THE HIGH COURT

JUDICIAL REVIEW

[2018/1029 J.R.]

IN THE MATTER OF THE PLANNING AND DEVELOPMENT ACT, 2000 (AS AMENDED)

BETWEEN

JOHN CONWAY

APPLICANT

AND

AN BORD PLEANÁLA, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

DUBLIN CITY COUNCIL

NOTICE PARTY

JUDGMENT of Mr. Justice David Barniville delivered on the 16th day of July, 2019

Introduction

1. This is one of the most unusual planning cases to have come before the Irish courts. Unlike the vast majority of planning cases before the courts, the applicant, who describes himself as an "*environmental activist*", does not seek to challenge a decision of a planning authority or of An Bord Pleanála (the "Board") granting permission for a development said to have potentially significant effects on the environment or on a protected or European site. Rather, the applicant seeks to challenge a decision of the Board refusing to grant approval for a proposed development. The development in question was that proposed by Dublin City Council (the "Council") for the development of a civic plaza and ancillary traffic management measures and road works at College Green in the centre of Dublin. The Board refused to grant approval in respect of the proposed development in a decision signed on 15th October, 2018 and apparently published on 17th October, 2018. The Council, as the applicant for that approval, did not and does not seek to challenge the Board's decision. The applicant, who did not participate in any way in the planning process before the Board, seeks to challenge the Board's decision on various grounds. Almost uniquely, therefore, this case is concerned with an attempted challenge, by a person with a significant interest in the environment, to a decision by the Board refusing to grant approval for a development.

2. This judgment is concerned with the preliminary question as to whether the applicant has standing to bring the proceedings. The issue has arisen in the course of the applicant's application for leave to challenge the Board's decision by way of judicial review.

Procedural Background

3. The proceedings came before me in the following circumstances. As noted above, the Board's decision was apparently published on 17th October, 2018. The applicant wished to challenge the decision. Conscious of the time limits for doing so in s. 50(6) of the Planning and Development Act, 2000 (as amended) (the "2000 Act (as amended)") and the requirement in s. 50A(2)(a) to make an *ex parte* application to the court, the applicant opened his application for leave before Noonan J. in the High Court on 10th December, 2018. The application for leave, having been opened, was then transferred to me, in my capacity as the judge dealing with the Strategic Infrastructure Developments list. It came before me on 20th December, 2018 and was put back to the following day, 21st December, 2018. Before the Court on that date were a statement of grounds (which was undated) (the "first statement of grounds"), an affidavit sworn by the applicant on 6th December, 2018, together with a series of exhibits including the Board Order recording the Board's decision and the inspector's report in respect of the application for approval for the proposed development, and a further version of a statement of grounds dated 20th December, 2018 (the "second statement of grounds"). The first statement of grounds named the Board as the sole respondent to the proceedings and the Council as a notice party. The second statement of grounds included Ireland and the Attorney General (the "State") as additional respondents.

4. Having considered the papers, I felt that there was at least an issue as to whether the applicant had standing to bring the proceedings and I directed the applicant to put the Board, the State and the Council on notice of the applicant's application for leave. I adjourned the application to 24th January, 2019 to enable that to be done. By agreement between the parties, the application for leave was further adjourned to 31st January, 2019. On that occasion, counsel for the Council informed the Court that it did not intend to participate in any way in the proceedings. On that date, the applicant produced a further statement of grounds (which was undated) (the "third statement of grounds"). Counsel for the Board objected to the provision of the third statement of grounds in circumstances where more than eight weeks had passed since the date of the Board's decision. It will in due course be necessary to refer to the reliefs sought in the various statements of grounds provided by the applicant. The issue as to whether the applicant had standing to bring the proceedings was again raised by me on 31st January, 2019. With the agreement of the parties, I directed that that issue be heard as a discrete issue on 8th February, 2019. I should stress that this issue was being dealt with in the course of the applicant's application for leave which had originally been opened before Noonan J. on 10th December, 2018.

5. The issue as to the applicant's standing to bring the proceedings was heard by me on 8th February, 2019. On that occasion, I heard submissions from counsel for each of the applicant, the Board and the State. This is my judgment on that issue.

Summary of Decision

6. As I explain in the course of this judgment, I have concluded that the applicant does not have standing to bring the proceedings under Irish law, which I have also concluded meets the EU law requirement in Article 11 of the codified EIA Directive, Directive 2011/92/EU ("Directive 2011/92") that there be "*wide access to justice*" for those seeking to judicially challenge decisions subject to the public participation provisions of that Directive. I have also concluded that, to the extent that Directive 2011/92 applies, the applicant similarly has no standing to bring the proceedings under the Directive. I have concluded that there is nothing in Directive 2011/92 or in the jurisprudence of the Court of Justice of the European Union (CJEU) which would lead me to conclude that the Irish national rules on standing should be disapplied or interpreted differently so as to require standing to be afforded to the applicant to bring the proceedings which he wishes to bring in order to challenge the Board's decision to refuse to approve the proposed development by the Council. Since the applicant does not have standing to bring the proceedings, I have concluded that I must refuse the applicant leave to bring the proceedings.

Structure of Judgment
7. I will first consider the Board's decision. I will then say something about the position of the applicant and outline his intended grounds of challenge to the Board's decision. Next I will consider the Irish national rules on standing as well as those existing under EU law and will attempt to apply those rules to the applicant in order to consider whether the applicant has standing to bring the proceedings.

The Board's Decision
8. On 18th May, 2017, the Council made an application to the Board pursuant to s. 175 of the 2000 Act (as amended) for approval for a proposed development of a civic plaza, ancillary traffic management measures and minor road works at College Green in the centre of Dublin City. The Council submitted an environmental impact statement with its application. Section 175 of the 2000 Act (as amended) provides for the procedures to be followed where a local authority, which is a planning authority, wishes to carry out a proposed development which may have significant effects on the environment. Such proposed development may not be carried out without the approval of the Board. Further information was sought by the Board and provided by the Council. With that further information, the Council submitted an environmental impact assessment report on 20th October, 2017.

9. The Board appointed an inspector to consider the Council's application. The inspector provided her report to the Board on 17th September, 2018. As appears from the inspector's report, there were more than 100 observers in respect of the Council's application. They are listed in the inspector's report. An oral hearing was held in relation to the Council's application for approval for the proposed development over a period of twelve days between 12th March, 2018 and 29th March, 2018. The applicant did not make any submission to the Board in respect of the Council's application and did not participate in the oral hearing. The applicant has given an explanation for his failure to do so which I consider later in the judgment.

10. In her report, the inspector recommended that the Board refuse to approve the proposed development. The inspector considered that the proposed development would give rise to significant adverse impacts on traffic generally, and on bus services in particular, in the city centre and would, therefore, be contrary to the proper planning and sustainable development of the area for various reasons.

11. The Board agreed with the inspector's recommendation. In its decision signed on 15th October, 2018 (and apparently published on 17th October, 2018), the Board refused to approve the proposed development. The decision of the Board is recorded in the Board Order exhibited by the applicant. As recorded in the Board Order, the Board considered that the principle of the proposed development was acceptable and that it would "*produce a quality public realm that would significantly enhance the amenity and attractiveness of this city centre location, would significantly improve the visual amenities of the area and would facilitate improved appreciation of the architectural and cultural heritage of this important site*" (p. 3). However, the Board considered that for four reasons the proposed development would give rise to "*significant adverse impacts on pedestrians and on bus transport within the city centre and would, therefore, be contrary to the proper planning and sustainable development of the area"* (p.4). The four reasons given by the Board for this conclusion may be summarised as follows:-

> (1) The Board was not satisfied that the traffic analysis carried out and the associated information provided was sufficient to "*accurately quantify the traffic impacts of the proposed development and the magnitude of those impacts*".
>
> (2) There was uncertainty but "*likely significantly negative impacts*" for bus transport in light of the extent of the re-routing of buses proposed, the critical importance of bus transport to the city and its future role in facilitating a shift from car usage.
>
> (3) There were identified and unresolved capacity issues on the Quays in relation to their capacity to accommodate the scale of the bus rerouting proposed.
>
> (4) There was a failure to demonstrate that the existing footpaths on both sides of the Quays had the capacity to accommodate the increased numbers of pedestrians that would be redirected onto the quays as a result of the bus re-routing.

12. The applicant has sought leave to challenge that decision.

The Applicant
13. In his affidavit sworn on 6th December, 2018 for the purpose of grounding his application for leave to bring these proceedings, the applicant describes himself as an "*environmental activist*". The applicant does not reside in Dublin but rather in Dundalk, Co. Louth, more than 80 kilometres away.

