THE HIGH COURT

[2016 No. 982 JR]

BETWEEN

DAVID MALONE

APPLICANT

AND

MAYO COUNTY COUNCIL

RESPONDENT

AND

PWWP DEVELOPMENTS LIMITED AND AN BORD PLEANÁLA

NOTICE PARTIES

JUDGMENT of Mr Justice Cregan delivered on 5th day of May, 2017.

Introduction

1. There are two applications before this Court: the first is an application by PWWP Developments Ltd., the first-named notice party in these proceedings and the second is an application by Mayo County Council, the respondent in these proceedings. In essence, both of these applications are applications to set aside the grant of leave to apply for judicial review against decisions of the respondent, granted by order of the High Court (Noonan J.) on 30th January 2017, and also for orders striking out the statement required to ground the application for judicial review for failing to disclose any proper grounds for judicial review. In broad terms the applicant seeks to quash six planning permissions granted to the notice party in respect of works connecting wind farms to the national grid.

The course of the hearing

2. These applications were heard on three separate occasions before me. On the first occasion I heard submissions from counsel on behalf of Mayo County Council and PWWP Developments and also from counsel on behalf of the applicant. Towards the close of the first hearing I indicated to the parties that some consideration should be given to permitting the applicant to amend his statement of grounds. This was because the applicant had submitted that in fact his grounds of judicial review were to be found both in the statement of grounds and in the affidavit grounding the application for leave to issue judicial review proceedings. The parties then agreed that the applicant should have an opportunity to reconsider his statement of grounds and to amend his statement of grounds by importing from the relevant grounding affidavit those factual and/or legal matters which he said were relevant to the statement of grounds, (on the express direction that no new legal grounds would be added to the statement of grounds). The matter was then adjourned for a week to permit the applicant to do this.

3. On the second occasion when the matter was before the Court, I again heard submissions from all parties in respect of the issue. There were still problems with the statement of grounds. The respondent and the notice party submitted that the second draft of the statement of grounds still had not identified with any particularity the legal grounds of the applicant's case. When questioned about this, counsel for the applicant submitted that these grounds were to be found in his legal submissions and that he did not realise that the Court direction required him not only to set out the appropriate factual matters from the affidavit, but also the appropriate legal grounds in his statement of grounds. I found this submission surprising as I thought that my direction had been clear, but in order to avoid doing an injustice to the applicant and in order to give him the benefit of the doubt, I adjourned the matter to a third occasion to permit the applicant to file a third draft of the statement of grounds - to include all relevant factual issues drawn from the relevant affidavit and also all relevant legal grounds to be drawn from the legal submissions. Again, I indicated that no new grounds were to be added and the applicant was restricted to those grounds for which he had sought and obtained leave to issue judicial review proceedings from Noonan J. on 30th January 2017. I also indicated that all relevant amendments were to be underlined.

4. This matter then came before the Court on the third occasion and the matter was argued before me for a further period of two and a half hours.

Jurisdiction to set aside leave orders

5. It is common case that the Court has a jurisdiction to set aside leave orders although this is a jurisdiction which ought to be exercised sparingly.

6. In *Adam v. Minister for Justice* [2001] 3 I.R. 53 Hardiman J. stated that an application to set aside an order granting leave was not in any sense an appeal from the judge of the High Court who granted the original leave. As he stated at p. 77:

> *"In my view, any order made ex parte must be regarded as an order of a provisional nature only. In certain types of proceedings, either the apparent requirements of justice or the requirements of its administration mean that a person will be affected in one way or another by an order made without notice to him and therefore without his having been heard. This state of affairs may, depending on the facts, constitute a grave injustice to the defendant or respondent. In the context of an injunction, only a very short time will normally elapse before the defendant has some opportunity of putting his side of the case. In judicial review proceedings the time before this can occur will normally be much longer. This clearly has the scope to work an injustice at least in some cases."*

Requirement to plead a judicial review with precision

7. Order 84 rule 20 (3) as amended provides:

> *"It shall not be sufficient for an applicant to give as any of his grounds for the purposes of paragraphs (ii) or (iii) of sub-rule (2) (a) an assertion in general terms of the ground concerned, but the applicant should state precisely each such ground, giving particulars where appropriate, and identify in respect of each ground the facts or matters relied upon as supporting that ground."*

8. This is the relevant test which I have to consider in this case.

9. Likewise in *A.P. v. DPP* [2011] IESC 2 Murray C.J. stated:

> *"5. In the interests of the good administration of justice it is essential that a party applying for relief by way of judicial review set out clearly and precisely each and every ground upon which such relief is sought. The same applies to the various reliefs sought.*

6. It is not uncommon in many such applications that some grounds, and in particular the ultimate ground, upon which leave is sought are expressed in the most general terms as to the alleged frailties of the decision or other act being impugned, rather in the nature of a rolled up plea, and alluding generally to want of legality, fairness or constitutionality. This can prove to be quite an unsatisfactory basis on which to seek leave or for leave to be granted particularly when such a ground is invariably accompanied by a list of more specific grounds."

