THE HIGH COURT
JUDICIAL REVIEW

[2021] IEHC 362
[2020 No. 54 JR]
[2020 No. 82 COM]

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

BETWEEN

THOMAS REID

APPLICANT

AND
AN BORD PLEANÁLA

RESPONDENT

AND
INTEL IRELAND LIMITED

NOTICE PARTY

(NO. 2)
JUDGMENT of Humphreys J. delivered on Thursday the 27th day of May, 2021

1. In *Reid v. An Bord Pleanála (No. 1)* [2021] IEHC 230 (Unreported, High Court, 12th April, 2021), I struck out certain evidence offered on behalf of the applicant. I am now dealing with the substance of the applicant's challenge, which is to a decision of An Bord Pleanála dated 23rd November, 2019 to grant planning permission for a development consisting of the extension and revision of a previously permitted manufacturing facility owned and operated by the developer at its campus in Leixlip, County Kildare, subject to a schedule of eighteen conditions.

2. The applicant's statement of grounds is dated 23rd January, 2020, the primary relief sought being *certiorari* of the board's decision.

3. On 10th February, 2020, Meenan J. directed that leave should be applied for on notice.

4. On 29th June, 2020, Barniville J. admitted the case to the Commercial List. It was then transferred to the Commercial Planning and Strategic Infrastructure Development List, and initially I listed it for telescoped hearing although this later fell to be reconsidered, for reasons to which I now turn.

The disadvantages of telescoped hearings

5. While there may no doubt be circumstances in which a telescoped hearing (that is, treating the leave application as the substantive hearing) may have advantages, such a procedure does have some disadvantages because it can create a technical problem for the court. If ultimately all points advanced by an applicant are accepted, then the distinction between leave and substantive relief does not arise. However, if at the substantive hearing the court rejects any points, it then has to ask itself a separate question in the telescoped context as to whether the point reaches the threshold for a substantial ground, even though it does not reach the threshold for success. That intellectual exercise can turn out to be largely pointless at that stage. It's also a quite

different and more difficult exercise than assessing substance at the leave stage because few points look that great once they have been rejected on their merits.

6. Admittedly, if leave to appeal is later sought, it would be relevant for that process if a point had not reached the substantial grounds threshold, but the court can address that issue at that point in the process, if it arises. More generally, refusing leave is not the only mechanism courts have to express a view on the weightiness or otherwise of a point being made, whether on one side or the other.

7. I raised these considerations with the parties here on 10th May, 2021, and very helpfully the respondent and notice party did not object to leave being granted at that point prior to the substantive hearing, albeit that they did not consent either. In view of that, I decided to de-telescope the proceedings, generally considered that the applicant had shown substantial grounds and granted leave without prejudice to any point that could have been made by the respondent and notice party. I then dispensed with the need for a substantive notice of motion.

Costs of the interlocutory motion

8. At the outset of the substantive hearing I heard argument on costs of the *Reid v. An Bord Pleanála (No. 1)* application and decided to make no order as to costs. The applicant's proposal to reserve the costs or make them costs in the cause is not in keeping with the approach set out in O. 99, r. 2(3) RSC.

9. I do agree that the motion to exclude evidence did raise important points, more so than usual. However, one important contextual point here is that this was not a novel point of law that the applicant sought to raise. It came into the proceedings because the notice party challenged the applicant's evidence and brought a motion to that effect. That does slightly dilute the case for the applicant to obtain any costs.

10. In addition, the applicant already has the statutory protection in respect of costs by virtue of s. 50B(2) of the Planning and Development Act 2000. And, importantly, the applicant created the problem by introducing new evidence, such as regarding new site surveys, that was not before the decision-maker. The notice party was predominantly successful on the motion to exclude evidence. I think the appropriate approach, but for the special cost rules, would have been to award costs to the notice party, but given those rules, the appropriate approach here has to be no order as to costs.

Whether the *Reid v. An Bord Pleanála (No. 1)* judgment should be revisited

11. The applicant suggested that the No. 1 judgment should be reopened to revisit the exclusion of certain evidence on his behalf. The basis for that was not altogether clear. Certainly the applicant's intention to appeal the No. 1 judgment is not a basis. The applicant does rely on there having been a time limit for submissions at the hearing and the fact that the parties were in dispute as to what principles were to be applied. I do not think that there being a time limit for the hearing can be a basis to revisit the decision. Limited judicial resources mean time limits are going to have to apply more generally and parties are generally going to have to major on their best points. Anyway, the parties got

quite a lot of time for the interlocutory motion in that a day was afforded, which is as much time as many substantive cases get.

12. The argument that the applicant did not know the principles which would have to be applied to the documents is understandable, but isn't a basis to revisit the process. Parties when making submissions may have to anticipate a range of options. Courts generally decide both the legal principles and their application to the case in a single judgment. The approach advocated by the applicant of a second bite of the cherry once the principles were established would involve a significant expansion of judicial work. I accept that occasionally it might be appropriate, but I did not particularly see the case for revisiting the matter here.

13. In terms of the specifics of what the applicant wanted revisited, the scientific evidence put forward by the applicant was generally rejected insofar as it was new evidence on the merits and it is hard to see how that should be revisited. Also, given that the applicant himself is not an expert scientist, it is equally difficult to see how he could bring forward scientific evidence in his own affidavits anyway. As regards my having allowed the applicant's expert, Ms Maria Cullen, to give evidence insofar as she points out omissions in material before the board, some of the matters that the applicant was seeking to revisit might be regarded as coming within that permissible reading anyway, and I did not see a pressing need to revisit that aspect.

