

THE HIGH COURT

[2022] IEHC 18
2021/532 JR
2021/86 COM

BETWEEN

ULTAN O'BRIEN AND EDEL O'BRIEN

PLAINTIFF

AND

**AN BORD PLEANÁLA,
IRELAND AND THE ATTORNEY GENERAL**

DEFENDANT

AND

BOWBECK DAC

NOTICE PARTY

JUDGMENT OF Mr. Justice Twomey delivered on the 18th day of January, 2022

SUMMARY

1. Litigation usually involves resolving conflicts between the rights/interests of various parties. This case involves the rights of persons to prevent planning permission being granted for housing in their neighbourhood, where it allegedly affects bats, versus the public interest in having homes developed to deal with current housing needs.
2. The plaintiffs (the "O'Briens") of Carrickmines, Dublin 18 are seeking to quash the grant of a strategic housing development for 482 apartments, a crèche, a gym and a local shop by the notice party ("Bowbeck") on Golf Lane, Glenamuck Road, Carrickmines, Dublin 18, which is the same lane on which the O'Briens reside. The permission for the development was granted pursuant to the Planning and Development (Housing) and Residential Tenancies Act, 2016 ("the 2016 Act").
3. In this preliminary application, the O'Briens are seeking to amend their Statement of Grounds by inserting a claim that, in granting planning permission for the development, which the O'Briens say will negatively affect bats, there was a failure by the first respondent (the "Board") to comply with Article 12 of the Habitats Directive.
4. However, the key new claim the O'Briens wish to now make is that, if there is found to be no such obligation upon the Board to comply with Article 12 of the Habitats Directive, then, in the alternative, the second and third respondents (the "State Respondents") incorrectly transposed the Habitats Directive into Irish law. This is the 'mis-transposition' claim.

Fundamental environmental rights affecting bats v. public interest in housing

5. In seeking to persuade this Court that this amendment to the Statement of Grounds, seeking to invalidate the planning permission, should be permitted, the O'Briens have submitted that what is at stake is a fundamental issue of European environmental law. In this regard, the O'Briens are of course perfectly entitled to rely on whatever legal provisions they choose, including those for the protection of bats, to quash the grant of planning permission. Indeed, in their original Statement of Grounds, they describe themselves as '*dedicated to the protection of the built and natural environment of Ballyogan.*' However, while it is of course true that the rights of bats are important, it is

also the case that the public interest, in providing badly needed housing for residents of this State, is also important.

6. In this instance, it is the latter public interest in the provision of housing which takes precedence and accordingly, this Court refuses the O'Briens' application to amend the Statement of Grounds on the basis, *inter alia*, that the Oireachtas has set down very tight time limits for any challenges to planning applications, such as this strategic housing development.
7. Accordingly, to grant the O'Briens the right to amend the Statement of Grounds *after* the expiry of those time limits risks that it '*might undermine the effectiveness of the eight-week limit*' as per Moriarty J. in *McEntee v. An Bord Pleanála* (Unreported, High Court, Moriarty J., 10th July 2015). This is particularly so when one bears in mind the lengths which the Oireachtas has gone to have very strict time limits in such planning cases and to have very limited scope for their extension by the courts in the interests of progressing strategic housing projects.
8. For the reasons set out below, this Court therefore refuses to permit the O'Briens to amend their Statement of Grounds to include the mis-transposition claim.

BACKGROUND

9. The planning permission from the Board was granted on 20th April, 2021 for the building of the 482 homes and the 8 week time limit for it to be challenged expired on 14th June, 2021. On the 14th June, the O'Briens sought liberty from the High Court to issue these proceedings seeking to quash the planning permission. A month and a half later, on the 26th July, 2021, the O'Briens sought liberty from Barniville J. to seek to amend their Statement of Grounds. The application, which was made returnable for 4th October, 2021, was duly heard by this Court on 2nd December, 2021.
10. In this application, the O'Briens are seeking to amend their Statement of Grounds by inserting a claim that there was a failure by the Board to comply with obligations in Article 12 of European Council Directive 92/43/EEC of 21 May 1992 on the Conservation of Natural Habitats and of Wild Fauna and Flora ("the Habitats Directive") in light of Article 27(2) of the European Communities (Birds and Natural Habitats) Regulations 2011 (S.I. No. 477/2011) ("the 2011 Regulations").
11. Accordingly, the O'Briens seek to amend their Statement of Grounds by inserting the following additional ground at para. 54A

