

# PHILIP LEE

---

## JUDICIAL REVIEW EMERGING ISSUES AND OLD FAVOURITES

---

Leonora Mullett, Senior Associate

05 March 2021

---

# Introduction

- ❑ Emerging issues in Judicial Reviews
- ❑ Habitats- Strict Protection, AA Screening
- ❑ Water Framework Directive
- ❑ EIA – Alternatives, Connected sites
- ❑ Practical Learning



**PHILIP**LEE

DUBLIN | BRUSSELS | SAN FRANCISCO | LONDON

Title: Subtitle

# Strict Protection & Derogation Licences

☐ Strict Protection                      Art 12 Habitats Directive

☐ Art 5 Birds Directive

☐ Art 51 Regulations

☐ Derogation Licences                      Art 16 Habitats Directive

☐ Art 9 Birds Directive

☐ Article 54 Regulations

☐ EC (Birds and Natural Habitats) Regs. 2011 (Irish law)

# Art 12 - Strict Protection Annex IVa

a) all forms of deliberate capture or killing of specimens of these species in the wild

(b) **deliberate disturbance** of these species, particularly during the period of breeding, rearing, hibernation and migration;

(c) deliberate destruction or taking of eggs from the wild;

(d) **deterioration** or destruction of breeding sites or resting places.

# Art 16 – MS may issue Derogation Licence

Provided there are *no satisfactory alternative* and it is *not detrimental* to the maintenance of the populations of the species at a favourable conservation status and a criterion in (a) to (e) exists.

c) in the interests of public health and public safety, or for other imperative reasons of overriding public interest, including those of a **social or economic nature** and beneficial consequences of primary importance for the environment

# Irish Case Law re: Derogations

*Redmond v An Bord Pleanála* [2020] IEHC 151

Simons J held the fact that the Board has granted permission does not obviate the need for the developer to apply for a “derogation licence”.

*Highlands v An Bord Pleanála* [2020] IEHC 622

McDonald J found that the Applicant’s submission failed to take account of the full extent to which the Developer committed to undertake mitigation and monitoring measures and comply with 2011 Regs.

# UK Case Law re: Derogation Licences

## *Morge v Secretary of State* [2011] UKSC 2

*“I cannot see why a planning permission ..... should not ordinarily be granted **save only** where the Planning Committee conclude that the proposed development would both **(a) be likely to offend article 12(1) and (b) be unlikely to be licensed pursuant to the derogation powers.**”*



# In Practice

- ❑ A grant of permission does not obviate obligation to seek a derogation licence.
- ❑ Compliance with NPWS survey requirements / Mitigation Guidelines.
- ❑ Is utility of the mitigation measure verified?
- ❑ Is Development unlikely to be licensed under Art 54?
- ❑ See Commission Guidance Document



**PHILIP**LEE

DUBLIN | BRUSSELS | SAN FRANCISCO | LONDON

Title: Subtitle

# Appropriate Assessment Screening

- ❑ Capacity Issues at Ringsend WWTP
- ❑ Clonshaugh WWTP
- ❑ Ex-situ effects
- ❑ Mitigation Measures

# Capacity at Ringsend WWTP

- “....in so far as it increases the flow of foul water to Ringsend WWTP the development would not be likely to have significant effects on Natura 2000 sites.”
- “What is clear from the 2018 EIAR is that the situation will be significantly improved by the upgrade. Furthermore, the 2018 EIAR demonstrates that, notwithstanding the increased flow through the Ringsend WWTP in the future, the upgrade will compensate for this increase in flow”.

*Dublin Cycling Campaign [2020] IEHC 587*

# AA – Clonshaugh WWTP

- ❑ *Joyce Kemper v an Bord Pleanála* [2020] IEHC 477
- ❑ 18 sites screened in, 4 screened out
- ❑ Challenge based on asserted lacunae and inadequate reasons

*“The grounds as formulated amount to mere assertions. There is no attempt to identify any lacuna or flaw in any of the assessments.”*

*“ and the court is not, to be invited to rummage through a 100 paragraph grounding affidavit .....to see what, if any .....appropriate assessments were not correctly carried out.”*

# Effects on Ex -Situ species

- Highlands v An Bord Pleanála [2020] IEHC 622
- Effects on ex-situ avi-fauna excluded at Stage 1
- Timing of survey –over wintering birds
- No survey of SPA designated birds using subject lands
- Standard Construction methods protecting EU site – requires AA
- Court found obvious Lacuna in the screening



Source: <https://www.water.ie/projects-plans/ringsend/>

# PHILIPLEE

DUBLIN | BRUSSELS | SAN FRANCISCO | LONDON

Title: Subtitle

15

# EIA & Alternatives - *Kemper*

- WWTP changed from 800 000 pe to 500 000 pe
- Alleged failure to consider alternative sites for a 500pe plant
- Art 5(1) (d) EIA requires EIAR to inc..

