

THE HIGH COURT
COMMERCIAL
JUDICIAL REVIEW

[2019 No. 297 J.R.]

[2019 No. 84 COM]

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

BETWEEN

NORTH WESTMEATH TURBINE ACTION GROUP

AND

NORTH WESTMEATH TURBINE ACTION GROUP COMPANY LIMITED BY GUARANTEE
APPLICANTS

AND

AN BORD PLEANÁLA,
IRELAND

AND

THE ATTORNEY GENERAL

RESPONDENTS

AND

WESTMEATH COUNTY COUNCIL,
COOLE WINDFARM LIMITED

AND

GREENWIRE LIMITED/GREENWIRE WINDFARMS LIMITED

NOTICE PARTIES

JUDGMENT of Mr. Justice Twomey delivered on the 19th day of December, 2019

SUMMARY

1. This judgment concerns two separate but connected applications relating to a grant of planning permission for wind turbines in the vicinity of Coole in County Westmeath.
2. The first application was issued by the second and third named respondents (the "State parties") on the 14th August, 2019 and seeks to strike out the proceedings against those named State respondents on the grounds, *inter alia*, that they are bound to fail and/or are an abuse of process. This application for strike out by the State parties is based on the fact that while the Statement of Grounds seeks relief against An Bord Pleanála, it does not seek any reliefs as against the State parties.
3. The second application was issued by the applicants (collectively the "Action Group") on the 9th October, 2019 in which they seek to amend the Statement of Grounds to include reliefs against the State parties.
4. In the application brought by the State parties they seek an Order dismissing the proceedings against them pursuant to O. 19, r. 28 of the Rules of the Superior Courts (the "RSC") or in the alternative, pursuant to the inherent jurisdiction of this Court (the "State's application") on the basis that no relief is claimed against the State parties in the Statement of Grounds. In the application brought by the Action Group it seeks to amend paragraph D of the Statement of Grounds, to include two reliefs against the State parties, who although sued as respondents in the proceedings, are not subject to any reliefs.

5. For the reasons set out below, this Court concludes that the strike-out application should be granted and accordingly that the application to amend the Statement of Grounds should be refused.

BACKGROUND

6. The Action Group is an interest group, comprising of persons living in the areas proximate to the townlands contained in the grant of planning permission the subject matter of the substantive judicial review proceedings. The Group was founded in mid-2017 with the purpose of, *inter alia*, actively opposing the development of windfarms in the North Westmeath area.
7. On 26th March, 2019 the first named respondent (“An Bord Pleanála”) granted planning permission (An Bord Pleanála reference ABP/300686/18) to the second named notice party (“Coole Windfarm”) for the development and operation of a windfarm comprising of, *inter alia*, 13 wind turbines each of 175 metres in height. The windfarm is to be located across several townlands in the county of Westmeath.
8. In the course of the planning application, the Action Group acted as an observer and made submissions to An Bord Pleanála in opposition to the proposed development of the windfarm. On foot of the grant of planning permission to Coole Windfarm on 26th March 2019, the Action Group issued a Notice of Motion seeking leave to bring judicial review proceedings. An *ex parte* application was made by the Action Group seeking this leave to bring judicial review proceedings against the respondents and by Order of the High Court (Noonan J.) dated 27th May, 2019 the Action Group was granted leave. By Order of Haughton J., the proceedings were entered into the Commercial Court on 8th July, 2019.
9. The main thrust of the substantive judicial review proceedings brought by the Action Group relates to the alleged non-compliance of the grant of planning permission with certain articles under both the Environmental Impact Assessment (“EIA”) Directive 2011/92/EU (as amended by Directive 2014/52/EU) and the Habitats Directive 92/43/EEC. The Action Group seek certain declaratory and ancillary reliefs as set out in paragraph D of the Statement of Grounds, which can be summarised as follows:

“An Order of Certiorari quashing the decision of the first named Respondent to grant Planning Permission for a development consisting of a 13 Turbine Windfarm in the townlands of Coole, Monkstown, Camagh (Foreby), Doone, Clonsura, Mullagh, Boherquill and Joanstown which Application Planning Register Reference 17/6292 and An Bord Pleanála Reference 300686/18 was made on the 26th day of March 2019.

A Declaration that the Respondent failed in respect of Application 17/6292 and An Bord Pleanála Reference 300686/18 to carry out an Environmental Impact Assessment in accordance with the obligations of Council Directive 2014/52/EU.

A Declaration that the proposed development was not considered and assessed in accordance with the requirements of Council Directive 92/43/EEC.

A stay on the implementation of Planning Permission Reference No. 17/6292 and An Bord Pleanála Reference No. ABP/300686/18 pending the determination in the above entitled proceedings.”

