Judgment

Title: Friends of the Curragh Environment Limited -v- An Bord Pleanala

Neutral Citation: [2006] IEHC 390

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Court: High Court

Composition of Court: Finlay Geoghegan J.

Judgment by: Finlay Geoghegan J.

Status: Approved

Neutral Citation Number: [2006] IEHC 390
JUDICIAL REVIEW

2006 No. 240 J.R.
and
2006 No. 38 COM

BETWEEN/
FRIENDS OF THE CURRAGH ENVIRONMENT LIMITED

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

AND

THE TRUSTEES OF THE TURF CLUB, KILDARE COUNTY COUNCIL, PERCY PODGER AND ASSOCIATES, GERALDINE MAC CANN

NOTICE PARTIES

Judgement of Ms. Justice Finlay Geoghegan delivered the 8th day of December, 2006

The applicant seeks, leave to apply for judicial review seeking, *inter alia* orders

of *certiorari* quashing two decisions of An Bord Pleanála (PL 09.213787 and PL 09.213791) whereby it granted permission on 18th January, 2006, for (a) the re-alignment of approximately one kilometre of roadway on the Curragh of Kildare and (b) the demolition of the western half of the west stand at the Curragh Racecourse and construction of a 72-bedroom hotel and ancillary facilities.
The first named notice party (the Turf Club) was the applicant for such permissions from the second named notice party as planning authority. Permission had been granted by the second named notice party. Appeals were lodged against those permissions to the respondent by, *inter alia*, Percy Podger & Associates on behalf of the applicant.
This application is subject to s. 50 of the Planning and Development Act, 2000.
The motion seeking leave was issued on 2nd March, 2006. Subsequently an application was made on behalf of the Turf Club seeking admission to the Commercial List which was granted. In the initial hearing for directions the unsatisfactory nature of the original statement of grounds was raised and the applicant was given leave to file and serve an amended statement of grounds. That was done on 6th April, 2006. The amended statement of grounds is alleged to include additional grounds to those identified in the original application and grounding affidavit of Percy Podger. In addition, a further affidavit of Gerard Griffin sworn on 7th April, 2006, was filed on behalf of the applicant.
In response to these documents a notice of motion was issued on behalf of the respondent on 26th April, 2006, effectively seeking to preclude the applicant from relying on the additional grounds in the amended statement of grounds filed on 7th April, 2006.
At the leave hearing, it was accepted on behalf of the applicant that it would confine its application for leave to the grounds, which are set out below. In those circumstances counsel for the respondent indicated that it was not proceeding with its motion of 26th April, 2006.
The applicant had also included in its original motion an application for a protective costs order. That application was heard as a preliminary issue and on 14th July, 2006, Kelly J. refused such application for the reasons set out in his judgment of that date. He also decided certain issues relevant to this application.

Background facts

The Turf Club is engaged in the redevelopment of the Curragh Racecourse complex. This redevelopment is being undertaken under the auspices of a "Master Plan". It is stated that the Master Plan aims to create a modern racing complex with improved stands, visitor facilities and stables. The first phases of the redevelopment are the realignment of the existing Curragh Road, R.413, to the north to loop around the existing hotel and other facilities, the demolition of part of the existing stand and construction of a 72 bedroom hotel and ancillary facilities.
Two separate applications were lodged with the second named notice party in respect of the proposed road realignment on 23rd December, 2004 and in respect

of the demolition of half of the existing west stand and construction of a 72-bedroom hotel and ancillary facilities on 21st December, 2004. As already stated, permission was granted for each of the above subject to conditions. Appeals were lodged by several parties including on behalf of the applicant.
It is common case that there are further intended phases in the redevelopment. As part of the redevelopment, it is also proposed to construct a new main stand. A planning application for such development has been lodged.
The Turf Club submitted one environmental impact statement (EIS) in relation to the applications for permissions for the road realignment and hotel development. It is also common case that an EIS was not mandatory having regard to the thresholds set by the Planning and Development Act, 2000 and the Planning and Development Regulations, 2001 for the road realignment and hotel developments, viewed either individually or collectively. Article 103 of the Planning and Development Regulations, 2001 permits an EIS for a sub-threshold development. In the EIS it is stated:

> "On the basis of the cumulative impact of all elements, the proposed second phase of development as part of the overall Master Plan and the sensitive location of the proposed developments on the edge of the Curragh plains, it was deemed appropriate to prepare an EIS in this instance."

