

**THE HIGH COURT
JUDICIAL REVIEW**

**[2022] IEHC 372
[2022 No. 157 JR]**

BETWEEN

MARTIN STAPLETON

APPLICANT

AND

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

RESPONDENTS

AND

SAVONA LIMITED AND DUBLIN CITY COUNCIL

NOTICE PARTIES

JUDGMENT of Humphreys J. delivered on Wednesday the 22nd day of June, 2022

1. This matter arises from a decision by the board on 23rd December, 2021 to grant permission for a strategic housing development in Clontarf, Dublin 3.
2. The statement of grounds was filed on 25th February, 2022 and amended statements filed on 16th and 23rd March, 2022. The relief sought is as follows:
 - “1. An Order of Certiorari pursuant to Order 84 of the Rules of the Superior Courts 1986 as amended and Section 50 of the Planning and Development Act 2000 as amended quashing the decision of the First Respondent, An Bord Pleanála (the Board), dated 23 December 2021, file reference 311333, authorising a proposed strategic housing development of 131 build-to-rent apartment units at Redcourt, Seafield Road, Clontarf, Dublin.
 2. Such declaration(s) of the legal rights and/or legal position of the applicant and (if and insofar as legally permissible and appropriate) persons similarly situated and/or of the legal duties and/or legal position of the Respondents as the court considers appropriate.
 3. A declaration that the Urban Development and Building Heights Guidelines for Planning Authorities 2018 (and / or 2020) are invalid, ultra vires and / or unconstitutional and should be set aside.
 4. A stay pursuant to Order 84 Rule 20(8)(b) of the Rules of the Superior Courts on the operation of the above Board Decision of 23 December 2021, file reference 311333, pending conclusion of the present proceedings.
 5. A Declaratory Order pursuant to Section 7 of the Environment (Miscellaneous Provisions) Act 2011 as amended, Order 99 of the Rules of the Superior Courts as

amended, the inherent jurisdiction of the Court, Article 47 of the Charter on Fundamental Rights of the European Union, Articles 4(3) and 19(1) of the Treaty on European Union, and / or Article 9 of the Convention on Access to Information, Public Participation In Decision-Making and Access to Justice In Environmental Matters done at Aarhus, Denmark, on 25 June 1998 (the Aarhus Convention), confirming that Section 50B of the Planning and Development Act 2000 as amended and / or Sections 3 and 4 of the Environment (Miscellaneous Provisions) Act 2011 apply to the Grounds set out at Part E hereof.

6. A Declaratory Order pursuant to Section 7 of the Environment (Miscellaneous Provisions) Act 2011 as amended, Order 99 of the Rules of the Superior Courts as amended, and/or pursuant to the inherent jurisdiction of the Court, that, if and insofar as the Applicants may not be entitled to an Order in the terms of the preceding paragraph, or an Order to equivalent effect, the State has failed adequately to guarantee and defend the Applicants' right to bring proceedings at a cost that is not prohibitively expensive, has failed to ensure the Applicants' right to effective judicial protection, and / or has failed to ensure reasonable predictability in relation to the costs of proceedings, and has accordingly failed to comply with the requirements of Article 47 of the Charter on Fundamental Rights of the European Union, Articles 4(3) and 19(1) of the Treaty on European Union, and / or Article 9 of the Aarhus Convention.
 7. A Declaratory Order pursuant to Order 84 Rule 18(2) of the rules of the Superior Courts as amended and Article 4(3) of the Treaty on European Union, that the Minister, Ireland and the Attorney General, and / or the Board, are required by law to pay to the Applicants on the conclusion of the present proceedings, the amount of any costs which the Applicants may be ordered to pay to the other Respondents or Notice Parties, or so much of such sum as may be necessary to ensure that the costs borne by the Applicants in the proceedings are not prohibitively expensive for it.
 8. An order referring a question or questions of law for determination by the Court of Justice of the European Union.
 9. If necessary, an extension of time to apply for leave to seek judicial review of the decision of the Board, pursuant to Section 50(8) of the 2000 Act.
 10. Further or other relief.
 11. Costs."
3. The core grounds pleaded are as follows:

"Grounds Relating to Compliance with National Law

1. The impugned decision is invalid because the Board erred in its interpretation of the term 'structure' for the purposes of S2 of the 2000 Act, failing to recognise that the overall roof would be part of the structure and that the space beneath it would not constitute open space or communal open space for the purposes of para 16.10 of the Development Plan, resulting in an unidentified material contravention of the Development Plan contrary to S9(6) of the 2016 Act and S37(2)(b) of the 2000 Act.

2. The impugned decision is invalid because the Board erred in its interpretation and application of SPPR3 and part 3.2 of the Height Guidelines, and S9(6) of the 2016 Act, failing to have appropriate and reasonable regard to the BRE Trust's Site Layout Planning for Daylight and Sunlight, in particular the recommended average daylight factor (ADF) of 5% for a well daylighted space, or to identify a rationale for alternative compensatory design solutions.

3. The impugned decision is invalid because the Board erred in its interpretation and application of S9(1)(a)(iii), S9(2) and S18 of the 2016 Act, and S143 of the 2000 Act, National Strategic Outcomes of the National Planning Framework, or failed to apply those provisions or requirements in relation to capacity of public transport to service the Proposed Development.

Grounds Relating to Compliance with European Union Law

4. If and insofar as their ordinary meaning may not be as set out in Ground 2 above, the impugned decision is invalid because the Board erred in its interpretation and application of SPPR3 and part 3.2 of the Height Guidelines, and S9(6) of the 2016 Act, having regard to their proper interpretation in the context of the National Planning Framework, the Binding Reductions Regulation, European Climate Law and Climate Neutrality Regulation, failed to consider the need to deliver sustainable development under S9 of the 2016 Act, S34 of the 2000 Act, A3(3) of the Treaty on European Union, and A11 of the Treaty on the Functioning of the European Union, and thereby breached its obligation pursuant to A4(3) of the Treaty on European Union not to adopt a decision that would undermine the State's obligations under those Regulations.

5. If and insofar as their ordinary meaning may not be as set out in Ground 3 above, the impugned decision is invalid because the Board erred in its interpretation and application of S9(1)(a)(iii), S9(2) and S18 of the 2016 Act, and S143 of the 2000 Act, having regard to their proper interpretation in the context of the National Planning Framework, the Binding Reductions Regulation, European Climate Law and Climate Neutrality Regulation, failed to consider the need to deliver sustainable development under S9 of the 2016 Act, S34 of the 2000 Act, A3(3) of the Treaty on European Union, and A11 of the Treaty on the Functioning of the European Union, and breached its obligation pursuant to A4(3) of the Treaty on European Union not

to adopt a decision that would undermine the State's obligations under those Regulations.

6. The impugned decision is invalid because the Board failed to apply or comply with A4(1)(a) of the European Communities Environmental Objectives (Surface Waters) Regulations 2009, S.I. No. 272 of 2009 (Surface Waters Regulations), A4(1)(a) of the Water Framework Directive (2000/60) and / or A4(3) of the Treaty on European Union in relation to transitional waters in the Tolka estuary and around the North Bull Island.

Grounds Relating to the Validity of Guidelines and Regulations with regard to the Constitution

Validity of Guidelines

7. In the alternative to Ground E1.3, the impugned decision is invalid because it is based on invalid Guidelines which exceed the powers conferred on the Minister by S28(1C) of the 2000 Act.

8. In the alternative, the impugned decision is invalid because it is based on SPPR3 of the Height Guidelines, which are adopted pursuant to Section 28(1C) of the 2000 Act, and that Section is contrary to Article 15.2.1 of the Constitution.

