THE HIGH COURT
JUDICIAL REVIEW

[2021] IEHC 509
[2020 No. 563 JR]

IN THE MATTER OF THE PLANNING AND DEVELOPMENT ACT 2000

BETWEEN

SAVE CORK CITY COMMUNITY ASSOCIATION CLG

APPLICANT

AND

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

RESPONDENTS

AND

CORK CITY COUNCIL

NOTICE PARTY

JUDGMENT of Humphreys J. delivered on Wednesday the 28th day of July, 2021

1. Cork City is said to take its name from Corcach Mór Na Mumhan (the Great Marsh of Munster), and the relationship with the River Lee has been central to its history. In the millennium and a half since its foundation in or around the 6th century, quite some progress has been made in draining the "great marsh", and much land has been reclaimed over the years (for a historical overview, see the city council's website, corkpastandpresent.ie).

2. This case concerns an area of central Cork City known as Morrison's Island that began as one of the marshes surrounding the city. The area is no longer an island, but a small part of the central island between the two channels of the Lee that encircle the inner city.

3. The *Pacata Hibernia* map of 1601 illustrates the walled medieval city showing Morrison's Island as a largely undeveloped island to the east of the city.

4. It was reclaimed and embanked in the mid to late 17th century. At that time, it was described as "East marsh next adjoining the city", but had other names such as Island Nagary, Red Abbey Marsh, Dunbar's Marsh, Lavitt's Marsh and Dog Island. It remained largely undeveloped in a map of 1690.

5. Smith's map of Cork of 1750 shows the island marked with the legend "About this place the Duke of Grafton was killed". This is a reference to Henry FitzRoy KG, first Duke of Grafton (1663-1690), a son of King Charles II and Barbara Palmer (née Villiers) (1640-1709), first Duchess of Cleveland, Countess of Castlemaine. Grafton was killed in the storming of Cork during the Williamite-Jacobite war in 1690. (Dublin's Grafton St. is named for his son Charles FitzRoy KG, the second Duke of Grafton.)

6. Rocque's map of 1759 shows Morrison's Island marked as Dunbar's Marsh. The first building to take place on Morrison's Island was around 1760 when a row of houses was erected on its northern side.

7. By Connor's map of 1774, Morrison's Island had been developed and a bridge was shown linking Prince's Street to the island.

8. Beaufort's map of 1801 also shows some development. The river's edge is marked as Dunbar's Marsh and the area retains its island character. The island by this time became a strong industrial and commercial centre. A notable businessman who set up a preserved provisions firm in the area was John Henry Gamble, whose firm supplied provisions to Sir William Parry (1790-1855) for his polar expedition in 1824. The following year, Parry's ship, *The Fury*, was wrecked in Nunavut, Canada, at Prince Regent Inlet, which Parry named, presumably for George, Prince Regent, 1811-20 (thereafter King George IV). Gamble's provisions were found years later in a perfect state of preservation, which is presumably a testament to the quality of his work at Morrison's Island.

9. Holt's 1832 map introduces a recognisably modern streetscape. Morrison's Island is no longer an island at this stage and lies on the north bank of the south channel of the Lee. Union Island (now Union Quay) lies on the south bank of the south channel. Morrison's island is essentially the triangular area bounded to the north by South Mall and to the south by the quays on the north bank of the Lee marked on the 1832 map as Morrison Quay and Charlotte Quay. The latter was presumably named for Queen Charlotte of Mecklenburg-Strelitz (19th May, 1744-17th November, 1818, mother of George, Prince Regent, who we met earlier) (although the quay concerned at some point became known as "Father Matthew Quay").

10. The name Morrison in introduced for the first time in the 1832 map, and derives from James Morrison who purchased the island. He was a member of one of Cork's great mercantile families and a Lieutenant-Colonel of the True Blues, a volunteer regiment, becoming Lord Mayor of Cork in 1784. Another member of the family, Rowland Morrison, became Lord Mayor in 1806. The largest commercial building on Morrison's Island was Suttons, founded in 1845 by Abraham Sutton, and had become a household name in the coal industry by the end of the 19th century. The most notable structure on Morrison's Island is Holy Trinity Church constructed between 1832 and 1908 (the long duration being explained by lack of funds). In later years, Morrison's Island became associated with Cork's legal and medical professions.

