

THE HIGH COURT

[2022] IEHC 29

[Record No. 2020/ 527 JR]

BETWEEN

KERRY FISH (IRELAND) UNLIMITED COMPANY

APPLICANT

AND

KERRY COUNTY COUNCIL

RESPONDENT

Judgment of Mr Justice Barr delivered extempore on the 21st day of January, 2022.

Introduction.

1. The applicant is an unlimited company which trades as a retail fish shop and restaurant, with an ancillary delicatessen, from a premises on The Mall, Tralee, Co. Kerry.
2. In 2017, a decision was made by the respondent to introduce traffic calming measures in Tralee town centre by means of the closure of Bridge Street and The Mall to vehicular traffic between 10:30 hours and 18:00 hours. The restrictions on vehicular traffic came into effect in December 2017.
3. A decision was made to suspend the operation of the traffic calming measures in light of the COVID-19 pandemic. The restrictions on vehicular traffic using the two streets were lifted from 28th March, 2020, until they were reintroduced on 17th May, 2020.
4. The applicant challenges the decision to reintroduce the traffic calming measures on the basis that the respondent did not carry out a screening assessment as to whether the measures would be likely to have a significant effect on a Natura 2000 site, as required by Directive 92/43/EEC (the Habitats Directive).

Background.

5. It is necessary to put this application in context by giving a brief summary of the background to the applicant's application herein. As already noted, on 10th November, 2017 the elected members of Kerry County Council decided to introduce traffic calming measures on Bridge Street and The Mall by restricting the hours during which those streets could be used by vehicular traffic. In particular, it was decided that the vehicles would be banned from those streets between 10:30 hours and 18:00 hours. The traffic calming measures decided upon were introduced pursuant to s. 38 of the Road Traffic Act 1994. They came into effect in December 2017. Prior to the introduction of those measures, submissions had been received from members of the public in relation to the proposed measures. The applicant had made a submission against the proposed measures.
6. The applicant did not challenge the respondent's decision of 10th November, 2017 to provide the traffic calming measures.
7. A review of the traffic calming measures was carried out in August 2018, when local business owners and members of the public were canvassed for their views on the measures. Seventy six submissions were received, of which 36 were in favour of pedestrianisation and 39 were against it, with one submission not expressing a

preference. According to the affidavit sworn by Mr. Michael Scannell, Director of Economic and Community Development in the respondent, the overwhelming feedback from pedestrians and shoppers was that pedestrianisation created a safe, relaxing, pleasant and enjoyable town centre, free from air and sound pollution, with improved pedestrian safety and mobility.

8. The findings of the public survey were discussed by the members of the respondent from the Tralee area on 19th November, 2018, at which meeting it was agreed that the traffic calming measures would remain in place.
9. In March 2020, Ireland went into lockdown as a result of the COVID-19 pandemic. The elected members of the respondent council for the Tralee area and a number of businesses in the town contacted the respondent requesting that the traffic calming measures be temporarily suspended. Mr. Quinlan, who is the owner of the applicant company, sent an email to the respondent on 28th March, 2020 at 11.10 hours in which he stated as follows:

"Michael,

I am writing to you in relation to The Mall in Tralee and as you are aware, we were up to last month experiencing a much reduced footfall in our premises as were many other retailers.

This has been severely exasperated by the current Covid-19 crisis and as people do not want to interact with others most want to pull up outside the door run in and get out as quickly as possible, without any interaction with anyone else.

While I accept your need to consult with others in KCC you can see the speed at which other much more important decisions are being taken in these times.

I am trying my best to keep my business open and pay my staff and pay my way as well as providing fresh and local seafood for the people of Tralee, we are actually working at a loss, but I feel the needs of the public are far greater than mine so we intend to try our best to serve them as best we can.

I am asking you to please show some compassion and make ours and the other businesses open in The Mall some way attractive for consumers by the opening of The Mall immediately.

Your swift reply would be appreciated."

10. In response to the COVID-19 emergency, the respondent temporarily suspended the traffic calming measures affecting Bridge Street and The Mall. Mr. Scannell sent the following email to Mr. Quinlan at 13.43 hours on 28th March, 2020:

"Liam,

The Mall will be open from today – the following email has been circulated[:]

As part of the response to the additional restrictions associated with COVID 19 the senior management team has been convening all morning and in order to facilitate the collection and dispersion of food from establishments in the town centre it has been agreed to open up The Mall on an emergency limited basis.

