

**THE HIGH COURT  
JUDICIAL REVIEW**

[2021] IEHC 597  
[2020 No. 813 JR]

**IN THE MATTER OF SECTION 50, 50A AND 50B OF THE PLANNING AND DEVELOPMENT  
ACT 2000 AND IN THE MATTER OF THE PLANNING AND DEVELOPMENT (HOUSING)  
AND RESIDENTIAL TENANCIES ACT 2016**

**BETWEEN**

**WALTHAM ABBEY RESIDENTS ASSOCIATION**

**APPLICANT**

**AND**

**AN BORD PLEANÁLA, MINISTER FOR HOUSING, LOCAL GOVERNMENT AND HERITAGE,  
IRELAND AND THE ATTORNEY GENERAL**

**RESPONDENTS**

**AND**

**O'FLYNN CONSTRUCTION COMPANY UNLIMITED**

**NOTICE PARTY**

**(NO. 2)**

**JUDGMENT of Humphreys J. delivered on Thursday the 7th day of October, 2021**

1. In *Waltham Abbey Residents Association v. An Bord Pleanála (No. 1)* [2021] IEHC 312, [2021] 5 JIC 1002 (Unreported, High Court, 10th May, 2021), I granted *certiorari* of the board's decision in this case. The board now seeks leave to appeal. The developer notice party and the State respondents did not get involved in the present application, which was opposed by the applicant.
2. I have considered the law in relation to leave to appeal under s. 50A(7) of the Planning and Development Act 2000, in particular *Glancre Teoranta v. An Bord Pleanála* [2006] IEHC 250, [2006] 7 JIC 1302 (Unreported, High Court, MacMenamin J., 13th July, 2006), *Arklow Holidays Ltd. v. An Bord Pleanála* [2006] IEHC 102, [2007] 4 I.R. 112 and other relevant cases.
3. The proposed questions suggested by the board are as follows:
  - (i). "Should Article 299B(1)(b)(ii)(II)(C) of the Planning and Development Regulations 2001, as amended, be interpreted as requiring that an application for planning permission made under the Planning and Development (Housing) and Residential Tenancies Act, 2016 which is to be subject to screening for environmental impact assessment be accompanied by a 'distinct identifiable document' which addresses the available results of other assessments carried out pursuant to European legislation other than the EIA Directive, or does it permit An Bord Pleanála to satisfy itself, absent such distinct document, that there is sufficient information in the application made to it which addresses the available results of other such assessments?"
  - (ii). Arising from the first question, if such a "distinct identifiable document" is required, is the Board obliged by Article 299B(2)(a) of the of the Planning and Development Regulations 2001, as amended, to refuse to deal with an application that does not include such a document?"

### **The No. 1 judgment**

4. In broad terms, while this may not have been spelled out fully (and one of the features of the leave to appeal procedure is that when the entrails of one's judgment get picked over, one sees many ways in which it could have been improved), what I was trying to do in the No. 1 judgment was to articulate the following:

- (i). As we know, art. 299B of the Planning and Development Regulations 2001 (S.I. No. 600 of 2001), implements art. 4(4) of the EIA directive 2011/92/EU as amended by directive 2014/52/EU.
- (ii). However, art. 299B adds to the directive by requiring that the relevant material regarding other EU law assessments be in the form of a "statement" which is not a term used in the directive.
- (iii). Since the concept of "statement" was one in domestic law rather than EU law, I saw this as the principle question of purely domestic law, namely whether the additional requirement for a statement imposed by Irish law specifically rather than European law, required an identifiable document as it generally does in the 2001 regulations.
- (iv). It was obviously irrelevant to this domestic law argument that art. 4(4) of the directive does not require a statement.
- (v). If "statement" means an identifiable document, then the case could be disposed of on a domestic law basis alone, and that is what happened.
- (vi). If "statement" does not mean an identifiable document, then one would move on to the question of whether the fragments provided by the developer adequately indicated "how" the assessments were taken into account (also a domestic matter in art. 299B, not specified in the directive).
- (vii). If these domestic matters are resolved in favour of the board, we would move on to EU law. While I now see that I did not clearly spell this out, the EU law questions would include whether the sort of fragments that the board is trying to jigsaw together here would comply with EU law, assuming that the jigsaw method is allowable.
- (viii). Without being definitive about it because we never got there, I would have had to give serious consideration to whether any question of the interpretation (as opposed to application) of EU law relevant to that exercise should be referred to the CJEU under art. 267 TFEU.

