

**THE HIGH COURT
JUDICIAL REVIEW**

[2022] IEHC 116
[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**

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

JUDGMENT of Humphreys J. delivered on Friday the 11th day of March, 2022

1. The applicant seeks an order of *certiorari* of a decision of the board of 15th April, 2021 granting provision for the demolition of all buildings, excluding the original fabric of the former Player Wills factory, on a site at South Circular Road, Dublin 8, and 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.
2. Judicial review in the planning and development context is governed by s. 50A of the Planning and Development Act 2000.
3. Subsection (3) lays down two requirements for the grant of leave for such judicial review: (a) substantial grounds, and (b) a demonstration of either sufficient interest or that the applicant meets certain criteria set out for an environmental NGO.
4. The notice party developer has questioned whether the applicant organisation in this case meets the statutory criteria set out for environmental NGOs and says that, if not, the sufficient interest test doesn't confer capacity to sue.
5. The developer's enquiries are based on various internet searches carried out in relation to the applicant by their solicitor's "Relativity Master", a formidable title worthy of a character from Dr Who, albeit that it refers to an electronic discovery qualification.
6. In late 2018 or early 2019 an organisation known as "Players Please" was founded to articulate concerns in relation to developments being carried out by the notice party. Mr Joe Clarke says that this body was formed at a meeting on 7th November, 2018 whereas Ms Sinead Kerins seems to put it at early 2019 (para. 20 of affidavit of 10th January, 2022).
7. At some point 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.

8. 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.
9. 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).
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.
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 28th June, 2021, 5th July, 2021 and 27th July, 2021.
13. On 30th July, 2021, I granted leave 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. On 22nd November, 2021, the notice party's solicitors wrote querying the standing of the applicant by reference to its date of establishment.
15. 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.
16. 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.
17. On 8th December, 2021, the notice party issued the present motion to set aside the grant of leave.
18. The applicant then set out a more detailed position on affidavit to the effect that Players Please changed its name to Dublin 8 Residents Association, but retained the old name as "a brand wholly controlled by the association".

Relationship between national and European law

19. Critical to the present application is an understanding of the relationship between domestic legislation and EU law. Article 1(2)(e) of the EIA directive 2011/92/EU (which mirrors amendments previously made to directive 85/337/EEC by the Public Participation directive 2003/35/EC) defines "public concerned as follows:

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

20. Article 11(1) provides as follows:

“Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned: (a) having a sufficient interest, or alternatively; (b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition; have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive.”

21. One then compares this with the domestic legislation which is s. 50A(3)(b) of the 2000 Act and which requires that:

- “(b) (i) the applicant has a sufficient interest in the matter which is the subject of the application, or
- (ii) where the decision or act concerned relates to a development identified in or under regulations made under *section 176* , for the time being in force, as being development which may have significant effects on the environment, the applicant —
- (I) is a body or organisation (other than a State authority, a public authority or governmental body or agency) the aims or objectives of which relate to the promotion of environmental protection,
- (II) has, during the period of 12 months preceding the date of the application, pursued those aims or objectives, and
- (III) satisfies such requirements (if any) as a body or organisation, if it were to make an appeal under *section 37(4)(c)* , would have to satisfy by virtue of *section 37(4)(d)(iii)* (and, for this purpose, any requirement prescribed under *section 37(4)(e)(iv)* shall apply as if the reference in it to the class of matter into which the decision, the subject of the appeal, falls were a reference to the class of matter into which the decision or act, the subject of the application for *section 50* leave, falls).”

22. Subparagraph (b)(ii) reflects the terms of s. 37(4)(d) of the 2000 Act to the effect that an established NGO is allowed to appeal to the board even if it did not make submissions to the council concerned.

23. Thus both limbs of the domestic statutory test are implementations of EU law:

- (a). sub-para. (b)(i) is a direct implementation of art. 11(1)(a) of the EIA directive; and
- (b). sub-para. (b)(ii) is an implementation of art. 1(2)(e) of the EIA directive with the setting of specific thresholds defined by national law.