The opening of the Mall for this purpose does not in any way detract from the continuing policy of the Council to maintain the Mall as a daytime pedestrian area, and it will revert to such as soon as the emergency has passed.”

11. By email sent at 14.37 hours on the same date, Mr. Quinlan responded as follows:

"Michael,

Thank you for your understanding, we will do our bit to help as many as we can during this crisis. Talk soon.

Regards and thanks,

Liam.”

12. On 1st May, 2020 the government set out timelines for the reopening of society following the national COVID-19 restrictions introduced in March 2020. It was agreed at an online meeting of the respondent held on 13th May, 2020, that the temporary suspension of the traffic calming measures on Bridge Street and The Mall would end on 16th May, 2020 and that those measures would recommence the following day. On 17th May, 2020, the traffic calming measures on Bridge Street and The Mall resumed in operation.
13. On 27th July, 2020, the applicant moved its application for leave to proceed by way of judicial review against the decision made by the respondent to reintroduce the traffic calming measures on Bridge Street and The Mall in May 2020.

Submissions On Behalf Of the Applicant.

14. Mr. Devlin SC, on behalf of the applicant, submitted that the key issue in this case was that under the European Communities (Birds and Natural Habitats) Regulations 2011 (SI 477/2011), which implemented the Habitats Directive into Irish law, the respondent was obliged to carry out screening in relation to the necessity to carry out an appropriate assessment as required under Art. 6(3) of the Directive, prior to making the decision to implement the traffic calming measures in May 2020. It was accepted that they had not done that.
15. Counsel submitted that Regulation 42(1) of the 2011 regulations was the provision which placed that obligation on the respondent. It is in the following terms:

"42. (1) A screening for Appropriate Assessment of a plan or project for which an application for consent is received, or which a public authority wishes to undertake or adopt, and which is not directly connected with or necessary to the management

of the site as a European Site, shall be carried out by the public authority to assess, in view of best scientific knowledge and in view of the conservation objectives of the site, if that plan or project, individually or in combination with other plans or projects is likely to have a significant effect on the European site."

16. Counsel submitted that a "project" was defined in regulation 2 as including land-use or infrastructural developments, including any development of land or on land and any other land use activities, that are to be considered for adoption, execution, authorisation or approval, including the revision, review, renewal or extension of the expiry date of previous approvals, by a public authority and notwithstanding the generality of the preceding, includes any project referred to in subparagraphs (a), (b) or (c) to which the exercise of statutory power in favour of that project or any approval sought for that project under any of the enactments set out in the second schedule of the regulations applied. Among the enactments set out in the second schedule were the Road Traffic Acts 1961 – 2010.
17. Counsel submitted that as the traffic calming measures that were implemented by the respondent in this case related to the use of land, namely the use of the two roads in question, there was a clear obligation placed on the respondent under the regulations to carry out a screening exercise as required under the Habitats Directive prior to implementing the traffic calming measures. In this regard, counsel submitted that it was not merely the removal of vehicular traffic from the roads in question that was of relevance, it was also the fact that such traffic would be diverted elsewhere and that that may have an effect on a European site.
18. Counsel submitted that the traffic calming measures that were adopted by the respondent in this case came within the definition of "project" under either subparagraphs (a) or (c) of the definition given in regulation 2, as it regulated the way in which the public road was used. It was submitted that if the court accepted the argument that these measures came within the definition of project as contained in the regulations, then regulation 42 applied and the public authority must do a screening in relation to the necessity to carry out an appropriate assessment.
19. Counsel submitted that it was not necessary that development in the form of carrying out works on the land should be present before the activity could be deemed to be a project within the definition contained in the regulations. In this regard, counsel referred to the decision in *Coöperatie Mobilisatie for the Environment UA*, a judgment of the CJEU (joined cases C-293/17 and C-294/17), where it was held that the Habitats Directive did not define the concept of "project". The court held that the requirements relating to "works" or "interventions involving alterations to the physical aspect" or even an "intervention in the natural surroundings" were not to be found in Art. 6 (3) of the Habitats Directive. The court further held that the definition of "project" for the purposes of the EIA Directive attached conditions to that concept that were not specified in the equivalent provision of the Habitats Directive. At paragraph 66, the court noted that the mere fact that activity may not be classified as a "project" within the meaning of the EIA

Directive did not suffice in itself, to infer therefrom that the activity may not be covered by the concept of "project" within the meaning of the Habitats Directive.