### **Conflict of jurisprudence**

5. I delivered the No. 1 judgment here on 10th May, 2021. Over a month later, Owens J. delivered judgment in *Pembroke Road Association v. An Bord Pleanála* [2021] IEHC 403, [2021] 6 JIC 1602 (Unreported, High Court, 16th June 2021). He was made aware of the No. 1 judgment and referred to it, but didn't follow it. Without taking from anyone's right

to disagree, in an ideal world such disagreement would be illuminated by engagement with the logic of the argument underpinning the conclusion being disagreed with.

6. Central to the No. 1 judgment was the fact that the 2001 regulations and the European Union (Planning and Development) (Environmental Impact Assessment) Regulations 2018 (S.I. No. 296 of 2018), that amend them use the terms "information" and "statement" in very different senses with the latter being more specific. These terms are not interchangeable. In the planning context "statement" is something of a term of art and is referable to identifiable documents like the Natura Impact Statement and the Environmental Impact Assessment Report (previously Environmental Impact Statement). Those are separate specific identifiable documents, and it seemed to me that the term "statement" under art. 299B should be interpreted likewise. Possibly it's my misreading, but I didn't see any convincing engagement with this aspect, or with the No. 1 judgment more generally, in *Pembroke Road*.
7. Another feature of *Pembroke Road* that perhaps warrants note is that at para. 67 Owens J. said, "[i]t also struck me that the issue of whether material provided by an applicant is sufficient for the purposes of sub-article 299B(1)(b)(ii)(II)(C) is the sort of matter which the Board is empowered to decide conclusively in exercise of its right to determine questions when examining whether to assume." My concern is that this analysis conflates the interpretation of law, which is ultimately a matter for the court and which does not involve any deference to administrative decision-makers, with the question of its application in the assessment of particular facts, which is a matter for the administrative decision-maker within the bounds of legality.
8. There is absolutely no question of an administrative decision-maker having power to decide anything "conclusively". All administrative decisions are subject to review for legality, and even if ostensibly within legal parameters, are subject to review on other established judicial review grounds. This conflation of these concepts of legality vs. judgement in application of standards also perhaps emerges from a subsequent passage where the learned judge said, "I cannot interfere unless exceptional circumstances are established which demonstrate clearly that the substance of what is required by the regulation was not provided by an applicant or that the decision of the Board to accept the adequacy of material as fulfilling the requirement was irrational or unreasonable."
9. The requirement for "exceptional circumstances" in this sense is unfortunately, I must respectfully conclude, clearly erroneous. If a decision is unlawful, one does not have to go on to establish "exceptional circumstances". There is simply no doctrine that an administrative decision can be quashed only if exceptionality is demonstrated, let alone demonstrated clearly.
10. The reference to the "substance of what is required" is a classic *petitio principii*. It begs the question by assuming the proposition sought to be proved, namely the contention that the legislation here does not impose a requirement as to the *form* of the material, independent of its substance.

11. We go back to Baker J. (Irvine and Costello JJ. concurring) in *V.K. v. Minister for Justice and Equality* [2019] IECA 232 (Unreported, Court of Appeal, 30th July, 2019) at para. 109: “[w]ords do matter, and if the language of the [decision-maker] departed in its emphasis, tone, and possible import from that in the case law, it seems to me that [the judge] was correct to grant *certiorari*”.
12. In any event, the concept of a stand-alone, distinct, identifiable statement is not purely a question of form. Such an identifiable document facilitates transparency, engagement and public participation, and promotes the objectives of the 2011 directive as amended.
13. Seneca made the point two millennia ago that disconnected fragments are qualitatively different from a unified presentation: “*Quaedam diversis locis iacent sparsa, quae contrahere inexercitata mens non potest. Iatque in unum conferenda sunt et iungenda ...*” (“Certain things lie scattered about in various places, and it is impossible for the unpractised mind to arrange them in order. Therefore, we should bring them into unity, and join them ...”) (*Epistles, 93-124* (Loeb Classical Library 77, Richard M. Gummere (trans.)) (Cambridge Mass., Harvard U.P., 1925), Epistle 94, pp. 30-31). A desiccated, legalistic, conceit that the few fragments of material combed out of various places in the developer’s documents here would not have gained anything by being brought together as a coherent statement about the European assessments wilts in the face of that ancient but realistic and profoundly human-centred insight.
14. Finally, the passage from *Pembroke Road* referred to above, if applied in the present context would presuppose that there in fact was a decision of the board to accept the material as fulfilling the requirements of art. 299B. In fact, the board here did not refer to art. 299B at all.
15. Owens J. then went on at paras. 78 and 79 to say, “there is a range of reasonable interpretation of how the requirements of that sub-article may be complied with. It is necessary to permit the Board a proper margin of appreciation in the discharge of this function ... [i]t has not been demonstrated that the Board acted irrationally or unreasonably when it decided to accept material presented in the “Environmental Impact Screening Report” as sufficient compliance with the requirement in sub-article 299B(1)(b)(ii)(II)(C).”
16. I have made the point above that there was no decision in the present case as such to accept the developer’s material as sufficient compliance with art. 299B. If this sort of analysis is correct, then not mentioning art. 299B and not dealing with the issues at all renders the decision impregnable subject only to *O’Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39 on the basis of an assumption that everything must have been in order. That on the face of things seems like a proposition that might be open to some debate.
17. More fundamentally, the concept of a range of reasonable interpretation as to how art. 299B can be complied with very much reinforces my concerns about the suggestion in *Pembroke Road* that there can be varieties of interpretation of a statute with deference being afforded to the decision-maker. While such an approach does indeed obtain in US