10. I have also considered the judgment of Barr J. in *McNamara v. An Bord Pleanála* [1996] 2 ILRM 339 where Barr J. referring to the Supreme Court decision in *K.S.K Enterprises Ltd. v. An Bord Pleanála* [1994] 2 I.R. 128 stated as follows at page 351:

"Ground (e) is a broad, general 'catch all' plea which tells the developer little or nothing as to the actual nature and basis for the challenge and what it should do to meet the case which will be presented against it on judicial review. Ground (a) is also too wide and ought to have specified in what respect the EIS was alleged to be defective and/or failed to comply with statutory requirements. The applicant is not entitled to rely on a general complaint about the EIS as an umbrella to justify subsequent specific allegations not notified as grounds within time. As to ground (f); this raises a fundamental argument that the board's decision in granting permission was irrational and therefore void. However, the allegation of irrationality as formulated in ground (f) which is confined to traffic only, is in general terms and lacks specifics. In my view it does not comply with the statutory requirements as to notification of grounds of objections in time."

The reliefs sought

11. The reliefs sought by the applicant, as set out in the statement of grounds are:

1. An order of certiorari by way of application for judicial review quashing the determinations of the Respondent to grant planning permissions for (PL16/467, PL16/468, PL16/469, PL16/470 PL16/471 and PL16/472) in respect to the connection to the National Grid via the Cloontooa Wind Farm substation under PL16/467 and PLI 6/468 all made on 1st November 2016.

2. A declaration that the decisions of the Respondent were in breach of and contravene the EIA Directive 2011/92 EU of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment ("the codified Environmental Impact Assessment (EIA) Directive"), and the jurisprudence of the European Court of Justice (ECJ) and the Court of Justice of the European Union (CJEU).

3. An Order of Mandamus compelling the Respondent to comply with its statutory duties under the following European and National Law:

a) Articles 3 and 9 (I) of the European codified EIA Directive 2011/92/EU;

b) The European Union (Environmental Impact Assessment) (Planning and Development Act 2000) Regulations 2012 (S.I. 419 of 2012), and Section 2 (a)(i) and (ii), section 17IA and subsections (I13), (1C), (ID), (10) and (IJ) (c) of section 172 of the Planning and Development Act 2000, as amended;

c) Article 3(2) (a) and (5) of the SEA Directive 2001/42/EC;

d) Article 11 of the Treaty on the Function of the European Union;

e) Article 3(3) to (7) and Article 4(2) to (4) of the Public Participation Directive 2003/35/EC, and Articles 6 and 7 of the Aarhus Convention;

4. An order for Protective Costs by way of an application for Judicial Review and under Section 50B (2A) of the Planning and Development Act 2000 (as amended by the Environment Miscellaneous Provisions Act 2011). The applicant seeks said leave for Judicial Review pursuant to the law of the State that gives direct effect to the provisions of the codified EIA Directive 2011/92/EU, the Public Participation Directive 2003/35/EC and the United Nations Economic Commission for Europe Aarhus Convention;

The grounds upon which relief is sought

12. In the original and second draft of the statement of grounds there were eight different grounds on which the applicant was seeking judicial review. By the time this Court came to deal with the third draft of the statement of ground, only the first five of these grounds remained and the other three had been abandoned. Thus, grounds six, seven and eight of the original statement of grounds no longer form part of the application which I have to consider.

