THE HIGH COURT

JUDICIAL REVIEW

[2021] IEHC 459

[2021 No. 20 JR]

IN THE MATTER OF
SECTION 50B, SECTION 214 AND SECTION 215 OF THE PLANNING AND DEVELOPMENT ACT 2000 AS AMENDED

AND

SECTION 51 OF THE ROADS ACT 1993 AS AMENDED

AND

SECTION 10 OF THE LOCAL GOVERNMENT (NO 2) ACT 1960

BETWEEN

JAMES CLIFFORD AND PETER SWEETMAN

APPLICANTS

AND

AN BORD PLEANÁLA, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

KERRY COUNTY COUNCIL

NOTICE PARTY

AND

THE HIGH COURT

JUDICIAL REVIEW

[2021 No. 19 JR]

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 76 OF AND THE THIRD SCHEDULE TO THE HOUSING ACT, 1986 AS EXTENDED BY SECTION 10 OF THE LOCAL GOVERNMENT (NO. 2) ACT, 1960 AND SUBSTITUTED BY SECTION 86 OF THE HOUSING ACT, 1966
AND IN THE MATTER OF THE PLANNING AND DEVELOPMENTS ACTS, 2000 TO 2019
AND IN THE MATTER OF SECTION 50B OF THE PLANNING AND DEVELOPMENT ACT, 2000
AND IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 51 OF THE ROADS ACT, 19993 (AS AMENDED)
AND IN THE MATTER OF AN APPLICATION

BETWEEN

DENIS O'CONNOR, CHRISTY MCDONNELL, MARY O'NEILL MCDONNELL AND THE GREENWAY INFORMATION GROUP

APPLICANTS

AND

AN BORD PLEANÁLA, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

KERRY COUNTY COUNCIL

NOTICE PARTY

JUDGMENT of Humphreys J. delivered on Monday the 12th day of July, 2021

1. Our story begins 177 years ago with the enactment of the Great Southern and Western Railway Act 1844 (7 & 8 Vict., c. c, repealed by the Statute Law Revision Act 2009), the first of 22 Acts relating to the Great Southern and Western Railway Company. The company established a west Kerry branch line between Killorglin and Valentia Harbour from 1885 onwards and ran services on the line up to 1960. It was said to have been the most westerly railway in Europe.

2. In recent years, a proposal emerged to use the abandoned railway line as a greenway for use by cyclists and pedestrians. On 23rd January, 2017, in contemplation of a planning application for the greenway, Kerry County Council sought a direction from the board as to whether an environmental impact statement (EIS) was required and the board directed such a statement.

3. Pre-application consultation with the board took place on 26th June, 2018.

4. On 27th August, 2018, the council made a compulsory purchase order (CPO) to acquire specified lands situated between Reenard, south-west of Cahersiveen, and Faha West, northwest of Glenbeigh.

5. On 29th August, 2018, the council applied under s. 51 of the Roads Act 1993 for development consent for a proposed 31.93 kilometre greenway route.

6. On 31st August, 2018, the council applied to the board to confirm the CPO.

7. On 30th November, 2018, further information was requested by the board. That was provided on 8th April, 2019.

8. The board decided that the information was significant and advertised accordingly. The closing date for submissions was 24th June, 2019 (see para. 5.2 of the inspector's report).

9. On the same date (24th June, 2019), regulations implementing the 2014 environmental impact assessment (EIA) directive (directive 2014/52/EU), in the context of the 1993 Act, came into force.

10. Also on 24th June, 2019, at 16:13, a submission was received from solicitors for Greenway Information Group, one of the applicants in the *O'Connor* proceedings. It is accepted by the board that any submissions received on 24th June, 2019 were not put on the board's website.

11. On 11th September, 2019, a derogation licence in relation to the lesser horseshoe bat was granted, valid to 30th April, 2020.

12. A further derogation licence regarding the Kerry slug was granted on 30th September, 2019 valid for 12 months.

13. An oral hearing was held by the board's inspector in Tralee from 8th to 18th October, 2019 and from 12th to 22nd November, 2019. At the oral hearing additional information was added to the EIA report and the CPO process in the form of 4 *errata* documents. Those documents were not put on the board's website.

14. On 9th December, 2019, Mr. Sweetman, one of the applicants in the *Clifford* proceedings, initiated a judicial review against the State in respect of the grant of the derogation licences.

15. The board's inspector prepared a report dated 28th April, 2020. She proposed omitting two sections of the greenway pending further consideration of environmental impacts, in particular erosion. Firstly, Reenard Point to Cahersiveen (Chainage c. 50 to c. 3,700), and secondly, at Cloghanelinaghan (Chainage c. 5,975 to c. 7,100).

16. A first board meeting was held on 17th June, 2020 and the inspector's original report was before the board at that point.

17. Following certain issues being raised by the board and by the inspector's supervisor, the inspector's report was amended at some date not currently clear, but between 17th and 26th June, 2020.

18. A second board meeting took place on 7th October, 2020 and the amended report was before the board on that occasion.

19. The board decided on 10th November, 2020 to approve the permission and the CPO subject to the omission of the sections recommended for removal by the inspector. A number of conditions were added. Condition 8 in particular requires an ecological pre-construction survey immediately prior to the commencement of works to check for the presence of protected species including badger, otter, lesser horseshoe bat, Kerry slug, freshwater pearl mussel, St. Patrick's cabbage and camomile. Any specimens were to be removed and relocated to a similar habitat nearby under the direct supervision of the project ecologist and subject to a derogation licence where required.

20. Public notice of the decision was given, including in *Kerry's Eye* newspaper dated 26th November, 2020 and in *Seachtain*.

21. In December, 2020, the State sent an open letter in the *Sweetman* proceedings agreeing to an order quashing the derogation licences, although an intention to do so seems to have been signalled in advance of the formal letter.