10. The first relief explicitly references the first named respondent, An Bord Pleanála. The second relief simply references ‘the Respondent’ but it seems clear that the failure (to carry out an Environmental Impact Assessment) is directed at An Bord Pleanála and not the State parties, since it is the planning authorities which carry out Environmental Impact Assessments and not Ireland or the Attorney General. The third relief, namely a Declaration that there was a failure to consider the proposed development in accordance with Council Directive 92/43/EEC is similarly clearly directed at An Bord Pleanála. It is to be noted from the foregoing reliefs, that no relief is specifically claimed against the State parties in the Statement of Grounds.
11. There are 44 separate grounds listed in paragraph E of the Statement of Grounds, in support of the reliefs claimed, the vast majority of which relate to An Bord Pleanála. Just four of those 44 grounds (grounds 41 - 44) could be said to relate to the State parties, namely two claims that the EIA Directive was not properly transposed into Irish law and two identical claims that the Habitats Directive was not properly transposed into Irish law. Grounds 41 to 44 of the Statement of Grounds state:

“41. Insofar as Section 34(5) of the Planning and Development Act, 2000 may be relied on as permitting the remittal of matters of a type contained in Condition 4 of Application Register Reference 17/6292 which provides for the mitigation measures identified in the Environmental Impact Assessment Report and Natura Impact Statement submitted with the Planning Application to be implemented in full and for the developer to submit and agree in writing with the Planning Authority a Schedule of these mitigation measures, at Condition 5 a detailed Environmental Management Plan for the construction of operation stages to be submitted and agreed in writing with the Planning Authority generally in accordance with the proposals as set out in the Environmental Impact Assessment Report including a detailed plan for the construction phase and at 13 details of a transport management plan, conditions, surveys or roads and bridges proposed for the rectification of any construction damage to be submitted subsequent to the determination of the application in circumstances where the Scheme of the Act provides that no member of the public is entitled to be made aware of the submissions made, is not entitled to participate, is not entitled to be notified and is thereby in effect precluded from bringing any proceedings in respect of any such determinations. In view of the provisions of Section 50 of the Planning and Development Act such a provision is inconsistent with and contrary to the requirements of Council Directive 2014/52/EU and fails to properly transpose the obligations of the Directive into Irish Law in that it fails to provide an appropriate or adequate procedure whereby the public can appropriately participate in the Environmental Impact Assessment provided for under the Environmental Impact Assessment Directive.

42. The provisions of the Council Directive 2014/52/EU have not been properly transposed in circumstances where there is no provision whereby mitigation measures can be lawfully imposed on lands other than those provided for under Section 34(4) and where the Scheme of the Planning Act appears to contemplate a provision whereby part of a Scheme can be the subject matter of an application for Planning Permission and can require the imposition of conditions mitigating the adverse effects of that development where no jurisdiction on the part of the competent authority to impose such conditions exists and where the decision to be made subsequent to the grant of the development consent. In those circumstances the 2nd Named Respondent has failed to transpose the Environmental Impact Assessment Directive as there is no appropriate or effective mechanism provided in the Scheme of the Act within which mitigation measures can adequately be imposed or enforced under application An Bord Pleanála Reference 300686/18.
 43. Insofar as Section 34(5) of the Planning and Development Act permits the remittal of matters of a type contained in Condition 4, Condition 5, Condition 4 regarding mitigation measures, Condition 5 regarding the Environmental Management Plan and Condition 13 of a Transport Management Plan to be submitted to the Local Authority subsequent to the determination of the application in circumstances where the Scheme of the Act provides that no member of the public is entitled to be made aware of the submissions made, is not entitled to participate, is not entitled to be notified and is thereby in effect precluded from bringing any proceedings in respect of any such determinations, in view of the provisions of Section 50 of the Planning and Development Act such a provision is inconsistent with and contrary to the requirements of Council Directive 19/43/EU and fails to properly transpose the obligations of that Directive into Irish Law in that it fails to provide an appropriate or adequate procedure whereby the public can appropriately participate in the Appropriate Assessment provided for under the Habitat's Directive.
 44. The provisions of Council Directive 92/43/EU have not been properly transposed by the 2nd Respondent in circumstances where there is no provision whereby mitigation measures can be lawfully imposed on lands other than those provided for under Section 34(4) and where the Scheme of the Planning Act appears to contemplate a provision whereby part of the Scheme can be the subject matter of an application for Planning Permission and can require the imposition of conditions mitigating the adverse effects of that development where no jurisdiction on that part of the competent party to impose such conditions exists. In the circumstances the 2nd Named Respondent has failed to transpose the Habitat's Directive has not been properly transposed as there is no appropriate or effective mechanism provided in the Scheme of the Act within which mitigation measures can adequately be imposed or enforced under Application An Bord Pleanála Reference 300686/18."
12. Since the grant of planning permission was made on the 26th March, 2019, it was necessary for any application for leave to bring judicial review proceedings to be made

within 8 weeks of that date, namely by the 22nd May, 2019. This time limit is a statutory requirement contained in s. 50, sub-ss. (6) to (8) of the Planning and Development Act, 2000 (as amended) ("the Act"), which state:

- "(6) Subject to *subsection (8)*, an application for leave to apply for judicial review under the Order in respect of a decision or other act to which subsection (2)(a) applies shall be made within the period of 8 weeks beginning on the date of the decision or, as the case may be, the date of the doing of the act by the planning authority, the local authority or the Board, as appropriate.
- (7) Subject to *subsection (8)*, an application for leave to apply for judicial review under the Order in respect of a decision or other act to which subsection (2)(b) or (c) applies shall be made within the period of 8 weeks beginning on the date on which notice of the decision or act was first sent (or as may be the requirement under the relevant enactment, functions under which are transferred under *Part XIV* or which is specified in section 214, was first published).
- (8) The High Court may extend the period provided for in *subsection (6)* or (7) within which an application for leave referred to in that subsection may be made but shall only do so if it is satisfied that—
- (a) there is good and sufficient reason for doing so, and
- (b) the circumstances that resulted in the failure to make the application for leave within the period so provided were outside the control of the applicant for the extension."

13. It is clear that the Oireachtas intended for there to be strict time limits applied to judicial reviews of decisions made by public authorities, including decisions of An Bord Pleanála, and this is reflected in the 8 week deadline as set out in s. 50(6) (and also in sub-s. (7)) of the Act. However, it should be noted that there is the potential for this time limit to be extended in certain limited circumstances as prescribed by s. 50(8)(a) and (b) of the Act, which states that an extension may be made if there is "*good and sufficient reason*" and if the circumstances that resulted in the failure to make an application within the 8 week time limit "*were outside the control of the applicant for the extension*".
14. As previously noted, the *ex parte* application for leave to apply for judicial review was made on the 20th May, 2019 and so within the strict 8 week period set down by statute. The Order dated 27th May, 2019 granted by Noonan J. states that the leave, which was granted to the Action Group to seek the reliefs set out above in paragraph D of the Statement of Grounds, was "*granted on the grounds set out in paragraph (E)*" of the Statement of Grounds.

Entry into Commercial Court

15. The Order of Haughton J. for entry of the proceedings into the Commercial Court on the 8th July, 2019 expressly noted the following regarding the State parties' position on the wording of the Statement of Grounds:

“And on hearing said Counsel [counsel for the Second Notice Party] and Counsel for the Applicants and Counsel for the Second and Third Respondents

And the Applicants not opposing the entry of the within proceedings into the list

And Counsel for the Second and Third Respondents (the State Respondents) not opposing the entry of the within proceedings into the list but intimating to the Court that although they are joined as Respondents no relief is sought against them in the within proceedings and that accordingly the Chief State Solicitor will write to the Solicitors for the Applicants to seek clarification as to what relief (if any) they are seeking against the State Respondents and if they are not seeking any relief inviting them to withdraw their application for judicial review as against the State Respondents and failing that the State Respondents will bring a Motion against the Applicants to have the proceedings struck out as an abuse of process

And the Court so noting.” (Emphasis added)

16. Thus, it was made clear to the Action Group as early as the 8th July, 2019 (as the Court Order notes that counsel for the Action Group was in Court) that its proceedings were an alleged abuse of process by virtue of the fact that they named the State parties as respondents but were not seeking any relief against them.
17. As intimated in the Order of Haughton J., this fact eventually led to the strike out proceedings which are before this Court. However, this was not before the Action Group was given the opportunity to release the State parties from the proceedings without any costs’ implications (pursuant to the terms of letters from the State parties to the Action Group, to which this Court will now turn).

Exchange of correspondence

18. This correspondence indicates that, in addition to the statement made on behalf of the State parties in open court on the 8th July, 2019 (that the proceedings against the State parties should be struck out because no relief was sought against them) the Action Group was also advised by several letters of this fact on a number of occasions throughout July 2019.

Letter of 10th July, 2019 to Action Group

19. Just two days after the entry of the proceedings into the Commercial Court, a letter dated 10th July, 2019 was sent by the Chief State Solicitor on behalf of the State parties to the solicitors for the Action Group. Contained in this letter was a request for the State parties to be released from the proceedings. A response was requested by 19th July, 2019. That letter stated, *inter alia*, that:

“[N]o relief was sought against any State party in the application for leave to apply for judicial review, no such relief was granted in the order of Noonan J dated 27 May 2019 and no such relief forms part of your client’s Notice of Motion or Statement of Grounds. [...]