The first ground

(a) Text

13. The first ground upon which relief is sought is as follows:

*1. The Respondent erred in law in accepting and validating [**and relying on]** six planning applications with six EIS's for a single project, [**Contrary to] Article 1(a) of the EIA Directive 2011/92/EU** As a result, the Respondent has granted 6 different development consents for grid connections instead of one. There are three further Appeals before An Bord Pleanála also for the same project. So you could end up with nine development consents for the same project. development consent. (sic).*

Facts:

[Paragraph 31 Affidavit]

a) *On 26 June 2009 the First Named Notice Party made planning applications accompanied by an Environmental Impact Statement's (EIS's) to the Respondent for two separate Wind Farm projects.*

[paragraph 14]

b) *PL16/468, PL16/470, PL16/469, were an integral part of three current Appeals (PL16.244033, PL16.244034 and PL16.244055) to An Bord Pleanála;*

[paragraph 12 bullet point 4]

c) *"The proposed wind farm development forms part of a cluster of three wind farms in the area east of Claremorris, Co. Mayo. The cluster is intended to deliver wind energy developments that together deliver the total approved 40.8 MW Gate 3 Grid Connection at the Dalton substation, immediately to the east of Claremorris (Gate 3 Refs: DG289 & DG 291) and is known as the "Dalton Gate 3 Mayo Wind Farms". Each cluster in connected to the Cloontooa substation with a single onward connection to the national grid."*

[Paragraph 22]

d) *On 27 July 2010, the Respondent granted development consent for 4 wind turbines subject to 31 Conditions. Condition 3 states that*

> *"Prior to the commencement of the proposed development, the developer shall submit to Mayo County Council written consent from ESB National Grid on the adequacy of the electricity transmission system to accommodate the additional output of the extension phase upon completion of its commissioning."*

[Paragraph 17]

e) *This decision was appealed to An Bórd Pleanála (the Board) on 23/08/2010 (Ref. PL16.237401. The proposed development was further revised by public notice received by the Board on the 12th day of July, 2011. The Board granted development consent on 14 September 2011 for 4 turbines subject to 27 Conditions. Condition 15 states "This condition shall not be construed as any form of consent or agreement to a connection to the national grid or the routing or nature of any such connection."*

[Paragraph 18]

f) *The second application was for the Magheramore Wind Farm was for the "Construction and Operation of a Wind Farm consisting of up to Twelve Wind Turbines Generators of a hub height of 100M and a blade length of up to 45M, an Anemometry Mask, an Electrical Substation, Associated Access Tracks, Underground Cabling and Ancillary Works."*

[Paragraph 19]

g) *On 23 December 2009, further information was received in the form of a revised EIS, which brought the number of turbines down from 12 to 7. The revised EIS also states that ESB is responsible for a planning application to connect the wind farm to the National Grid. The Respondent on 11 May 2010 granted development consent for 7 Turbines. On 6 March 2015, the First Named Notice Party applied to the Respondent under PL 09/6640 for extension of time for PL09/664. The Respondent granted permission on 29 April 2015.*

[Paragraph 20]

h) *Each of the EIS's states that "The proposed wind farm development forms part of a cluster of three wind farms in the area east of Claremorris, Co. Mayo. The cluster is intended to deliver wind energy developments that together deliver the total approved 40.8 MW Gate 3 Grid Connection at the Dalton substation, immediately to the east of Claremorris (Gate 3 Refs: DG289 & DG 291) and is known as the "Dalton Gate 3 Mayo Wind Farms". Each cluster in connected to the Cloontooa substation with a single onward connection to the national grid."*

[Paragraph 22]

i) *The Cloontooa Wind Farm is the only application for a substation and the Magheramore and Ballykinava Wind Farms are to be connected to the Cloontooa substation with a single onward connection to the national grid. I say that there is no Gate 3 license for the Ballykinava Wind Farm. The ESB license DG291 is for the Magheramore and Cloontooa Wind Farms for a maximum of 40.8 MW under Gate 3.*

[Paragraph 23]

j) *An Bord Pleanála in a Pre-Application Ref: 09. PC0186 for a 47 wind turbine Strategic Infrastructure Development ruled that "Having regard to these refinements and to the proposal that each cluster would be connected to a single substation, with a single onward connection to the national grid, the Board advised that the proposed development could be accepted as a single project."*

[Paragraph 24]

k) *The Respondent requested 18 items of further information for the Ballykinava, Magheramore and Cloontooa Wind Farms on 20 February 2014 and the information was received on 20 August 2014. The Respondent granted development consent for all three Wind Farms on 8 October 2014. The decisions were all Appealed to the Board (Cloontooa Ref: PL16.244034, Ballykinava PL16.244033 and Magheramore PL16.244055).*