22. Leave in the present proceedings seeking to challenge the board's decision was granted on 14th January, 2021 in *Clifford* (with the imposition of a stay on the development) and on 21st January, 2021 in *O'Connor.* An amended statement of grounds in *O'Connor* was filed on 20th January, 2021.

23. On 13th April, 2021, in *Sweetman v. Minister for Culture, Heritage and the Gaeltacht* [2019 No. 829 JR], the court made a formal order on consent quashing the derogation licences.

Application to cross-examine

24. A motion headed in both proceedings, but only filed in *Clifford,* was heard on 21st June, 2021 seeking relief under O. 39, r. 4, which relates to evidence on commission and similar matters. In moving the motion, the applicants sought to apply for orders in both sets of proceedings, to reprogramme the motion under O. 40, r. 1 as an application for cross-examination, and also to cross-examine a deponent who was not referenced in the motion. That is not necessarily the most appropriate procedure. The motion arose

because the board had informed the court and the applicants that the inspector's report had been amended.

25. Respondents in judicial review are obliged to give a full account of the decision-making process. Accordingly, the board is to be commended for acting correctly by clarifying the manner in which the amendment of the inspector's report came about. While the applicants raised various questions about the exact mechanics of this, thinking up questions (which is always possible) isn't enough. In order to obtain an order for cross-examination on the basis of the doctrine of the obligation to give a full account of the process (as opposed to on the basis of a conflict of evidence), an applicant must do more than say that some points of detail are not specified. Detail may be relevant or it may be irrelevant. An applicant for an order for cross-examination has to point to some issue of material significance in respect of which there is a reasonable possibility that the respondent's evidence may not be a full account of the decision-making process, or to put it another way, to show how any point not addressed by the respondent would, if answered, contribute materially to a reasonable possibility of obtaining relief either on the pleadings as they stand or following any possible amendment after obtaining the new information.

26. An applicant does not have to establish as a matter of probability that there may be a shortcoming in the evidence because that would be creating an unfair catch-22 standard. How can an applicant demonstrate wrongful omission of information as a matter of probability without the information itself? But there must still be some threshold of reasonable possibility in relation to a matter of material significance, and I just do not see that as having been established here.

27. The applicants make essentially four points as follows:

    (i). It is suggested that this is a point of principle and an applicant is entitled to an explanation and to all the papers. I agree that an applicant is entitled to all relevant papers. The applicants here applied for the full file and apparently got twelve document-boxes of material. They did not get the original version of the inspector's report because that had been taken off the file. Possibly with the wisdom of hindsight, the applicants could have asked for any relevant documents that were taken off the file as well, but they got what they asked for. They now have not only the full file and the document that was removed, but also an explanation.

    (ii). It is suggested that there is a conflict of affidavits because the board's original affidavit does not disclose the issue of the amendment of the report. One might view the failure to deal with that originally as being sub-optimal, but it does not warrant further cross-examination in the light of the information the board has now provided. While the applicants sought to describe this as confusion as to what was before the board, I do not accept that. The board have clarified what happened, albeit that they did not do that initially. The correction of an error or omission in an earlier affidavit is not automatically the sort of "conflict" of affidavits that triggers

cross-examination. It depends whether there is a reasonable possibility that any question of material significance remains unanswered.

(iii). It is suggested that not all concerns of the board, the deputy chair and the inspector's supervisor were incorporated in the final report. That submission is very speculative. A reading of the affidavits of Mr. Hyde and the inspector do not give the impression that there are any outstanding concerns of legal relevance. It was also suggested that it undermined the procedure that the board or a supervisor could suggest amendments to the inspector's report and that this affected the integrity of the process. However, no plausible legal ground to question this has been advanced. The basis for the board or the supervisor to suggest amendments to an inspector's report lies in the hierarchal relationship between the various actors. This is not a case where say, hypothetically, an actor with an ecological mission is being directed to speak or act, or not to do so, by a managerial cadre that has non-environmental or even political objectives, or acts as if it did even if formally its functions are environmental. That certainly would raise questions as to the integrity of the process. However, here all relevant actors have, and are attempting to implement, the same shared ecological and planning mission statement, or at least it hasn't been established otherwise in this case.

(iv). The applicants also question why the report was not placed on the public file or the website. They have a point to the extent that it was not completely clear from the board's initial response whether both versions of the report were available for consultation. Nor was it clear what the situation was regarding the website or, to the extent that documents were not published, what was the rationale for non-publication. In fairness to the applicants, I suggested that the board might clarify the position regarding compliance with the publication requirements of s. 146 of the Planning and Development Act 2000. The board did so on 22nd June, 2021. As regards the obligation to publish the report under s. 146(7)(a), the board stated that it did not consider that the original inspector's report was a "document relating to the matter", so it fell outside s. 146. That may be correct or alternatively it may not be (particularly where the original report was considered at one of the two board meetings), but that is a matter for legal submission insofar as it is relevant to the pleadings, which as matters stand it is not because the applicants did not seek an amendment. But either way it would not require cross-examination to deal with the issue.

28. For these reasons the motion, including insofar as it was construed as an application to cross-examine, was dismissed.

Matters left for a later module

29. Two matters were left to be addressed in a later module. Firstly, the claim for a declaration that "Schedule 5 Part 2 s. [*sic*, (*sc*. para.)] 10 (dd) of the Planning and Development Act 2000 [*sic*, (*sc*. the Planning and Development Regulations 2001)] as amended is incompatible with the State's obligations under Annex II s. [*sic*, (*sc*. para.)] 10(e) of the EIA Directive …". As that only affects the possible completion of the project

in the event of an application for permission for the omitted section, it does not affect *certiorari* of the impugned decision already made, and in fairness the applicants accepted that.