"It is the [O'Briens'] case that the Board is obliged to comply with the obligations in Article 12 by virtue of, at least Article 27(2) of the 2011 Regulations for the purposes of any decision made to grant permission pursuant to section 9 of the 2016 Act. In the alternative and in the event that the Honourable Court does not accept that Article 12 of the Directive applies to the Board by virtue of the 2000 Act, the 2011 Regulations, the doctrine of direct effect or the application of the principles from *Workplace Relations Commission*, it is the [O'Briens'] case that

exempting the Board from compliance with the requirements of Article 12 represents a transposition error by the Second and Third Respondents as it allows for grant of planning permission pursuant to the 2016 Act without any or any adequate consideration being given to the requirement of strict protection by the Board.”

12. In addition, the O'Briens seek to inset a new para. 3A in which they seek the following new relief against the State Respondents

“A declaration that section 9 of the 2016 Act is ultra vires and invalid in that it constitutes a mis-transposition of Article 12 of the Habitats Directive (Council Directive 92/43 on the protection of natural habitats) and/or the Second and Third Named Respondents have failed to properly transpose Article 12 of the Habitats Directive by allowing the Board to grant planning permission for the purposes of the 2016 Act without considering the requirements of that Article for the purposes of ensuring strict protection for flora and fauna.”

13. The solicitor for the O'Briens, Mr. Fred Logue (“Mr. Logue”) avers as follows regarding the reason for the late amendment of the Statement of Grounds

“I say that the [O'Briens] made the case in its original Statement of Grounds that *the Respondent has not discharged its obligations pursuant to the Habitats Directive by reference, in particular, to the impacts from the proposed development on bat fauna*. It was the [O'Briens'] understanding that there was no dispute but that the Board was obliged to comply with the requirements of Article 12 of the Habitats Directive by virtue of, at least Article 27 of the European Communities (Birds and Natural Habitats) Regulations 2011.

However, in other pending proceedings where I am on record for the applicant and where the same point has been raised, *the Board has denied that Article 12 of the Habitats Regulations applied to it* in the context of a decision made pursuant to section 177AE of the Planning and Development Act 2000 (*Ballyboden Tidy Towns Group v. An Bord Pleanála* 2020 816 JR). The Applicant in that case is waiting the delivery of the Board's written legal submissions which are due for delivery imminently in order to identify the scope of this alleged non-application of Article 12 of the Directive to the Board. In the absence of those submissions the [O'Briens] do not know the basis for that argument and are therefore adopting the prudent course of seeking to amend the Statement of Grounds in anticipation of the possibility of a cognate argument being raised in these proceedings and in order to allow compliance with the timetable set by Mr. Justice Barniville. Although the argument may not ultimately arise the [O'Briens] is doing so at the early stage in order to impose the least possible administrative burden on the Court or the parties to the proceedings. I say that there is no possible prejudice to any of the other parties given that they have not delivered Opposition papers in these proceedings.” (Emphasis added)

ANALYSIS

14. In essence, the O'Briens wish to amend the Statement of Grounds to challenge the grant of planning permission on the grounds that, if the Board was, in these proceedings, to deny that the Board was bound by Article 12 of the Habitats Directive, the O'Briens want to be able to make a new argument against the State respondents, namely that they mis-transposed the Habitats Directive into Irish law.
15. As a preliminary point regarding the terms of Mr. Logue's affidavit, it is firstly to be observed that, whether there has in fact been a change in the position of An Bord Pleanála is unclear from his averments. All that one has is Mr. Logue's averment that it is the O'Briens' '*understanding*' that there was no dispute that the Board was obliged to comply with Article 12. This understanding may or may not be correct. Secondly, it is to be noted that this Court was not provided with evidence of the Statement of Opposition of an Bord Pleanála in the *Ballyboden* case (referred to in Mr. Logue's affidavit) which purports to support the averment of Mr. Logue that the Board has denied that Article 12 applies to it.
16. On the other hand, it is of course true, as argued by the O'Briens, that the factual issues, which led the O'Briens to claim, in their original Statement of Grounds at para. 53 (referenced below), that the Board failed to comply with Article 12 of the Habitats Directive, are the same factual issues which have led the O'Briens to the conclusion that they should also make a claim that the Habitats Directive was mis-transposed.

