



AN ARD-CHÚIRT  
THE HIGH COURT

JUDICIAL REVIEW

2020 813 JR

FRIDAY THE 1<sup>ST</sup> DAY OF DECEMBER 2023

BEFORE MR JUSTICE RICHARD HUMPHREYS

BETWEEN/

WALTHAM ABBEY RESIDENTS ASSOCIATION

APPLICANT

AND

AN BORD PLEANÁLA, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

O'FLYNN CONSTRUCTION CO. UNLIMITED COMPANY

NOTICE PARTY

Upon Motion of Counsel for the Applicant pursuant to the Notice of Motion filed on the 18<sup>th</sup> day of November 2020 and the Amended Statement of Grounds filed on the 1<sup>st</sup> day of February 2021 and coming before the Court for hearing on the 9<sup>th</sup> day of March 2023 and on the 21<sup>st</sup> day of November 2023 and for mention on the 27<sup>th</sup> day of November 2023 seeking the following reliefs

1. “An order of certiorari quashing the decision of the Respondent of 16 September 2020 (ref. PL28.307313) (the “**Decision**”) to grant planning permission to the Notice Party (the “**Developer**”) for the construction of 123 apartments and associated works at a site on the Old Fort Road, Ballincollig, County Cork (the “**Site**”).
2. Such declaration(s) of the legal rights and/or legal position of the Applicant and/or persons similarly situated as the Court considers appropriate.
3. A declaration that (to the extent that they are not capable of bearing a conforming construction) sections 5, 6, and 7 of the Planning and Development (Housing) and Residential Tenancies Act, 2016 are invalid and incompatible with Article 6(4) of Directive 2011/92/EU (the “**EIA Directive**”) and/or the requirements of fair procedures and natural and constitutional justice.

4. A stay on works being carried out pursuant to the Decision pending the resolution of these proceedings.
5. An order that section 50B of the Planning and Development Act, 2000 (the “2000 Act”), and/or sections 3 and 4 of the Environment (Miscellaneous Provisions) Act 2011, and/or Article 9 of the Aarhus Convention apply to the present proceedings.
6. Costs.”

In the presence of Counsel for the Applicant and Counsel for the First Named Respondent and Counsel for the Second and Third Named Respondents and the Court noting that the reliefs against the Notice Party are adjourned generally and that the Notice Party are not participating in these proceedings

Whereupon and on reading said Notice of Motion and Amended Statement of Grounds and the Affidavit of Tom Keane filed on the 3<sup>rd</sup> day of November 2020 and the Affidavit of Pierce Dillon filed on the 2<sup>nd</sup> day of February 2021 and the Affidavit of Michael [orse Mike] Woods filed on the 12<sup>th</sup> day of February 2021 and the Affidavit of Tom Halley filed on the 12<sup>th</sup> day of February 2021 and the Affidavit of Michael O’Flynn filed on the 12<sup>th</sup> day of February 2021 and on reading the written submissions filed herein and on reading the judgments of the Court in the within proceedings delivered on the 10<sup>th</sup> day of May 2021 and on the 7<sup>th</sup> day of October 2021 and on the 24<sup>th</sup> day of March 2023 and the Orders of the Court made in the within proceedings

And on hearing said respective Counsel

The Court was pleased to reserve judgment

And the judgment of the Court being advised to the parties electronically on this day

IT IS ORDERED that

1. the questions set out in the judgment of the Court delivered on this day and in the schedule hereafter be referred to the Court of Justice of the European Union pursuant to article 267 Treaty of the Functioning of the European Union
2. the substantive determination of the proceedings be adjourned pending the judgment of the Court of Justice of the European Union without prejudice to the determination of any appropriate procedural or interlocutory issues in the meantime

3. the parties be required to comply with the directions regarding preparation of papers for transmission to the Court of Justice of the European Union as set out in Guidance Notes attached to Practice Direction HC119 so that all papers are received by the Registrar within 28 days from the date of this judgment
4. the parties be required to comply with the directions to keep the referring court informed of progress of the reference as set out in para. 100(vii) of Eco Advocacy CLG v. An Bord Pleanála [2021] IEHC 265
5. the costs of the proceedings to date not already disposed of be reserved until further order

And the COURT DOTH ADJOURN this matter to Monday the 15<sup>th</sup> day of January 2024 for mention in the Planning and Environment List

CATRÍONA MCGRATH  
REGISTRAR  
PERFECTED: 21/12/2023

Denis Healy & Co [Cork] Solicitors  
Solicitor for the Applicant

Fieldfisher LLP  
Solicitor for the First Named Respondent

Chief State Solicitors Office  
Solicitor for the Second and Third Named Respondent

BHK Solicitors LLP  
Solicitor for the Notice Party

SCHEDULE HEREIN BEFORE REFERRED TO

The first question is:

**Does Article 4(4) of and/or paragraph 3 of Annex IIA to Directive 2011/92, as amended by Directive 2014/52, interpreted in the light of the precautionary principle, have the effect in a case where information under Annex IIA to the Directive should be furnished, and where there is material before the competent authority that a species or habitat might be affected by the project, that the developer concerned should obtain all relevant information on species or habitats that may be affected by the project by conducting or obtaining scientific surveys that are adequate to remove doubt about significant effects on such species or habitats, and that in the absence of the results of such surveys, the competent authority should be informed of and required to proceed on the basis of the absence of sufficient information to exclude doubt as to whether the project will have significant effects on the environment?**

The second question is:

**Does Article 4(4) of and/or paragraph 3 of Annex IIA to Directive 2011/92, as amended by Directive 2014/52, interpreted in the light of the precautionary principle, have the effect in a case where information under Annex IIA to the Directive should be furnished, that the competent authority is required to exclude doubt as to the possibility of significant effects on the environment if it proposes not to subject the project to an assessment under Articles 5 to 10 of the Directive, and thus that where in the course of a determination under Article 4(2) of the Directive, a competent authority objectively lacks sufficient information to exclude doubt as to whether the project will have significant effects on the environment, the project should be required to be subjected to an assessment under Articles 5 to 10 of the Directive?**

The third question is:

**If the answer to the first question in general is no, do such consequences arise insofar as the potential significant effect on the environment relates to species that may be affected by the project where such species are entitled to strict protection under Article 12 of Directive 92/43, having regard *inter alia* to the importance of such species as recognised in Article 3(1)(b) of Directive 2011/92 and Recital 11 to Directive 2014/52?**

The fourth question is:

**Does Article 4(4) of and/or paragraph 3 of Annex IIA to Directive 2011/92, as amended by Directive 2014/52, interpreted in the light of the precautionary principle, have the effect that, if, following the provision of information by the developer pursuant to Annex IIA of the Directive, additional information is provided by another party to the competent authority objectively capable of creating a doubt as to the effect of the project on the environment, either the developer is required to provide further information to the competent authority which would exclude such doubt or to inform the competent authority of the absence of such information, or the competent authority itself is required to obtain further information which would exclude such doubt or alternatively to determine that assessment under Articles 5 to 10 of the Directive is required in the absence of sufficient information to exclude doubt as to whether the project will have significant effects on the environment?**

The fifth question is:

**If the answer to the fourth question in general is no, do such consequences arise insofar as the potential significant effect on the environment relates to species that may be affected by the project where such species are entitled to strict protection under Article 12 of Council Directive 92/43, having regard *inter alia* to the importance of such species as recognised in Article 3(1)(b) of Directive 2011/92 and Recital 11 to Directive 2014/52?**

[2023] IEHC 661

THE HIGH COURT  
JUDICIAL REVIEW

[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, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

O'FLYNN CONSTRUCTION CO. UNLIMITED COMPANY

NOTICE PARTY

(No. 4)

**JUDGMENT of Humphreys J. delivered Friday the 1st day of December, 2023.**

**Subject-matter of the dispute**

1. This request for a preliminary ruling concerns the interpretation of Article 4(4) of and paragraph 3 of Annex IIA to Directive 2011/92.

2. The request is being made in proceedings concerning a challenge by the applicant residents' association to a strategic housing development approved by the first named respondent, An Bord Pleanála ("the board"), for 123 apartments and associated works at Ballincollig, County Cork.

**Legal context**

**Relevant provisions of EU law**

3. Article 191 TFEU provides:

"1. Union policy on the environment shall contribute to pursuit of the following objectives:

- preserving, protecting and improving the quality of the environment,
- protecting human health,
- prudent and rational utilisation of natural resources,
- promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.

2. Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.

In this context, harmonisation measures answering environmental protection requirements shall include, where appropriate, a safeguard clause allowing Member States to take provisional measures, for non-economic environmental reasons, subject to a procedure of inspection by the Union.

3. In preparing its policy on the environment, the Union shall take account of:

- available scientific and technical data,
- environmental conditions in the various regions of the Union
- the potential benefits and costs of action or lack of action,
- the economic and social development of the Union as a whole and the balanced development of its regions.

