[2021] IEHC 265

THE HIGH COURT
JUDICIAL REVIEW

[2020 No. 1030 JR]

BETWEEN

ECO ADVOCACY CLG

APPLICANT

AND
AN BORD PLEANÁLA

RESPONDENT

AND
KEEGAN LAND HOLDINGS LIMITED

NOTICE PARTY

JUDGMENT of Humphreys J. delivered on Thursday the 27th day of May, 2021

1. This judicial review concerns a development in Trim, designated as a heritage town, at a site close to a zone of archaeological potential and an architectural conservation area. 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).

2. There is a recorded monument on the site, an enclosure reference number RMP ME036:026. A protected structure, Mornington House, lies to the north, a detached three-bay two-storey house, built c. 1880, reference NIAH 14328001, RPS TT036-084. There is an adjacent protected view (number 11) along the east of the site towards Wellington Monument, protected by objective HER OBJ 13 in the County Development Plan, as well as wider views of Trim Castle and adjoining features.

Facts

3. There were a number of previous refusals of development on the site. In 2008 a development was refused due to the lack of a sustainable drainage (SUDS) system.

4. In 2009 a development was rejected due to poor quality design having regard to the site's location, which as noted above is in or close to areas of heritage, historical, archaeological and architectural interest.

5. A further proposed development was rejected in 2011 due to design issues and the conclusion that it would represent a low standard of residential development.

6. The lands were originally zoned for commercial or industrial use in the Trim Town Development Area Plan 2014 to 2020, but that was since changed to residential use.

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

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

9. 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.

10. 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.

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

12. A second AA screening report was prepared in June 2020 and the formal planning application was submitted on 8th July, 2020.

13. An 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.

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

15. On 11th August, 2020, a submission was made on behalf of An Taisce noting the potential for impact on the European sites.

16. On 31st August, 2020, the CEO of Meath County Council reported on the application and I will refer further to that below.

17. 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.

18. 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.

19. On 14th January, 2021, I granted leave in the present proceedings, the primary relief sought being an order of *certiorari* of the decision of 27th October, 2020.

20. 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 subject to further follow-up written submissions and replies. That became a slightly lengthier process than I had envisaged – what counsel for the notice party presciently referred to as a process of "ping-pong". That is unfortunately always a risk if one allows anything further to be put in, a risk exacerbated here because I later sought further submissions on the extent, if any, of the court's own motion obligations, but the process of sur-reply and sur-rejoinder did eventually peter out and judgment was formally reserved at that point.

Preliminary issues

21. There were two issues that are perhaps best categorised as of a preliminary nature: a complaint, primarily by the notice party, as to the alleged lack of *bona fides* of the

applicant; and a complaint, again primarily advanced by the notice party, as to lack of detail in the pleadings.

Alleged lack of *bona fides*

22. The notice party alleged that the applicant lacked *bona fides*, misled the court at the *ex parte* stage and was animated by hostility and *animus* towards the developer and its principal, Mr. John Keegan. Those objections, however, are over-cooked. In virtually any case, one can find something that any party could or should have done better, and, I might add, one could probably find something that the judge could have done better as well. Normally that is just down to human error. Any possible infelicities in how matters were presented here, even if hypothetically I accepted that such were established, are a long way off any situation where it would be just and reasonable to refuse relief on a discretionary basis or discharge the leave order. As to *animus*, in fairness, counsel for the notice party did accept that merely having *animus* (which I amn't to be taken as having been demonstrated) did not mean that one might not have a good point. It would not advance the rule of law if an investigation into the motive of the person making the complaint (hard to determine anyway, at the best of times, even by the person themselves) precluded an alleged illegality from being examined and, if established, from being corrected.

Alleged lack of detail in the pleadings

23. In fairness to the notice party, the applicant's pleadings here are in places a little sub-optimal in terms of detail. The pleading objection might have been obviated to some extent had the applicant complied with the procedure set out in Practice Direction HC96 at the time (now HC103), requiring a clear statement of core grounds, a clear distinction between factual and legal grounds and a framing of the legal points in *ratio* format setting out in respect of each point why precisely the decision is infirm by reference to what specific legal provision, and in what precise respect.

24. If applicants don't embrace that approach with the required fervour, they certainly run the risk of at least a few shots across the bows from the other side. Counsel for the applicant hinted that maybe one could blame the court that granted leave (myself in this instance) for not ensuring that compliance with the Practice Direction was addressed at that point; and in fairness I suppose there may be some validity to that, and we might have to file it under the heading of judicial fallibility. But blaming the court, rewarding and worthwhile as that normally is, does not completely solve the applicant's difficulty here.

25. At the same time there is some modest onus on respondents to give notice of the objection as to inadequate particulars of pleading by way of the statement of opposition so as to allow consideration of whether an applicant should seek an amendment to further particularise the complaint being made. There must be some equality of arms. If respondents want to live by the sword in respect of these sorts of points, they may have to accept a liability to have pleading points taken against their own papers.