The EIS submitted is stated primarily to assess the two applications to the planning authority in December, 2004. The environmental impact assessment carried out was only of the two proposed developments for which permissions were sought and obtained. The failure of the respondent to assess the impact on the environment of the overall Master Plan for the Curragh Racecourse prior to making decisions on the two appeals relating to the road realignment and hotel development is central to the first ground on which the applicant seeks to challenge the validity of the decisions of the respondent.

Grounds

The grounds pursued by the applicant at the hearing of the application for leave may be summarised as follows:
1. The respondent acted in breach of Council Directive 85/337/EEC as amended in failing to carry out an environmental impact assessment of the overall Master Plan for the redevelopment of the Curragh Racecourse prior to reaching its decisions on the two appeals sought to be challenged herein. This ground was referred to as the "project splitting" ground.
2. Certain of the conditions attached to the respondent's decisions are alleged to constitute an unlawful delegation by the respondent to the planning authority. These conditions require agreement to be reached between the Turf Club and the planning authority in respect of certain matters. It is contended that the matters so delegated are not matters of detail and contrary to the principles set out by the Supreme Court in *Boland v. An Bord Pleanála* [1996] 3 I.R. 435. It is also

contended that such delegation and conditions are contrary to the EIA and public participation requirements of Directive 85/337 EEC as amended. These were referred to as 'the condition grounds'.

Applicable law

The application for leave is subject to s. 50 of the Planning and Development Act, 2000 (as amended). Section 50(4)(b) prohibits the High Court from granting leave unless it is satisfied that:

i. there are substantial grounds for contending that the decision is invalid or ought to be quashed; and

ii. the applicant has a substantial interest in the matter, which is the subject of the application.

Section 50(4)(c) so far as relevant further provides:

> "Without prejudice to the generality of *paragraph (b)*, leave shall not be granted to an applicant unless the applicant shows to the satisfaction of the High Court that –
>
> …

(i) the applicant –

> …

(III) in the case of a decision of the Board on any appeal or referral, was a party to the appeal or referral or is a prescribed body or other person who made submissions or observations in relation to that appeal or referral.

> . . .
>
> or
>
> (ii) in the case of a person (other than a person to whom clause (I), (II), (III), (IV) or (V) applies, there were good and sufficient reasons for his or her not making objections, submissions or observations, as the case may be."

Paragraph (d) of sub-s. 50(4) provides:

> "A substantial interest for the purposes of *paragraph (b)* is not limited to an interest in land or other financial interest."

The respondent and notice party submit that the applicant herein has not established that it has a substantial interest in the matters which are the subject of this application and have invited the Court to refuse leave on this ground alone, irrespective of its conclusion on the existence of substantial grounds for contending that the decisions are invalid or ought to be quashed.

Substantial interest or standing of applicant

The applicant submits that it has a substantial interest in the matters the subject matter of this application because of the following facts:

1. It is a company limited by guarantee, which is an environmental non-

governmental organisation whose interest lies in the protection of the environment especially of the Curragh of Kildare, inclusive of the site of the proposed developments.
2. It participated in the planning process before the planning authority. It lodged and pursued appeals to the applicant.
3. It put substantial funds and time into participation in the planning process.
4. The appeals to the respondent were grounded on issues of procedure and EIA law and also contained a complaint to the Commission.
The respondent and the Turf Club both contend that the matters advanced on behalf of the applicant do not give it standing in the sense of constituting a substantial interest in the matters the subject of the application within the meaning of s. 50(4)(b) of the Act of 2000. In particular, they submit that notwithstanding that the applicant was a party to an appeal before the respondent that by reason of the fact that it did not advance before the respondent on the appeals the grounds upon which it now seeks to challenge the validity of the decisions that it cannot be considered to have a substantial interest in matters which are the subject of this application within the meaning of s. 50(4)(b).
The requirement in s. 50(4)(b) of substantial interest is a requirement of standing. Order 84, r. 20(4) of the Rules of the Superior Courts, 1986 sets out the general standing required for an applicant in judicial review. It provides:

> "The Court shall not grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates."