24. An important point to note is that at no stage was s. 50A(3)(b) challenged by the applicant as invalid by reference to European law, so I must take the 12 month threshold defined by national law as a given for the purposes of this application. That doesn't mean that the domestic legislature is at large to impose whatever restrictions it wishes – that clearly isn't the case – just that the relevant restrictions or conditions weren't challenged here.

CJEU caselaw cited

25. In Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening v. Stockholms kommun genom dess marknämnd* (Court of Justice of the European Union, 15th October, 2009, ECR 2009 I-09967, ECLI:EU:C:2009:631), the CJEU decided that members of the public concerned, for the purpose of art. 1(2) and 10a of directive 85/337/EEC as amended, must be able to have an access to a review procedure to challenge a decision by which a body attached to a court of law of a member state has given a ruling on a request for development consent regardless of the role that such applicants might have played in the administrative procedure. The court also held that art. 10a of directive 85/337/EEC precludes a provision of national law that restricts the right to seek a judicial remedy to environmental protection associations with at least 2,000 members. The court said at para. 47 that it was conceivable that a minimum number of members might be relevant to ensure that the organisation “does in fact exist and that it is active”, that this cannot be fixed by national law at such a level as to run contrary to the objectives of the directive and of “facilitating judicial review of projects which fall within its scope.” The court said at para. 48 that the directive “in no way permits access to review procedures to be limited on the ground that the persons concerned have already been able to express their views in the participatory phase of the decision making procedure”. It went on to point out that limiting standing to major national organisations and ruling out small local organisations would not comply with the directive or the Aarhus Convention: see paras. 50 and 51.
26. In Case C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein Westfalen eV v. Bezirksregierung Arnsberg* (Court of Justice of the European Union, 12th May, 2011, ECLI:EU:C:2011:289), the CJEU decided that art. 10a of directive 85/337/EEC effectively requires that NGOs promoting environmental protection must be entitled to contest a development consent in relation to a project likely to have significant effects on the environment on the grounds of infringement of the rule flowing from the environmental law of the European Union which protects the interests of the general public as opposed to the interests of individuals, where the environmental NGOs were of a type referred to in art. 1(2) of the directive.
27. In Case C-664/15 *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation v. Bezirkshauptmannschaft Gmünd* (Court of Justice of the European Union, 20th December, 2017, ECLI:EU:C:2017:987), the CJEU held that art. 9(3) of the Aarhus Convention as approved on behalf of the European Community by Council decision 2005/370/EC read in

conjunction with art. 47 of the Charter of Fundamental Rights has the effect that a duly constituted environmental organisation operating in accordance with the requirements of national law must be able to contest before a court a decision granting development consent for a project that may be contrary to the Water Framework Directive 2000/60/EC, and that those increments preclude national procedural rules that deprive environmental organisations of the right to participate on grounds of not having had the status of a participant to the administrative procedure concerned. Those provisions also preclude a national rule that imposes a time-limit on an environmental organisation such that it loses the status of being a party to the procedure and thus unable to bring a legal action by reason of failure to submit objections in due time during the administrative procedure.

28. I turn now to the specific questions raised by the present application.

Whether the motion should be refused because the notice party does not have the capacity to apply to the court

29. The Irish Collective Asset-management Vehicles Act 2015 provides for the incorporation of an Irish Collective Asset-management Vehicle (ICAV).

30. That clearly specifies that the ICAV itself is “a body corporate” and thus has legal personality (s. 5(1)) and that sub-funds have limited liability (s. 35), but there is no provision for sub-funds themselves to have legal personality. This is a point I also made in *Kerins v. An Bord Pleanála (No. 1)*.

