[2024] IEHC 156

THE HIGH COURT
PLANNING & ENVIRONMENT

[H.JR.2021.0001110]

IN THE MATTER OF SECTION 50 OF THE PLANNING AND DEVELOPMENT ACT 2000 (AS AMENDED)

BETWEEN

SAVE ROSCAM PENINSULA CLG, SOPHIE CACCIAGUIDI-FAHY, MARTIN FAHY AND PHILIP HARKIN

APPLICANTS

AND

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

RESPONDENTS

AND

ALBER DEVELOPMENTS LIMITED

NOTICE PARTY

(No. 5)

JUDGMENT of Humphreys J. delivered on Monday the 25th day of March, 2024

1. The test for an amendment of pleadings involves three key elements within the overall envelope of the interests of justice: explanation, arguability, and lack of irremediable prejudice. This application relates to the first issue – explanation. Where the only explanation offered on affidavit for an amendment is, in effect, a belief that the amendments were merely particularising, can that be a basis for any change that goes beyond the mere provision of particulars?

Judgment history

2. In *Save Roscam v. An Bord Pleanála (No. 1)* [2022] IEHC 202, [2022] 4 JIC 0809, I decided certain issues on costs protection adversely to the applicants and also decided to refer certain related issues to the CJEU.

3. In *Save Roscam v. An Bord Pleanála* (*No. 2*) [2022] IEHC 328, [2022] 6 JIC 0903, I granted leave to appeal on the costs issue.

4. In *Save Roscam v. An Bord Pleanála* (*No. 3*) [2022] IEHC 425, [2022] 7 JIC 1402 I made certain directions in relation to the reference to the CJEU.

5. In *Save Roscam v. An Bord Pleanála* (*No. 4*) [2022] IEHC 426, [2022] 7 JIC 1403, I made the formal order for reference to the CJEU. That reference was subsequently withdrawn following clarification of domestic law on costs by the Supreme Court.

Facts

6. The notice party developer applied for permission for the present development and submitted plans and particulars on 9th July, 2021.

7. An appropriate assessment was conducted which concluded that the relevant European sites would not be adversely affected.

8. An environmental impact assessment was conducted which concluded that adverse effects could be mitigated.

9. The board concluded that a grant of permission would not materially contravene the Galway City Development Plan in relation to zoning, but would so contravene the plan in relation to plot ratio/ density. The board decided that this contravention could be justified by reference to government policy and ministerial guidelines.

10. Permission was granted with 33 conditions on 28th October, 2021.

Procedural history

11. The applicants filed a statement of grounds challenging this decision on 17th December, 2021.

12. Liberty to file an amended statement of grounds was granted on 20th December, 2021.

13. The amended statement of grounds was filed on 21st December, 2021. Certain grounds were subsequently adjourned generally.

14. The issue of costs protection then arose as set out above. Following the resolution of that issue, all relevant papers were exchanged and a hearing date was fixed for 29th May, 2024.

15. Subsequent to the fixing of the date, the applicants brought a motion seeking to amend the amended statement of grounds. It is with that motion that we are now concerned.

Relief sought in motion

16. The reliefs sought in the motion are as follows:

> "1. An Order pursuant to Order 84 Rule 23 of the Rules of the Superior Courts as amended granting liberty to the Applicants to amend their grounds of application in accordance with the draft Amended Statement of Grounds annexed hereto at Schedule 1.

2. Costs."

17. Certain proposed amendments are not objected to – the criticism is levelled at the changes to sub-grounds 6 and 11.3, which are set out below.

The law in relation to amendment

18. The law on amendment of pleadings has been exhaustively discussed elsewhere, and the essential issues are the interests of justice having regard to explanation, arguability (to a substantial grounds standard in the planning context) and lack of irremediable prejudice.

Application of principles to the facts here

19. As regards substantial grounds, that doesn't seem to be a huge issue in relation to the particularising points.

20. As regards irremediable prejudice, any new factual points could derail a hearing date that has already been set, as here. While the opposing parties haven't pressed that too far, one can't be unduly complacent about allowing factually-based new issues to be introduced for the first time in a context where time has been allocated in a competitive list, briefs issued and so on. That could lead to a need for further affidavits with all of the potential for disruption that could entail. A legal point to be addressed by submission isn't always quite so problematic, especially where, as here, submissions are still awaited. That said, I don't in fact need to decide on the irremediable prejudice issue.