26. The pleading objection is only made to a limited extent in the notice party's statement of opposition. It is certainly 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.

27. Looking at the board's objections, it is notable that the only complaint made under O. 84, r. 20(3) in the board's statement of opposition is in reference to the pre-planning procedures rather than generally.

28. For reasons that will become apparent, it is not particularly necessary to get into the question of whether the complaint about pre-planning procedures is pleaded in detail or not, because the applicant's pleading problem under that heading goes way beyond points of detail.

29. As regards particularising how the decision is unreasonable, again that issue is not going to be pivotal, but nonetheless I do not think it needs much particularisation in principle because a complaint of unreasonableness is a complaint that the decision was not open to the decision-maker on the material. It is not immediately obvious how that can be further particularised beyond saying what the conclusion is that isn't open on the evidence. 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.

30. As regards the complaint that there are no particulars as to inadequacy in the screening procedure and in relation to failure to consider certain matters, there is something in that complaint, although in fairness to the applicant, some aspects of that are in fact reasonably clearly identified in the pleadings. I will return to that later in this judgment.

31. Nonetheless, the notice party does make a valid point more generally 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 I will deal with that more specifically below where it arises.

Domestic law issues

32. I will start with the purely domestic law issues which were raised at the hearing or on the papers, which I will endeavour to summarise as follows:

    (i). alleged failure to address compliance with the development plan and local area plan;

    (ii). alleged lack of certainty regarding what was decided at the pre-planning stage;

(iii). alleged past breaches of planning law by related companies;

(iv). alleged failure to have regard to submissions;

(v). alleged lack of reasons as a matter of domestic law; and

(vi). alleged unreasonableness of the decision.

Alleged failure to address compliance with local area plan and county development plan

33. The claim is made at para. 14 of the applicant's written legal submissions that the decision did not address compliance with the local area plan and county development plan. I do not consider that that complaint is adequately articulated in the pleadings so I would uphold the notice party's objection to that matter being advanced.

Alleged lack of certainty regarding what was decided at the pre-planning stage

34. The applicant raised various complaints about the pre-planning stage. However, in terms of domestic law, this is misconceived because the pre-planning process is not binding in the substantive process: see *Balscadden Road SAA Residents Association Ltd. v. An Bord Pleanála (No. 1)* [2020] IEHC 586, [2020] 11 JIC 2501 (Unreported, High Court, 25th November, 2020) (a decision which did not address the EU law elements of the point).

Alleged past breaches of planning law by related companies

35. The applicant alleges that companies related to the applicant company were engaged in previous breaches of planning law. For example, the applicant alleges that a related company, Keegan Quarries Ltd., also controlled by Mr. John Keegan, ploughed up two early medieval burial grounds in County Meath on which numerous human skeletal remains had been buried. According to the applicant, the State was complicit in this to some extent by consenting to an order of *certiorari* quashing a protection order *(Keegan Quarries Ltd. v. Minister for the Environment, Heritage and Local Government* [2011 No. 353 JR]), and I suppose inferentially, by not putting in place a replacement protection measure.

36. On the face of things, the legal provision on taking into account the past record of developers would be meaningless if one could simply avail of a different corporate carapace in order to circumvent that consideration.

37. Despite that, we go back to the pleading problem for the applicant here and I do not think that the applicant has developed this particular point sufficiently in the pleadings for it to be a basis for quashing the decision. The thrust of paras. 12 and 13 of the statement of grounds is that the inspector's treatment of the issue didn't engage with the submissions made. The pleadings don't engage with the various thresholds that need to be met for this issue to be potentially determinative, as set out in s. 35 of the Planning and Development Act 2000.

Alleged failure to have regard to submissions

38. The applicant here propounds the standard confusion between the duty to have regard to something and the question of whether it is given narrative discussion. The board did not

fail to have regard to anything in the sense pleaded under this heading. There was no obligation to deal with submissions by way of a detailed narrative discussion or to give micro-specific reasons (see *Balscadden Road (No. 1*) and the authorities discussed therein).

Alleged lack of reasons as a matter of domestic law

39. Leaving aside the EU law points for the moment and the question of whether and to what extent they differ from the domestic law points (the applicant naturally contending as a first line of attack that all standards are equally high), the complaint is made that, in endorsing the inspector's report, the board was not articulating its own reasons. That is misconceived. Reasons can be incorporated from another document (see *Balscadden Road (No. 1))*.

40. The complaint is also made that the inspector's report does not contain reasons, but it does, at least to the standard required by national law. There is the obligatory reference in the applicant's submissions to the *obiter* comments in *Balz v. An Bord Pleanála* [2019] IESC 90, [2020] 1 I.L.R.M. 637. But those comments were made in a specific context that does not apply here. The standard for reasons is *Connelly v. An Bord Pleanála* [2018] IESC 31, [2018] 2 I.L.R.M. 453 as discussed in *Balscadden Road (No. 1).*

41. Overall, taking into account the implied broad acceptance of the inspector's report read in the light of the supporting documentation there are sufficient reasons in the decision insofar as domestic law is concerned. Again for the avoidance of doubt that conclusion excludes any question of reviewing the decision from the standpoint of European law.