14. Finally, insofar as the applicant sought to rely on a 2016 Natura Impact Statement by way of a third supplemental affidavit, the problem with that is that the applicant never asked for that exhibit to be part of the case except by way of a replying affidavit on foot of the motion to exclude evidence. The applicant's third supplemental affidavit and Maria Cullen's fourth supplemental affidavit were filed in the context of that interlocutory motion to exclude evidence. A party cannot respond to a motion to exclude evidence by filing affidavits which include additional evidence for the purposes of the case proper without leave to do so. That would logically lead to a death spiral for the case, whereby every such motion would be greeted with new evidence necessitating a further such motion and so on.

15. That does not mean that no affidavit on an interlocutory motion could be relied on in the trial. That could happen either by express agreement between the parties or by tacitly being accepted (for example, by being referred to in some subsequent document, or even in a proposed book of pleadings, without that being objected to) or by leave of the court, but such new evidence cannot come into the present case in this way. For good measure, it would be unfair to the notice party to allow that to be done at the last minute. Consequently, I held that I did not see the need to revisit the No. 1 judgment and also made clear that the applicant was not entitled to rely, for the purposes of the case proper, on the affidavits filed in the context of the motion to exclude evidence.

16. A point then arose at the hearing as to whether the logic of the exclusion motion was that the notice party was not entitled to adduce new evidence either. However, given that the applicant brought no application to strike out the developer's affidavits, and didn't clearly

raise the issue until the point was argued in the reply on the final day of the hearing, and given that the notice party, therefore, did not have an opportunity to advance a basis on which those affidavits might be relevant, I do not think it would be fair to consider the notice party's affidavits as inadmissible.

Pleading objection regarding European law

17. An objection was raised to the applicant relying on European law without also pleading national implementing legislation, based on Case C-62/00 *Marks and Spencer Plc v. Commissioners of Customs & Excise* (Court of Justice of the European Union, 11th July, 2002, ECLI:EU:C:2002:435). Paragraph 27 of the CJEU judgment says that "[i]ndividuals are therefore entitled to rely before national courts, against the State, on the provisions of a directive which appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise whenever the full application of the directive is not in fact secured, that is to say, not only where the directive has not been implemented or has been implemented incorrectly, but also where the national measures correctly implementing the directive are not being applied in such a way as to achieve the result sought by it."

18. If a directive has not been implemented at all, or has not been implemented correctly, a party can rely on the directive by way of direct effect if it is unconditional and sufficiently clear and precise. However, even if it has been correctly implemented, a party can still rely on the directive insofar as it is unconditional and sufficiently clear and precise in order to ensure its effective application.

19. I would reject the submission made by the board and the notice party that this requires a systemic failure to apply the directive in practice. The entitlement to rely directly on a directive applies even to an individual one-off erroneous application. There is an analogy with infringement proceedings under art. 258 TFEU which are not limited to systemic failures by member states, but also apply to individual breaches of EU law. To adopt the interpretation argued for by the board and notice party here would create a significant lacuna in the application of European law. It would also be totally impractical. It would not be possible for an applicant to establish a systemic breach in the very tight time limit of eight weeks. That would be, as the applicant submits, "utterly unrealistic".

20. I would also reject the argument that the State would have to be a party to any claim that a directive had not been properly applied in a given case. The State proper (Ireland and the Attorney General) does not have to be a party to cases involving the interpretation of European law. Since EU law comes into a vast number of cases, the State would find it an impractical burden to be compelled to be a necessary party in all such cases, but of course they are always welcome if they want to get involved in any given proceedings. I would emphasise that if there is a claim of non-transposition, or of course of invalidity of an enactment or general measure by reference to EU law, then the State is a necessary party. But that is a very distinct and separate category from a claim of inadequate application of European law, whether in an individual case or more generally.

21. Insofar as the applicant here relies on European law without citing the corresponding domestic law, that pleading should be understood as a claim that European law was not properly applied in the given circumstances. Having said all of that, there may be situations where a certain amount of shorthand may be understood in particular areas where there is a clearly appreciated direct correspondence between a provision of European and national law, but positing such an understanding does not particularly make any difference here.

Further pleading objection regarding ammonia emissions and air emissions in major accidents

22. As well as having successfully challenged some of the applicant's evidence in the No. 1 judgment, the notice party sought to challenge further grounds at the substantive hearing, in particular the pleas in relation to ammonia (NH_3) emissions and air emissions in major accidents. However, resolution of that complaint turns on the distinction between matters the board has to consider only if such matters are raised, and matters that the board has to deal with autonomously. In essence the pleading objection doesn't succeed because it assumes that the board's only obligations are to deal with matters raised with it. That isn't the case. Like any statutory decision-maker, it has some autonomous obligations to apply relevant law, which we will see later in this judgment.

23. Relatedly, in *Reid v. An Bord Pleanála (No. 1)* I left open the point as to whether Case C-137/14 *European Commission v. Germany* (Court of Justice of the European Union, 15th October, 2015, ECLI:EU:C:2015:683), also applies to the habitats directive, 92/43/EEC. In the absence of any detailed argument as to why that is not the case, I am going to proceed on the basis that it does so apply.

Whether the court should entertain European law points of its own motion

24. Insofar as pleading points were raised, the issue arose as to whether the applicant should be entitled to make any submissions that go beyond the pleadings or, alternatively phrased, whether the court should of its own motion allow certain European law points to be raised.

25. The general principle is one of equivalence and effectiveness: see Joined Cases C-430/93 and C-431/93 *Vin Schijndel and van Veen v. Stichting Pensioenfonds voor Fysiotherapeuten* (Court of Justice of the European Union, 14th December, 1995, ECLI:EU:C:1995:441), as discussed in *Callaghan v. An Bord Pleanála* [2017] IESC 60 (Unreported, Supreme Court, Clarke C.J., (MacMenamin and Dunne JJ. concurring), 27th July, 2017). As Clarke C.J. pointed out at para. 4.4 of his judgment in *Callaghan*, "[i]t must be recalled that the proper interpretation of legislation is objective and is not dependent, necessarily, on the arguments put forward by the parties."