4. Within their respective spheres of competence, the Union and the Member States shall cooperate with third countries and with the competent international organisations. The arrangements for Union cooperation may be the subject of agreements between the Union and the third parties concerned.

The previous subparagraph shall be without prejudice to Member States' competence to negotiate in international bodies and to conclude international agreements."

4. Directive 92/43 includes the following:

(a). Article 12 which provides:

"1. Member States shall take the requisite measures to establish a system of strict protection for the animal species listed in Annex IV(a) in their natural range, prohibiting:

- (a) all forms of deliberate capture or killing of specimens of these species in the wild;

- (b) deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration;
  - (c) deliberate destruction or taking of eggs from the wild;
  - (d) deterioration or destruction of breeding sites or resting places.
2. For these species, Member States shall prohibit the keeping, transport and sale or exchange, and offering for sale or exchange, of specimens taken from the wild, except for those taken legally before this Directive is implemented.
3. The prohibition referred to in paragraph 1(a) and (b) and paragraph 2 shall apply to all stages of life of the animals to which this Article applies.
4. Member States shall establish a system to monitor the incidental capture and killing of the animal species listed in Annex IV (a). In the light of the information gathered, Member States shall take further research or conservation measures as required to ensure that incidental capture and killing does not have a significant negative impact on the species concerned.”; and
- (b). Annex IV which includes provision that the following species of bat are subject to strict protection:  
 “MICROCHIROPTERA  
 All species  
 MEGACHIROPTERA  
 Pteropodidae  
*Rousettus aegyptiacus*”.
5. Directive 2011/92 includes the following:
- (a). Article 3(1) which provides:  
 “The environmental impact assessment shall identify, describe and assess in an appropriate manner, in the light of each individual case, the direct and indirect significant effects of a project on the following factors:  
 (a) population and human health;  
 (b) biodiversity, with particular attention to species and habitats protected under Directive 92/43/EEC and Directive 2009/147/EC;  
 (c) land, soil, water, air and climate;  
 (d) material assets, cultural heritage and the landscape;  
 (e) the interaction between the factors referred to in points (a) to (d).”;
- (b). Article 4 which provides:  
 “1. Subject to Article 2(4), projects listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10.  
 2. Subject to Article 2(4), for projects listed in Annex II, Member States shall determine whether the project shall be made subject to an assessment in accordance with Article 5 to 10. Member States shall make that determination through:  
 (a) a case-by-case examination; or  
 (b) thresholds or criteria set by the Member State.  
 Member States may decide to apply both procedures referred to in points (a) and (b).  
 3. When a case-by-case examination is carried out or thresholds or criteria are set for the purpose of paragraph 2, the relevant selection criteria set out in Annex III shall be taken into account. Member States may set thresholds or criteria to determine when projects need not undergo either the determination under paragraphs 4 and 5 or an environmental impact assessment, and/or thresholds or criteria to determine when projects shall in any case be made subject to an environmental impact assessment without undergoing a determination set under paragraphs 4 and 5.  
 4. Where Member States decide to require a determination for projects listed in Annex II, the developer shall provide information on the characteristics of the projects and its likely significant effects on the environment. The detailed list of information to be provided is specified in Annex IIA. The developer shall take into account, where relevant the available results of other relevant assessments of the effects on the environment carried out pursuant to Union legislation other than this Directive. The developer may also provide a description of any features of the project and/or measures envisaged to avoid or prevent what might otherwise have been significant adverse effects on the environment.

5. The competent authority shall make its determination, on the basis of the information provided by the developer in accordance with paragraph 4 taking into account, where relevant, the results of preliminary verifications or assessments of the effects on the environment and carried out pursuant to Union legislation other than this Directive. The determination shall be made available to the public and:

- (a) where it is decided that an environmental impact assessment is required, state the main reasons for requiring such assessment with reference to the relevant criteria listed in Annex III; or
- (b) where it is decided that an environmental impact assessment is not required, state the main reasons for not requiring such assessment with reference to the relevant criteria listed in Annex III, and, where proposed by the developer, state any features of the project and/or measures envisaged to avoid or prevent what might otherwise have been significant adverse effects on the environment.

6. Member State shall ensure that the competent authority makes its determination as soon as possible and within a period of time not exceeding 90 days from the date on which the developer has submitted all the information required pursuant to paragraph 4. In exceptional cases, for instance relating to the nature, complexity, location or size of the project, the competent authority may extend that deadline to make its determination; in that event, the competent authority shall inform the developer in writing of the reasons justifying the extension and of the date when its determination is expected."

- (c). Annex IIA, which provides:

"ANNEX II.A

Information referred to in Article 4(4)

(Information to be provided by the Developer on the projects listed in Annex II)

1. A description of the project, including in particular:
  - (a) a description of the physical characteristics of the whole project and, where relevant, of demolition works;
  - (b) a description of the location of the project, with particular regard to the environmental sensitivity of geographical areas likely to be affected.
2. A description of the aspects of the environment likely to be significantly affected by the project.
3. A description of any likely significant effects, to the extent of the information available on such effects, of the project on the environment resulting from:
  - (a) the expected residues and emissions and the production of waste, where relevant;
  - (b) the use of natural resources, in particular soil, land, water and biodiversity.
4. The criteria of Annex III shall be taken into account, where relevant, when compiling the information in accordance with points 1 to 3."

- (d). Annex III, which provides:

"ANNEX III

Selection Criteria Referred to in Article 4(3)

(Criteria to determine whether the projects listed in Annex II should be subject to an environmental impact assessment)

1. Characteristics of Projects
 

The characteristics of projects must be considered having regard, in particular, to:

  - (a) the size and design of the whole project;
  - (b) cumulation with other existing and/or approved projects;
  - (c) the use of natural resources, in particular land, soil, water and biodiversity;
  - (d) the production of waste;
  - (e) pollution and nuisance;
  - (f) the risk of major accidents and/or disasters which are relevant to the project concerned, including those caused by climate change, in accordance with scientific knowledge;

(g) the risks to human health (for example due to water contamination or air pollution).

2. Location of Projects

The environmental sensitivity of geographical areas likely to be affected by projects must be considered, with particular regard to:

- (a) the existing land use;
- (b) the relative abundance, availability, quality and regenerative capacity of natural resources (including soil land, water and biodiversity) in the area and its underground;
- (c) the absorption capacity of the natural environment, paying particular attention to the following areas:
  - (i) wetlands, riparian areas, river mouths;
  - (ii) coastal zones and the marine environment;
  - (iii) mountain and forest areas;
  - (iv) nature reserves and parks;
  - (v) areas classified or protected under national legislation; Natura 2000 areas designated by Member States pursuant to Directive 92/43/EEC and Directive 2009/147/EC;
  - (vi) areas in which there has already been a failure to meet the environmental quality standards, laid down in Union legislation and relevant to the project, or in which it is considered that there is such a failure;
  - (vii) densely populated areas;
  - (viii) landscapes and sites of historical, cultural or archaeological significance.

3. Type and characteristics of the Potential Impact

The likely significant effects of projects on the environment must be considered in relation to criteria set out in points 1 and 2 of this Annex, with regard to the impact of the project on the factors specified in Article 3(1), taking into account:

- (a) the magnitude and spatial extent of the impact (for example geographical area and size of the population likely to be affected population);
- (b) the nature of the impact;
- (c) the transboundary nature of the impact;
- (d) the intensity and complexity of the impact;
- (e) the probability of the impact;
- (f) the expected onset, duration, frequency and reversibility of the impact;
- (g) the cumulation of the impact with the impact of other existing and/or approved projects;
- (h) the possibility of effectively reducing the impact."

6. Directive 2014/52 includes Recital 11 as follows:

"The measures taken to avoid, prevent, reduce and, if possible, offset significant adverse effects on the environment, in particular on species and habitats protected under Council Directive 92/43/EEC ( 1 ) and Directive 2009/147/EC of the European Parliament and of the Council ( 2 ), should contribute to avoiding any deterioration in the quality of the environment and any net loss of biodiversity, in accordance with the Union's commitments in the context of the Convention and the objectives and actions of the Union Biodiversity Strategy up to 2020 laid down in the Commission Communication of 3 May 2011 entitled 'Our life insurance, our natural capital: an EU biodiversity strategy to 2020'".