[Paragraph 25]

l) *On 16th June 2016 the First Named Notice Party made six further planning applications to the Respondent for grid connections PL16/467, PL 16/468, PL16/469, PL 16/470, PL16/471 and PL 16/472. All the applications related to connections to the National grid via the proposed Cloontooa Wind Farm.*

[Paragraph 27]

m) *On 9 August, 2016 the Respondent requested 14 items of further information from the First Named Notice Party, which was submitted on 8 September 2016, and on 1 November 2016 the Respondent granted development consent for all six grid connections.*

[Paragraph 28]

n) *The respondent did not carry out an EIA of the effects of the grid connections nor send it to the Board for it to carry out an EIA of the whole project.*

[Paragraph 29]

(b) **Submissions of the parties on first ground**

14. Mr. Butler S.C. on behalf of the respondent submits that the first ground should be struck out on the grounds that it is completely vague, and that it fails to disclose any cause of action or any proper ground for judicial review. He submits that although the first ground purported to set out certain facts at paras. (a) to (m) that, in fact, when properly analysed, all of these facts were background facts entirely unrelated to the actual ground, which is purportedly relied upon at ground 1. Thus, he submits, that all of the facts set out at (a) to (m) were not relevant to the actual ground. In respect of background fact (n) Mr. Butler noted that this simply stated as follows:

> *"The respondent did not carry out an EIA of the effects of the grid connections nor send it to the Board for it to carry out an EIA of the whole project".*

This, he says, is simply a bald statement of fact and it does not set out what was required under the relevant legal test. He also

submits that the actual EIS was never exhibited by the applicant, either at the leave stage, or in any affidavit before this hearing. As such the Court could not make an assessment in respect of the EIS as it was not exhibited. He also submits that the last two sentences of the first and second drafts of the first ground had been deleted from the third draft. These sentences were as follows:

> *"This is an infringement of the Aarhus Convention as it results in public participation being prohibitively expensive. If the public concerned were to exercise their right under Aarhus Convention, it could cost in excess of €500,000 if all nine decisions were to be challenged in court."*

Mr. Butler submits that the consequence of the deletion of the last two sentences in the first ground is, in effect, to repoint or to reorientate the first ground itself so that it is no longer an Aarhus Convention point but instead appears to be a different point but, he submitted, what that was, was not clear to him.

15. Mr. Galligan S.C. for the notice party adopted the submissions of Mr. Butler S.C. and in addition submitted that the only purported legal ground set out at ground number 1 was that:

> *"The Respondent erred in law in accepting and validating and relying on six planning applications with six EIS's for a single project contrary to Article 1 (a) of the EIA Directive 2011/92/EU."*

16. Mr. Galligan submitted that there was in fact no such Article 1(a) but that there was in fact an Article 1.2(a) which provides:

> *"For the purposes of this Directive, the following definitions shall apply:*
> *(a) 'project' means:*
> *— the execution of construction works or of other installations or schemes,*
> *— other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources".*

He submits that it was not clear at all what this ground was or whether an argument could be made that something was contrary to the definitions section of the Directive. He submitted that both the respondent and the notice parties - and indeed the Court - needed to understand what exactly was being argued.

17. Counsel for the respondent and the notice party stated that the relevant test was Order 84 rule 20 (3) which states as follows:

> *"It shall not be sufficient for an applicant to give as any of his grounds for the purpose of para. (ii) or (iii) of sub rule (2) (a) an assertion in general terms of the grounds concerned but the applicant should state precisely each such ground, giving particulars where appropriate and identify in respect of each ground the facts or matters relied upon as supporting that ground."*

They submit that there was a complete lack of specificity in relation to the first ground. They submit that there was no precise statement of what the ground was, or the particulars of such a ground, and it did not identify in respect of that ground the facts or matters relied upon as supporting that ground. Counsel therefore submits that it is not possible to ascertain from the first ground what exactly is the legal case which the applicant is making on the first ground and what are the precise facts and particulars giving rise to that ground.

18. Mr. Dixon B.L., counsel for the applicant, submits that the essence of the first ground is that the respondent erred in law in that it engaged in "project-splitting" (i.e. that it had entertained and considered and granted six grid connections in six separate applications) and what it should have done was to consider all grid connections as one single application. This he says is project splitting contrary to the Directive as interpreted by the case-law. He also submits that the Aarhus Convention was the policy reason behind the prohibition on project splitting. He says that these six planning applications were the ones set out at para. (e) under para. E1 of the statement of grounds.