Alleged unreasonableness of the decision

42. While there was reference made by the applicant to the alleged unreasonableness of the decision, in view of the conclusion that there are sufficient reasons for national law purposes, I do not think that those reasons are so manifestly unsustainable that the decision can be held to be unreasonable.

EU law issues

43. As the domestic law issues don't succeed, I turn now to the EU law points in the case.

Whether mitigation measures should be disregarded at the EIA screening stage

44. This project constitutes a development under the heading of "[u]rban development projects" for the purposes of para. 10(b) of annex II to directive 2011/92/EU. That is implemented by schedule 5 of the Planning and Development Regulations 2001 (S.I. No. 600 of 2001) as amended. There is an incorrect reference in the EIA screening document to the 2018 regulations as amended. That is a misunderstanding because the Planning and Development (Amendment) Regulations 2018 (S.I. No. 29 of 2018) are amending, not principal, regulations. A screening exercise is required as to whether EIA is necessary having regard to the factors in annex III of the directive (implemented by schedule 7 and 7A in the 2001 regulations). The applicant claims that mitigation measures should be disregarded during the screening process, but that point is *acte clair* against the applicant because consideration of mitigation during screening is baked into art. 4(4) and 4(5) as well as annex III, para. 3(h).

Lack of discussion of the issues in EIA screening

45. Much of the pleaded complaint about the inspector's conclusion in relation to EIA screening seems to be based on a false premise, which is that the sole analysis of this issue is in the body of the inspector's report. The ground as pleaded unfortunately more or less ignores appendix A which sets out the considerations in more detail.

46. One turns then to Appendix A, but the applicant hasn't pleaded any specific complaint about that appendix in the statement of grounds, or about its adoption by reference or by implication of the developer's documents. In oral submissions, the applicant sought to raise two further specific issues which, as I ultimately endeavoured to understand them, could be summarised as follows:

    (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 sub headings 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.

47. The critical pleading regarding EIA includes the following: "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).

48. While the applicant does refer to "EU law", the only reference to the EIA directive specifically is under para. 2 in the context of pre-application procedures. That said, the reference to "EU law" in para. 15 can only, in context, mean the EIA directive. Even allowing that fairly obvious interpretation, I don't see any 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.

49. A referrable question in my view arises, particularly in the light of para. 67 of the opinion of Advocate-General Kokott in Case C-254/19 *Friends of the Irish Environment Limited v. An Bord Pleanála* (30th April, 2020, ECLI:EU:C:2020:320), as follows:

> 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.

50. While I have received helpful submissions from the parties on this issue, I don't think I need to resolve this question now or even get into it in any great detail, and nor do I think the issue is altogether *acte clair*. It's true that traditionally, EU law did defer to national procedural autonomy on such questions, subject to the principles of equivalence and effectiveness (see e.g., Joined Cases C-430/93 and C-431/93 *van Schijndel und van Veen* [1995] ECR I-4705, Case C-312/93 *Peterbroeck* [1995] E.C.R. I-4599, Case C-222/05 to C-225/05, *Van der Weerd and Others* [2007] E.C.R. I-4233, Case C-416/10 *Krizan and Others v Slovenská inšpekcia životného prostredia*, EU:C:2013:8, CJEU (Grand Chamber) 15th January 2013), but this approach has been subject to more recent debate and scrutiny in various contexts. The judgment of the CJEU in Case C-254/19 *Friends of the Irish Environment Limited v. An Bord Pleanála* doesn't resolve the issue because its wording, properly construed, only recites what the national court thought (para. 67 of the judgment), not what the CJEU itself thought on the question. When the court says "that question is raised because the referring court wishes to point out that ... that error of law was not pleaded by the applicant in the main proceedings and cannot, therefore, be raised of its own motion by the referring court", it means that is what the referring court is saying, not what Luxembourg is saying. That is underlined by the discussion that follows in the subsequent paragraphs of the judgment of the CJEU. The notice party argues that Advocate General Kokott is incorrect, or contradicts her own opinion in Case C-416/10 *Križan v. Slovenská inšpekcia životného prostredia*, but ultimately such arguments are the stuff of debate rather than of the kind of unanswerable point that can be classified as *acte clair*. It's also true that Barniville J. didn't think much of the point in *Rushe v. An Bord Pleanála (No. 2)* [2020] IEHC 429 (see also *Rushe v. An Bord Pleanála (No. 1)* [2020] IEHC 122, *Kelly v. An Bord Pleanála* [2019] IEHC 84). As against that, Simons J. in *Dempsey v. An Bord Pleanála (No. 1)* [2020] IEHC 188 did consider that there was a referrable point here. Ultimately, the decision to refer doesn't engage *stare decisis* in the same way as deciding the point oneself. Another court's view of whether something is *acte clair* doesn't deprive any given court or for that matter tribunal of its discretion under EU law. Nor, in doing so, does the court have to resolve any conflict of legal opinion or decision, although it can give its own view. The board also suggested that the Annex III headings and sub-headings could be found in the inspector's report if

one combed through it, although that wasn't entirely obvious to me. I don't think that such a re-programming of the report is a sufficient basis to find that the issue in that regard does not arise.