20. In that case the court was considering whether the grazing of cattle or the application of fertilisers on the surface of the land or below its surface, could be classified as a "project" within the meaning of Art. 6 (3) of the Habitats Directive. In determining that question, the court held that it was important to examine whether such activities were likely to have a significant effect on a protected site. The court went on to hold that the carrying out of such activities in the vicinity of a Natura 2000 site may be classified as a "project" within the meaning of that provision, even if those activities did not constitute a "project" within the meaning of the EIA Directive.
21. Insofar as it was alleged by the respondent that the applicant had failed to challenge the decision to implement the measures in 2017 and that that prevented him from raising the challenge based on failure to comply with the provisions of the Habitats Directive and the 2011 regulations in relation to the 2020 decision, counsel submitted that that submission was not sound in law.
22. In this regard counsel referred to the decision in *Friends of the Irish Environment v An Bord Pleanála* (Case C – 254/19) and in particular to paragraph 42 of the opinion of the Advocate General, where it was stated that the fact that a person had not challenged the first grant of planning permission, which had allegedly been made in breach of the provisions of European law, did not prevent the applicant challenging the second decision. If the original decision was defective, it was all the more important that the applicant should challenge the second decision. Counsel submitted that that portion of the Advocate General's opinion had been accepted by the court in its judgment; see paragraphs 26 and 50.
23. In relation to the submission raised by the respondent that the applicant had not pleaded this aspect of the case with sufficient particularity in the statement of grounds, counsel submitted that the test which the court should apply when looking at the pleadings in the case was whether it was "fair and reasonable" to allow the applicant to put the case forward based on the matters that had been pleaded by him in the statement of grounds. In this regard counsel referred to the judgment of Haughton J. in *People Over Wind v An Bord Pleanála* [2015] IEHC 271 and in particular to paras. 53 – 59. Haughton J. outlined at para. 55:

"The Court also accepts that in assessing the scope of the Statement of Grounds the approach that should be adopted is that of a "fair and reasonable reading" – but not from the point of view of one or other parties to the proceedings but rather from the point of view of the Court on an objective basis."
24. Counsel submitted that while the 2011 regulations were not explicitly referred to in the applicant's statement of grounds, it was clear from the matters pleaded at paragraph E (xvi) that the applicant was referring to those regulations. It was further submitted that even if such a reference was not implicit in the matters that had been pleaded in that

paragraph, the respondent was well aware that the regulations were being relied upon by the applicant, because they had specifically referred to them in their statement of opposition.

25. Insofar as the respondent had criticised the applicant's challenge on the basis that it had merely made a bare assertion of there being a risk posed to a European site by the project and that that was not sufficient to oblige the public authority to carry out any screening for the necessity to carry out an appropriate assessment under the directive; it was submitted that that argument was to invert the burden of proof. It was submitted that under the Habitats Directive and the 2011 regulations, the obligation was not on the applicant to show that there was a risk of a significant effect on a European site; rather the obligation was cast upon the public authority to carry out the necessary screening to rule out the risk of any significant effect on such site.
26. In this regard, counsel stated that the relevant site was the Tralee Bay Complex Special Protection Area, as provided for in SI 175/2019. It was submitted that while the precise distance between the area covered by the traffic control measures on Bridge Street and The Mall and the nearest portion of the bay was not explicitly stated in evidence, it could be determined from the map attached to that statutory instrument. It was clear from that map that the distance between the protected site and the area of the traffic calming measures was relatively small. It was submitted that in these circumstances, it was not the duty of the applicant to show that there was a risk of a significant effect on the site, it was the duty of the respondent as public authority to carry out a screening exercise to show that such risk did not exist.
27. In summary, counsel submitted that the traffic calming measures that were implemented by the respondent in 2020 constituted a "project" within the meaning of the 2011 regulations and therefore the provisions of regulation 42 applied. These required that a screening exercise be carried out to ensure that there was no risk to a protected site prior to the project being commenced. That had not been done in advance of either the 2017 decision, or the 2020 decision and on that basis the latter decision had to be struck down.

Submissions On Behalf Of the Respondent.