26. The obligation to apply European law applies where the court may, as opposed to must, raise of its own motion a corresponding issue in domestic law: see Case C-72/95 *Kraaijeveld BV e.a. v. Gedeputeerde Staten van Zuid-Holland* (Court of Justice of the European Union, 24th October, 1996, ECLI:EU:C:1996:404), at para. 60: "Consequently where, pursuant to national law, a court must or may raise of its own motion pleas in law based on a binding national rule which were not put forward by the parties, it must, for

matters within its jurisdiction, examine of its own motion whether the legislative or administrative authorities of the Member State remained within the limits of their discretion under Articles 2(1) and 4(2) of the directive, and take account thereof when examining the action for annulment."

27. Applying the principle of equivalence, the court should therefore itself consider any authority or materials relevant to the proper interpretation of EU law, in the same way as it can in relation to the interpretation of national law. Examples of domestic law points being raised autonomously by the court of its motion include *Brown v. Donegal County Council* [1980] I.R. 132 at 136, where it is noted that the court of its own motion invited submissions on the application of a particular statutory provision to issues in a case stated, and *Cahill v. Sutton* [1980] I.R. 269 at 275, where the court of its own motion invited submissions on *locus standi* which was not an issue that had been raised by the parties. *Clonres v. An Bord Pleanála (No. 2)* [2021] IEHC 303 (Unreported, High Court, 7th May, 2021) is another example where, in the domestic context, the court can raise of its own motion a question of the interpretation of national law even if the parties do not raise it. Normally, that is where the court invites submissions on a legal point that arises from the pleadings rather than one that is not pleaded.

28. There may also be less requirement for express pleading of points which are made by way of reply to points made in opposition papers, in the sense that the statement of grounds and statement of opposition procedure does not require an applicant to anticipate matters that may be raised by way of defence.

29. Likewise, the principle of effectiveness allows the court to raise an EU law point of its own motion if the parties have not had a genuine opportunity to raise that plea themselves: see Joined Cases C-222/05 to C-225/05 *van der Weerd and van Middendorp* (Court of Justice of the European Union, 7th June 2007, ECLI:EU:C:2007:318), at para. 41. The opinion of Advocate General Maduro in that case helpfully discusses this principle at paras. 33 to 38 and gives as an example of where this might have arisen: Case C-126/97 *Eco Swiss China Time Ltd. v. Benetton International NV* (Court of Justice of the European Union, 1st June, 1999, ECLI:EU:C:1999:269).

30. There may also be exceptions in limited areas like consumer protection where the court can raise European law issues of its own motion: see Case C-416/10 *Križan v. Slovenská inšpekcia životného prostredia* (Court of Justice of the European Union, 15th January, 2013, ECLI:EU:C:2013:8). Simons J. noted in *Dempsey v. An Bord Pleanála (No. 1)* [2020] IEHC 188 (Unreported, High Court, 24th April, 2020), at para. 51, that it had not yet been considered whether similar principles might apply to environmental protection.

31. Advocate General Kokott said at para. 162 of her opinion in *Križan* that "[i]t can be left open whether completely dispensing with an environmental impact assessment which is required by European Union law must possibly be raised *ex officio*. After all, such an assessment is an important basis for the formulation of objections to a project that are based on environmental law." However, she did not think that it was necessary for a

domestic to raise questions as to the up to date nature of an Environmental Impact Assessment (EIA) *ex officio* in every case (para. 163).

32. In *Dempsey (No. 1),* Simons J. thought that the own-motion obligations in an EIA context were not *acte clair* and that a reference to the CJEU was necessary (paras. 64, 74 and 75). However, ultimately, Simons J. decided not to make a reference on a separate basis (*Dempsey v. An Bord Pleanála (No. 2)* [2020] IEHC 462 (Unreported, High Court, 9th October, 2020)).

33. In Case C-378/17 *Minister for Justice and Equality v. Workplace Relations Commission* (Court of Justice of the European Union, 4th December, 2018, ECLI:EU:C:2018:979), the CJEU held at para. 35 that "[o]n the other hand, in accordance with the Court's settled case-law, the primacy of EU law means that the national courts called upon, in the exercise of their jurisdiction, to apply provisions of EU law must be under a duty to give full effect to those provisions, if necessary refusing of their own motion to apply any conflicting provision of national law, and without requesting or awaiting the prior setting aside of that provision of national law by legislative or other constitutional means (see, to that effect, judgments of 9 March 1978, *Simmenthal*, 106/77, EU:C:1978:49, paragraphs 17, 21 and 24, and of 6 March 2018, *SEGRO and Horváth*, C-52/16 and C-113/16, EU:C:2018:157, paragraph 46 and the case-law cited)." This has the effect that a court must of its own motion refuse to apply a provision of national law which is in conflict with European law.

34. A further high water mark was reached in the opinion of Advocate General Kokott in Case C-254/19 *Friends of the Irish Environment v. An Bord Pleanála* (Court of Justice of the European Union, 30th April, 2020, ECLI:EU:C:2020:320), at para. 69, where she said: "In any event, the obligation of a national court to interpret national law as far as possible in accordance with EU law does not require that the parties to the proceedings before it expressly assert that specific interpretation, if those parties allege at least an infringement of the relevant provisions of EU law."

35. There is a question mark as to how far this principle reaches in the sense that if a party alleges infringement of a particular directive, would it then have to identify the particular sub-provision of the directive before it can rely on the breach; and secondly, does it have to elaborate in the pleadings exactly how the provision is breached or can it do that by submissions.

36. The judgment itself in that case (C-254/19 *Friends of the Irish Environment v. An Bord Pleanála*) does not entirely answer such questions. The reference at para. 67 of the judgment to the error of law not being pleaded and, therefore, not being capable of being raised of its own motion by the referring court, is just a reference to what the national court is saying, not what the CJEU is saying. The CJEU is concluding simply at para. 71 that the court does not have the necessary factual or legal material to give a useful answer and, therefore, that the question is inadmissible. It is absolutely not finding that there is no own-motion obligation.