30. The second issue related to publication requirements. As discussed further below, I gave consideration to the applicants' claim that breach of publication requirements was a ground for *certiorari*, but it seemed to me that that had not been made out, so I considered the matter relevant to declaratory relief only. I adjourned to module II the question of such declaratory relief under that heading, which would give the State respondents the option to make submissions if they so wish. I explain reasons for that in further detail below. Accordingly, the present module will deal with the matters which I considered to be potentially relevant to the claim for *certiorari*. Those fall broadly under the following headings:

    (i). Issues of domestic law:

        (a) issues regarding the CPO;
        (b) fair procedures and other miscellaneous points;

    (ii). EU law issues:

        (a) environmental impact assessment/appropriate assessment;
        (b) publication requirements; and
        (c) derogation licence issues.

31. I will now deal with these in sequence.

CPO challenge

32. The CPO was challenged in the *O'Connor* proceedings (it was not an issue in the *Clifford* proceedings). I will endeavour to deal with the main headings of the challenge in sequence.

Alleged incorrect use of Roads Act 1993

33. The applicants complain that the council proceeded to acquire their land under the 1993 Act rather than the 2000 Act, although the pleadings do not specify why the 1993 Act is an unfair or even inferior procedure. Arguments were made in submissions that the council could have proceeded to acquire a mere right of way under s. 207 of the 2000 Act. That was not adequately pleaded. But in any event, there is a clear distinction between a lesser right of way and the superior right of ownership which the council was perfectly entitled to consider to be more effective for the purposes of this scheme. In particular, a mere right of way would not have made the greenway into a public road, but even without that factor a decision to acquire title would still have been lawful.

Allegation that the project is not a cycleway or a road

34. The argument was made that the greenway falls outside the definition of public road in the 1993 Act. Section 2(1) defines public road as "a road over which a public right of way exists and the responsibility for the maintenance of which lies on a road authority". The

cycleway is defined in s. 68(1) as "a public road or proposed public road reserved for the exclusive use of pedal cyclists or pedal cyclists and pedestrians."

35. The argument is made that the greenway is not for the exclusive use of cycles and pedestrians because landowners will have to cross the cycleway to get access to their properties. But incidental crossing does not breach the *exclusive* use requirement any more than any other *de minimis* use would. Apart from being an academic point, this argument proves too much because no cycleway would qualify under that interpretation. In any event, ground 22 as pleaded does not properly cover this point. It makes a different and equally fallacious point that a greenway is not a cycleway; but this greenway given its objectives is a cycleway.

Alleged lack of distinct assessment for the CPO

36. Reliance was placed on *Clinton v. An Bord Pleanála (No. 2)* [2007] IESC 19, [2007] 4 I.R. 701, under this heading and generally in relation to the CPO. The argument was made that the processes of CPO and development consent were improperly combined by the board or in particular that the CPO got inadequate consideration. But that is not so. A separate order was made in relation to the CPO (reference ABP-302452-18) and there are separate CPO-related reasons. The inspector's report clearly distinguishes between the development consent in sections 1-10 and the CPO in section 11. The fact that the CPO assessment says that the certain sections of the development assessment and EIA consideration at sections 8 and 9 are relevant and should be read in conjunction with the CPO assessment (para. 11.1) does not change that.

37. It is perfectly logical for the board to ask whether a development is in accordance with the development plan or is environmentally appropriate before allowing the CPO. How a decision-maker arranges its material is a matter for it, and that is not to be dictated by an applicant or an objector (see *Balscadden Road SAA Residents Association Ltd. v. An Bord Pleanála* [2020] IEHC 586, [2020] 11 JIC 2501 (Unreported, High Court, 25th November, 2020), at para. 39(iv)).

Alleged wrong test or disproportionality

38. The board's written submission is worth quoting under this heading because it demolishes the applicants' disproportionality argument very effectively: "[f]irst, is the objective legitimate? Well, the objective is to facilitate the greenway and clearly it is legitimate or more accurately within the competence of the Board to determine as legitimate. Second, are the means at least rationally connected to achieving that end? They are. The means are about taking the land needed for the greenway. Third, is there a less invasive way to achieve the objective? Not here, no, because you can't have the greenway without the land".

39. The applicants quibble with the reference to community need, but that is only a recognition of the reality and a legitimate consideration. Necessity for compulsory acquisition does not require absolute necessity. It requires a determination that the acquisition is desirable or expedient having regard to public benefits such as the creation of public infrastructure and meeting community need. That involves a judgement as to

public benefit and does not require some sort of artificially high threshold like a finding that the existing infrastructure is dangerous.

40. The right to private property is of course extremely important, but has to yield to measures which, as put in art. 1 of protocol 1 of the ECHR, are taken "in the public interest and subject to the conditions provided for by law and by the general principles of international law." Here, the interference with the applicants' property rights was taken in a lawful manner in the public interest. For what it is worth, there is no basis to suggest that the taking of land to create public infrastructure is in itself a breach of general principles of international law. Alternatives were considered "at length during the oral hearing" (para. 11.2.4 of the inspector's report). It has not been established that there was any failure to consider such alternatives or to consider submissions in that or any regard.

41. Insofar as it was suggested that the wrong test was considered, in fairness, it is true that that there was some confusion in the papers as to which statutory provision is relied on. The relevant provision for development consent is s. 51(2) of the 1993 Act, and as regards CPO confirmation is s. 76 of the Housing Act 1966, as amended, following a proposal from the council under s. 213 of the 2000 Act. At para. 11.1, the inspector refers to s. 52(2) of the 1993 Act, but that is irrelevant. Page 1 of her report refers to s. 216 of the 2000 Act which is also irrelevant, but no point is pleaded on these technical errors; and despite the incorrect statutory references the correct test was considered in substance.