7. The following other materials are also relevant:

- (i) Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters, done at Aarhus, Denmark on 15 June 1998;
- (ii) Judgment of 21 September 1999, *Commission v Ireland*, C-392/96, ECLI:EU:C:1999:431;
- (iii) Judgment of 16 September 1999, *World Wildlife Fund v Autonome Provinz Bozen and others*, C-435/97, ECLI:EU:C:1999:217;
- (iv) Judgment of 30 January 2002, *Commission v Greece*, C-103/00, ECLI:EU:C:2002:60;



- (v) Judgment of 7 September 2004, *Waddenvereniging et Vogelbeschermingsvereniging*, C-127/02, ECLI:EU:C:2004:482, para. 44;
- (vi) Judgment of 10 January 2006, *Commission v Germany*, C-98/03, ECLI:EU:C:2006:3;
- (vii) Judgment of 14 June 2007, *Commission v Finland*, C-342/05, ECLI:EU:C:2007:341;
- (viii) Opinion of Advocate General Sharpston of 18 October 2011, *Boxus & Others*, C-128/09, ECLI:EU:C:2011:319;
- (ix) Judgment of 18 October 2011, *Boxus & Others*, C-128/09, ECLI:EU:C:2011:667;
- (x) Judgment of 24 March 2011, *Commission v Belgium*, C-435/09, EU:C:2011:176, para. 64;
- (xi) Judgment of 11 February 2015, *Marktgemeinde*, C-531/13, ECLI:EU:C:2015:79;
- (xii) Judgment of 6 October 2015, *East Sussex County Council*, C-71/14, ECLI:EU:C:2015:656;
- (xiii) Judgment of 10 November 2016, *Commission v Greece*, C-504/14, ECLI:EU:C:2016:847;
- (xiv) Judgment of 31 May 2018, *Commission v Poland*, C-526/16, ECLI:EU:C:2018:356, paras 66 and 67;
- (xv) Judgment of 7 November 2018, *Holohan and Others*, C-461/17, ECLI:EU:C:2018:8843;
- (xvi) Judgment of 4 March 2021, *Föreningen Skydda Skogen*, C-473/19, ECLI:EU:C:2021:166;
- (xvii) Judgment of 24 February 2022, *Namur Est v Region Wallonie*, C-463/20, ECLI:EU:C:2022:121;
- (xviii) Opinion of Advocate General Kokott of 15 June 2023, *Eco Advocacy CLG*, C-721/21, ECLI:EU:C:2023:39;
- (xix) Judgment of 15 June 2023, *Eco Advocacy CLG*, C-721/21, ECLI:EU:C:2023:477; and
- (xx) Commission Notice Guidance document on the strict protection of animal species of Community interest under the Habitats Directive (C (2021) 7301 final).

#### **Relevant provisions of domestic law**

**8.** The Planning and Development Regulations 2001, articles 109(2B), (4) and (5) and 299B(2)(b) (see consolidated version at <https://www.gov.ie/en/publication/c0ac2-planning-legislation-primary-legislation/>) are as follows:

- (a) Article 109(2B) provides as follows:
  - “109(2B)
  - (a) Where a planning application for sub-threshold development is not accompanied by an EIAR but is accompanied by the information specified in Schedule 7A and sub-article (2A), or where an applicant submits to the Board such information pursuant to a requirement issued under sub-article (2)(b)(ii), the Board shall carry out an examination of, at the least, the nature, size or location of the development for the purpose of a screening determination.
  - (b) The Board shall make a screening determination and –
    - (i) if such a determination is that there is no real likelihood of significant effects on the environment arising from the proposed development, it shall determine that an EIA is not required, or
    - (ii) if such a determination is that there is a real likelihood of significant effects on the environment arising from the proposed development, it shall–
      - (I) determine that the development would be likely to have such effects, and
      - (II) by notice in writing served on the applicant, require the applicant to submit to the Board an EIAR and to comply with the requirements of article 112.”
- (b) Article 109(4) and (5) provide as follows:
  - “(4)(a) the Board shall, in making its screening determination under sub-article (2B) whether there is no real likelihood of significant effects on the environment arising from a proposed development or there is a real likelihood of significant effects on the environment arising from the proposed development, have regard to –
    - (i) the criteria set out in Schedule 7,
    - (ii) the information submitted pursuant to Schedule 7A,
    - (iii) the further information, if any, referred to in sub-article (2A)(a) and the description, if any, referred to in sub-article (2A)(b),

- (iv) the available results, where relevant, of preliminary verifications or assessments of the effects on the environment carried out pursuant to the European Union legislation other than the Environmental Impact Assessment Directive, and
- (v) in respect of a development which would be located on, or in, or have the potential to impact on –
  - (I) a European site,
  - (II) an area the subject of a notice under section 16(2)(b) of the Wildlife (Amendment) Act 2000 (No. 38 of 2000),
  - (III) an area designated as a natural heritage area under section 18 of the Wildlife (Amendment) Act 2000,
  - (IV) land established or recognised as a nature reserve within the meaning of section 15 or 16 of the Wildlife Act 1976 (No. 39 of 1976)
  - (V) land designated as a refuge for flora or as a refuge for fauna under section 17 of the Wildlife Act 1976,
  - (VI) a place, site or feature of ecological interest, the preservation, conservation or protection of which is an objective of a development plan or local area plan, draft development plan or draft local area plan, or proposed variation of the development plan, for the area in which the development is proposed, or
  - (VII) a plan or site which has been included by the Minister for Culture, Heritage and the Gaeltacht in a list of proposed National Heritage Areas published on the National Parks and Wildlife Service website,

the likely significant effects of the development on such site, area, land, place or feature, as appropriate.

(b) The Board's screening determination under sub-article (2B) whether there is no real likelihood of significant effects on the environment arising from a proposed development or there is a real likelihood of significant effects on the environment arising from the proposed development, as the case may be, including the main reasons and considerations, with reference to the relevant criteria listed in Schedule 7, on which that determination is based, and any notice under sub-article (2C)(c), shall be placed and kept with the documents relating to the planning application.

(5). Where the screening determination under sub-article (2B) is that the proposed development would not be likely to have significant effects on the environment and the applicant has provided, under sub-article (2A)(b), a description of the features, if any, of the proposed development and the measures, if any, envisaged to avoid or prevent what might otherwise have been significant adverse effects on the environment, the Board shall specify such features, if any, and such measures, if any, in that determination."

- (c) Article 299B(2)(b) provides:
  - "(2)(b)(i) Where the information referred to in sub-article (1)(b)(ii)(II) was provided by the applicant, the Board shall carry out an examination of, at the least, the nature, size or location of the development for the purpose of a screening determination.
  - (ii) The Board shall make a screening determination and -
    - (I) If such a determination is that there is no real likelihood of significant effects on the environment arising from the proposed development, it shall determine that an EIA is not required, or
    - (II) If such determination is that there is a real likelihood that significant effects on the environment arising from the proposed development, it shall –
      - (A) determine that the development would be likely to have such effects, and
      - (B) refuse to deal with the applicant pursuant to section 8(3)(a) of the Act of 2016."

**9.** The European Communities (Bird and Natural Habitats) Regulations 2011 arts. 51 and 54 (see consolidated version at:

[https://www.npws.ie/sites/default/files/files/European%20Communities%20\(Birds%20and%20Natural%20Habitats\)%20Regulations%202011%20to%202021%20-](https://www.npws.ie/sites/default/files/files/European%20Communities%20(Birds%20and%20Natural%20Habitats)%20Regulations%202011%20to%202021%20-)

[%20Unofficial%20Consolidation%20\(Updated%20to%2028%20July%202022\)\(1\).pdf](#)) provide in part as follows:

"51. (1) The Minister shall take the requisite measures to establish a system of strict protection for the fauna consisting of the species referred to in Part 1 of the First Schedule.

(2) Notwithstanding any consent, statutory or otherwise, given to a person by a public authority or held by a person, except in accordance with a license granted by the Minister under Regulation 54 or 54A a person who in respect of the species referred to in Part 1 of the First Schedule –

- (a). deliberately captures or kills any specimen of these species in the wild,
- (b). deliberately disturbs these species particularly during the period of breeding, rearing, hibernation and migration,
- (c). deliberately takes or destroys eggs of those species from the wild,
- (d). damages or destroys a breeding site or resting place of such an animal,
- (e). keeps, transports, sells, exchanges, offers for sale or offers for exchange any specimen of these species taken in the wild, other than those taken legally as referred to in Article 12(2) of the Habitats Directive, shall be guilty of an offence.

...

54.

(1) Any person may apply to the Minister, or the Minister or Ministers of Government with responsibilities for fish species referred to in Part 2 of the First Schedule, for a derogation licence from complying with the requirements of the provisions of Regulations 51, 52 and 53.

(2) Where there is no satisfactory alternative and the derogation is not detrimental to the maintenance of the populations of the species to which the Habitats Directive relates at a favourable conservation status in their natural range, the Minister, or the Minister or Ministers of Government with responsibilities for fish species referred to in the Fourth Schedule, may grant such a derogation licence to one or more persons, where it is—

- (a). in the interests of protecting wild fauna and flora and conserving natural habitats,
- (b). to prevent serious damage, in particular to crops, livestock, forests, fisheries and water and other types of property,
- (c). in the interests of public health and public safety, or for other imperative reasons of overriding public interest, including those of a social or economic nature and beneficial consequences of primary importance for the environment,
- (d). for the purpose of research and education, of repopulating and re-introducing these species and for the breeding operations necessary for these purposes, including the artificial propagation of plants, or
- (e). to allow, under strictly supervised conditions, on a selective basis and to a limited extent, the taking or keeping of certain specimens of the species to the extent specified therein, which are referred to in the First Schedule.