31. The applicant has named the sub-fund as a notice party in the statement of grounds because it was the applicant for planning permission. However, it is clear that it is not a legal entity, and thus not an appropriate party at least for the purposes of litigation, whatever about the planning process (an issue in the substantive judicial review).

32. Order 15, r. 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.”

33. The notice party accepted that the court could use O. 15, r. 13 of its own motion to substitute the parent body as the proper legal entity and indeed the rule says so explicitly. Where the discussion ended up was that the notice party invited the court to consider using that power of its own motion.
34. I need to turn to that question now because if the matter is resolved in that way then any basis to refuse the motion under this heading might not arise.

Whether the court should make an order under O. 15, r. 13 naming the correct legal entity as a notice party

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.
36. The applicant also says that any O. 15, r. 13 application should be brought by notice of motion, grounded on affidavit, and that the notice party should have moved immediately, instead of bringing a motion seeking the strike out of a leave order without rectifying the title state and the pleadings, which the applicant describes as proceeding in a "disorderly manner".
37. All of that is well and good, but it does not really go to the substance, which is that the name of the notice party on the title of the proceedings is not correct. This is clearly the sort of case where the court should intervene. It's a matter of law not evidence, so an affidavit would be a pointless formality. Rectifying such problems is what the rule is there for and I would propose to make that order.
38. Admittedly there is a certain irony in a notice party having proceeded in the name of a body not entitled to litigate for the purpose of complaining about the applicant not being entitled to litigate. The correct course would have been for the notice party to apply to the court to amend the title before bringing a motion. This is yet another illustration of the penetrating insight of O'Donnell J. (McKechnie and Laffoy JJ. concurring), in *O'Neill v. Appelbe* [2014] IESC 31, [2014] 4 JIC 1003 (Unreported, Supreme Court, 10th April, 2014), at para. 18, that "[e]rrors in legal procedure are rarely the exclusive province of one of the parties".

Whether an order under O. 15, r. 13 retrospectively rectifies any misjoinder of the notice party

39. It seems to be inherent in O. 15, r. 13 RSC that its purpose is to enable the court to deal with the substance of the matter in dispute. That would not be achieved unless the effect of an order was to enable the matter to proceed as if the correct party had been named initially. Thus any rectification is in effect a retrospective cure for the problem. There may be more difficult questions if this raises a limitations issue, but that is not a specific concern arising from rectifying the misnaming of the notice party here.

Whether the application to set aside leave should be left over to the trial of the action

40. The thrust of the applicant's defence of the motion was that the jurisdiction to strike out a leave order should be sparingly exercised and only in a plain case where leave should never have been granted. In all other cases the issues should be left to the trial of the action.
41. Of course I do bear in mind the point that an order striking out leave is relatively exceptional and should be granted only if it is clear that leave should not have been given, if for no other reason that one would not want to incentivise interlocutory procedural applications (generally it's better for all concerned, as well as quicker, to deal with everything in one hearing rather than multiple hearings); but it seems to me that the issue of standing is sufficiently net and discrete as to enable the court to deal with it in the context of a motion such as this.
42. As regards putting the matter off to the substantive hearing, I do not see anything that is going to be achieved by that in a situation where I have received full legal submissions on all of the many issues arising here. The mere fact that the motion has turned out to be somewhat complex and nuanced doesn't in itself mean that something new is going to arrive between now and the substantive hearing in relation to this point that is going to fundamentally change things.