Alleged incorrect population figures and unduly narrow justification

42. Part of the case put forward by the council was about economic and population decline in the region. It was not an error to look at population trends and economic trends, and not an error to have regard to such matters in determining whether there is a public need for the compulsory acquisition. Furthermore, no error has been demonstrated in how the board went about that exercise. It is clear that the board had material on which it could draw and the inspector's report gives a reasoned explanation for the approach taken. In particular, the council set out a rationale for the project under the heading "The Need for the Scheme" in section 5.1 of the Project Appraisal Report.

Alleged misunderstanding of severance of lands

43. Insofar as it is alleged that the inspector misunderstood whether agricultural lands had already been severed by the railway line, it is clear from her report at para. 8.4.5 ("planning assessment", under the sub-heading of "farm severance") that she did not.

Alleged impermissible modification of CPO

44. As regards the complaint that the CPO proposal was unlawfully amended, the relevant legislation clearly envisages the possibility of confirming a CPO with modification (see para. 5(b) of the Third Schedule to the 1966 Act and s. 51(6) of the 1993 Act). No unlawful exercise of that power has been made out

Miscellaneous domestic law issues

45. Turning then to the miscellaneous remaining issues regarding domestic law, the major headings appear to be as follows:

    (i). legality of condition 3;

    (ii). fair procedures arising in the oral hearing;

    (iii). fair procedures regarding the *errata* documents;

    (iv). lack of reasons; and

    (v). speed limits.

Condition 3

46. The full greenway is approximately 32 km long and the section removed is in the order of 5 km, leaving approximately 27 km subject to the development consent. There are approximately 122 different types of intersection between the greenway and other routes:

    (i). Firstly, there are approximately 32 intersections with private driveways and agricultural access roads. Of those 14 are residential, 2 commercial and 16 agricultural.

    (ii). Secondly, there are 72 other agricultural crossings that do not involve roads. There could, for example, be a field-to-field crossing. Those are gated (see the example at plate 3-12 in book 2 of the EIAR (chapter 3, p. 29)).

    (iii). Thirdly, there are 18 intersections with public roads (see p. 93 of the inspector's report).

47. The inspector's report dealt in particular detail with the intersections with the approximately 32 domestic and agricultural access routes. The inspector proposed a condition to require compliance with drawing no. 318-380 Rev. A, which became her proposed condition 4 and the board's condition 4. This involved a chicane at either side of the intersection. The council's drawings, while envisaging chicanes, do not involve cattle grids or a requirement to dismount, or signs to that effect.

48. Having addressed that, the inspector then went on to refer to complaints of owner-objectors regarding straying animals at p. 95 of her report. She says "[t]he installation of cattle grids on either side of these junctions to work in combination with the chicane gates (c.50:50 chicane & cattle grid) would serve to deter farm animals from straying along the pavement." She states that a similar arrangement exists on the Great Western Greenway from Newport to Mulranny and that she had cycled this route herself.

49. Her reference to animals straying onto the greenway pavement is "in the vicinity of the crossover junctions as they may not be gated (unlike the agricultural crossings)." The crossover junctions seem to mean the same approximately 32 intersections referred to above. Having proposed cattle grids at those locations, she then referred to 4 areas of

steep gradient where she suggested that the greenway would be narrowed and cattle grids provided along with chicanes with a requirement to dismount. The inspector's proposed condition 3 only refers to cattle grids at those 4 locations with significant gradient. Her proposed condition 4 is therefore slightly inconsistent with the narrative because it does not add the proposed cattle grids at the remaining 28 intersections that she refers to in the body of the report.

50. The ultimate board decision is slightly different again because it does not narrow the greenway at the 4 steep gradients but it also tries (not totally successfully, as we shall shortly see from the wording used) to make explicit the need the need for cattle grids at all 32 crossover points. It also extends the signage to dismount to all such intersections. The upshot is 32 double sets of cattle grids in a 27 km greenway.

51. I turn then to the specific grounds of challenge. Insofar as these grounds concern the impact of condition 3 on the applicants themselves, it is hard to see how this gets the applicants anywhere as an argument about the impact on their rights, because the condition was introduced on foot of some of their representations.

52. Turning more specifically to the grounds, I will address them as follows:

(i). As regards ground 68 and uncertainty as to where these grids will be, the board condition is that "cattle grids shall be provided at the intersections of the greenway with the access road/driveway". The use of the singular in isolation is not clear, but one has to interpret condition 3 in the light of the inspector's narrative albeit that her condition in isolation did not make the position clear either. When read in such context, it needs to be read as meaning the approximately 32 locations of intersection with domestic access and agricultural access routes.

(ii). As regards ground 69 insofar as it relates to irrationality (and acknowledging that the wording of the ground is not totally clear and not grammatically correct, but I think can be legitimately construed as making an unreasonableness point), irrationality is a high bar and involves a lack of material before the decision-maker. I do not think that has been demonstrated in the sense pleaded, at least for the purpose of a challenge by the landowning objectors to any aspect of the decision that was predicated on responding to their own objections.

(iii). It is alleged that the reasons are inconsistent with the rationale for the inspector's report (grounds 69 and 70). The argument is made that insofar as the reasons relate to the gradient, that could not justify all of the cattle grids. That is a fair point because the gradient only arises at 4 locations, but the gradient was not the only reason. Safety is referenced as well.