..."

**10.** Sections 8(3)(a) and 9(5) of the Planning and Development (Housing and Residential Tenancies) Act 2016 (see consolidated version at <https://revisedacts.lawreform.ie/eli/2016/act/17/front/revised/en/html>) provide as follows:

"8.(3)(a) The Board may decide to refuse to deal with any application made to it under section 4(1) where it considers that the applicant for permission, or the environmental impact assessment report or Natura impact statement if such is required, is inadequate or incomplete, having regard in particular to the permission regulations and any regulations made under section 12, or section 177 of the Act of 2000, or to any consultations held under section 6.

...

9.(5) Where the Board did not exercise its functions under section 8(3) to refuse to deal with an application, then nothing in that subsection shall be read so as to prevent the Board from refusing to grant permission for a proposed strategic housing development in respect of an application under section 4 where the Board considers that development of the kind proposed would be premature by reference to the inadequacy or incompleteness of the environmental impact assessment report or

Natura impact statement submitted with the application for permission, if such is required.”

- 11.** The following other domestic materials are also relevant:
- (i) *Jennings & Anor v. An Bord Pleanála* [2023] IEHC 14 ([https://www.courts.ie/viewer/pdf/a1c1a22e-f190-48c3-8176-c54dda9eed1/2023\\_IEHC\\_14.pdf/pdf#view=fitH](https://www.courts.ie/viewer/pdf/a1c1a22e-f190-48c3-8176-c54dda9eed1/2023_IEHC_14.pdf/pdf#view=fitH));
  - (ii) *Shadowmill v An Bord Pleanála & Ors.* [2023] IEHC 157 (Holland J.) ([https://www.courts.ie/viewer/pdf/3c50bad1-f934-4230-b38c-59cdd893fdd1/2023\\_IEHC\\_157.pdf/pdf#view=fitH](https://www.courts.ie/viewer/pdf/3c50bad1-f934-4230-b38c-59cdd893fdd1/2023_IEHC_157.pdf/pdf#view=fitH)); and
  - (iii) *Monkstown Road Residents Association v An Bord Pleanála* [2022] IEHC 318, [2022] 5 JIC 3106 (Holland J.) ([https://www.courts.ie/viewer/pdf/6be2f31e-50e2-419f-ac0f-f71b14ada74c/2022\\_IEHC\\_318.pdf/pdf#view=fitH](https://www.courts.ie/viewer/pdf/6be2f31e-50e2-419f-ac0f-f71b14ada74c/2022_IEHC_318.pdf/pdf#view=fitH)).

#### **Facts**

**12.** The species of bat living in Ireland are as follows, all of which fall within the list of strictly protected species in Directive 92/43:

- (i). Vespertilionidae;
- (ii). Common pipistrelle (*Pipistrellus pipistrellus*);
- (iii). Soprano pipistrelle (*Pipistrellus pygmaeus*);
- (iv). Nathusius’ pipistrelle (*Pipistrellus nathusii*);
- (v). Leisler’s bat (*Nyctalus leisleri*);
- (vi). Brown long-eared bat (*Plecotus auritus*);
- (vii). Daubenton’s bat (*Myotis daubentonii*);
- (viii). Whiskered bat (*Myotis mystacinus*);
- (ix). Natterer’s bat (*Myotis nattereri*);
- (x). Rhinolophidae; and
- (xi). Lesser horseshoe bat (*Rhinolophus hipposideros*).

**13.** The Irish bat guidelines at the time of the development consent were adopted in 2006: Kelleher C. and Marnell F., *Bat Mitigation Guidelines for Ireland*, Irish Wildlife Manuals No. 25 (2006, National Parks and Wildlife Service, Department of Environment, Heritage and Local Government, Dublin) (<https://www.npws.ie/sites/default/files/files/mitigation-guidelines-for-bats.pdf>). Section 5.1 is headed “The importance of a good survey” and states as follows:

“The importance of a thorough site survey prior to considering development cannot be overemphasised. The following descriptions of survey techniques and their correct application are aimed at assisting consultants (to appreciate the type of survey that is expected), the developer (to be assured that their consultant is recommending a survey to help them meet legal and policy requirements), and planning officers and National Parks and Wildlife Service staff (to be sure that an accurate assessment of the site and the extent of its bat interest has been made). Without a sound survey that includes an assessment of all available evidence, it is difficult to predict the likely impact of development.

From the developer’s perspective, the primary objective of a survey for protected species is to ensure that any development can proceed without breaking the law. The consequences of not carrying out a survey on sites which subsequently prove to have a significant protected species interest can be severe and may include delays, additional costs and, in exceptional cases, the cancellation or curtailment of projects.”

**14.** Section 5.2 of the bat guidelines is headed “Some general points on surveys” and begins: “A survey for bats may be indicated when background information on distribution and occurrence suggests that they may be present”.

**15.** For the purposes of the application for development consent, a tree survey was conducted, and screening reports prepared on behalf of the developer for the purposes of environmental impact assessment (EIA) under Directive 2011/92 as amended and appropriate assessment (AA) under Directive 92/43. [PR1]

**16.** The EIA screening report does not include any particular analysis of flora and fauna or refer to the impact on bats, and the screening table does not refer to biodiversity. [PR2]

**17.** In the AA screening report, there is no particular consideration of the actual impact on bats, above and beyond a general reference that “[d]isturbance to fauna can arise directly through the loss of habitat (e.g. bat roosts) or indirectly through noise, vibration and increased activity associated with construction and operation”. The only reference to biodiversity is in the AA screening report which in turn only refers to Natura 2000 sites rather than the ecology of the development site itself.

**18.** The arboricultural assessment was carried out on a single day on 16th November, 2019 and identified thirteen trees for removal. The assessment did not include the potential or actual use of the trees by bats or whether the site was used for foraging or commuting. The EIA screening report proposes the retention of existing vegetation on site “where possible” and states that its

enhancement through new landscaping will result in a positive biodiversity impact. The Statement of Consistency asserts that "the existing hedgerows and trees along the site boundary are to be retained and protected where appropriate. All trees to be maintained will be protected appropriately during construction and operation ... As above, the existing trees on site are to be retained and protected ...". Contrary to the impression thereby created, a number of trees are in fact being removed, including a number of cypress trees and two of the six oak trees on site. One of the oak trees has a cavity which could raise questions regarding potential use by bats.

**19.** The applicant made a submission to the board on 7th July, 2020, which included the following:

"The site of the proposed development is less than 400 m. from the River Lee at its closest point. It is situated in an area of natural beauty and a significant wildlife habitat and natural corridor. The Lee, particularly in and around the former Powder Mills of Ballincollig, is recognised as being a habitat for rare and endangered species of bats. [n41] Residents have noticed bats and other fauna flying over the site yet no commuting/flight path analysis for bats or other fauna over the plot has been conducted. [n42] None of the trees within the development plot have been surveyed for bat presence or as potential for bat roosts and this, along with mitigation strategies, needs to be undertaken prior to any grant of permission, given that most of the trees in the area are identified for removal. If necessary, Ministerial notification and authorisation is required as an Annex IV species. Further, the Flora and Fauna Report prepared for the Lower Lee Drainage Scheme has identified the Little Egret, another Annex I EU Birds Directive species in the vicinity of the project. [n43] Similarly, the same report identifies that 'The area of the River Lee north of the old Barracks area in Ballincollig is considered the most important area [for otter habitat] between Inniscarra Bridge and Poulavone (i.e. the upper section of the Lower River Lee), given abundant fish for otter, good riparian cover and limited development. [n44] The otter is protected pursuant to the Wildlife Act and as both an Annex II and IV species under the EU Habitats Directive.'

Paragraph 10.46 of the City Development Plan states that '*Under the EU Freshwater Fish Directive the River Lee is designated as a Salmonoid river from its source to Cork City Waterworks. This imposes an obligation to maintain specific water quality standards and to control pollution. Species of fish found along its length include Brook, Sea Lamprey and Salmon. In addition the River Lee and its banks provide habitats, feeding and resting grounds for a variety of protected species of birds, bats and other mammals such as the otter.*' Given that the Lee is a corridor for aquatic and other life which ultimately goes to a Natura 2000 site at the Gearagh, the statement in the Stage 1 AA Screening Report at p. 11 that '[t]here are no other Natura 2000 sites within 10 Km of the site boundary which are likely to be affected by the proposed development' is somewhat misleading. A fuller analysis in this respect should be submitted by the developer to ABP.

