



Limestone cowboy

The decision of the European Court of Justice in *Sweetman v An Bord Pleanála* has had major implications for development in Ireland. **Tara O'Connor** goes to the waters and the wild

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*"...when I try to imagine a faultless love
Or the life to come, what I hear is the murmur
Of underground streams, what I see is a limestone landscape"*
– WH Auden, In Praise of Limestone



When Auden compared limestone landscapes to a 'faultless love' in the 1940s, he likely could not have predicted the legal issues that would spring from

the same sort of karstic regions in future years. Though less poetic, the decision of the European Court of Justice in Case 258/11 *Sweetman v An Bord Pleanála*, relating to the impact of the Galway bypass on a section of limestone pavement, is equally noteworthy, given the court's pronouncements on the provisions of the *Habitats Directive* and the potentially stark consequences it has for development in Ireland.

The *Habitats Directive* (92/43/EEC) on the conservation of

natural habitats and wild fauna and flora aims to promote the maintenance of biodiversity, taking account of economic, social, cultural and regional requirements.

Article 3 of the directive requires the establishment of a

European network of [special areas of conservation](#) (SACs), collectively known as Natura 2000 (or 'European sites'). This network is made up of sites hosting habitat types listed in annex I of the directive, habitats of the species listed in annex II of the directive and, since 1994, [special protection areas](#) (SPAs) classified under the *Birds Directive*. Natura 2000 is the most extensive network of protected sites in the world.

The process of designation of SACs is lengthy, encompassing three distinct phases. Member

≡ AT A GLANCE

- The *Habitats Directive* aims to promote the maintenance of biodiversity, taking account of economic, social, cultural and regional requirements
- Effectively, the decision in *Sweetman* makes it seemingly very difficult, if not impossible, for projects to be permitted where even the smallest areas of protected habitats will be destroyed as a consequence



THE JUDGMENT HAS IMPOSED A VERY STRICT INTERPRETATION OF WHAT 'INTEGRITY' MEANS FOR THE PURPOSES OF ASSESSING WHEN A PLAN OR PROJECT IS LIKELY TO HAVE 'AN ADVERSE EFFECT ON THE INTEGRITY' OF A SITE



PIC: SHUTTERSTOCK

IT IS UNCLEAR WHETHER THE COURT'S STRICT INTERPRETATION IS APPLICABLE TO ALL EUROPEAN SITES, OR JUST PRIORITY HABITATS

states submit a list of sites that host annex I habitat types, and/or species in annex II, to the European Commission following comprehensive assessments in their jurisdiction. From there, the commission adopts a list of [sites of community importance](#) (SCIs) in agreement with member states. The final step is designation by the member states of these SCIs as special areas of conservation. This must be done within six years of their designation as an SCI.

Article 6 of the directive sets out the legal consequences for a site once it has been designated. Where a plan or project is found to have a significant effect on the conservation objectives of a European site, that plan or project is subject to an [appropriate assessment](#) of its effects on the site. Authorisation will only be permitted for such a project if:

- It will not adversely affect the integrity of the site, or
- Where there are no reasonable or feasible alternatives, the development can be justified by imperative reasons of overriding public interest (IROPI).

Priority natural habitat types are those in danger of disappearance, and are indicated by an asterisk in annex I to the directive. Derogations from the directive in relation to sites containing priority natural habitat types and/or a priority species are only permitted for reasons of human health or safety.

One such priority site under annex I of the *Habitats Directive* is limestone pavement. The *Interpretation Manual of European Union Habitats* describes these complex stone mosaics as “regular blocks of limestone known as ‘clints’, with loose flags separated by a network of vertical fissures known as ‘grykes’ or ‘shattered pavements’, containing more loose limestone rubble”. The protection of this unique habitat was at issue in the *Sweetman* proceedings.

The Galway bypass

On 20 November 2008, An Bord Pleanála granted permission for the N6 Galway City outer bypass road scheme by Galway County Council and Galway City Council. However,

the project was planned to traverse the Lough Corrib SCI, which hosted a variety of priority habitat types including limestone pavement. The development would result in the permanent loss of 1.47 hectares approximately of the pavement from the SCI.

Notwithstanding this, the inspector and the board considered that the project would not have a significant effect overall: “The part of the road development being approved would be an appropriate solution to the identified traffic needs of the city and surrounding area ... and, while having a localised severe impact on the Lough Corrib candidate special area of conservation, would not adversely affect the integrity of this candidate special area of conservation. The development, hereby approved, would not, therefore, have unacceptable effects on the environment and would be in accordance with the proper planning and sustainable development of the area.”