Grounds Relating to Costs

9. The grounds advanced in the present proceedings are grounds alleging contraventions of national law relating to the environment for the purposes of A9(3) of the Aarhus Convention, and attract the operation of S3(1) and (2) of the Environment (Miscellaneous Provisions) Act 2011, or, in the alternative, of S50B(2) and (2A) of the 2000 Act as amended."

4. The applicant brought a motion filed on 27th May, 2022 for a protective costs order, specifically a declaration that s. 50B of the Planning and Development Act 2000 or s. 3 of the Environment (Miscellaneous Provisions) Act 2001 applies, or alternatively a declaration in effect that the Aarhus Convention interpretative obligation applies. There was also a fall-back claim for relief in the event that the State has not properly transposed EU law.
5. On 2nd June, 2022, the issue in relation to the board was adjourned to 25th July, 2022 on the basis that the board would take a pragmatic approach to the filing of pleadings (that is, accept without making any concession as to the legal position otherwise that the applicant is not liable for costs in the event of not winning the case, as concerns costs up to the close of pleadings) and that we would review the costs position regarding subsequent steps once pleadings are complete.
6. The present motion, therefore, relates only to relief against the State. It was given a hearing date of 15th June, 2022.

7. In written submissions, the applicant had argued that the court should not deliver judgment until the Supreme Court had determined the appeal in *Heather Hill Management Company CLG v. An Bord Pleanála* [2021] IECA 259 (Unreported, Court of Appeal, Costello J. (Ní Raifeartaigh and Pilkington JJ. concurring), 14th October, 2021). That makes very little sense because there is no point in the court hearing a matter but then declining to deliver judgment. The correct course would have been to seek an adjournment of the motion, which the applicant didn't do.
8. At the completion of the hearing, I indicated the order being made in respect of s. 50B of the 2000 Act and the 2011 Act and indicated that a formal judgment would be given later giving reasons and dealing with the Aarhus Convention issues.

Claim regarding s. 50B of the 2000 Act

9. There is no basis whatsoever for a declaration that s. 50B applies. A claim that ministerial guidelines under s. 28 of the 2000 Act are *ultra vires* or that s. 28 is invalid is not a proceeding under the habitats directive or any EU directive on public participation or under a national law giving effect to such a directive.

Claim under the 2011 Act

10. The 2011 Act only applies, by virtue of s. 4(1)(a), where the proceedings are "for the purpose of ensuring compliance with, or the enforcement of, a statutory requirement" or in other related circumstances.
11. An action seeking to invalidate a statutory requirement (including a requirement in an instrument such as a guideline made under a statute), is not an action to ensure compliance with or enforcement of a statutory requirement. If I am wrong about that, such an action is not aimed at preventing "damage to the environment" in the sense meant by the 2011 Act as explained in *Enniskerry Alliance v. An Bord Pleanála (No. 1)* [2022] IEHC 6, [2022] 1 JIC 1410 (Unreported, High Court, 14th January, 2022), *Enniskerry Alliance v. An Bord Pleanála (No. 2)* [2022] IEHC 337, [2022] 6 JIC 1002 (Unreported, High Court, 10th June, 2022) and *Save Roscam Peninsula CLG v. An Bord Pleanála* [2022] IEHC 328, [2022] 6 JIC 0903 (Unreported, High Court, 9th June, 2022). The harm thereby prevented is insufficiently tangible and in addition is not a harm to the existing natural or human ecosystem in the sense of the statute but rather a complaint that a more Utopian development might have been authorised but for the guidelines. The 2011 Act does not apply.

Claim regarding Aarhus interpretative obligation

12. The applicant has proposed a number of questions for reference to the CJEU in relation to the Aarhus interpretative obligation. Many of these overlap with the *Enniskerry Alliance* case.
13. The first question is:

"Is the Aarhus Convention itself an instrument of EU law for the purposes of engaging the jurisdiction of the Court under A267 TFEU, or is it necessary that there be a further distinct measure of EU law engaged?"