Whether the motion should be refused because it is brought by the notice party rather than a respondent

43. As regards the claim that a standing motion should not be brought by a notice party, I don't accept that. In very broad terms, a notice party does have the right to oppose an application, provided that the respondent is either defending the proceedings or not the appropriate *legitimus contradictor* (for example where the real issue is between the applicant and notice party and not in substance an act of the respondent body). Such a right must include the right to seek to set aside a leave order.
44. I accept that the notice party's rights are not totally equivalent to those of the respondent, so that if a respondent positively concedes a legal error in its own decision, then a notice party is not entitled to seek to fight the case on the basis that the respondent was right after all: see the decision of McDonald J. in *Protect East Meath Limited v. An Bord Pleanála* [2020] IEHC 294, [2020] 6 JIC 1901 (Unreported, High Court, 19th June, 2020).
45. It is true that in *O'Connell v. Environmental Protection Agency* [2001] IEHC 102, [2001] 4 I.R. 494, Herbert J. said at p. 508 "I have some very considerable reservations as to the power of the court to make any form of order, either against or in favour of a party who is on notice of proceedings but who is not a respondent in the proceedings, and this includes an order as to costs and also includes an order that an applicant should give an undertaking to pay damages to such a mere notice party for any possible loss sustained by such notice party should the applicant not be successful in the proceedings against the respondent." While that statement is clearly *obiter*, I don't think it can be correct as a broad proposition because it isn't consistent with general practice embodied in a large number of other decisions and indeed it is at odds with the actual decision in *O'Connell* and what is said elsewhere in the judgment as to the need for justice to a notice party.

46. Thus where *Delany and McGrath on Civil Procedure*, 4th ed. (Dublin, Round Hall, 2018), say at para. 31-142, p. 1311, that there is “some doubt” as to whether an order setting aside leave can be obtained by a notice party, I think that *O’Connell* doesn’t really detract from the conclusion that it can do so, provided that the respondent is also actually seeking to defend the proceedings, although matters would be different if the respondent was prepared to concede that its own decision was invalid.

Whether the notice party’s application should be refused by reason of alleged abusive SLAPP tactics

47. The applicant complains of abusive SLAPP tactics directed against it, in particular the demand for details of members and funding sources, and suggests that this be taken into account as a factor towards refusing the relief sought. But even if we assume *arguendo* that such a complaint is well-founded, and the notice party shouldn’t have written letters seeking details of members and supporters who might have funded the litigation, that can be dealt with separately if it needs to be (although in fairness to the notice party it didn’t actually do anything on foot of that correspondence). But such a situation doesn’t solve the applicant’s problem, which is whether it has standing and capacity to bring the proceedings in the first place.

Whether the notice party’s application should be refused by reason of delay

48. The applicant complains that the delay in bringing the application is inordinate, inexcusable and unexplained and links this to its view that the conduct of the notice party “requires to be deprecated”, particularly its attempts to raise issues regarding the funding of the proceedings.

49. However, it seems to me that the delay of four months here was not particularly excessive especially bearing in mind the intervention of the Long Vacation. But in any event, the delay is not really sufficient grounds to refuse the application here, given the nature of the problem alleged, namely a lack of entitlement on the part of the applicant to bring the proceedings in the first place.

Whether the application should be refused because standing or capacity is not a jurisdictional requirement

50. The applicant contends in written submissions that “[t]here was no jurisdictional restriction that prevented the Court from granting leave pursuant to s.50A(3)”, but I don’t accept the logic of that. The court’s jurisdiction to determine the judicial review proceedings *does* depend on a showing of capacity on the part of the applicant to sue as well as standing to do so, so that can be revisited on a motion to set aside leave.

If standing or capacity is a jurisdictional requirement, can the applicant mend its hand if it failed to address the s. 50A criteria at the leave stage

51. The notice party suggests that because the grounding affidavit before the court when leave was sought did not address the issue of the applicant being in existence for twelve months, the applicant cannot do that now. However, I can’t accept that submission. That would set an unacceptably unforgiving standard and would elevate hindsight into a mandatory legal requirement.