28. Mr. Esmonde Keane SC, on behalf of the respondent, submitted that the applicant was not entitled to mount any challenge to any decision taken by the respondent based upon any alleged breach of the 2011 regulations for the simple reason that it had not referred to those regulations at all in its statement of grounds, upon which leave have been granted. It was submitted that the provisions of Order 84, rule 20 (3) of the Rules of the Superior Courts were clear. They provided that full and detailed particulars of all matters that are alleged to constitute a breach of duty on the part of a respondent must be pleaded in the statement of grounds. In this regard counsel referred to the decisions in *AP v DPP* [2011] IESC 2; *Alen-Buckley v An Bord Pleanála* [2017] IEHC 541; *An Taisce v An Bord Pleanála* [2015] IEHC 633 and *Harrington v An Bord Pleanála* [2014] IEHC 232.
29. Secondly, counsel submitted that the traffic calming measures did not constitute a "project" within the meaning of the 2011 regulations. The roads in question had always

been used as public roads. They were always open for use by members of the public. All that had happened was that when the traffic calming measures were originally put in place in 2017, the use of the roads by vehicular traffic had been restricted for a number of hours during the day. However, they were open for use by members of the public at all times during the day and night and could be used by vehicular traffic outside the restricted hours. It was submitted that as those traffic calming measures had involved the insertion of bollards that were sunk into the road and were only raised during the hours that the restrictions were in place, this did not involve any alteration of the use of the land use in any material sense.

30. Thirdly, counsel submitted that there were not two decisions to implement traffic calming measures. There had only been one decision, which had been taken in November 2017 to introduce the measures pursuant to s. 38 of the Road Traffic Act 1994. While the applicant had made submissions against the introduction of those measures, he had never challenged the decision taken in November 2017 to introduce the measures.
31. Counsel pointed out that the operation of the traffic calming measures had only been suspended at the request of a number of business people, including the applicant. That had been done in light of the conditions then prevailing due to the COVID-19 pandemic. The respondent had acceded to the request made by the applicant and others to suspend the operation of the measures and had done so for approximately seven weeks. It had always been intimated that the suspension was a purely temporary measure, designed to cater for the requirements of people in the emergency that existed at that time. It was submitted that the decision to lift the suspension of the operation of the measures did not constitute in any real sense a new decision to introduce the measures. It was submitted that if the court held with the respondent that there had only been one decision, being that taken in November 2017, that was the end of the matter, as the applicant was long out of time to challenge that decision.
32. It was submitted that the present application, while dressed up as a challenge to a decision allegedly taken in May 2020, was, in reality, an opportunist attempt to mount a collateral challenge to the 2017 decision. It was submitted that the court should not allow such a collateral challenge that was long out of time.
33. Fourthly, it was submitted that in reality the applicant had sought to challenge the alleged decision in May 2020 on the basis that in taking that decision the respondent had not complied with the provisions of s. 38 of the 1994 Act, in that it had not gone through the preliminary steps of public engagement, etc, prior to taking the decision in May 2020. It was only when the applicant's legal advisers realised that that argument could not be made, as no measures had been prescribed under the 1994 act, which would have mandated the taking of any such steps, that the applicant then attempted to rely on the argument based on breach of the Habitats Directive. It was submitted that there was no reality to that argument. Counsel suggested that it may only have been included at the end of the statement of grounds, as an attempt to guard against an order for costs,

should the applicant be unsuccessful, rather than as any meaningful challenge to any decision taken by the respondent.

34. It was submitted that insofar as the applicant had alleged a breach of the Habitats Directive, same was misconceived, as Art. 6 (3) thereof only ever mandated the public authority to carry out a screening for an appropriate assessment where it was likely that the project would have a significant effect on a European site. It was submitted that the likelihood of there being some effect on a European site caused by the project in question, was a necessary precondition to the existence of the obligation to carry out screening. It was submitted that such likelihood was completely absent in this case. It was submitted that to suggest that the raising of bollards preventing the access of vehicular traffic to two roads in the town, could in any way cause a significant effect on any European site, was not only hypothetical, but was verging on the realm of fantasy.
35. Counsel submitted that it was not sufficient for an applicant to make a bare assertion of the possibility of there being a significant effect on European site. He had to establish a real risk, rather than a hypothetical risk: see *Boggis v Natural England* [2009] EWCA Civ 1061 at para. 37 and *Commission v Italy* (Case C-179/06) at paras. 33 – 39.
36. Counsel submitted that where the Irish regulations had not been referred to at all in the statement of grounds, it was not appropriate to "read in" an allegation that the respondent had breached its obligations under those regulations; the proper procedure to have adopted in those circumstances, would have been for the applicant to have made an application prior to the hearing to amend his statement of grounds and, if necessary, to have obtained leave to proceed on that basis, but that had not been done: see *People Over Wind* case, at para. 41.
37. It was submitted that having regard to all these matters, the court should refuse to grant any of the reliefs sought by the applicant.