14. At para. 4 of his affidavit, the applicant stated as follows:-

> *"I have a longstanding and passionate interest in the protection of the environment and am Director of Strategy for a representative environmental group or NGO known as the Louth Environmental Group whose objectives include to protect, preserve and enhance all coastal areas of Ireland, including its beaches and their environmental interests and amenities. I have previously taken legal proceedings in the interest of protection of the environment including enforcement and compliance by the Irish State with its obligations under the Aarhus Convention. Proceedings which I instituted were the subject of a relatively recent judgment of the Supreme Court concerning, inter alia, legal aid in respect of environmental matters. I strongly hold the view that public authorities should at all times comply fully with legislation concerning the carrying out [of] their duties, particularly where environmental matters are concerned".*

The decision of the Supreme Court to which the applicant referred in that paragraph of his affidavit is *Conway v. Ireland & ors* [2017] 1 IR 53 ("*Conway*"). Indeed, the applicant was a co-applicant with the environmental group, the Louth Environmental Group, in further proceedings against the Board concerning a proposed development adjacent to St. Anne's Park in Raheny which was the subject of a judgment I delivered on 31st July, 2018 (*Clonres CLG and Others v An Bord Pleanála and Others* [2018] IEHC 473 (the "Raheny proceedings")). No issue was taken in relation to the applicant's standing to bring any of those proceedings.

15. The applicant explained in his affidavit that he first learned of the Board's decision to refuse to approve the proposed development at College Green from media reports circulating after the decision was issued (para. 5 of his affidavit). The applicant stated that, while the Council's application for approval in respect of the proposed development had come to his attention "*earlier*" than that, as it had received widespread coverage, he did not take any part in the planning process in relation to that application. It is clear from para. 6 of his affidavit that the applicant took a decision not to participate in the planning process in relation to the proposed development. The applicant gave a reason for that decision which was that he "*never really doubted that permission would be granted*" in respect of the proposed development and he was, therefore, surprised when he learned of the Board's refusal to grant the

approval sought. He explained that he became aware from media reports that the Council was "*possibly going to challenge the validity of the impugned decision by way of judicial review in the High Court*" and that it was only in the "very recent past" that he learnt that that was no longer the intention of the Council. He then resolved to take the proceedings himself (para. 6).

16. The applicant went on to outline in his affidavit (at para. 6) the reason why he decided to bring the proceedings. He was of the view that the Board's decision was unlawful. He continued:-

> *"I find it upsetting that seemingly huge sums of money were spent by the [Council] and great effort put into the project by numerous parties, whether supportive of the project or not, all to be 'thrown away' as a result of what I perceive to be a flawed decision by the [Board]. I find it furthermore upsetting that there appears to be no public commentary on what I perceive to be a waste of public resources and no concerns aired concerning the apparent intention of the [Council] to make a renewed application along similar lines in the near future which, in my view, may well be doomed to fail if certain aspects of the legality of the impugned decision are not clarified for the benefit of all concerned, including the public at large. Had I accurately anticipated the course of events that have now occurred, I would have taken part in the planning process from an earlier stage"*

17. It can be seen, therefore, that the applicant's stated concern and determination to bring the proceedings is not as a result of any alleged adverse environmental effects, in the strict sense of that term, as a result of the refusal by the Board to approve the proposed development, but rather as a result of his strongly held view that it would be a waste of money if the Council had to make a new application for approval and also that there was no public commentary on what he perceived to be a waste of public resources.

The Applicant's Intended Grounds of Challenge

18. As explained earlier, the applicant has put forward three different statements of grounds. The first statement of grounds sought an order of *certiorari* quashing the Board's decision and an order remitting the Council's application to the Board for its reconsideration. Six grounds were set out in support of those reliefs. There was no reference in the first statement of grounds to any alleged failure to comply with the provisions of the EIA Directive (Directive 2011/92) or with Council Directive 92/43/EEC (the Habitats Directive). The second statement of grounds included an additional relief and further grounds. As noted earlier, the applicant named the State as an additional respondent to the proceedings. An additional relief was sought, namely:-

> *"A declaration that the regime provided by law for assessing and/or adjudicating upon applications for planning permission made pursuant to section 175 of the Planning and Development Act, 2000, as amended, is unlawful."*

19. The original two reliefs sought by the applicant were described as Relief 1 and Relief 2. The additional declaration sought was described as Relief 3. As well as relying on the original six grounds in support of Reliefs 1 and 2, the applicant added a further ground which, for the first time, made reference to the EIA Directive (Directive 2011/92) and the Habitats Directive. That ground was as follows:-

> *"7. In view of the inadequate information that was before the [Board] when making the impugned decision the [Board] was prevented from complying with and failed to comply with the provisions of the Habitats Directive and the EIA Directive thus rendering the refusal of permission invalid."*

20. Three new grounds were then set out in respect of the new relief sought (Relief 3). Those additional grounds were to the effect that there was: a failure (in the s. 175 procedure) to provide an effective remedy to challenge the refusal of permission as allegedly required by the Constitution and/or Article 47 of the Charter of Fundamental Rights of the European Union (the "Charter") and the general principles of European law and that such failure rendered the decision to refuse permission invalid (Ground 8); a failure to provide a mechanism by which an applicant for permission of the type sought by the Council could appeal the refusal of permission which the applicant asserted was in breach of the principle of equivalence (Ground 9); and an alleged inability of the High Court in judicial review proceedings to adjudicate on the substance of the application for permission on its merits or to decide matters of fact which he asserted amounted to a failure to provide an "*effective remedy*" as required under the Constitution and under the Charter (Ground 10).

21. The third statement of grounds included two new grounds in support of Reliefs 1 and 2 and then renumbered the grounds advanced in respect of Relief 3 (now renumbered Grounds 10 to 12). The two new grounds sought to be advanced in support of Reliefs 1 and 2 were: a contention that the Board's decision was irrational or failed to provide any proper reason or rationale in the body of the decision for the conclusion reached by the Board (new Ground 8); and a contention that the Board's decision was disproportionate in circumstances where the Board was supportive in principle of the proposed development and ought, therefore, to have granted permission subject to conditions rather than refusing the Council's application outright (new Ground 9).

22. Both the Board and the State objected to the applicant's entitlement to rely on the second but, more particularly, the third statement of grounds in light of the requirement on an applicant under s. 50(6) of the 2000 Act (as amended) to make an application for leave within eight weeks from the date of the relevant decision unless an extension of time was obtained in accordance with the provisions of s. 50(8).

23. The applicant contended that he was entitled to rely on the third statement of grounds, notwithstanding that it was produced on 31st January, 2019, long after the eight-week period under s. 50(6) had expired and long after the applicant had formally opened his application for leave before Noonan J. on 10th December, 2018. The applicant relied on the fact that the leave application had not yet been determined and that he was entitled to amend his statement of grounds at any time before the leave application was determined. The applicant relied on the judgment of the Court of Appeal in *B.W. (Nigeria) v. Refugee Appeals Tribunal & ors* [2017] IECA 296 and on the judgment of Humphreys J. in the High Court in *P.C.N. (Zimbabwe and the Democratic Republic of Congo) v. Minister for Justice and Equality & ors; J.N.(Zimbabwe) v The Minister for Justice and Equality* [2018] IEHC 295.

24. While I have some doubt as to whether an applicant is entitled to amend his or her statement of grounds without leave of the court well outside the time period provided for in s. 50(6) and several weeks after the leave application was first formally opened, I am satisfied that it is in the interests of justice, in this case, that I should consider the issue of the applicant's standing to bring the proceedings by reference to the most recent statement of grounds on which the applicant seeks to rely, namely, the third statement of grounds. Neither the Board nor the State advanced the case that they would be prejudiced if I were to assess the applicant's standing by reference to the third statement of grounds. In any event, I do not believe that they would be prejudiced if I were to proceed on that basis. I will, therefore, consider the question of the applicant's standing by reference to the case sought to be advanced in the third statement of grounds.

25. As noted earlier, the applicant has sought three reliefs: an order of *certiorari* quashing the Board's decision, an order remitting the

Council's application to the Board and a declaration that the procedure under s. 175 of the 2000 Act (as amended) is unlawful. Most of the grounds set out in the third statement of grounds are advanced in respect of Reliefs 1 and 2. The grounds advanced in support of those reliefs are:-

> •The applicant complains that the inspector reached findings in relation to traffic and transport related matters which significantly differed from the findings made by a consultant appointed by the Board to assist in considering those matters.
>
> • There was "*insufficient reliable traffic modelling and traffic assessment information"* before the Board on which to base its decision to refuse to approve the proposed development.
>
> • The Board failed to take proper account of significant changes proposed under the National Transport Authority's (the "NTA") "Bus Connects" proposal to re-route and reorganise the bus network in Dublin.
>
> • The Board based its decision to refuse to approve the proposed development on an incorrect assumption that the Board or the Council exercises some control or influence over the routing of bus traffic in the environs of the proposed development or elsewhere, when that was the role of the NTA.
>
> • The Board's assessment failed to take account of the prevailing and changing conditions within the environs of the proposed development during the assessment period and, in particular, measures implemented by the NTA to alleviate delays to commuters and that, therefore, relevant information was disregarded by the Board in reaching its decision.
>
> • The Board made a decision based on inadequate and unreliable information.
>
> • As a result of the alleged inadequate information before the Board when making its decision, the Board was "*prevented from complying with and failed to comply with the provisions of the Habitats Directive and the EIA Directive*" as a result of which the Board's decision is invalid.
>
> • The Board's decision was irrational and/or the Board failed to provide any proper reason or rationale in the body of its decision to support its conclusion.
>
> • The Board's decision was disproportionate in that it ought to have granted permission with conditions rather than refusing the Council's application outright.