administrative law (*Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984)), it is completely alien to the Anglo-Irish system. In Irish law, the legislation can only have one interpretation - the correct interpretation. That is a matter exclusively for the court. The board's interpretation may be right or wrong, but the court does not show any deference to it, still less feels bound by it. Likewise, an appellate court in no way defers to the legal conclusions of a first instance court – any such questions of law are ones for *de novo* review (see *Minogue v. Clare County Council* [2021] IECA 98, [2021] 3 JIC 2902 (Unreported, Court of Appeal, 29th March, 2021) para. 100).

18. The application of the correct interpretation to the facts may well be something to which a reasonableness standard applies insofar as it involves questions of factual judgement. But all of that must be within the envelope of lawfulness, which in turn is determined by the correct interpretation of the regulations. In respect of that question, the board's opinion is not something that weighs with the court, even bearing in mind the fact that in a context not involving legal proceedings, administrative bodies applying legislation are in practice required to interpret it. But such interpretation yields to that of the court in the event of contested proceedings.
19. It is also perhaps worth making the point that the board in the *Pembroke Road* case did expressly refer to art. 299B when seeking further information in an opinion dated 10th December, 2019 and that is in turn specifically addressed in the Environmental Impact Screening Report by reference to art. 299B. There is no such statement here. In para. 89 of the judgment, Owens J. rejects the notion that the board had to make any reference to art. 299B in its decision or as he puts it, "record in a formalised way the manner in which the Board vetted the application for compliance with the provisions of the 2016 Act and the regulations". It is not immediately apparent what the reason for that particular decision is insofar as para. 89 appears to be more an assertion of a conclusion rather than a detailed rationale.
20. Likewise, at para. 90, Owens J. said that "Nothing arises because of the fact that the Water Framework Directive was not referred to in the "Environmental Impact Screening Report". This submission does not pay sufficient regard to the fact that the "Environmental Impact Screening Report" is accompanied by and refers to further specialist reports dealing with matters such as hydrology and ecology which feed into the conclusions." Unfortunately, one would have to respectfully point out that merely "dealing with matters such as hydrology and ecology" goes nowhere near addressing the requirements of art. 4(4) of the EIA directive or the wording of art. 299B of the 2001 regulations. Those require specific steps in terms of taking into account where relevant the available results of other relevant assessments, which must inherently involve an identification of the assessments and their results and an indication of how they were taken into account.

**The board's approach to art. 299B in the present case**

21. It is agreed that here there was no distinct stand-alone document. While it did not arise at the substantive hearing, I suppose I might be permitted to clarify with the benefit of further argument and hindsight (judicial fallibility yet again rearing its head, as it always

seems to) that had there been a distinct stand-alone “document within a document”, such as a particular identifiable section of the EIA screening document that was devoted to other European assessments, I would have regarded that as sufficient. A distinct identifiable document could still be part of a larger document, but what it could not be (and this was really what the No. 1 judgment was driving at) would be a scattered set of fragments and shards of material that one might retrospectively try to glue together into something vaguely recognisable for the purposes of art. 299B.