51. Depending on the answer to that, there are two further referrable questions that arise under this heading:

> If the answer to the first question is "yes", whether art. 4(2), (3), (4) and/or (5) and/or Annex III of the EIA directive 2011/92 and/or the directive read in the light of the principle of legal certainty and good administration under art. 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 statement as to what documents exactly set out the reasons of the competent authority; and
>
> If the answer to the first question is "yes", whether art. 4(2), (3), (4) and/or (5) and/or Annex III of the EIA directive 2011/92 and/or the directive read in the light of the principle of legal certainty and good administration under art. 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 of the EIA directive, insofar as those headings and sub-headings are potentially relevant to the development.

Relevance of the EIA directive to the pre-planning stage

52. The applicant raised EU law complaints about the pre-planning stage and suggested that a question of European law arose under that heading (see question 3 in the applicant's European law issue paper). As noted above, in domestic law terms, this is misconceived because the pre-planning process is not binding in the substantive process.

53. Looking at the matter from an EU law perspective, I think the applicant runs up against the same problem it has in relation to the other EIA points, namely a lack of specific pleading. But this particular problem can't be cured by any proposed reference. If the applicant's complaint is that the exclusion of the public from the pre-planning process violates the EIA directive or the Aarhus Convention as applied by that directive, then that is in substance a validity complaint regarding the Planning and Development (Housing) and Residential Tenancies Act 2016. Challenging the validity of an enactment requires a specific relief and also the joinder of Ireland and the Attorney General as respondents. Even the most extensive "own motion" obligations won't breathe life into that point here.

Habitats directive

54. I turn now to the habitats directive, 92/43/EEC of 21st May, 1992, in respect of which the applicant laid particular emphasis on a reference to the CJEU.

55. The notice party has submitted that the applicant did not seek a reference until late in the day: "yet another *volte face* by the Applicant in these proceedings" (Second Supplemental Submission, 14th April, 2021, para. 6) ... "the Applicant's true and primary motive is to delay, obstruct and frustrate the Developer" by "[t]his last gasp roll of the dice" (para. 7)). The notice party also implies that there is a want of fair procedures in this respect, but that is a misunderstanding. The possibility of a reference is there from the outset in any case that raises EU law interpretative or validity points that may be determinative, are not *acte clair* or *acte éclairé,* and relate to the interpretation rather than the application of EU law. The court can refer of its own motion (*Rostas v. D.P.P.* [2021] IEHC 60, [2021] 2 JIC 0904 (Unreported, High Court, 9th February, 2021), para. 41), or can itself bring that issue up with the parties for discussion. A court does not need an application by a trial participant in order to do so. That procedure is always there in the background anyway, casting a shadow on any case with an EU-law dimension, and in fact was discussed at the hearing here anyway. Realistically in practice, the precise questions to be referred may only be formulated once the court has made decisions on the other points, and weighed all arguments made, which can't fully happen until after judgment is reserved, if it is reserved. If there is a reference, the parties will get a clean shot at the merits of the point at the European level. There is also, if I might venture to say so, something a tiny bit incongruous in a party complaining about the lack of an opportunity to comment within the very submission that was permitted in order to provide the opportunity to comment. So the complaint of surprise or lack of notice is overblown. Plus it has to be read in the context that, leaving aside procedural matters, of the substantive grounds of challenge I am disposing of in the present judgment, 100% of those are being resolved in favour of the developer. That doesn't seem unduly indicative of that party being massively short-changed. And a final plus – a reference may, and frequently does, finally resolve the proceedings concerned, and it can be far better for the speed of ultimate determination of matters to front-load the reference rather than leave it to an appellate court, the proverbial longest way round sometimes being in practice the shortest way home.

56. The relevant complaints are pleaded at paras. 4, 16, 17, 21 and 22 of the statement of grounds which provide as follows:

(i). Para. 4 – "In addition to the concerns expressed by the applicant, the submissions raised by the prescribed bodies including the Department of Culture, Heritage and the Gaeltacht, An Taisce and Meath County Council also raised significant concerns in respect of the proposed development. These concerns were nowhere properly addressed or considered by the respondent."