37. However, even bearing in mind all of the above, and even at the possible high water mark of the own-motion obligation, I do not see that reading in new interpretative arguments that can fit within the tram-lines of the actual complaints pleaded will really get the applicant a great deal further here, given the evidential situation and in particular the limited way in which the board's lack of expertise is pleaded, a matter to which we will return.

How to plead breaches of EU law

38. The applicant here complained about the lack of any clearly articulated rules for how to plead European law points. I will optimistically attempt to pick up the gauntlet thus thrown down. If an applicant wishes to claim a breach of EU law in order to challenge a domestic decision, she has a number of basic options. These include the following:

(i). If an EU law measure requiring transposition has not been transposed at all, the applicant can plead the EU law measure against the State or its emanations insofar as that provision is directly effective. The State proper (Ireland and the Attorney General) is not a necessary party to that claim.

(ii). If an EU law measure requiring transposition has not been transposed adequately, the applicant can plead the non-transposed element of it against the State or its emanations insofar as it directly effective. The applicant should also particularise the issue in respect of which the directive is inadequately transposed, although that may be implicit and apparent. Again, the State proper is not a necessary party to that claim.

(iii). If an EU law measure requiring transposition has not been transposed at all or has been inadequately transposed, an applicant can also seek declaratory relief (and perhaps, if necessary, mandatory relief, although that is a point remaining to be fully explored) regarding non-transposition. That does not in itself render the impugned decision invalid, in the absence of a directly effective provision of EU law binding on the decision-maker. However non-transposition or inadequate transposition does give rise to an entitlement to a declaration, which should be sought as a separate and distinct relief in the statement of grounds, particularising in what respect there is a failure of transposition. Ireland and the Attorney General are necessary respondents.

(iv). If an EU law measure requiring transposition has been transposed adequately, but not applied adequately, either in any particular case or more systemically, an applicant can plead the EU law measure as against the State and its emanations insofar as the provision that has not been properly applied is unconditional and sufficiently clear and precise. Again the applicant should particularise why the measure was not adequately applied although that may be implicit and apparent. The State proper is not a necessary party to such a claim. In such a plea, an applicant does not have to identify the corresponding national implementing measure because this argument presupposes adequate transposition. However, it is preferable, although not essential, to also refer in the pleadings to the domestic

legislation and to contend that such legislation should be construed in a manner compatible with EU law.

(v). Whether or not transposition has occurred adequately, a party can always plead reliance on any domestic legislation that purports to implement European law. Such a plea does not have to expressly refer to EU law. The need for a conforming interpretation is always implicit and that doesn't need to be pleaded, so even without reference to the EU measure, any reference to national law means such law as construed in conformity with EU law insofar as it is possible to do so.

(vi). If the EU law measure is one that is directly applicable, such as an EU regulation under art. 288 TFEU, and does not require transposition it can, in any event, be directly relied on (with or without reference to any national law that has been enacted in the light of that measure). In such a case the State proper is not a necessary party.

(vii). If the applicant's claim is that the provision of domestic law includes some provision that actively contravenes EU law (in the sense that the provision as enacted effects a violation of EU law, as opposed to passively, by leaving something out, but otherwise being lawful), then that gives rise to an entitlement to declaratory relief that the enactment is invalid. That should be sought separately in the statement of grounds, with particularisation of how the invalidity arises and with Ireland and the Attorney General named as respondents. Secondly, such invalidity also amounts to a ground for *certiorari* of any decision taken under or in consequence of such invalid legislation, because a decision made under invalid legislation is itself invalid, all other things being equal.

The obligations of a decision-maker

39. Before turning to the substantive issues in the case, it would be helpful to return to the nature of the obligations of a decision-maker. Any decision-maker has two distinct sets of obligations:

(i). obligations to deal with issues that apply only if such issues are raised; and

(ii). obligations that the decision-maker has autonomously whether a party raises them or not.

That distinction is critical here because the most points on which the matter turns were not specifically raised by the applicant in his appeal to the board. So, therefore, I can only consider such points if they are part of an autonomous obligation on the board.

40. The correct application of an enactment falls into the category of autonomous obligations. All decision-makers must apply the law and in particular the enactments relevant to the decision-making process. Thus, the board was required to apply the EIA and habitats directives whether an objector pointed out any alleged deficiency or not.

41. As regards the applicant's complaint of an alleged lacuna in the Appropriate Assessment (AA), that is not a point about failure to address the submissions made to the board by the applicant. Nor is it relevant to say that mere assertion does not create doubt (*Harrington v. An Bord Pleanála* [2014] IEHC 232 (Unreported, High Court, O'Neill J., 9th May, 2014)). I agree of course with the point made in *Sliabh Luachra Against Ballydesmond Windfarm Committee v. An Bord Pleanála* [2019] IEHC 888 (Unreported, High Court, McDonald J., 20th December, 2019), at para. 35, that judicial review takes place on the material before the decision-maker, and indeed this was a point I made in the *Reid v. An Bord Pleanála (No. 1)* judgment. However, there is an autonomous obligation to subject the developer's Natura Impact Statement to analysis that is informed by sufficient expertise. The EIA directive says that the developer's material must be prepared by competent experts (art. 5(3)(a)) and that "the competent authority shall ensure that it has, or has access as necessary to, sufficient expertise to examine the environmental impact assessment report" (art. 5(3)(b)). As regards whether this requirement for sufficient expertise also applies to appropriate assessment under the habitats directive, logically it must so apply, since effect on habitats is a more particular example of effects generally to which the sufficient expertise obligation *does* apply. It follows that there is an autonomous obligation on the board to bring the necessary level of expertise to bear on the assessment of the developer's material for the purposes of the habitats directive.