14. That seems to me to be a repeat in essence of *Enniskerry*.

15. The second question is:

"If the latter, are any or all of the following sufficient to engage that jurisdiction: Decision 2016/1841, Regulations 2018/842, 2018/1999, 2021/1119, where the impugned instrument was adopted in part for the purpose of ensuring denser development in order to promote sustainable development and reduce carbon emissions from transport, and indirectly to address climate change".

16. That does not add a whole lot to *Enniskerry* and is likely to be answered in substance by the answer in that case.

17. The second question continues:

"Or, where the impugned decision was adopted pursuant to a national law intended to promote sustainable development in the field of town and country planning, and where the impugned instrument pursuant to which that decision was taken was itself adopted pursuant to the same national law, for the same purpose and subject to strategic assessment under that Directive."

18. That likewise does not add a whole lot to *Enniskerry* or in particular to the reference in *Save Roscam*.

19. The applicant's third question is as follows:

"If the jurisdiction of the Court is engaged pursuant to A267 TFEU, do A9(2), (3) and (4) Aarhus, taken together, apply to the entirety of proceedings that seek to challenge the validity of a decision taken pursuant a national law intended to promote sustainable development in the field of town and country planning?"

20. The question of splitting an applicant's challenge so that some grounds were covered by costs protection and others are not was addressed in Case C-470/16 *North East Pylon Pressure Campaign Limited v. An Bord Pleanála* (Court of Justice of the European Union, 15th March, 2018, ECLI:EU:C:2018:185), but only in the context of art. 11(4) of directive 2011/92/EU. The court held: "[w]here an applicant raises both pleas alleging infringement of the rules on public participation in decision-making in environmental matters and pleas alleging infringement of other rules, the requirement that certain judicial procedures not be prohibitively expensive laid down in Article 11(4) of Directive 2011/92 applies only to the costs relating to the part of the challenge alleging infringement of the rules on public participation." That does not relate to the interpretative obligation.

21. But the question of whether this cost-splitting approach is permissible under the interpretative obligation will probably be answered in substance in *Enniskerry*.
22. Question 4 is:

“If the answer to the preceding question is no, do A9(3) and (4) Aarhus apply to that portion of proceedings that seeks to challenge the validity of an instrument pursuant to which the impugned decision was taken where both the decision and the instrument are adopted pursuant to a national law intended to promote sustainable development in the field of town and country planning?”
23. As far as the challenge to the constitutionality of legislation is concerned, this falls outside the Aarhus Convention. Article 2(2) of Aarhus defines public authority as follows:

“Public authority” means: (a) Government at national, regional and other level; (b) Natural or legal persons performing public administrative functions under national law, including specific duties, activities or services in relation to the environment; (c) Any other natural or legal persons having public responsibilities or functions, or providing public services, in relation to the environment, under the control of a body or person falling within subparagraphs (a) or (b) above; (d) The institutions of any regional economic integration organization referred to in article 17 which is a Party to this Convention. This definition does not include bodies or institutions acting in a judicial or legislative capacity;”
24. What is in issue in the present motion is the requirement that costs be not prohibitively expensive under art. 9(4) of Aarhus. That refers back to art. 9(1), (2) and (3). The position is as follows:
 - (i). Article 9(4) is purely derivative. It requires the application of either art. 9(1), (2) or (3).
 - (ii). Article 9(1) is about information and is irrelevant to the present case.
 - (iii). Article 9(3) is expressly limited to acts of public authorities and private persons.
 - (iv). Article 9(2) is not in its terms expressly limited to public authorities, but refers back to art. 6. The text of art. 6 is closely tied into the acts of public authorities and it seems to me implicit, particularly having regard to art. 6(2)(c) and (d), that art. 6 only applies to the acts of public authorities. The provision relates only to an “environmental decision-making procedure”, and that pre-supposes a decision-maker which can only be a public authority in the context.
25. Thus, insofar as the applicant’s point relates to a challenge to the validity of legislation, it seems *acte clair* that challenge falls outside the scope of the Aarhus Convention.