11. Notwithstanding various ongoing works of land reclamation and consolidation of the smaller islands in central Cork, flooding has remained a problem. Indeed it has figured prominently in jurisprudence in recent years: *University College Cork v. Electricity Supply Board* [2014] IEHC 135, [2014] 2 I.R. 525*, University College Cork v. Electricity Supply Board* [2015] IEHC 598, [2015] 10 JIC 0504 (Unreported, High Court, Barrett J., 5th October, 2015), *University College Cork v. Electricity Supply Board* [2017] IEHC 599, [2017] 10 JIC 2401 (Unreported, High Court, Barrett J., 24th October, 2017), *University College Cork v. Electricity Supply Board* [2017] IECA 248, [2017] 9 JIC 2201 (Unreported, Court of Appeal, Ryan P., 22nd September, 2017), *University College Cork v. Electricity Supply Board* [2018] IECA 82, [2018] 03 JIC 2002 (Unreported, Court of Appeal, Ryan P. (Irvine and Whelan JJ. concurring), 20th March, 2018), *University College Cork v.*

Electricity Supply Board [2018] IESCDET 140, [2018] 10 JIC 1703 (Unreported, Supreme Court, O'Donnell, Dunne and Finlay Geoghegan JJ., 17th October, 2020), *University College Cork v. Electricity Supply Board* [2020] IESC 38, [2020] 7 JIC 1301 (Unreported, Supreme Court, Clarke C.J. (O'Donnell, MacMenamin, Dunne and Charleton JJ. concurring), 13th July, 2020), *University College Cork v. Electricity Supply Board* [2020] IESC 66, [2020] 10 JIC 2107 (Unreported, Supreme Court, Clarke C.J. (O'Donnell, MacMenamin, Dunne and Charleton JJ. concurring), 21th October, 2020), *University College Cork v. Electricity Supply Board* [2021] IESC 21, [2021] 3 JIC 2502 (Unreported, Supreme Court, Clarke C.J. (O'Donnell, MacMenamin, Dunne and Charleton JJ. concurring), 25th March, 2021).

12. The construction of flood defences for Cork has a chequered history going back 15 years and involving 4 separate statutory processes. It is worthwhile to outline some of the highlights of those procedures. Essentially the four processes were:

    (i). a proposal by the Office of Public Works ("OPW") under the Arterial Drainage Act 1945;

    (ii). a foreshore licence application by the council under the Foreshore Act 1933;

    (iii). a proposal for works at Morrison's Island by the council under part 8 of the Planning and Development Regulations 2001 (S.I. No. 600 of 2001); and

    (iv). the current proposal under s. 177AE of the Planning and Development Act 2000.

OPW proposals

13. The OPW's flood relief project for central Cork was given a ministerial launch in October 2006. That was followed by a public information day in December 2006 and a stakeholder workshop in January 2007.

14. An environmental scoping report was published in April 2007 and further stakeholder workshops and presentations were held in June 2008, May 2009 and February 2010.

15. In February 2010 a draft plan, the Catchment Flood Risk Management Plan ("CFRMP"), was published as well as a strategic environmental assessment report and made available on the project website and in hard copy at five public locations. Comments were invited up to 30th April, 2010. There were a number of presentations at relevant conferences and fora as well as landowner consultations, and I am also informed that approximately 500 statutory notices were erected around Cork city.

16. On 17th July, 2013, a first public consultation on the constraint stage of the overall project, now known as the Lower Lee Flood Relief Scheme ("LLFRS"), took place.

17. On 29th July, 2014, there was a second public consultation day on the emerging preferred option and between 12th December, 2016 to 20th January, 2017 the OPW advertised the scheme in City Hall.

18. On 10th March, 2017, the OPW published the Lower Lee (Cork City) Assessment of Phasing Options document. This document noted at p. 14 that "it has been assumed that flood defences for Morrison's Island are provided upfront under a Part 8 Planning permission". This indicated the start of a split-off of the present project, namely works at Morrison's Island specifically, to be developed in advance of the broader project of flood defences for Cork City overall.

19. A report on the public exhibition was published in December 2017, but no further significant steps have been taken by the OPW to progress the overall flood relief scheme since then. I am informed that depending on the outcome of the present case, the OPW would propose to apply to the Minister for Public Expenditure and Reform for consent for the project under the 1945 Act in Q1 2022.

Council's foreshore licence application

20. On 22nd March, 2018, the council applied for a foreshore licence. The application was made to the Minister for Housing, Planning and Local Government in accordance with s. 1B of the Foreshore Act 1933 (inserted by the Foreshore and Dumping at Sea (Amendment) Act 2009, s. 6(1) and as substituted by s. 2 of the Foreshore (Amendment) Act 2011).

