

**THE HIGH COURT
JUDICIAL REVIEW**

[Record No. 2018/100 J.R.]

BETWEEN

KIM GRIFFIN, TONY HENRY, NOEL KELLY AND PHILIP HUGHES

APPLICANTS

AND

DUBLIN CITY COUNCIL

RESPONDENT

JUDGMENT of Ms. Justice Pilkington delivered on the 10th day of July, 2020

1. By order of Noonan J. dated 5th day of February, 2018, the applicants were granted leave to apply by way of judicial review for the reliefs, now within their Notice of Motion, as follows;
 - (1) An order of *certiorari*, by way of judicial review, quashing the decision of the respondent made on the 4th day of December, 2017 and notified to the second named applicant by letter dated 7th December, 2017 ("the decision"), whereby the elected members of Dublin City Council decided to approve a local authority owned development proposal at Croke Villas, Sackville Avenue, Dublin 3, under planning register reference 3857/17 ("the proposed development");
 - (2) An order of *certiorari*, by way of judicial review, quashing the report of the Chief Executive number 400/2017 dated 23rd November, 2017 ("the CE report") which recommended approval of the proposed development, the subject of the decision;
 - (3) A declaration, by way of judicial review, that in making the aforesaid decision on 4th December, 2017 to approve the proposed development, the subject of the Chief Executive's report number 400/2017 dated 23rd November, 2017, the respondent erred in law and, in doing so, misdirected itself in law, acted in excess of jurisdiction, and in breach of the rules of natural and/or constitutional justice, and/or acted irrationally and/or unreasonable and, consequently, the aforesaid decision of the respondent is *ultra vires* the powers of the respondent invalid, and of no legal effect;
 - (4) A declaration, by way of judicial review, that the recommendation contained within the report of the Chief Executive number 400/2017 dated 23rd November, 2017 to approve proposed local authority owned development, the subject of Dublin City Council planning register reference number 3857/2017 was made unlawfully, and/or in breach of their procedure and/or natural and constitutional justice, and/or is irrational and/or unreasonable, and, consequently, the said report of the Chief Executive number 400/2017 is invalid, void and of no legal effect;
 - (5) Further or in the alternative, a declaration by way of judicial review that in purporting to propose and to approve this development pursuant to s. 179 of the Planning and Development Act, 2000, as amended, and part 8 of the Planning and Development Regulations, 2001, as amended, the respondent has erred in law and

in doing so misdirected itself in law by reason of failing to comply with s. 178(6)(d) and s. 175 of the Planning and Development Act, 2000, as amended;

- (6) Further or in the alternative, a declaration by way of judicial review, that the respondent failed to conduct a screening exercise for “appropriate assessment”, and consequently the respondent has erred in law, and misdirected itself in law, by reason of failing to comply with the requirement of Regulation 42 of the European Union (Birds and Natural Habitats) Regulations, 2011 (S.I. No. 477 of 2011);
 - (7) A declaration by way of judicial review that the proposed development, the subject of planning register reference number 3857/17 requires to be made subject to Environmental Impact Assessment by way of application to An Bord Pleanála pursuant to s. 175 of the Planning and Development Act, 2000, as amended;
 - (8) An order that the said decision of the respondent dated 4th December, 2017, the subject matter of the proceedings herein before referred, be stayed until the determination of the within application for judicial review or until further order or until the stay of proceedings shall have lapsed by reason of the applicants’ failure to serve an originating notice of motion herein within any time period prescribed by this Honourable Court;
 - (9) If necessary, an order providing for the discovery of documentation which is or has been in the power, possession or procurement of the respondent and which is relevant to any issue in these proceedings;
 - (10) An order directing that s. 50B of the Planning and Development Act, 2000, as amended, applies to the within proceedings;
 - (11) Thereafter, what might be described as standard reliefs, including further and other reliefs and costs.
2. At the hearing the applicants confirmed they were not pressing and no longer relying upon arguments relating to the requirement of Regulation 42 of the European Union (Birds and Natural Habitats) Regulations, 2011 (S.I. No. 477 of 2011).
 3. This development relates to local authority development, created by s. 179 of the Planning and Development Act 2000 and Part VIII of the Planning and Development Regulations 2001. The Orders sought seek to quash the decision of the respondent on 7th December, 2017 in respect of planning proposal 3857/17.
 4. In broad terms the proposal relates to development within the immediate environs of Croke Park and is part of an overall development set out within Dublin City Development Plan 2016-2022, which deals with this and other developments within this area, some of which have already been undertaken.

5. This development itself (3857/17) affects the areas of Croke Villas, Ardilaun Square, Ardilaun Road, Sackville Avenue and Sackville Gardens. The Council approval is in the following terms: -

“Location: Croke Villas, Sackville Avenue, Dublin 3

Proposal LAW: Planning and Development Act, 2000 (as amended), Planning and Development Regulations, 2001 (as amended) – Part 8. Proposal: Pursuant to the requirements of the above, notice is hereby given of proposed development within the Strategic Development and Regeneration Area at Croke Villas, Sackville Avenue, Dublin 3.