22. That this was the situation here can be demonstrated by testing the board’s assertion that it should be allowed to satisfy itself that the information was there somewhere in all of the voluminous materials listed at para. 3.4 of the inspector’s report. But the reality of that needs to be tested by measuring that against what the content of the required statement would need to look like. Paragraph 22 of the No. 1 judgment attempts to draw the headings of such content together and in that regard I would observe as follows:

- (i). **Habitats directive:** As regards directive 92/43/EEC, the habitats directive, the board’s substantive submissions for the No. 1 hearings say that the EIA screening report refers to the appropriate assessment screening report and I would accept that, but even if it had not referred to that document, that was before the board anyway. So at least that is an identifiable document.
- (ii). **Directive 2000/60/EC, the water framework directive:** That is not referred to by the board in its submissions at para. 17. Instead the board fell back on the marvellously circular argument that since the directive was not mentioned, it was not relevant and, therefore, did not have to be mentioned. That argument is well short of legally transparent to begin with, but doubly so under this heading insofar as the Lee-Cork Harbour Catchment Area as an area designated on the directive may have a relevance.
- (iii). **Directive 2001/42/EC, the strategic environmental assessment (SEA) directive:** The board’s submissions at para. 17 say that the EIA screening report records the outcome of SEA in respect of the 2015 Cork City Development Plan and the 2014 Cork County Development Plan. This in turn refers to p. 6 of the EIA screening report which says that “[t]he results of the SEA as briefly referenced in the preceding paragraph have been taken into account”. That is fairly *pro forma* and not very illuminating. Furthermore, it does not do a whole lot more than assert that the results have been taken into account without in any way explaining how they have been taken into account as required by the regulations. The express wording of sub-para. (C) requires “a statement indicating how the available results of other relevant assessments of the effects on the environment carried out pursuant to European Union legislation other than the Environmental Impact Assessment Directive have been taken into account.” It is hard to see how a mere assertion that the assessments have been taken into account complies with that paragraph. What is required is a statement “indicating how the available results ... have been taken into account”. The term “how” involves reasoning, illumination,

illustration, explanation. If the board thinks it can be satisfied how a matter has been taken into account by simple assertion that it has been taken into account because we say it has been taken into account, then words have possibly lost all meaning.

- (iv). **Directive 2002/49/EC regarding environmental noise.** Again, the board advances the Joseph Heller/Lewis Carroll argument that this was not mentioned, so was not relevant, so doesn't have to be mentioned.
- (v). **Directive 2008/50/EC, the clean air for Europe directive.** Again, this was not mentioned and that is similarly accounted for.
- (vi). **Directive 2007/60/EC, regarding flood risks.** The board's substantive submissions at para. 17 say that "reference is made to the OPW Flood Maps, which identify that neither the site nor its surrounds have flooded in the past." That refers to p. 11, para. 4.2.6 of the EIA screening report which makes a general reference to flood risks and says that the "Flood Maps identifies (*sic*) that the site or its surrounds have not flooded in the past. There is very low potential for surface water run-off from neighbouring properties to enter the site. All neighbouring lands are composed of built up mature residential areas with their own surface water collection and drainage systems in place." It is not immediately obvious how that passing comment amounts to properly and validly explaining and outlining the result of assessments under other EU directives, even though neither the directives nor the assessments thereunder are referred to, and nor it explained how those assessments have been taken into account.
- (vii). **Any other relevant provision of EU law.** Again, nothing is referred to under this heading, therefore, the board's "we weren't obliged to refer to anything" argument applies.

### **The first question**

- 23. The essence of the board's first question could be reworded as follows: "whether the word 'statement' in art. 299B(1)(b)(ii)(II)(C) of the Planning and Development Regulations 2001, as amended, means a distinct identifiable document (which could include a distinctly identifiable statement within a larger document)?"
- 24. As noted above, I didn't spell out the possibility of the identifiable document being located within a larger document, but I can clarify that now.
- 25. I think what tips this question (reworded) over the edge into the leave to appeal category is the need to reconcile the subsequent conflict with Owens J. That can only be done by an appellate court. My main concern to the contrary is that even if that question is answered in a sense different from the No. 1 judgment, there are yet further hurdles to cross; a point discussed further below. Thus the point is determinative only in the weak sense that it's the point the board lost on – not in the strong sense that its resolution in a different way to the No. 1 judgment will determine the proceedings overall. While I see

the logic of saying that since the point is not determinative in a strong sense, it should not be a basis for leave to appeal, I think that is unduly restrictive when viewed from the point of view of a loser who falls at the first hurdle with other hurdles still lying ahead. Such a person could never appeal to the Court of Appeal if the point had to be determinative of all matters in the strong sense.

### **The second question**

26. The board's second question is just not a viable proposition. It seemed primarily a reworded way of challenging the conclusion that art. 299B(1) imposed a requirement for an identifiable distinct statement, in which case it doesn't add anything and is unnecessary.
27. If, as was developed in oral submissions, the board means to suggest that "statement" means something different in 299B(2) to what it means in 299B(1), that seems to me to be an utterly implausible interpretation. In any event, there is no conflict with *Pembroke Road* on this point because Owens J. didn't find any non-compliance. So the second question clearly doesn't meet the test for certification.