21. The critical issue for present purposes is explanation. What the applicants' solicitor says is:

"2. I say that, in their Statements of Opposition, the Respondents and Notice Party objected to the adequacy of the particulars of certain grounds furnished. That objection is not admitted, and the Applicants believe that the Grounds as furnished are adequate to ground the proceedings.

3. Without prejudice to the above, and to avoid time being taken up at the hearing addressing this issue, the Applicants elected to draft a revised Statement of Grounds including further particulars in respect of the matters objected to. A copy of these additional particulars was furnished to the Respondents, who ultimately confirmed that they accepted most but not all of the amendments. Specifically, they indicated that they do not accept the proposed amendments at Grounds 6.1 to 6.4 and the first, third, fourth and fifth unnumbered bullet points after 11.3."

22. One immediate misunderstanding that appears here is that the applicants seem to think that they have the right to "elect" to submit an amended statement of grounds following objections. That misconception leads us to the question as to whether there an explanation at all. The affidavit could have been a lot more explicit about that, but the natural inference is that the applicants think that their points are adequately particularised but are now wishing to spell out further particulars in case they are wrong about that.

23. That being the inferential explanation, the only amendments that could be allowed are particularising ones.

24. Overall, in the absence of an explanation for anything other than the furnishing of "further particulars", as it is put in the affidavit, the interests of justice favour permission for genuinely particularising points and not for points that go beyond that. Had the applicants wanted to pursue more substantial amendments they would have needed an explanation relating to that – at the risk of repetition, the only explanation offered relates to "further particulars".

25. Sub-ground 6 is proposed to be amended as follows

"Even were the Board to be correct in the above, it would still be in error in finding that the 2020 Guidelines warrant a grant of permission in circumstances where the predominant part of the Proposed Development would involve a 2-storey, cul-de-sac dominated approach, and would not return to traditional compact urban forms which created our finest town and city environments, as per paragraph 3.7 of those Guidelines.

<u>6.1 The Board failed to consider or determine whether the Proposed Development would be compatible with §3.7 of the Height Guidelines which stipulates that development proposals must move away from a 2-storey, cul-de-sac dominated approach."</u>

26. That appears to be paraphrase and adds little if anything so is acceptable.

27. The next amendment is:

<u>"6.2 The Board failed to consider or determine the Applicant's submission that the development was inappropriate because it constituted a 2 storey cul-de-sac form of development that is no longer considered appropriate in the Galway City Development Plan, the Urban Design Manual, or the Height Guidelines."</u>

28. That also seems to add little to the basic point and just describes it from another point of view.

29. The amendment continues:

<u>"6.3 The Board is precluded from granting permission for a material contravention of the Development Plan in reliance on the Height Guidelines where it has failed to establish that</u>

the Proposed Development complies with the Height Guidelines, in this instance the requirement to move away from a 2-storey, cul-de-sac dominated approach."

30. Again that seems to be merely a re-phrasing of the basic point and is acceptable.

31. Sub-ground 6.4 reads:

"The Board acted unreasonably if (which is denied) it reached any factual conclusion in relation to the Applicants' submission that the Proposed Development constituted a 2 storey cul-de-sac form of development that is no longer considered appropriate."

32. That plea is not particularly intelligible, which is probably not a great start. More specifically, it must fall outside mere particularisation. What the plea says is that if the board "reached any factual conclusion in relation to the applicants' submission" then it "acted unreasonably". *Any* factual conclusion? That seems a sweeping claim and certainly goes well beyond particularisation of the existing sub-ground 6.

33. The next pieces of text are un-numbered bullet points:

- "Part E3 §17 to 22 are relied on in relation to Ground 6. Reliance is placed on §3.7 of the Height Guidelines, the submission by Bucks Planning, on behalf of the Applicants, in particular §3-4, p16, p17, and §8-1, P182, as well as §6.5.3 p92, §6.5.4 p93, 94, 96, repeated at §6.5.6, p97, 98, and §6.5.7, p100, 101, and §6.5.8 p103. Reliance is also placed on the absence of reference to cul-de-sacs in the Application, the Inspector's Report, the Direction and the Decision. And the Applicant relies on the text of the documents submitted for their full meaning and effect.
- See the following in particular: Submission on behalf of Save Roscam by Bucks Planning, §3-4 p16-17, §6.5.3 p92, §6.5.4 p93-96, which is repeated at §6.5.6 p97-98, at §6.5.7 p100-101, §6.5.8 p103, and see also §8-1, P182. The Applicant relies on those documents and the other exhibits for their full meaning and effect."

