THE SUPREME COURT

Record No. 2019/25

Clarke C.J.
O'Donnell J.
Dunne J.
O'Malley J.
Irvine J.

IN THE MATTER OF SECTION 50 OF THE PLANNING AND DEVELOPMENT ACT, 2000

BETWEEN

FRIENDS OF THE IRISH ENVIRONMENT LIMITED

APPELLANT

AND

AN BORD PLEANÁLA

RESPONDENT

P. PLUNKETT LIMITED, WESTMEATH COUNTY COUNCIL, CAVAN PEAT LIMITED, HARTE PEAT LIMITED, NANCY HENNESSY, EAMONN CREGGY, MICHAEL BRADY, JOHN PATRICK MURTAGH, JOHN REILLY, PÁDRAIG HILL AND CLOVER PEAT

NOTICE PARTIES

Judgment of Ms. Justice Dunne delivered on the 23rd day of April 2020

Background

1. This is a leapfrog appeal from the High Court judgment delivered by Meenan J. on 9th March, 2018. The pertinent facts (as summarised by Meenan J. in his judgment) are that the appellant herein (who is a limited company with objectives including the protection of the Irish environment) (hereinafter referred to as "FIE") became concerned about peat extraction in Ireland. FIE maintains that under both domestic legislation and European Union law, certain peat extraction works do not constitute "exempted developments" and thus require planning permission. FIE also maintains that certain peat extraction works require an Environmental Impact Assessment (hereinafter "EIA") and an Appropriate Assessment (hereinafter "AA"), pursuant to the legislation.

2. FIE, by letter dated 21st August, 2010 referred certain peat extraction works in the townlands of Lickny/Newcastle, Doon, and Carlanstown, County Westmeath, under s. 5 of the Planning and Development Act 2000 (hereinafter "the Act of 2000") to the appropriate planning authority (in this case Westmeath County Council). The purpose of the referral was to seek a determination as to whether such peat extraction activities were or were not indeed "exempted development".

3. Westmeath County Council considered the referral and in turn referred the matter to An Bord Pleanála (the respondent herein, hereinafter referred to as "the Board") on 24th November, 2010. The Board sought additional information from Westmeath County Council concerning the "name and address of the owner of the land in question and the name and address of the occupier of the said land, if different". Westmeath County Council then provided some thirteen Land Registry folios which indicated that some nine parties were involved in the ownership of the lands at issue. An examination of the maps

attached to the Land Registry folios showed that the lands contained numerous subdivisions. The Board then wrote to the nine individuals referred to in the various Land Registry folios but the responses did not advance to any extent the Board's knowledge of the relevant owners/occupiers. Indeed in some cases there was no response.

4. It appears that in the course of this process, the Board kept FIE informed of its efforts to identify the relevant owners/occupiers but this did not assist any further in adding to the Board's knowledge of the identity of the relevant owners/occupiers.

5. Following investigations and the preparation of an inspector's report, the respondent issued its decision on 3rd May, 2013, dismissing the referral and (as quoted by Meenan J. at para 23) saying that:

> "…Having regard to the different parcels of land identified in this referral, which appear to be in multiple ownership, in varying size of individual holdings with numerous parties involved and in the absence of certainty in regard to ownership of the land or the individual circumstances of the plots (not necessary adjoining), it is considered that the question is (sic) referred is not sufficiently particular or detailed enough to enable the Board to carry out its obligations under s. 129 of the Planning and Development Act, 2000, (as amended). Furthermore, the diversity of circumstances involved militated against a thorough evaluation of the referral question as posed. In light of the forgoing, the Board decided to dismiss this appeal…"

6. FIE thereafter sought an order of *certiorari* quashing the determination made by the Board. In considering the issues raised by both parties, at paras 28 to 30 of the High Court judgment Meenan J. said:

"28. What is in issue in these proceedings is the determination made by the respondent based on the information it had. The respondent submitted that it was best placed to assess whether it had the information necessary to make a determination and also to comply with its legal obligation to follow fair procedures, in particular, to hear from those who may be affected by the determination.