52. If an applicant believes that it satisfies the statutory criteria and seeks leave on that basis, the making of the application is a representation to the court that the applicant considers that any relevant criteria are satisfied. If that is disputed later, the matter can be analysed in more detail, but it would be unfair to expect an applicant to anticipate every possible objection or demand that could be made at a future point.
53. That is not to say that it might not be best practice for applicants to specifically address the sub-paragraphs of s. 50A(3)(b) in more detail in their grounding affidavits or statements of grounds and one suspects that the challenge dealt with in the present judgment might be likely to have that effect on applicants generally going forward.
54. It wasn't specifically argued that the s. 50A issue has to be addressed in the statement of grounds, and rightly not because I don't think it does. It is a procedural issue that can be gone into if it arises, not something that has to be specifically pleaded.

Whether s. 50A(3)(b)(ii)(II) requires continuous pursuit of an NGO's objectives during the twelve months prior to the application

55. The applicant argues that insofar as para. (b)(ii)(II) requires pursuit of the NGO's objectives "during" the previous twelve months, this effectively means at any time during the previous twelve months. However, that interpretation is clearly erroneous because it would render the provision meaningless.
56. There is a distinct difference between a negative prohibition of something during a period and a positive requirement to do something during the period. The positive requirement requires a broad degree of continuity (even accepting the applicant's point that "[t]he pursuit of environmental aims and objectives is by necessity discontinuous; as a human endeavour, it is incapable of continuing on a 24/7 basis.")
57. The applicant would have a point if the context was *prohibition* of doing something "during" a period. That means at any time during that period. Such a clause is not exclusively directed to persons who do the thing continuously throughout the whole period. That would drive a coach and four through the legislation because it would have no impact on those who merely do the prohibited thing from time to time.
58. Thus, the meaning of "during" depends primarily on whether it is a prohibitory term, in which case it means prohibition on doing something at any time during the specified period, or whether it is a positive requirement or condition, in which case it generally means that the thing must have been the case on a broadly continuous basis during that period.
59. As regards human activity being necessarily discontinuous *in fact*, it would be a fallacy to conclude that that means the state of affairs is not continuous *in legal terms*. The point has been made about the calculation of length of service at the bar, for example, that a barrister is practising her profession when on the ski slopes. In other words, 12 years' standing at the bar includes time spent on vacation, asleep, labouring on domestic duties, engaging in recreational activities, awaiting the arrival of the next brief, or doing some combination of these simultaneously. It is not a calculation of 12 years barristering on a 24/7 basis, albeit that in some unusually dedicated cases there mightn't appear to be much

difference between the two. Likewise, for legal purposes, an environmental NGO, if established to conduct that work and functioning as such, is an environmental NGO on a continuous basis as well, assuming that it actively functions as such when moved to do so during the period in question.

Who carries the onus of proof on an application to set aside leave due to a lack of standing?

60. The notice party says that the applicant carries the onus because standing is a jurisdictional requirement that has to be met at the leave stage, and doubly so where the issue wasn't really addressed in the given case at that time. The applicant says that this is the notice party's motion and thus that party had to prove that there was a lack of standing, and doubly so where setting aside leave requires exceptional circumstances were the applicant's case is to be taken at its high-water-mark.
61. I think that, given the statutory requirement, the situation must be that the applicant has an initial onus to demonstrate standing. Until such time as that onus is overcome to a satisfactory *prima facie* standard, the burden of proof does not shift to the notice party to displace that.
62. In the present case, the applicant's grounding affidavit is somewhat light on relevant facts and, in the light of what has now been put forward, cannot be deemed to be sufficient without more to demonstrate that standing has been addressed satisfactorily. That is reinforced by the fact that at leave stage, I assumed rather than decided that sufficient interest was enough without particularly considering the criteria in para. (b)(ii), or at least that is my best attempt to reconstruct my thought processes at the time. So the applicant retains the onus of proof in the present motion to establish standing to a satisfactory *prima facie* standard before it can be said that the onus to displace that shifts to the notice party.