We wish to draw your attention, in consideration of the above issues, to the judgement of the High Court (Costello J) in *Alen-Buckley v An Bord Pleanala, Ireland and the Attorney General*, [2017] IEHC 311." (Emphasis added)

Letter of 18th July, 2019 from Action Group

20. By letter dated 18th July, 2019 the solicitors for the Action Group responded, not with an acceptance or refusal of the request made by the State parties, but it simply noting that a formal response would be communicated by 29th July, 2019.

Letter of 24th July, 2019 to Action Group

21. The State parties by letter of 24th July, 2019 agreed to this new deadline provided that the letter was to be received by no later than 4 pm on 29th July, 2019.

Letter of 29th July, 2019 from Action Group

22. While the Action Group did indeed send a letter on 29th July, 2019, as it had stated it would, this letter did not provide an acceptance or refusal of the request of the State parties to be released from the proceedings. Instead, the Action Group again sought to extend the time in which a formal response was to be given in relation to the request of the State parties to be released by stating that:

"[W]e will have a reply with you, without fail by the end of this week [2nd August, 2019]."

Letter of 30th July, 2019 to Action Group

23. Again, in a reply dated 30th July, 2019 the State parties acceded to this further deadline and noted:

"[P]lease note that if we fail to receive a reply from you with a final response to our letter by that time we will proceed to issue a Motion without further warning to you."

Motion to strike out by the State parties

24. Despite this extended exchange of correspondence between the Action Group and the State parties, no actual response, to the initial request by the State parties to be released from the proceedings, was ever communicated to the State parties by the Action Group. Thus, on the 14th August, 2019 the State parties issued their motion, first flagged on the 8th July, 2019, to have the proceedings against them struck-out (in the event of a failure by the Action Group to release them).

Motion to amend proceedings by the Action Group

25. Despite this motion of the 14th August, 2019 (and the letters from the State parties to the Action Group during July 2019, referenced above), the first substantive response by the Action Group to an issue that had been first raised on the 8th July, 2019 in open court, was the motion of the 9th October, 2019 issued by the Action Group to amend the Statement of Grounds to include reliefs against the State parties. This motion was therefore issued by the Action Group almost two months after the issue of the strike out motion by the State parties.

26. This motion by the Action Group seeks an amendment to paragraph D of the Statement of Grounds to include the following reliefs:

“A Declaration that Council Directive 92/43/EU has not been properly transposed by the Second Names (sic) Respondent in circumstances where there is no provision in the Planning and Development Act 2000 (as amended) whereby mitigation measures can be lawfully imposed on lands other than those provided for under Section 34(4) of the Planning and Development Act.

A Declaration that the provisions of Council Directive 2014/52/EU have not been properly transposed in circumstances where there is no provision whereby mitigation measures can be lawfully imposed on lands other than those provided for under Section 34(4) of the Planning and Development Act.”

ANALYSIS

27. As the strike-out application was the motion issued first in time, this Court will consider that motion before considering the motion to amend the Statement of Grounds.

Strike-out application

28. The State parties rely on the decision of Costello J. in *Alen-Buckley v. An Bord Pleanála, Ireland and the Attorney General* [2017] IEHC 311 to support their claim that the Action Group’s proceedings against them should be struck out. It is claimed that the facts of the current case are on all fours with the facts in the *Alen-Buckley case*.
29. It is further claimed that, on the authority of the principle that a Judge of the High Court ought usually follow the decision of another judge of the High Court, this Court should follow the *Alen-Buckley case*. This principle is clear from the judgment of Clarke J. (as he then was) in *Re Worldport Ireland Limited (In Liquidation)* [2005] IEHC 189, at p. 7:

“It is well established that, as a matter of judicial comity, a judge of first instance ought usually follow the decision of another judge of the same court unless there are substantial reasons for believing that the initial judgment was wrong.”