Unreasonableness in the habitats context

42. Another general problem that should be addressed at this stage is whether and to what extent the standard of *O'Keeffe* unreasonableness (under *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39) applies to appropriate assessment. This question merits a little unpacking.

43. It is worth emphasising that in the *O'Keeffe* case, Finlay C.J. said (at p. 71) that "[u]nder the provisions of the Planning Acts the legislature has unequivocally and firmly placed questions of planning, questions of the balance between development and the environment and the proper convenience and amenities of an area within the jurisdiction of the planning authorities and the Board". However, that has little or no relevance to appropriate assessment because, in the habitats directive context, we are not dealing with a question of "balance". There is a clear EU law requirement that there be no adverse effect on the integrity of a European site and that all reasonable scientific doubt on this point must be excluded.

44. Admittedly, it seems to have been assumed in the caselaw that *O'Keeffe* applies to appropriate assessment: see *e.g. M28 Steering Group v. An Bord Pleanála* [2019] IEHC 929 (Unreported, High Court, 20th December, 2019), at para. 76 and 77, *Rushe v. An Bord Pleanála* [2020] IEHC 122 (Unreported, High Court, 5th March, 2020), at para. 195. However, if I may respectfully say so, I think there is a conceptual problem with applying the *O'Keeffe* standard to a situation where one has to exclude all reasonable scientific doubt. To view the matter as one of irrationality might be to say that if reasonable people could disagree about whether there is a doubt then there isn't one. That cannot

be correct. If reasonable people could disagree about whether there is a doubt, then there *is* a doubt, even if each individual viewpoint would in isolation survive *O'Keeffe* scrutiny. Or to put it another way, there might be "material before the decision-maker" that there is no doubt, which would render the decision reasonable on a textbook *O'Keefe* approach, but there might also be other material going the other way capable of creating a doubt. That would render unlawful a finding of no impact. Thus the traditional, unmodified, *O'Keefe* wording, that the decision stands if there is material to support it, simply can't be right in the AA context.

45. The test is not whether the applicant has demonstrated that no reasonable decision-maker could have concluded that there was no scientific doubt. The test is whether the applicant has demonstrated that a "reasonable expert" (a reasonable person with the relevant sufficient expertise and aware of, and in a position to fully understand and properly evaluate, all the material before the decision-maker) could have a reasonable scientific doubt as to whether there could be an effect on a European site. One could, as the board in the present case seemed to be suggesting, turn this into a merely semantic issue by redefining the application of *O'Keefe* to produce a meaning in which it could make sense in the exclude-all-doubt context, but that would be a fairly tortured exercise. Far better in terms of understandability, transparency, clarity, accessibility of the law and all-round credibility of the intellectual process at stake to accept that "some material before the decision maker" just isn't enough when the mission statement of the exercise is not "form a planning judgement" but "exclude all reasonable scientific doubt".

The concept of sufficient expertise

46. The matters to be considered in deciding whether there is reasonable scientific doubt involve looking in particular at:

    (i). the source of environmental impact;

    (ii). the pathway between source and receptor;

    (iii). the receptor, that is the habitat, flora or fauna being affected; and

    (iv). the degree of impact thereby created.

47. Each of these steps, in terms of source – pathway – receptor – impact, involve two dimensions. Firstly, a fact-specific examination, such as, where are the flora and fauna concerned, where would the wind carry any air emissions, in what direction and to what extent. And secondly, measuring those fact-specific matters against general scientific standards which would include for example the degree of impact that is regarded as being acceptable and that would not produce an adverse effect on the integrity of a European site.

48. The "sufficient expertise" on the part of the board thus has those dimensions: firstly, an expertise to be able to fully understand and properly evaluate the developer's fact-specific material and the science underlying it; and secondly, to do so in the context of expert knowledge of prevailing general standards and scientific information. The board here

argued, incorrectly in my view, for a considerably lower standard of expertise. The board specifically disagreed with the proposition that it should know what the appropriate emission standard for ammonia is, and unfortunately contended that it was entitled to rely on the apparent fact that the developer's material was prepared by experts, that a range of bodies had been given the opportunity to comment on such material, and that the county council had already assessed the material. But the council's view is irrelevant because what is before the board is an appeal. The notion of relying on other people's judgements more generally is flawed and, if it were to be applied, would be an abdication of the board's independent statutory role. Indeed it is a circular argument - how can the board know that the developer's advisers are in fact competent experts that can be relied on if the board doesn't itself have, or have access to, equal competence and expert knowledge. The logic that "other people have looked at this, therefore it must be OK" is the sort of thing that leads to systems failures. It is the stuff of Challenger, Columbia, Grenfell Tower, pre-crash financial regulation. I don't accept that the board would be complying with its critically important independent evaluative obligations if it took that approach, although I emphasise that I say that in the context of endeavouring to clarify the board's obligations. I'm not finding that the board did take that approach here. Likewise, the board's argument that it "doesn't have infinite resources" is facile and hollow. Developers don't have infinite resources either, yet they manage to assemble teams of experts to deal with all technical issues. The board must have a corresponding level of expertise on each of the areas so dealt with. But I emphasise that just because the board argued for an unacceptably low standard doesn't mean it isn't in a position to comply with a higher standard. Decision-makers sometimes like a safety net in legal terms, but I'm afraid here it isn't available. Sufficient expertise means fully understanding the developer's material in all its aspects. Green-lighting something you don't fully understand wouldn't be an acceptable procedure, if it were to happen. With those preliminary points in mind, I now turn to the specific grounds of challenge.

Ground 22. IV - lack of reasons

49. The applicant complains that the board failed to give proper reasons for its various decisions. That seems to me to be very much subsidiary on the substantive points made by the applicant. If the applicant's substantive complaints are not valid, then the reasons were adequate. If the applicant has a valid substantive point, then the inadequacy of reasons does not make any difference, so the point is best addressed under the substantive headings concerned.

