

THE HIGH COURT  
JUDICIAL REVIEW

[2021] IEHC 662  
[2020 No. 557 JR]

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

BETWEEN

PETER SWEETMAN

APPLICANT

AND

AN BORD PLEANÁLA, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

BORD NA MÓNA POWERGEN LIMITED

NOTICE PARTY

**SWEETMAN XVII (No. 2)**

**JUDGMENT of Humphreys J. delivered on Tuesday the 26th day of October, 2021**

1. In *Sweetman v. An Bord Pleanála (No. 1)* [2020] IEHC 390, [2021] 6 JIC 1601 (Unreported, High Court, 16th June, 2021), I granted *certiorari* of a decision of the board permitting the notice party to construct a windfarm development. The issue now before the court is whether leave to appeal should be granted.

**Sweetman cases – nomenclature**

2. I begin with a question of nomenclature. Looking only at cases where Mr. Sweetman is the first-named applicant, whether or not the board is the first-named respondent, there appear to be 17 separate *Sweetman* cases. These are now frequently difficult to readily distinguish from each other. Following discussion with the counsel in the present case, I suggest that they could be identified going forward as *Sweetman Nos. 1 to XVII* inclusive according to the table below. The present case would on this nomenclature system be *Sweetman XVII (No. 2)*. I should emphasise that this is meant to be a guide to citation, not a complete record of Mr Sweetman's litigation, because there are many other cases (including two CJEU references) in cases where he is or was the second-named rather than first-named applicant. I should also say that I amn't expecting this naming system to be taken up universally, but it might help provide some clarification in at least some contexts as to which *Sweetman* case is being talked about at any given time.

Proposed Case Citation	Case name	Record No.	No. 1 Judgment	No. 2 Judgment	No. 3/ subsequent Judgment/ appellate/ CJEU decisions
Sweetman I	<i>Sweetman v. Shell E. &amp; P. Ireland Ltd.</i>	[2005 MCA 17]	[2006] IEHC 85		[2016] IESC 2; [2017] 3 I.R. 13 [2016] IESC 58; [2016] 1 I.R. 742

Sweetman II	<i>Sweetman v. An Bord Pleanála</i>	[2006 No. 477 JR]	[2007] IEHC 153; [2008] 1 I.R. 277	[2007] IEHC 361	
Sweetman III	<i>Sweetman v. An Bord Pleanála</i>	[2009 No. 99 JR]	[2009] IEHC 174	[2009] IEHC 599	Case C-258/11
Sweetman IV	<i>Sweetman v. An Bord Pleanála</i>	[2009 No. 202 JR]	[2010] IEHC 53		
Sweetman V	<i>Sweetman v. An Bord Pleanála</i>	[2013 No. 356 JR]	[2016] IEHC 277	[2016] IEHC 374	[2016] IESCDET 133
Sweetman VI	<i>Sweetman v. An Bord Pleanála</i>	[2015 No. 2 JR]	[2015] IEHC 285		[2016] IECA 123 [2016] IESCDET 92 [2018] IESC 1; [2018] 2 I.R. 250
Sweetman VII	<i>Sweetman v. An Bord Pleanála</i>	[2015 No. 545 JR]	[2016] IEHC 310		[2017] IESCDET 19
Sweetman VIII	<i>Sweetman v. An Bord Pleanála</i>	[2016 No. 542 JR]		[2019] IEHC 40	[2019] IESCDET 217 [2020] IESC 39
Sweetman IX	<i>Sweetman v. An Bord Pleanála</i>	[2016 No. 715 JR]	[2017] IEHC 46	[2017] IEHC 133	
Sweetman X	<i>Sweetman v. EPA</i>	[2016 No. 824 JR]	[2018] IEHC 156		
Sweetman XI	<i>Sweetman v. EPA</i>	[2017 No. 664 JR]	[2019] IEHC 81		
Sweetman XII	<i>Sweetman v. Clare County Council</i>	[2018 No. 178 JR]	[2018] IEHC 517		
Sweetman XIII	<i>Sweetman v. An Bord Pleanála</i>	[2018 No. 1076 JR]	[2021] IEHC 259		