Having regard to the similarity of wording, the clear intention of the legislature is that the courts in determining an application for leave to which s. 50 of the Act of 2000 applies should require a greater interest of the applicant in the matter which is the subject of the application than it would require if only O. 84, r. 20(4) of the Rules of the Superior Courts was applicable.
This stricter requirement of standing in s. 50(4)(b) is consistent with a number of decisions of the High Court to which I have been referred and invited to follow. In particular I was referred to the decisions of Ó Caoimh J. in *Ryanair Ltd. v. An Bord Pleanála* [2004] 2 I.R. 334, Macken J. in *Harrington v. An Bord Pleanála* (Unreported, High Court, 26th July, 2005) and O'Neill J. in *O'Brien v. Dun Laoghaire/Rathdown County Council* (Unreported, High Court, 1st June, 2006). Since the hearing in this matter, it has further been considered by Clarke J. in *Harding v. Cork County Council & Ors.* (Unreported, High Court, 12th October, 2006).
I have carefully considered each of the above, which are of great assistance and am in broad agreement with the principles set out. The application of those principles differs depending upon the facts of each case. None of those decisions relate to an applicant similar to the applicant herein or to a similar substantial interest as contended for herein.
Those decisions correctly emphasise the need to construe and apply the stricter requirement of standing in s. 50 in the context of the overall legislative scheme for

planning applications and appeals and the clear intention of the Oireachtas to limit the persons entitled to challenge planning decisions by Judicial Review.
However, as observed by Macken J. in *Harrington* the section must not be applied in such a restrictive manner as would preclude the courts from checking "a clear and serious abuse of process by the relevant authorities". She refers to the observations of Keane C.J. in*Lancefort Ltd v. An Bord Pleanála (No. 2)* [1999] 2 I.R. 270. In his judgment in considering the locus standi issue, he states at pp.308-309:

> "The authorities reflect a tension between two principles which the courts have sought to uphold: ensuring on the one hand, that the enactment of invalid legislation or the adoption of unlawful practices by public bodies do not escape scrutiny by the courts because of an absence of indisputably qualified objectors and, on the other hand, that the critically important remedy provided by the law in these areas are not abused."

Whilst in *Lancefort* standing was considered under O. 84 r. 20(4) and not s. 50 of the Act of 2000 it appears that a construction of s. 50 of the Act of 2000 which is consistent with the constitutional right of access to the courts requires the court to have regard to the first principle referred to by Keane C.J. above.
In practical terms, this seems to require the court to have some regard to the grounds on which the decision is challenged when deciding whether the applicant has satisfied the standing requirement of section 50(4)(b). The wording of the section so permits. What the applicant must have is a substantial interest in "the matter which is the subject of the application". In a judicial review application such as this, "the matter which is the subject of the application" is the challenge to the validity of the decision on specified grounds.
This approach also appears consistent with the general approach of the courts to questions of standing in judicial review. In practice where a respondent objects to the *locus standi* of an applicant, the objection may relate to the full challenge or it may only be to reliance on a particular ground. Similarly, a court in deciding on an objection may determine that an applicant *has* standing to challenge a decision on one ground but to lack the requisite standing to challenge the decision on other grounds.
Hence where, as in this application, the applicant seeks leave to pursue a challenge to the validity of a decision or decisions of the respondent on two distinct grounds, it appears that the court must consider not just whether the applicant has established standing to challenge the validity of the decision or decisions but rather whether it has established the requisite standing to challenge the decisions on each or either of the grounds.
It therefore appears necessary to consider whether the matters asserted on behalf of the applicant in these proceedings give it standing in the sense of a substantial interest in a challenge to the validity of these decisions of the respondent on the

two sets of grounds advanced and outlined above.
The fact that the applicant is a company limited by guarantee; which is expressed to be an environmental non-government organisation whose interest lies in the protection of the environment, especially of the Curragh of Kildare, and has participated in the planning process including as a party to the appeal cannot either individually or cumulatively alone mean that the applicant has the type of substantial interest required by s. 50(4)(b). This appears to follow from the statutory scheme provided for in the Act of 2000. That scheme provides for an appeal by way of full re-hearing before An Bord Pleanála and under s. 37(1)(a) and entitles any person who has made submissions or observations to the planning authority to bring such an appeal. Section 50(4)(b) and (c) set out above indicate a clear intention that a more limited class of persons should be granted leave to challenge a planning decision by way of judicial review.
Where, as in this instance, (1) the applicant has no financial, property or other interest adversely affected by the challenged decision; (2) has a general interest in the protection of the relevant environment and (3) primarily relies for standing upon its participation in the planning process and as a party to the appeal, then it appears that in the absence of special circumstances the question of whether or not the applicant has a substantial interest within the meaning of the section must be determined by reference primarily to the interest asserted expressly in the appeal or by implication from the nature of the appeal and the connection between that and the grounds upon which it has sought to challenge the validity of the decisions.
In *Harding v. Cork County Council & Ors.* in the context of an individual seeking leave to challenge a decision of a planning authority Clarke J. at p. 9 stated:

> "As pointed out by Macken J. in *Harrington* the interest which the applicant must have is one he has expressed as being peculiar or personal to him. It seems to me that it, therefore, follows that the interest which an applicant asserts as conferring standing on him must either be one which he has asserted in the course of the planning process (either expressly or by implication as deriving from the case he makes) or is one where there is a reasonable basis to assume that the matters giving rise to the relevant interest would have been asserted by the applicant concerned were his involvement in the process not interfered with by the matters which are contended for in the proceedings to represent a breach of proper process in the planning application."

It is therefore necessary to consider the contents of the appeals lodged on behalf of the applicant to the respondent against the decisions of the planning authority to grant permission for the road realignment and hotel development. Percy Podger & Associates lodged these appeals on behalf of the applicant. Mr. Podger who swore the grounding affidavit on behalf of the applicant herein referred to the appeals at

exhibit D of his affidavit. I have considered the documents exhibited carefully and also the Inspector's summary of the appeals and the applicant's own characterisation of the appeals in the written submissions to this Court. In the applicant's written submissions it is stated "the appeals to the respondent were grounded on issues of procedure and EIA law and also contained a complaint to the European Commission". This appears to me to be a fair summary of the nature of the appeals.

I have reached the following conclusions of fact in relation to the appeals lodged and further submissions on other third party appeals.

1. The interest asserted on behalf of the applicant in those appeals is in having the respondent determine the appeals in accordance with law and in particular the requirements of the EIA Directive.

2. The appeals contain no substantive objection to the permissions granted by the planning authority because of any specific identified adverse impact on the environment of the Curragh of Kildare.

3. The appeals make no submission in relation to the type of conditions that it might be permissible or impermissible for the Board to impose in the event that it granted permission having regard to either the requirements of Irish law or the EIA Directives. This lacuna must be considered in the context of the permissions granted by the planning authority, which in respect of the road realignment permission contains 45 conditions and the hotel permission 77 conditions. Certain of the conditions imposed by the planning authority were similar to the type of conditions now alleged to be impermissible insofar as they required subsequent approval or agreement with the planning authority. They also each contained conditions relating to archaeological monitoring and assessment which are analogous to the conditions in the decisions of the respondent which are likewise objected to as being contrary to the EIA Directive.

4. The applicant made no submission of substance in relation to those aspects of the developments to which the conditions to which objection is taken relate. In the case of the hotel development, these include the proposed sewage treatment works; the external finishes of the proposed hotel; landscaping; an external lighting scheme for the proposed development and archaeological appraisal and monitoring. In the case of the road alignment decision the conditions particularly objected to include those relating to design proposals to mitigate the effects of noise and light and archaeological appraisal and monitoring. Likewise, no substantive submissions were made relating to these aspects of the development. This lacuna must again be considered in the context of the Environmental Impact Statement which considers in detail most of these aspects of the developments and sets out proposed remedial, reductive and mitigation measures which it must have been anticipated might become the subject of conditions.

5. The appeals exhibited do not contain any express submission that the respondent was obliged to conduct an environmental impact assessment of the overall Master Plan for the redevelopment of the Curragh Racecourse prior to making its decision on the appeals as now sought to be contended in support of

ground 1 set out above. However, it appears from the Inspector's reports that the issue of "project splitting" was addressed by Percy Podger & Associates (presumably on behalf of the applicant) in its responses to the appeals of the other third party appellants in each appeal (see exhibit J on p. 10 in the report in the road realignment appeal and p. 9 in the report on the hotel development appeal). The applicant has not exhibited those responses in these proceedings.

6. The Inspector in his report in the road realignment appeal under a heading of "Master Plan" at p. 15 addresses in a limited way the overall Master Plan and "project splitting". It is unclear whether this resulted from submissions made on behalf of the applicant or it appears more probable by reason on a submission of An Taisce to the planning authority and referred to in the Inspector's report. The Inspector states at p. 15 insofar as relevant:

"Masterplan:

> While reference is made in the EIS to an overall masterplan for the redevelopment of the racecourse facilities, the EIS addresses only those developments before the Board i.e. this appeal and PL 09.213791. This is referred to as the first phase of the redevelopment (Ref. Section 1.16 of the EIS). Drawing 9460/MP/102 – *Masterplan Proposal – Phase 2* contained in the EIS indicates the overall proposals. This assessment and the assessment on PL 09.213791 will address only the proposals contained in the applications i.e. the realignment o the R 413 and a new hotel. With reference to 'project splitting' on file, if further applications are made for the redevelopment of the racecourse facilities it is within the remit o the p.a. and the Board, if appealed, to seek an EIS which should have regard to the development subject of the current appeals as well as any future proposals."