On 9 October 2009, the High Court upheld An Bord Pleanála’s decision and



refused Mr Sweetman leave to judicially review the decision. Sweetman, supported by the State, unsuccessfully argued that An Bord Pleanála had erred in its interpretation of article 6 of the *Habitats Directive* in finding that the proposed development would not have an adverse effect on the integrity of the site. Mr Justice Birmingham stated that he was not persuaded that the board had misinterpreted the *Habitats Directive* and that its approach “accords with the clear language of the legislation”. He noted that the concepts of significant impacts and effect on the integrity of the site did not have equivalence under the directive: “In my view, the clear language of the *Habitats Directive*, in its ordinary and natural meaning, provides for a two-stage procedure involving the national authorities ascertaining in the first instance whether a project under consideration is one that is likely to have a significant effect on the site and then, if that is established, moving on to consider whether the proposal is one that will affect the integrity of the site.”

On 6 November 2009, Mr Sweetman was granted leave to appeal this decision to the Supreme Court.

On 13 May 2011, the Supreme Court referred the following questions to the European Court of Justice for a preliminary ruling under article 267 of the *Treaty on the Functioning of the European Union*:

- “1) What are the criteria in law to be applied by a competent authority to an assessment of the likelihood of a plan or project the subject of article 6(3) of the *Habitats Directive*, having ‘an adverse effect on the integrity of the site’?”
- 2) Does the application of the precautionary principle have as its consequence that such a plan or project cannot be authorised if it would result in the permanent non-renewable loss of the whole or any part of the habitat in question?”
- 3) What is the relationship, if any, between article 6(4) and the making of the decision under article 6(3) that the plan or project will not adversely affect the integrity of the site?”

Ultimately, the ECJ determined that the board’s decision to grant development consent for the bypass was contrary to the directive. The court held that: “If, after an

appropriate assessment of a plan or project’s implications for a site ... the competent national authority concludes that that plan or project will lead to the lasting and irreparable loss of the whole or part of a priority natural habitat type whose conservation was the objective that justified the designation of the site concerned as an SCI, the view should be taken that such a plan or project will adversely affect the integrity of that site.”

The matter was remitted to the Supreme Court and An Bord Pleanála consented to an order quashing its decision.

Implications of the decision

The judgment of the European Court has imposed a very strict interpretation of what ‘integrity’ means for the purposes of assessing when a plan or project is likely to have ‘an adverse effect on the integrity’ of a site for the purposes of the directive.

Advocate General Sharpston’s opinion was notably supportive of this very strict interpretation of ‘integrity’ for the purposes of the directive: “Any interpretation of article 6(3) that provides a lower level of protection than that which article 6(4) contemplates cannot be correct ... allowing them [member states] to authorise more minor projects to proceed under the former provision, even though some permanent or long-lasting damage or destruction may be involved, would be incompatible with the general scheme which article 6 lays down. Such an interpretation would also fail to prevent what the commission terms the ‘death by a thousand cuts’ phenomenon, that is to say, cumulative habitat loss as a result of multiple, or at least a number of, lower-level projects being allowed to proceed on the same site.”

Effectively, the decision in *Sweetman* makes it seemingly very difficult, if not impossible, for projects to be permitted where even the smallest areas of protected habitats will be destroyed as a consequence, unless it is possible to proceed via the IROPI/article 6(4) process.

This ‘death by a thousand cuts’ phenomenon comes into keen focus in relation to the protection of raised bog habitats in Ireland. Ireland is obliged to report to the European Commission every six years regarding the status of its EU protected habitats and species in Ireland under article 17 of the directive. In Ireland’s latest such

report to the commission, the conservation status of raised bog in Ireland is classed as declining. Applying the stringent *Sweetman* test with regard to ‘integrity’ to raised bog habitats, it would appear to sound the death knell for turf cutting in these areas, on both a commercial and domestic scale.

A further notable point arising from the judgment is that, at first blush, and in the absence of any subsequent cases specifically on this point, it is unclear whether the court’s strict interpretation is applicable to all European sites, or just priority habitats. In particular, the ECJ observed that competent national authorities “cannot ... authorise interventions where there is a risk of lasting harm to the ecological characteristics of sites which host priority natural habitat types”. This, in the court’s view, would particularly be so where there is a risk that an intervention would bring about “the disappearance or the partial and irreparable destruction of a priority natural habitat type present on the site concerned”.

Ultimately, Ireland’s overarching obligation is to endeavour to achieve favourable conservation status for each European site. Even small interventions that individually seem to have little impact can undermine Ireland’s ability to meet these obligations by decreasing the area of habitat. Recent destructive fires across many areas of protected habitat have made this task all the more challenging. Given the lofty bar that has been set in cases involving European sites in both the European and the national courts, it seems the ‘faultless love’ Auden saw reflected in limestone all those decades ago may be preserved for the time being, and not just in a collection of poetry. 

LOOK IT UP

CASES:

- Case 258/11 *Sweetman v An Bord Pleanála*

LEGISLATION:

- *Birds Directive* (2009/147/EC)
- *Habitats Directive* (92/43/EEC)
- *Treaty on the Functioning of the European Union*