26. The grounds sought to be advanced in respect of Relief 3 (the declaration sought in relation to the s. 175 regime) have been touched on earlier. In summary, they are:-

> •The s. 175 procedure fails to provide an effective remedy to challenge a refusal of permission.
>
> • The failure to make provision for an applicant for approval under s. 175 to appeal the refusal of such approval is a breach of the principle of equivalence.
>
> • Judicial review is not an "*effective remedy*" as required under the Constitution and under the Charter.

27. It is apparent from a review of the third statement of grounds that the bulk of the grounds advanced concern traffic matters and the Board's assessment of traffic and transportation related issues. There is only one reference in one of the grounds to the EIA Directive and the Habitats Directive. However, it is a somewhat curious reference in circumstances where the Board refused to grant approval in respect of the proposed development as a result of which the proposed development cannot have had any adverse impact or effect on the environment or on any protected or European site. The case sought to be made by the applicant in respect of the EIA Directive and the Habitats Directive is that as a result of allegedly inadequate information before the Board, the Board was "*prevented from complying with and failed to comply with*" the provisions of the EIA Directive and the Habitats Directive. That is all that is said about those Directives. It is not indicated how the Board allegedly failed to comply with either of those Directives and what it is the Board allegedly failed to do in that regard.

28. It is clear from a review of the third statement of grounds that Relief 3 and the grounds pleaded in respect of that relief are not freestanding but are ancillary to the other grounds sought to be advanced by the applicant in support of his challenge to the Board's decision. The grounds advanced in respect of Relief 3 concern alleged deficiencies in the procedure under s. 175 of the 2000 Act (as amended) for dealing with applications by a local authority that is a planning authority for approval for a proposed development which may have significant effects on the environment and, in particular, the absence of a right of appeal (as opposed to judicial review) for an applicant where the application for approval is refused. The party which one might normally expect might wish to ventilate complaints in relation to the absence of such a right of appeal would be the disappointed applicant for the approval rather than some other person. Indeed, it is that party who is the focus of the ground set out at Ground 11 of the third statement of grounds. In the present case, that party is of course the Council who has not sought and does not seek to challenge the Board's decision. Nor does it wish to participate in any way in these proceedings. Grounds 10 and 12, which are also advanced in support of Relief 3, could, if successful, avail of a person, such as the applicant in these proceedings, who was not the applicant for approval of the proposed development which was refused but rather someone else who was supportive of the proposed development. The object of those grounds appears to be to enable the applicant to make the case that in some way he has been unable fully and effectively to challenge the Board's decision to refuse approval in respect of the proposed development.

29. It seems to me that a number of observations can be made in relation to facts which are undisputed or incapable of being disputed in these proceedings:-

> (1) The applicant is a person who has a significant interest in environmental matters, generally, both in a personal capacity and in his capacity as Director of Strategy with the Louth Environmental Group.
>
> (2) The applicant has previously brought environmental proceedings in his personal capacity and as a co-applicant with the Louth Environmental Group.
>
> (3) The applicant and the Louth Environmental Group have a particular interest in the protection, preservation and enhancement of coastal areas of Ireland including its beaches and associated environmental interests and amenities.

(4) The applicant has a strongly held view that public authorities should comply fully with legislation, particularly where environmental matters are concerned.

(5) The applicant does not reside in Dublin but rather in Dundalk, Co. Louth, more than 80 kilometres away from College Green in the centre of Dublin city.

(6) The applicant was aware of the Council's application for approval for the proposed development and was supportive of it.

(7) The applicant did not participate in the planning process before the Board. He did not make any submissions as part of that process and did not attend or participate in any way in the oral hearings.

(8) The applicant provided an explanation for his non-participation. He thought that the Council's application would be granted by the Board. The applicant did not suggest that he was in any way precluded or prevented from participating in the process.

(9) The decision of the Board which the applicant has sought to challenge in the proceedings was one which refused to approve the proposed development. Since the Board refused to approve the proposed development, there will be no development unless and until a further application for approval is made by the Council and granted by the Board. Until then, the effect of the decision of the Board is to prevent the Council from carrying out the proposed development.

(10) There is no direct intervention into or onto the environment or any protected or European site permitted or provided for by the Board's decision which might engage the provisions of the EIA Directive or the Habitats Directive. The only case sought to be made by the applicant in relation to those Directives is that the Board was prevented from complying with and failed to comply with them, in some unspecified manner, because of the alleged "*inadequate information*" before the Board.

(11) It is not suggested by the applicant that there is any particularly sensitive protected or European site which would be adversely affected by the Board's refusal to grant the approval sought by the Council.

(12) The applicant has not suggested that he has any particular connection or interest in the College Green area of Dublin or that it is of any particular amenity value to him which is or might arguably be impaired by the Board's refusal to approve the proposed development.

(13) The Council has not sought to challenge the Board's decision and has not sought to participate in these proceedings. There is no evidence before the Court that the Council would proceed with its application for approval for the proposed development if the Board's decision were quashed in these proceedings and the application for approval remitted to the Board for further consideration. It is not evident from the evidence before the court, therefore, that any party would be in a position to progress the application before the Board if the applicant were successful in the proceedings.

Approach to Standing Issue

30. The question which I have to determine as part of the applicant's application for leave to bring these proceedings is whether the applicant has standing to bring and maintain the proceedings in light of these observations on the uncontested or uncontestable facts before the court. In considering that issue, it will be necessary for me to consider Irish national rules on standing and to assess whether those rules require to be re-interpreted or modified in any way by reason of any applicable requirement of EU law. This whole area of law was comprehensively examined by the Supreme Court in its decision in *Grace and Sweetman v. An Board Pleanála* [2017] IESC 10 ("*Grace and Sweetman*") and was further considered by the High Court in *McDonagh v. An Bord Pleanála* [2017] IEHC 586 (McDermott J.) ("*McDonagh*") and *Sweetman v. An Bord Pleanála & ors* [2017] IEHC 133 (Haughton J.) ("*Sweetman*"). In addition to considering those cases, it will also be necessary for me to consider the relevant case law of the CJEU, as the applicant contends that that case law is supportive of his standing to maintain these proceedings.

National Rules on Standing

31. The starting point for a consideration of whether an applicant has standing to bring judicial review proceedings is O. 84, r. 20(5) RSC which provides that the court shall not grant leave unless it considers that the applicant for such leave has a "*sufficient interest in the matter to which the application relates*". As the Supreme Court stated in *Grace and Sweetman*, in a joint judgment delivered by Clarke J. and O'Malley J., with which the other members of the Court agreed, the requirement to establish such a "*sufficient interest"* on the part of an applicant for leave to bring judicial review proceedings "*now defines the limits of standing to bring a judicial review challenge irrespective of the form of order sought"* (para. 5.1, p. 13). The Supreme Court further observed that the Irish courts have traditionally applied the same rules on standing which were identified in respect of constitutional cases in *Cahill v. Sutton* [1980] IR 269, in judicial review proceedings not involving a constitutional dimension (para. 5.1, p. 13). As noted by the Supreme Court (at para. 5.2, p. 13), the overall approach to standing in judicial review proceedings can fairly be described as "*reasonably flexible*", as pointed out by Henchy J. in *Cahill*. The approach was summarised by the Supreme Court (at para. 5.4, p. 14) as follows:-

> "*Therefore, the starting point is that the decision or measure under challenge must be said to give rise to an actual or imminent 'injury or prejudice' to the challenger or that the challenger has been or is in danger of being 'adversely affected'. That can be described as the broad general principle. In order for a person to have standing to bring a judicial review challenge, ordinarily the person concerned will need to be in a position to demonstrate that the decision or measure which they wish to challenge either has or is imminently in danger of having adversely affecting (sic) their interests so as to cause or potentially cause injury or prejudice."* (para. 5.4, p. 14)

32. The Supreme Court continued:-

> *"Be that as it may, and subject to the sort of general extension of standing in particular exceptional cases identified in Cahill, where the interests of justice may require it, the broad rule requires that a challenger must establish adverse effect causing or likely to cause injury or prejudice. As noted earlier the application of that broad rule in respect of many types of challenge may not give rise to any great difficulty. The range of persons affected by a decision or measure to a sufficient extent that they can be described as having been adversely affected by injury or prejudice may be clear, obvious and limited. However, as is often the case, there may be categories of challenge where the application of that*

general principle may give rise to much greater difficulty…" (para. 5.7, p. 15)

33. There has, of course, been specific legislative intervention in relation to standing to maintain judicial review proceedings in planning and environmental cases. Section 50(4) of the 2000 Act, when enacted, required an applicant for leave to apply for judicial review in respect of a relevant decision of a planning authority or of the Board to demonstrate a "*substantial interest in the matter which is the subject of the application*". That requirement was changed in subsequent legislation. Section 50A(3)(b) now requires an applicant for such leave to demonstrate a "*sufficient interest*" in the matter the subject of the application unless the applicant is an environmental body or organisation satisfying certain requirements. This provision was inserted by s. 20 of the Environment (Miscellaneous Provisions) Act, 2011.