21. Submissions were made on that application and the council responded to those submissions on 1st December, 2020. The matter remains before the Minister awaiting decision.

Council proposal under part 8 of the 2001 regulations

22. As noted above a proposal emerged to split off the Morrison's Island works from the overall scheme for Cork city as a whole and the council proposed the present development for flood defence works at Morrison's Island under part 8 of the 2001 regulations on 12th February, 2018. That proposal generated a local record of 1,491 submissions which the applicant here suggests were predominantly negative.

23. On 14th May, 2018, the city council granted itself approval for the scheme. However, judicial review proceedings were then brought, with the present applicant as one of the moving parties: *Ó Muirí & Save Cork City v. Cork City Council* [2018 No. 546 JR].

24. An order of *certiorari* was made on 8th January, 2019 the primary ground being that because the development required appropriate assessment ("AA") having regard to the judgment in Case C-323/17 *People Over Wind v. Coillte Teoranta* (Court of Justice of the European Union, 12th April, 2018, ECLI:EU:C:2018:244), the council was not entitled to pursue the project under s. 179 of the 2000 Act and part 8 of the 2001 regulations.

The current proposal

25. Having regard to the legal problem with the part 8 application, the council then launched the current proposal pursuant to s. 177AE of the 2000 Act. Newspaper notice of the application was published on 12th December, 2018.

26. The newspaper notice stated that the Natura Impact Statement ("NIS") would be available in Cork City Council offices between 20th December, 2018 and 15th February, 2019 and at the offices of the board.

27. The formal application was made to the board on 13th December, 2018 involving:

    (i). remedial works to existing quay walls;

    (ii). the construction of public realm improvement works; and

    (iii). the construction of flood defence works along the quayside between Parliament Bridge and Parnell Bridge.

28. The reinforced concrete walls involved seem to have attracted particular attention in the applicant's submission. The walls are slightly brutalist in appearance although that is in no way a criticism. Form presumably follows function in this regard.

29. The works involve only a 553 metre stretch of River Lee and thus a relatively small section of the overall city centre and indeed of the overall flood defence works. This is illustrated in drawing number LL-104 Proposed Phasing Plan, where this is "Phase 0", shown as a small fragment of a 6-phase overall grand design.

30. As flagged in the newspaper notice, the application was accompanied by a Natura Impact Statement and also by an environmental impact screening report and an environmental report.

31. On 21st December, 2018, some members of the public attended at the offices of Cork City Council and were either dissuaded from or were unable to purchase copies of the Natura Impact Statement. Details are set out in the applicant's submission to the council, but have not been challenged in any granular manner or at all by the council. In particular:

    (i). Mr. John McCarthy sought documents and was refused, he then queried this and was given the NIS and charged €1.50;

    (ii). Ms. Polly Magee was refused documents and directed to a website; no one else who was refused documents was so directed;

    (iii). Ms. Catherine Kirwan was refused documents and also refused written confirmation of the refusal;

    (iv). Mr. Eamonn Wiseman was initially refused documents and was then given the NIS free;

    (v). Mr. Diarmaid Sean MacCarthaigh was given the NIS, but no other documents and was charged €9; and

(vi). Mr. Sean Ó Muirí called, but the counter was closed and he was unable to purchase anything.

32. These problems go beyond a *de minimis* lapse and suggest some breakdown in communications or procedures within the council. The fact that 3 different prices were charged for the NIS on the same day (€0, €1.50 and €9) suggests a considerable amount of disorganisation or improvisation that has got to be suggestive of a systems issue rather than a one-off lapse.

33. Notwithstanding these problems the applicant *did* make a detailed submission to the board on 14th February, 2019, as did 630 other third parties and 4 prescribed bodies.

34. On 31st May, 2019, the board requested further information from the council under s. 177AE(5) to address submissions made and also to provide further information regarding the NIS and to provide further drawings. The council responded on 11th July, 2019. The board then directed the council to advertise the further information pursuant to s. 177AE(5)(d). On foot of that, two further submissions were made from prescribed bodies. The applicant did not make a further submission.

35. The board appointed its in-house inspectorate ecologist to prepare a report in respect of AA which is dated 2nd March, 2020.