Sweetman XIV	<i>Sweetman v. An Bord Pleanála</i>	[2018 No. 740 JR]	[2021] IEHC 16		
Sweetman XV	<i>Sweetman v. An Bord Pleanála</i>	[2019 No. 33 JR]	[2020] IEHC 39		
Sweetman XVI	<i>Sweetman v. Cork County Council</i>	[2019 No. 253 JR]	[2021] IEHC 350		
Sweetman XVII	<i>Sweetman v. An Bord Pleanála</i>	[2020 No. 557 JR]	[2021] IEHC 390	[2021] IEHC 662	

### **Leave to appeal generally**

3. The present application is brought under s. 50A(7) of the Planning and Development Act 2000. I have considered the criteria for leave to appeal and the caselaw in that regard, in particular *Arklow Holidays Ltd. v. An Bord Pleanála* [2006] IEHC 102, [2007] 4 I.R. 112, *Glancreé Teoranta v. An Bord Pleanála* [2006] IEHC 250, [2006] 7 JIC 1302 (Unreported, High Court, MacMenamin J., 13th July, 2006), *S.A. v. Minister for Justice and Equality (No. 2)* [2016] IEHC 646, [2016] 11 JIC 1404 (Unreported, High Court, 14th November, 2016), *Dublin City Council v. An Bord Pleanála (No. 2)* [2021] IEHC 34, [2021] 1 JIC 2801 (Unreported, High Court, 28th January, 2021), *An Taisce v. An Bord Pleanála* [2021] IEHC 422 (Unreported, High Court, 2nd July, 2021).

### **Application of the law to the present case**

4. The animating spirit and totem of the board in this application is that of Joe, a surnameless character in *The Pickwick Papers* (Charles Dickens (London, Chapman & Hall, 1836-37)), whose mission in life was expressed in his declamation "I wants to make your flesh creep". His catchphrase was referenced by Lord Reed (Lord Neuberger, Lady Hale, Lord Dyson and Lord Toulson concurring) in *Cox v. Ministry of Justice* [2016] UKSC 10 when rejecting scare tactics on behalf of officialdom as to the implications of finding for the plaintiff, including the spectre of knock-on floodgates of copycat litigation.
5. History repeats itself, and here the board has sought to suggest that the No. 1 judgment has extremely wide-ranging implications. That concern, without entirely dismissing it, is, however, overblown. I will try to summarise the situation under the main headings of the design envelope, the related issue of the application form, the use of "typical" designs, and finally the need to assess the options rather than the worst-case only.

### **The design envelope**

6. The board interprets the No. 1 judgment as a rejection of the concept of the design envelope. I'm afraid I can't agree with that characterisation. An envelope joins two sides of paper in a front and a back with the design contained in between. The permission here

involves just one such constraint. The design is free to float as far away as it likes in the other direction. This isn't an envelope – it is a single sheet of paper flapping in the wind.

7. To that extent the phrase "Rochdale envelope" is possibly a misnomer if it means an open-ended permission. But the No. 1 judgment does recognise the legitimacy of a certain limited flexibility. What that could reasonably look like might vary from context to context. Purely for indicative and illustrative purposes, my overall reaction to the evidence here was that a variation of plus or minus 10% from a mean height specified in the application might have been legitimately within the concept of plans and particulars in the context of a turbine in a location like the one at issue in this case, but that is only indicative because if the application had been formulated in that more tangible way, there could have been specific evidence for and against as to whether such a variation would have created a genuine planning issue on the facts. That could have regard to factors such as visual impact, which was a vital issue here – let's not forget that the first inspector recommended rejection of the planning application due to impact of the turbines on the landscape setting of the Corlea Trackway.
8. If a figure of 10% sounds unduly prescriptive, it isn't meant to be, but basic mathematics indicates that if you vary much more than that, the net effect is really significant. A 100m construction with a variation of 20% each way results in a maximum that is 50% higher than the minimum ( $120m = 150\% \times 80m$ ). So 10% is only a very loose, illustrative and indicative figure as to the sort of variation that could still result in maxima and minima that bear some reasonable resemblance to each other, no more than that.
9. That illustrates the point that while of course the open-ended application suits developers, for reasons eloquently elaborated on in the developer's post-judgment affidavit, there are other interests involved. The concept of limited flexibility, applied reasonably in a context-specific way, appropriately balances these interests, allowing developers a margin within which they can refine the exact design post-consent, but also allowing other participants sufficient certainty as to what the proposal in fact is.
10. For what it's worth, a plus or minus 10% variation would have accommodated all of the various turbine designs exhibited in Mr Noel Cunniffe's affidavit of 6th July, 2021. So to that extent it's hard to see wide-ranging implications from the judgment, whether apocalyptic or otherwise, or any compelling reason why the application needed to include turbines of an open-ended height down to 1 metre.
11. While the board relied heavily on para. 52 of the No. 1 judgment as a basis for leave to appeal, I referred in that para. to the lack of legal provision for a "widely variable design envelope", which implies that a *variable* design envelope is permissible as long as it is not *widely variable*.
12. The board also interprets the judgment as rejecting the concept of the "Rochdale envelope", but that is not a totally accurate summary either. What I found was that the board's interpretation of the Rochdale envelope is not reflected in the legislation. But there is no difficulty with the general concept of a design envelope provided it is within a