Grounds 19. II, 19. IV and 19. V - effect on Dublin Bay related sites

50. The applicant complains that there was inadequate assessment of the North Dublin Bay Special Area of Conservation (SAC), South Dublin Bay SAC, North Bull Island Special Protection Area (SPA) and South Dublin Bay SPA. Leaving aside mitigation, which I will deal with separately, I do not see that there was any material before the board to create real doubt as to the impact on the Dublin Bay related European sites. Admittedly, there was some inconsistency between the inspector's report and the board decision regarding the screening out of the Dublin Bay related sites, which the Deputy Chairperson of the

board has unusually sought to explain on affidavit, but I do not think the point could have made any difference on the materials before the board.

51. That is so even given the duty to give reasons for disagreeing with the inspector. Where the reason cannot be in doubt (that is, the only impact on the Dublin Bay sites being *via* the impact on the local SAC, so if the impact on the latter can be excluded then so can the former), then the lack of reasons is not fatal. The applicant argued that there was an impact *via* the River Liffey based on a reference to the River Liffey in the AA screening report, but in context it was hard to see how that was other than *via* the Rye Water which is part of the Rye Water Valley/Carton SAC.

52. Ultimately the applicant tried to clarify that the impact other than *via* the local SAC was *via* the waste water treatment plant at the east of the site. However, the applicant has not established that the factors by reference to which an impact *via* Rye Water can be ruled out are not equally applicable to any impact *via* the waste water treatment plant. Indeed, such impact is likely to be much less applicable *via* the waste water treatment plant due to the beneficial effects of treatment.

Ground 19. III - alleged improper reliance on mitigation

53. The applicant alleges that screening out of the Dublin Bay related European sites improperly had regard to mitigation as it applied to the Rye Water Valley/Carton SAC. However, if (ignoring mitigation) one concludes that there is no possibility of adverse effects on Area B other than via Area A, and if (taking account of mitigation) there is no possibility of adverse effects on area A, then further consideration of area B is pointless. I do not think that law should be interpreted to impose pointless obligations. If I am wrong about that, this is harmless error see: Case C-72/12 *Altrip v. Land Rheinland-Pfalz* (Court of Justice of the European Union, 20th June, 2013, ECLI:EU:C:2013:422).

Ground 20. VIII - lack of proper Environmental Impact Assessment

54. The applicant pleads generally that the board failed to carry out a proper Environmental Impact Assessment (EIA). In particular this ground only relates to the lack of a proper EIA, not the lack of expertise to assess either the EIA or AA (which is pleaded in a more limited way under another heading). In that limited available sense, it's hard to see any point under this heading that doesn't arise under another specific ground.

Ground 20. I - absence of description of reasonable alternatives in the EIA process

55. The applicant claims that there was an absence of description of reasonable alternatives studied by the developer. The situation considered by the CJEU in Case C-461/17 *Holohan v. An Bord Pleanála* (Court of Justice of the European Union, 7th November, 2018, ECLI:EU:C:2018:883), related to the original wording of directive 2011/92/EU which was referable to the main alternative studied by the developer. That has since been changed to reasonable alternatives by the directive 2014/52/EU. That might leave open the possibility that, if a developer unreasonably refused to consider a reasonable alternative, there could be debate as to whether the directive had been satisfied, but it has not been established that such a situation arose here.

Ground 20. VI - failure to consider the whole project

56. The claim is made that the board contravened the EIA directive, in particular Annex IV para. 1(b), by failing to consider the whole project including land use requirements during the construction phase. I am not convinced that that is made out on the facts. While construction will take considerable time and while effects will be considerable while they are occurring, given the ultimately temporary and short-term nature of the impacts concerned, the assessment in the materials before the board (including the Construction Management Plan, the draft Construction Traffic Management Plan and the information in the EIA report) were adequate for the purposes of this heading.

Ground 20. III - inadequate assessment of parking

57. The applicant claims that the board contravened art. 2(1) of the EIA directive by failing to assess the impacts of parking during the construction phase. Insofar as his submissions also complain of breach of the Planning and Development Regulations 2001 (S.I. No. 600 of 2001), that complaint is not pleaded so does not arise. But the complaint under art. 2(1) can be construed as a complaint that European law was inadequately applied. However, insofar as the effects of construction are concerned, the previous point applies and I consider that no inadequacy in the material has been demonstrated.

Ground 20. II - alleged inadequate assessment of construction noise

58. The applicant again complains of a breach of art. 2(1) of the EIA directive and recital 2 (although I don't accept the notion of "breach" of a recital – they are not operative provisions). But again, I think the previous point applies and the information before the board has not been shown to constitute an inadequate assessment in the circumstances. For good measure, a condition was imposed in relation to this issue, which has not been shown to be inconsistent with the jurisprudence: see *Boland v. An Bord Pleanála* [1996] 3 I.R. 435.

Ground 21. II - alleged breach of art. 15(5) of the Seveso III directive

59. The applicant complains that the board breached art. 15(5) of the Seveso III directive (directive 2012/18/EU) by failing to put forward reasons for granting planning permission. However, this is essentially a subsidiary point. If air emissions in the case of an accident were properly dealt with, then the reasons provided are sufficient. If not, the inadequacy of reasons does not add anything to that conclusion. The substantive point is dealt with below.

Ground 21. III - breach of 2001 regulations

60. The applicant complains that the board contravened the Planning and Development Regulations 2001 in respect of obtaining technical advice in the context of the possibility of a major accident. However, the Health and Safety Authority (HSA) were consulted and responded. A response from an expert body, having seen the developer's expert report, constitutes technical advice, even if the advice is fairly blunt that the authority does not advise against the proposal. There is no further obligation to give notice seeking additional advice under art. 141(1) of the 2001 regulations.