(c) Assessment

19. The test in considering this issue is Order 84 rule 20 (3) which states that it shall not be sufficient for an applicant to give as any of his grounds, assertions in general terms of the ground concerned, but the applicant should state precisely each such ground giving particulars where appropriate, and identify in respect of each ground, the facts or matters relied upon as supporting that ground.

20. I am of the view that, in relation to the first ground, the applicant has not stated precisely what this ground is, he has not given particulars where appropriate and he has not identified in respect of this ground the facts or matters relied upon as supporting that ground. The first ground is entirely vague as to what the applicant's legal case is and does not provide any clarity at all either for the parties - or indeed for the Court - to understand what is the nature of the legal case being made by the applicant. In addition, the fourteen purported facts are merely background facts. None of the facts really set out precisely the facts or matters relied upon as supporting that ground. Thus, for example, the fact alleged at (n) is that the respondent did not carry out any EIA of the effects of the grid connection or send it to the Board for it to carry out an EIA of the whole project. However, this is simply a generalised assertion with no EIS exhibited and in those circumstances it is simply not possible for the respondent, or notice party, to know with any clarity what is the first ground upon which relief was sought by the applicant either as a matter of law or as a matter of fact.

21. In the circumstances, I am of the view that the first ground does not comply with the relevant rule, Order 84 rule 20 (3), and should be struck out.

The second ground

(a) Text

22. The second ground is as follows:

2. The Respondent erred in law in accepting and validating [***and relying on*** **]** planning applications PL16/468, PL16/470, PL16/469, which were an integral part of three current Appeals (PL16.244033, PL16.244034 and PL16.244055) to An Bord Pleanála [***contrary to Section 37.2.5 (a) of the Planning and development Act 2000 as amended]***;

Facts:

> a) *As at 1 (a) to (o) above.*
>
> b) *All six EIS's for the grid connections state that:*
>
> c) *"McCarthy Keville O"Sullivan Ltd (MKO), were appointed as Environmental Consultants on this project and commissioned to prepare an Environmental Impact Statement (EIS) that fulfils the requirements set out by Schedule 6 of the Planning and Development Regulations 2001, as amended, relating to the information to be contained in an EIS, and the "Guidelines on the Information to be contained in Environmental Impact Statements" (Environmental Protection Agency, 2002).*

[Paragraph 38]

d) *The Magheramore (PL09/664) and the Cloontooa (PL09/663) were both carried out*

e) *under the EIA Directive 97/11/EC and there was no EIA carried out for these projects.*

[Paragraph 39, 5th point]

f) *The planning applications for Magheramore (PL16/472) and Cloontooa (PL16/468) did not have in accordance with Annex IV of the EIA Directive 2011/92/EU a description of the physical characteristics of the* ***whole project*** *and the land-use requirements during the construction and operational phases.*

[Paragraph 39, 6th point]

g) *All six EIS's for the grid connections state that:*
"This EIS uses the grouped structure method to describe the existing environment, the potential impacts of the proposed development thereon and the proposed mitigation measures. Potential impacts are identified, assessed and mitigated under the following headings:

- *Human Beings;*
- *Flora and Fauna;*
- *Soils and Geology;*
- *Hydrology and Hydrogeology;*
- *Air and Climate;*
- *Noise and Vibration;*
- *Landscape and Visual;*
- *Cultural Heritage;*
- *Material Assets - including Traffic;*
- *Interaction of the Foregoing.*

The EIS also includes a non-technical summary, which is a condensed and easily comprehensible version of the EIS document"

[Paragraph 40]

h) *All six EIA's for the grid connections state that:*
"In accordance with the requirements of Article 3 of the European Directive 85/337/EEC, as amended by Council Directive 2011/92/EU and Section 171A of the Planning & Development Act 2000-2014. This process requires Mayo County Council, as the competent authority, to identify, describe and assess in an appropriate manner, in light of each individual case and in accordance with Articles 4 to 11 of the EIA Directive, the direct and indirect effects of the proposed development on the four indents stated in Article 3 of that Directive as set out below:

a) human beings, flora and fauna,
b) soil, water, air, climate and the landscape,
c) material assets and the cultural heritage, and
d) the interaction between the factors mentioned in paragraphs (a), (b) and (c).