certain limited flexibility and no genuine planning issue is thereby created, consistent with what Hamilton C.J. said in *Boland v. An Bord Pleanála* [1996] 3 I.R. 435 at pp. 466 to 467. Of particular note there was Hamilton C.J.'s raising the criterion of "whether any member of the public could have reasonable grounds for objecting to the work to be carried out pursuant to the condition".

13. There is a huge difference between saying that structure will have a height of between X metres and Y metres (X and Y being within the zone of a limited degree of flexibility) and saying that it can be any height up to Y metres. What might be regarded as a reasonable zone of flexibility may vary from context to context. On the approach of a reasonable margin of variability, I do not think that the implications of the judgment are as theatrical as are suggested. My reference to the design not having to be "to the millimetre" in such a context as this (although there are contexts where it would have to be so) was not intended to imply that, once we get into centimetres, the application is a nullity. The fact that the development here is strategic in nature does not change the meaning of the phrase "plans and particulars".
14. Likewise, it seems to me that the notice party's affidavit also slightly over-cooks the implications of the judgment. The affidavit of Mr Cunniffe refers at para. 13 to not being able to "finally determine ... the particular turbine design", but final determination was not required by the No. 1 judgment. Likewise, the difficulty referred to at para. 14 in determining the "exact extent of turbine foundations, hard stands and other infrastructure" can still be accommodated within a reasonable degree of flexibility because the No. 1 judgment didn't demand advance specification of the exact extent either. Indeed, in the offshore context, the need for legislative provision for flexibility is impliedly recognised in the document "Building Offshore Wind: 70 by 30" which is exhibited in Mr. Cunniffe's affidavit, para. 4.3.1 of which says that "[a] form of design envelope flexibility is required within the consenting process for offshore wind in Ireland to keep pace with a rapidly evolving technology."
15. I am in no way dismissing the argument that there are many sound economic and engineering reasons why turbine design has to be kept flexible to some extent until nearer the construction date. However, as the notice party acknowledges at para. 35 of submissions, the fact that any applications have been prepared on a similar basis to that here does not have a bearing on the question of interpretation of the regulations. As I endeavoured to point out in the No. 1 judgment, an open-ended permission is not self-evidently the only or best solution for such a problem and as, the applicant in effect perceptively points out at para. 4.5 of the written submissions on the leave to appeal application, one woman's flexibility is another woman's uncertainty.
16. One really telling point about the board's proposed questions is that they are not addressed individually in the board's written submissions on leave to appeal. That has got to say something about the exercise we are engaged in - in particular that the bogeyman scenarios being put up are put up are to some extent compensating for a lack of real engagement with the points made in the judgment.