The works comprise the following:

The clearance of walls and perimeter fencing at Sackville Gardens, Sackville Avenue, Ardilaun Square and Ardilaun Road at the Croke Villas site, the clearance of an existing wall along the boundary between Croke Villas and Irish Rail lands, the construction of a new boundary wall/fence adjacent to Irish Rail lands with new pavement treatments, carriageway, trees, lamp standards, planters and ancillary works along a proposed extension of Sackville Gardens.

The construction of a new Boulevard on Sackville Avenue from the junction with Ballybough Road to Croke Park Stadium, comprising new pavement treatments, carriageway, trees, lamp standards, planters and ancillary works.

The upgrading of pavement finishes, carriageway, street lighting and ancillary items along Ardilaun Road and Ardilaun Square.

The construction of 61 no. apartments in two blocks, Block A along proposed extension of Sackville Gardens and Block B along Sackville Avenue. Area – Block A circa 3355 sq.m, Area – Block B circa 1849 sq.m; with underground parking garage containing parking for 36 cars and 54 bicycles, ancillary plant rooms and storage room, accessed off Sackville Avenue... and ancillary perimeter walling to car park ramp.

Block A is five storeys high along the proposed extension to Sackville Gardens and Ardilaun Square and comprises 2 no. 3 bed apartments on two levels, 1 no. 2 bed apartment on two levels; 27 no. 2 bed apartments, 7 no. 1 bed apartments and 1 no. studio apartment; Block B is four storeys high along Sackville Avenue and the access road to underground car park, and comprises 1 no. 3 bed apartment on two levels, 9 no. 2 bed apartments, 12 no. 1 bed apartments and 1 no. studio apartment.”

6. The applicants have all clearly asserted that their principal area of concern is in respect of that portion of the Part 8 decision which relates to Sackville Gardens, where most of them reside.

7. Sackville Gardens is a small cul-de-sac of six late Victorian houses, built in or around 1850. The houses are two storeys over basement, with cellars running underneath the roadway. It is a narrow road, some four metres in width. The only paved footpath is on the side adjacent to the houses. On the opposite side, there is no footpath but a wall which forms the boundary with the railway. Beyond the railway lies the Royal Canal. It appears there is very little through traffic and the roadway is, in effect, used by its residents and for visitor parking.
8. The cul-de-sac at one end of Sackville Gardens appears to have been established over time by way of a gate or fencing.
9. The impugned approval 385/17 is broadly in three parts: -
 - a) The construction of 61 new apartments, served by an underground carpark with access from a new laneway to be constructed off Sackville Avenue and running behind the residential properties of Sackville Gardens.
 - b) The main spectator route to and from Croke Park stadium, described as a "processional boulevard" to be on Sackville Avenue, running from the junction with Ballybough Road to the stadium.
 - c) With regard to Sackville Gardens, it is proposed that there will be an extension of it as far as Ardilaun Square. Retractable bollards are to be installed for pedestrian access only. The only exception is that Sackville Gardens will be available for emergency service vehicles to Croke Park on what are described as event days. On such days, the route linking Sackville Gardens with Ardilaun Road would become the designated emergency vehicle access route to the stadium. At all other times it is a pedestrian access route.
10. The applicants contend that the proposed development will radically alter Sackville Gardens by transforming what is described by them as a small sleepy quiet cul-de-sac into a major new thoroughfare for pedestrian traffic and also a dedicated route for emergency vehicles.
11. This overall development is within the SDRA (Strategic Development and Regeneration Area) pursuant to the 2016-2022 Dublin City Development Plan and is zoned Z14. The land use zoning of Z14 is: -

"To seek the social, economic and physical development and/or rejuvenation of an area with mixed use, of which residential and 'Z6' would be the predominant uses."
12. Prior to this part 8 approval, within the vicinity of Sackville Gardens and the other areas set out within it, there have been prior approvals as follows: -
 - (a) Demolition of four blocks for social housing (2946/16) – Part 8 approval
 - (b) Building 11 houses in respect of derelict houses (3435/17) – Part 8 approval

- (c) In October (4073/16) following a sale of a portion of ground to the GAA, it was granted planning permission by An Bord Pleanála for a handball centre, museum and ancillary development.

13. On 11th September 2017 this Part 8 application was lodged.

Local Authority Development Proposal – Register 3857/17

14. This proposal in respect of Croke Villas is stated to be in respect of phase 2 of a Part 8 planning application dated 11th September, 2017.

15. With regard to Croke Villas site, it refers to making: -

“The provision of.....:

New high-quality residential development in conjunction with exploiting the tourism, commercial and recreational uses associated with Croke Park.”

The application continues: -

“Further to this, the opportunity to provide a city connection to Croke Park along Sackville Avenue, and the possibility of extending the route along Sackville Gardens should also be considered by any new development.”

16. With regard to the site for blocks A and B (the 61 apartments), it is stated that the resulting site (absent the disposal of lands for the handball centre, which was the subject of earlier decision above) is an unusual shape and partly arising from that, it is stated: -

“Our solution is to propose two simple L-shaped blocks to make a strong new edge along both streets – Sackville Gardens and Sackville Avenue – carefully defining the new boulevard, and also a space between the blocks for playgrounds and residential amenity space. The urban design intent here includes the formation of a new street – mainly for pedestrians, but also for emergency services – by extending the existing line of Sackville Gardens. The new street will continue along the boundary to the Irish Rail lands, as far as Ardilaun Square, creating permeability throughout the whole new urban neighbourhood.”

