interpretation, the domestic court before which proceedings are brought must, or may, examine the complaint, notwithstanding any rule of domestic procedure requiring the specific breaches concerned to be set out in the party's written pleadings?

(2) If the answer to the first question is "Yes", [does Article] 4(2), (3), (4) and/or (5) [of] and/or Annex III [to] … Directive 2011/92 and/or the directive read in the light of the principle of legal certainty and good administration under [Article] 41 of the Charter of Fundamental Rights of the European Union have the consequence that, where a competent authority decides not to subject a proposal for development consent to the process of environmental impact assessment, there should be an express, discrete and/or specific statement as to what documents exactly set out the reasons of the competent authority?

(3) If the answer to the first question is "Yes", [does Article] 4(2), (3), (4) and/or (5) [of] and/or Annex III [to] … Directive 2011/92 and/or the directive read in the light of the principle of legal certainty and good administration under [Article] 41 of the Charter of Fundamental Rights of the European Union have the consequence that, where a competent authority decides not to subject a proposal for development consent to the process of environmental impact assessment, there is an obligation to expressly set out consideration of all specific headings and sub-headings in Annex III [to Directive 2011/92], in so far as those headings and sub-headings are potentially relevant to the development?

(4) [Must Article] 6(3) of Directive 92/43 … be interpreted as meaning that, in the application of the principle that in order to determine whether it is necessary to carry out, subsequently, an appropriate assessment of the implications, for a site concerned, of a plan or project, it is not appropriate, at the screening stage, to take account of the measures intended to avoid or reduce the harmful effects of the plan or project on that site, the competent authority of a Member State is entitled [not] to take account of features of the plan or project involving the removal of contaminants that may have the effect of reducing harmful effects on the European site solely on the grounds that those features are not intended as mitigation measures even if they have that effect, and that they would have been incorporated in the design as standard features irrespective of any effect on the European site concerned?

(5) [Must Article] 6(3) of Directive 92/43 … be interpreted as meaning that, where the competent authority of a Member State is satisfied notwithstanding the questions or concerns expressed by expert bodies in holding at the screening stage that no appropriate assessment is required, the authority must give an explicit and detailed statement of reasons capable of dispelling all reasonable scientific doubt concerning the effects of the works envisaged on the European site concerned, and that expressly and individually removes each of the doubts raised in that regard during the public participation process?

(6) If the answer to the first question is "Yes", [must Article] 6(3) of [Directive] 92/43 and/or the directive read in the light of the principle of legal certainty and good administration under [Article] 41 of the Charter of Fundamental Rights of the European Union has the consequence that, where a competent authority decides not to subject a proposal for development consent to the process of appropriate assessment, there should be an express, discrete and/or specific statement as to what documents exactly set out the reason of the competent authority?"

Judgment of the CJEU

43. In its judgment, the CJEU (Second Chamber) ruled as follows:

"1. EU law must be interpreted as not precluding a national procedural rule according to which, first, an application for judicial review, both under national law and under provisions of EU law such as Article 4(2) to (5) of, and Annex III to, 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, as amended by Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014, or Article 6(3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and

of wild fauna and flora, must state precisely each ground, giving particulars where appropriate and identify in respect of each ground the facts or matters relied upon as supporting that ground and, second, an applicant may not rely upon any grounds or any relief sought at the hearing other than those set out in that statement.

2. Article 6(3) of Directive 92/43 must be interpreted as meaning that:

although, where a competent authority decides to authorise a plan or project likely to have a significant effect on a site protected under that directive without requiring an appropriate assessment within the meaning of that provision, that authority is not required to respond, in the statement of reasons for its decision, to all the points of law and of fact raised during the administrative procedure, it must nevertheless state to the requisite standard the reasons why it was able, prior to the granting of such authorisation, to achieve certainty, notwithstanding any opinions to the contrary and any reasonable doubts expressed therein, that there was no reasonable scientific doubt as to the possibility that that project would significantly affect that site.

3. Article 6(3) of Directive 92/43 must be interpreted as meaning that:

in order to determine whether it is necessary to carry out an appropriate assessment of the implications of a plan or project for a site, account may be taken of the features of that plan or project which involve the removal of contaminants and which therefore may have the effect of reducing the harmful effects of the plan or project on that site, where those features have been incorporated into that plan or project as standard features, inherent in such a plan or project, irrespective of any effect on the site."