[Paragraph 43]

i) *[The assessment does not] include an examination, analysis and evaluation and it does not identify, describe and assess in an appropriate manner, in light of each individual case and in accordance with Articles 4 to 11 of the EIA Directive, the direct and indirect effects of a proposed development on the four indents listed in Article 3 of that Directive.*

[Paragraph 44]

j) *The EIA carried out by the Respondent for PL 16/467 states that the current application was also submitted concurrently with another 5 similar applications for grid connections to other wind farm developments in the area, some granted permission and some currently on appeal to the board, but fails to consider the cumulative effects of these other 5 wind farm projects.*

[Paragraph 45]

k) *The Magheramore (PL09/664) and the Cloontooa (PL09/663) were both carried out under the EIA Directive 97/11/EC and there was no EIA carried out for these projects.*

[Paragraph 39, 5th point]

(b) Submissions

23. Mr. Galligan S.C. submitted that the amendment to the second ground was in order to argue that the respondent erred in law in accepting and validating and relying on the relevant planning applications contrary to s. 37.2.5 (a) of the Planning and Development Act, 2000 as amended ("the Act of 2000"). He submitted that in fact there was no such section as s. 37.2.5 (a) of the Act of 2000. There is however a s. 37 (2) and s. 37 (5). Counsel for the applicant confirmed that this was an error and that the relevant section of the Act of 2000, upon which he was relying was s. 37 (5) (a) of the said Act.

24. This section provides:

> *"No application for permission for the same development or for development of the same description as an application for permission for development which is the subject of an appeal to the Board under this section shall be made before—*
> *(i) the Board has made its decision on the appeal,*
> *(ii) the appeal is withdrawn, or*
> *(iii) the appeal is dismissed by the Board pursuant to section 133 or 138."*

25. Mr. Galligan S.C. however asked rhetorically how exactly was there a contravention of s. 37 (5)(a) of the said Act? He submits that as none of the three relevant planning applications were exhibited and none of the three appeals were exhibited it was impossible for the parties to work out - based on the grounds before the Court or indeed the evidence before the Court - whether there was any factual basis on which there was an overlap between the planning applications and the appeal. He says therefore, that it was impossible for the parties to assess this ground at all. He also submits that the purported facts set out in the statement of grounds at number 2 did not relate in any way to the purported legal ground set out at ground 2. It was submitted that the facts set out were simply too vague to allow the respondent, the notice party (or indeed the Court) to assess what was the legal and/or factual case

which the applicant was making. He states that this was simply not an acceptable approach to the pleading of this matter. Mr. Galligan S.C. submits that the respondent and notice party simply did not know what was the case they had to meet, there were no specific factual assertions, and the assertions were too broad and too vague.
26. Mr. Butler S.C. also submitted that although the second ground was an alleged breach of s. 37 (5) of the Act of 2000 (i.e. that the planning authority received applications when appeals were in existence) the entire of the supporting facts related to alleged EIS deficiencies and assessments. Therefore, the factual grounds set out have no bearing on the alleged legal case being made and therefore it failed the legal test under Article 84 rule 20 sub rule 3.
27. Mr. Dixon B.L. submitted that the projects seeking connections to the grid were in reality part of the relevant appeals and that therefore this is a breach of s. 37 (5)(a) of the Act of 2000. In response to a question as to why the relevant factual grounds all refer to the EIS, he submits that they were there to illustrate the linkage between both issues.

(c) Assessment

28. I have to confess that I was at a loss in trying to understand what precisely was the applicant's case, both as a matter of law and on the facts. The legal test under Order 84 rule 20 (3) is not that the statement of grounds should be asserted in general terms, but instead that the applicant should state precisely each such ground, giving particulars where appropriate and identify in respect of each ground the factual matters relied upon as supporting that ground.
29. Having considered all three drafts of the statement of grounds and having heard counsel for the applicant on a number of occasions, it is not clear what are the precise grounds for judicial review and in respect of each such ground what are the facts or matters relied upon as supporting that ground. They are not set out with the requisite precision as is required under the rules. If, for the purposes of argument, the essence of this ground is an alleged breach of s. 37 (5) (a) of the Act of 2000, it is not set out with any precision what are the facts or matters relied upon as supporting that ground. Instead, numerous facts are recited almost all of which are irrelevant. Even where a fact is relevant it is simply a summary or repetition of the relevant legal requirements without in any way trying to say on what factual basis there is an alleged breach of the legal requirements.
30. In the circumstances I am of the view that the ground also fails to satisfy the test set out in O. 84 r. 20 (3) and should be struck out.