(iv). It is contended that no reason was given for disagreeing with the inspector (ground 71), but when one looks at the narrative of her report, the board was *not* disagreeing with the inspector on the basic point as to whether there should be cattle grids at the 32 intersections. It is true that in *Dunne v. An Bord Pleanala*

[2006] IEHC 400, [2006] 12 JIC 1401 (Unreported, High Court, McGovern J., 14th December, 2006), at para. 34 it was suggested that in that case there was no need to give reasons for disagreeing with the inspector in relation to the particular condition in that case. But that was in the context of a condition that was not one of the main issues. In other cases, a condition could be a main or even pivotal issue. If the disagreement *is* on a main issue, then there is a requirement to give the main reasons for it, even if it relates to a condition. That doesn't arise here, not because this isn't a main issue, but because there isn't disagreement on the central aspect of it.

53. Nonetheless, this heading raises three general points about the process that are worth making.

54. The first point is that the correctness, as opposed to the legality, of a decision is for the decision-maker rather than the court. Thus, I am not concerned with whether this greenway in particular, or any given development more generally, is a good idea or not.

55. Nor am I concerned with the merits of the legislative procedure under which this or any given decision was made, save insofar as that procedure either raises issues of *vires* or constitutional or EU law validity, or ECHR compatibility, for decision, or of legal policy (as opposed to pure executive or legislative policy), on which courts have always had some limited latitude to comment, hopefully constructively.

56. Nor indeed am I concerned with the merits of whether the imposition of 32 double-sets of cattle grids on a 27 km greenway is a good idea or not. However, a court does have a role in the *process* by which such a decision is made, bearing in mind that the "process" does include some merits-related aspects like reasonableness and proportionality. It is probably worth making the point that the process does give rise to possible concerns here. In particular:

    (i). Insofar as I understood the board to submit that there was no real difference between chicanes alone, and chicanes with both cattle grids and signs requiring dismounting, that is a view that could not be open to any reasonable decision-maker. A walking experience where one has to negotiate the inconvenience if not arguably possible difficulty of cattle grids, and a cycling experience where one is directed by signs to dismount, especially multiplied 32 times over the course of the greenway, is qualitatively different from one without such grids.

    (ii). I don't see anything in the decision investigating whether the objectors' concern over straying cattle had any reality or not. In Westminster parlance, there is the insightful concept of the "wrecking amendment", which is an amendment that may look plausible, but is really motivated by a desire to complicate the proposal being amended and ideally render it unworkable. I don't know whether the objection regarding straying cattle falls into this category or not, but what I do know is firstly that the board didn't give the reality of the objection any identifiable consideration; secondly, that the council doesn't share that concern; and thirdly, that the group

making that cattle-related objection doesn't share the objective of supporting the development.

(iii). Nor do I see anything in the board's decision weighing up the trade-offs involved in installing 32 double sets of cattle grids on a 27 km greenway. There are two obvious trade-offs: firstly, general impact on the user experience in encountering a double set of grids every 843m on average (albeit that they are not in fact evenly spaced); and secondly, and in particular, any possible safety considerations for walkers, compliant cyclists or non-compliant cyclists. There might be a view that depending on the design, cattle grids could arguably pose difficulty, at least for some users. Or maybe the safety gains of such grids in counteracting the menace of vast hordes of straying cattle are so great that such gains outweigh any safety downsides. One can't really say because, working off the wording of the decision, the question was never considered by the board.

(iv). Insofar as the inspector referred to her experience on the Great Western Greenway and her view that it worked well, that is fine insofar as it goes, but a conclusion in that form doesn't immediately lend itself to analysis. One is left in doubt, for example, as to how many such cattle grids are used on the 42 km of that greenway, and on what criteria and types of intersection, and thus as to whether it is really comparable. More importantly, maybe one could reasonably ask what is the objective basis for dealing with intersections in that manner, and whether there are Irish, British, European or international standards, studies or reports that weigh up all the factors involved. Instead of that, we are told the inspector used one other greenway and thought it worked well. A valuable and reassuring comparison, no doubt, but arguably short of something that could be said to be objective, scientific, clear, transparent or comprehensive. In fairness, this isn't a phenomenon that can be attributed to any individual inspector. The board has had a long run with *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39, but neither administrative law generally nor planning law in particular has stood still since, and nor has the nature of the wider society. Expertise is of course vital. But in our increasingly democratic age experts are expected to "show their workings" where that is reasonably practicable, rather than to have deference demanded for assertions or conclusions merely because of the position or qualification held by the speaker. I don't think judges would get very far these days in terms of public acceptance of their decisions on the latter basis, so I don't think it is unreasonable to expect such transparency from administrative decision-makers. As against that though it is only fair to say that, in general, a lack of detail or transparency in a decision-maker's analysis only becomes a ground for *certiorari* if legal thresholds are met, for example if there is an autonomous obligation to address a point even if no party raises if, if some relevant contrary point is put up in submissions or otherwise exists on the materials so as to make the matter an issue on which further detail is necessary, or if the point is dropped into the process without a full or at least adequate opportunity to rebut it (an argument that one might arguably consider from the viewpoint of the council or hypothetically disconcerted walkers or

cyclists, but not from the point of view of the landowner-objectors who own the issue because they ignited the whole straying-cattle farrago to which the chicanes, signs and grids were the proposed answer). Hence, while it's desirable for the board or any decision-maker to adopt best practice and make explicit reference to the existence or otherwise of any relevant objective standards, studies or reports, and how they are complied with, failure to do so is not automatically a basis to quash a decision. It depends among other things on submissions made, illustrating how the participants in the process can shape the end result even by omission.

57. Hopefully the board will be proved right in due course, or at least not so wrong as to cause any serious problems. If not, perhaps the council will find some procedure before construction is completed in order to walk back some of the aspects of the board's decision that they are unhappy about. If that can't be done, perhaps the details of final design may produce high quality options that can minimise any inconvenience caused by the conditions. One can obviously leave all that to the council's judgement.