36. The inspector's report is dated 10th March, 2020. In particular, para. 11.1 of the report notes that "there is no provision under s. 177AE of the Planning and Development Act 2000 (as amended) to require EIAR screening for a project under that section". Nonetheless it was considered appropriate for the board to address that issue.

37. The board direction granting permission is dated 4th June, 2020 and the formal decision date is dated 17th June, 2020. As appears from the direction, the decision was taken generally in accordance with the inspector's recommendation.

38. These proceedings were initiated on 10th August, 2020. The applicant quite rightly makes the point that this is a large and important project which has legitimately divided opinion in Cork and that insofar as reasonable points are brought forward by an applicant (whether they prove to be ultimately successful or not), parties are entitled to advance their objections or challenges under the Aarhus Convention and in accordance with law. That must be accepted. One has to be concerned about blaming or criticising applicants merely for the fact of engaging in rights of participation and challenge, insofar as such a practice could have the effect of disincentivising the actual exercise of Aarhus Convention rights, or rights under the Constitution (leaving aside abuse of process which most certainly doesn't arise here). Concerningly, applicant-shaming has now become a background feature in a number of planning cases. One must also bear in mind the strong Aarhus anti-victimisation provisions. One can only hope that drawing attention to the issue will help in some small way to stimulate more informed responses and a greater recognition of the entitlement to exercise rights of public participation. In the present case it could be somewhat unfair if not ill-informed to criticise the applicant for delaying

this project when it's clear from the history of the matter that these proceedings have taken up just one year out of the 15 year history of Cork flood defence works.

Relief sought

39. The relief sought in the statement of grounds as filed can be summarised as follows:

(i). *certiorari* of the board's decision of 17th June, 2020;

(ii). general declaratory relief;

(iii). a declaration that the State has failed to transpose art. 9a of EIA directive 2011/92/EU;

(iv). a declaration that s. 177AE of the 2000 Act is invalid having regard to EU law or the Constitution;

(v). a declaration that regs. 51 and 54 of the European Communities (Birds and Natural Habitats) Regulations 2011 (S.I. No. 477 of 2011) are invalid in EU law;

(vi). a stay; and

(vii). costs.

Legislative framework

40. The regulation of a local authority's own development involves a highly confusing statutory jumble of different categories and provisions. Departing from the usual lawyer's approach that a word is worth a thousand pictures, it is best to summarise the situation as a matrix depending on whether EIA or AA is required or not.

Types of local authority own development

	AA not required	**AA required**
EIA not required	**Type 1A** Minor developments not prescribed under s. 179 – no statutory process **Type 1B** Otherwise s. 179 / Part 8 of 2001 regulations	**Type 2** S. 177AE
EIA required	**Type 3** S. 175	**Type 4** Single application complying with both ss. 175 and 177AE (see s. 177AE(15))

41. The present application, according to the board and the council, is type 2, namely where AA is required but not EIA. There is no challenge being ultimately pursued in the present proceedings to the various sections referred to above or to the internal architecture of the

legislative scheme. In the statement of grounds as filed a declaration was sought regarding the validity of s. 177AE, but the grounds underlying that were withdrawn in the applicant's written submissions, so it is accepted that this relief no longer arises.

42. It should perhaps be noted that there is a mistake in the Law Reform Commission version of s. 176 of the 2000 Act because the text of subsection (1) does not begin with a "(1)".

43. The developments prescribed under s. 176 are set out in schedule 5 of the 2001 regulations, pursuant to art. 93 of those regulations. The council did not apply under s. 175 because it did not consider that the scheme came within schedule 5. Thus, the application was made under s. 177AE.

EIA screening determination

44. A point about the lack of jurisdiction of the EIA screening process was advanced. Such a point can be advanced firstly, as a challenge to the particular decision, and secondly, as a challenge to the legislation (although applicants generally don't always make that distinction as clear as it could be in their pleadings). I will take each of those challenges in turn.

As a challenge to the particular decision

45. It is important to start with what is pleaded under this heading. Three points are made:

(i). At grounds 10 to 15 it is alleged that the council had an impermissible conflict of interest in carrying out screening. That plea assumes that the council *did* carry out the screening which unfortunately is incorrect because the application was made under s. 177AE. Thus the decision-maker was the board rather than the council, so this point does not arise. The board is the competent authority so it has to carry out the screening. The applicant in the statement of grounds refers to art. 120 of the 2001 regulations, but that only applies to developments prescribed for EIA purposes under ss. 175 and 176.