Objective 10.9 of the City Plan provides that '*development proposals in river corridors shall...preserve the biodiversity value of the site subject to Ecological Assessment by a suitably qualified Ecologist and... shall not have a negative effect on the distinctive character and appearance of the waterway corridor and the specific characteristics and landscape elements of the individual site and its context.*' This does not appear to have been done, at least as far as can be ascertained from the documents released by the developer to the public."

**20.** The footnotes to the applicant's submission are numbers 41 to 44 and read as follows:

"[n41] 'The lesser horseshoe bat is restricted to the west of Ireland and it is only known from Counties Mayo, Galway, Clare, Limerick, Kerry and Cork (Kelleher 2004). However, single specimens have recently been discovered in Lough Key, near Boyle, Co. Roscommon in 2004 (B. Keeley, pers. comm.) and in Tubbercurry, Co. Sligo in 2008 (pers. obs.), two counties where their low numbers may have caused their presence to be overlooked until now. The population of this species in Co. Cork is small and most roosts are in West Cork however small numbers are known to be present in the Ovens, Ballincollig and Blarney areas to the immediate west and northwest of Cork city.

...

The River Lee is an important habitat for bats and other wildlife. The watercourse acts as a vegetated corridor along which bats and other animals can commute from the wider countryside into the urban environment. The riparian habitat also provides a sheltered foraging area, a breeding site for invertebrate prey and, at night, screening from the surrounding artificial lighting of the urban area.

...

Extant records of bats in the immediate area indicate that a diverse range of bat species use the river corridor and the key impacts on these animals arise through potential roost

loss, loss of feeding areas and disruption of commuting routes’: Bat Fauna Study conducted by Ryan Hanley engineers in 2016:

[https://s3-eu-west-1.amazonaws.com/arup-s3-lower-lee-frs-ie-wpstatic/wpcontent/uploads/lee\\_valley/Individual\\_Appendices/Appendix5D.pdf](https://s3-eu-west-1.amazonaws.com/arup-s3-lower-lee-frs-ie-wpstatic/wpcontent/uploads/lee_valley/Individual_Appendices/Appendix5D.pdf) [dead link – current link is

[https://www.floodinfo.ie/frs/media/filer\\_public/64/ad/64adf281-396f-4df9-b388-9d08ab4cb18c/appendix-5d.pdf](https://www.floodinfo.ie/frs/media/filer_public/64/ad/64adf281-396f-4df9-b388-9d08ab4cb18c/appendix-5d.pdf)]

[n42] This is also required under the Urban Development and Building Heights Guidelines 2018, p. 14.

[n43] ‘According to local residents in the Ballincollig Little Egret is also known to occur occasionally on the River Lee in the area.’, [https://s3-eu-west-1.amazonaws.com/arup-s3-lower-lee-frs-ie-wp-static/wpcontent/uploads/lee\\_valley/Individual\\_Chapters/Chapter-5\\_Flora-and-Fauna.pdf](https://s3-eu-west-1.amazonaws.com/arup-s3-lower-lee-frs-ie-wp-static/wpcontent/uploads/lee_valley/Individual_Chapters/Chapter-5_Flora-and-Fauna.pdf), p. 5-14.

[n44][https://s3-eu-west-1.amazonaws.com/arup-s3-lower-lee-frs-ie-wp-static/wpcontent/uploads/lee\\_valley/Individual\\_Chapters/Chapter-5\\_Flora-and-Fauna.pdf](https://s3-eu-west-1.amazonaws.com/arup-s3-lower-lee-frs-ie-wp-static/wpcontent/uploads/lee_valley/Individual_Chapters/Chapter-5_Flora-and-Fauna.pdf) [dead link – current link is

[https://www.floodinfo.ie/frs/media/filer\\_public/b8/a6/b8a6adbd-82b1-473b-99ff-5711c1f7fa48/chapter-5\\_flora-and-fauna.pdf](https://www.floodinfo.ie/frs/media/filer_public/b8/a6/b8a6adbd-82b1-473b-99ff-5711c1f7fa48/chapter-5_flora-and-fauna.pdf)], p. 5-39.”

**21.** The inspector recommended a grant of permission on 11th September, 2020. The inspector was of the view the site did not generally provide suitable habitats for wildlife or species of conservation interest, but said that tree-felling should be undertaken in accordance with the advice of a suitably qualified ecologist to obviate potential impact on bats. This was ultimately reflected in condition 21 in the board’s decision. [PR3]

**22.** The inspector did not carry out an EIA screening but instead rejected the necessity for screening after a preliminary examination. [PR4]

**23.** The board decided to grant permission on 16th September, 2020. While the board adopted the AA screening exercise of the inspector, it did not do so in relation to the issue of EIA. Instead, the board itself carried out the EIA screening. The section of the decision on EIA screening does not refer to annex IIA or III, or any other provision, of Directive 2011/92, or indeed to EU law at all. It only refers to art. 109(3) of the Planning and Development Regulations 2001. The screening decision is as follows:[PR5]

“Environmental Impact Assessment Screening

The Board completed an environmental impact assessment screening of the proposed development and considered that the Environmental Impact Assessment Screening Report submitted by the developer, identifies and describes adequately the direct, indirect secondary, and cumulative effects of the proposed development on the environment.

Having regard to:

- (a) the nature and scale of the proposed development on an urban site served by public infrastructure,
- (b) the absence of any significant environmental sensitivities in the area, and
- (c) the location of the development outside of any sensitive location specified in article 109(3) of the Planning and Development Regulations 2021 (as amended),

the board concluded that, by reason of the nature, scale and location of the subject site, the proposed development would not be likely to have significant effects on the environment. The Board decided, therefore, that an environmental impact assessment report for the proposed development was not necessary in this case.”

**24.** The lack of information to objectively exclude any risk of significant effects on bats is evidenced by the following:[PR6]

- (i) the EIA screening report does not refer to the impact on bats;
- (ii) the EIA screening table does not refer to biodiversity;
- (iii) in the AA screening report, there is no particular consideration of the actual impact on bats, above and beyond a generic reference (para. 4.5);
- (iv) the AA screening report refers to biodiversity only in the context of Natura 2000 sites rather than the ecology of the development site itself;
- (v) the arboricultural assessment occurred on a single day and did not include the potential or actual use of the trees by bats or whether the site was used for foraging or commuting;
- (vi) there was no bat survey or other surveys that could be regarded as scientifically complete in relation to bat use of the site;
- (vii) there was thus a non-compliance with the official guidance, given the factual conclusion set out above that there was a possible risk of impact on bats in the light of the points made in the applicant’s submission;

- (viii) there has been no explanation by the developer for the inadequate survey effort or as to why the relevant Bat Mitigation Guidelines for Ireland (NPWS 2006) were not complied with;
  - (ix) the applicant's submission raised issues regarding the risk of significant impacts on bats;
  - (x) the location of the site within 400 metres of the River Lee;
  - (xi) the fact that bats have been observed flying over the site;
  - (xii) the presence of the oak tree with a cavity which could raise issues under the bat mitigation guidelines;
  - (xiii) the bat mitigation guidelines note the difficulties in identifying bat presence "[w]ithout a sound survey" (p. 27);
  - (xiv) roosts used by a small number of bats can be "particularly difficult to detect" (p. 37 of guidelines);
  - (xv) the guidelines also say that "Except in the simplest cases, it is extremely difficult to survey trees and be certain that any bat roosts have been detected. Tree cavities (which includes under bark or in splits or cracks) are used throughout the year by a variety of species, many of which are known to move unpredictably between roosts" (p. 37); "It can also be difficult to pinpoint exactly which tree a bat emerged from. A dawn survey is more likely to be productive than a dusk one as swarming bats returning to the roost are much more visible than those leaving the roost." (p. 38);
  - (xvi) "'Presence/absence' surveys may determine presence but in fact it can be extremely difficult to demonstrate absence for highly mobile animals such as bats. The guidance here is designed to suggest a reasonable level of effort that, at the majority of roosts, will detect the presence of bats. However, where survey conditions are difficult, buildings are large or inaccessible or where populations are small, it can be exceedingly difficult to detect bats, particularly at some times of year. It is feasible, for example, that for winter visits to sites used by few bats, several visits could be carried out with no bats detected, but a further visit might find them. In many sites, usage is heavily influenced by the external temperature" (p. 39 of guidelines);
  - (xvii) no further information was sought from the developer following the applicant's submission;
  - (xviii) the accelerated process for "strategic" housing developments under the Planning and Development (Housing) and Residential Tenancies Act 2016 does not permit any requests for further information, by stark contrast with the normal planning process;
  - (xix) the inspector's site visit occurred in daytime which is not the ideal time to assess the presence of bats;
  - (xx) the inspector noted that potential impact on bats, and specifically the absence of any survey, had been raised as an issue by the applicant in its submission (§7.7);
  - (xxi) the inspector or board did not themselves identify any further information to address the risk of impact on bats; and
  - (xxii) the board order does not refer to bats at all and simply endorses the developer's original material without addressing under the heading of EIA the issues subsequently raised as regards bats.
- 25.** On the other hand, there are factors which would render the board's decision reasonable if the test is merely reasonableness as opposed to exclusion of doubt:
- (i) the proposed development is located on a 1.13 hectare site which is a brownfield site and was formerly used as a construction compound. It is in an urban setting;
  - (ii) there are no buildings on site which could be used as bat roosts;
  - (iii) the tree survey was carried out on 16 November, 2019 which include a visual inspection of all trees. As part of the survey a description was recorded of each tagged tree, group of trees, their species, age class, dimensions; the survey also included an assessment of the tree health/vitality, structural form, life expectancy and quality categorisation;
  - (iv) there are 17 trees located at the development site, 13 of which are considered to be low value and are to be removed. 4 oak trees will be retained and two will be removed;
  - (v) the 6 oak trees on site are being suppressed by the Lawson Cypress, which limits the possibility of them being used by bats;
  - (vi) the site is not designated as a habitat for bats or other species by the NPWS and there are no bat habitats or recorded sightings of bats in the area by the National Biodiversity Data Centre;
  - (vii) the National Parks and Wildlife Service Bat Mitigation Guidelines provide for a sequential approach to bat surveys and that they should be undertaken when "the