The third ground

(a) Text

31. The third ground is as follows:

*3. The Respondent failed to comply with the legislation adopted by Ireland to implement the ECJ judgement in Case C-50/09 (Commission v Ireland). In particular, the Respondent failed to comply with the provisions of the European Union (Environmental Impact Assessment) (Planning and Development Act 2000) Regulations 2012 (S.I. 419 of 2012), or its amendments to Section 2 of the Planning and Development Act 2000, as amended, which were transposed into Irish law in order to implement the judgement in Case C-50/09 [**contrary to Section to Section 172 1G of the Planning and Development Act 2000 as amended**;]*

a) *The EIAs only describe and assess the information in the EIS.*

[Paragraph 50]

b) *The EIS submitted does not comply with the codified EIA Directive 2011/92/EU*

[paragraph 51, 1st point]

c) *all six EIS's for the grid connections state that:*
"McCarthy Keville O"Sullivan Ltd (MKO), were appointed as Environmental Consultants on this project and commissioned to prepare an Environmental Impact Statement (EIS) that fulfils the requirements set out by Schedule 6 of the Planning and Development Regulations 2001, as amended, relating to the information to be contained in an EIS, and the "Guidelines on the Information to be contained in Environmental Impact Statements" (Environmental Protection Agency, 2002).

[Paragraph 38]

(b) Submissions

32. The third ground is that the respondent failed to comply with s. 172 (1G) of the Act of 2000, as amended.
33. Section 172 (1G) provides that:-

"In carrying out an environmental impact assessment under this section the planning authority or the Board, as the case may be, shall consider —
(a) the environmental impact statement;
(b) any further information furnished to the planning authority or the Board pursuant to subsections (1D) or (1E);
(c) any submissions or observations validly made in relation to the environmental effects of the proposed development;
(d) the views, if any, provided by any other Member State under section 174 or Regulations made under that section."

25. (b) Submissions
34. Mr. Butler S.C. submits that whilst this might have some *prima facie* coherence (as opposed to the two previous grounds) the facts set out in relation thereto simply do not support it or clarify it in any respect whatsoever. He submits that as the EIS is not exhibited, how is the Court to judge the facts or statements at para. (A) that "the EIAs only describe and assess the information in the EIS". He also submits that the facts at (b) and (c) were simply a repetition of earlier facts and did not add anything to the statement of ground in question.
35. Mr. Galligan S.C. submits that if ground 3 was s. 172 1G of the Act of 2000 then the question was which particular part of this section was the applicant complaining about, which parts were alleged to have been contravened and what were the relevant factual issues giving rise to this complaint. He submits that this ground also did not have the specific legal or factual precision required by the rules.
36. Mr. Dixon B.L. submitted that this ground was that the summary of the EIS was not a sufficient manner in which to conduct an EIA.

(c)Assessment

37. Having considered the third draft of the statement of grounds and having considered the third set of submissions by Mr. Dixon B.L., it might be possible to glean an outline of what is the nature of the case which the applicant is trying to make under this ground. That however is not the test. The test is that the applicant should state precisely what each ground is, give particulars where appropriate and identify, in respect of each ground, the factual matters relied upon as supporting that ground. What is set out at

ground number 3 does not meet that threshold. It simply alleges that there is a breach of a particular section without specifying precisely how the section is breached and it provides no factual matters to be relied upon as supporting that ground.
38. Therefore, I am of the view that this ground has not satisfied the relevant test and also should be struck out.

The fourth ground

(a) Text

39. The fourth ground states as follows:

*4. The Respondent erred in law in accepting and validating [**and relying on]** six planning applications contrary to subsection (1B) of section 172 of the Planning and Development Act 2000, as amended. In particular, the EIS's were not prepared under the EIA Directive 2011/92/EU and the EIS's failed to include the mandatory information specified in Annex IV of the EIA Directive 201I/92EU and there was [**non compliance with Article 3 of the EIA Directive 2011/92/EU**;]*

Facts.

***[None of the 6 EIS's include adequately or at all** :-]*

1. A description of the project, including in particular:

*(a) a description of the physical characteristics of the **whole project** and the land-use requirements during the construction and operational phases;*

(b) a description of the main characteristics of the production processes, for instance, the nature and quantity of the materials used;

(c) an estimate, by type and quantity, of expected residues and emissions (water, air and soil pollution, noise, vibration, light, heat, radiation, etc.) resulting from the operation of the proposed project.