*“ a description of the reasonable alternatives **studied by the developer**”*

“Again, the net practical effect of the construction contended for would be to rewrite Article 5(1)(d) of the EIA Directive and the Irish legislation transposing it so as to disregard the words *“studied by the developer”*”





**PHILIP**LEE

DUBLIN | BRUSSELS | SAN FRANCISCO | LONDON

Title: Subtitle

17

# EIA “Connected Developments”

- Sweetman / Bradan Beo Teo “Gorumna Island” [2021] IEHC 16
- *“... not require an EIA of a development and previous developments not the subject of an EIA simply because those developments are “connected..... EU law does not impose an obligation to carry out an EIA of a development simply because of a “connection” with other developments that lack an EIA.”*
- Different if devt was one stage in a multi-stage consent process and previous stages impermissibly had no EIA

# Water Framework Directive

- Gorumna Island - Board Order was quashed.
- **Article 4(1)** of Directive 2000/60/EC..... to ensure non-deterioration and the achievement of good surface water status when granting approval for a development affecting a surface water body.
- As EPA has not assigned a “water status” to Loch an Mhuilinn.....it was impermissible for the Board to assess whether the proposed works were compliant with Article 4(1) of the WFD.

# Overview

- Be alert to Art 12 and Strict Protection
- Consider effects on ex-situ designated species in AA
- Consider implications of Water Framework Directive
- Use caselaw as a resource.

# Resources

European Commission Guidance on strict protection	<a href="https://ec.europa.eu/environment/nature/conservation/species/guidance/index_en.htm">https://ec.europa.eu/environment/nature/conservation/species/guidance/index_en.htm</a>
<i>Redmond v An Bord Pleanála &amp; ors</i> [2020] IEHC 151	<a href="https://www.courts.ie/acc/alfresco/f3e3af70-c3c7-45fc-b757-01a5e785e6af/2020_IEHC_151.pdf/pdf#view=fitH">https://www.courts.ie/acc/alfresco/f3e3af70-c3c7-45fc-b757-01a5e785e6af/2020_IEHC_151.pdf/pdf#view=fitH</a>
<i>Morge v Secretary of State</i> [2011] UKSC 2	<a href="https://www.supremecourt.uk/cases/docs/uksc-2010-0120-judgment.pdf">https://www.supremecourt.uk/cases/docs/uksc-2010-0120-judgment.pdf</a>
<i>Sweetman v An Bord Pleanála &amp; ors</i> (“Gorumna Island”) [2021] IEHC 16	<a href="https://www.courts.ie/acc/alfresco/d419e3dd-9590-4671-bbaf-c37ccfb52d28/2021_IEHC_16.pdf/pdf#view=fitH">https://www.courts.ie/acc/alfresco/d419e3dd-9590-4671-bbaf-c37ccfb52d28/2021_IEHC_16.pdf/pdf#view=fitH</a>

<p><i>Highlands Residents Association &amp; anor v An Bord Pleanala &amp; ors</i> [2020] IEHC 622</p>	<p><a href="https://www.courts.ie/acc/alfresco/0f76ebe9-2d4c-4134-97cc-4f1a78281f9c/2020_IEHC_622.pdf/pdf#view=fitH">https://www.courts.ie/acc/alfresco/0f76ebe9-2d4c-4134-97cc-4f1a78281f9c/2020_IEHC_622.pdf/pdf#view=fitH</a></p>
<p><i>Dublin Cycling Campaign CLG v an Bord Pleanala &amp; ors</i> [2020] IEHC 587</p>	<p><a href="https://www.courts.ie/acc/alfresco/6aff01da-4f6b-41d8-a9e9-bca9eea2d757/2020_IEHC_587.pdf/pdf#view=fitH">https://www.courts.ie/acc/alfresco/6aff01da-4f6b-41d8-a9e9-bca9eea2d757/2020_IEHC_587.pdf/pdf#view=fitH</a></p>
<p><i>Joyce Kemper v an Bord Pleanala &amp; ors</i> [2020] IEHC 601</p>	<p><a href="https://www.courts.ie/acc/alfresco/b3ca46fa-2448-4fb8-b84c-9da16c69693b/2020_IEHC_601.pdf/pdf#view=fitH">https://www.courts.ie/acc/alfresco/b3ca46fa-2448-4fb8-b84c-9da16c69693b/2020_IEHC_601.pdf/pdf#view=fitH</a></p>

---


Q&A /  
Thank you

**PHILIP**LEE

DUBLIN | BRUSSELS | SAN FRANCISCO | LONDON



**Leonora Mullett**  
**SENIOR ASSOCIATE**

 +353 (0) 1 237 3700

 [lmullett@philiplee.ie](mailto:lmullett@philiplee.ie)

# PHILIPLEE

[philiplee.ie](http://philiplee.ie)  
[info@philiplee.ie](mailto:info@philiplee.ie)



**DUBLIN**  
7/8 Wilton Terrace  
Dublin 2  
Ireland  
T: +353 (0)1 237 3700

**BRUSSELS**  
EU Quarter, level 6 box 6,  
Schuman Roundabout, 2-4,  
1040 Brussels  
T: +353 (0)1 237 3700

**SAN FRANCISCO**  
388 Market Street, Suite  
1300, San Francisco,  
CA 94111  
T: +1 415 839 6406

**LONDON**  
2 Eastbourne Terrace,  
London, W2 6LG  
United Kingdom  
T: +44 20 3934 7010