Not role of Courts to facilitate challenges to planning after deadline

17. However, the crucial point for this Court is that this does not excuse or explain the O'Briens failure to make the claim of mis-transposition when they first filed the Statement of Grounds. When they filed their original Statement of Grounds, it was at that stage possible that the Board might deny that it was bound by Article 12 of the Habitats Directive, just as it is now possible the Board might make such a denial.
18. The fact that that this did not occur to the O'Briens or their solicitor is neither here nor there. It is not the purpose of the courts in planning judicial reviews to facilitate challenges to planning permission for housing, simply because a point occurs to an applicant or her legal team after the expiry of the very strict deadlines, which deadlines are undoubtedly imposed for good policy reasons for the development of strategic housing.
19. The bottom line is that the O'Briens failed to insert the mis-transposition ground in its original Statement of Grounds. The fact that they, or their solicitor, suddenly became alive, however that came about, to the risk that a respondent in a judicial review might use a defence they had not previously anticipated, is not a good and sufficient reason for this failure.
20. In order to justify this Court acceding to the amendment application, the O'Briens have submitted that '*the proposed amendment is extremely limited in scope*', on the grounds that the same factual issues, in relation to the allegedly inadequate bat surveys by the Board's inspector, gives rise to both the amended claim (para. 53A, set out above) and

the original claim (paras. 50-53). In those original paragraphs, the O'Briens state, *inter alia*, that:

"[I]t is quite clear that no adequate survey effort was carried out on site[...] It is the [O'Briens'] case that this approach is not compatible with the requirements for strict protection for bat species on a site of considerable significance for bat fauna. At its most basic, [Bowbeck] is obliged to conduct adequate surveys prior to consent being granted, in order to allow the Board to assess the potential impacts on bat fauna both for the purposes of assessing compliance with the Habitats Directive and for the purposes of the environmental impact assessment. [...] the Board was obliged, but failed, to reach a conclusion consistent with the requirements of strict protection in Annex IV and Article 12 of the Habitats Directive."

21. However, just because claims in the original Statement of Grounds, also give rise to the new case being made in the amended Statement of Grounds, does not mean that 'a new case' is not being made.
22. It is clear to this Court that on any interpretation of what is occurring, there is a stand-alone and separate, or 'new case', now being made by the O'Briens. This is because the mis-transposition of the Habitats Directive was not claimed previously in the Statement of Grounds and this claim significantly expands the scope of the case which the State Respondents have to answer, as it introduces an entirely new aspect to the proceedings.
23. That alone is sufficient, in this Court's view, for there to be a 'new case' being made by the O'Briens, as that term is used by Clarke J. in *Sweetman v. An Bord Pleanála* [2008] 1 I.R. 277 (referenced below). However, added to that is the fact that there is a brand new category of relief, claimed against the State Respondents, which is not insignificant, since it seeks a declaration that legislation passed by the Oireachtas (s. 9 of the 2016 Act), is *ultra vires* and invalid. All of this means that a 'new case' is now sought to be made by the O'Briens, in the words of Clarke J. in *Sweetman*, and to which case reference will now be made.

Law regarding amendments to grounds/reliefs in planning judicial reviews

24. In the *Sweetman* case Clark J., as he then was, stated at p. 290 as follows:

"Where an amendment to grounds is sought which would amount to the pleading of a new case and where that amendment is sought outside the statutory time limit, then it can only be granted in circumstances where there is "good and sufficient reason" for allowing the amendment outside time. In substance the court must be satisfied that there would have been good and sufficient reason for extending the time to bring an application for judicial review based on the new grounds. The situation in such cases is, therefore, wholly different from the situation which would apply in relation to what I might call an ordinary amendment in ordinary

proceedings where the court will readily grant an amendment (if necessary on terms) provided that there is no significant prejudice.” (Emphasis added)