Pleading requirements

44. Insofar as the applicant tries to re-open the No. 1 judgment regarding the adequacy of its pleadings, what the notice party calls "groundhog day", it might be helpful to set the following context regarding the pleading rules, particularly those applying in EU-heavy areas such as planning law, as here.

45. The general rule in relation to pleadings at its most basic is that as was stated by Fitzgerald J. in *Mahon v. Celbridge Spinning Company Limited* [1967] I.R. 1 at p. 3 (and cited by Clarke J. in *Mooreview Developments Ltd. & Ors v. First Active Plc & Anor* [2005] IEHC 329, [2009] 3 JIC 0606 at para. 7.2):

> "The whole purpose of pleading, be it a statement of claim, defence or reply, is to define the issues between the parties, to confine the evidence at the trial to the matters relevant to those issues, and to ensure that the trial may proceed to judgment without any party being taken at a disadvantage by the introduction of matters not fairly to be ascertained from the pleadings. In other words a party should know in advance, in broad outline, the case he will have to meet at trial."

46. It's not clear to me that the applicant's pleadings would have complied in their entirety even with that general principle, but there is a more specific principle applying to judicial review. Order 84 r. 20(2) and (3) provide:

> (2) an application for such leave shall be made by motion *ex parte* grounded upon:
>
> (a) a notice in Form No 13 in Appendix T containing:
>
> (i) the name, address and description of the applicant,
>
> (ii) a statement of each relief sought and of the particular grounds upon which each such relief is sought,
>
> (iii) where any interim relief is sought, a statement of the orders sought by way of interim relief and a statement of the particular grounds upon which each such order is sought,
>
> (iv) the name and registered place of business of the applicant's solicitors (if any), and
>
> (v) the applicant's address for service; and
>
> (b) an affidavit, in Form No 14 in Appendix T, which verifies the facts relied on.
>
> Such affidavit shall be entitled:
>
> THE HIGH COURT
>
> JUDICIAL REVIEW
>
> BETWEEN A.B.... APPLICANT
>
> AND
>
> C.D.... RESPONDENT
>
> (3) It shall not be sufficient for an applicant to give as any of his grounds for the purposes of paragraphs (ii) or (iii) of sub-rule (2)(a) an assertion in general terms of the ground concerned, but the applicant should state precisely each such ground, giving particulars where appropriate, and identify in respect of each ground the facts or matters relied upon as supporting that ground.

47. In *Kelly v. An Bord Pleanála* [2019] IEHC 84, [2019] 2 JIC 0804 Barniville J. said of that provision as follows:

"142. This provision was inserted by way of amendment to O.84 by the Rules of the Superior Courts (Judicial Review) 2011 (SI no. 691 of 2011) and gave effect to the views expressed by Murray C.J. in the Supreme Court in *AP v. Director of Public Prosecutions* [2011] 1 IR 729 ("AP"). In that case, Murray C.J. stated: 'In the interests of the good administration of justice it is essential that a party applying for relief by way of judicial review sets out clearly and precisely each and every ground upon which such relief is sought. The same applies to the various reliefs sought'. (per Murray C.J) at para. 5, p. 732).

143. Murray C.J. continued:

'6. It is not uncommon in many such applications that such grounds, and in particular the ultimate ground upon which leave is sought or expressed in the most general terms as to the alleged frailties of the decision or other act being impugned, rather in the nature of a rolled up plea and alluding generally to want of legality, fairness or constitutionality. This can prove to be quite an unsatisfactory basis on which to seek leave or for leave to be granted, particularly when such a ground is invariably accompanied by a list of more specific grounds.

7. Moreover, if, in the course of the hearing of an application for leave, it emerges that a ground or relief sought can or ought to be stated with greater clarity and precision then it is desirable that the order of the High Court granting leave, if leave is granted, specify the ground or relief in such terms.

8. There has also been a tendency in some cases, at a hearing of the judicial review proceedings on the merits, for new arguments to emerge in those of the applicant that in reality either go well beyond the scope of the particular ground or grounds upon which the leave was granted or simply raise new grounds.