34. It is necessary to mention at this stage the potential relevance to the applicant's standing to bring the proceedings of Article 11 of the Directive 2011/92 and the Aarhus Convention (to which the EU is a party). This territory was very fully explored by the Supreme Court in *Grace and Sweetman*. As noted by the Supreme Court at para. 4.1 (pp. 8 – 9), Article 11 of Directive 2011/92 requires member states to ensure that "*in accordance with the relevant national legal system*" members of the "*public concerned*" who have either a "*sufficient interest*" or, alternatively, where the member state requires it, can demonstrate the "*impairment of a right*", have access to a review procedure before a court of law or other independent and impartial body to challenge the procedural or substantive legality of certain decisions made in the environmental field. The decisions referred to are those which were subject to the public participation provisions of the Directive. Ireland opted for the "*sufficient interest*" requirement as opposed to the requirement to establish an "*impairment of a right*". It is important, however, to note that Article 11(3) states that:-

> "*What constitutes a sufficient interest… shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice…"*

35. Commenting upon these provisions, the Supreme Court in *Grace and Sweetman* stated:-

> *"It is clear, therefore, that standing, for the purposes of Article 11, does not involve an autonomous European law concept as such but rather involves the application of national standing rules subject to the important caveat that those rules must be consistent with the 'wide access to justice' requirement found in the text of the Article itself. It follows that each member state has a material margin of appreciation in determining the precise standing rules which are to apply in respect of challenges covered by Article 11 but that that margin of appreciation is circumscribed by the overriding obligation, to be found in the Article, that standing rules must nonetheless confer wide access to justice."* (para. 4.4, p.10)

The Supreme Court pointed out that this entitlement on persons to challenge the validity of certain decisions made in the environmental field arises as a matter of European law and in accordance with the provisions of the Aarhus Convention.

36. The Supreme Court made clear in *Grace and Sweetman* that the starting point in determining the question of standing must be a consideration of Irish standing rules although, the court noted, "*it may ultimately be necessary to consider whether those rules are consistent with the 'wide access to justice' requirement imposed by European law*" (para. 4.6, p. 10).

37. As in *Grace and Sweetman*, one aspect of the standing issue which arises in this case is the extent to which the failure by a person to participate in the planning process from which the decision sought to be impugned emerged can be taken into account in considering the standing of that person to challenge the decision. While the applicant's failure to participate in the planning process which led to the Board's decision to refuse to grant approval in respect of the proposed development is relied upon by the Board and by the State to dispute the applicant's standing, it is not the only matter relied upon by them. They also rely on the applicant's geographical distance from the proposed development, the nature of the decision involved (the refusal of approval in respect of the proposed development), the particular interests of the applicant and the various other features of the case which arise from the facts, which I have sought to identify earlier in the judgment. In other words, the failure by the applicant to participate in the planning process in the present case is but one of a number of matters which I have been asked to take into account in considering the applicant's standing.

38. Following the approach to considering standing mapped out and applied by the Supreme Court in *Grace and Sweetman*, I will first consider the applicant's standing by reference to Irish rules on standing. On the question of the relevance of the non-participation of an applicant for judicial review in the planning process, the Supreme Court pointed out that it was previously the case under s. 50(4) of the 2000 Act, as enacted, that an applicant for judicial review must have participated in the process before the planning authority and/or the Board unless that person could show that there were *"good and sufficient reasons"* for not so participating. That requirement was removed by s. 13 of the Planning and Development (Strategic Infrastructure) Act, 2006. The Supreme Court noted, therefore, that with effect from October, 2006, a failure to participate "*does not operate necessarily in all circumstances as a barrier to standing*" (para. 6.4, p. 17). The Court referred to a pre-2000 Act decision in which a failure to participate did not necessarily and in all circumstances prevent a person from having standing: *Chambers v. An Bord Pleanála* [1992] 1 IR 134. The Court noted (at para. 6.5, pp. 17 – 18) that *"…in the absence of a specific statutory measure introduced in respect of environmental cases, the general principle permitted, at least in some circumstances, persons to be held to have standing even though they did not participate in the process".* The Court also referred to *Mulcreevy v. Minister for the Environment* [2004] 1 IR 72 ("*Mulcreevy*"), a decision relied upon by the applicant in this case. The Supreme Court noted that in *Mulcreevy*, the applicant was found to have standing to challenge the validity of a statutory instrument permitting works to be carried out on a national monument, and to restrain the carrying out of those works, notwithstanding the fact that the national monument was located in Co. Dublin and the applicant lived in Co. Kerry. The Supreme Court in *Grace and Sweetman* observed (at para. 6.7, p. 18):-

> *"…nonetheless Mulcreevy seems to suggest that the nature of the measure under challenge may be such as to confer a right to challenge on a very wide range of persons (and possibly, in some cases, on all persons not motivated by bad faith or the like)."*

39. The Supreme Court summarised the effect of the case law to date on national rules on standing as follows:-

> *"6.9 The case law to date would seem to suggest, therefore, that a reasonably liberal approach is taken to the sort of interest which must be potentially affected in order to confer standing in environmental cases. Persons clearly can have an interest by virtue of proximity to the proposed development. The degree of proximity required may well depend on the scale and nature of the development in question. For example, a large scale development having the potential to impact on the amenity of persons within a wide catchment area might well be said to have the potential to have an adverse impact on the legitimate interests of persons living, or perhaps working or otherwise having regular contact with, a significant geographical area. A minor domestic development might well only have an impact on a much more*

restricted area.

6.10 In addition, regard can be had to the nature and general importance of the site or amenities sought to be protected. Developments which have the potential to have a material and significant effect on the environment generally or raise questions of particular national or international importance (such as the national monument involved in Mulcreevy) may confer standing on a much wider range of persons."(p. 19)

40. Major points of distinction between *Mulcreevy* and the present case are, of course, that the applicant in that case was seeking to restrain works intended to be carried out on a national monument where there were no obvious particularly directly affected persons to bring the proceedings. In the present case no development will take place on foot of the impugned decision and there is a person or body directly affected by the decision, the Council.

41. The Supreme Court then summarised the current state of the law in Ireland, leaving aside the requirements of EU law, as follows:-

> *"6.11 On the current state of the jurisprudence in Ireland, and without, for the moment, having regard to the requirements of European law, it seems that standing in environmental cases involves a broad assessment of whether the legitimate and established amenity or other interests of the challenger can be said to be subject to potential interference or prejudice having regard to the scale and nature of the proposed development and the proximity or contact of the challenger to or with the area potentially impacted by the development in question. Furthermore, that broad assessment should have regard, in an appropriate case, to the legitimate interest of persons in seeking to ensure appropriate protection of important aspects of the environment or amenity generally…*" (pp. 19 – 20)

42. The Supreme Court proceeded to assess whether Ms. Grace and Mr. Sweetman had standing in accordance with the Irish rules on standing and commented that it was only if, on the proper application of domestic standing rules, those applicants would not have standing that the question of whether the national rules on standing needed to be modified or re-interpreted in the light of EU law would arise.

43. In considering whether Ms. Grace had standing under Irish standing rules, the Supreme Court made a number of important observations which have a particular relevance to the present case. The first matter to which the Supreme Court drew attention was the fact that the proposed development was intended to take place on a site which was protected as a matter of EU law. That, the Court stated, "*must carry significant weight in the assessment of standing"* (para. 8.2, p. 22) as the protection of such sites "*involves the legitimate interests of, arguably, every citizen*". On the facts of that case, the proposed development was a wind farm on lands owned by Coillte which was intended to be developed and operated by ESB Wind. The Supreme Court was, therefore, considering the potential effect of that proposed development on a European site where the purpose for the designation of the site was to provide for habitat for the hen harrier. The Court noted that the amenity value associated with such a site was not necessarily confined to those who reside in its immediate proximity. Therefore, the Court considered that the nature of the protected site was relevant to the question of standing. In that context, the Court considered that, where it was unlikely that any person could demonstrate that the proposed development would have any "*direct effect on their own affairs including their enjoyment of an amenity"*, the requirement of "*sufficient interest*" would need to be interpreted in a way which protected the site against adverse effects. It seems to me that that is not so in the present case where the person most directly affected by the decision to refuse to approve the proposed development is the Council, which has not sought to challenge the Board's decision.

44. The second matter addressed by the Supreme Court in the context of Ms. Grace's standing was her failure to participate in the planning process which led to the impugned decision. The Supreme Court had this to say:-

> *"8.5 For the reasons already addressed it is clear that, as a matter of national law, a failure to participate in the permission granting process does not of itself exclude a person from having standing but that it may be a factor which can, in an appropriate case, be taken into account. That may be especially so where the person concerned does not have a reasonably close physical proximity to the development in question or an established connection with a particular amenity value which might arguably be impaired by the proposed development. In that context it is important to emphasise that participation in the process will undoubtedly confer standing. A failure to participate may, (or may be likely to) leave the question of standing open to doubt particularly in the case of persons who cannot show either a physical proximity or a more general established interest in an amenity value of the site of the proposed development which may potentially be impaired."* (pp. 23 – 24)

I will shortly return to consider the relevance of these factors to the position of the applicant in this case. It bears stressing, however, that the Court made clear that participation in the planning process would confer standing on an applicant.

45. The Supreme Court noted that neither Ms. Grace nor Mr. Sweetman had put forward any "*significant explanation*" as to why they did not participate in the process. While an explanation was proffered by the applicant for his failure to participate – he thought that the Council's application would succeed before the Board – as I indicate later, I do not find that explanation cogent or remotely convincing. Such an explanation could potentially be relied upon by any person, as an excuse for not participating, who then subsequently seeks to challenge a decision by way of judicial review.