17. There is also reference to security and match/event day issues and these are dealt with below. With regard to Sackville Gardens and its extension to Ardilaun Square, it states: -

“The extension... will be the subject of a new shared surface of high quality modular paving... this is acceptable to DCC roads and traffic on the basis that this is not a normal vehicular traffic route and will be for emergency use only. Retractable bollards will be utilised at either end to ensure the route is used only in emergencies. High quality modular paving will be used, together with tree planting and thresholds to apartments will be set up using brick walls and railings containing planters.”

18. Mr. John Bird, town planner and consultant, who swore the grounding affidavit within these proceedings submitted observations on behalf of the residents of Sackville Gardens. The respondent points out that, from the time of its application onwards, their view was clear that no Environmental Impact Assessment ('EIA') was required. If it had been required then they point out, correctly, that this would necessitate an application not to it but to An Bord Pleanála. In seeking Part 8 approval it was apparent that no EIA was required and the applicants could have clarified this at the outset. Equally apparent they assert, is the absence within the observations submitted on behalf of the Sackville Gardens residents of the absence of any reference to the necessity for an EIA and subsequent Environmental Impact Statement ('EIS'), prior to the Chief Executive's report. The first reference appears within their statement of grounds and the grounding affidavit of Mr. Bird to this application. Whilst the point is noted, in my view that does not preclude this point from being raised within this application.

Report of the Chief Executive – No. 400/2017

19. The report (400/2017) of the CEO describes the works as follows: -

"The clearance of walls and perimeter fencing at Sackville Gardens, Sackville Avenue, Ardilaun and Ardilaun Road at the Croke Villas site, the clearance of an existing wall along the boundary between Croke Villas and Irish Rail lands, the construction of a new boundary wall fence adjacent to Irish Rail lands with new pavement treatments, carriageway, trees, lamp standards, planters and ancillary works along the proposed extension of Sackville Gardens... the construction of 61 numbered apartments and two blocks... block A is five-stories high along the proposed extension to Sackville Gardens and Ardilaun Square and comprises two 3 bedroomed apartments on two levels..."

20. In describing the site, the CEO states as follows: -

"The site is situated to the north to the Royal Canal and adjoining railway line at Ballybough and includes Sackville Avenue to the north and an area of Ardilaun Road to the west, the site is bounded to the south by the railway line and to the southeast by the rear gardens of existing houses at Sackville Gardens and part of an associated laneway adjoining these. Sackville Gardens is a terrace of two-storey houses dating from the nineteenth century, facing the railway line and canal bank. The site consists of the existing four and five-story residential blocks constructed by Dublin Corporation at Croke Villas and adjoining roadways at Sackville Avenue and Ardilaun Road. Three blocks front onto Sackville Avenue and one onto the canal bank, with a gap, previously occupied by a hard surfaced playing pitch, between this area and no. 6 Sackville Gardens. A palisade fence above a low wall has been erected at the western end of Sackville Gardens to form a cul-de-sac..."

21. Under the heading "(b) the proposal", the report states: -

"The proposed development comprises the clearance of walls and perimeter fencing of Sackville Gardens, Sackville Avenue, Ardilaun Square and Ardilaun Road at the

Croke Villas site, the clearance of an existing wall along the boundary between Croke Villas and Irish Rail lands and the construction of a new boundary wall/fence adjacent to Irish Rail lands with new pavement treatments, carriageway, trees, lamp standards, planters and ancillary works along a proposed extension of Sackville Gardens.”

22. Under the heading “interdepartmental reports” and specifically under the heading “roads/traffic”, the following is noted: -

“Report received; note proposal for new ceremonial approach to Croke Park Stadium in conjunction with the GAA; new boulevard to be defined by the new housing and permitted GAA handball centre; redeveloped Sackville Avenue would be c.18m wide, and would be the main spectator route from the Cusack Stand during match days; note new carriageway along Sackville Avenue would be 6.5m wide, and would have tree planting along the kerb edges and integrated street lighting”

23. Under the heading “submissions/observations”, it was noted that two observations had been received; one from residents of Sackville Gardens and from Mr. Ruadhan MacEoin of Mountjoy Square Community Group, who is not a party to this litigation. However, the residents of Sackville Gardens observations have been separately delineated within the report. It comprises some 55 separate bullet points summarising Mr. John Bird’s submissions.

24. The evaluation section (G) states amongst other matters: -

- “(a) A potential new proposed green cycle/pedestrian route with the extension of Sackville Gardens.
- (b) That there would be pedestrian access only from the proposed new street to Sackville Gardens.
- (c) That Sackville Gardens is part of the SDR and after a description of the properties states that it together with the canal bank and railway form a conservation area.
- (d) That in respect of no. 4 Sackville Gardens the height of the block in the area adjacent to it could be considered as it could have the effect of introducing a discordant element to the development which would not be in keeping with the design and rhythm of the block and the development of the whole.
- (e) That special care is required in a case of development proposals and works which impact on structures both protected and non-protected with regard to the street at Sackville Gardens.
- (f) That the proposed extension of Sackville Gardens to Ardilaun Square will comprise a new shared surface, stated as being of high quality modular paving and a colour to match the brick. It is stated that this will ensure a coherent public realm for the

proposed new neighbourhood, connecting both to the proposed boulevard and to the network of streets in the city.”