Conclusions.

38. Order 84, rule 20 (3) requires that in judicial review proceedings matters must be pleaded with some specificity. The rule provides as follows:

"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."

39. In *Reid v An Bord Pleanála* [2021] IEHC 362 Humphreys J. stated as follows:

"The basic rule as regards pleadings can be summarised as follows:

(i). a party can only pursue grounds set out in his or her pleadings;

(ii). a party cannot introduce new grounds of claim or opposition by affidavit; and

(iii). any new grounds or reliefs have to be sought by amendment of the statement of grounds; and

(iv). likewise for any new points of opposition.”

40. In *AP v DPP*, Murray C.J. stated:-

“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.”

41. In *Rushe v An Bord Pleanála* [2020] IEHC 122, Barniville J. stated as follows at para. 108:

“These passages from the various judgments delivered by members of the Supreme Court in AP set out the obligations on an applicant who seeks judicial review to set out clearly and precisely each ground upon which each relief is sought in the proceedings and make clear that the order giving leave to seek the various reliefs on the grounds set out in the statement of grounds is what determines the jurisdiction of the court to conduct the review. Unless there is an application for leave to amend the statement of grounds to include an additional relief or additional grounds to support an application for existing relief, it is not open to the applicant to seek that additional relief or to advance that additional or those additional grounds. It is not open to an applicant to advance new arguments during the course of the hearing which go beyond the scope of the ground or grounds upon which leave was granted or to raise new grounds. These requirements, which are now reflected in O. 84, r. 20(3), are intended to ensure not only procedural fairness for the opposing parties in the judicial review proceedings, but also to avoid ambiguity or confusion as to the issues before the High Court, both for that Court itself and in the context of any appeal from the judgment of the High Court.”

42. There are statements to similar effect in the two High Court decisions in *Alen-Buckley v An Bord Pleanála* [2017] IEHC 311 and [2017] IEHC 541. It is clear from all of these decisions that parties cannot obtain leave on one basis and then attempt to go beyond the grounds pleaded in the statement of grounds, either by way of averments in subsequent affidavits, or in their legal submissions to the court.

43. In this case the applicant's main challenge was on the basis of the alleged failure on the part of the respondent to carry out the procedures that were mandatory under s. 38 of the 1994 Act for certain measures. However, prior to the hearing, it became apparent that these procedures did not apply, even assuming that a relevant decision had been made in 2020, as no measures had been prescribed under the Act which would have required such procedures of public consultation. Accordingly, that entire ground of challenge was abandoned at the hearing.

44. Instead, the applicant sought to rely solely on the matters pleaded at ground E (XVI) of the statement of grounds. The only reference therein was to an alleged lack of compliance with the provisions of the Habitats Directive. That ground of challenge was pleaded as follows:

"The Respondent Road Authority were under an obligation in respect of any proposal that was required to be made under section 38 of the Road Traffic Act 1994 to comply with the obligations under Council directive 92/32/EU [sic] and in particular to consider whether there was any possibility of an effect on any European site and if necessary to have any such scheme subject to an assessment for the purposes of that Directive. This obligation is required to be complied with in advance of the decision to impose limitations and restrictions in respect of the road of 17th May 2020 and was required afortiori in circumstances where there had been no compliance with the requirements of Council Directive 92/43/EU in advance of the scheme being implemented in 2017 which scheme was later abandoned and the said restrictions no longer applied and the road reverted to its use without restriction."