…

29. The problem facing the respondent in reaching its determination was that, regardless of the fact that the lands could be identified, the relevant owners/occupiers could not to the extent that it would have been unsafe for the respondent to make a determination concerning the property rights of those involved. In previous paragraphs, I have set out the steps taken by the respondent to identify such persons.

30. In applying the principles set out in the authorities referred to, it is clear to me that I cannot conclude that the decision of the respondent to dismiss the referral was either irrational or unreasonable. Given the absence of information as to who

owned and/or occupied the lands in question and the basic legal requirement that such persons be on notice of the referral, I cannot reach any other conclusion."

7. At para 37, Meenan J. dealt with the FIE's submission that the Board failed in its statutory duty under s. 138(2) which requires the respondent to "state the main reasons and considerations on which the decision is based" by saying:

"37. It is well established that a body, such as the respondent, in giving reasons is not 'bound to provide a discursive judgment as a result of its deliberations'. (see the decision of Murphy J. in *O'Donoghue v An Bord Pleanála* [1991] ILRM 750)."

At para 38, Meenan J. concluded:

"The basis on which the respondent reached its determination is clear to me. I have set out at para. 23 above the 'reasons and considerations' for the determination. This refers to, succinctly, problems in identification of the individuals who owned and/or occupied the lands involved. Furthermore, as stated above, the applicant was fully aware of the problems which the respondent encountered in seeking to identify the persons whom it was obliged to put on notice of the referral. Therefore, I cannot conclude that there was any failure on the part of the respondent, in the words of the s. 138(2) of the Act of 2000, to state 'the main reasons and considerations on which the decision is based'.

8. In a judgment delivered on 7th December, 2018 Meenan J. considered an application to certify for appeal three questions of law. The questions were set out at para 6 of the judgment:

"(i). [To] what extent, if any, must An Bord Pleanála take into account the requirements of Article 2(1) of the EIA Directive in exercising its discretion under s. 5 of the PDA 2000 and/or its powers under s. 250(1)(d) and/or s. 250(7)?

(ii). By what criteria are matters of 'planning judgment' to be identified? In particular, do matters of fair procedures come within that concept?

(iii). Where the Board decides not to exercise its powers under s. 250(1)(d) and/or s. 250(7) is it obliged to give any reason for not doing so?"

9. In declining to certify the questions, Meenan J. said at para 13 of his judgment that he was satisfied that the decision of the Court "…has not involved any point of law of exceptional public importance." He said that the Court reached its decision by applying well established principles to the facts of the case. It was under those circumstances that FIE applied for leave to appeal directly to the Supreme Court.

10. The Supreme Court Determination states that FIE notes that in the judgment refusing the relief sought herein, the High Court referred to and relied on the decision in the case of *Kinsella v. Dundalk Town Council* [2004] IEHC 373 to support the Board's argument that it was best placed to assess whether it had the information necessary to make a

determination. This gives rise to what is stated to be a question of "curial deference". On the other hand, the Board points out, *inter alia*, that it was faced with difficulties in identifying the owners/occupiers of the lands in question and thus, having regard to the "fair procedures rights" of the owners/occupiers, it was appropriate to exercise its discretion to dismiss the referral.

11. Para 9 of the Determination granting leave to appeal identifies the issue of general public importance in the following way:

> "…the issue raised by the applicant is one of general public importance in relation to the steps required to be taken to identify the owners/occupiers of the lands in question and whether or not the High Court was correct to afford curial deference to the Board in its approach to the undoubtedly difficult question of identifying the relevant owners/occupiers of the lands in question."

12. Irvine J., in a judgment ([2019] IESC 53) delivered on 26th July, 2019 refined the scope of the appeal to the questions of curial deference and the proper interpretation of s. 5 of the Act of 2000 and the other provisions applicable thereto in light of the State's obligations under Article 2(1) of the Environmental Impact Assessment (EIA) Directive. The relevant part of the judgment is set out later on in the course of this judgment.