25. Under the heading “recommendation” states, in part: -

‘...It is considered that the proposed development accords with both the City Development Plan including the objectives for the Croke Villas SDRA, and with the proper planning and sustainable development of the area.’

26. Recommendations are then included, mainly of a more technical nature, are stated to include works concerning drainage and sewer systems and with regard to the roads and traffic planning division.

27. The development is deemed in accordance with the Dublin City Development Plan of 2016-2022.

28. On 7th December, 2017 the respondent approved the proposal as being in accordance with that Dublin City Development Plan 2016-2022 and endorsed both the report and the specific recommendations of the chief executive within that document.

The Applicants

29. On behalf of the applicants the motion is grounded upon the affidavit of John Bird, consultant town planner. Each of the applicants have sworn affidavits; the first named applicant resides in Ardilaun Square, the second named applicant lives and is the owner of no. 2 Sackville Gardens, is the owner of no. 3 and is part owner of no. 4 (with the third named applicant). The fourth named applicant owns no. 1 Sackville Gardens. I accept that the applicants are directly affected by the proposed development.

30. The second named applicant has sworn a number of affidavits within these proceedings and is the only person to have sworn an affidavit specifically in response to the affidavits filed on behalf of the respondent by Mr. Hugh McKenna and Ms. Claire Sheehan.

31. The grounding affidavit of Mr. Bird raises a myriad of issues. The affidavit is certainly broad ranging. It avers (amongst other matters): -

- (a) That the CEO’s report largely mirrors the planner’s report and other than a recitation of the observations submitted by him on behalf of these applicants in advance of this report and has not properly assessed any of them.
- (b) Absence of reports online or on file in the planning registry.
- (c) Failure of the CEO report to properly deal with his observations submitted on behalf of the applicants.
- (d) Failure to have regard to the cellars running from the houses in Sackville Gardens which would have additional traffic imposed upon them.

- (e) The narrowness of the width of Sackville Gardens which he assesses at four metres wide.
 - (f) The lack of consultation with or from the conservation and heritage officers.
 - (g) The lack of proper consideration at the designation of Sackville Gardens as a route for emergency vehicles.
 - (h) No evidence on file of any screening decision for an Environmental Impact Assessment having been made. This is linked at paragraph 49 of his affidavit to the impact and potential of the cumulative effect arising from multiple recent development consents in the same area or development envelope (para 51).
 - (i) Issues with regard to the absence of appropriate traffic considerations with regard to the "secondary emergency access" route through Sackville Gardens.
32. The second named applicant in his affidavits raises a number of issues and concerns (and all applicants adopt those advanced by Mr. Bird), amongst them being: -
- (a) That by treating each development proposal separately, that each has managed to fall into sub threshold development. With regard to that, he complains of the failure to conduct a screening exercise in order to establish whether an Environmental Impact Assessment is warranted for this development.
 - (b) Complaints concerning certain potential changes to the route incorporating Sackville Gardens with various other access routes within the areas.

Statement of Opposition

33. By way of reply, as well as the statement of opposition, there are affidavits sworn by Hugh McKenna, senior executive officer in the House Supply Management of the respondent on 18th June 2018 and an affidavit of Claire Sheehan sworn the 19th June, 2018. The second named applicant swears a further affidavit in respect of the first two affidavits on behalf of the respondents on 24th October 2018 and a further affidavit is sworn by Mr. McKenna in response to that affidavit on 18th November 2018.
34. The Statement of Opposition contends that there were two consultations held on the 22nd and 24th May, 2017 respectively and that, arising from that consultation process, the proposal for the road on Sackville Gardens being open to both vehicular and pedestrian traffic was changed to restrict vehicular traffic by means of retractable bollards on non-event days and to emergency vehicles on event days and on those days to remove pedestrian traffic completely. The applicants are criticised for failing to advert to this within their affidavits, but it is not contradicted by them.
35. The contention that the opening of Sackville Gardens in providing a new pedestrian access to Croke Park is disputed, pointing out that there is no pedestrian access on event days within Croke Park as Sackville Gardens will be reserved for emergency vehicles. On non-event days, the vehicular access is restricted by means of the bollards. Any

additional pedestrian traffic will include new residents from the new units on the proposed extension to Sackville Gardens comprising 41 units and possibly some existing residents of Ardilaun Square.

36. It is contended that the requirements are part of the statutory context for the development of the site as contained within Dublin City Development Plan (2016-2022). Insofar as the Strategic Development and Regeneration Area ('SDRA') proposals are concerned, the following guiding principles are highlighted to: -
- “• Promote provision of new high quality residential development in conjunction with exploiting the tourism, commercial and recreational uses associated with Croke Park;
 - Explore potential to extend Sackville Gardens, providing improved passive surveillance of the canal and the proposed new green cycle/pedestrian route.”
37. With regard to the issue of an EIA it is confirmed that the development plan itself was subject to the process of an Environmental Impact Assessment under the Strategic Environmental Assessment in the overall consideration of the plan and that EIA is a detailed and substantive assessment. I accept this.
38. In his replying affidavit, Mr. Hugh McKenna has sought to put the this development against a background of significant renewal and rejuvenation of the area. The proposals for its overall rejuvenation are set out in some detail within the context of the Dublin City Development Plan. Within that development plan, the proposed provisions for Sackville Gardens are again set out in some detail together with the processional boulevard along Sackville Avenue and this development is put within a broader context of the provision of social housing and other project development within the area.
39. The position is again clarified with regard to the issue of traffic and emergency access and retractable bollards with regard to Sackville Gardens in the manner set out above.
40. With regard to the screening of the development, Mr. McKenna avers as follows: -
- “The issue of Environmental Impact Assessment was considered prior to lodgement of the Part 8 application. Proposals for local authority works which require EIA cannot be assessed under the Part 8 procedure and need to be submitted to An Bord Pleanála for assessment. The criteria under which an application would require EIA were discussed between representatives from the Planning and City Architects Department prior to lodgement of the application and it was considered that, having regard to the size and location of the site, the scale and nature of the proposed development and the scale and nature of proposed developments previously permitted within the Croke Villas SDRA, the proposal did not fall under any of the criteria for which an EIA may be required. Furthermore, the development plan of which the SDRA forms part, is a statutory document which was itself subject