Consideration of Alen-Buckley

30. The *Alen-Buckley case* concerned an application by the applicants against the same respondents as in this case. The same State parties in that case sought the striking out of the proceedings on almost identical grounds as in this case. In *Alen-Buckley* the Order granting leave for judicial review contained similar reliefs as have been stipulated in the Order of Noonan J. in this case. Those proceedings were also entered into the commercial list. As in this case the State defendants (as they were defined in that judgment) wrote to the applicants’ solicitor pointing out that as no relief had been sought against them, the State defendants should be released from the proceedings. The response of the applicants in that case was to refer to the fact that, while no relief was sought against the State defendants, the grounds for the relief related to the transposition of the EIA directive and the Habitats Directive and therefore it was appropriate to name the State defendants as respondents. The letter from the applicants’ solicitors to the State defendants was quoted at para. 5 of Costello J.’s judgment in the following terms:

"The primary respondent is the Board of (*An Bord Pleanála*) as the entity who made the decision and to the extent that it acted *ultra vires* due to the manner it determined the application. We are however concerned lest the Board may rely on the domestic law provisions to authorise and justify the manner in which it determined the application. In the event that it does so then the extent to which any such domestic law provision appropriately transposes the requirements of the Directives must be reviewed and accordingly clearly Ireland and the Attorney General are appropriate respondents. It may be that these issues will become clearer when the respective Statements of Opposition and replying affidavits are filed and we have no objection if the State wishes to reserve its position pending the extent to which the Board seeks to raise transposition issues and the extent of the State's involvement that will be required in those circumstances can be reviewed at that stage."

31. As in this case (where only four of the 44 grounds contained in the Statement of Grounds concern the State parties), Costello J. noted that only three of the 37 grounds concerned the State defendants. At para. 12 of her judgment, Costello J. summed up the State defendants' position in the strike-out proceedings as follows:

"In essence [the State defendants] say the applicants have failed to identify in the pleadings what Ireland is alleged to have done wrong. The pleadings do not therefore disclose a cause of action against the State defendants."

32. As a preliminary issue, Costello J. rejected the claim by the applicants in that case that the grant of leave to seek judicial review (granted by Noonan J.) prevented the State defendants from arguing that the proceedings were bound to fail. Having dispensed with this argument, Costello J. then stated at para. 40:

"Even if it were the case that the court was somehow obliged to treat the order granting leave to seek judicial review as deciding that the proceedings were neither frivolous nor vexatious nor bound to fail, the order in this particular case does not assist the applicants. By reason of their own pleadings, Noonan J. did not in fact give the applicants leave to seek any relief against the State defendants."
(Emphasis added)

33. At paragraph 41, Costello J. noted:

"It is noteworthy that the applicants advanced no explanation as to why they did not seek any relief expressly against the state defendants. It was open to them, had they so wished, to have sought declaratory relief to the effect that the Directive had not been properly transposed into Irish law, if that was the case which they wished to advance. Of course, such a case would have to be properly pleaded in accordance with the requirements of O. 84, r. 20 (3). In addition, it would have to be pleaded when the leave application was moved and to have been within the time limited for bringing judicial review proceedings." (Emphasis added)

34. At paragraph 43, Costello J. refers to the letter from the applicants' solicitor to the State defendants already referenced:

"The implications of the letter are inescapable. The applicants wish to finalise their case in relation to the alleged or possible failure properly to transpose the Directive into national law when they have received opposition papers from the Board. This is clearly impermissible and contrary to the rules of court. The applicants are required to advance the case they wish to make in full in the statement of grounds. They must do so within time. Leave to amend their statement of grounds must be specifically sought and the permission granted pursuant to O. 84, r. 23 (2). The rules cannot be implicitly circumvented." (Emphasis added)

35. As noted by Costello J., it remains the position at law that any applicant seeking leave for judicial review must state the case he/she wishes to make at the leave stage. This means that the applicant must state the relief sought and must also state the grounds for that relief. This was not done in this case by the Action Group vis-à-vis the State parties, and just as in *Alen-Buckley*, these rules of Court cannot be implicitly circumvented by the Action Group.
36. It was no surprise in the *Alen-Buckley* case therefore that Costello J. concluded at para. 44 *et seq.* of the judgment in the following terms:

"In my opinion, the proceedings in fact seek no relief whatsoever against the State defendants, notwithstanding the attempt of the applicants to argue to the contrary. Therefore, the continued maintenance of these proceedings against these respondents is vexatious and amounts to an abuse of process. On the pleadings as they stand, even if the applicants were to succeed entirely in the case they have advanced to date, no relief could be granted against the State defendants. It follows inescapably in my opinion that the proceedings fail to disclose a cause of action on their face within the meaning of O. 19, r. 28. [...]

While I am of course aware that the jurisdiction to dismiss the case on the basis of O. 19, r. 28 or the inherent jurisdiction of the court should only be exercised sparingly and in the clearest of cases, this is a case where it is appropriate to exercise the jurisdiction. The continuance of these proceedings against the State defendants as an abuse of process for the reasons I have identified. Accordingly, I dismiss the proceedings against the State defendants on the basis of O. 19, r. 28 and separately on the basis of the inherent jurisdiction of the court." (emphasis added)

37. This Court is of the same view as Costello J. in *Alen-Buckley* that, in this case, as the pleadings stand, even if the Action Group was to succeed entirely in the case it has advanced to date, no relief could be granted against the State parties. Therefore, the proceedings fail to disclose a cause of action on their face within the meaning of O. 19, r. 28. Accordingly, notwithstanding that the inherent jurisdiction of the Court should only be exercised sparingly and in the clearest of cases, this is such a case and therefore the

proceedings against the State parties should be dismissed on the basis of O. 19, r. 28 and, separately, on the basis of the inherent jurisdiction of this Court.