(ii). Ground 16 argues (inconsistently with the previous ground) that no screening determination was made by the council. That is correct, but that is not a basis for relief because it is the board and not the council that is meant to do the screening.

(iii). Ground 17 alleges that the board had no jurisdiction to carry out EIA screening *via* s. 177AE.

46. Having regard to the foregoing it seems that much of the applicant's pleading is based on a false premise as it has confabulated the various distinct statutory processes and categories. Hence the crucial importance of distinguishing between the various types of application as I have endeavoured to do in the matrix above. I will now turn to the alleged lack of jurisdiction under s. 177AE.

Complaint that s. 177AE of the 2000 Act did not provide jurisdiction to conduct EIA screening

47. The statement of opposition of the board, like the inspector's report, stated that s. 177AE did not provide for EIA screening. Clearly, in context, these references meant that the

section did not *expressly* so provide. The issue is whether EIA screening is implicitly provided for.

48. Insofar as it was argued that s. 177AE(6), which provides for taking into account environmental impacts, provides such a basis, that comes nowhere near providing transposition of the detailed procedures in the 2011 and 2014 EIA directives.

49. What is relevant, however, is s. 177AE(15) which provides that if s. 175 (EIA being required) applies, then that section has to be complied with in the context of a s. 177AE application. Thus, the board must have a necessarily implied jurisdiction to determine whether the application should be dealt with by way of compliance with s. 177AE alone or in conjunction with s. 175. That being the case, that necessarily involves a determination as to whether s. 175 applies by virtue of schedule 5 of the 2001 regulations, including the catch-all provisions of para. 15 of part 2 of schedule 5. That amounts to a screening decision in all but name. If EIA was required in an application under s. 177AE, then the application would have to be either refused or alternatively further information sought to enable s. 175 to be complied with (assuming that were a valid procedural option, which I don't have to decide for present purposes).

50. Despite the fact that the jurisdiction to conduct EIA screening, therefore, arises on the legislation in a highly indirect manner, I am of the view that it can properly be read in to the section by necessary implication from s. 177AE(15).

Issues not pleaded under this heading

51. A number of issues were raised arising from submissions which I consider did not properly come within the pleadings, particularly complaint that if the board did have jurisdiction to conduct EIA screening, it incorrectly exercised that jurisdiction and that the board's decision did not expressly announce any decision on EIA at all.

52. On the latter point, unusually the only headings in the decision are matters considered, reasons and considerations, AA stage 1, AA stage 2 and conditions. There are no conclusions on EIA or on planning assessment. There is only passing reference to EIA in the matters considered and in condition 1. That might be questionable given the need for clarity and transparency of decision-making: see *e.g. Deerland Construction Ltd. v. Aquaculture Licences Appeals Board* [2008] IEHC 289, [2009] 1 I.R. 673.

53. While the board relied on *Maxol Ltd. v. An Bord Pleanála* [2011] IEHC 537, [2011] 12 JIC 2113 (Unreported, High Court, Clarke J., 21st December, 2011), at para. 2.5.1, regarding the implied adoption of the inspector's material, the applicant argued that the law of reasons had been in a state of ongoing development since then.

54. In addition, there is also an EU law dimension to the question of the need for express articulation of a decision: *Eco Advocacy CLG v. An Bord Pleanála* [2021] IEHC 265 (Unreported, High Court, 27th May, 2021). The applicant here sought to circumvent any pleading issues by relying on that decision, but in *Eco Advocacy* there were express and repeated pleas as to a lack of reasons even though they could have been more

particularised in terms of detail (grounds 11, 15, 20, 22, 24 and 26 in that case). Here, there is no pleading as to reasons, so there is not a lot for the court to build on even if it was minded to do so.

55. All that said, the format adopted for this decision is not very satisfactory and it is hard to completely exclude the lurking suspicion that EIA was not referred to by the board in an endeavour to keep all options open and to avoid having to take a clear position on the legal question of jurisdiction. Maybe that's over-suspicious and I am not deciding that that was the case, primarily because the applicant did not plead this issue and therefore did not take any steps to require the board to give a full account of a decision-making process on this point. But for decision-makers to fudge such issues (speaking generally rather than about this case) would not uphold the required transparency on public decision-making that is part of the rule of law.

56. A further point that was not pleaded was whether the board in fact adopted the inspector's EIA screening, and again that would have had to be explored evidentially as well as being pleaded.