to a process of environmental assessment under the Strategic Environmental Assessment (SEA) process prior to adoption by elected representatives.”

41. The proposed development and its role in providing social housing is emphasised at some length. Equally the applicants are unanimous that their application does not oppose but rather supports the provision of social housing, but rather their focus is on the impact of the amenities they currently enjoy within their occupation of Sackville Gardens itself.
42. The affidavit of Claire Sheehan, a senior executive planner within the respondent, again, as does Mr. McKenna, points out the public consultation nature of the Part 8 application, the documentation furnished and supplied on foot of it. This documentation has in turn formed part of the exhibits to the grounding affidavit of Mr. Bird and are referred to above.
43. It is pointed out that the alleged failure to conduct a screening for EIA purposes was not part of any submission of Mr. Bird prior to the respondent’s decision. Whilst averring that there is no merit to the EIA ground of challenge that has now been raised, the respondent seeks to link this ground of challenge, which they contend has been raised principally to ground an application pursuant to section 50B. Ms. Sheehan specifically points to generic and vague grounds advanced by the applicants with regard to screening and the purpose and precise nature of any EIA, without the requisite degree of specificity.
44. Ms. Sheehan specifically avers that the management of crowds by An Garda Síochána and the GAA does not constitute a “abrogation of responsibility” as contended, but simply deals with the manner in which event day plans are conducted.
45. With regard to the question of whether an EIA was required and whether the present application satisfies the subthreshold criteria, Ms. Sheehan initially confirms the affidavit of Mr. McKenna to the effect that the question or issue as to whether an EIA was required was considered prior to the lodging of the Part 8 application. In her case that was a discussion between herself and Matt Shelton of City Architects Division (senior executive architect) within the respondent. She exhibits that email of 22nd March, 2017. Its subject is headed “Croke Villas – Part 8 – Application – EIA Screening Report” and states: -

“Claire,

I refer to our conversation last week in connection with the above, as discussed, given that the proposed development, at 73 number units is beneath the relevant threshold, an EIA screening report will not be necessary as part of the Part 8 application and it will suffice for us to note on the Part 8 documentation that the scheme is beneath the relevant thresholds.”
46. In addition, Ms. Sheehan states that the proposed development was subthreshold for EIA pursuant to schedule 5 of the Planning and Development Regulations (2001-2015) which sets out the categories of development for which the EIA is required, that Part 1 of schedule 5 sets out where an EIA is mandatory while Part 2 sets out the categories where

it is not mandatory but may be required. She again points out that no specific category has been identified by the applicants within their affidavits.

47. Ms. Sheehan also deals with the suggestion that the development was in part done on a piecemeal basis so as to avoid the necessity for it requiring any assessment as being a subthreshold development, with the possibility of an EIA being required. She avers that, within the criteria set out above, the proposal for the 61 residential units and the pedestrian was subject to screening and it was considered an EEIA was not required (para.59). She continues: -

'The addition of fifteen houses previously approved under a part 8 application (3435/17) would not alter this, nor would the inclusion of the permitted development of a 3,307square metres handball facility.....together with a new 565 square metres museum built on lands owned by the GAA result in an overall development of a scale and nature as to require an EIA, or even a formal screening exercise as such. The claim of project splitting for EIA purposes is therefore without merit'.

That averment is not contradicted by any expert evidence.

48. Ms. Sheehan also exhibits a copy of an email which appears to raise this complaint from the first named plaintiff (Kim Griffin) which appears to be dated 8th January, 2018 and a reply by Mary Conway which in part (being a reply of 26th January, 2018) states the following: -

" Following the lodgement of the Part 8 applications, they were all assessed (a reference to the three separate Part 8 applications (the demolition of the existing flat blocks at Croke Villas, the construction of eleven houses on Sackville Avenue and the present application) were all assessed to determine their effects on the proper planning and sustainable development of the area"

The email continues: -

"Having considered the relevant planning legislation for Environmental Impact Assessment, it is my opinion that the various developments when taken together individually or cumulatively fall significantly below the threshold levels that triggers a need for an EIA. Furthermore, I have also reviewed the approved various developments in the context of the guiding principles for SDRA 14 Croke Villas and consider that the developments are fully consistent with SDRA and the development plan.