The parties' submissions

13. In arguing that the High Court erred in law in dismissing the application and requesting this Court to allow the appeal and grant an order of *certiorari* quashing the Board's decision of 3rd May, 2013 FIE advanced a number of arguments, including the contention that the Board possesses the means to overcome the perceived difficulties. Accordingly, it is its submission that the High Court afforded an overly high level of curial deference to the "opaque process" by which the Board made its decision. FIE also argues that those matters which the Board failed to address are not matters of special skill, competence and experience in planning matters but matters of law and that such powers were afforded to it by the Oireachtas in full expectation that they would be used. FIE says that the respondent also failed to address its mind to s. 250 of the Act of 2000 or to the powers of inquiry contained within the Act. It is also contended that the High Court could not have known from the Board's decision why it had not exercised the s. 250 powers or the investigative powers and that to conclude that the Board's decision on these issues was in some way "reasonable" was to afford unjustifiable deference, because the Court did not know what reasons (if any) the Board had. FIE contends that there was no logical process to defer to and that the substantive issue before the Board was an issue of EU law, namely, did the extraction of peat on the identified lands require development consent and an EIA or AA under the relevant Directives? The Board was, according to FIE, obliged under European law to take, within the sphere of its competence, all the general or particular measures necessary to ensure the object of the Directive was fulfilled and in failing to address and correctly interpret and apply the powers available in the Act of 2000 to overcome the perceived difficulties, it breached its European law obligations.

14. In the alternative to requesting this Court to allow the appeal and grant an order of *certiorari* quashing the Board's decision of 3rd May, 2013 FIE asks the Court to consider making an Article 267 reference along the following lines: whether it is compatible with the State's obligations under Article 2(1) of the EIA Directive for a s. 5 determination in respect of an Annex I or II project to be denied without adjudication on grounds of insufficient information or difficulties of service without recourse to the powers available under domestic law in that regard.

15. The Board, in the submissions to this Court, argues inter alia that in relation to the issue of curial deference, FIE has not identified in a clear manner how it alleges the High Court erred in its application of the doctrine. Secondly the respondent contends that the Court is simply not as well placed as the Board to make the type of assessment this case concerns and that this is consistent with the established principle that the decision-maker is best placed to assess whether it has sufficient information to perform its task. The Board contends that before it can exercise its planning judgment, it needs to make sure that it has adequate information to do so, and that is an assessment of fact and degree which is informed by the Board's understanding of what information it requires to perform its task. Thirdly, the Board argues that FIE places some reliance on the need for proportionality where fundamental rights are at play and the Board makes a number of observations in response. The Board says it is not immediately clear what fundamental rights of FIE are said to have been adversely affected by the Board's decision, particularly in circumstances where the Board determined the issue of principle in FIE's favour in parallel s. 5 referrals made by it. The Board also says that in any event, to the extent that proportionality does come into play in the review of the decision of an expert body such as the Board, it tends to support the approach adopted by the Board. The fundamental property rights and entitlement to fair procedures of the unidentified owners/operators were at stake, and, in those circumstances, the Board's decision to dismiss the referral represented a proportionate balancing of interests and to have proceeded to determine the referral without notice to some of the affected parties would have been disproportionate. Fourthly, the Board contends that this is not, in any event, an appropriate appeal in which to reconsider the scope of the doctrine of curial deference. This is because, on the facts, even if the Supreme Court were to hold that the High Court Judge should have been prepared to substitute his own view of whether the Board had adequate information, the appeal would not succeed (because Meenan J. indicated his view that the Board's approach was not only reasonable, but that it was correct.)

16. Regarding the issue of the inter-relationship between Article 2 of the EIA Directive and the proper interpretation of section 5 of the 2000 Act, the Board argues *inter alia* that pursuant to the judgment of Irvine J. of the 26th July, 2019 on the issue of the scope of this appeal, the appellant is entitled to rely on Article 2 only insofar as it concerns the question of the proper interpretation of sections 5 and 250 of the 2000 Act. The respondent contends that the appellant is not permitted to advance any stand-alone argument or point alleging a breach of EU law.