9. The court of trial of course may, in the particular circumstances of the case, permit these matters to be argued, especially if the respondents consent, but in those circumstances the applicant such seek an order permitting any extended or new ground to be argued. This would avoid ambiguity if not confusion in an appeal as to the grounds that were before the High Court. The respondents, if they object to any matter being argued at such a hearing because if goes beyond the scope of the grounds on which leave was granted, should raise the matter and make their objection clear…' (per Murray C.J. at 732).

144. The Board and Aldi rely on O. 84, r. 20(3) RSC and the decision in AP in support of their objection. They further rely on the decision of the High Court (Haughton J.) in Alen Buckley, where the court ruled out a number of arguments on the basis that they were not pleaded and, therefore, fell outside the scope of the pleaded case. In the course of so ruling, Haughton J. stated: 'The rules of pleading governing judicial review are quite clear and require applicants to state specifically each ground advanced and to particularise matters as appropriate. Linking new matters back to generally pleaded grounds is not permissible, nor is pointing to information which was before the Board. The court is concerned with the contents of the documentation before the Board only in the context of arguments which have been correctly pleaded'. (per. Haughton J. at para. 15). Haughton J. continued 'Where new arguments or evidence arises, an application should be made to amend the pleadings so as to include such arguments or evidence…' (para. 16)."

48. In the particular circumstances of that case the court did not see the pleading issue as precluding the point made, but that was where there was no prejudice and where the point had been dealt with by opposing parties on affidavit well in advance of the trial, and thus we are well beyond that point now.

49. In *Sweetman v. An Bord Pleanála* [2020] IEHC 39, [2020] 1 JIC 3104 ("Sweetman XV"), McDonald J. said as follows at para 103:

"103. In my view, the case against the State respondents was never properly pleaded in Part E of the statement of grounds. As Costello J. observed in *Alen-Buckley* [[2017] IEHC 311, [2017] 5 JIC 1211] at para. 43 (quoted above), an applicant for judicial review is required to advance the case he or she wishes to make in full in the statement of grounds. It is not sufficient to plead a case of alleged failure to transpose an EU Directive without properly setting out full particulars of the basis on which it is contended that a specific provision of Irish law fails to comply with a specific obligation imposed by the Directive concerned. An allegation of a failure to transpose an obligation of EU law is a serious and significant allegation and accordingly it is particularly important, in such a case, that the requirements of O. 84 r. 20 (3) should be observed. It is unacceptable that an applicant should make an allegation of failure to transpose purely on the basis that the applicant apprehends that the relevant competent authority (in this case the Board) may be in a position to demonstrate, in an area of activity ultimately governed by European law that it has acted fully in compliance with its obligations under the relevant Irish law implementing

the EU law measure in question. That is precisely the form of procedure which was condemned by Costello J. in *Alen-Buckley*."

50. Barniville J. said as follows in *Rushe v. An Bord Pleanála* [2020] IEHC 122, [2020] 3 JIC 0502:

"111. McDonald J. also had cause to consider the requirements of O. 84, r. 20(3) and the principles in AP in *Sweetman/IGP Solar* [[2020] IEHC 39, [2020] 1 JIC 3104]. He concluded that in that case the applicant had failed properly to plead his case against the State respondents in relation to the alleged failure by the State to properly transpose the EIA Directive. McDonald J. held that the case against the State respondents had not been properly pleaded in the statement of grounds. In particular, he held that it was not sufficient to plead a case of alleged failure to transpose an EU Directive without properly setting out full particulars of the basis on which it was being contended that a particular provision of Irish law failed to comply with a specific obligation imposed by the EU Directive concerned. He stressed that it was particularly important, in the case of an allegation of a failure properly to transpire an obligation under EU law, that the requirements of O. 84, r. 20(3) be observed. McDonald J. dismissed the applicant's claim against the State respondents on the ground that the statement of grounds failed properly to plead a case against those respondents as required by Order 84, rule 20(3).