46. The Supreme Court made clear in *Grace and Sweetman* that a person who has "*sufficient proximity, having regard to the nature of the development and any amenity in the location of the development (which might potentially be impaired), will have standing even without participation"* (para. 8.7, p. 24). However, in the case of persons who do not have such proximity, the Court stated that they "*may reasonably be required to show that they have some interest which is potentially affected and one very clear way of doing that is by demonstrating that interest by participation in the permission process."* (para. 8.7, p. 24). The Court did observe, however, that that was not the only way in which such an interest could be demonstrated.

47. The Supreme Court drew attention to other potentially relevant factors in assessing standing. One was the nature of the amenity at issue. The Court stated that *"[t]he more general and more important the amenity which may be at stake then the wider range of persons who may well be able to show that they have an interest in the amenity of the area which is the subject of the proposed development".* Another potentially relevant factor, according to the Supreme Court, was the "*nature of the legal challenge intended to be mounted"*. The Court noted that a person who could not show "*proximity*" to a proposed wind farm and did not participate in the planning process would be "*unlikely to have standing to make an argument more properly raised by a person more directly affected"* (para. 8.8, p. 24). In that regard, the Court stated:-

> "*In our view a challenger who has not previously participated and cannot show any direct personal prejudice must satisfy the leave judge that the point being made is one directed solely to the purpose of the special protection of the*

site." (para. 8.8, p.24)

It is very difficult to see how the applicant in the present case could satisfy that requirement.

48. The Supreme Court noted that in respect of Ms. Grace, many of the factors pointed towards her having standing. The Court noted that she lived less than one kilometre from the European site and relatively close to the site of the proposed wind farm. The Court observed that Ms. Grace had stated on affidavit that she chose to buy a house in the area because of its particular attributes and its "*unspoiled nature, rich biodiversity, wildlife and history*". The Court also attached significance to the fact that she was involved in local voluntary groups some of which were concerned with sustainable energy and tourism, which she felt would be jeopardised by the proposed development. Having regard to the nature of the protected site and the development proposed together with its potential effect on the site, the Supreme Court was satisfied that, notwithstanding her failure to participate in the planning process, Ms. Grace had standing. It can be seen, however, that there were many factors which Ms. Grace could rely on to demonstrate standing.

49. The Court noted that the position of Mr. Sweetman was "*less clear*". He did not have any "*physical proximity*" to the site of the proposed development. While he had an interest in environmental matters generally, the Court noted that he did not put any evidence before the court to show that he had "*any particular interest in the specific amenity value which [was] potentially impaired"* by the proposed development (para. 8.10, p. 25) and had not given "*any real explanation*" for his non-participation which would have been expected if he had a broad interest in a particular amenity value associated with the site or its environs. However, having regard to the Court's finding that Ms. Grace had standing and that it would, therefore, proceed to consider the merits of the substantive case, the Court did not find it necessary to reach a final determination on the question of Mr. Sweetman's standing. The Court concluded by stating that:-

> "*We would simply reiterate that had he participated in the permission granting process or given the Court some cogent explanation for non-participation, then it would have been much easier to resolve the standing question in his favour*." (par. 8.11, pp. 25 – 26)

50. Before proceeding to apply the principles set out in *Grace and Sweetman* to the present case in order to determine the question of the applicant's standing as a matter of Irish law, I should refer briefly to the two High Court judgments following *Grace and Sweetman* referred to earlier. In *McDonagh*, the High Court (McDermott J.) found that the applicant in that case who sought to challenge a decision of the Board to grant planning permission in respect of a data centre had not established a "*sufficient interest*" in the matter which was the subject of the application for the purposes of s. 50A(3)(b) of the 2000 Act (as amended). The applicant had not participated in the planning process before the planning authority or on appeal to the Board. Further, the applicant had no connection with the proposed development in that he was not a resident in the area where it was intended to be located. Nor would he have been personally affected by it. Having referred to *Grace and Sweetman*, McDermott J. was satisfied that the applicant did not have standing. He reached that conclusion for a number of reasons. First, he noted that the applicant was not living in "*physical proximity*" to the site in issue. The site of the proposed development was in Athenry, Co. Galway. The applicant was based in Dublin. Second, the applicant did not participate in the planning process before the planning authority or on appeal before the Board. Third, there was no explanation as to why the applicant did not participate in the process. Fourth, there was no evidence to indicate that the applicant had any "*local and conservation interest*" in the destruction of forests in Co. Galway. Fifth, there was no evidence of any "*wider interest in the area based on its designation as an SPA as in Ms. Grace's case*". In that regard, the Court noted that the area in issue was not a special area of conservation or a special protection area and was not near any such site. For these reasons, the Court concluded that the applicant did not have a "*sufficient interest*" in the matter, the subject of the application and, therefore, did not have standing to bring the proceedings.

51. In *Sweetman*, the High Court (Haughton J.) considered the question of the applicant's standing, in the context of an application by the applicant for a certificate to enable him to appeal from the substantive judgment of Haughton J. delivered on 2nd February, 2017. In that judgment, Haughton J. found that the applicant did not have "*sufficient interest*" to make a freestanding and general challenge to the validity of s. 5 of the 2000 Act (as amended) on the basis that it infringed EU law. On the question of whether the applicant had a "*sufficient interest*" for the purpose of ss.50A(3)(b) and (4) of the 2000 Act (as amended), in determining whether to grant a certificate to appeal to the applicant, Haughton J. considered *Grace and Sweetman*. He observed (at para. 21) that the Supreme Court had:-

> "*…left open the question as to whether a person with a general interest in environmental matters, but insufficient proximity or connection to/or specific interest in the amenity value of the site of the proposed development, may have locus standi under Irish law as an exceptional case. In so doing the court has also not sought to resolve the question as to whether Irish law should be disapplied or reinterpreted to ensure compliance with 'wide access to justice' under Article 11 if a person such as Mr. Sweetman does not have standing under domestic law under the principles now enunciated by the court. Thus while modernising the law, providing useful guidance, and bringing a measure of certainty to the issue of standing in environmental challenges, the decision has also left considerable uncertainty*." (para. 21, pp. 16 – 17).

52. Haughton J. considered that there were a number of background facts which an appellate court might consider relevant as to whether the applicant had a "*sufficient interest*" to bring a freestanding challenge to section 5. They included the fact that the proposed wind farm and grid connections at issue in that case fell within or were adjacent to European sites, and fell within the habitat of protected species and might threaten protected species; the fact that an area of the proposed development might be remote with few, if any, residents who could directly point to injury, adverse effect or proximity; the fact that the applicant had attempted to appeal the relevant s. 5 declarations in that case; the fact that the applicant had not become aware of the s. 5 declarations within the required period for seeking judicial review; and the fact that the applicant made certain observations to the Board in the context of a related application. I note in passing that none of these factors are present in this case. In those circumstances, Haughton J. was satisfied that it would be appropriate to certify a question concerning the applicant's standing to challenge the validity of s. 5 of the 2000 Act (as amended) under EU law.

Conclusions on Applicant's Standing under National Rules

53. I have concluded that as a matter of national law, it is very clear that the applicant does not have a "*sufficient interest*" in the matter which is the subject of the application for the purposes of s. 50A(3)(b) of the 2000 Act (as amended) and, therefore, does not have standing to bring these proceedings. I have reached that conclusion for several reasons, in light of the principles set out by the Supreme Court in *Grace and Sweetman*.

54. First, the applicant seeks to challenge a decision to refuse approval in respect of the proposed development. There will, therefore, be no development by the Council unless and until a fresh application for approval is made in respect of the proposed development.

The impugned decision does not, therefore, give rise to any adverse intervention into the environment, and none is alleged by the applicant in the third statement of grounds.

55. Second, unlike in *Grace and Sweetman* and *Sweetman*, and in light of the fact that the decision of the Board was to refuse to grant approval in respect of the proposed development, there is no European site potentially threatened as a result of any development arising from the impugned decision. There is no threat to any protected species as a result of the decision to refuse approval in respect of the proposed development. There will be no development on foot of the decision.

56. Third, unlike in *Grace and Sweetman*, there was an obvious candidate to challenge the Board's decision in this case, namely, the Council. The Council has chosen not to challenge the decision or indeed to participate in the proceedings. This is not a case, therefore, where no person could demonstrate that the decision to refuse to grant approval in respect of the proposed development would have a direct effect on his or her own affairs. The Council was the obvious person to challenge the decision. As noted earlier these are all very significant points of distinction between the present case and *Mulcreevy* on which the applicant relied. I do not see that case as being of any great assistance to the applicant.

57. Fourth, the applicant does not have a "*reasonably close physical proximity*" to the site of the proposed development (adapting the words used by the Supreme Court at para. 8.5, p 23). The site of the proposed development is in College Green in the centre of Dublin City. The applicant resides more than 80 kilometres away in Dundalk, Co. Louth.

58. Fifth, the applicant does not have any particular or special connection with the area of the proposed development and does not assert any particular amenity value which would or might arguably be impaired by the decision refusing approval in respect of the proposed development. None of the particular features on which Ms. Grace was able to rely in *Grace and Sweetman* to establish a "*sufficient interest*" and, therefore, standing to bring the proceedings, are present in this case. The applicant is not in a position to show any "*direct personal prejudice"* as a result of the impugned decision still less a personal prejudice arising from any protected status of the area of the development, as required by the Supreme Court in *Grace and Sweetman* (para 8.8, p.24).