17. I will refer further to the parties' submissions in the course of this judgment.

The legislative framework

18. Turning now to the legislative framework, it is s. 5 of the Act of 2000 which allows the public to seek declarations as to what, in any particular case, is or is not "development" or "exempted development". Section 5 provides:

"(1) If any question arises as to what, in any particular case, is or is not development or is or is not exempted development within the meaning of this Act, any person may, on payment of the prescribed fee, request in writing from the relevant planning authority a declaration on that question, and that person shall provide to the planning authority any information necessary to enable the authority to make its decision on the matter.

(2)(a) Subject to *paragraph (b),* a planning authority shall issue the declaration on the question that has arisen and the main reasons and considerations on which its decision is based to the person who made the request under *subsection (1),* and, where appropriate, the owner and occupier of the land in question, within 4 weeks of the receipt of the request.

(b) ...

(c) A planning authority may also request persons in addition to those referred to in *paragraph (b)* to submit information in order to enable the authority to issue the declaration on the question.

(3) ...

(4) Notwithstanding *subsection (1),* a planning authority may, on payment to the Board of such fee as may be prescribed, refer any question as to what, in any particular case, is or is not development or is or is not exempted development to be decided by the Board."

Section 6 provides:

"A planning authority and the Board shall each have all such powers of examination, investigation and survey as may be necessary for the performance of their functions in relation to this Act or to any other Act."

Section 129 provides:

"(1) The Board shall, as soon as may be after receipt of an appeal or referral, give a copy thereof to each other party.

(2)(a) Each other party may make submissions or observations in writing to the Board in relation to the appeal or referral within a period of 4 weeks beginning on the day on which a copy of the appeal or referral is sent to that party by the Board.

(b) Any submissions or observations received by the Board after the expiration of the period referred to in *paragraph (a)* shall not be considered by the Board.

(3) Where no submissions or observations have been received from a party within the period referred to in *subsection (2),* the Board may without further notice to that party determine the appeal or referral.

(4) Without prejudice to *section 131 or 134*, a party shall not be entitled to elaborate in writing upon any submissions or observations made in accordance with *subsection (2)* or make any further submissions or observations in writing in relation to the appeal or referral and any such elaboration, submissions or observations that is or are received by the Board shall not be considered by it."

Section 131 provides:

"Where the Board is of opinion that, in the particular circumstances of an appeal or referral, it is appropriate in the interests of justice to request—

(a) any party to the appeal or referral,
(b) any person who has made submissions or observations to the Board in relation to the appeal or referral, or
(c) any other person or body,

to make submissions or observations in relation to any matter which has arisen in relation to the appeal or referral, the Board may, in its discretion, notwithstanding *section 127 (3), 129 (4), 130 (4) or 137 (4)(b*), serve on any such person a notice under this section—

(i) requesting that person, within a period specified in the notice (not being less than 2 weeks or more than 4 weeks beginning on the date of service of the notice) to submit to the Board submissions or observations in relation to the matter in question, and
(ii) stating that, if submissions or observations are not received before the expiration of the period specified in the notice, the Board will, after the expiration of that period and without further notice to the person, pursuant to *section 133*, determine the appeal or referral."

Section 138 provides:

"(1) The Board shall have an absolute discretion to dismiss an appeal or referral —

(a) …
(b) where, the Board is satisfied that, in the particular circumstances, the appeal or referral should not be further considered by it having regard to —

(i) the nature of the appeal (including any question which in the Board's opinion is raised by the appeal or referral), or
(ii) any previous permission which in its opinion is relevant."

The Board is obliged to give reasons for dismissing a referral by s138(2):

"A decision made under this section shall state the main reasons and considerations on which the decision is based."

Section 250 provides:

"(1) Where a notice or copy of an order is required or authorised by this Act or any order or regulation made thereunder to be served on or given to a person, it shall be addressed to him or her and shall be served on or given to him or her in one of the following ways—

(a) where it is addressed to him or her by name, by delivering it to him or her;
(b) by leaving it at the address at which he or she ordinarily resides or, in a case in which an address for service has been furnished, at that address;
(c) by sending it by post in a prepaid registered letter addressed to him or her at the address at which he or she ordinarily resides or, in a case in which an address for service has been furnished, at that address;
(d) where the address at which he or she ordinarily resides cannot be ascertained by reasonable inquiry and the notice or copy is so required or authorised to be given or served in respect of any land or premises, by delivering it to some person over the age of 16 years resident or employed on the land or premises or by affixing it in a conspicuous place on or near the land or premises;
(e) in addition to the methods of service provided for in *paragraphs (a), (b), (c) and (d),* by delivering it (in the case of an enforcement notice) to some person over the age of 16 years who is employed, or otherwise engaged, in connection with the carrying out of the development to which the notice relates, or by affixing it in a conspicuous place on the land or premises concerned.