17. Another quite telling point is that the board's written submissions do not mention the Supreme Court's decision in *Boland* at all except once when quoting the No. 1 judgment. There is certainly no attempt made to engage with the logic or explain why a point arises in a chain of reasoning leading to a conclusion that I was wrong under this heading.
18. It is true that art. 210 of the 2001 regulations (a provision I referenced in the judgment at paras. 51 and 69) allows the board to "indicate to a prospective applicant ... the plans, particulars or other information which the Board will require for the purposes of consideration of an application". But an indication of the information the board requires may during the application stage does not in law and nor is it designed to change the meaning of the term "plans and particulars", so I do not see art. 210 as providing an answer here. If anything, art. 210 supports the applicant because it reinforces the content of the application form.
19. The board also relies on s. 37C(1) of the 2000 Act which provides that: "[a] prospective applicant shall, for the purposes of consultations under section 37B, supply to the Board sufficient information in relation to the proposed development so as to enable the Board to assess the proposed development." Section 37C is not expressly referred to in the No. 1 judgment, but I am not sure that it adds a whole lot in the sense that it does not dilute the requirement for plans and particulars.
20. It is on the other hand correct that the content of an application in the Strategic Infrastructure Development ("SID") context is not quite as exacting as that in the normal planning context, as pointed out by Clarke C.J. in *Callaghan v. An Bord Pleanála* [2018] IESC 39, [2018] 2 I.L.R.M. 373, at para. 8.7. In that regard Clarke C.J. said that: "The fact that, for example, the Board is given some latitude in respect of specifying material requirements under Article 210 of the Regulations concerning plans and information and that, therefore, the precise requirements may not be the same as apply in an ordinary application for permission to a local planning authority does not mean that, in and of itself, it can properly be said that the *Dellway* [v. *N.A.M.A.* [2011] IESC 13, [2011] 4 JIC 1201 (Unreported, Supreme Court, 12th April, 2011)] test is met. No real argument was put forward as to how those differences could have a real practical effect on the entitlement of a person, such as Mr. Callaghan, to raise objections at the permission stage."
21. This is a different situation because it involves an open-ended form of application that does impact on the detail and content of the public participation process. *Callaghan* is certainly not an authority for the proposition that whatever *Boland* allows by way of flexibility in construction design, the SID context must allow significantly more. In particular, while the board and notice party have made a spirited case for flexibility for wind turbine designs, nobody has given me any reason why it is appropriate or necessary for the notice party here to be able to apply for a permission that allows the construction of a turbine that is for example one metre high or one that is 185 metres high at its own subsequent discretion, subject to agreement with the planning authority pursuant to the condition imposed by the board. A reasonable albeit limited degree of flexibility yes,

particularly in a changing context like wind turbines, but a completely open-ended permission at one end of the scale goes far beyond what is necessary or appropriate and indeed makes very little sense.

### **The application form**

22. An alternative ground for reaching the conclusion that the application can't be totally open-ended was the application form itself. The board's submission claims that the judgment holds that the application form incorporates the requirements of arts. 22 and 23 of the Planning and Development Regulations 2001 (S.I. No. of 600 of 2001), but that ignores the qualifier that such provisions are only incorporated to the standard of "general accord". That is what the application form says. The board complains that it does not know what that means, but it is their phrase.
23. In fairness none of the parties placed any huge reliance on the decision of Barrett J. in *North East Pylon Pressure Campaign Ltd. v. An Bord Pleanála* [2017] IEHC 338, [2017] 8 JIC 2201 (Unreported, High Court, 22nd August, 2017) para. 24. And it seemed to be accepted that that relatively brief paragraph dealt with a much more ambitious argument than that made here. But insofar as the learned judge, referring to the application form, said that "it is general guidance (so it is not specific), it is merely guidance (so it is not prescriptive)", this seems to focus unduly just on the heading of the guidance note rather than on any identifiable consideration of its content. Engaging in the latter would have highlighted quite mandatory language ("shall" ... "should") as well as a correspondence between the concept of the requirement to "generally accord" in the body of the form and the heading of "general guidance". Nor does the brief mention of this issue in that judgment consider the argument that the application form is backed up with a statutory significance by art. 210 of the 2001 regulations. Insofar as the phrase referred to above from that judgment might be thought to suggest the implication that very specific conclusions can't follow from the application of quite general provisions to particular cases, that clearly isn't correct, and nor would it be correct to imply that documents that are not framed in highly prescriptive terms or are not enacted statute law can't have legal effects.