58. A second general point is that I imagine that fans of the public participation process will not be using this development as a case study. Public participation is only as good as the participants make it. In the absence of anyone fighting for any given interest, other interests will probably prevail on the principle of the squeaky wheel getting the grease. Hence, perhaps the slightly one-sided nature of the board's consideration of the cattle grids issue. A related aspect is that the nature (or absence) of submissions before the decision-maker does affect the extent to which an applicant can succeed on the point later (even in an EU context).

59. The third and final point is that the pleadings are absolutely vital. The general approach (not of these applicants specifically, but in this area generally) of trying to overwhelm the court with volume of words is not going to achieve very much. Leaving aside any limited latitude that might exist under EU law, the situation is that if there is a potentially viable point, but it isn't adequately pleaded, then it just isn't going to be a basis for relief. In the absence of such a basis here, I can take note of the points in the interests of completeness, transparency, good decision-making and respectful dialogue with other branches of government (or as part of the court's unwritten educational and informative role if you want to call it that), but that's where it ends.

Fair procedures regarding the oral hearing

60. While it is contended that the oral hearing was unfair, leaving aside the issue of the *errata* documents dealt with below, nothing specific has been established as to how any unfairness arose.

Unfairness regarding the *errata* documents

61. Insofar as concerns the response to the request for further information that was provided in advance of the oral hearing, the council's website included the EIAR, the public notices, the request for further information and the response. While the applicants complain they could not access this, the board has identified as to how this material was accessible. That has not been adequately countered, and it has not been explained exactly why the

material was not accessible. In any event, the board received a number of responses to the further information provided by the council, which included submissions from Mr. McDonnell and the Greenway Information Group.

62. As regards the *errata* documents, they were submitted at the start of the oral hearing and read into the record (see para. 7.3.3 of the inspector's report, p. 46). There was also a long adjournment of the oral hearing which gave an opportunity to the applicants to consider the *errata* further. No breach of fair procedures has been made out under this heading and, additionally, the applicants have not established that they would have had anything new to say on foot of this material. Thus, the fair procedures argument is completely academic.

Alleged lack of reasons

63. The pleaded objection regarding the alleged inadequate reasons for allegedly disagreeing with the inspector as regards condition 3 has been dealt with more specifically above. As regards any other issue, the standard is to provide the main reasons on the main issues, and that was done. *Balz v. An Bord Pleanála* [2019] IESC 90, [2020] 1 I.L.R.M. 637 doesn't create a higher standard. The standard for reasons is in *Connelly v. An Bord Pleanála* [2018] IESC 31, [2018] 2 I.L.R.M. 453.

64. It was more specifically alleged that there is a lack of reference to alternatives, but there is a discussion of alternatives in the inspector's report.

Alleged *ultra vires* condition 5(c) and (d)

65. It is alleged that a condition regarding speed limits (condition 5(c) and (d)) is *ultra vires*, but that misunderstands the process under this heading. The permission does not render any particular development lawful, but merely removes any planning objection to it. Subject to any EU law argument (not relevant to this point) as to the need for interlinkage between different systems of approval, any other requirements remain in being independently, and if the conditions imposed cannot be carried out, then the permission cannot be implemented.

EU law

66. As the domestic law points fail I turn now to the EU law points.

EIA and AA points

67. A number of sub-points are made under the headings of EIA and appropriate assessment (AA):

    (i). the consented route was not properly assessed;

    (ii). the omitted section of the route amounts to salami slicing;

    (iii). there was inadequate assessment due to differences between the inspectorate ecologist's report and the inspector's report; and

    (iv). there was a lack of assessment of impact on farm practices.

68. There was a general plea of other breaches of the EIA directive, but it was accepted that the complaints could be condensed under those four headings.

Complaint that the consented route was not assessed for EIA or AA because it was different to what was proposed

69. The applicants complain that the consented project is different to the project in respect of which consent was sought. The reason for that is that, as noted above, the board omitted two relatively modest sections of the greenway having regard to environmental concerns. That background makes the applicants' whole point somewhat implausible from the outset. If the board had included the contested sections then that would have been environmentally unacceptable. And since they omitted the sections on environmental grounds they are caught by a catch-22 that they are accused of not assessing the project. While there could be cases where a project is so reconfigured by the ultimate permission that the final outcome cannot be said to have been assessed, so the point is somewhat fact-specific, but I think that the facts here do not support the conclusion advanced.

70. While it is true that the ultimate project approved *does* have to be assessed, and not just the project for which consent was sought, it is clear from the EIA and habitats directives that a project can be amended following the EIA report or NIS, so an amendment in the final decision does not automatically necessitate revised statements or going back to square one. In the roadway context, Advocate General Gulmann noted in Case C-396/92 *Bund Naturschutz in Bayern e.V. v. Freistaat Bayern, Stadt Vilsbiburg and Landkreis Landshuat* (Court of Justice of the European Union, 3rd May, 1994, ECLI:EU:C:1994:179), para. 69, that EU law did not have the effect of "forcing the Member States to depart from the normal practice according to which long road links are executed by constructing sections over staggered periods." Assessment of any individual part had to have regard to the significance of the section in the linear route to be taken by the rest of the road link (para. 72).

71. It is clear from the board decision that it envisages omission of a part of the route "pending further investigations and the consideration of an increased buffer zone between sections of the Greenway infrastructure and its boundary with the Valentia Estuary shoreline". That is the context of the omission. It is not a case where an application has been reconfigured to produce some outcome that could not have been contemplated or where the outcome ignores the possible future completion of the greenway. By definition, in a context where the application is for the complete greenway, and a section has been omitted, the board has considered the proposal with due regard to its possible final extent. It was aware of all impacts of the scheme and it cannot be said that what was described as the "fragmentation" of the greenway brings up some wholly new issue.