EIA screening as a challenge to the legislation

57. Two elements of challenge were advanced. Firstly, to the non-transposition of art. 9a of EIA directive 2011/92/EU as inserted by directive 2014/52/EU; and secondly, in the pleadings as originally filed, to s. 177AE.

Non-transposition of art. 9a of the 2011 directive

58. Article 9a of the 2011 directive is designed to avoid "conflict of interest" within the "competent authority" particularly where "the competent authority is also the developer". The article imposes duties only on a "competent authority". While the definition of competent authority in art. 1(2)(f) of the directive is not totally enlightening in that it "means that authority or those authorities which the Member States designate as responsible for performing the duties arising from this Directive", the directive taken as a whole draws a clear distinction between the competent authority and the developer. Thus, art. 9a would only apply if the council was also the body giving the consent.

59. For what it's worth, that is also the interpretation that emerges from Kingston, Heyvaert and Čavoški, *European Environment Law* (Cambridge University Press, 2017) p. 389.

60. Having regard to the terms of the directive overall, it seems to me this argument is *acte clair* against the applicant in the present statutory context. However it could arise in some other context such as Part 8 where the developer is also the competent authority. As that didn't arise here, I don't know whether there is any non-transposition problem still to be explored in that context.

Alleged non-transposition of art. 4(5) of the EIA directive in the context of s. 177AE

61. As noted above this particular point was withdrawn in the end. However, it is possibly worth making the point under this heading that even if I am correct in the view I expressed earlier in this judgment that s. 177AE does in fact adequately provide a jurisdiction to conduct an EIA screening, the fact that it does so in such a tortuous,

indirect and implied manner could arguably fall short of the necessary transparency, clarity and legal certainty that would amount to proper transposition. That was not raised as an issue in this case, but nonetheless it is hard to feel much satisfaction in the labyrinthine way in which planning law has managed to evolve in recent years either generally or as regards this particular issue more specifically.

EIA - other points

62. Two other points were raised regarding EIA:

(i). alleged breach of the public participation requirements; and

(ii). alleged project splitting.

63. I will deal with each of these in turn.

Alleged breach of public participation requirements

64. As noted above the applicant relies on a failure of the council to comply with the advertised public access arrangements. The council has not particularly disputed any of those problems, but rather argues that they are not of major legal significance. As a possible ground for *certiorari*, however, I am unconvinced that this should be a basis for relief because, as stated in *Clifford v. An Bord Pleanála* [2021] IEHC 459 (Unreported, High Court, 12th July, 2021), it would be an inappropriate and improvident exercise of the power of *certiorari* to quash a decision based on the fair procedures rights of third parties absent an egregious disregard of legal requirements. On that basis I would refuse *certiorari* under this heading: see also *Hellfire Massy Residents Association v. An Bord Pleanála* [2021] IEHC 424, [2021] 7 JIC 0201 (Unreported, High Court, 2nd July, 2021).

65. That being said however, disregard of or non-compliance with legal requirements (even if on a first occasion it might not amount to egregious disregard of the law) could still be a matter to be properly considered as appropriate to address with declaratory relief, not least because it puts down a formal marker so that any future non-compliance can be assessed by reference to whether there has been a pattern of action or inaction that amounts in effect to disregard of the legal obligations concerned.

66. Section 177AE(4)(a) requires a local authority making an application under the section to publish in one or more newspapers circulating in the area a notice stating that approval has been sought, that an NIS has been prepared and that the board may approve the application with or without conditions or may refuse it. The notice must also among other things "specif[y] the times and places at which, and the period (not being less than 6 weeks) during which, a copy of the Natura impact statement may be inspected free of charge or purchased".

67. One can note that s. 177AE(4) is not exactly generous in terms of the information to be provided in that only the NIS is to be available, not other information about the project, but that aspect has not been challenged here.

68. An initial question is whether "inspected free of charge or purchased" in s. 177AE(4)(a)(ii) means inspected or purchased at the option of the council. Obviously it doesn't. It means either inspected or purchased or both at the option of the person engaging in public participation.

69. As noted above, the replying affidavit on behalf of the council does not dispute the specifics of the non-compliance. The council rather claims that the information is available in other ways including online at the offices of An Bord Pleanála and on an unattended table in the atrium of the city council offices.

70. Even if relevant documents (particularly the NIS) were available on a table in the atrium or for download, that does not address the fact that identified individuals were dissuaded or misdirected in the matter, or that the NIS was not available for purchase. Under either or both heading the newspaper notice was not complied with, and both headings apply here.