Ground 20.IV - alleged breach of 2015 regulations

61. The applicant contends that if the HSA's statement is technical advice, then it was not formulated in accordance with art. 24(3) of the Chemicals Act (Control of Major Accident

Hazards Involving Dangerous Substances) Regulations 2015 (S.I. No. 209 of 2015), by not specifying details that would allow the board to rely on the advice and having regard to the planning of effective appropriate safety distances or protection of areas of sensitivity or interest and similar measures. However, not advising against the project must be construed as an acceptance of the parameters of the application as proposed by the developer, so I think that the decision is not invalid under this heading either.

Ground 22. I - alleged failure to consult with the Health and Safety Authority

62. While the applicant complains that the board failed to properly consult with the Health and Safety Authority, I think that it has not been shown that the consultation that did take place was inadequate.

Ground 22. II - failure to seek further information

63. The applicant complains that the board failed to seek further information from the developer in relation to emissions to the air during a major accident. That seems to me to be tied into the general point that evaluation of air emissions in the case of an accident was insufficient. If the evaluation was sufficient, then there wasn't a need for further information. If the evaluation was insufficient, then a failure to seek further information does not add anything to that conclusion. So the point is best dealt with below under that substantive heading.

Ground 22. III - failure to take into account safety distances or impact on the applicant

64. The applicant complains that the board failed to take into account the effect on the applicant's property of safety distances. That seems to be an allegation of inadequacy of assessment. Failure to take into account the impact on the applicant is not made out. The board states that it considered the submissions made.

Grounds 20. IV, 20. VII and 21. I – failure to assess effects of major accidents

65. The applicant complains that the board breached art. 2(1) of the EIA directive, the corresponding domestic legislation in the form of the 2001 regulations, and art. 13 of the Seveso III directive, by failing to assess the effects of air emissions from a major accident other than the risks to humans. The applicant hasn't shown that there was something specific that the board could have done under this heading. The affidavit of Fergal Callaghan states that the improbability, brief duration and limited spatial extent of such accidental air emissions would render negligible any meaningful measurable potential effects on the environment other than what has been provided on behalf of the developer in the control of major accident hazards involving dangerous substances (referring to the COMAH Land Use report). That has not been contradicted and nor has the developer's deponent been cross-examined, so in the light of that evidence that there wasn't in fact anything further that could have been said on the point, I do not think that I can uphold the applicant's complaint under this heading.

Ground 20. V - lack of expertise of the board in relation to major accidents

66. The applicant pleads that the board contravened art. 5(3) of the EIA directive by failing to ensure that it had access to sufficient expertise to examine the EIA report in the context of the effects of major accidents. Noting that this complaint is limited to the effects of major accidents, I do not think it has been sufficiently developed evidentially to enable

me to make any finding in favour of the applicant under this heading, given that any actual inadequacy of assessment in relation to the effects of accidents hasn't been demonstrated.

Ground 19. I - failure to consider effects of ammonia emissions contrary to the habitats directive

67. The applicant pleads that the board contravened art. 6(3) of the habitats directive in particular "by assessing the effects of the project on the priority habitat petrified springs and/or bryophytes therein on the basis of levels of Ammonia in ambient air of 3 $\mu g/m^3$ instead of the lower limit of 1 $\mu g/m^3$ appropriate for the Ammonia-sensitive bryophytes. In this regard, the Respondent purported to act on the basis of the UNECE recommendation identified by the developer, but the appropriate UNECE recommendation is in fact a level of 1 $\mu g/m^3$."

68. The developer's interpretation of its NIS is that the 3 µg NH_3/m^3 limit is correct, but is subject to an exception that is not spelled out because it does not apply. The developer's analysis is that the lower 1 µg NH_3/m^3 limit for bryophytes isn't relevant by reference to a defined zone of influence. The relevant interests lay outside that zone of influence, so that the only vegetation that was going to be affected was subject to the 3 µg NH_3/m^3 limit.

69. Admittedly, the applicant has now sought to challenge the zone of influence approach, but that complaint in particular, as well as the applicant's complaints more generally, must be assessed by reference to the two questions I have discussed above, namely was this raised with the decision-maker and was it an issue that the decision-maker had an autonomous duty to consider.

70. On the first point, it's clear that nobody challenged the developer's science when the matter was before the board.

71. On the second point, I do not think there was anything hugely significant before the board from which it could be said that the zone of influence approach was in doubt.

72. The board's most legally pertinent defence to the complaint that it had not adequately assessed the ammonia emissions was, as it was put, that there was nothing on the face of all of the material before the board showing reasonable scientific doubt.

73. I would accept that as a statement of the relevant yardstick of the decision-maker's autonomous obligation, but with one important clarification – the board can accept the developer's material for AA purposes if there is nothing on the face of the material, *as it appears to a reasonable person with sufficient expertise*, that would create scientific doubt. Not as it appears to a planning generalist without detailed expertise in the particular sub-specialty to which any given document relates. A document can only be accepted if it is fully understood – what's the point in nodding through something you don't fully understand? That process lacks integrity and couldn't be proper scrutiny on any analysis.

74. One factor pointed to the applicant as creating doubt was that the scale adopted in the developer's diagrams began at 1.2 µg NH_3/m^3 and did not factor in a 0.3 µg NH_3/m^3 ambient background. An additional factor was reference to bryophytes at another location to the north of the site, separate from the sensitive location of Louisa Bridge to the west of the site.

75. Are these matters that the "reasonable expert" would have said created doubt so as to require the board to examine the NIS more critically without being asked to do so? That is a conclusion that has to be established evidentially. Any scientist could disagree with any other scientist about something – that's science. Hence when Ms Cullen complains about the developer's science, that is to be expected. Had the applicant put forward all, or any, of that at the time, it would have created doubt. But while her affidavits (even looking back at the struck-out paragraphs to see if they need to be revisited yet again) make clear she doesn't agree with the developer (informed as that is to some extent by new original research, which doesn't come in to the legal test), they don't establish that a reasonable person with all of the necessary "sufficient expertise", having read and fully understood the materials before the board, would have autonomously seen the materials on their face as not excluding reasonable scientific doubt.