It is my opinion that the development proposals for Sackville Avenue and environs... were all fully and properly assessed, and given and gave due consideration to third party submissions... They are considered to be in accordance with Dublin City Development Plan and the proper planning and sustainable development of the area and will help to deliver the objectives of SDRA 14."

49. This would appear to encapsulate the respondent's position.
50. Arising from these matters, the second named applicant, Mr. Henry within his final affidavit contends that there is also a need, given the scale of the development project, that it be screened for an Environmental Impact Assessment (for example, in respect of Article 103.3 of the Planning and Development Regulations, 2001), that whilst an EIS appears to have been conducted in respect of the Dublin City Development Plan, 2016-2022, he believes that the Croke Villas development has not been adequately assessed by that process and as a "project" for the purposes of an Environmental Impact Assessment, it necessitates a separate assessment. His is the only affidavit filed in response to the specific averments of Mr. McKenna and Ms. Sheehan with regard to the necessity of an EIA or otherwise, the issue of sub threshold development and traffic management within Sackville Gardens. Within his affidavits the second named applicant describes his occupation as businessman. I am not aware that he has any specialist qualification in respect of the opinions he furnishes with, for example, regard to an EIA or traffic management and in respect of a number of matters within his affidavit, particularly that sworn on 24th October 2018. There is no replying affidavit from Mr. Bird who is the planning expert.

Submissions

51. The applicants invoke s. 179(3)(b) of the Planning and Development Acts, 2000. It is in the following terms: -

- "(3)(a) The manager (now Chief Executive) of a local authority shall, after the expiration of the period during which submissions or observations with respect to the proposed development may be made, in accordance with regulations under subsection (2), prepare a written report in relation to the proposed development and submit the report to the members of the authority.
- (b) A report prepared in accordance with paragraph (a) shall--
- (i) describe the nature and extent of the proposed development and the principal features thereof, and shall include an appropriate plan of the development and appropriate map of the relevant area,
 - (ii) evaluate whether or not the proposed development would be consistent with the proper planning and sustainable development of the area to which the development relates, having regard to the provisions of the development plan and giving the reasons and the considerations for the evaluation,
 - (iii) list the persons or bodies who made submissions or observations with respect to the proposed development in accordance with the regulations under subsection (2),
 - (iv) summarise the issues, with respect to the proper planning and sustainable development of the area in which the proposed development would be situated, raised in any such submissions or observations, and give the response of the manager thereto, and

- (v) recommend whether or not the proposed development should be proceeded with as proposed, or as varied or modified as recommended in the report, or should not be proceeded with, as the case may be.”

52. Thereafter, pursuant to subsection (4)(b): -

“Following the consideration of the manager's report under paragraph (a), the proposed development may be carried out as recommended in the manager's report, unless the local authority, by resolution, decides to vary or modify the development, otherwise than as recommended in the manager's report, or decides not to proceed with the development.”

53. The appellants particularly invoke a failure of compliance with regard to section 179(3)(b)(ii) and (iv). The requirement within (3)(b) is of course mandatory.

54. The report of the Chief Executive is criticised for failing to deal with the question of EIA and the lack of specificity and detail in the affidavits grounding the statement of opposition are criticised for their failure to properly consider the question of screening or an EIS within the context of an assessment for an EIA.

55. Baker J. in *Byrnes v. Dublin City Council* [2017] IEHC 19 states, in respect of the CEO's report, as follows: -

“The importance of a manager's report cannot be overstated. It is the statutory means by which the members of a local authority are informed of all relevant matters arising for their consideration and forms the framework within which their decision making process is engaged.”

In considering the decision of McKechnie J. in *Sandyford Environmental Planning and Road Safety Group Limited v. Dun Laoghaire Rathdown County Council* [2004] IEHC 133, Baker J. stated as follows: -

“...I am of the view that the distillation by the Manager of the public submissions was adequate and was within the duty imposed upon him. In complying with this obligation he is not bound to use any formula or follow any specified method. There is within the section scope for a variety of presentations, some of which by choice may be far more extensive than others. The applicant's challenge, however, is not put in this way. In truth, this is a question of statutory interpretation, and although quite briefly dealt with, I am nevertheless satisfied that the issues raised, both in substance and in materiality, were adequately outlined in his said report.”

The task of a court in considering whether the requirements of s. 179(3) have been met does require a critical evaluation of the report of the Chief Executive, as was done by McKechnie J. in that case... The question is whether the submissions and observations were sufficiently outlined in their substance and materiality...

...

The function of a court in hearing a judicial review where the adequacy of a city or county manager's report is under consideration must be to look at whether there has been compliance with the statutory requirements in the round, and to consider whether taken as a whole, a report was sufficient to present to the elected members evidence on which they could make a decision.

There is no statutory requirement that mandates a particular formula or structure or amount of content that must be found in a report from the Chief Executive, and provided a report taken as a whole is not so generic or vague or lacking in detail so as to fail to identify the nature and planning implications of a proposed development, a report would satisfy the purpose for which it is mandated."

56. The Court, noting that the members of the respondent body had the necessary expertise and knowledge of the planning and policy considerations within their functional area, then continued: -

"Furthermore, if there were inadequacies, they were *de minimis* and met the test explained by Henchy J. in *Monaghan Urban District Council v. Alf-a-Bet Promotions Limited*, where he accepted that the *de minimis* rule did apply to a judicial review under the Planning Acts, and referred to deviations 'so trivial, or so technical, or so peripheral, or otherwise so insubstantial that, on the principle that it is the spirit rather than the letter of the law that matters, the prescribed obligation has been substantially, and therefore, adequately, complied with'."