45. The respondent submitted that in that paragraph the applicant had only alleged a breach of the Directive in relation to the making of the decision in 2017. However, I think that on a "fair and reasonable" interpretation of that paragraph in the statement of grounds, as recommended by Haughton J. in the *Allen – Buckley* case, that paragraph can be read as referring to a challenge to the 2020 decision as well.
46. However, what that ground of challenge did not do, was make any allegation of failure to comply with the 2011 regulations. They were not mentioned at all. In these circumstances, I hold that having regard to the provisions of O. 84, r. 20 (3), the applicant is not entitled to rely on any alleged failure to comply with the 2011 regulations, as they were not mentioned in its statement of grounds, which formed the basis of its application for leave to proceed and on which such leave was granted. Accordingly, on this ground the applicant's claim to relief must fail.
47. However, even if the court is wrong in dismissing the applicant's application on that basis, the court would also refuse to grant relief on the following grounds. Firstly, there was only ever one decision in relation to the introduction of the traffic calming measures. That decision was taken in November 2017. It was not challenged by the applicant at that time. He is now long out of time to challenge that decision.
48. In reaching that conclusion, it is necessary to keep the core facts in mind. The traffic calming measures were introduced in 2017. That was a permanent decision, albeit subject to review in 2018. Following that review the measures were continued in place. After the emergence of the COVID-19 pandemic, the applicant and other business owners asked for the traffic calming measures to be suspended. That was agreed to on a temporary basis. The suspension was lifted after approximately 7 weeks, when the traffic calming measures were put back in operation.

49. When one looks at what was actually entailed in that decision, one sees that in 2017 cylindrical holes were cut into the road surface to enable the bollards to be inserted therein. They are raised mechanically each day at the appointed hour. They remain in place for the duration of the period during which vehicles are prevented from entering the streets. They go down again at night. What happened in 2020 was simply that the operation of the bollards was suspended for the relevant period, being 28th March, 2020 to 17th May, 2020.
50. If one looks at the reasons why the operation of the traffic calming measures were suspended, that was done for two reasons: firstly, business people in the area had requested the suspension of the traffic calming measures, so that customers could drive up close to the shops to collect their goods. Secondly, customers wished to have the facility to get as close to the shop as possible to collect their provisions. This was due to the fact that during the relevant period in 2020, many people in the country were living in extreme fear of contracting COVID-19. None of the population was vaccinated at that time. Many people, and in particular those that were elderly, or had other health concerns, were particularly anxious that they could drive up to shops and have their goods delivered directly into their car, without them having to leave their vehicles. It was against that background, where there was great fear among the general population and in circumstances of an almost unparalleled emergency, that the respondent took the humane decision to suspend the traffic calming measures during the period of the most intense lockdown.
51. It is perhaps ironic that the applicant, having asked for the suspension of the traffic calming measures, should then seek to challenge the lifting of that suspension following the lifting of the national lockdown by the government in May 2020. The court is satisfied that the decision taken by the respondent to lift the suspension of the operation of the measures in May 2020, was not a new decision to introduce traffic calming measures, which required any specific procedure or assessments. It was merely the ending of a temporary suspension of the measures that had been put in place pursuant to the original decision taken in November 2017. The court is satisfied that the applicants challenge herein is, as characterised by counsel for the respondent, an opportunist collateral attack on the 2017 decision, taken by the applicant because he is one of the traders in the area who is not in favour of the traffic calming measures.
52. While the applicant is entitled to hold whatever views he wishes in relation to the appropriateness of those measures; the fact is that he did not challenge the 2017 decision at the time. He is now out of time to do so and it is not possible for him to attempt to mount a collateral attack on that decision, by formulating it in the guise of a challenge to a "new" decision made by the respondent in May 2020.
53. The making of such collateral attacks by people trying to rely on measures that were introduced to deal with the COVID-19 pandemic, was deprecated by Humphreys J. in *Hellfire Massey Residents Association v An Bord Pleanála* [2021] IEHC 424, where the applicant had tried to challenge a planning decision on the basis that the requisite notices

had not been available for inspection in the public library, due to it being closed as a result of the COVID-19 pandemic. The court is in agreement with the views expressed by the learned judge therein. He stated as follows at paragraph 54(iii):

"Even assuming arguendo that there was some technical breach (which I do not accept), I would refuse relief in the discretion of the court. It would bring the law into disrepute to uphold such an opportunistic attempt to invalidate a planning permission merely because a particular library had to be closed due to the Covid-19 emergency. Such a submission trivialises the impact of the pandemic (which at time of writing has killed 3,923,238 people worldwide, according to who.int), and the extent of the extraordinary arrangements that had to be made to deal with a situation unprecedented in living memory."