7. The copy complaints to the EU Commission submitted with the appeals do not expressly raise before the respondent any matters relevant to the grounds now advanced herein.

Conclusions on standing of applicant

The Court cannot be satisfied that the applicant has a substantial interest in the matters the subject of this application within the meaning of s. 50(4)(b). I have reached this conclusion for the following reasons.

The only interest expressly asserted on behalf of the applicant in the appeals before the respondent was in having the respondent determine those appeals in accordance with law and in particular the requirements of the EIA Directives. The applicant did not expressly assert any concern as to any specific adverse impact on the environment of the Curragh if the appeals were not so determined.

Considering matters in the most favourable light to the applicant it appears reasonable to assume that it was implicit in the expressly asserted interest that the applicant was concerned about a risk of damage to the important and sensitive environment of the Curragh if the appeals were not determined in accordance with the requirements of the EIA Directives and other relevant law.

Even making this assumption in favour of the applicant it does not appear that such interests could constitute a substantial interest to challenge the decisions of the respondent on the specified grounds unless the substance of matters relied on in the grounds as constituting the alleged invalidity were either brought to the attention of the respondent in the course of the appeals or the applicant can now establish that it was prevented from doing so or some special circumstances exist. No submission of prevention or special circumstances was made on behalf of the applicant.
This is so as the matters now raised in relation to both sets of grounds were matters, which it was open to the applicant to submit in the appeals. In the scheme of the Act of 2000 that was the latest point at which those matters should have been raised if the applicant wished to pursue them.
I have concluded that as a matter of fact, no submission relevant to the condition grounds was made to the respondent on the appeals and the applicant has not sought to advance any reason for which it was precluded from doing so. In relation to the project splitting ground, the factual position is slightly different. The findings set out above, considered in the most favourable light to the applicant mean that the issue may have been referred to in the applicant's submissions on the third party appeals. The contention now made is a straightforward one and capable of being simply put. The respondent is alleged to be bound to carry out an EIA of the overall Master Plan and not just the developments for which permissions were sought. The planning authority had not done this. If this was a matter which the applicant seriously wished to pursue it had to do so clearly in its appeal. This was not done. It cannot be considered to have raised the matter in such a way as would now support a substantial interest in a challenge to the validity of the decisions on this ground.

The Grounds

For the reasons set out earlier in this judgment, it is necessary notwithstanding the above conclusions to consider the grounds for the purpose of determining whether in refusing leave by the application of the above requirements for substantial interest the court is applying a too restrictive requirement. This might be so if it were precluded from checking "a clear and serious abuse of process by the relevant authorities". If so, special circumstances may exist for a less strict approach.

The applicant now asserts on the first ground that the respondent was in breach of Council Directive 85/337/EEC as amended in failing to assess the environmental impact of the overall Master Plan for the redevelopment of the Curragh Racecourse prior to making its decision on the appeals for what are essentially phases I and II of a multi-phase redevelopment. The applicant, correctly in my view does not contend that the respondent is in breach of any specific Irish statutory provision or regulation in relation to this ground.
In appeals such as these, where an environmental impact statement was submitted

to the planning authority, the obligations of the respondent are set out in s. 173(1) of the Act of 2000. This provides:

> "In addition to the requirements of *section 34 (3)*, where an application in respect of which an environmental impact statement was submitted to the planning authority in accordance with *section 172* , the planning authority, and the Board on appeal, shall have regard to the statement, any supplementary information furnished relating to the statement and any submissions or observations furnished concerning the effects on the environment of the proposed development."

The proposed development referred to s. 173(1) construed in the context of the Act of 2000 is the development for which permission is sought. This is apparent from the definition of development in s. 3 of the Act of 2000 and the requirement to obtain permission in respect of development under s. 32(1) and the provisions of ss. 33 and 34 in relation to the application and procedure relating to the granting of permission for development.

The question which requires to be considered is whether there is anything in Directive 85/337/EEC as amended which makes it clear that a planning authority must assess not only the impact on the environment of the development for which permission is sought but also the impact on the environment of future or proposed related developments for which permission is not yet sought.