57. The Court identified that some of the errors identified with the report were trivial or technical and then continued: -

"However, there is nothing in the legislation which displaces the characterisation of a judicial review as a discretionary remedy. Charleton J. made it clear in *MacMahon v. An Bord Pleanála & Ors.* [2010] IEHC 431, as follows:

'It has been argued that an order of the court quashing a decision should automatically follow in every case where such procedures have been found to be defective. I cannot accept, however, that the court is to be shorn of its discretion in judicial review matters simply because the issue concerns planning.'

The errors identified are minor and trivial, and for the reasons stated and in the exercise of my discretion I reject this ground of challenge."

58. Whilst I accept the submission that simply reciting the issues (in excess of 55 of them) does not constitute dealing with them, in my view, nevertheless, the issues raised can also be seen to have been dealt with in the overall context of the CEO's very comprehensive report. In my view the narrowing of the issues advanced could possibly have increased the requirement for consideration of each in detail. If specificity and detail is advanced in a carefully narrowed and clearly defined submission, then some criticism

might be advanced in failing to deal with such a submission. In my view this does not arise on the facts of this case; each submission and CEO report must be considered within its own parameters. In respect of this I am satisfied that considering the report as a whole that all matters have been fairly and properly considered.

59. Within S.I. No. 600 of 2001 (as amended), pursuant to s. 120 states (1) provides: -
- “(1) “where a local authority proposes to carry out a sub-threshold development and the likelihood of significant effects on the environment cannot be excluded by the authority, the authority shall make a determination as to whether the development would be likely to have significant effects on the environment, and where it determines that the development would be likely to have such significant effects it shall prepare, or cause to be prepared, an EIS in respect thereof.”
60. The appellants break this down into essentially three conditions, (a) that there must be a precondition assessment that the likelihood of significant effects on the environment cannot be excluded, thereafter, (b) the authority must make a determination on whether the development would be likely to have significant effects on the environment and, then, (c) if so, prepare an EIS in that regard.
61. With regard to the allegation of a failure to adequately conduct a screening exercise or to, in any sense, record any assessment in that regard, the respondent contends, through the averments of Mr. McKenna and Ms. Sheehan that the issue of an EIA was considered and screening within that process was considered prior to the lodgement of the Part 8 application. Thereafter, the respondent points to the assessment by the City Architects Department, exhibited within Ms. Sheehan’s affidavit, quoted in full above.
62. With regard to the issue of pedestrian and emergency vehicle traffic within Sackville Gardens, the respondent contends that the report of the CEO did deal with the impact of additional traffic. I cannot see any requirement to exhaustively examine that issue. The respondent was content to leave a number of matters in that regard to An Garda Síochána and the GAA and considers it entirely appropriate that matters relating traffic management are left to the appropriate authorities who have the competence and abilities to coordinate the traffic management plan for event days. The applicants contend this is an abrogation or derogation of responsibility and contend that the Roads and Traffic Planning Division of the respondent having assessed the proposal that division had no objection subject to conditions.
63. With regard to the traffic issue within Sackville Gardens, in my view, there was a certain degree of confusion within the applicants’ initial affidavits as to the precise position with regard to traffic maintenance on Sackville Gardens. I am satisfied that the position is that as maintained by the respondent. With regard to the width of the roadway and the Part 8 development, no evidence has been furnished to show this to be impermissible as a matter of law.

64. I do not accept the proposition that deferring matters to the GAA and An Garda Síochána constitutes a derogation or abrogation of duty. In my view, it is an appropriate decision, in light of their ongoing experience in dealing with traffic and other matters specifically dealing with event days, in this instance, with regard to the Croke Park stadium. I note that the number and nature of those events is very closely monitored and remains under constant ongoing consideration assessment.

65. I accept that the test of *certiorari* remains that as set out by Finlay C.J. in *O’Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39 where he states: -

“The Court cannot interfere with the decision of an administrative decision-making authority merely on the grounds that

- (a) it is satisfied that on the facts as found it would have raised different inferences and conclusions, or
- (b) it is satisfied that the case against the decision made by the authority was much stronger than the case for it...

I am satisfied that in order for an applicant for judicial review to satisfy a court that the decision-making authority has acted irrationally in the sense which I have outlined above so that the court can intervene and quash its decision, it is necessary that the applicant should establish to the satisfaction of the court that the decision-making authority had before it no relevant material which would support its decision.”

66. The applicants rely upon the decision of *Runa Begum v. Tower Hamlets LBC* [2003] 2 A.C. 430 where Millet J. stated: -

“A decision may be quashed if it is based on a finding of fact or inference from the facts which is perverse or irrational; or there was no evidence to support it; or it was made by reference to irrelevant factors or without regard to relevant factors. It is not necessary to identify a specific error of law; if the decision cannot be supported the court will infer that the decision-making authority misled or overlooked relevant evidence or misdirected itself in law...”