72. As regards the claim that the approval in two sections creates new *termini*, the board clearly was aware of the local road network as set out in the EIAR (see maps at chapter 9, fig. 9-1, in four sub-maps at pp. 5 to 8). While the inspector does note that the existing rural roads would not have the capacity to accommodate the predicted number of cyclists that would be required in order to realise the overall benefits of the scheme, the context of that is in the context of the use of the greenway itself. The fact that the local

network would not support the bulk of greenway traffic is not an argument that some cyclists might not be capable of branching off and using other local roads. There is not automatic necessity for there to be car parking and toilets and other facilities at all *termini* of any section of the greenway, and in that context it is clear that the greenway has multiple access points (see fig. 9.1 of the EIAR referred to above and para. 3.3.6, chapter 3 of EIAR, p. 25). That inherently involves an acceptance that entry points without full visitor facilities are environmentally acceptable. The alleged impact on any nearby European site is speculative and not evidentially made out. As regards reasons, it is clear that sufficient reasons are provided.

Complaint that the omission of a section amounts to salami slicing contrary to the EIA directive

73. The EIA directive imposes a requirement to consider cumulative effects and thus it cannot be circumvented by project splitting or salami slicing: Case C-508/03 *Commission v. United Kingdom* (Court of Justice of the European Union, 4th May, 2006, ECLI:EU:C:2006:287), Case C-227/01 *Commission v. Spain* (Court of Justice of the European Union, 16th September, 2004, ECLI:EU:C:2004:528), Case C-396/92 *Bund Naturschutz in Bayern e.V. v. Freistaat Bayern, Stadt Vilsbiburg and Landkreis Landshuat* (Court of Justice of the European Union, 3rd May, 1994, ECLI:EU:C:1994:179), Case C-142/07 *Ecologistas en Acción-CODA v Ayuntamiento de Madrid* (Court of Justice of the European Union, 25th July, 2008, ECLI:EU:C:2008:445). That, however, is not a ground for challenging the present decision. It would arise if there was a future attempt to authorise the missing section of the greenway without EIA. The principle would only arise here if this particular project was not being subjected to EIA but would have been had the omitted section been included.

Alleged inadequate AA due to differences between the inspectorate ecologist report and the inspector's report

74. Insofar as the inspectorate ecologist did not express concern set out in the inspector's report, this does not give rise to a ground for judicial review. The board had all of the materials before it and clearly erred on the side of ecological caution by omitting the contested portion of the greenway. This does not give rise to an argument that the board granted permission for development in breach of the requirement to remove scientific doubt.

Alleged lack of EIA regarding impact on farm practices

75. The argument that there was no proper assessment of the impact on farming has not been made out. The EIAR includes this issue (see chapter 7, "population, human health and material assets").

Publication requirements

76. As noted above, the applicants complain that there had been a breach of requirements regarding the publication (both physical and electronic) of certain materials, particularly the submissions on foot of the request for further information and the decision itself. Before dealing with whether there was a breach (which will ultimately be left over for a later module), I need to spell out the reasons for my conclusion on why this is not a ground for *certiorari*.

77. The applicants have not averred that they were unable to make submissions and there has been no evidence that they were themselves deterred from making submissions. Barring some egregious disregard of core legal requirements, it would, in general, be an improvident and inappropriate use of the power of *certiorari* to quash a decision merely because of the theoretical possibility that some person not before the court might have had difficulty in engaging in the public participation process. For *certiorari* purposes, absent exceptional circumstances, applicants cannot make a fair procedures point on behalf of somebody else, but rule of law considerations can be secured by declaratory relief where appropriate. As regards the complaint that the decision itself was not notified under s. 51(6C) of the 1993 Act, implementing art. 9(1) of directive 2011/92/EU as amended by directive 2014/52/EU, that cannot go to validity because it only arises after the decision has been made. It could only go to declaratory relief.

78. On that basis, it seemed to me that there was no possible argument by which any non-publication could give rise to relief by way of *certiorari.* Accordingly, since the only relief available was declaratory relief, I deferred that matter to module II to give the State respondents an opportunity to make submissions if they wish since the question intersects with the issue of transposition.

79. The main issues arising under the heading of whether there was a breach seemed to include the following, in no particular order:

(i). whether art. 6(5) of the 2011 EIA directive as amended in 2014 is directly effective;

(ii). whether s. 51(6) (in its original form, pre-amendment) was complied with noting the evidence that a notice was published in *Kerry's Eye* and *Seachtain*;

(iii). whether the applicants' complaints are properly pleaded;

(iv). the extent to which the amendments to the 1993 Act, made with effect from 24th June, 2019 by the European Union (Roads Act 1993) (Environmental Impact Assessment) (Amendment) Regulations 2019 (S.I. No. 279 of 2019), must be retrospectively applied by the board despite both the application and a good deal of the process predating that date;

(v). whether there is a distinction between retrospectively publishing notices seeking additional information and submissions on the one hand, and publishing details of the decision even if the process had begun prior to the transposition date;

(vi). whether the newspaper notices complied with s. 51(6C) in that they refer the reader to the board's website rather than themselves containing the necessary information;

(vii). whether the newspaper notices were published promptly given the nearly two-week delay;

(viii). whether the board did in fact approve "the proposed South Kerry Greenway as submitted by Kerry County Council" as stated in the notices or whether that is inaccurate; and

(ix). whether the retrospection issue is affected by the fact that transposition was late.

80. Focused submissions on these matters can be made in module II.

Derogation licence issues

81. Four derogation licence issues are pleaded:

(i). failure to have regard to the reliance on derogation licences;

(ii). failure to have regard to the lack of a valid derogation licence;

(iii). an error in granting permission where there was no valid derogation licence; and

(iv). failure to establish a system of strict protection.