Alen-Buckley distinguishable from this case?

38. This Court does not agree with the claims by the Action Group that the *Alen-Buckley* decision is distinguishable from the facts of the current case. The Action Group makes this claim by pointing out that in the *Alen-Buckley* case there was not an application, as there is in this case, by the applicant to amend their Statement of Grounds (so as to avoid a claim that the proceedings did not seek relief against the State parties and so were not bound to fail). In this Court's view this is not sufficient to distinguish the *Alen-Buckley* case from the present case. This is because, at its simplest, the current dispute can be pared back to the following points:

- There is a strict statutory time limit of eight weeks/56 days during which an applicant may seek leave to judicially review a planning decision under s. 50 of the Planning and Development Act, 2000. This time limit is considerably tighter than the 3 month time limit in which to bring other judicial review challenges. This time limit exists for very good policy reasons, namely to ensure that there is certainty in planning matters particularly as the rights of third parties are usually involved. Indeed, as noted by Clarke J. (as he then was) in *Kelly v. Leitrim County Council* [2005] 2 I.R. 404, at p. 416, the time period is strict even where third party rights are not involved, since in that case he noted that:

“[...] the delay of nineteen days in relation to a period of 56 days is significant having regard to the necessity to bring finality to all planning matters even those that do not involve third parties.”
- More generally, in the context of judicial review time limits, the public interest in such time limits was emphasised by Charleton J. in *Copymoore Limited and Ors. v. Commissioner of Public Works in Ireland (No. 2)* [2014] 2 I.R. 786, where he noted that there is a “public interest in the swift disposal of this kind of litigation” (at p. 789) and that “concepts of the public good may be relevant as being prejudiced by protracted and delayed judicial review” (at p. 796).
- The Action Group challenged the decision in this case within the statutory 8-week time period. While the grounds in paragraph E of the Statement of Grounds include a failure to transpose EU legislation into Irish law as a ground, it remains the case that, for whatever reason, the Action Group did not seek relief against the State parties.
- Accordingly, the pleadings of the Action Group, which had to be issued within 8 weeks of the grant of planning permission, contain no relief claimed against the State parties. It is the case therefore that the pleadings disclose no cause of action against the State parties and therefore the proceedings are bound to fail against the State parties.

- It is self-evident that if the pleadings are *now* amended to include relief against the State parties, there would then be a cause of action against the State parties. However, such an amendment of the pleadings involves not simply the adding of a *new ground* (which would be the case, if *some* relief had been originally claimed against the State parties). Nor does the amendment sought involve adding *additional relief* (which would be the case if *other* relief had been originally claimed against the State parties). Rather the change which is being sought by the Action Group would convert the situation from one where the State parties are not exposed at all to any claim for relief, to one where they are exposed to a claim for relief for the first time. This is because although the State parties were always named respondents in the proceedings, it remains the case that there was never any relief claimed against them.
- This Court does not believe that such a way of circumventing strict time sensitive rules, for challenging decisions of public bodies affecting third party rights, is justifiable. This is particularly so since denying the strike out proceedings and allowing the amendment to the pleadings sought by the Action Group would be akin to allowing the Action Group mount a judicial review challenge to the State parties with effect from the date of the Action Group's motion (9th October 2019). This would in effect mean that notwithstanding the fact that the time limit for seeking leave to bring judicial review expired on the 22nd May, 2019, some 142 days after this time limit expired the Action Group could amend its Statement of Grounds to effectively bring a judicial review challenge against the State parties, who although always named as respondents were never subject to any claim for relief.

The existing pleadings contain an implied claim for relief against State parties?

39. The Action Group also claims that mentioning the cause of action in the 'grounds' part of the Statement of Grounds (at paragraph E) is sufficient to establish a case against the State parties. In furtherance of this claim in its legal submissions, it claims that the State parties were not "*under any illusion that a case was not being made against them*". This cannot in this Court's view be sufficient. If it were sufficient, an applicant could simply list a ground and then name several respondents, some or all of whom are not subject to any actual claim for relief. Yet, well after the time limit the applicant could decide from which respondents to seek relief. This approach would run completely contrary to the intention of the very tight statutory deadline within which a party must apply for leave to apply for judicial review of a planning decision.
40. To put the matter another way, simply naming a party as a respondent, with no relief claimed against that respondent, does not mean that an applicant has effectively sought judicial review against that respondent. However, in the within proceedings, this is the import of what the Action Group is stating in claiming that the pleadings, even without the proposed amendment, are sufficient to establish a cause of action against the State parties.