112. The obligation upon an applicant (and indeed also upon a respondent who wishes to oppose an application for judicial review) to plead its case with particularity, as described in the authorities just referred to, applies with even greater force in the case of a planning judicial review having regard to the requirements of s. 50A(5) of the 2000 Act. That subsection provides that if a court grants leave to apply for judicial review in respect of a planning decision, 'no grounds shall be relied upon in the application for judicial review' under O. 84 RSC 'other than those determined by the court to be substantial' under s. 50A(3)(a), on the application for leave. An applicant is, therefore, under an even greater obligation than in ordinary judicial review cases, by reason of this additional statutory provision, to ensure that any ground relied upon by it at the hearing is one which the court granting leave to apply for judicial review has determined to be substantial. That does not necessarily preclude an applicant from seeking to amend its statement of grounds, either before or at the hearing, subject, of course, to the time limits and provision for an extension of time provided for in ss. 50(7) and 50(8) of the 2000 Act, and the attitude of the opposing party or parties and the court.

113. In my view, these pleading obligations imposed upon an applicant in planning judicial review proceedings are particularly important where those cases involve issues of very considerable complexity and give rise to issues under EU Directives, such as the Habitats Directive and the EIA Directive. It is especially important in those types of cases, involving such complex issues, that the applicant's case is clearly and precisely pleaded in order that the parties opposing the application (whether they be the respondents or the notice parties or both) are clearly aware prior to the hearing of the application for judicial review of what precisely the case is. Such precision is also required, as Murray C.J. pointed out in *A.P. v. D.P.P.* [2011] IESC 2, [2011] 2 I.L.R.M. 100, 1 I.R. 729, [2011] 1 JIC 2501], to ensure that there is no doubt, ambiguity or confusion as to what the applicant's case is before the High Court, in the context of any appeal from the judgment of that Court to the Court of Appeal or the Supreme Court. It is not appropriate that a case brought on a particular basis, in which reliefs are sought on stated grounds is, when the case comes on for hearing, transformed into one in which different or additional grounds are sought to be advanced in support of the reliefs sought or new and additional reliefs are sought. Such a course would be unfair on the parties opposing the application for judicial review and on the court."

51. It isn't procedurally appropriate for the applicant now to revisit findings already made by the court as to the adequacy of the pleadings (in the absence of a basis for doing so that is a lot more solid than what the applicant has come up with here).

52. The applicant's essential case for re-opening the decision on pleadings reflected in No. 1 judgment is that:

(i) the standard of pleading applied in the No. 1 judgment was that the applicant was required to plead every provision and article of national or EU law relied on, and that for this purpose "it doesn't matter how clearly stated the grounds are";

(ii) no specific domestic rule was identified in the No. 1 judgment, and reference is made to the comments of the Commission to that effect;

(iii) there is no such requirement, as said to have been conceded by the Attorney General in the CJEU;

(iv) in any event there was no prejudice to the other parties;

(v) the opposition papers made pleading objections to various points but not regarding the EIA screening;
(vi) therefore any findings that points were not pleaded based on such a standard of particularisation are not correct and should be revisited; and
(vii) if contrary to the foregoing the court considers that the matter is not pleaded, the applicant is seeking an amendment to particularise the points concerned.

53. While I can understand where the applicant is coming from, this submission involves some misconceptions.

54. Firstly it's true that I didn't spell out narratively the terms of O. 84 r. 20 in the reference but rightly or wrongly I didn't see that as in dispute and nor did I think it was ultimately a matter for the CJEU. But the fact that I didn't spell that out didn't mean that that wasn't what I was referring to. In case the applicant needs this explained further in metaphorical words of one syllable – O. 84 r. 20 *was* what I was referring to, and all trial participants with the possible exception of the applicant understood that, as did the CJEU.

55. Secondly I wasn't intending to break new ground or create new law in referring to pleading requirements. I was referring to the existing pleading requirements which are reflected in the rules and in the caselaw set out above.

56. Thirdly the lack of prejudice to other parties is a factor in an amendment application (if we were to ever get to that), but it doesn't logically get over the problem of whether a point is properly pleaded in the first instance.

57. As regards the way in which the pleading point is made in the opposition papers, this brings out an interesting point in relation to how such objections can be raised. There are in broad terms two types of pleading objection:

(i) objections to points raised on the applicant's pleadings as being insufficiently specific; and
(ii) objections to additional points raised by the applicant in written legal submissions or oral argument on the basis that they were not adequately grounded in the pleadings.