(ii). Para. 16 - "The same occurs in the context of appropriate assessment. In that context, the inspector states that there are no European Sites near the site, but also records the River Boyne SAC is 700 metres away and a tributary thereof drains the site some 100 metres distant. Observers had raised concerns in respect of impacts. These are nowhere properly considered or addressed. Moreover, the inspector seems to screen out the development based on mitigation measures that

are not even properly or clearly set out. The inspector states as follows at paragraph 12.6: 'The submitted screening report notes the location of the Kingfisher along the Boyne and Blackwater system. No habitats associated with this species are identified on the site. The surface water outfalls to a stream c. 100m south, a tributary of the River Boyne. The design of the surface water treatment takes into account the scale and nature of the proposed development, i.e. a housing development of moderate size which will be constructed and operated in accordance with standard environmental features associated with a residential development, it is not considered that the proposed development would have potential to have a significant impact on the water quality (and hence various qualifying interests) of the River Boyne and River Blackwater SAC and SPA. The submission from An Taisce refers to the location of the stream which flows into the River Boyne and notes the potential for impact on spawning habitat for trout as well as any potential impact on the European Sites. Trout 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 wastewater 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."

(iii). Para. 17 - "This does not meet the test for a screening as set out by the CJEU in multiple cases, and in particular Sweetman -v- ABP Case C-251-11. in which the advocate general established a light trigger of a possibility of significant effects. This was approved by the High Court in Kelly -v- ABP 2014 IEHC 400. The consideration of mitigation measures (underlined above) is precluded by the judgment of the CJEU in POW Case C-323/17. This recommendation fails to properly identify the risks posed by surface water run-off and, makes no complete, precise, definitive findings capable of removing scientific doubt about the likely effects."

(iv). Para. 21 - "In relation to AA screening, the Board states: Appropriate Assessment Screening, The Board completed an Appropriate Assessment screening exercise in relation to the potential effects of the proposed development on designated European Sites, taking into account the nature, scale and location of the proposed development within a zoned and serviced urban area, the Habitats Directive Screening document submitted with the application, the Inspector's report, and submissions on file. In completing the screening exercise, the Board adopted the report of the Inspector and concluded that, by itself or in combination with other development in the vicinity, the proposed development would not be likely to have a significant effect on any European Site in view of the conservation objectives of such sites, and that a Stage 2 Appropriate Assessment is not, therefore, required."

(v). Para. 22 - "This does not meet the requirements of EU and national law. It fails to include any complete findings or reference any of the matters required. It provides

no reasons or considerations. Insofar as the inspector's report is adopted, for the reasons set out above, this is also insufficient in law. No or no proper screening for AA has been carried out or recorded, there is simply no information available. The decision does not deal with the submissions and matters and doubts raised, in particular by An Taisce and the Chief Executive and the Council. The determination is contrary to law."

57. Even taking into account:

(i). that these complaints combine a very large number of points;

(ii). the pleading objections made and discussed above; and

(iii). the counterbalancing fact that the notice party did not expressly object to all of these specific paragraphs as insufficiently particularised in the statement of opposition;

it is clear that at least two matters are very specifically identified.

58. Those matters are:

(i). taking account of mitigation measures at the screening stage; and

(ii). failure to deal with the submissions and matters raised in the submissions by An Taisce and Meath County Council.

59. Counsel for the notice party submits that he does not know which submissions are being talked about or what they mean, but I am afraid that I think that that is a totally artificial objection. The game of "particularise that" could, in principle, go on forever; which may be one reason why some respondents enjoy it so much. It may even, at the risk of falling into the realist school of jurisprudence, be a reason why the get-out clause of inadequate pleadings is so often plausibly available to any court that doesn't want to decide any given point. But the game 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)). We are well past that threshold here. Everything (including pleadings), has to be read in context, and in context this plea clearly means that submissions relevant to the habitats directive. So the nature of the point being made by the applicant in the pleadings here is to my mind absolutely clear and beyond doubt.

60. I will now deal with the two issues raised under this heading and the questions that follow from them.

Whether the competent authority improperly took account of mitigation measures

61. The real question here is whether the surface water drainage system constitutes a mitigation measure or is not to be regarded as such because it is simply a standard feature of the design that has nothing to do with the nearby European sites. 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.

62. 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].

63. 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].

64. The CJEU decided in Case C-323/17 *People Over Wind v. Coillte Teoranta* (Court of Justice of the European Union, 12th April, 2018, ECLI:EU:C:2018:244), that at the screening stage, regard should not be had to mitigation measures; and established 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.