34. These bullet points were not expressly objected to.

35. We turn then to sub-ground 11.3 which is proposed to be amended as follows

"The Board failed to identify, describe and assess, adequately or at all, or to reach reasoned conclusions in relation to, the likely significant effects of the project on the environment, in particular on bats. The information submitted by the Developer made it clear that there would be a loss of foraging habitat and a loss of suitable roosting sites (though it did not detect bats roosting in those sites.) The information confirmed that there would be an impact at the level of individual bats. The Board made findings on this basis as to the likely significant effects, but made no findings as to the measures necessary to prevent that effect, for the purposes of Article 8a of the EIA Directive and Article 12 of the Habitats Directive.

(1) As to the first sentence of §11.3, the Board either (a) ~~failed to~~ failed to consider relevant material contrary to S9(1) of the 2016 Act and A8a of the EIA Directive, or (b) failed to reach lawful reasoned conclusions in relation to the significance of effects as to impacts on bats. The test for significance of effects proposed at §6.4.3.3 of the EIAR, used by the Developer in relation to bats, and not obviously dissented from by the Board sets a standard for significance where an effect which (1) causes noticeable changes in the character of the environment but without significant consequences, (2) causes noticeable changes in the character of the environment without affecting its sensitivities, or (3) alters the character of the environment that is consistent with existing and emerging trends. This standard is not the same in law as the standard required to demonstrate compliance with A12 of the Habitats Directive, which requires proof that there will be no deliberate disturbance of bats, and no deterioration or destruction of breeding sites or resting places. Proof that there will be no remaining significant effects at population level is not a sufficient compliance with A12 of the Habitats Directive which operates at the level of the individual, rather than the species. Accordingly, the Board failed to apply the correct legal test for the lawful conclusion of an EIA."

36. Some (albeit not all) of this paragraph introduces new points. To that extent, such matter is not properly particularisation and the applicants haven't averred that these new points were overlooked by oversight.

37. More specifically there seem to be three points made:

(i) "(1) As to the first sentence of §11.3, the Board either (a) ~~failed to~~ failed to consider relevant material contrary to S9(1) of the 2016 Act and A8a of the EIA Directive, or" – the allegation in (a) of failure to consider relevant material is a new point;

(ii) "(b) failed to reach lawful reasoned conclusions in relation to the significance of effects as to impacts on bats." – that is just a rephrase of what is already pleaded so could be allowed;

(iii) "The test for significance of effects proposed at §6.4.3.3 of the EIAR, used by the Developer in relation to bats, and not obviously dissented from by the Board sets a standard for significance where an effect which (1) causes noticeable changes in the

character of the environment but without significant consequences, (2) causes noticeable changes in the character of the environment without affecting its sensitivities, or (3) alters the character of the environment that is consistent with existing and emerging trends. This standard is not the same in law as the standard required to demonstrate compliance with A12 of the Habitats Directive, which requires proof that there will be no deliberate disturbance of bats, and no deterioration or destruction of breeding sites or resting places."– this must be viewed as a new point, not mere particularisation

(iv) "Proof that there will be no remaining significant effects at population level is not a sufficient compliance with A12 of the Habitats Directive which operates at the level of the individual, rather than the species. Accordingly, the Board failed to apply the correct legal test for the lawful conclusion of an EIA". – the existing text pleads breach of art. 12 of the habitats directive, and these sentences explain why that is, so this addition can be regarded as allowable as legitimately particularising.

38. The next paragraph is:

"(2) As to the second sentence of §11.3, the information submitted by the Developer said there would be a loss of foraging habitat, but this would be minimised, and lost habitat would be replaced."

39. This is not objected to.

40. The next amendment is:

"(3) As to the third sentence of §11.3, the Developer's assertion that there would be no significant effect at the population level constitutes an admission that such effects will occur at the level of the individual. The Board erred in failing to recognise that this was the wrong legal test to apply, or in failing to explain how it considered that application of this test could amount to a sufficient finding for the purposes of A12 of the Habitats Directive."

41. While possibly borderline, this is akin to the final two sentences of the new sub-para (1) and is essentially particularising.