26. It follows that there can be no question of relief against the State in respect of non-transposition of Aarhus in this respect.
27. Insofar as the applicant's complaint relates to a challenge to the ministerial guidelines, that does raise a new question similar to question 4 in *Enniskerry*, which I would attempt to formulate as follows:

Is a challenge to be considered as falling outside the interpretative obligation whereby in proceedings where the application of national environmental law is at issue, it is for the national court to give an interpretation of national procedural law which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) and (4) of the Aarhus Convention, so that judicial procedures are not prohibitively expensive, either as not being one where the application of national environmental law is in issue or as not within the sphere of EU environmental law, merely because it involves a challenge to the validity of an instrument adopted under a statutory provision based on domestic public law or constitutional law (for example, a challenge on the basis of national administrative law principles and constitutional provisions regarding the exercise of the legislative function in accordance with the separation of powers as between the legislature and the executive) in a context relating to the environment or by way of a challenge to the procedure by which guidelines with environmental relevance (assessed under directive 2001/42) were adopted.

28. It is perhaps fair to say that the Irish courts to date have not treated similar challenges as subject to the Aarhus interpretative obligation, but decisions of domestic courts do not automatically make an EU point *acte clair*.
29. The applicant's fifth question is as follows:

"If A9(3) and (4) Aarhus apply, in interpreting the concept of an act that contravenes provisions of national law relating to the environment, should the national court look to:

the grounds of challenge, to see if the form of the grounds is specific to environmental law (eg, error of law, excess of jurisdiction, consideration of irrelevant material, failure to consider relevant material, unreasonableness – referred to as classic grounds of judicial review), or

The provision of law pursuant to which the impugned decision was adopted, to determine if it relates to the environment, or

The provision of law pursuant to which the impugned instrument was adopted, to determine if it relates to the environment, or

The impugned decision itself, to determine if it relates to the environment, or

The impugned instrument, to determine if it relates to the environment, or

To some other factor or to any combination of the above factors?"

30. That does not add a whole lot to *Enniskerry*.

31. The sixth question proposed by the applicant is as follows:

"If the answer to the preceding question is that the court should look to the grounds of challenge, is it significant that national procedural law prescribes that a challenge to the validity of a decision can only be taken by way of judicial review, and that none of the classic grounds of judicial review is specific to the environment?"

32. Again, that does not add much to what the CJEU has already been asked in *Enniskerry*.

33. It seems to me having regard to the foregoing that a referable question of EU law arises, that this relates to the interpretation rather than application of EU law, that an answer is necessary for the decision of this court, that the answer is not *acte clair* or *acte éclairé*, and that it is appropriate in all circumstances to make a reference to the Court of Justice of the European Union under article 267 TFEU.

Order

34. The order will be as follows:

- (i). as announced on 15th June, 2022, the declaration under s. 50B of the 2000 Act is refused;
- (ii). as announced on 15th June, 2022, the declaration under the 2011 Act is refused;
- (iii). the declaration that the challenge to the validity of primary legislation is covered by the Aarhus obligation is refused;
- (iv). the claim for relief by reference to any alleged non-transposition of Aarhus in respect of the challenge to the validity of primary legislation is refused;
- (v). as regards the challenge to the guidelines made under primary legislation, I will in principle to refer the question identified to the CJEU;
- (vi). in that regard I will require the parties to make submissions in the *Eco Advocacy CLG v. An Bord Pleanála (No. 1)* [2021] IEHC 265, [2021] 5 JIC 2704 (Unreported, High Court, 27th May, 2021), format within the two weeks following the date of this judgment;

- (vii). in order to accelerate that process, I will direct that the submissions be simultaneous rather than sequential and any of the parties, including notice parties, that wish to get involved should deliver such submissions within that two-week period;
- (viii). I will list the matter for mention on Monday 11th July, 2022 to confirm that the submissions have been delivered.