65. While the judgment of the CJEU does not expressly say that mitigation measures should not be considered even if they are "an integral part of the design", that is, on one interpretation, suggested by the judgment. Counsel for the applicant has helpfully produced para. 9 of the respondent's statement of opposition in the underlying proceedings, *People Over Wind v. Coillte* [2016 No. 785 JR], in which the respondent clearly states that it denies the proposition (similar to one advanced by the applicant in this case) that "protective measures which have been applied at the design stage of a proposed development and/or which form an integral part of the design cannot be taken into account at the screening stage". This is reflected to some extent in para. 19 of the judgment of the CJEU in which the respondent noted that its conclusions had regard to "the protective measures that have been built into the works design of the project" (the board was not a party to the *Coillte case*). While the production of this document is objected to by everyone else in the present proceedings, I don't think it creates an injustice for me to receive it, even at a rather late stage in the game; in fact quite the reverse. It is a public document and it speaks for itself. This isn't a case of producing late evidence that can't be replied to, and anyway the other parties have now had a chance to comment. Furthermore, there isn't anything that unusual or unprecedented about a pleading in another case being produced or referred to in order to illuminate the context, meaning or scope of some other proceedings. Something similar happened recently, as counsel may be aware, in *Balscadden Road SAA Residents Association Ltd. v.*

An Bord Pleanála (No. 2) [2021] IEHC 143 (Unreported, High Court, 12th March, 2021), where counsel for the respondents informed me (without objection from anyone, quite rightly) that, by reference to the pleadings in a completely separate case, declaratory relief had been sought in a case that the CJEU held to be moot, in order to demonstrate that merely seeking declaratory relief doesn't automatically render live that which is not otherwise so (see para. 20). That was really helpful there, and something similar is helpful in this case. Whether this kind of useful material comes from applicants, respondents or notice parties doesn't matter.

66. In fact, even if the notice party's strenuous objections about admissibility of this document were valid (which they aren't), it doesn't matter because, since the point is proposed to be referred rather than decided by me, the notice party will have the opportunity to persuade the CJEU on the merits anyhow. And if it's any further comfort to the notice party, that additional document isn't determinative anyhow, but just reinforces a conclusion I would have arrived at anyway that the point is not *acte clair*. So the order would have been the same even without it.

67. Insofar as the *People Over Wind* judgment has been applied in Irish jurisprudence, there are a medley of cases including *Kelly v. An Bord Pleanála* [2019] IEHC 84 (Unreported, High Court, Barniville J., 8th February, 2019), *Heather Hill Management Company CLG v. An Bord Pleanála* [2019] IEHC 450 (Unreported, High Court, Simons J., 21st June, 2019), *Uí Mhuirnín v. Minister for Housing, Planning and Local Government* [2019] IEHC 824 (Unreported, High Court, Quinn J., 5th December, 2019), *Sweetman v. An Bord Pleanála* [2020] IEHC 39 (Unreported, High Court, McDonald J., 31st January, 2020) and *Highlands Residents Association v. An Bord Pleanála* [2020] IEHC 622 (Unreported, High Court, McDonald J., 2nd December, 2020). Despite the submission that this point is *acte clair*, I for one find it not quite as easy to reconcile the multitude of judgments as the board seems to suggest. The primary emphasis in these cases seems to be on whether the measures are *intended* to reduce the impact on the European site concerned as opposed to whether they have that *effect*. But at the same time there are suggestions in the jurisprudence that the intention is not decisive. I personally do not necessarily find those two propositions to be self-evidently entirely consistent. If intention isn't automatically decisive in a particular case, something else must be, and that presumably must be effect. One or other of the two approaches has to be right – it can't be both.

68. There is also some difference in emphasis in the Irish cases as to whether it is relevant that the measures are standard practice or not. Again, I am not sure that I would describe the judicial writings on that point as self-evidently being an entirely clear and consistent line of authority. I certainly do not think that I can be totally confident that the Irish caselaw taken as a whole is completely clear and user-friendly as to what the *People Over Wind* decision means.

69. There is an important factual context here which is that there is a pathway in the present case between this site and the European site. The surface water will run off into the tributary that feeds directly into the river the subject of the SAC and SPA.

70. In the light of all the circumstances it seems to me that a referrable question of European law arises here:

> Whether art. 6(3) of directive 92/43/EEC is to 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 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.

Whether there is a requirement to expressly respond to all expert points made during the screening process

71. An understanding of this point involves a review of the submissions made, particularly the two key submissions referenced in the statement of grounds, those by Meath County Council and An Taisce. Both submissions are included in exhibit KC1 at tab 5.

72. As regards the council, a memorandum from the heritage officer of Meath County Council of 30th August, 2020 was prepared entitled "Comments Screening Statement for Appropriate Assessment and EcIA for residential development Charterschool Land, Manorlands, Trim, Co. Meath".

73. 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).

74. 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".

75. The CEO'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*.

76. Turning to the submission of An Taisce, that organisation is, of course, Ireland's national heritage body and a statutory consultee under planning legislation. 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.

77. 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.

78. Turning then to the way in which these points 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.

79. 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.

80. 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."

81. 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.

82. It is true to say that there are a variety of conditions proposed, for example ultimately condition 14 which requires the SUDS system to be agreed with the county council and one can see perhaps some relationship between some of the conditions and some of the points made, but the board or its inspector does not address those points in an explicit and detailed mode of reasoning. Even the requirement that the SUDS system be agreed with the council does not quite answer the point made by the council that the board should satisfy *itself* as to the adequacy of the system.