2. An outline of the main alternatives studied by the developer and an indication of the main reasons of this choice, taking into account the environmental effects.

3. A description of the aspects of the environment likely to be significantly affected by the proposed project, including, in particular, population, fauna, flora, soil, water, air, climatic factors, material assets, including the architectural and archaeological heritage, landscape and the interrelationship between the above factors.

4. A description [1] of the likely significant effects of the proposed project on the environment resulting from:

(a) the existence of the project;

(b) the use of natural resources;

(c) the emission of pollutants, the creation of nuisances and the elimination of waste.

[1] This description should cover the direct effects and any indirect, secondary, cumulative, short, medium and long-term, permanent and temporary, positive and negative effects of the project.

5. The description by the developer of the forecasting methods used to assess the effects on the environment referred to in point 4.

6. A description of the measures envisaged to prevent, reduce and where possible offset any significant adverse effects on the environment.

7. A non-technical summary of the information provided under headings 1 to 6.

8. An indication of any difficulties (technical deficiencies or lack of knowhow) encountered by the developer in compiling the required information.

[Paragraph 41]

(b) Submissions

40. The plea at ground 4 appears to be that the respondent erred in accepting six planning applications contrary to s. 172 (1B) of the Act of 2000 as amended and also that the EISs failed to include the mandatory information specified in Annex 4 of the EIA Directive.
41. However, it is submitted by the notice party and the respondent that the so-called facts set out therein are not facts at all, but simply a repetition of a whole series of legal obligations. They submit that there were no legal or factual specificity about these alleged breaches sufficient to enable them to understand the case being made against them up to the required standard in Order 84 rule 20(3). They submit that what the applicant has done is to set out the legal requirements, then say the respondents are in breach of the legal requirements and then say to the Court – in effect - that it is now up to the Court and the parties to figure out precisely how the respondents were in breach of the legal requirements. Mr. Galligan S.C. submits that this was unacceptable in principle and unacceptable as a matter of law.
42. Mr. Dixon B.L. submits that this ground was that there was no EIA for the whole project - only for elements of the project.

(c) Assessment

43. Again I have to consider this plea in the light of the relevant test set out at Order 84 rule 20(3). Having considered the third iteration of the statement of grounds and having considered the submissions of Mr. Dixon B.L. it is not clear to me what is the precise legal case being made by the applicant and what are the facts or matters relied upon as supporting that ground. There is simply no sufficient statement setting out precisely what the ground is, giving particulars of that ground and identifying the facts or matters relied upon as supporting that ground. I agree with the submissions made by the respondent and notice party that all the applicant has done is to make a generalised claim of a breach of a legal obligation and then to state generally somehow that breach has occurred. That however, is not sufficient and I am of the view that the test has not been fulfilled in this regard. The fourth statement of grounds is again, too imprecise, and too unclear to fulfil the relevant test. It is also unfair to the notice party and the respondent as it simply does not allow them an opportunity to understand the case which they have to meet. I would therefore strike out this ground.

The fifth ground

(a) Text.

44. The fifth ground is as follows:

5. The Respondent contrary to the provisions of the Public Participation Directive 2003/35/EC, failed to publish in one or more newspapers circulated in the area and/or by electronic means, a notice informing the public of its decisions. Such notice shall further state that a person may question the validity of any decision of the planning authority by way of an application for judicial review, under Order 84 of the Rules of the Superior Courts (S.1. No 15 of 1986), in accordance with section 50 and shall identify where practical information on the appeal and review mechanisms can be found;

a. *No notice was published in any newspaper.*
b. *No information was given electronically to the public.*

[Paragraph 12, 5th point]

(b) Submissions

45. Mr. Galligan S.C. submitted that in relation to the fifth ground the Public Participation Directive does not specify any particular measure by means of which a notification has to occur. There is no requirement to publish a notice in any newspaper or to give information electronically to the public. In response to a question from the court to Mr. Dixon B.L. as to what specific provision of the Public Participation Directive he was relying on, Mr. Dixon replied that he was not relying on any particular provision but on the Directive as a whole.

(c) Assessment

46. I am of the view that the fifth ground also has not satisfied the relevant test required by Order 84 rule 20 (3). It is not sufficient to point to the Directive as a whole and expect the parties to figure out what the case is. Moreover, there are no factual matters set out supporting this ground. In the circumstances I would strike out the fifth ground also.

Conclusion

47. In the circumstances, I would set aside the grant of leave to apply for judicial review.