54. Even if the court is wrong in its finding that there was only one decision, being the decision that was taken by the respondent to introduce the traffic calming measures in 2017 and that the applicant is out of time to challenge that decision, and cannot do so by means of a collateral attack on a non-existent "new" decision made in May 2020; the court holds that the lifting of the suspension and the reinstatement of the traffic calming measures in 2020 was not a "project" as defined in the 2011 regulations.
55. While the applicant submitted that the implementation of the traffic calming measures was a project because it affected the use of the land, the court does not find that there is any substance in that submission. Bridge Street and The Mall were public roads upon which members of the public had a right to pass and re-pass prior to 2017. They continued to be public roads after November 2017. The public still had a right to pass and re-pass up and down the roads. They were still used as public roads. The only difference after the introduction of the traffic calming measures in 2017, was that cars and other vehicles could not use the roads between the hours of 10:30 hours and 18:00 hours.
56. The use of the land remained the same from 2017, right through 2020 and down to the present. Accordingly, the court holds that the introduction of the traffic calming measures in the form of the introduction of bollards did not cause a change in the land-use and therefore was not a project within the 2011 regulations. Accordingly, the issue of whether there was any failure to comply with the provisions of regulation 42 thereof, does not arise.
57. Finally, the applicant has only pleaded a breach of the Habitats Directive. That Directive makes clear that a screening is only required under Art. 6 (3) when there is a likelihood, or risk that the measure could have a significant effect on a European site. Article 6 (3) provides:

"Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for

the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public."

58. In the course of argument, counsel for the applicant referred to the opinion of the Advocate General in the *Friends of the Irish Environment* case. In that opinion the following was stated at paragraphs 52 and 53:

"52. Under the first sentence of Article 6(3) of the Habitats Directive, any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, is to be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives.

53. It follows that the first sentence of Article 6(3) of the Habitats Directive makes the requirement of an appropriate assessment of the implications of a plan or project conditional on there being a likelihood or a risk that the plan or project will have a significant effect on the site concerned. Having regard to the precautionary principle, in particular, such a risk is deemed to be present where it cannot be ruled out, having regard to the best scientific knowledge in the field, that the plan or project might affect the conservation objectives for the site. The assessment of that risk must be made in the light, in particular, of the characteristics and specific environmental conditions of the site concerned by such a plan or project."

59. In *Boggis v Natural England*, the court emphasised that there must be a real risk, rather than a hypothetical risk to the European site. It is not sufficient to make a bald assertion that there may be some unidentified risk to some unidentified site. In that case, Sullivan L.J. stated as follows at para. 37:

*"In my judgement, a breach of Article 6.3 is not established merely because, some time after the "plan or project" has been authorised, a third party alleges that there was a risk that it would have a significant effect on the site which should have been considered, and since that risk was not considered at all it cannot have been "excluded on the basis of objective information that the plan or project will have significant effects on the site concerned". Whether a breach of Article 6.3 is alleged in infraction proceedings before the ECJ by the European Commission (see *Commission of the European Communities v Italian Republic Case C-179/06, para. 39*), or in domestic proceedings before the courts in member states, a claimant who alleges that there was a risk which should have been considered by the authorising authority so that it could decide whether that risk could be "excluded on the basis of objective information", must produce credible evidence that there was a real, rather than a hypothetical, risk which should have been considered."*

60. Similar comments were made by the CJEU in the *Commission v Italy* case at paras. 33 – 39. Although that case related to enforcement proceedings brought by the Commission

against a member state. Nevertheless, the court is satisfied that on a true construction of Art. 6 (3) of the Directive, the obligation to carry out a screening only arises where there is a likelihood or risk of the project having a significant effect on a protected site.

61. In the real world, rather than in some legalistic bubble, it could not be argued that restricting the hours during which vehicular traffic could use two public roads, could be likely to significantly affect any European site. During the course of argument, counsel for the applicant suggested that there was a requirement to consider the risk that may be posed to a European site by the traffic which would be diverted elsewhere due to the road closures. There is no substance to that vague assertion. Accordingly, the requirement to carry out screening under Art. 6 (3) of the Habitats Directive, did not arise.
62. For the reasons set out herein, the court refuses all the reliefs sought by the applicant against the respondent.