No reasons given for the delay

41. Although not determinative of this issue, it is also relevant to note that no evidence was put before the Court as to why the Action Group chose not to include relief against the State parties in its original Statement of Grounds. Although never explicitly stated, it seems to have been implied at the hearing by counsel for the Action Group that it might be due to an oversight by the legal advisers. However, if this was genuinely the reason for the failure to include reliefs against the State parties, one would have thought that when this failure (to include reliefs against the State parties by the deadline of the 22nd May, 2019), was brought to the attention of the lawyers for the Action Group (on the 8th July, 2019 in the Commercial Court and by letter on the 10th July, 2019), that they would immediately have filed a motion to amend the Statement of Grounds at that stage.
42. However, this they failed to do, which would lend support to the view that the non-inclusion of relief against the State parties was not in fact an oversight by the lawyers. In the alternative, if there was some oversight by the lawyers for the Action Group, this was only a reason for not including reliefs against the State parties up until 8th July, 2019 (some six weeks after the statutory deadline expired). It was not a reason for the further delay up until 9th October, 2019 when the motion to amend the Statement of Grounds was filed.

Summary - motion to strike out

43. In summary, it is this Court's view that the strict statutory time limits in planning cases exist for very good policy reasons. Accordingly, an applicant such as the Action Group cannot defeat a strike out motion of proceedings which are on their face bound to fail (by disclosing no relief against a respondent), by simply amending the Statement of Grounds (by, as in this case, inserting reliefs which were never originally sought) and continuing on as if the statutory deadline had been satisfied. To permit this practice would, in this Court's view, be to completely undermine the good policy reasons behind the statutory deadline contained in s. 50(6) of the Planning and Development Act, 2000.
44. The filing of the motion to amend its pleadings by the Action Group was clearly filed in response to, but two months after, the motion to strike out. In this Court's view, the filing of this motion to amend does not, and cannot, impact on the strength of the standalone argument contained in the motion for strike out, that where pleadings disclose no reliefs as against the State parties, they are bound to fail.

Amendment under Order 84, rule 3

45. Although the foregoing analysis disposes of this matter, if this Court is wrong in the foregoing conclusion that the motion to amend the pleadings must be viewed in the context of the motion to strike out the pleadings, as well as in the context of the statutory time periods for planning judicial reviews, then this Court would have to look at the basis for the application to amend the Statement of Grounds in isolation. It would do so as follows.
46. The relevant principles for the consideration of the amendment of pleadings are set out in O. 84, r. 23. This rule states:

- “(1) A copy of the statement in support of an application for leave under rule 20, together with a copy of the verifying affidavit, must be served with the notice of motion or summons and, subject to sub-rule (2), no grounds shall be relied upon or any relief sought at the hearing except the grounds and relief set out in the statement.
- (2) The Court may, on the hearing of the motion or summons, allow the applicant or the respondent to amend his statement, whether by specifying different or additional grounds of relief or opposition or otherwise, on such terms, if any, as it thinks fit and may allow further affidavits to be used if they deal with new matters arising out of an affidavit of any other party to the application.
- (3) Where the applicant or respondent intends to apply for leave to amend his statement, or to use further affidavits he shall give notice of his intention and of any proposed amendment to every other party.”
47. As a preliminary point, it is relevant to note that in this case, one is not dealing with ‘*different or additional*’ grounds of relief as envisaged by O. 84, r.23(2). Rather one is dealing with the insertion of grounds of relief against the State parties, where none previously existed. This therefore militates against an order from this Court under this rule to amend the Statement of Grounds.
48. Furthermore, in the Supreme Court case of *Keegan v. Garda Síochána Ombudsman Commission* [2012] 2 I.R. 570 Fennelly J. considered applications to amend pleadings in judicial review proceedings and noted at pp. 581 and 582:

“Persons are permitted to seek review of administrative decisions which affect them within prescribed times and on grounds in law which they propose and which the courts grant them leave to argue. The object of the system is to strike a fair balance between the certainty and security of administrative decisions and the rights of persons affected by them who wish to contest them.

The strict imposition of time limits is mitigated by the power of the court to permit an application outside the permitted time, provided the court is persuaded that there is good reason for the delay and that no other party is adversely or unfairly prejudiced.

Once an applicant has obtained an order granting leave to apply for judicial review, he is confined to the grounds permitted. He may not argue any additional grounds without leave of the court.