Whether an unincorporated association for the purposes of s. 50A(3)(b) must have rules or a constitution

63. It was argued by analogy with *Conservative and Unionist Central Office v. Burrell* [1981] EWCA Civ 2, [1982] 1 WLR 522 that an unincorporated association must itself have written rules or a constitution. However, it seems to me that that decision arose in a very specialised context. The more fundamental principle of law applied by the Court of Appeal of England and Wales in that decision was that the union between the members of an unincorporated association had to be contractual and thus the agreement bringing about the contract should have been made on some identifiable occasion or in some identifiable circumstances. Obviously as a matter of general contract law there is no immutable requirement that a contract be written in all circumstances and thus an unincorporated association is capable of being formed by oral agreement rather than exclusively through the adoption of written rules or constitutions. That being said, a more informally constituted association that lacks any demonstration of adopted rules or constitutional text may in practice have to exert slightly more effort in establishing the necessary continuity of existence required to satisfy s. 50A(3)(b)(ii)(II) .
64. Local unincorporated organisations such as residents' groups can range from those tightly organised with the legalistic and financial discipline of, say, the Law Library, where

constitutions are adopted and annual subscriptions are demanded and followed up, to those without any formal rules or membership structure, where a group of civic-minded local people assume a representative function with the tacit consent of the residents, but without any contractual relationship with those residents. There is nothing at all wrong with the latter informal way of doing things, and such a body can still be quite representative in practice, and can also be an environmental NGO. But in the latter context, the signature of petitions or submissions or the mere attendance at meetings by residents doesn't create legal relations between the officers and the residents. Membership is contractual – so no definite legally binding contract means no members. Thus in such a case there are in fact no "members" in the legal sense above and beyond the small group of persons who actually take on functions related to the association such as committee officeholding. The absence of any evidence of a formal rules-based contractual membership structure in the present case leads to the inference that the applicant here is one of the latter types of bodies.

Whether the applicant has discharged the onus to show on a satisfactory *prima facie* basis that it has been in continuous pursuit of its objectives as an environmental NGO during the twelve months prior to the application

65. Leaving aside the painful question of when a judicial review is commenced exactly, it seems to follow logically that an applicant must have standing when it takes the first legal step, which in this case was filing the statement of grounds on 9th June, 2021. Thus, to satisfy para. (b)(ii) the applicant had to be in existence between 8th June, 2020 and 9th June, 2021.
66. The present case is not so much a conflict of fact as such requiring cross-examination, but rather a case where what the applicant has averred to as having happened contains significant omissions and raises major unanswered questions.
67. The applicant relied on the fallacy identified by Professor Steven Pinker in *Rationality: What It Is, Why It Seems Scarce, Why It Matters* (London, Allen Lane, 2021), that "one can always maintain a belief, no matter what it is, by saying that the burden of proof is on those who disagree", but this is not really an example of that problem. The essential defence to the motion is that Players Please changed its name to Dublin 8 Residents Association. On any view, there are huge holes in that story. It has not been specified when this happened. It has not been specified how this happened. As mentioned above, there has been no reference to any rules or constitution of the association and no specific claim that there are any such rules or constitution, let alone a specific claim that the change of name was in accordance with the rules and constitution. Consistent with this, there is no meaningful evidence that the association has any "members" in the normal sense beyond its officers, or if so whether these members themselves played any role in this change of name. If there are members, it is not even clear that they were particularly aware of the change of name given that the old name is said to be retained as a brand for those more familiar with it.
68. The failure to provide a full list of members was reasonable enough given that the notice party seemed to be making some sort of complaint about maintenance and champerty (something I don't need to get into for the purposes of the present application for the

reasons explained), but even acknowledging that point, there is no satisfactory reason not to specify other central features of the alleged name-change.