59. Sixth, the applicant did not participate in the planning process which led to the decision of the Board. Many people and bodies did, as appears from the inspector's report. The applicant provided an explanation for his non-participation – he was aware of the Council's application but felt that it was not necessary for him to participate as he believed that the Council would obtain approval in respect of the proposed development. However, I do not accept that the explanation advanced by the applicant for his non-participation is a "*real*" or "*cogent"* explanation, as those terms were used by the Supreme Court in *Grace and Sweetman* (paras. 8.10 and 8.11, p. 25). A decision not to participate in a process of which the person is aware on the basis that the person believes that the process will lead to a result which he or she supports, is not, in my view, a proper or adequate explanation for a failure to participate in the process when that person seeks to challenge the decision subsequently. To my mind, it is not a real or cogent explanation.

60. Finally, while the applicant undoubtedly possesses a particular interest in the environment and, specifically, in the protection, preservation and enhancement of the coastal areas of Ireland including its beaches (para. 4 of the applicant's affidavit), he does not profess to have any particular interest in the centre of Dublin City or in the College Green area. The applicant's primary concern, as appears from his affidavit, would seem to be his view that it would be a waste of money and resources to require the Council to make a fresh application for approval in respect of the proposed development rather than being based on any particular or special concern about the environment or the area of the proposed development.

61. The applicant's non-participation in the planning process is only one of several factors which I have taken into account in coming to the conclusion that the applicant does not have a "*sufficient interest*" in challenging the Board's decision refusing approval in respect of the proposed development. I am satisfied that as a matter of Irish law (and leaving aside any consideration of EU law for the moment) it is a factor which can, in an appropriate case, be taken into account (*Grace and Sweetman*, para. 8.5, p. 23). It is a factor which I have taken into account in combination with the many other factors which I have identified and discussed earlier. The applicant can point to none of the factors to which Ms. Grace could point in *Grace and Sweetman* and to which the applicant in *Sweetman* could point. The applicant's position is much closer to that of the applicant in *McDonagh* than Ms. Grace or Mr. Sweetman.

62. In my view, therefore, due to a combination of the several factors discussed above, the applicant does not have "*sufficient interest*" to challenge the decision of the Board refusing approval in respect of the proposed development and does not, as a matter of national law, have standing to bring or maintain the proceedings.

Standing under EU Environmental Law

63. The applicant contends that he has "*sufficient interest*" to bring the proceedings having regard to the provisions of Article 11(3) of Directive 2011/92 and, in particular, the requirement on the part of member states to provide for "*wide access to justice*" for the "*public concerned*". I am satisfied that notwithstanding the rather limited case which the applicant seeks to make in relation to Directive 2011/92 and the Habitats Directive and, notwithstanding that his primary ground of complaint appears to be based on a waste of money and resources argument, since the procedure provided for by s. 175 of the 2000 Act (as amended) under which the Council applied to the Board for approval in respect of the proposed development is one which attracted the public participation provisions of Directive 2011/92, it is appropriate for me to consider whether it is necessary for me to reinterpret or modify the Irish national rules on standing or to disapply those rules in such a way as to confer standing on the applicant to bring the proceedings. This might potentially be the case in order to ensure compliance with the requirement to "wide access to justice" for the "*public concerned*" in Article 11(3) of Directive 2011/92.

64. As the Supreme Court concluded in *Grace and Sweetman* that Irish domestic standing rules are "*expressed in broad terms capable of appropriate interpretation* [to ensure that they meet the "*wide access to justice*" standard] *it does not seem that any question of disapplication truly arises*" (para. 7.1, p. 20) and that the task of the Supreme Court in that case was to ensure that the interpretation of the "*sufficient interest*" requirement for standing contained in national law conforms with the requirements of Article 11 (para. 7.1, p. 20). That is my task in the present case (see the recent discussion of the interpretative obligation on a national court to ensure conformity with EU law in *Heather Hill Management Co. CLG v An Bord Pleanála* [2019] IEHC 186 (Simons J.) (paras 84-104)).

65. The Supreme Court made a number of other important observations in this regard. First, the Court confirmed that a "*reasonably liberal approach*" is taken under Irish law as regards the type of interest which might potentially be affected in order to establish standing in environmental cases. The Supreme Court discussed the sort of factors to be considered in determining that question (at para. 6.9, p. 19). Second, the fact that Article 11(3) refers to the member states determining what constitutes a "*sufficient interest*" (for the purposes of Article 11) and that under Article 11(1) such a determination is made "*in accordance with the relevant national legal system"*, means that member states have a "*material margin of appreciation*" in determining the standing rules to be applied in

respect of challenges covered by Article 11 subject to the requirement to ensure that they confer "*wide access to justice*" (*Grace and Sweetman*, para. 4.4, p. 10). The Court also stated that the fact that Article 11 (and Article 9 of the Aarhus Convention) "*gives status to national standing rules necessarily implies that it is open to subscribing or member states to impose some limitations on those who may have standing*" (para. 8.4, p. 23).

66. Third, the Supreme Court indicated that it was potentially of some relevance to consider the provisions of Directive 2011/92 in relation to the standing of environmental nongovernmental organisations ("ENGOs") and the measures adopted by the State to implement those provisions into Irish law. Those provisions are contained in Article 11(3) which expressly provides that ENGOs meeting certain requirements in the Directive are deemed to be sufficient to establish (*inter alia*) a "*sufficient interest*" to challenge the relevant decision. The implementing provisions are contained in s. 50A(3)(b)(ii) of the 2000 Act (as amended). As the Supreme Court noted, "*broad standing*" is given to ENGOs in Irish law (para. 7.2, pp. 20 – 21). It was suggested by the applicants in that case that it would be a "*strange*" and "*anomalous*" result if the proper interpretation of standing rules (under Irish law) led to the result that a small group of persons by forming themselves into an ENGO could bring a challenge which those persons, acting as individuals, would not be in a position to bring. The applicant relies on this alleged anomaly in the present case.

67. The applicant contended that the requirement in Article 11(3) to provide for "*wide access to justice*" requires that national rules on standing be interpreted in a manner as to confer standing upon him. On the particular question of the relevance of his non-participation in the planning process, the applicant relied on two judgments of the CJEU which he says preclude the Court, as a matter of EU law, from finding that he does not have standing by reason of his non-participation in the planning process in question. The cases on which the applicant relied are: *Case C-263/08 Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämnd*. [2009] ECR I-09967 ("*Djurgården*") and Case C-137/14 *Commission v. Germany* [ECLI:EU:C:2015:683] ("*Commission v. Germany"*). The applicant noted that in its determination granting leave to the applicants in *Grace and Sweetman* to appeal directly from the High Court to the Supreme Court in that case, the Supreme Court observed, at s. 5 of its determination, that "*it* [was] *arguable that the jurisprudence of this Court in respect of standing in environmental matters may need to be revised in light of recent jurisprudence of the Court of Justice not least Case C-137/14, Commission v. Germany (judgment of October 15th 2015)."*

68. On the other hand, the Board and the State submitted that there is nothing in Article 11 or in any of those judgments of the CJEU which preclude the court, as a matter of EU law, from treating an applicant's non-participation in the planning process prior to the attempted challenge to the planning decision which emerged from that process as a relevant factor in considering the applicant's standing to bring the challenge. Both relied on the more recent judgment of the CJEU in *Case C-664/15 Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation v Bezirkshauptmannschaft Gmünd* [ECLI:EU:C:2017:987] ("*Protect Natur*") as supporting the proposition that EU law does not preclude national standing rules from at least taking account of the non-participation of a party who wishes to challenge a decision in the administrative process which led to that decision.

Conclusions on Applicant's Standing under EU Environmental Law

69. I consider that the submissions advanced by the Board and by the State are correct on this issue. I have concluded that EU law does not preclude a national court from applying national standing rules and from treating non-participation in the planning process as a factor to be taken into account in assessing whether an applicant has standing. I have also concluded that an interpretation of national standing rules which permits non-participation to be taken into account as a factor in determining standing, would not amount to a breach of the requirement to provide for "*wide access to justice*" to the "*public concerned*" under Article 11(3). I have reached these conclusions for a number of reasons.

70. First, as the Supreme Court noted in *Grace and Sweetman*, Irish rules on standing in environmental cases are "*reasonably liberal*". Second, again as the Supreme Court noted in *Grace and Sweetman*, Article 11 of Directive 2011/92 provides for a "*material margin of appreciation"* on the part of member states in determining the standing rules which are to apply in respect of challenges covered by Article 11, subject always to the overriding requirement to ensure "*wide access to justice*". I do not believe that permitting a court to take into account, as one of the factors to be considered in determining standing, the non-participation by an applicant in the planning process and any explanation by that applicant for such non-participation, would be inconsistent with the "*reasonably liberal*" approach typically taken by the Irish courts in determining standing in environmental cases or with the requirement to ensure "*wide access to justice*" for the "*public concerned*" in Article 11(3). However, while non-participation, and any explanation for such non-participation, are relevant factors to be taken into account, they are by no means the only such factors or the decisive factors. They may well be among many factors which the court will take into account in considering the question of standing. Several of those factors were discussed by the Supreme Court in *Grace and Sweetman*. I have considered many of them (and some others) in my application of national standing rules in the previous section of this judgment.