71. Another point made in reply to this heading is that this is a minor issue and *de minimis*, but I'm afraid I don't entirely accept that. It is sufficiently minor not to warrant *certiorari,* but it is more than *de minimis* in that as noted above, the level of contradictory reactions to the requests for information suggests a systems issue rather than a one-off lapse.

72. By way of background, although not specifically a ground for the declaration here, allegations of a lack of compliance with public participation requirements are now becoming a recurrent feature of this type of planning and environmental litigation. Possibly against that background it is worth considering whether even minor non-compliance should be addressed by way of declaration in the interests of promoting the rule of law. But I do not need to be concerned about that here because this was more than a purely minor one-off lapse. Consequently, in all the circumstances I think it is appropriate to grant a declaration that the council did not comply with the obligations arising from s. 177AE(4).

Alleged project-splitting

73. Again it is important to begin with what is pleaded under this heading.

74. Ground 1 alleges that permission cannot be granted until EIA is "complete". That is true, but somewhat begs the question as to what constitutes completion.

75. Ground 4 alleges that the LLFRS as a whole must be subject to EIA because this is part of it.

76. Ground 5 makes the different point that "it is necessary to take into account the cumulative effect of such projects". Thus, the applicant makes the point at ground 6 that "the Board was under an obligation, but failed, to consider the proposed development as part of the LLFRS."

77. Ground 8 makes the point that the inspector erred in stating that the LLFRS was "in abeyance" at paras. 11.3.2 and 11.3.3.3 of her report, whereas in fact it is being progressed (albeit, one would have to say, somewhat slowly).

78. Thus, three issues emerge from the pleadings:

(i). a requirement to assess the whole set of works;

(ii). a requirement to consider the cumulative effect in the context of possible future works; and

(iii). alleged error of fact regarding the wider project being in abeyance.

Alleged requirement to submit the full set of works to EIA including possible future works

79. As noted above, it is true that these works form part of a wider set of possible works that the inspector called a "masterplan". However, it is not possible to do a full EIA for all such works in the absence of any formal proposal. Insofar as the inspector makes that point here, that has to be right: see *Fitzpatrick v. An Bord Pleanála* [2019] IESC 23, [2019] 3 I.R. 617. That is a similar point to that made in *R. (Littlewood) v. Bassetlaw District Council* [2008] EWHC 1812 (Admin), [2009] Env LR 21, especially at para. 32. The lack of a formal application hinders the possibility of detailed assessment. In any event, the present project does not seem to have the sort of necessary interaction with the wider works that would render full EIA mandatory: see *Fitzpatrick v. An Bord Pleanála, Ó Grianna v. Framore Ltd.* [2014] IEHC 632, [2014] 12 JIC 1208 (Unreported, Peart J., 12th December, 2014).

80. The alternative interpretation is that the present works would have to go into limbo pending a formal proposal for the remaining works. That does not seem a practical interpretation. A similar point was rejected in *Littlewood.*

Requirement to consider the cumulative effect of the project in the context of possible future works

81. The applicant contends (and I see this as a separate argument from the one discussed above) that even if full EIA of the masterplan is not required, the cumulative effects of the development in the context of future works would still need to be considered. I would accept that proposition. But unfortunately for the applicant, those cumulative effects were considered as noted at para. 11.3. of the inspector's report. That in my view complies with Case C-142/07 *Ecologistas en Acción-CODA v. Ayuntamiento de Madrid* (Court of Justice of the European Union, 25th July, 2008, ECLI:EU:C:2008:445).

Alleged error of fact regarding the wider works being in abeyance

82. While the term "in abeyance" might not be literally accurate, the inspector and board were clearly aware that the wider scheme would be progressed. "Abeyance" was just an informal description to convey the fact that the wider scheme was not currently the subject of an application before the board or anyone else for that matter, so its use is not of legal significance.

Point not pleaded under this heading

83. One point that that was touched on in submissions was whether it could arguably be contradictory for the board to have required AA, but not EIA. Obviously one can require EIA without AA where the environmental impact is about something other than a European site. But if AA is required then that does create a serious question about why EIA was not required. In other words, that there is enough environmental impact to warrant an NIS, but not enough to warrant an EIAR. The board sought to explain this insofar as mitigation could be taken into account for EIA screening, but not for AA screening. I don't see much other basis for the distinction and I am not even sure that the suggested basis would stand up to rigorous examination. However, that rigorous examination will have to take place in some other case because the applicant has not pleaded that point, so I do not need to consider it further.