- background information on distribution and occurrence suggests that they may be present". The indicators include recent or historical records for bats on the site, bat roosts in the general area, built structures, underground structures such as abandoned mines, tunnels, souterrains, kilns, cellars or fortifications which provide appropriate hibernation conditions, trees with a high probability of use by bats;
- (viii) the decision includes a lawful mitigation measure in relation to impact on bats which is relevant to the screening decision (condition 21) which reflects the view of the inspector (§11.7) that to mitigate impact on bats from tree-felling, such felling should be undertaken in accordance with the advice of a suitably qualified ecologist;
  - (ix) while the submission made by the applicant raised an issue as regards to bats and pointed to particular academic commentary which related to a river 400m from the development site, it did not contain any scientific evidence or evidence to suggest that bats used the site in question; and
  - (x) the board noted the absence of any significant environmental sensitivities in the area and the location of the development outside any sensitive location.

**26.** The board places reliance on the fact that it and the inspector made findings of lack of impact. But that doesn't logically establish that such findings excluded doubt so as to allow a decision not to conduct EIA. The applicant has an onus to displace the board's position, but has been able to identify a number of factors capable of creating doubt as set out above, even when put in the context of other factors supporting the board's position. [PR7]

**27.** The board did not submit evidence by way of affidavit explaining what exactly it thought it was doing when conducting the EIA screening.

**28.** The board did however rely on evidence put in by Mr Tom Halley, Planning Consultant, in an affidavit of 11th February, 2021, at paras. 14 to 18. Mr Halley is characterised by the board as giving "expert evidence ... which ... has not been controverted" (submission of 14th November, 2023, p. 5) although in oral submissions the board re-characterised it as professional evidence. The phrase "expert evidence" is a term of art and it is implausible that a party's own adviser could so qualify in such circumstances, especially where the deponent's own acts in preparing documents for the EIA screening are the ones that are in question and there is no reference in the affidavit to the duties of an expert to the court. The relevant parts of the developer's affidavit consist of the following:

- (i) para. 13 merely sets out the applicant's complaints;
- (ii) paras. 14 and 15 set out some content of the bat guidelines;
- (iii) para. 16 sets out what the developer's consultants did and merely records the fact that the consultants concluded that impact on bats was unlikely and that it was considered that a bat survey was unnecessary;
- (iv) para. 17 is merely a statement of fact as to what trees are to be removed, although it is slightly ambiguous in stating that one oak tree is being removed to facilitate the development – it should be added that a second oak tree is also being removed; and
- (v) para. 18 merely records the terms of condition 21 and the requirement for a derogation licence if it arises.

**29.** Overall that affidavit does not evidentially establish that there was a removal of all reasonable risk of impact on bats.

**30.** As a finding of fact on the evidence, the conclusion on the facts drawn by the referring court is that while there was some information from which the board might have concluded that it was possible there might not be a significant effect on bats, the above factors cumulatively mean that there was a lack of information to definitively exclude the possible risk of significant effects on bats as a result of the development. Rather the board appears to have simply proceeded on the basis of accepting the developer's original EIA screening report, which was prior to the applicant's submission and was not subsequently updated. The very nature of the procedure adopted, namely no updating of the information before the board in the light of the applicant's submissions – which did not happen because of the serious design flaw that the 2016 Act didn't allow the developer's information to be supplemented – contributed to the problem.

**31.** The board submits that:  
 "The decision of the Board can only be challenged by way of an application for Judicial Review. The Judicial Review procedure is limited to an analysis of the legality, rather than the substantive merits of the decision. The EIA Directive does not require that the decision of the competent authority be subject to a merits based assessment and the procedure by which the legality of the decision may be challenged is a matter of national procedural autonomy subject to the principles of equivalence and effectiveness (see C-71/14 *East Sussex County Council*)."

**32.** But the referring court is not engaging in a merits-based review. This is not about the court deciding whether the impacts on the environment are acceptable, but rather about whether they have been excluded so as to warrant a decision not to conduct assessment. The issue is about



procedure – the procedural question being firstly what is the threshold – whether the board is required to remove all reasonable doubt as to significant effects on the environment or merely to adopt a “reasonable” decision based on some material before it, even if other reasonable people could disagree – and secondly whether if the test is the former, it is satisfied here – which is a question of fact for the referring court and which on the facts is not met. If on the other hand the test is simply to adopt a reasonable decision then the test would be satisfied on the facts here.

**33.** The current bat guidelines were adopted in 2022: Marnell, Ferdia., Kelleher, Conor. and Mullen, Enda., *Bat Mitigation Guidelines for Ireland - v2*, Irish Wildlife Manuals No. 134 (2022, National Parks and Wildlife Service, Department of Housing, Local Government and Heritage, Dublin) (<https://www.npws.ie/sites/default/files/publications/pdf/IWM134.pdf>). Section 5.1 in this second edition states as follows:

“The importance of a thorough site survey prior to considering development cannot be over-emphasised. The following descriptions of survey techniques and their correct application are aimed at assisting consultants (to appreciate the type of survey that is expected), the developer (to be assured that their consultant is recommending a survey to help them meet legal and policy requirements), and planning authorities and National Parks and Wildlife Service (to be sure that an accurate assessment of the site and the extent of its bat interest has been made). Without a sound survey that includes an assessment of all available evidence, it is difficult to predict the likely impact of development.

From the developer’s perspective, the primary objective of a survey for protected species is to ensure that any development can proceed without breaking the law. The consequences of not carrying out a survey on sites which subsequently prove to have a significant protected species interest can be severe and may include delays, additional costs and, in exceptional cases, the cancellation or curtailment of projects. The UK *Bat Conservation Trust* published the 3<sup>rd</sup> edition of *Bat Surveys: Best Practice Guidelines* in 2016 (Collins, 2016) and the recommendations contained therein should be referred to, bearing in mind, in particular, the different bat faunas of the two jurisdictions.”

#### **Procedural history**

**34.** The present proceedings were issued on 3<sup>rd</sup> November, 2020. The primary relief sought is an order quashing the grant of permission by the board.

**35.** By order of 26<sup>th</sup> November, 2020, liberty was given to amend the Statement of Grounds. Following hearings in the High and Supreme Courts, the domestic law issues were resolved in favour of the board. The EU law issues then fell for decision.

**36.** The EU law issue is pleaded in core ground 4 of the applicant’s statement of grounds which provides as follows:

“The Decision is invalid because the Board erred in failing to have any, or any adequate regard to potential disturbance of bats or to deterioration or destruction of resting places for bats, and in particular erred in screening out an environmental impact assessment (‘EIA’) despite the lack of evidence in relation to these matters.”

**37.** Sub-grounds 9 to 11 provide as follows:

“9. There was no or no adequate assessment of potential disturbance to bats, or of potential deterioration or destruction of resting places, within the meaning of Article 12 of the Habitats Directive and the European Communities (Birds and Natural Habitats) Regulations 2011 (SI:477/2011). [PR8]

- (b) Potential disturbance of bats, or deterioration or destruction of resting places, was not addressed in the reports submitted by the Developer, namely: the EIAR Screening Report; the Tree Survey Report; and the Appropriate Assessment Screening Report.
- (c) No surveying in respect of bats appears to have been carried out, notwithstanding that the proposed development will result in the loss of a significant number of trees.
- (d) In particular, no tree roost survey was conducted.
- (e) The Inspector (§11.7) acknowledged the potential for impact on bats from tree-felling and recommended that this should be undertaken in accordance with the advice of a suitably qualified ecologist. This is reflected in Condition 21 of the Decision.