Article 2 of the directive 85/337/EEC as amended provides:

> "1. Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, *inter alia*, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects. These projects are defined in Article 4.
>
> 2. The environmental impact assessment may be integrated into the existing procedures for consent to projects in the Member States, or, failing this, into other procedures or into procedures to be established to comply with the aims of this Directive."

The applicant in its written submissions correctly sets out what is involved in environmental impact assessment pursuant to the above where it states:

> "Environmental assessment is a procedure that ensures that the environmental implications of decisions are taken into account before the decisions are made."

The only decisions, which were being made by the respondent in relation to the subject matter of these applications, were the decisions on the appeals against the decisions of the planning authority in respect of the applications for road re-alignment and the 72-bedroom hotel and part demolition of the existing stand. No

decisions were being taken on the balance of the overall Master Plan for the redevelopment.
Accordingly, it appears that there is nothing in the Directive which makes it clear that a planning authority must assess not only the impact on the environment of the development for which permission is sought but also the impact on the environment of future or proposed related developments for which permission is not yet sought.
The term 'project splitting' appears to be used in more than one context, which gives rise to confusion. It is important to emphasise that there is no allegation in this application that the Turf Club has artificially divided the Master Plan to avoid the need to lodge an EIS or for an EIA on those parts of the project, which are the subject matter of the applications for planning permission. This is the 'project splitting' at issue in several of the cases to which the court was referred. It is clear from the case law that there are circumstances in which a planning authority should have regard to related developments or even proposed developments when considering whether an EIA is required. However the issue in this application is quite different. An EIS was submitted and an EIA conducted. The issue relates to the project or proposed development in respect of which the respondent or second named notice party as planning authority is obliged to carry out the EIA in circumstances where an EIS was submitted.
The conclusion which I have reached that Directive 85/337/EEC as amended only requires an environmental impact assessment of the project or development which is the subject matter of the application for planning permission and not of any related project which may be the subject of future or proposed application appears to me similar to the conclusion reached (albeit in relation a different national statutory scheme) by Davis J. in the English High Court in *R (on the application of Candlish) v. Hastings Borough Council* [2005] E.W.H.C. 1539 (Admin.).
Accordingly, the ground does not support any clear or serious abuse of process by the respondent. Further even had I formed the view that the applicant had satisfied the standing requirement to challenge the validity of the decisions on the above ground, I would have refused leave as there do not appear to be substantial or weighty arguments in favour of the contention of the applicant on this ground and hence it does not meet the threshold of being a "substantial ground".
It appears unnecessary to engage in any similar analysis in relation to the condition grounds. Those grounds were analysed by Kelly J in his judgment on the protective costs application herein. It is clear from that analysis, the case law referred to, s.34(5) of the Act of 2000 and the conditions in the impugned decisions of the respondent that the grounds advanced could not support a contention of clear or serious abuse of process. In so deciding, I wish to make clear I am not expressing any view as to whether the condition grounds constitute substantial grounds within the meaning of s. 50 of the Act of 2000. That is quite a different issue.

Article 10a of Directive 85/337/EEC

Finally the applicants sought, in reliance upon article 10a of Directive 85/337/EEC as inserted by Directive 2003/35/EC to submit that the court should not apply to this application the standing requirements in s. 50(4)(b) of the Act of 2000 but rather what it contends is a the lesser threshold which applies to it as a non-governmental organisation promoting environmental protection. Directive 2003/35/EC is not yet implemented in this jurisdiction. This submission is dependent upon the applicant establishing that the Directive has direct effect and it is entitled to rely on it in these proceedings.

A similar submission was made in the protective costs application heard by Kelly J. herein on which judgment was delivered on 14th July, 2006. In that judgment in these proceedings between the same parties appearing on the leave application Kelly J. determined that the Directive, though not given effect to by the State within the time permitted, cannot be considered to have direct effect for the reasons he set out.

By reason of that conclusion it appears to me that that issue of direct effect of article 10a of Directive 85/337/EEC as inserted by Directive 2003/35/EC is *res judicata* between the parties in these proceedings in the High Court and it is not open to the applicant to seek to revisit the issue in this application.

Accordingly, the Court is precluded by s. 50(4)(b) of the Act of 2000 from granting leave to the applicant on the grounds sought to be advanced as it is not satisfied that the applicant has a substantial interest in the matters which are the subject of this application. This conclusion is irrespective of whether those grounds constitute substantial grounds.

The Court has also concluded that the first ground is not a substantial ground.

Leave is refused.