If he applies for an amendment of his grounds within the judicial review time limit, he should, obviously, at least in normal circumstances, have no difficulty obtaining the amendment. If he applies for an amendment outside the time, he will have to justify the application. He will have to explain his delay, just as in the case of a late

applicant. The court will expect him to give reasons to explain his failure to include the new proposed ground in his original application.

On the other hand, it is difficult to see why an applicant for an amendment of grounds should have to satisfy a more exacting standard in explaining delay than is imposed on an ordinary late application. He may say that the additional ground is based on material of which he was unaware when he was making his original application. On occasion, the respondent reveals a new ground of argument in its answer to the application, as appears to have occurred in *McCormack v. Garda Síochána Complaints Board* [1997] 2 I.R. 489 and *Dooner v. Garda Síochána Complaints Board* (Unreported, High Court, Finnegan J., 2nd June, 2000). The applicant may offer a different explanation. There is no reason, in logic, to impose on an applicant a criterion of newly discovered fact to justify an application to amend, when an application for an extension of time is not subject to any equivalent condition. This is not to say that the applicant's knowledge of the facts is irrelevant. In some cases, as in *McCormack v. Garda Síochána Complaints Board*, discovery of new facts may be an explanation for the omission to include a ground. In other cases, the applicant may have been aware at all relevant times of the facts relevant to the new ground and this will weigh in the balance against him, without being necessarily conclusive.

None of this is to take away from the fact that an application for an amendment of his grounds for judicial review must explain his failure to include the proposed new ground in his original application. The cases show that the courts are reluctant to admit new grounds which amount to advancing an entirely new cause of action, as in *Ní Eilí v. Environmental Protection Agency* [1997] 2 I.L.R.M. 458, or a challenge to a different decision as in *Muresan v. Minister for Justice, Equality and Law Reform* [2004] 2 I.L.R.M. 364. The nature of the decision under attack may also be relevant. If it is one which benefits the public at large or a large section of the public, a challenge may have corresponding disadvantages for a large number of people. This may explain why special and stricter statutory rules have been introduced in cases of public procurement, planning and development, and asylum and immigration. The courts will have regard to the public policy considerations which have prompted the adoption of such rules." (Emphasis added)

49. The amendment of pleadings outside the relevant time limits in judicial review proceedings was also considered by the Supreme Court in *Copymoore* where Charleton J. noted at p. 789 *et seq.*:

"[A]t issue is the validity of a decision to limit the available range of suppliers in public procurement for State bodies, any amendment to proceedings must take into account the public interest in the swift disposal of this kind of litigation and will only allow exceptions to the strict time limits involved where good reasons are advanced. [...]

Thus, the applicants had to show that there were reasons which both explained the delay and offered a justifiable excuse. The public contract in issue involved

significant liabilities, obligations and expenditure which may raise important factors for a court. The justice of the situation may raise issues such as prejudice to the notice party arising from the expenditure and other undertakings in the contract.

Also, I am satisfied, concepts of the public good may be relevant as being prejudiced by protracted and delayed judicial review. The common good could have a heavy weighting in reviews of this type, reflecting the requirement on any applicant to move rapidly." (Emphasis added)

50. In this case, it is argued by the Action Group that because reference was made, in four of the 44 grounds in the Statement of Grounds, to the transposition of the two Directives (which grounds clearly relate to the State parties, rather than An Bord Pleanála), it follows that the claiming of relief for the first time against the State parties (as distinct from inserting additional relief) is not akin to advancing an entirely new cause of action. This Court disagrees with this approach. In this case the Action Group did not claim relief against the State parties and so if this Court were to insert any, as distinct from additional, relief for the first time against the State parties, it would amount in this Court's view to advancing an entirely new cause of action and, as noted by Fennelly J. in *Keegan*, this is something the Courts are reluctant to do and so it is not something which this Court is prepared to do in this instance.
51. Furthermore, this Court would observe that if it was to consider the amendment to the Statement of Grounds in isolation, this Court has already noted that it has not been provided with any clear evidence or submissions regarding the precise reasons for the failure to include the relief against the State parties at the leave stage. It appears to have been implied that the failure was due to an oversight by the lawyers for the Action Group, which, if true, is not a compelling justification for the reasons already stated. Accordingly, even if the amendment to the Statement of Grounds was to be considered in isolation, this Court does not accept that reasons have been provided that explain the delay and offer a justifiable excuse for that delay so as to justify this Court in allowing an amendment of the Statement of Grounds.

Conclusion

52. In summary, this Court will grant the motion of the State parties dated 14th August, 2019 for an Order striking out the proceedings against them as bound to fail. It follows therefore that this Court refuses the application of the Action Group dated 9th October, 2019 to amend the Statement of Grounds.