10. The Board erred in screening out the need for EIA and in not refusing to deal with the application under section 8(3)(a) and/or section 9(5) of the 2016 Act and/or Article 299B of the 2001 Regulations. [PR9]

- (a) Having regard to the strictly protected status of bats under the Habitats Directive, potential disturbance of bats, or deterioration or destruction of resting sites, constitute significant effects on the environment, within the meaning of the EIA Directive.

(b) The Board did not have before it sufficient information to allow it to conclude that significant effects on the environment were unlikely.

11. Further, the Decision is unlawful, having regard to section 23(5)(d) of the Wildlife Act, 1976 (as amended). The Board has no legal authority to grant permission that will result in the potential destruction of breeding or resting places.”

38. Having held a hearing on 9th March, 2023 on the balance of the case following the disposal of the domestic law issues, the referring court decided in principle on 24th March, 2023 to make a reference under Article 267 TFEU and invited submissions in that regard. On receipt of those submissions the referring court transmitted an issue paper to the parties on 4th July, 2023, setting out further queries. The parties made supplementary written submissions in response to that and a further hearing on the balance of the case took place on 21st November, 2023. The matter was then listed for final mention prior to the formal reference on 27th November, 2023. Updated links for materials referred to in the applicant’s submission were provided on 28th November, 2023, which enabled the present judgment to be delivered.

39. The notice party developer did not get involved in the reference phase of the proceedings.

40. In those circumstances the referring court is staying the proceedings and referring the questions below to the Court of Justice for a preliminary ruling.

#### The first question

41. The first question is:

**Does Article 4(4) of and/or paragraph 3 of Annex IIA to Directive 2011/92, as amended by Directive 2014/52, interpreted in the light of the precautionary principle, have the effect in a case where information under Annex IIA to the Directive should be furnished, and where there is material before the competent authority that a species or habitat might be affected by the project, that the developer concerned should obtain all relevant information on species or habitats that may be affected by the project by conducting or obtaining scientific surveys that are adequate to remove doubt about significant effects on such species or habitats, and that in the absence of the results of such surveys, the competent authority should be informed of and required to proceed on the basis of the absence of sufficient information to exclude doubt as to whether the project will have significant effects on the environment?**

42. The applicant’s proposed answer is that the purpose of Directive 2011/92 would be set at naught if a Developer and/or the consent authority could purport to exclude the possibility of significant effects on the environment at screening stage on the basis of incomplete and/or inadequate information. If the required information is not available or is not submitted by the Developer then Article 4(4) of the Directive should be read as importing an obligation on the Developer to inform the competent authority of that fact and that therefore the possibility of significant effects on the environment cannot be excluded. The key element is that the competent authority must be exclude the likelihood of significant effects on the basis of objective information. In this instance that would require surveying of the site to establish whether and how it is used by Bat Fauna. That surveying, to reach the requisite level of objectivity should broadly comply with the requirements of the Bat Mitigation Guidelines published by the NPWS (2006 as revised in 2022). In the event that adequate surveying has not been submitted such as to allow the exclusion of the likelihood of significant effects on the basis of objective information then the competent authority must request sufficient further information to allow it to reach the requisite threshold of certainty.

43. The board’s proposed answer is that Article 4(4) of Directive 2011/92 requires a developer to provide information on the characteristics of the project and its likely significant effects on the environment. The information to be provided is listed in Annex IIA (PR10). The nature of the information which is required to be provided in any individual case will depend on the precise circumstances of that case and whether there is a probability or a risk that the project in question will have significant effects on any individual species. It is primarily for the competent authority to determine whether it has sufficient information to complete a screening for EIA in accordance with Directive 2011/92 and relevant national legislation. Where a competent authority has sufficient information to complete a screening for EIA, it may do so. Where it is not satisfied as to the information it has before it, it can request further information. Directive 2011/92 does not require a competent authority to carry out an EIA simply because it decides that it does not have sufficient information before it. Where that occurs, it is open to the competent authority to request further information to enable it to complete a screening for EIA.

44. The referring court’s proposed answer is Yes. Insofar as concerns the screening of assessment of impacts of project on species or habitats, such screening would be incomplete, inadequate and ineffective unless there was an implied obligation to either conduct or obtain adequate scientific surveys, or to proceed on the basis that impact cannot be excluded. It would undermine the objective of the Directive to allow a competent authority to decide not to conduct

assessment under Articles 5 to 10 in a case where a reasonable doubt as to significant effects on the environment had not been excluded.

**45.** The relevance of the question is that the developer here did not obtain all necessary scientific surveys, in particular a bat survey, such as would have excluded all reasonable risk of significant effects on the environment and specifically on bat species, but the board rejected the possibility of significant effects on the environment at the EIA screening stage. This would be impermissible if Directive 2011/92 has an effect as postulated in the question.

**The second question**

**46.** The second question is:

**Does Article 4(4) of and/or paragraph 3 of Annex IIA to Directive 2011/92, as amended by Directive 2014/52, interpreted in the light of the precautionary principle, have the effect in a case where information under Annex IIA to the Directive should be furnished, that the competent authority is required to exclude doubt as to the possibility of significant effects on the environment if it proposes not to subject the project to an assessment under Articles 5 to 10 of the Directive, and thus that where in the course of a determination under Article 4(2) of the Directive, a competent authority objectively lacks sufficient information to exclude doubt as to whether the project will have significant effects on the environment, the project should be required to be subjected to an assessment under Articles 5 to 10 of the Directive?**

**47.** The applicant's proposed answer is Yes. In the light, in particular, of the precautionary principle, which is one of the foundations of the high level of protection pursued by EU policy on the environment, in accordance with Article 191(2) TFEU, and by reference to which the Directive 2011/92 must be interpreted, requires that the likelihood of significant effect to the environment must be considered to exist when that likelihood cannot be objectively excluded. The purpose of Directive 2011/92 would be set at naught if the consent authority could purport to exclude the possibility of significant effects on the environment at Screening stage on the basis of incomplete and/or inadequate information. If the competent authority objectively lacks sufficient information to exclude doubt as to whether the project will have significant effects on the environment, the project should be required to be subjected to an assessment under Articles 5 to 10 of the Directive. In this case it should be recalled that the only evidence placed before the board as to the presence of sensitive ecological receptors on the site was provided by the applicants. The Developer provided no objective information at all, still less sufficient objective information, which would allow the competent authority to exclude the doubt raised as to the possibility of significant effects caused by the proposed project on the environment.

**48.** The board's proposed answer is as set out above in relation to the first question. The requirement for an environment impact assessment will only arise where there is a "probability or a risk that the project in question will have significant effects on the environment" (see Opinion of Advocate General Kokott of 15 June 2023, *Eco Advocacy*, C-721/21, ECLI:EU:C:2023:477 at §61). Such a risk will exist where it cannot be excluded, on the basis of objective elements, that the project is likely to have significant impacts on the environment (see, the Judgment of 31 May 2018, *Commission v Poland*, C-526/16, ECLI:EU:C:2018:356 at §67). It is necessary not to conflate Directive 2011/92 and Directive 92/43. While both directives are directed at environmental protection, they exist separately and place different obligations on Member States as regards different projects (see, for example, the Judgment of 7 November 2018, *Coöperatie Mobilisatie for the Environment and Vereniging Leefmilieu*, C-293/17 and C-294/17, ECLI:EU:C:2018:882). The Directives are different in scope and in substance. While Directive 92/43 can operate to direct the outcome of a development consent process, Directive 2011/92 is not determinative as to outcome. It is limited to requiring that a project be subject to an assessment, without dictating that the grant of development consent is determinative of the outcome.

**49.** The referring court's proposed answer is Yes. Insofar as concerns the screening of assessment of impacts of the project on species or habitats, the power to decide not to conduct an assessment under Articles 5 to 10 of the Directive should not apply to any case where a reasonable risk of significant effect on the environment cannot be excluded. Directive 2011/92 must have the effect that a risk exists if it cannot be excluded on the basis of objective elements: see the judgment of 7 September 2004, *Waddenvereniging et Vogelbeschermingsvereniging*, C-127/02, EU:C:2004:482, para. 44, judgment of 24 March 2011, *Commission v Belgium*, C-435/09, EU:C:2011:176, para. 64, judgment of 31 May 2018, *Commission v Poland*, C-526/16, EU:C:2018:356, paras. 66 and 67, judgment of 15 June 2023, *Eco Advocacy*, C-721/21 ECLI:EU:C:2023:477. The decision in *Commission v Poland*, C-526/16 itself cites the test for exclusion of risk in *Waddenvereniging et Vogelbeschermingsvereniging*, C-127/02, which is a case under Directive 92/43. This undermines the board's argument that the test for EIA and AA are totally separate. As stated in the judgment of 10 June 2004, *Commission v Italy*, C-87/02,

ECLI:EU:C:2004:363 §49, “a decision by which the national competent authority takes the view that a project’s characteristics do not require it to be subjected to an assessment of its effects on the environment must contain or be accompanied by all the information that makes it possible to check that it is based on adequate screening, carried out in accordance with the requirements of Directive 85/337.” This implies the existence of required objective elements which exclude doubt in that regard.