(2) Where a notice or copy of an order is required by this Act or any order or regulation made under this Act to be served on or given to the owner or to the occupier of any land or premises and the name of the owner or of the occupier cannot be ascertained by reasonable inquiry, it may be addressed to "the owner" or "the occupier", as the case may require, without naming him or her.

(3) …

(4) Where a notice or copy of an order is served on or given to a person by affixing it under *subsection (1)(d),* a copy of the notice or order shall, within two weeks thereafter, be published in at least one newspaper circulating in the area in which the person is last known to have resided.

(5) …

(6) …

(7) Where the Minister or the Board is satisfied that reasonable grounds exist for dispensing with the serving or giving under this Act or under any order or regulation made under this Act of a notice or copy of an order and that dispensing with the serving or giving of the notice or copy will not cause injury or wrong, the Minister or the Board may dispense with the serving or giving of the notice or copy and every such dispensation shall have effect according to the tenor thereof."

The lands at issue

19. The trial judge in his judgment described the lands at issue (see para. 9). He noted that FIE in its referral under s. 5 of the Act of 2000 to Westmeath County Council referred to peat extraction:

> "…in the townlands of:-
>
> '1 Lickny (Newcastle) (see map 1);
>
> Doon (see map 2);
>
> Carlanstown (see map 3) …"

20. The areas concerned were simply delineated on the maps and no additional information as to who the owners/occupiers of the lands might be was provided. The trial judge noted at para 11:

> "The three sites in question are not adjoining, although the townlands in which they are located are. Each site is substantial, the Lickny/Newcastle site comprises approximately 100 hectares, the Doon site comprises approximately 60 hectares and the Carlanstown site comprises approximately 7 hectares."

21. The reference to Carlanstown lands comprising 7 hectares appears to be a typographical error as it has approximately 70 hectares.

22. The matter having been referred to the Board, the Board entered into correspondence with Westmeath County Council with a view to establishing the identities of the owners/occupiers of the lands in question. Some 13 Land Registry folio maps were provided identifying some nine parties involved with the lands. However, as the trial judge noted, the folio maps showed numerous subdivisions of the land and as he said at para 14:

> "…Each subdivision may have a different occupier engaged in the extraction of peat."

23. Correspondence then ensued with the nine parties involved with the lands and FIE was kept informed by the Board as to its efforts to identify the relevant owners/occupiers. The trial judge noted at para 20 of the judgment:

"By reason of the foregoing, it seems to me that in dealing with the referral under s. 5 of the Act of 2000, the respondent was faced with a number of difficulties:-

i. Those who may be affected by the determination of the respondent were entitled to be heard, i.e. owners/occupiers of the lands in question;
ii. The identities of the owners/occupiers were difficult to ascertain. The maps provided by the applicant were only a start point. There was more detailed information available in the various Land Registry folios and folio maps but this still did not yield all the necessary information;
iii. There was a potential legal issue in that s. 5(4) refers to a 'particular case' whereas what was before the respondent were three separate parcels of land."

24. The trial judge also concluded that the problem of identifying the owners/occupiers could not have been resolved by affixing a notice on the lands under the provisions of s. 250(1)(d) of the Act of 2000 or by simply dispensing with the need to give notice. He concluded in this respect at para. 34 of his judgment:

"The affixing of a notice "on or near the land" involved may be suitable where the respondent is dealing with a particular portion of land or structure but not in the situation that presents from the folio maps in question. Therefore, I do not think it unreasonable that a course of action, such as that submitted by the applicant, was not followed by the respondent."