Alleged breach of habitats directive

84. The applicant alleges that there is a breach of the strict protection requirements for bats and otters under annex IV of the habitats directive 92/43/EEC of 21st May, 1992. Again, this is pleaded both as a challenge to the particular decision and as a challenge to the legislation and I will consider each of these in turn.

Habitats directive as a challenge to the individual decision

85. Two particular elements were stressed as regards the validity of the present decision. Firstly, alleged inadequate surveys; and secondly, the lack of a pre-existing derogation licence.

Alleged inadequate surveys

86. The problem for the applicant here is that the council undertook a number of surveys between 2014 and 2018, and a site-specific targeted survey in late 2018 with observations. The lack of contradiction of the council's material is also relevant. The environmental report states that all coverts impacted by the Morrison's Island scheme are well below the normal high tide and are, therefore, not considered to be suitable for otter usage. It was, therefore, concluded that no otter holts would be directly impacted by the project (see para. 5.5.4.1).

87. As regards bats, the report stated that while many city quays have crevices and holes of various sizes suitable for use as bat roosting features, the inundation of those crevices during flood events was such that they were not suitable for use by bats due to the risk of drowning. It was also said that trees of Morrison's Island were not suitable for roosting bats (para. 5.4.3.2). Having regard to the foregoing, I do not think that the applicant has made out a case for invalidity of the decision under this heading.

Alleged requirement for derogation licences prior to development consent

88. Insofar as an argument was made that planning consent could not be granted before appropriate derogation licences had been obtained, that does not arise on the facts because (as in *Hellfire*) this is a scheme where no current requirement for a derogation licence has been identified.

89. As regards the possible inadequacy of the legislation regarding post-consent derogation licences, that is not a basis to challenge the validity of the decision for the simple reason

that it only arises after consent has been granted. It may give rise to a potential issue against the State about the interlinkage between planning and the derogation systems, which presumably will be resolved in *Hellfire*. I can now turn to that heading.

The derogation licence issue as challenge to the legislation

90. The factual context is similar to *Hellfire*, so for similar reasons I think it raises a potential issue regarding declaratory relief concerning the legislation. Admittedly, such relief if granted would be to an extent repetitive of that which would follow in *Hellfire* if it is granted in that case, but it seems to me that is not an insuperable objection. As the issue is going to be determined in *Hellfire* (one hopes), I will adjourn the claim for a declaration in this regard generally with liberty to re-enter following the determination of the *Hellfire* case.

91. The council and to an extent the State suggested that in this case (unlike *Hellfire*) there was no reasonable possibility of an impact on strictly protected species. However, I do not entirely accept that. The reasonable possibility of a post-consent impact requiring a derogation licence arises from the fact that species subject to strict protection use the site in question. It is true that the inspector found the construction impact would be minimal and temporary and that is why this is not a basis for *certiorari* since no derogation is currently required, but one cannot reasonably exclude that issue having to be revisited between now and construction being completed.

Order

92. In summary, the application is granted in part, dismissed in part, refused in part and adjourned in part:

(i). The following relief is granted based on relief 2, namely a declaration that Cork City Council did not comply with its obligations arising from s. 177AE(4)(a)(ii) of the Planning and Development Act 2000 by failing to ensure that during the times and places publicly advertised a copy of the Natura Impact Statement was available to be inspected free of charge or purchased or both at the option of the person availing of the right of public participation and/or by failing to facilitate persons seeking to avail of the right of public participation in that regard.

(ii). The following relief is dismissed as having been withdrawn, namely relief 4, a declaration that s. 177AE of the Planning and Development Act 2000 is incompatible with the EIA directive and/or in breach of the applicant's rights.

(iii). The following reliefs are refused;

(a). relief 1 - *certiorari* of the board's decision;
(b). relief 3 - a declaration regarding non-transposition of art. 9a of the EIA directive; and
(c). relief 6 - a stay on the undertaking of any works pursuant to the grant of the planning permission for the proposed development.

(iv). The following relief is adjourned generally with liberty to apply, namely relief 5, a declaration that regs. 51 and 54 of the European Communities (Birds and Natural Habitats) Regulations 2011 (S.I. No. 477 of 2011) are contrary to arts. 12 and 16 of council directive 92/43/EC.