25. It seems clear to this Court that the O’Briens’ application falls four-square within the foregoing principle stated by Clarke J., since as previously noted a ‘new case’ is now being made by the O’Briens at para. 54A (namely the alleged non-transposition of the Habitats Directive) and they seek brand new relief against the State respondents at para. 3A (the declaration that legislation is invalid).
26. In reliance on *Sweetman*, this Court concludes that when one is dealing with an amendment to a Statement of Grounds in a planning case, such as this one, as distinct from other judicial reviews, the applicant must satisfy the statutory test relevant to an extension of time in a planning case. The statutory test for the relevant time-period and the extensions of time in a planning case is set out in s. 50(6) and s. 50(8) of the Planning and Development Act 2000 (“the 2000 Act”) which state that:
- “(6) Subject to subsection (8), an application for leave to apply for judicial review under [Order 84 of the Superior Court Rules] in respect of a decision or other act to which subsection 2(a) applies *shall be made within the period of eight weeks* beginning on the date of the decision or, as the case may be, the date of the doing of the act by the planning authority, local authority or the Board, as appropriate.
- [...]
- (8) The High Court may extend the period provided for in subsection (6) or (7) within which an application for leave referred to in that subsection may be made *but shall only do so* if it is satisfied that—
- (a) there is good and sufficient reason for doing so, and
- (b) the circumstances that resulted in the failure to make the application for leave within the period so provided were outside the control of the applicant for the extension.” (Emphasis added)

Very strict attitude taken by the Oireachtas to planning challenges

27. In relation to the foregoing sections it is to be observed firstly that they make clear (‘but shall only do so’) that the courts have no discretion regarding the extension of a time limit where the judicial review concerns a planning matter governed by this legislation, since it must be strictly applied. Secondly, it is also relevant to note that while the time limit for non-planning judicial reviews is three months, the time limit for *planning* judicial reviews is the considerably tighter period of eight weeks. Thirdly, the restricted approach, which the Oireachtas has sought to apply to any challenges to planning matters, is also clear when one considers that it is not enough for an applicant to show good and sufficient reason, in order to circumvent the strict time limit, since she must also show that the failure to comply with the time limit was outside her control.

28. Thus, there can be no doubt that the Oireachtas has enacted laws which provide for a *very tight time period* which is *strictly applied* in relation to any challenges to planning permission for strategic housing as in this case.

29. It is also relevant to note that while Order 84, Rule 21 (1) provides for judicial review applications to be made within three months from the date when the grounds for the application first arose, and Rule 21 (3) provides that this time limit may be extended in certain circumstances, Rule 21 (7) goes on to expressly provide that:

“The preceding sub-rules are *without prejudice to any statutory provision which has the effect of limiting the time* within which an application for judicial review may be made.” (Emphasis added)

Thus this rule expressly gives precedence to any other statutory provision, such as s. 50 of the 2000 Act (which provides for the eight week time period), in determining the applicable approach to extending time limits.

30. On the basis of *Sweetman* and the terms of Order 84, Rule 21(7), it seems clear to this Court that the test, when considering the O'Briens' application to amend their Statement of Grounds, is that set out in s. 50(8) of the 2000 Act and not Order 84, Rule 21(3).

31. There are of course good policy reasons why a very strict approach is taken by the Oireachtas, as to the length of the time-limits and compliance with them, in planning applications. This is because the provision of housing, and in this case one is dealing with the provision of 482 residential units, is in the public interest and should not be delayed unnecessarily.

32. There can be little doubt that it is not an easy matter for an applicant who has missed a deadline in a planning judicial review, to be permitted to nonetheless bring her challenge. In this regard, in the *People Over Wind, Environmental Action Alliance Ireland v. An Bord Pleanála* [2015] IEHC 271, Haughton J. at para. 59 in the context of an application for an extension of time in a planning judicial review, observed that these are 'onerous requirements'.

33. As noted by Moriarty J. in *McEntee v. An Bord Pleanála*, it is important that the very tight time-frame of eight weeks, which is there for good policy reasons, is not undermined by the amendment of the Statement of Grounds after that time period, unless special circumstances exist, since he observed, at para. 24 that

“As regards to any application to amend the statement of grounds, special circumstances must be adduced by the applicant seeking to amend or introduce a new ground as amendments might undermine the effectiveness of the eight-week limit, particularly if a low threshold for the advancement of new grounds or amendments was allowed.”