42. The next amendment is:

"(4) As to the fourth sentence of §11.3, The assertion of lack of significant effect in this context was made at a population level, not at the level of the individual. The fact that the assertion is made at the population level constitutes an admission that impact at the level of the individual either has not been excluded or has not been considered. In either case, the Board erred because it failed to identify that the expression of the wider proposition either constituted an admission of the narrower or a failure to consider same."

43. This is also essentially particularising.

44. The next amendment is:

"(5) Overall, the test for the purposes of A12 of the Habitats Directive requires that impact on individual specimens of bat requires a derogation licence pursuant to A16 of the Habitats Directive (as implemented by R54 of the Habitats Regulations), and that the Board cannot lawfully grant permission unless it has established that there will be no deliberate disturbance of bats, and no deterioration or destruction of breeding sites or resting places, or has established that a derogation licence has been granted to authorise such derogation."

45. This introduces a discussion of derogation which goes beyond particularisation of what was originally pleaded. The original plea was about measures to prevent adverse effects so as to comply with art. 12. Launching a discussion of derogation licences is a new point, not particularisation. The applicants haven't averred that this new point was overlooked through oversight.

46. The next amendment is:

"(6) See in relation to Ground 11.3, §6.4.2.2 of the EIAR main report, §6.4.3.3, §6.4.4.4, §6.5.1.3, §6.5.1.4, §6.5.1.7, §6.5.1.10, §6.5.2.4, §6.5.2.5.1 (p6-38 to 6-48), §6.5.2.7, §6.6.2.2.1, §6.6.3.2, §6.6.3.3, §15.1 Schedule of Mitigation #25 and #27; Inspector's Report §12.3.2 p77-80; submission of Martin Fahy, §6.10 to 6.12; submission by Buck Planning on behalf of Save Roscam, §6.3.4.2; report of the Chief Executive of Galway City Council, p8. The Applicant relies on those documents and the other exhibits for their full meaning and effect.

(7) Factual Ground E3 §31 is relied on respect of Ground 11.3."

47. These points were not objected to.

Costs

48. For the purposes of proposing a default order as to costs, one would not normally be too inclined to get into the issue in too much detail, so I will confine matters at this stage to saying that one might take the view that insofar as the applicants were successful, this could be said to be more than outweighed by the refusal of the more extensive amendments. So no order as to costs would seem to be a reasonable default position subject to any contrary argument.

Summary

49. In outline summary, without taking from the more specific terms of this judgment:

(i) the test for amendment of pleadings is the interests of justice, having regard to explanation, arguability (to substantial grounds level in the planning context), and lack of irremediable prejudice;

(ii) where the only explanation given was a belief that particularisation was not necessary, that can only support amendments that are in the nature of providing particulars, not of introducing new points - support for the latter would require a more substantive explanation, such as lawyers' oversight, which is lacking here; and

(iii) even if an explanation had been given for the other amendments, if the context is, as here, a situation where a date has already been fixed, the court would need to look critically at the issue of whether allowing any new fact-related ground could have the potential to derail a hearing date by requiring further replying evidence, thereby creating irremediable prejudice; however it is not necessary to decide that here.

Order

50. For the foregoing reasons, it is ordered that:

(i) there be liberty to file a second amended statement of grounds, within 7 days of this judgment, in the form sought with the exclusion of:

a. sub-ground 6.4;
b. sub-ground 11.3(1)(a);
c. in sub-ground 11.3(1), the words "The test for significance of effects proposed at §6.4.3.3 of the EIAR, used by the Developer in relation to bats, and not obviously dissented from by the Board sets a standard for significance where an effect which (1) causes noticeable changes in the character of the environment but without significant consequences, (2) causes noticeable changes in the character of the environment without affecting its sensitivities, or (3) alters the character of the environment that is consistent with existing and emerging trends. This standard is not the same in law as the standard required to demonstrate compliance with A12 of the Habitats Directive, which requires proof that there will be no deliberate disturbance of bats, and no deterioration or destruction of breeding sites or resting places."; and
d. sub-ground 11.3(5).

(ii) the existing statements of opposition be taken to traverse the amended claims but if any opposing party wishes to expressly amend the statement of opposition they have liberty to do so within a further 21 days;

(iii) unless any party applies otherwise by written legal submission within 14 days from the date of this judgment, the foregoing order be perfected forthwith thereafter on the basis of no order as to costs;

(iv) the parties be directed to confirm the schedule of directions in advance of the next mention date; and

(v) the matter be listed for mention on Monday 8th April, 2024.