Failure to have regard to the reliance on derogation licences

82. Ground 21 in *Clifford* and grounds 11 and 59 in *O'Connor* plead that the board "failed to have proper regard for the reliance on derogation licences". It is hard to know what that plea really means. "Failed to have regard for the reliance on" licences cannot be reconfigured as meaning "failed to disregard the reliance on" the licences. The grounds do not say why a failure to have regard to the reliance on derogation licences was unlawful and such an incomplete ground cannot in general be a basis for relief and certainly not here. It seems to me these grounds do not have any definite meaning that warrants relief and in any event, the factual premise seems to be incorrect because, since the derogation licences had expired by the time of the grant of permission, there was no "reliance" on derogation licences in the sense pleaded.

Failure to have regard to the lack of a valid derogation licence

83. In complete contradiction to the first point made, ground 23 in *Clifford* and 61 in *O'Connor* complain that because the board "knew or ought to have known that no valid derogation licence has been granted" it "failed to have proper regard to matters which it [ought] to have had regard to". Again that is vague as a plea. The matters to which it ought to have regard are not specified. But even assuming that that means the absence of an in-force derogation licence, it is hard to see either the factual basis to conclude that the board was unaware of anything that was brought to its attention, or the legal basis to conclude that it ought to have been aware of something that was not brought to its attention (lack of discussion is not equivalent to lack of consideration: see *F.M.O. (Nigeria) v. Minister for Justice and Equality* [2019] IEHC 371, [2019] 5 JIC 2816 (Unreported, High Court, 28th May, 2019)). The derogation licences were handed into the board at the oral hearing and were before the board. They say on their face that they have an expiry date, so there is no real basis for saying that the board was not aware of that. If the licences were invalid (as they later proved to be), that did not particularly matter for this purpose because they were not in force anyway.

Alleged error in law in granting permission where there was no valid derogation licences

84. Even assuming *arguendo* that the words "erred in law" in ground 23 in *Clifford* and 61 in *O'Connor* must be injected with the meaning that the board was not entitled to grant permission for the project in the absence of there being at that time an in-force derogation licence, the applicants did not state in those grounds any specific legal basis as to why a licence must exist before a permission is granted and I do not actually see such a basis.

85. While admittedly there is some passing comment in the Opinion of Advocate General Léger in Case C-183/05 *Commission v. Ireland* (Court of Justice of the European Union, Opinion, 21st September, 2006, ECLI:EU:C:2006:597), at para. 57, that could be construed in that sense, that was in the context of a complete lack of rules providing a system of strict protection. The 2011 regulations were many years into the future at that point, and on that basis the case is clearly distinguishable. In any event, domestic law in Ireland is clear that, contrary to what seems to be implied by the Advocate General, the grant of planning permission does not render the development lawful: see *Redmond v. An Bord Pleanála* [2020] IEHC 151, [2020] 3 JIC 1003 (Unreported, High Court, Simons J., 10th March, 2020), *Highlands Residents Association v. An Bord Pleanála* [2020] IEHC 622, [2020] 12 JIC 0201 (Unreported, High Court, McDonald J., 2nd December, 2020).

86. There is a broader question as to whether there should be a linkage between planning and derogation (see *Hellfire Massy Residents Association v. An Bord Pleanála* [2021] IEHC 424), but that goes way beyond the pleadings here. In any event, it is not at all self-evident that it would be in the interests of environmental protection to have a derogation licence before planning permission if there is no requirement for an integrated process. If it has to be one before the other, it seems much more likely that the environment is best protected if there is a requirement for planning permission first.

87. Another aspect is that a derogation licence may last for only 7 to 12 months as appears from the durations of the derogations here, whereas planning permission lasts for 5 years.

88. There is no allegation in the pleadings here that the distinction in terms of duration is problematic, which only goes to show that if there is an issue in the area of derogation, it is in the systemic relationship between planning and derogation (which is not pleaded), not in some formalistic argument that there must be a derogation in force at the date the permission is granted even if it expires immediately thereafter.

89. It is also noteworthy that derogation licences were not conditional on the subsequent grant of planning permission. They were granted for activity specified in connection with the South Kerry Greenway. That does not automatically mean that all the activities they authorise would have required planning permission. That is all the more reason why it is not automatically appropriate for derogation to be granted in the abstract ahead of the permission, especially when it can then be lawfully acted upon insofar as that does not require permission. That seems inappropriate and only reinforces the case that the real

point for discussion is whether there should be some linkage between the systems rather than some artificial rule that one must have a derogation licence in one's hand on the day the planning permission is granted. Given that the linkage between the systems is not pleaded, I do not see an issue under this heading on which the applicants can succeed.

Failure to establish a system of strict protection

90. Ground 22 in *Clifford* and grounds 42 and 60 in *O'Connor* complain that the decision "is invalid in that it contravenes art. 12 of the Habitats Directive by failing to take the requisite measures to establish a system of strict protection". That is misconceived. The establishment of a system is a matter for the State. An individual planning decision cannot be condemned for failure to establish a system. That is not the role of a competent authority for development consent. In any event, an individual planning decision could not amount to establishing a system, so it cannot logically be condemned for failing to do so.

Order

91. For the reasons stated in the judgment the order will be as follows:

(i). both proceedings are dismissed other than as to declaratory relief;

(ii). module II of the proceedings will commence on 16th November, 2021 to address the claim for declaratory relief regarding:

(a). alleged non-transposition of the EIA directive; and

(b). the claim that the board was in breach of public information requirements of s. 51 of the Roads Act 1993 regarding inadequate publication of material and of the decision on its website and in local newspapers; and

(iii). in the light of the fact that such declaratory relief does not affect the validity of the decision, I am provisionally minded to discharge the stay with effect from the perfection of the order in the absence of any submission to the contrary.