58. An opposing party can be expected to plead type-(i) objections in a statement of opposition. But such a party can't be expected to anticipate type-(ii) objections. Such objections only arise if and when the point materialises in written or oral submissions. So that's the rational justification as to why the notice party's papers didn't object to the EIA screening plea. The reason is that the applicant only introduced the highly developed, technical and specific points under this heading at the hearing itself.

59. The critical point is that O. 84 r. 20(3) RSC provides that "[i]t shall not be sufficient for an applicant to give as any of his grounds … an assertion in general terms of the ground concerned, but the applicant should state precisely each such ground, giving particulars where appropriate, and identify in respect of each ground the facts or matters relied upon as supporting that ground."

60. What I said in the No. 1 judgment was as follows.

61. At para. 26 I identified that the notice party had made a pleading objection in its statement of opposition. That was filed on 5th February, 2021. That puts in context the applicant's belated demand for an amendment at the hearing on 17th November, 2023, albeit that was semi-signalled shortly beforehand in submissions.

62. The objection was made in relation to pre-planning procedures at para. 8 of the statement of opposition. At para. 27 it is said that the plea of scant consideration of heritage and ecology issues alleged in the statement of grounds has not been particularised. At para. 69 of the submissions of the notice party, complaint is made that there are no particulars as to inadequacies in the screening procedure. At para. 75 it is alleged that the plea of unreasonableness is not particularised and should also be dismissed. What I decided in that regard was:

(i) it was not necessary to determine the pleading objection regarding pre-planning procedures because that point had the implication that the legislation was invalid, and since challenging the validity of an enactment requires a specific relief and also the joinder of Ireland and the Attorney General as respondents, which was not done, the point didn't get off the ground;
(ii) the pleading objection regarding reasonableness didn't strictly have to be decided but I was minded to reject it- an applicant can't really be expected demonstrate a negative on the pleadings, by for example going through every piece of evidence *seriatim* and saying in each case that this doesn't support the conclusion;
(iii) insofar as the applicant referred to "EU law" generically rather than the EIA directive as grounding its argument on EIA screening, I did not globally reject the applicant's argument as unpleaded but rather construed the reference as being in effect to that directive (para. 48);

(iv) the essential complaints about the AA screening procedure were adequately pleaded and the objection was rejected in that regard (paras. 57 to 59), which is what enabled the reference to Luxembourg on the issues arising from those grounds – I held that the opposing cry of "particularise that" has to stop when it is acceptably clear what the point being made is (see *Atlantic Diamond Ltd. v. An Bord Pleanála* [2021] IEHC 322, [2021] 5 JIC 1403 (Unreported, High Court, 14th May, 2021)), and the context of the reference in the pleadings to "submissions" (which the notice party said it didn't understand) clearly referred to submissions relevant to the habitats directive;

(v) other complaints about EIA screening were not adequately pleaded (as I will explain further below);

(vi) as regards a new point raised in submissions (para. 14) but not on the pleadings, that the decision did not address compliance with the local area plan and county development plan, the objection to this point was upheld (para. 33 of the No. 1 judgment);

(vii) a complaint made in submissions of breach of s. 35 of the Planning and Development Act 2000 wasn't adequately grounded in paras. 12 and 13 of the statement of grounds which make the different point that the inspector's treatment of the issue didn't engage with the submissions made (para. 37 of the judgment); and

(viii) a complaint made in oral submissions about the precise reasoning of the competent authority in the habitats context in terms of what documents were being referred to was not grounded in the pleadings so was referred subject to the prior question about any impact of EU law on the pleadings (para. 86 of the No. 1 judgment).