### **The use of a "typical" design**

24. A further aspect of the No. 1 judgment is whether there is something problematic about submitting "typical" designs. It seemed to me (although perhaps this wasn't adequately spelled out in the No. 1 judgment – let's file that under the now-bulging heading of judicial fallibility) that the problem here is the lack of anything specific to hold a developer to in the context of typical designs. If the board's decision or alternatively some instrument of general application were to say that the approval of plans and particulars based on a typical design had the effect that the developer could not depart substantially from such a design, then there would not be a problem. But there is not such a provision. Hence, if an objector were to complain afterwards that the constructed item was materially different to the design submitted, they are going to be met with the devastating riposte "sure that was only typical".

25. The board's argument at para. 33 of the written submissions on leave to appeal now contends for the first time that the developer having submitted something typical, "is not permitted to deviate from a specific and defined programmed shape." While that would not be a problem if it were correct, that is a completely new argument that was not raised at the hearing and indeed it would be distortion of the word "typical", rendering it meaningless. If that is the intention why not just say this is the design. More fundamentally, the argument now made contradicts the evidence before the court and the board. As noted at para. 41 of the *No. 1* judgment quoting from counsel's submission, the EIA report notes that the details of what it described as the "typical" designs will not in fact be strictly adhered to, but will be determined at a later stage in the process (see paras. 2.4.1.2 in relation to the design of the turbine, 2.4.1.5 in relation to the foundation design which will be dictated by the turbine manufacturer and 2.4.1.6 regarding the size, arrangement and position of the hard stands).

**Assessment of the range of options vs. the worst case only**

26. If the board had assessed the range of options it would have seen the pointlessness of an application for permission that would have allowed a one-metre-high construction or any bonsai constructions which are all perfectly within the terms of the application actually made. Condition 8 of the permission granted provides that the "final details of the turbine design hub height, tip height and blade length, complying with the maximum limit and within the range set out in the application documentation" shall be agreed with the planning authority, the reason being given was "in the interest of visual amenity".

27. It is far from clear what that actually means. In particular, given the absence of any real range provided in the application itself, the only range the board could point to was the existence of separate maxima for blade length and hub height when in effect added together created the maximum height overall. It seems to me it is a bit of a stretch to call that a "range" in the present context. I made the point in the *No. 1* judgment that even the more permissive English approach clearly requires the spectrum of different scenarios being allowed for to be considered and assessed, not just the "worst case scenario" as here. That remains an issue even if all other points didn't arise.

**Conclusion**

28. Notwithstanding all of the foregoing difficulties, however, I do think that the practical operation of the planning system would be enhanced by the clarification of certain questions, albeit not those formulated by the board. The notice party developer here perceptively noted in submissions that perhaps the court would consider "some variant of the question as the court might deem appropriate" and that is the approach I intend to take.

29. I consider the test for leave to appeal including public interest and the point being exceptional are (just about) satisfied here having regard to the requirements of a clarification of the practical operation of the planning system. It seems to me that the questions arising that are appropriate to be certified are as set out below. These questions should be construed as referable to Irish domestic law considered on the provisional assumption that EU law didn't add anything additional, bearing in mind that



we did not get to the European law dimensions of the case. Also it might be worth making the point that the second question below is not, in itself and standing alone, one of exceptional public importance, but it is a necessary adjunct to the third question. The questions are:

- (i). Whether it is permissible to allow a variable design application that (i) goes beyond a reasonable limited degree of flexibility and/or (ii) could give rise to a genuine planning issue after the grant of development consent in the Strategic Infrastructure Development context, having regard in particular to:
  - (a). the requirement in art. 214(1)(a) of the Planning and Development Regulations 2001 for plans and particulars;
  - (b). the Supreme Court decision in *Boland v. An Bord Pleanála*;
  - (c). the judgment in *Bailey v. Kilvinane Wind Farm Ltd.* [2016] IECA 92, [2016] 3 JIC 1602 (Unreported, Court of Appeal, Hogan J. (Finlay Geoghegan and Irvine JJ. concurring), 16th March, 2016), where the Court of Appeal held at paragraph 87 that an increase in rotor diameter of 23 metres was a material deviation (and the subsequent decision of Donnelly J. (Costello and Collins JJ. concurring), for that court in *Krikke v. Barranafaddock Sustainable Electricity Ltd.* [2021] IECA 217, [2021] 7 JIC 3001 (Unreported, Court of Appeal, 30th July, 2021) (on appeal from Simons J. in *Krikke v. Barranafaddock Sustainability Electricity Limited* [2019] IEHC 825, [2019] 12 JIC 0601 (Unreported, High Court, Simons J., 6th December, 2019)));
  - (d). the fact that an open-ended scale inherently creates a large zone of permitted design where construction on such a basis would be neither intended nor appropriate (e.g. the 1m high turbines that would be allowed in principle under this permission);
  - (e). the requirement in the application form for Strategic Infrastructure Development that there be general accord with the Planning and Development Regulations 2001 to 2018 insofar as that includes arts. 22 and 23 of the 2001 regulations;
  - (f). the extent to which art. 210 of the 2001 regulations reinforces the effect of the application form; and/or
  - (g). the inappropriateness of the court adding significant flexibilities to the 2000 Act and 2001 regulations beyond those provided, particularly given the highly complex and comprehensive nature of the statutory code and the potential impacts on and trade-offs for multiple stakeholders above and beyond the board and developers.
- (ii). Is it open to the board in the present case to contend on appeal that approval of a "typical" design cannot be substantially deviated from:
  - (a). not having clearly and/or effectively and/or at all made that point at the hearing; and/or
  - (b). given that such a point contradicts the evidence before the court and the board;

- (iii). If the board can make that argument, is that argument correct having regard in particular to:
  - (a). a lack of provision to that effect in the board decision here;
  - (b). a lack of provision to that effect in any relevant measure of general application such as the Planning and Development Regulations 2001 as amended; and/or
  - (c). the fact that such an interpretation renders the phrase "typical" redundant (because if only a non-material deviation is allowed from a typical design, then it serves the same purpose as a "design" *simpliciter*, from which a non-material deviation is also allowed); and
- (iv). Insofar as a permission can lawfully allow a degree of flexibility, is the board required to consider and assess the range of options within that flexibility as opposed to merely assessing the worst-case scenario, having regard in particular to:
  - (a). the inherent incompleteness of assessing only one option for the outcome where potentially a number of alternatives could be constructed;
  - (b). the subjectivity of the concept of what is worst-case; and/or
  - (c). the impact on public participation of such a limited form of assessment.

#### **The pleading objection**

30. Before concluding I might point out that the board and notice party did challenge the entitlement of the applicant to even make the points which are the basis of the application for leave to appeal (see paras. 44 to 49 of the No. 1 judgment). However, there is something at best incongruous and at worst contradictory (or maybe even abusive, depending on your point of view) in a would-be appellant getting leave to appeal on the basis of asserting the need to clarify a point of law of exceptional public importance and then, in an appellate forum, advancing a pleading objection which, if accepted, would have the effect that the point on which the leave to appeal had been obtained never gets to be decided.
31. The notice party here said in fairness that it would not argue for such an entitlement and the board while not formally making any concessions, certainly gave me the distinct impression that it was not proposing to do so. That would be to my mind right and proper, but ultimately whether a point could properly be argued on appeal that fundamentally contradicted the whole basis of the application to the court in the leave to appeal application would really be a matter for the appellate forum rather than for me. Hopefully that problem won't arise.

#### **Order**

32. Before concluding and in view of the conclusion that this case warrants leave to appeal on the exceptional importance standard, I hope I might be forgiven for deferentially suggesting that this might be a matter where the board might on reflection consider making a leapfrog leave to appeal application to the Supreme Court, which could well be worth consenting to from the applicant's point of view and which if made might be worthy

of consideration for a number of reasons given the benefit of early and final clarification of this point of practical importance, which might happen more quickly by dealing with it directly rather than *via* the Court of Appeal, and given the fact that some other live cases raise similar issues.

33. As I am of the view that the statutory tests are met here, the order will be as follows:
- (i). I will grant the respondent leave to appeal and certify the questions identified above in the judgment as being (collectively) ones of exceptional public importance on the basis of which it is in the public interest that there be an appeal to the Court of Appeal; and
  - (ii). given that the applicant needs leave to appeal if he intends to cross-appeal for any reason, I would propose to give the applicant an opportunity to consider that before the order is perfected and I would propose that the matter be mentioned in the next Monday List for the court to be advised as to the position.