83. The present case is very different from *An Taisce v. An Bord Pleanála* [2021] IEHC 254, [2021] 4 JIC 2003 (Unreported, High Court, 20th April, 2021), where an appropriate assessment screening decision was challenged for failure to consider certain matters, but those points had not actually been made to the decision-maker during the process and were only first raised after the decision had been made. Here we are talking about possible scientific doubt arising during the development consent process itself.

84. In Case C-461/17 *Holohan v. An Bord Pleanála* (Court of Justice of the European Union, 7th November, 2018, ECLI:EU:C:2018:883), the CJEU held *inter alia* as follows:

> "Article 6(3) of Directive 92/43 must be interpreted as meaning that, where the competent authority rejects the findings in a scientific expert opinion recommending that additional information be obtained, the 'appropriate assessment' must include an explicit and detailed statement of reasons capable of dispelling all reasonable scientific doubt concerning the effects of the work envisaged on the site concerned."

85. *Holohan* related to a full appropriate assessment (see *Holohan v. An Bord Pleanála* [2017] IEHC 268, [2017] 5 JIC 0403 (Unreported, High Court, 4th May, 2017), para. 1 of which notes an AA had been carried out and a Natura Impact Statement prepared), rather than the screening exercise which falls for consideration in the present case. In practice it seems to be assumed without necessarily having been expressly decided that the principle of *Holohan* also applies to the screening stage. That raises the question of the level of reasons required for a negative AA screening decision. It seems to me that there is a referrable question of EU law here, as follows:

> Whether art. 6(3) of directive 92/43/EEC is to 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.

Identification of precise reasoning of competent authority

86. In addition to the foregoing there is also a referrable question raised in oral argument which wasn't expressly pleaded. Assuming that the answer to the question about fleshing out the express pleadings is answered in a way that allows this issue to be addressed, that question is:

> If the answer to the first question is "yes", whether art. 6 (3) of the habitats directive 92/43 and/or the directive read in the light of 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, where a competent authority decides not to subject a proposal for development consent to the process of appropriate assessment, there should be an express statement as to what documents exactly set out the reason of the competent authority.

Further steps required

87. My overall conclusion on the various questions of EU law as set out above is that they relate to the interpretation rather than application of EU law, they are necessary for the decision in the context where I have rejected all of the purely domestic law points, and the answers are not *acte clair*. The discretion to refer to the CJEU therefore arises and I consider it appropriate in all of the circumstances to exercise that discretion in favour of a reference under art. 267 TFEU.

88. The art. 267 procedure requires a formal order for reference from the court, and to facilitate that, a further, short, judgment will be necessary confined to the matters relevant to the questions to be referred. It would assist the court considerably in preparing that if the parties could provide short written submissions on the following matters:

(i). a list of the provisions of European law they consider relevant to answering the questions together with full citations and Official Journal (OJ) publication references;

(ii). a list of the provisions of European caselaw they consider relevant to answering the questions together with ECLI references, a brief (1 sentence) summary of the relevance of the decision and an accessible web address for each case;

(iii). a list of the provisions of international law (if any) they consider relevant to answering the questions, and an accessible web address for each;

(iv). a list of the provisions of domestic legislation they consider relevant to answering the questions together with a brief (1 sentence) summary of the relevance of each provision, which EU law provision it implements, and an accessible web address for each piece of legislation;

(v). a list of the provisions of domestic caselaw they consider relevant to answering the questions together with together with a brief (1 sentence) summary of the relevance of the decision and an accessible web address for each case;

(vi). a one-sentence summary of the party's proposed answer to each question (maximum 100 words per question);

(vii). separately and optionally, more detailed reasons for the foregoing if they so wish; and finally

(viii). whether there should be any *amici curiae* added to the proceedings prior to the reference being made (see further below).

89. I emphasise that I am not particularly inviting further submissions going beyond the foregoing, in particular I am not asking for submissions on the principle of whether to make a reference or on the wording of the questions, absent the identification of any fundamental oversight regarding some decisive and express ruling from the CJEU that has not been factored in thus far.

90. As regards timelines, I would propose that the applicant have 2 weeks, the respondent 2 weeks, and the notice party a final 2 weeks to reply.

Specific features of the art. 267 procedure

91. It is appropriate that I refer to two procedural aspects affecting the art. 267 reference procedure.

92. Firstly, while the CJEU does remain in contact with the referring court *via* the Central Office and does send the referring court its ultimate judgment, experience to date has indicated that the referring judge might not automatically receive copies of the parties' submissions and those of member states and EU institutions, or the Advocate-General's opinion if any. In order to stay abreast of developments I will direct the parties to copy such documents to this court through the normal channels, as they come on stream.