63. In terms of more detail regarding EIA screening (since the applicant now zeroes in on that), the applicant's pleadings set out the complaint that "In terms of EIA, no or no adequate screening for EIA was undertaken by the Board. There is no record of the matters considered or the basis for the decision" (para. 14) ... "This is totally unsatisfactory and is contrary to national and EU law. It amounts to nothing more than a recommendation, and it recites a conclusion of no likelihood of significant effects. It further recites entirely generic matters and gives no explanation of their significant. No reasons or considerations are given. None of the matters of concern raised about the environment are considered. This is a highly sensitive site both ecologically and in terms of cultural heritage. No consideration of these matters is apparent. Specific issues raised in relation to ecology such as preservation of hedgerows, loss of habitat, impacts on archaeology, sensitive cultural structures, traffic, bats etc. are nowhere considered. Instead, a bald conclusion is reached. This is a sizeable development greater than 50% of the mandatory threshold in a sensitive area. There are significant effects and an EIA is required. It is not undertaken, and no proper screening is anywhere apparent" (para. 15).

64. The applicant then sought to make the following different or in any event much more specific and technical points at the hearing:

(i) whether the EIA directive and/or the principle of legal certainty and good administration under art. 41 of the Charter of Fundamental Rights of the European Union has the consequence that there should be an express statement as to what documents exactly set out the reason of the competent authority; and

(ii) whether there is an obligation to expressly address all specific headings and subheadings in annex III of the EIA directive, a question that is particularly relevant in circumstances where, as here, the template used by the inspector in annex A of her report uses a format for the EIA screening that differs in material respects from annex III.

65. My decision on this was that there wasn't an adequate basis in the pleadings for the two specific points referred to above. Therefore they must fail *in limine*, unless there is an EU law principle enabling the court to flesh out the bare bones of an applicant's pleadings (which we now know there isn't).

66. As the board validly submitted in the present hearing, *there is a reason why we have pleading requirements*. The applicant never made any reference to Annex III for example in the pleadings and nor is such an argument otherwise acceptably clear by necessary or even probable implication. If the applicant had pleaded these points, the board says it would have put in an affidavit explaining the decision-making process by reference to following the Commission guidance which sets out that body's interpretation of the correct format and template, which is why the inspector prepared a report in the format concerned, or at least that's the implication of what the board says it would have said on affidavit if this point had been properly pleaded.

67. Overall this certainly wasn't a blanket rejection of the applicant's pleadings. It was implementing conventional pleading rules with a scalpel, not a bloodaxe. The critical issue was as stated at para. 31 that if points that were made at the oral hearing are not properly grounded in the

pleadings, it is not appropriate to grant relief on the basis of such points, leaving aside any putative countervailing principle of EU law (and we now know that there is no such principle).

68. The question about pleadings actually referred was:

> "Does the general principle of the primacy of EU law and/or of co-operation in good faith have the effect that, either generally, or in the specific context of environmental law, where a party brings proceedings challenging the validity of an administrative measure by reference, expressly or impliedly, to a particular instrument of EU law, but does not specify which provisions of the instrument have been infringed, or by reference to which precise interpretation, the domestic court before which proceedings are brought must, or may, examine the complaint, notwithstanding any rule of domestic procedure requiring the specific breaches concerned to be set out in the party's written pleadings."

69. The applicant here invokes the familiar would-be-appellant's move of exaggerating what was decided for the purpose of crying blue murder and claiming unprecedented novelty and fundamental error on the part of the trial judge. This fallacy arises where the loser can't knock down what was actually decided, so has to create a straw man for the purposes of creating and then winning a hypothetical appeal. The basic problem for the applicant is that I didn't decide that a pleading has to invoke every specific provision and article of any law relied on. Indeed one can see from the way in which the applicant's pleadings were dealt with overall, as set out above that the applicant got quite a bit of latitude in terms of what arguments I considered were properly within the case. The notice party's objections were rejected in those respects. What I said in the wording of the relevant referred question was:

(i) there was a rule of domestic procedure "requiring the specific breaches concerned to be set out in the party's written pleadings" – that was intended to be, and is, simply a reasonably accurate summary paraphrase of O. 84 r. 20(3) RSC; and

(ii) the applicant did not, in its pleadings, "specify which provisions of the instrument have been infringed, or by reference to which precise interpretation". That was just a statement of fact as regards the present case. It was a description of the pleadings, not a normative proposition laying down some new rule of procedure. It does not imply some higher content in the domestic rules above and beyond the wording of O. 84 r. 20(3). More specifically, that wording does not refer exclusively to specifying the provisions of law infringed – the word "or" envisages a situation where pleadings would set out specific interpretations even if the provisions were not specified. But if pleadings don't set out either particular provisions or particular interpretations and are just wholly general, giving no reasonable notice of what the point made actually is, one would normally be into a situation where the compatibility of the pleadings with O. 84 r. 20(3) would be very much in question.