### **The procedural situation if the board succeeds on the certified question**

28. There is much questionable about the decision-making process here:
- (i). unlike in *Pembroke Road*, there is no reference by the board good, bad or indifferent to art. 299B;
  - (ii). art. 299B involves two separate decisions of the screening stage, but the board has conflated those into one which it presents as its assessment (singular);
  - (iii). there was a lack of evidential clarification by the board as to the extent to which art. 299B was really considered either at all or in all of its sub-detail;
  - (iv). the reference to other EU law assessments in the developer's material is very cursory;
  - (v). there is an almost complete absence of information as to "how" those other assessments were taken into account; and
  - (vi). a number of potential EU law assessments were passed over in silence and even if this was something that was somehow permissible for manifestly irrelevant or non-existent assessments, it is very hard to see how it could have been permissible in relation to the water framework directive.
29. Let's assume that the answer to the certified question is "No". Unfortunately that wouldn't be the end of the matter – a host of further questions would arise (some in cases of this type generally, some in this case in particular):
- (i). Is it to be presumed that the board properly operated art. 299B without either making adequate reference to art. 229B or disclosing any material showing actual consideration of that provision? Subject to *Eco Advocacy CLG v. An Bord Pleanála*



(No. 1) [2021] IEHC 265 (Unreported, High Court, 27<sup>th</sup> May, 2021) and *Eco Advocacy CLG v. An Bord Pleanála* (No. 2) [2021] IEHC 610 (Unreported, High Court, 4<sup>th</sup> October, 2021) this might be a more general point as the pleadings here don't focus on this.

- (ii). Is it to be presumed that the board properly operated art. 299B where the board's published decision incorrectly conflates the two separate decisions at the screening stage (envisaged by art. 299B, not mentioned) into a single decision which it presents as its assessment (singular)? Again, subject to *Eco Advocacy CLG v. An Bord Pleanála*, probably a more general point as not particularly pleaded here.
  - (iii). Is art. 299B complied with where 3 of the 6 potentially relevant directives, as well as the 7<sup>th</sup> fall back category of any other EU law, are passed over in silence without any attempt to state whether assessments were available or relevant, or evidence that those questions were considered at all, particularly where the applicant has pointed to the potential relevance of the assessments under the water framework directive? That it seems to me legitimately arises from the applicant's pleadings here: see grounds 12 and 13.
  - (iv). Is art. 299B complied with where 2 of the 6 potentially relevant directives are referred to in cursory terms without information as to "how" those other assessments were taken into account? That also arises from the applicant's grounds 12 and 13. Thus, even if the scattered shards of material that could be snipped from the voluminous developer's documentation here and there could be jigsawed together to create such a statement, the question arises whether this material "indicate[ed] how the available results ... have been taken into account", which is not specifically a requirement of art. 4(4) of the 2011 directive and hence is best viewed as also a domestic law point.
30. Even if all of these questions are to be decided in favour of the board, we then have to address the EU law issues which we didn't get to in the No. 1 judgment. Had we got to that, I might well have referred the applicant's questions to the CJEU so it might have had the prospect of succeeding on those issues ultimately.
31. It would be a matter for an appellate court to decide what to do if it answers the certified question in the negative. The options are obviously to decide all subsequent matters itself (operating art. 267 TFEU if needs be) or to remit any outstanding matters back to the High Court. Puisse judges possibly have a general preference for the latter (and, insofar as I may say so, that probably applies here), but I don't think their views really matter greatly in such a context.
32. Of importance is the need to resolve the conflict of jurisprudence. There is one further procedural issue, namely the board's stated intention to apply for leapfrog leave from the Supreme Court in this case, even if it gets leave to appeal. The parties didn't object to my endorsing that, and, if the Supreme Court doesn't mind me saying so, I think there might be merit in the idea for a number of reasons. Among other things it would provide

definitive resolution of the point, potentially sooner than if the issue came to the Supreme Court *via* the Court of Appeal, and I think the point is of sufficient practical importance to warrant consideration being given to such a procedure.

**Order**

33. In the light of the matters discussed in the judgment, I consider that the first question in the reworded form I have suggested above meets the relevant tests including exceptionality and public interest and accordingly the order will be:

- (i). I will certify that reworded question for the purposes of s. 50A(7) of the 2000 Act and grant leave to appeal on that basis.
- (ii). Since the appellant needs leave to cross-appeal on any point on which it was unsuccessful, the order will not be perfected until the applicant has a chance to consider that matter and make any appropriate submission or application as it thinks fit, which should be notified to the court within 7 days of this judgment.