93. Secondly, the Luxembourg process is such that only EU institutions, member states, and those who participated in domestic proceedings can get involved in the hearing (art. 23(2) of the CJEU Statute). Hence, in the asylum context when a question of reference to Luxembourg arose, I did in at least one case put the United Nations High Commissioner for Refugees (UNHCR) on notice as an *amicus curiae* in order to enable the Commissioner to assist the court and thus, if necessary, the Luxembourg court: see *B.D. (Bhutan and Nepal) v. Minister for Justice and Equality* [2018] IEHC 461, [2018] 7 JIC 1709 (Unreported, High Court, 17th July, 2018).

94. Given the continent-wide nature of any potential ruling of the CJEU, one has to give at least some thought to whether a wider set of voices should be included in the discussion. If that were to happen, the general approach should be that it would be on the basis of a clear direction from the outset that any *amicus curiae* would bear their own costs throughout, in the Irish courts and in Luxembourg, and equally not having liability for the costs of others. Such parties would get involved on a written-submissions-only basis unless otherwise ordered.

95. While of course the court has to retain the possibility of calling in *amici curiae* of its own motion (in the way that I asked the Attorney General to get involved in *Balscadden Road (No. 2*) or the UNHCR to get involved in *B.D. (Bhutan and Nepal*)), what I would propose to do as a general proposition and subject to further argument would be to leave it to the parties as to whether or not they want to ask for any other national, European or even (as with the UNHCR in *B.D. (Bhutan and Nepal))* international body to participate as *amici curiae* on the basis set out above.

96. As regards national entities, two obviously potentially interested parties on the facts here are Meath County Council and An Taisce, being the parties affected by the question concerning their submissions. There may be other national bodies interested in the matter and I by no means preclude that. The Attorney General will be involved anyway at the Luxembourg stage, but it would be appropriate for the applicant to put him on notice at this point of the intention to refer.

97. As regards European-level entities, as a participant in the official network of European environmental judges (EUFJE), I had been informed prior to the present proceedings being initiated (not specific to the issues that now arise in this case, but regarding the art. 267 procedure in general), that active European bodies that may have an interest in environmental references include ClientEarth and Justice and Environment. There may also be European bodies of planning decision-makers or of developers of which I have yet to be informed. Again, I am neutral on whether these or any other bodies should be considered as *amici curiae* and I will leave it to the parties to consider and propose or not as they see fit. In the event of disagreement the matter can be listed for submission and decision.

98. Lest it be thought that mention of a specific body above is meant to convey an implied preference on the part of the court that they participate, I had better make clear that I don't have such a preference and will leave it entirely to the parties in the first instance

and thereafter to any particular body concerned, subject to considering any views of the parties. If the parties don't want to take up the option of proposing any *amici*, that is equally fine as far as I am concerned, but given that the window for additional entities to contribute in Luxembourg closes the moment the reference is dropped in the post by the Principal Registrar, the parties might as well make that decision consciously rather than by default.

99. I would, therefore, simply give the parties liberty to make any enquiries with any suitable bodies whether domestic, European or international if and to the extent that they think fit, and to include any proposals in their submissions as outlined above. The parties are, needless to say, at liberty to convey this judgment and any of the papers to any proposed *amicus curiae*. If any such body wishes to get involved on the basis set out above, or if there is disagreement as to whether any such body should get involved, the court should be informed in early course. At the risk of repetition, I am equally happy if there are no such proposals.

Order

100. Accordingly, the order will be as follows:

(i). I will in principle make a reference to the CJEU in relation to the referrable questions as set out above subject to a formal order for reference following further steps set out in this judgment;

(ii). the parties are to provide further submissions to assist in that regard on the basis set out above, within the timelines set out above;

(iii). the parties have liberty to propose the addition of any relevant *amici curiae* in such submissions;

(iv). I will direct that if any one or more *amici curiae* is to be added, such entities would bear their own costs throughout, in the Irish courts and in Luxembourg, and would not have any liability for the costs of any other participant in the proceedings, and that such entities would get involved on a written-submissions-only basis unless otherwise ordered;

(v). the parties will have liberty to make any enquiries with any suitable entities whether domestic, European or international if and to the extent that they think fit, and for the avoidance of doubt have liberty to convey this judgment in unapproved form and any of the papers to any proposed *amicus curiae;*

(vi). the applicant should, however, put the Attorney General on notice of the intention to refer the matter, should he wish to make a submission at this stage on the basis outlined above;

(vii). once the matter is referred, the parties should liaise to ensure that this court is copied with all submissions including those of member states and EU institutions,

and the Advocate-General's opinion, as those documents become available, and to contact the court as soon as the CJEU judgment has been delivered; and

(viii). the matter will be listed in the next Monday List following the expiry of 6 weeks from the date of this judgment, unless some matter giving rise to disagreement arises in the meantime or unless any entity proposes to get involved as an *amicus curiae,* in which case the parties should contact the List Registrar to have the matter listed at the earliest opportunity in the meantime.