70. The Grundnorm of error for the applicant, the parent misconception from which the rest of the elaborate superstructure of fallacious argument springs, is that there isn't any rule that an applicant has to identify every specific provision of law or article or a directive relied on. And I didn't say there was. The rule is that an applicant has to set out the specific breaches of law concerned in its pleadings. Best practice is of course to do so by reference to the specific provisions or articles or domestic or EU law. But failing that, if the applicant specifies the actual point (what I called the "specific interpretation") in a way that allows the issue to be reasonably identified in advance by the opposing parties, giving them a chance to respond, then the pleading is acceptably clear and complies with O. 84 r. 20(3) RSC. That's the standard I adopted. If I had adopted the fictitious standard confected by the applicant now for the sole purpose of taking its failed points further, then I wouldn't have held that *any* of the applicant's points were properly pleaded. Because whatever else you might say about the statement of grounds, it certainly doesn't specify every provision or article of domestic or EU law on which reliance was placed in argument.

71. Overall, I wasn't trying to create any significant new law on pleadings either in the No. 1 judgment, the No. 2 judgment, or now. I was applying to the pleadings in the present case the clear established pleadings rules in Irish law which are reflected in a solid body of existing jurisprudence. So there just isn't any basis to re-open anything. The applicant's interpretation of the No. 1 and No. 2 judgments is simply a complete mischaracterisation.

72. Turning to the applicant's alternative escape hatch of an amendment, the problem with that is that there is massive prejudice to the developer in introducing a new substantive EU law point after a reference comes back from Luxembourg. The whole point of the reference procedure is that the court can take an overview of what EU law points are necessary to decide the case, put those points together and send them to the CJEU subject to the court being satisfied that it was appropriate to do so. To allow any new EU law point to be introduced now would not merely require a further hearing on that point post-amendment, but would potentially raise the possibility of a further reference either from the High Court or either appellate court on that new issue (which a final appellate court would be *obliged* to make unless the point was *acte clair*). Irrespective of the

outcome, that would completely kill off the validity of the permission under challenge because there is no way that such a reference would be completed within the remaining lifespan of that permission. Even leaving aside the problem that there is no proper application before the court, that no draft amended statement of grounds and verifying affidavit has been produced, that there is no evidential basis for an explanation for not having made the point originally, and that there was extraordinary delay of 2 years and 9 months in suggesting an amendment since the objection was pleaded in opposition papers, the insuperable difficulty is that such a potential amendment fails to meet the test of not causing irremediable prejudice to the notice party. Apart from mere delay jeopardising the permission itself, I am also informed that the notice party would also miss out on exemptions from the development levy if construction is not commenced by April, 2024.

Disposition of the balance of the case

73. Insofar as the applicant now seeks to introduce new unpleaded points (such as reliance on matters related to the Judgment of 29 June 2023, *Commission v. Ireland*, C-444/21, ECLI:EU:C:2023:524), that is procedurally improper. Insofar as the applicant quibbles with matters on which the court has already given judgment (such as whether the points brought up in oral argument were properly grounded in the pleadings), that is also procedurally improper and unfounded for the reasons explained. Insofar as concerns the four live grounds which awaited determination in the light of the judgment of the CJEU, those points need to be disposed of as follows:

(i) lack of discussion of the issues in EIA screening – I decided that this point was not adequately pleaded, and that finding is not disturbed by the CJEU judgment;

(ii) whether the competent authority improperly took account of mitigation measures under the habitats directive – there is simply nothing in this point following the judgment of the CJEU; the applicant misunderstands and mischaracterises the CJEU judgment, but there is literally nothing I can do to prevent parties arguing that black is white if that's what they want to do;

(iii) whether there is a requirement to expressly respond to all expert points made during the AA screening process – the CJEU has also clarified that there is no obligation to respond to all points, but just to state to the requisite standard the reasons why it was able, prior to the granting of such authorisation, to achieve certainty, notwithstanding any opinions to the contrary and any reasonable doubts expressed therein, that there was no reasonable scientific doubt as to the possibility that that project would significantly affect that site; and given that the No. 1 judgment specifically holds that the requisite standard in national law was met (paras. 40 and 41), and that the CJEU hasn't added a heightened level of reasons to that, this point must therefore fail; and

(iv) identification of precise reasoning of competent authority for AA purposes – I decided that this point was not adequately pleaded, and that finding is not disturbed by the CJEU judgment either.