71. Third, in my view, neither *Djurgården* nor *Commission v. Germany* is authority for the proposition that EU law precludes national standing rules which permit non-participation in the planning process and any explanation for such non-participation to be taken into account as relevant factors in assessing standing. It is necessary, therefore, to consider what was at issue in both of those cases and the potential relevance of the CJEU judgments in those cases to the question which I must determine in the present case.

72. In *Djurgården*, the CJEU was considering a reference from a Swedish court which raised a number of questions which are potentially relevant to the present case. Three questions were referred to the CJEU. The second and third questions are potentially relevant. Those questions concerned the interpretation of the predecessor to Article 11 of Directive 2011/92, namely, Article 10a of Directive 85/337. The applicant in the case was an environmental protection association in Sweden. It participated in the administrative procedure in Sweden under which development consent was given to carry out certain construction works which were likely to have significant effects on the environment, particularly with respect to ground water. The applicant sought to appeal the grant of consent to a Swedish court. However, the appeal was held to be inadmissible on the ground that the applicant had not fulfilled a condition laid down in the relevant Swedish legislation that it had to have at least 2,000 members to be entitled to appeal against judgments and decisions covered by the legislation. The applicant brought a further appeal from that decision to the Swedish Supreme Court which referred a number of questions to the CJEU. As noted earlier, the second and third of those are potentially relevant. The second question raised the issue as to whether, under Article 10a of Directive 85/337, members of the "*public concerned*" were entitled to access to a review procedure to challenge a decision granting development consent even where they had had the opportunity of participating in the earlier examination at the administrative stage on the question of whether development consent should be granted and of expressing their views at that stage (para. 32). It might be noted here that what was involved in that case was very different to the present case. In *Djurgården*, the applicant had participated in the prior administrative procedure (analogous to the planning process here) and had expressed its views at that stage. At paras. 38 and 39 of its judgment (on which the applicant in the present case relied), the CJEU stated:-

> *"38. First, the right of access to a review procedure within the meaning of Article 10a of Directive 85/337 does not depend on whether the authority which adopted the decision or act at issue is an administrative body or a court of law.*

> *Second, participation in an environmental decision-making procedure under the conditions laid down in Articles 2(2) and 6(4) of Directive 85/337 is separate and has a different purpose from a legal review, since the latter may, where appropriate, be directed at a decision adopted at the end of that procedure. Therefore, participation in the decision-making procedure has no effect on the conditions for access to the review procedure.*
>
> *39. Accordingly, the answer to the second question is that the members of the public concerned, within the meaning of Article 1(2) and 10a of Directive 85/337, must be able to have access to a review procedure to challenge the decision by which a body attached to a court of law of a Member State has given a ruling on a request for development consent, regardless of the role they might have played in the examination of that request by taking part in the procedure before that body and by expressing their views."*

73. In that case, the CJEU answered the second question by making it clear that participation in the earlier procedure could not be relied on to preclude the applicant from participating in the review procedure. However, the judgment of the CJEU in that case did not address the position, which arises in this case, where an applicant wishes to challenge a decision but did not participate in the earlier procedure. The CJEU was not dealing with such a scenario, which is precisely the situation which arises in the present case. In my view, there is nothing in the CJEU's answer to the second question in *Djurgården* which precludes a court from taking into account as one of the factors to be considered in determining an applicant's standing to challenge a decision, the non-participation of the applicant in the planning process and any explanation for that non-participation as factors to be taken into account.

74. In answer to the third question referred by the Swedish Supreme Court, the CJEU reiterated its conclusion that Directive 85/337 "*in no way permits access to review procedures to be limited on the ground that the persons concerned have already been able to express their views in the participatory phase of the decision-making procedure established by Article 6(4) thereof"* (para. 48). The CJEU further stated that the fact that national rules offered:-

> *"…extensive opportunities to participate at an early stage in the procedure in drawing up the decision relating to a project is no justification for the fact that judicial remedies against the decision adopted at the end of the procedure are available only under very restrictive conditions*" (para. 49).

75. The "*very restrictive conditions*" to which the CJEU was referring was a requirement that an environmental protection association, such as the applicant in the case, had to have at least 2,000 members as well as satisfying other requirements. The CJEU concluded that such restrictive conditions were precluded by Article 10a of Directive 85/337. Again, in my view, there is nothing in the CJEU's answer to the third question which would preclude an Irish court from taking into account as part of its consideration of an applicant's standing, the non-participation of the applicant in the planning process and any explanation for such non-participation. The issue simply did not arise in that case.

76. *Commission v. Germany* did involve a consideration of Article 11 of Directive 2011/92. The facts are somewhat complicated both in terms of the complaint made by the Commission against Germany and the provisions of German law at issue. One of the complaints made by the Commission was that German law restricted the standing to bring proceedings and the scope of the review by the courts to objections made during the administrative procedure. The German law in question restricted the pleas in law which could be made by an applicant in legal proceedings challenging an administrative decision falling within the scope of Article 11 of Directive 2011/92 and another Directive on industrial emissions to those which were previously made during the administrative procedure. The CJEU held that neither Directive allowed restrictions on the pleas in law which could be raised in support of legal proceedings under Article 11. The CJEU rejected the contention by Germany that without the restriction under the relevant law, objections which were known at the time of the administrative procedure could be held back, for strategic or tactical reasons, and reserved for the proceedings before the courts. The CJEU stated that the objective pursued by (*inter alia*) Article 11 of Directive 2011/92 was *"not only to ensure that the litigant has the broadest possible access to review by the courts but also to ensure that that review covers both the substantive and procedural legality of the contested decision in its entirety*" (para. 80). However, the CJEU did note that it was open to the national legislature to lay down procedural rules to ensure the efficiency of legal proceeding such as by precluding the admissibility of an argument which was submitted abusively or in bad faith (para. 81).

77. The CJEU then looked at a further complaint brought by the Commission in which certain restrictions were placed on the entitlement of environmental protection organisations to challenge decisions of the type at issue in that case. The complaint was complicated by the fact that Germany had adapted and amended its legislation in order to remedy a deficiency found in an earlier judgment of the CJEU. The CJEU upheld that complaint. However, it seems to me that the most relevant issue dealt with by the CJEU in that case concerned the bar on an applicant in proceedings challenging a decision from raising in those proceedings points which it had not raised in the earlier administrative procedure. That was found to be a breach of (*inter alia*) Article 11 of Directive 2011/92. However, that type of restriction is not what is at issue in the present case. The CJEU in *Commission v Germany* did not deal in that case with the entitlement of a national court to consider as one of the factors to be taken into account in determining standing the non-participation of an applicant in the planning process which led to the decision the subject of the proposed challenge and any explanation given for such non-participation. That question simply did not arise in *Commission v. Germany*.

78. The judgment of the CJEU in *Protect Natur* seems to me to be more relevant to the present case than *Djurgården* or *Commission v. Germany* even though the judgment does not directly address Article 11 of Directive 2011/92 but rather Article 9(3) of the Aarhus Convention. That case concerned a reference from a preliminary ruling from the Supreme Administrative Court in Austria on the interpretation of a provision in Directive 2000/60/EC establishing a framework for Community action in the field of water policy and of Article 9(3) of the Aarhus Convention. The request was made in proceedings brought before the Austrian courts concerning the applicant's application to secure status as a party to the procedure concerning a request by a company for the extension of a permit for a snow-making facility which was granted under Austrian legislation governing water-related matters. The applicant was an environmental organisation. During the administrative procedure, the applicant asked to be accorded the status of a party and submitted objections to the grant of the permit. The relevant authority granted the permit and rejected the applicant's request and objections on the ground that it had not claimed that any rights protected under the legislation governing water-related matters had been affected. For that reason, it could not claim to be a party in the procedure. The applicant then brought proceedings arising from that decision and alleged (*inter alia*) infringement of Article 9(3) of the Aarhus Convention. Its action was dismissed by the Lower Austria Regional Administrative Court on the ground that the applicant had lost its status as a party to the procedure under the relevant provision of Austrian law because it had failed to invoke rights protected under the legislation governing water-related matters during the administrative procedure. The applicant then brought an application for a review on a point of law before the Supreme Administrative Court in Austria which referred certain questions to the CJEU. One of the questions raised was whether it was permissible for national procedural law to require an environmental organisation to submit its objections in good time at the administrative stage failing which it would lose its status as a party and no longer be able to bring an appeal to the administrative court. However, as the CJEU noted, an environmental organisation such as the applicant could not, in principle, under the applicable national rules, obtain the status of a party to the procedure to enable it to participate in the administrative procedure for the grant of

the relevant permit and, therefore, it was not clear how it could have lost that status under the provision of Austrian law in question. However, the CJEU nonetheless considered and answered the question by reference to the requirements of Article 9(3) of the Aarhus Convention.

79. The CJEU held that, in principle, Article 9(3) did not preclude a rule imposing a time limit such as that contained in the Austrian law in question:-

> *"…obliging the effective exercise, from the administrative procedure stage, of the right of a party to the procedure to submit objections regarding compliance with the relevant rules of environmental law, since such a rule may allow areas for dispute to be identified as quickly as possible, and, where possible, resolved during the administrative procedure so that judicial proceedings are no longer necessary"* (para. 88).