25. Finally, it should be observed that while it appears that some of the land concerned in the reference comprised registered land, not all of the land is registered land. A significant amount of the land at issue is unregistered land. Some 167 hectares was registered land and reflected in the folios exhibited and apparently one of the registered owners of the lands at Doon (Clover Peat Products Ltd.) also owned some 232.75 hectares of unregistered land. A map exhibited in the course of the proceedings (relating to the townland of Derrycrave) showed a number of narrow strips of land apparently utilised by local farmers, thus highlighting the difficulty of identifying those who may be in occupation of the lands in question.

Curial deference

26. The first issue I propose to consider is the issue of curial deference. I have already set out the terms of the decision of the Board and the reason given by the Board for dismissing the referral, namely, the lack of particulars or details as to the ownership/occupation of the lands at issue, given the "diversity of circumstances" involved.

27. The provisions of s. 129 of the Act of 2000 are set out above. Under s. 129, the Board is obliged to furnish a copy of the referral "to each other party". This is to enable "each other party" to make submissions on the referral. "Party to an appeal or referral" in the case of a referral under s. 5 is defined in s. 2(1)(c) as being:

"(c) In the case of a referral under *section 5*, the person making the referral, and any other person notified under *subsection. (2)* of that section,

. . .

'and party' shall be construed accordingly."

28. Section 5(2) of the Act of 2000 is set out above and refers in that context as can be seen to "the owner and occupier of the land in question". FIE, in the course of its submissions refers to the fact that service on the owner and occupier is only required where appropriate and also refers to the provisions of the Registration of Title Act 1964 as to the conclusiveness of the register in relation to title to the property and any rights, privileges, appurtenances or burdens appearing on the title. Reference was made to the provisions contained in the Act of 2000 in relation to the question of service, namely, s. 250 of the Act, to which further reference will be made in the course of this judgment and it was pointed out that in certain cases, where the "name of the owner or of the occupier cannot be ascertained by reasonable inquiry", it may be addressed to "the owner" or "the occupier" as the case may be without naming him or her.

29. Reference was made to other powers contained in the Act of 2000 which might have been deployed by the Board to overcome the difficulties in ascertaining the identities of the owners and occupiers of the lands in question. It is in this context that FIE makes the argument that the decision of the Board did not give any explanation as to why it did not avail of these provisions and consequently it is argued that the absence of such an indication is of relevance to what is described as the deference extended to the decision of the Board to dismiss the referral. The implication is that the High Court afforded undue curial deference to the decision of the Board in dismissing the referral.

30. The submissions of both parties contain references to a number of academic considerations of the topic of curial deference and to a number of decided cases in which the topic is discussed. Both parties are broadly in agreement as to the relevant case law in respect of curial deference. It would be appropriate to refer to some of the academic commentary and the case law in this area.

31. Hogan, Morgan and Daly in *Administrative Law in Ireland* (5th edition) at paras 17-108 *et seq*. discuss the topic in some detail, tracing the modern law in this area back to the decision of this court in *O'Keeffe v An-Bord Pleanála* [1993] 1 IR 39 in which Finlay C.J. said at pages 71-72 as follows:

> "…the circumstances under which the court can intervene on the basis of irrationality with the decision-maker involved in an administrative function are limited and rare. It is of importance and, I would think, of assistance to consider not only as was done by Henchy J in *The State (Keegan) v. Stardust Compensation Tribunal* [1986] I.R. 642 the circumstances under which the court can and should intervene, but also… the circumstances under which the court cannot intervene.

> The court cannot interfere with the decision of an administrative decision-making authority merely on the grounds that (a) it is satisfied that on the facts as found it would have raised different inferences and conclusions, or (b) it is satisfied that the case against the decision made by the authority was much stronger than the case for it.
>
> …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 which are expected to have special skill, competence and experience in planning questions. The court is not vested with that jurisdiction, nor is it expected to, nor can it, exercise discretion with regard to planning matters.
>
> I am satisfied that in order for an applicant for judicial review to satisfy a court that the decision-making authority has acted irrationally in the sense which I have outlined above so that the court can intervene and quash its decision, it is necessary that the applicant should establish to the satisfaction of the court that the decision-making authority had before it no relevant material which would support its decision."