74. When one has disposed of the pleaded grounds, that's the end of the case at High Court level. There isn't any residual category of available point which allows an applicant to keep talking.

Procedure from here

75. While the developer wasn't particularly happy about my making the reference in the first place, that is a right enjoyed by every court or tribunal in the European Union. I go back to the point that if a reference is worth considering it is better to do it at first instance rather than add a further layer of appellate litigation before the inevitable request to Luxembourg. Such a procedure saves time overall. While I am always interested in people's views, one has to be resigned to the inevitability that one can't please everyone. I did consider at the time that a reference would probably be determinative, and that is certainly how I see matters now. That is normally the case anyway when something comes back from Europe. Losers can sometimes go through the motions of a sputtering attempt to resuscitate points that arrive back from Luxembourg in a body bag, but such an exercise doesn't generally take them very long or get them very far.

76. Insofar as the developer complains about delay overall, it will have to take most of that up with the EU rather than me. I gave the judgment for reference on 4th October, 2021. Thereafter, preparing the papers to Luxembourg required the parties to co-operate and formal transmission was done at an administrative level in November, 2021. The processing of the case was a matter for the CJEU, which delivered judgment on 15th June, 2023. The applicant made submissions on foot of that dated 3rd July, 2023. The matter came back before me on 24th July, 2023, and was adjourned for opposing submissions. The notice party's submissions are undated but seem to have been prepared around 28th September, 2023. When the matter came back before me on 2nd October, 2023, I fixed a proximate hearing date in November, 2023 despite immense difficulties with the parties' diaries. So overall I think I can't be held overly responsible for the passage of time between

4th October, 2021 and 2nd October, 2023, other than perhaps as seen by a party who would object to a reference at all. But I have dealt with that above.

77. The one thing I totally agree with the developer on is that a party should not be allowed to win the litigation by default by simply bringing the proceedings or delaying their resolution. Likewise, if the grant of a stay would actually determine the proceedings overall, or deprive the action of benefit as seen by one party or another, the court should think long and hard before doing so. That is a point I tried to make in *Agrama v. Minister for Justice* [2016] IEHC 55, [2016] 2 JIC 0802, upheld in *Agrama v. Minister for Justice* [2016] IECA 72, [2016] 2 JIC 2204 (Birmingham J.). It is also a point relevant to the rejection of attempts by developers to stay impugned development plans, if such a stay could create a planning outcome pending the determination of the proceedings that would nullify the intended zoning. The significance of that principle here is that the permission granted on 27th October, 2020 has a 5-year validity, and over 60% of the time for implementation of that has now expired due to the litigation. Significant further delay would compromise the prospect of implementation and jeopardise the developer's entitlement to exemption from development levies. That isn't something that could even theoretically be rectified monetarily by an order against the applicant, due to the not-prohibitively-expensive rule. I therefore propose to give tight deadlines for any further steps. In that regard, I raised with the parties a possible date and timescale for any further hearing, and did not receive any objection, so I propose to incorporate that into the order.

Order

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

(i) the proceedings be dismissed;

(ii) unless any party applies for leave to appeal, an order as to costs, or any other order, by written legal submission within 7 days from the date of this judgment, the foregoing order be perfected forthwith thereafter on the basis of no order as to costs (including no order as to the costs of written submissions and as to costs before the CJEU); and

(iii) if any party so applies by lodging a written legal submission with the court within that 7 day period, the other parties be afforded a further 7 day period for replying written legal submissions and the matter be listed for hearing at the end of the list on Monday 11th December, 2023 for oral submissions not to exceed a total of 45 minutes for all parties combined.