80. The CJEU continued (at para. 89):-

> *"Thus, such a rule imposing a time limit may contribute to the objective of Article 9(3) of the Aarhus Convention… of providing effective judicial mechanisms and appears also to be in line with Article 9(4) of that convention, which requires that the procedures referred to, inter alia, in Article 9(3) of the convention provide 'adequate and effective' remedies that are 'equitable'".*

81. The CJEU stated that in such circumstances, a rule imposing a time limit may be justified in accordance with Article 52(1) of the Charter subject to certain conditions (para. 90). However, in order to comply with the requirement of proportionality, the Court stated that:-

> *"…the practical arrangements for the exercise of administrative remedies available under Austrian law must not disproportionately affect the right to an effective remedy before a court referred to in Article 47 of the Charter…"*
>
> (para. 91).

82. The CJEU then considered the question as to whether the imposition of the time limit concerned on an environmental organisation was such as to excessively restrict the right to bring judicial proceedings and held that, while that was ultimately for the referring court to answer in light of all of the relevant facts and national law, it appeared to the CJEU to be the case, subject to verification by the referring court, that there was such an excessive restriction. On the facts of the case, the applicant had requested the competent authorities to accord it the status of a party to the procedure but was refused principally on the basis that there was no legal basis under Austrian law for that to be done. Therefore, the applicant had to participate in the administrative procedure in a different capacity which did not grant it the right to submit objections. Consequently, the court held that the applicant was being required to fulfil an obligation which could not, *a priori*, be fulfilled by it. It appeared to the CJEU, therefore, that there was an excessive restriction on the applicant's right to bring judicial proceedings for the purpose of Article 9(3) of the Aarhus Convention on the specific facts of that case.

83. However, the CJEU expressly accepted, albeit in the context of Article 9(3) of the Aarhus Convention and not Article 11 of Directive 2011/92, (which is closely related to and must be "*properly aligned with*" Article 9 of the Aarhus Convention: see *Case C-260/11 R (Edwards and another) v Environment Agency and others (No. 2)* [2013] 1 WLR 2914 and *Conway*, paras 26-27, p.66) that it could lawfully be possible to have a rule imposing a time limit obliging a party to submit its objections at the administrative procedural stage in the environmental field since such a rule might allow the areas in dispute to be identified at the earliest opportunity and resolved during the administrative procedure so that judicial proceedings might not be necessary. However, such a rule would have to satisfy the principle of proportionality and could not disproportionately affect the right to an effective remedy.

84. It is interesting that in his paper at the judicial review conference on Recent Developments in Public Law (Sutherland School of Law, UCD, 11th June, 2018), Garrett Simons SC (as he was) referred to *Protect Natur* and observed that the case "*suggests that it would be legitimate to confine access to judicial review to those who have previously participated in the administrative stage of the planning process*". That may well be so. However, it is not necessary to go that far in order to determine the question at issue in this case. It suffices to say that, in my view, there is nothing in Article 11 or in *Djurgården* or *Commission v. Germany* which would preclude a national court, as a matter of EU law, from considering as among the factors to be taken into account in determining standing, the non-participation by the applicant in the prior administrative or planning process which led to the impugned decision and any explanation for that non-participation (factors which, as the Supreme Court in *Grace and Sweetman* confirmed, can be considered under Irish national standing rules). Indeed, *Protect Natur* suggests that a prior participation requirement may not infringe the right of access to effective judicial mechanisms, at least under Article 9 of the Aarhus Convention and potentially also under Article 11 of Directive 2011/92. It is unnecessary for present purposes to go that far and I express no concluded view on that point.

85. Fourth, the applicant contended that it would be an anomaly if an ENGO had standing to bring proceedings under Irish and EU law whereas an individual, who may be a member of that ENGO, might not have such standing, if the court were to interpret the requirement for an individual to establish a "*sufficient interest*" under Irish law or under Article 11 of Directive 2011/92 in the manner for which the Board and the State have contended. Such a potential anomaly was raised in the course of argument before the Supreme Court in *Grace and Sweetman* and is referred to at paras. 7.2 and 7.3 (pp.20 – 21) of the judgment in that case. However, a couple of observations may be made in that regard. In the first place, ENGOs are afforded a special status in terms of standing under EU law and under Irish law. Article 11(3) makes clear that in order to give effect to the objective of giving "*wide access to justice*" to the "*public concerned*", the "i*nterest of any non-governmental organisation meeting the requirements referred to in Article 1(2) shall be deemed sufficient*" to establish the requirement of having a "*sufficient interest*" for the purposes of Article 11. Article 11(2)(e) provides, in the context of the definition of "*public concerned", that "non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest*" in the environmental decision-making procedures referred to in Article 2 of the Directive. Special provision is also made for ENGOs under Article 9(2) of the Aarhus Convention. Similarly, s. 50A(3) makes special provision for ENGOs and their standing to bring proceedings. It was observed by the Supreme Court in *Grace and Sweetman* that Ireland has not imposed any "*significant conditions which would restrict the type of NGO which might have standing*" to bring proceedings challenging a planning decision (para 7.3, p.21). The EU legislature deemed it appropriate to make special provision for ENGOs and, in compliance with its obligations under EU law, Ireland has done likewise. In the second place, the applicant appears to have made a deliberate decision to seek to bring these proceedings in his personal capacity. The applicant is an officer in the Louth Environmental Group and did not offer any explanation as to why that association did not seek to bring the proceedings. As I observed earlier, the applicant and the association of which he is a member were co-applicants in earlier proceedings (the Raheny proceedings) in relation to permission granted for a large housing development adjacent to St. Anne's Park in Raheny. In those circumstances, it is not, in my view, open to the applicant to pray in aid any alleged anomaly in the application of standing rules in the case of individuals when compared to those applicable to ENGOs. Finally, I do not

wish to give the impression that were the proceedings sought to be brought by the Louth Environmental Group, the court would necessarily have afforded that association standing to bring the proceedings. The issue does not arise as that association has not sought to bring the proceedings.

86. Fifth, to the extent that a case is made by the applicant that the refusal to afford him standing to bring the proceedings amounts to an infringement of the obligation to afford adequate and effective protection for the applicant's rights as a matter of EU law, I do not accept that any such breach arises. It is clear that as a matter of EU law (for example, *Djurgården*, paras. 38 and 48) and as a matter of Irish law (*Grace and Sweetman*, para. 8.5), if the applicant had participated in the planning process before the Board, he would undoubtedly have had standing to bring the proceedings. His non-participation, and the explanation advanced by him for such non-participation, as well as the many other factors discussed earlier combined lead, in my view, inexorably to the conclusion that the applicant does not have standing to bring the proceedings under Irish national standing rules or under EU law.

87. In my view, therefore, there is nothing in EU law which requires the court, in compliance with its obligations to ensure "*wide access to justice*" to the "*public concerned*", to interpret Irish national standing rules in such a way as to afford standing to the applicant to bring and maintain these proceedings. It would be quite extraordinary if Article 11 of Directive 2011/92 or any other provision of EU law were to require the court to uphold the applicant's standing to bring these proceedings having regard to the several factors which strongly militate against such standing. I am quite satisfied that neither Article 11 nor any other provision of EU law requires the court to interpret Irish national standing rules in such a way as to confer standing on the applicant.

Reference to CJEU
88. The applicant submitted that if the court was in any doubt as to the scope of EU law in this regard, a preliminary reference should be made to the CJEU under Article 267 TFEU to clarify the conformity of Irish standing rules with EU law, particularly, in view of the "*wide access to justice*" requirement. As I hope I have made clear earlier in this judgment, I am not in any doubt as to the scope of EU law in that regard. It is not necessary, therefore, to make any reference to the CJEU under Article 267 TFEU in respect of any of the issues arising on this application and I refuse to do so.

Conclusions
89. For the reasons set out in the course of this judgment, I have concluded that the applicant does not have standing to bring these proceedings by way of challenge to the decision of the Board refusing to grant approval to the Council in respect of the proposed development at College Green. I have concluded that the applicant's non-participation in the planning process before the Board and his explanation for such non-participation (he thought that the Council would obtain the required approval) together with the many other factors identified by me in the course of the judgment have driven me to the conclusion that the applicant does not have a "*sufficient interest*" in the matter the subject of the proceedings and does not, therefore, have standing to bring a challenge to the Board's decision. I have further concluded that Irish national rules on standing are in conformity with the EU law requirement in Article 11 of Directive 2011/92 that there be "*wide access to justice*" and that there is nothing in Article 11 or otherwise in EU law which requires me to interpret Irish national standing rules in such a way as to confer standing on the applicant to bring the proceedings. I have concluded that EU law does not require the court to uphold the applicant's standing to bring the proceedings.

90. I am not in any doubt as to the scope of EU law in this regard and I do not, therefore, believe that it is necessary to make a reference to the CJEU under Article 267 TFEU to clarify the conformity of Irish standing rules with EU law, as requested by the applicant. I refuse to make the requested reference.

91. Since the applicant does not have standing, I must refuse to grant leave to the applicant to bring the proceedings.