76. Thus the developer's material can be filed under the heading of "correct insofar as it goes" with a lack of material before the board to specifically make an issue of that. It seems to me that in the end, this is a case where, analogous to *An Taisce v. An Bord Pleanála* [2021] IEHC 254, [2021] 4 JIC 2003 (Unreported, High Court, 20th April, 2021), there wasn't anything before the board to make the zone of influence a real issue. While the developer's science can be critiqued in retrospect like a lot of things, it hasn't been shown to create a doubt on its face in the mind of a reasonable expert so as to make it necessary for the board to question it in the exercise of the board's own required expertise.

Conclusion and order

77. For these reasons I must dismiss the proceedings, although I hope I can be allowed to say that I do so without much enthusiasm. That lack of enthusiasm stems from a suspicion that the board didn't fully understand the science behind the developer's proposal. The smoking gun in that regard is the fact that the board accepted the developer's material without noticing that on the critical point of the 3 µg NH_3/m^3 limit there was an error, in that a key report (UNECE document 'Review of the 1999 Gothenburg Protocol', Executive Body for the Convention on Long-range Transboundary Air Pollution (2007), ECE/EB.AIR/2007/13, ECE/EB.AIR/WG.1/2007/14/Rev.1) was referred to by the name of a different report published some years later (Review and revision of empirical critical loads and dose-response relationships : Proceedings of an expert workshop, Noordwijkerhout, 23-25 June 2010).

78. The board submitted, incorrectly in my view, that it cannot be expected to know the appropriate emission standard itself, and seemed to be saying that it cannot be expected to be familiar with all of the main relevant scientific material itself, or to read or even look at the scientific material referred to in the developer's material. The board helpfully

clarified on the latter point that the inspector could not recall looking at the UNECE report and that doing so was not recorded. Clearly the document wasn't looked at because if the board had done so, the error would have been obvious. The fact that the error was cut and pasted into the board's opposition papers isn't hugely significant in itself, but doesn't particularly enhance any claim that it subjected the developer's materials to the necessary level of in-depth, expert, independent scrutiny.

79. As emphasised earlier in this judgment, by virtue of the EIA directive, the board must have, or have access to, "sufficient expertise" to examine the relevant assessments.

80. Subject to further argument if it arises in some future case, it would be questionable if the "sufficient expertise" test requires individual bord members to have qualifications in specific sub-fields. The nature of board meetings is that they lend themselves to high-level examination of a project, not line-by-line interrogation of the materials. That, one might have thought, must occur at official level. The real problem is likely to be the inspector-as-jack-of-all-trades model. That might work at the level of appeals regarding extensions to domestic dwellings, for example, but no one individual can have "sufficient expertise" in all of the sub-fields now arising in highly complex large-scale applications. So one can't in any sense blame the inspector in this case – no single hypothetical person could have the necessary "sufficient expertise" in all of the various sub-disciplines concerned. Nobody could have the necessary detailed knowledge, constituting sufficient expertise, of everything from geology to physics, ecology to emissions, human health to archaeology. Again the point is that if the knowledge isn't in-depth, it isn't sufficient, because otherwise you are approving something you don't totally understand. There isn't likely to be any single planning inspector to be found, who purports to opine on that full range of sub-fields, that couldn't be severely discomfited in a witness box on the basis of a skilful line-by-line examination of at least some sub-set of a developer's materials in a complex application. The approach of regarding the board and its inspectors as "experts" *simpliciter*, to be automatically deferred to, has to be reviewed in the light of both the amended EIA directive, the massively changed nature of complex planning applications, and the detailed science now required for environmental assessment procedures. No single expert could provide a modern developer with all she needs – hence each developer seeking a large permission comes girded with a phalanx of highly qualified experts, each specialised in their own sub-discipline. The notion that a single person on the board's side can have equivalent expertise to fully understand and evaluate every line of every document so created is, unfortunately, clearly flawed. One is left with the question as to whether the way the board channels the examination of applications through a single inspector in each case complies with EU law.

81. Why then, one might ask, am I not giving more consideration to the grant of relief to the applicant? Unfortunately there is a very old-fashioned answer to that – this point isn't sufficiently pleaded. The only allegation of lack of expertise is in relation to air emissions in the case of a major accident, and I don't see any huge problem with the way the board dealt with that. Nor is there any claim for general declaratory relief. The only declarations sought are along the lines that the decision was *ultra vires* on various

grounds. Indeed, the present case shows the pointlessness of seeking declarations of that type. It is hard to imagine why a court would grant a declaration that a decision was *ultra vires* and not also grant *certiorari*. If *certiorari* is granted, declarations are unnecessary, and if refused, then a declaration that the decision is invalid is also going to be refused. The form of declaration encouraged by the current practice direction in the Commercial Planning and Strategic Infrastructure Development List (and the Asylum List for that matter) as to the rights and legal position of the parties and persons similarly situated, wasn't sought here, although in fairness that post-dated the initiation of these proceedings. And finally, even if the point had been fully pleaded, and broad declaratory relief sought to give the court options in that regard, the issue would still have had to be developed evidentially – perhaps by having sought directions requiring the board, in the exercise of its obligation under the jurisprudence requiring it to lay its cards face up on the table as a respondent in judicial review (see *R. v. Lancashire County Council, ex parte Huddleston* [1986] 2 All E.R. 941 at 945 and subsequent cases), to put in an affidavit giving a detailed account of the extent to which it examined and understood the science and the background documentation. Even the most expansive view of a court's "own motion" jurisdiction couldn't fill those gaps. So any full discussion of these questions will have to await some other case.

82. The order, therefore, will be:

(i). that the application be dismissed; and

(ii). that the parties be directed to liaise with the List Registrar to have the matter listed for the next convenient Monday to finalise any consequential matters.