69. Also relevant is the fact that the name-change story came out on a drip-feed basis. The grounding affidavit didn't mention it, and neither did the initial correspondence on behalf of the applicant.
70. The overall impression is that the arrangement of matters on the applicant's side of the house was loose and informal to a degree that renders the story now advanced something that is likely to be an oversimplification. The affidavits on behalf of the applicant are so lacking in information on key points that the belated averment that this was a simple name change is not such as to discharge the burden of proof that Dublin 8 Residents Association was in continuous existence for the twelve months prior to the bringing of the proceedings. While the applicant says that Players Please has no existence separate from the Residents Association, and while that is fair enough in one sense, the inference that is more compellingly available is that both Players Please and Dublin 8 Residents Association have no existence in governance terms separate from the small group of local people that operate both entities. At times that group faces outwards as Players Please, at times as Dublin 8 Residents Association, and at times as both. That doesn't mean that Players Please and Dublin 8 Residents Association aren't environmental NGOs, and I rather think they are, but what it means is that in such a context I cannot be satisfied that the evidence provided by the applicant is such as to lead to a conclusion that the Dublin 8 Residents Association was in a definite form of stand-alone existence as an environmental NGO for a 12 month period prior to the proceedings in such a way as to satisfy s. 50A(3)(b)(ii)(II).
71. This is not a case of determining facts against an applicant without cross-examination. It is more a case that the applicant's evidence is insufficiently specific or adequate as to discharge the burden of proof to demonstrate standing on a satisfactory *prima facie* basis. I would accept on the basis of the affidavits that the Dublin 8 Residents Association exists as an environmental NGO and has a functioning committee of officers who are named at para. 30 of the affidavit of Ms Kerins, but it seems insufficiently clear even on such a *prima facie* basis when one looks at the totality of the material that the continuous existence of that NGO for twelve months has been demonstrated.

Whether even if the applicant has not demonstrated compliance with para. (b)(ii) the court can or should exercise a discretion to let the applicant continue with the application

72. It is true that not all unlawful acts are complete nullities. For example, an invalid action can become effectively valid if not challenged within the limitation period. I would be prepared to assume that the court could possibly exercise some form of discretion to dismiss the motion here even if the applicant had not demonstrated compliance with para. (b)(ii), but that could only be done for exceptional reasons and I don't see that here.

If the sufficient interest test applies, has it been met?

73. Given that I don't think that para. (b)(ii) is satisfied, we turn then to para. (b)(i).

74. If the test applies, it seems to me that the applicant does meet it on the facts. While I am not satisfied that the applicant's existence for a twelve-month period has been clearly demonstrated, I am satisfied 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.
75. The real issue it seems to me is to whether the sufficient interest test actually applies to this applicant, which in turn is dependent on whether the applicant has capacity to bring the proceedings.

Whether s. 50A(3)(b)(i) confers capacity on an unincorporated body that satisfies the test in that sub-paragraph

76. The question is whether sufficient interest is enough to confer capacity on an unincorporated body, or whether it merely confers standing on a body that already has legal capacity.
77. The Supreme Court decision in *Sandymount & Merrion Residents Association v. An Bord Pleanála* [2013] IESC 51, [2013] 2 I.R. 578 doesn't really answer this question because it finds that implied capacity is created by para. (b)(ii), but does not address para. (b)(i). The meaning of para. (b)(i) ultimately turns on the effect of EU law given the point as noted earlier that para. (b)(i) is a straight implementation of art. 11(1)(a) of EIA directive 2011/92/EU.
78. An important point is made by David Browne B.L. in *Simons on Planning Law*, 3rd ed. (Dublin, Round Hall, 2021), para. 12-831, p. 947, that if capacity is not impliedly conferred on an unincorporated NGO that is entitled to make submissions to the board, then that creates a "trap for the unwary" which is "inconsistent with the principle of legal certainty".
79. A further possibly important contextual point here is that planning applications regarding strategic housing developments must, by law, be decided within a very tight time period of sixteen weeks from the making of the application (s. 9(9)(a) of the Planning and Development (Housing) and Residential Tenancies Act 2016). Thus, if the period required for the existence of an NGO was greater than sixteen weeks (and it is far longer than that under the 2000 Act), then any unincorporated body that was established in response to a particular application, even if set up immediately, could never satisfy the condition set out in domestic law as provided for in paragraph (b)(ii). This suggests that para. (b)(ii) is not a satisfactory alternative to an implicit conferral of standing under the provisions of art. 11(1)(a) of EIA directive 2011/92/EU by means of para. (b)(i). Admittedly this applicant says it was formed prior to the particular planning application here, but that isn't the point. The point is that the period for planning decision-making in this context is so short that the law is pretty much designed to exclude bodies formed in response to any given SHD application.
80. This issue seems to me raises referable questions of EU law as follows:

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 provision of domestic law which precludes unincorporated associations from bringing legal proceedings?

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 where domestic law 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?

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 where domestic law and/or the procedures adopted by the competent authority 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?

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 a member state in order to enable an NGO to qualify for the purpose of art. 1(2)(e) are such that 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).

Whether the capacity issue can be circumvented under O. 15, rr. 2 or 13.

81. Order 15, r. 2 RSC provides as follows:

“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 it 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.”

82. I have referred to O. 15 r. 13 earlier. The applicant’s position was that if all else in the application failed, it would want to consider seeking an order under O. 15 rr. 2 or 13. Assuming that the applicant can’t otherwise maintain the proceedings, a fairly major issue arises as to whether O. 15 is available in such case notwithstanding the limitation period having expired.
83. In that regard, domestic law is in a state of uncertainty and contradiction. The conflict of judicial opinion is noted in *Delany and McGrath on Civil Procedure* at paras. 6-58 to 6-62. In *Wicklow County Council v. O’Reilly* [2006] IEHC 265, [2006] 2 JIC 803 (Unreported, High Court, 8th February, 2006), Clarke J. considered that the Statute of Limitations 1957 would not apply following the making of an order under O. 15, r. 2, but in other cases a different view appears to have been taken: see in particular *B.V. Kennemerland Groep v. Montgomery* [2000] 1 I.L.R.M. 370, *Sandy Lane Hotel Ltd. v. Times Newspapers Ltd.* [2009] IESC 75, [2011] 3 I.R. 334, [2010] 1 I.L.R.M. 411. Such contradiction and uncertainty raises serious issues as to whether the principle of legal certainty is being observed.
84. Given that in the special context we are dealing with here, what is at issue is the access by an applicant to a right to avail of a judicial remedy that is provided for by European law, it seems to me that such a matter couldn’t be resolved without factoring in the ramifications of the EIA directive, and thus there are additional referable questions of European law as follows:

Does 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 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 a rule of domestic law regarding limitation of time for the action.

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 referred to in the fifth question in general circumstances, does it have that effect 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.

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 referred to in the fifth question in general circumstances, does it have that effect if domestic law regarding the application of limitation periods in such situations are unclear and/or contradictory such that an applicant does not enjoy legal certainty prior to bringing proceedings as to whether such substitution is permissible.

Order

85. In all the circumstances I consider that the questions set out in the judgment are ones of interpretation, rather than application, of EU law, that they are not *acte clair* or *acte éclairé*, that they are necessary for my decision, and that it is appropriate in all the circumstances to exercise the discretion to refer the questions to the CJEU.
86. For the reasons set out in the judgment the order will be as follows:
- (i). that there be 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;
 - (ii). I will in principle refer the questions identified in the judgment to the CJEU;
 - (iii). I will give the parties the directions specified in *Eco Advocacy v. An Bord Pleanála (No. 1)* [2021] IEHC 265, [2021] 5 JIC 2704 (Unreported, High Court, 27th May, 2021), noting that the CJEU request the submission of documents in electronic form which, when the formal order for reference is complete, should be provided to the List Registrar together with a schedule of such documents; and
 - (iv). I will adjourn the matter for mention to Monday 21st March, 2022 for mention, to confirm the timetable involved.