**50.** The relevance of the question is that the developer here did not, on the facts, obtain all necessary scientific surveys such as would have excluded any doubt as to the effect on bats. If a decision to screen out the necessity for full EIA under Articles 5 to 10 of the Directive is dependent on excluding all reasonable doubt as to significant effects on the environment, the absence of such information meant that the risk should have been screened in, then the decision not to conduct an EIA was impermissible.

**The third question**

**51.** The third question is:

**If the answer to the first question in general is no, do such consequences arise insofar as the potential significant effect on the environment relates to species that may be affected by the project where such species are entitled to strict protection under Article 12 of Directive 92/43, having regard *inter alia* to the importance of such species as recognised in Article 3(1)(b) of Directive 2011/92 and Recital 11 to Directive 2014/52?**

**52.** The applicant’s proposed answer is that the question should be answered in the affirmative. Directive 2011/92 must be interpreted by reference to its broad principle and the achievement of the objective of environmental protection. Natural habitats and wild flora and fauna are the subject of particularly robust environmental protection. Any potential impact on such habitats and fauna must be axiomatically regarded as significant for the purposes of Stage 1 EIA. This is particularly the case where (as here) the wild fauna are not designated as Conservation Objectives in respect of a Natura 2000 site but rather are included within the ambit of Article 12. The CJEU case law in respect of Article 12 strongly suggests that any disturbance of such fauna represents a significant effect on the environment and therefore assume a particular significance for the purposes of assessing any potentially significant impact for the purposes of Directive 2011/92. If the necessary information is not available, then the absence of such information cannot justify screening out for EIA; rather if the developer wishes to avoid EIA, then it necessary to obtain the information at the screening stage. Any other approach is inconsistent with the purpose of the Directive as identified in the Judgment of 16 September 1999, *World Wildlife Fund v Autonome Provinz Bozen*, C-435/97, ECLI:EU:C:1999:418.

**53.** The board’s proposed answer is that the nature of the information which is to be provided for the purposes of Article 4(4) and in compliance with Annex IIA of Directive 2011/92 is not altered by the fact that a species is entitled to strict protection under Article 12 of the Directive 92/43. The nature of the information which is required to be provided to a competent authority in respect of species which benefit from strict protection under Article 12 of the Directive 92/43 will depend on the precise circumstances of that case and whether there is a probability or a risk that the project in question will have significant effects on the individual species.

**54.** The referring court’s proposed answer is Yes insofar as this question arises. The importance of species subject to strict protection and the enhanced level of protection afforded by Directive 92/43 requires an enhanced level of certainty as to the absence of any impacts on such species for the purposes of Directive 2011/92. Consistently with the Judgment of 24 February 2022, *Namur Est v Region Wallonie*, C-463/20, ECLI:EU:C:2022:121 consideration of impacts on species protected for the purposes of Directive 92/43 must form an integral part of the development consent procedure for the purposes of Directive 2011/92 (§§48-53) which means that the competent authority must have appropriate survey and other information to gauge the impact of the project on any species protected by Directive 92/43.

**55.** The relevance of the question is that the developer here did not obtain all necessary scientific surveys, or in particular a bat survey, that would exclude all possibility of any significant effects on bats subject to strict protection, but the board rejected the possibility of significant effects on the environment at the EIA screening stage.

**The fourth question**

**56.** The fourth question is:

**Does Article 4(4) of and/or paragraph 3 of Annex IIA to Directive 2011/92, as amended by Directive 2014/52, interpreted in the light of the precautionary principle, have the effect that, if, following the provision of information by the developer pursuant to Annex IIA of the Directive, additional information is provided by another party to the competent authority objectively capable of creating a doubt as to the effect of the project on the environment, either the**

**developer is required to provide further information to the competent authority which would exclude such doubt or to inform the competent authority of the absence of such information, or the competent authority itself is required to obtain further information which would exclude such doubt or alternatively to determine that assessment under Articles 5 to 10 of the Directive is required in the absence of sufficient information to exclude doubt as to whether the project will have significant effects on the environment?**

**57.** The applicant's proposed answer is that if the necessary information is not available, then the absence of such information cannot justify screening out for EIA; rather if the developer wishes to avoid EIA, then it necessary to obtain the information at the screening stage. Any other approach is inconsistent with the purpose of the Directive as identified in the judgment of 16 September 1999, *World Wildlife Fund v Autonome Provinz Bozen and others*, C-435/97, ECLU:EU:C:1999:217. The Directive does not appear to envisage any obligation on the competent authority to obtain the information itself at screening stage, or to ask the developer to do so; while the Directive does not preclude such further information at screening stage, that does not overcome a prohibition in the domestic legislation on the provision or obtaining of such further information at screening stage.

**58.** The board's proposed answer is that in conducting a screening for environmental impact assessment in accordance with Article 4(4), the competent authority shall make its determination on the basis of the information provided by the developer taking into account, where relevant, the results of preliminary verifications or assessments of the effects on the environment carried out pursuant to Union legislation other than Directive 2011/92. The steps to be taken by the competent authority leading to the determination pursuant to Article 4(4) and any decision as to whether it requires further information, either from the developer or other sources, is matter to be determined by the competent authority depending on the circumstances of the case. Directive 2011/92 permits a competent authority to obtain, where necessary, further information on the likely significant effects on the environment of a proposed project from either a developer or other sources.

**59.** The referring court's proposed answer is Yes. If doubt as to significant effects on the environment is created by additional information following the submission of information under Annex IIA, then either the developer or the competent authority itself must identify further information to dispel any doubt as to such effects or the competent authority must regard such effects as not being excluded.

**60.** The relevance of the question is that no such additional information was obtained or provided following the information in the applicant's submission to the board such as would be capable of dispelling all doubts as to the possible significant effects on the environment. Indeed the 2016 Act precludes the possibility of such new information being sought. If the answer to the question is yes then the board ought to have screened in the potential impact on bats following the applicant's submission.

#### **The fifth question**

**61.** The fifth question is:

**If the answer to the fourth question in general is no, do such consequences arise insofar as the potential significant effect on the environment relates to species that may be affected by the project where such species are entitled to strict protection under Article 12 of Council Directive 92/43, having regard *inter alia* to the importance of such species as recognised in Article 3(1)(b) of Directive 2011/92 and Recital 11 to Directive 2014/52?**

**62.** The applicant's proposed answer is as for the third question; and in the context of species which enjoy strict protection, *a fortiori* the competent authority cannot screen out because information has not been supplied.

**63.** The board's proposed answer is that in conducting a screening for environmental impact assessment in accordance with Article 4(4), the competent authority shall make its determination on the basis of the information provided by the developer taking into account, where relevant, the results of preliminary verifications or assessments of the effects on the environment carried out pursuant to Union legislation other than Directive 2011/92. The steps to be taken by the competent authority leading to the determination pursuant to Article 4(4) and any decision as to whether it requires further information, either from the developer or other sources, is matter to be determined by the competent authority depending on the circumstances of the case. Directive 2011/92 permits a competent authority to obtain, where necessary, further information on the likely significant effects on the environment of a proposed project from either a developer or other sources. The answer is not altered by the status of a species as one having protection pursuant to Article 12 of Directive 92/43.

**64.** The referring court's proposed answer is Yes insofar as this question arises. The importance of species subject to strict protection requires an enhanced level of certainty as to the absence of any impacts on such species.

**65.** The relevance of the question is that no such additional information was obtained or provided following the information in the applicant's submission to the board such as would be capable of dispelling all doubts as to the possible significant effects on the environment in respect of species subject to strict protection.

**Order**

**66.** For the foregoing reasons it is ordered that:

- (i) the questions set out in this judgment be referred to the CJEU pursuant to article 267 TFEU;
- (ii) the substantive determination of the proceedings be adjourned pending the judgment of the CJEU, without prejudice to the determination of any appropriate procedural or interlocutory issues in the meantime;
- (iii) the parties be required to comply with the directions regarding preparation of papers for transmission to the CJEU as set out in Guidance Notes attached to Practice Direction HC119, so that all papers are received by the List Registrar within 28 days from the date of this judgment;
- (iv) the parties be required to comply with the directions to keep the referring court informed of progress of the reference as set out in para. 100(vii) of *Eco Advocacy CLG v. An Bord Pleanála* [2021] IEHC 265;
- (v) the matter be listed for mention on a date to be notified by the List Registrar as soon as convenient after the expiry of 28 days from the date of this judgment, to update the court on progress of the reference; and
- (vi) the costs of the proceedings to date not already disposed of be reserved until further order.