67. In *NM (DRC) v. The Minister for Justice, Equality and Law Reform* [2016] IECA 217, Hogan J. held, quoting in turn from a decision of Barr J., in the following terms: -

“It has been stated on many occasions that the courts can only review the process leading to the impugned decision, rather than review the merits of the decision itself. The court is not an appeal court and is not free to substitute its own substantive findings for those of the decision maker. The court cannot reverse the decision of the decision maker; it can only annul its decision. The court can only interfere if it is satisfied that there was an error of law, or an error of fact on the face of the record, or there was some unfairness in the procedure adopted or if the decision was irrational in that there was no evidence supporting the finding made by the decision maker.”

68. Hogan J. continued: -

“All of this is in its own way true. But, perhaps, with respect, this passage may be thought to underplay the scope of contemporary, post-*Meadows* judicial review. While the judicial review court cannot review the merits of the decision, it can nonetheless quash for unreasonableness or lack of proportionality... or where the decision simply strikes at the substance of constitutional or EU rights... The court can further examine the conclusions reached and ensure that they follow from the decision-maker’s premises. The court can further quash for material error of fact.”

69. The material errors committed by the respondent and Chief Executive, contend the applicants, relate to their taking irrelevant considerations into account during the decision making process and, in such circumstances, the applicants may seek and the court may grant an order of *certiorari* in respect of these material errors of fact.

The applicants further contend pursuant to *Ó Gríanna v. An Bord Pleanála* [2015] IEHC 248 that a project could, for planning purposes, lawfully be split into two independent parts. It is submitted on the circumstances of these planning applications that they all combined to form phased parts of the same project and, accordingly, it was necessary for the entire project to be considered not merely isolated elements of it which are assessed in unequal fashion.

70. In this regard, I also accept the point raised by the respondent that a project splitting argument cannot be utilised so as to, in effect, ensure that projects already granted approval (and in respect of which none of the applicants raised any objection) can be in any sense reconsidered or reopened within this application. Whilst I accept that proposition, in my view the applicants point here is more nuanced, concerning the project development and its failure to conduct proper screening assessments.

71. The respondent contends, the applicants made a detailed submission relating to the EIA requirements in its observations in advance of the Part 8 approval process and that as a matter of fact they did screen the development for EIA purposes including subthreshold purposes and that that matter is averred to within the affidavits of Mr. McKenna and Ms. Sheehan.

72. Even if the three Part 8 consents (the present one sought to be impugned and the two others which were not challenged by the applicants) were deemed to form part of the same project for EIA purposes, the respondent contends that they were in any case cumulatively assessed and that, taken together, those developments fall significantly short of any threshold required in such circumstances. That matter is specifically averred to in the affidavit of Ms. Sheehan and no countervailing evidence was presented to the court.

73. On the basis of the uncontroverted averments within the affidavits sworn on behalf of the respondent, I accept that the appropriate screening procedure was considered and the decision properly arrived at that an EIA in respect of this proposed Part 8 development

was not required. I, therefore, find that the respondent conducted itself appropriately in the consideration and determination of this issue.

74. With regard to traffic issues, in my view, it is not an abrogation of responsibility to ensure that traffic management on event days is dealt with by An Garda Síochána and the GAA. Indeed, in my view, there is an argument to be advanced that that is a prudent course to adopt in all the circumstances.
75. In my view, the report of the Chief Executive clearly covers all of the salient issues presented to him on behalf of the residents of Sackville Gardens and otherwise and his report is a comprehensive distillation of all of the issues with regard to this aspect of the Part 8 development.
76. With regard to the reliefs sought within the notice of Motion, there would appear to be some degree of overlap but, in any event, considering each in turn, I refuse the reliefs that seek an order for *certiorari* by way of judicial review at paras. 1 and 2 of the notice of motion.
77. I decline to make any declaration in respect of the Chief Executive's report as sought at para. 3 and, in my view, the respondent did not err in law or misdirect itself in law, act in excess of jurisdiction, in breach of the rules of natural and/or constitutional justice and/or acted irrationally and/or unreasonably *ultra vires* the powers of the respondent.
78. Likewise, the declaration sought at para. 4 in respect of the report of the Chief Executive is declined. I see no basis that it was made unlawfully, in breach of procedural or natural and constitutional justice, is irrational and/or unreasonable and, as a consequence, invalid, void and of no legal effect.
79. With regard to para. 5 which is phrased in the alternative and perhaps for that reason does not arise, but for the avoidance of doubt, I decline to make a declaration by way of judicial review that in approving this development pursuant to s. 179 of the 2000 Act (as amended) and Part 8 of the 2001 Regulations (as amended) that the respondent has erred in law and misdirected itself by reason of failing to comply with s. 179(6)(d) – the motion refers to s. 178 but this would appear to be a typographical error and s. 175 of the Planning and Development Act, 2000 (as amended).
80. It would appear that relief no. 6 is no longer relied upon by virtue of the applicants not relying upon the matters set out within it. With regard to para. 7, I decline to make a declaration by way of judicial review. In my view, for the reasons set out above, there is no requirement that it be made subject to an EIA by way of application to An Bord Pleanála pursuant to s. 175 of the Planning and Development Act, 2000 (as amended).
81. I do not believe that the matters as set out within paras. 8 and 9 of the motion now arise.
82. With regard to para. 10, I will propose to deal with this aspect of the matter when the parties have had an opportunity of considering this judgment and to make any application with regard to it or any other consequential orders and reliefs that might arise.