34. For this reason, this Court needs to be alive to the risk of the very tight, and the very strict, time limit in planning cases being undermined by an applicant filing an initial

Statement of Grounds within the 8 week time limit, but then simply expanding the grounds at some stage thereafter and thereby thwarting the intention of the Oireachtas, namely that if planning permission is to be challenged, any challenge, and the grounds for that challenge, need to be made known to the parties affected within eight weeks of the grant of planning permission.

35. Indeed, one could legitimately ask what is the purpose of very strict time-limits, if they could be overcome on the basis simply that an applicant has thought of further grounds upon which they wish to challenge a grant of planning permission, which for understandable human nature reasons, will no doubt be a regular occurrence for applicants.
36. With this in mind, and for the foregoing reasons, this Court, in determining whether to permit the O'Briens' amendment to the Statement of Grounds, must consider, first whether there is good and sufficient reason for doing so and secondly whether the failure to insert those amendments to the Statement of Grounds initially was outside the control of the O'Briens.

Were there good and sufficient grounds for the omission of the mis-transposition claim?

37. This Court has already concluded that there were not good and sufficient grounds for the failure of the O'Briens to include the mis-transposition issue in its original Statement of Grounds, such that there is not a good and sufficient reason to extend the time period to enable a challenge on these grounds.
38. This Court is supported in this conclusion, by the judgment of Haughton J. in the *People Over Wind*. There, he dealt with a similar argument to the one here, regarding whether a development in the law, *after* the expiry of the time period for judicially reviewing a planning decision, might have been a sufficient reason for the court to permit the amendment of a Statement of Grounds. However, he rejected this notion, as he stated at para. 59 that

“[I]f the only reason that could have been advanced for failing to seek leave on this particular ground in July 2014 was that there was a development in jurisprudence in December 2014, that would not have satisfied the Court or given it jurisdiction to extend the 8 week period to allow the further ground to be pursued.”

39. In this case, what is being considered is not even a development in jurisprudence or other change in the law, referenced by Haughton J. in *People Over Wind*, but rather simply a realisation by the O'Briens of the risk that a particular defence might be relied upon by the Board. Accordingly, this Court's earlier conclusion, that this was not a good and sufficient reason to permit the amendment of the Statement of Grounds, is consistent with the approach in *People Over Wind*.

Was failure to include mis-transposition claim outside the control of the O'Briens?

40. It is clear from the terms of s. 50(8) that the two grounds listed to justify an extension of the time limit are cumulative, so that not only do the O'Briens have to show a good and

sufficient reason for failing to include the mis-transposition claim in the Statement of Grounds, but they also must establish that that the failure, to include that claim, was outside their control.

41. No evidence was provided to this Court of how it could be said that the O'Briens could not have made the mis-transposition argument in their original Statement of Grounds. In particular, the O'Briens do not explain why the mis-transposition ground could not have been included in the Statement of Grounds initially, or how or why they were precluded from so doing. There appears to this Court to have been nothing stopping the O'Briens making the mis-transposition claim in their original Statement of Grounds. Accordingly, this Court cannot see how it could have been outside their control.
42. As previously noted, it is a strict requirement, before there is an extension of time, that the failure be outside the control of the applicant, which is not the case here. Accordingly, the application fails on this ground also.

CONCLUSION

43. This Court concludes that the O'Briens have failed to satisfy this Court that there were good and sufficient reasons for their failure to include the mis-transposition issue in the original Statement of Grounds. Even if this were not the case, the O'Briens have failed to convince this Court that it was outside their control to insert those grounds in the original Statement of Grounds.
44. On this basis, this Court rejects the application for the amendment of the Statement of Grounds.
45. Insofar as final orders are concerned, this Court would ask the parties to engage with each other to see if agreement can be reached regarding all outstanding matters without the need for further court time. In case it is necessary for this Court to deal with final orders, this case will provisionally be put in for mention a week for the date of delivery of this judgment at 10.45 am (with liberty to the parties to notify the Registrar, in the event of such listing being unnecessary).