32. It was acknowledged by FIE that the Board does have specialist skills and expertise but it is contended that it is the Board's failure to apply that specialist skill and expertise that is the source of the dispute.

33. It would be useful to refer to some of the academic commentary and authorities relied on by FIE. The observation made by Delany in an article entitled "Curial Deference in the Context of Judicial Review of Administrative Action" (2013) Irish Jurist 49 (1) 29 - 48 is cited where it was said at p 29:

> "The debate about curial or judicial deference is of fundamental importance to achieving the correct balance between the respective roles of the legislature, executive and judiciary. At a broad level, the question of the circumstances in which judges ought to exercise restraint is an issue of crucial significance that cuts across most areas of public law and to an extent, across aspects of private law too. It is an issue which has provoked considerable controversy, particularly in relation to the circumstances in which the courts should defer to decisions of administrative bodies."

34. In addition, some well-known passages from the case law were set out. Thus, the court was referred to the observations of Clarke J. (as he then was) in *Sweetman v An Bord Pleanála*, [2008] 1 I.R. 277 at para 6-12:

> "…it is important to remember that a court, in judicial review proceedings, is not confined to the irrationality test identified in *O'Keeffe*… That is but one ground which can be advanced. A court is also entitled (and indeed is duty bound) to consider matters such as whether the decision maker had regard to factors which

ought not properly have been included in the consideration or failed to have regard to factors which should properly have been considered. *O'Keeffe v. An Bord Pleanála* irrationality only arises in circumstances where the decision maker properly considered all of the matters required to be taken into account and did not take into account any matters which should not. The limitations inherent in the *O'Keeffe v. An Bord Pleanála* irrationality test, therefore, only arise in circumstances where all, but only, those matters properly considered were taken into account and where the decision maker comes to a judgment based on all of those matters. It is in those circumstances that the court, by reason of the doctrine of deference, does not attempt to second guess the judgment of the person or body concerned provided that there was material for coming to that decision. In particular the court does not attempt to re-assess the weight to be attached to relevant factors."

35. The case of *Harding v Cork County Council (No. 1)* [2006] 1 IR 294 (hereinafter referred to as "*Harding*") was also referred to. In that case, Kelly J. (as he then was) stated at par. 32:

> "…In view of the fact that I have already held that there are serious issues for trial which are properly within the jurisdiction of this court on judicial review I have, in effect, held that such complaints are not matters appropriate to An Bord Pleanála. These points relate to *vire*s, fair procedures and bias and they should properly be determined by a court rather than by An Bord Pleanála. If I had been of the view that all of the matters raised were capable of determination by An Bord Pleanála then I might have been prepared to make the order but I am not."

36. *Harding* was said to be in contrast to the decision in the case of *Kinsella v Dundalk Town Council* [2004] IEHC 373 where Kelly J. made the following statement which was referred to by the trial judge (at para. 28 of his judgment):

> "The decision as to whether the information obtained on foot of an article 33 request contains significant additional data is one for the planning authority… This Court, in exercising its judicial review jurisdiction, is not a court of appeal on the merits from the exercise by a planning authority of its statutory function. I decline the invitation extended to me by counsel for the applicant to sit in the chair of Mr. Ewbanks and decide for myself whether or not the information supplied by Coverfield on foot of the article 33 request contained significant additional data. He contends that I would be in just as good a position as Mr. Ewbanks to make such a decision…"

37. In truth, I find it difficult to see any contrast between the observations of Kelly J. in the two passages referred to. In each case, Kelly J. was identifying the role of An Bord Pleanála on the one hand and the role of the Court on the other hand. Thus, as he said, it was not the function of the Court to step into the chair of the planner nor was it the role of the Board to take on the role of the Court in relation to such issues as *vires*, fair procedures etc.

38. A number of other citations were referred to in the course of the submissions from judgments such as *North Wall Property Holding Company v Dublin Docklands Development Authority* [2008] IEHC 305, *EMI v Data Protection Commissioner* [2013] 2 I.R. 669, *Efe v Minister for Justice* [2011] 2 I.R. 798 and *Meadows v Minister for Justice* [2010] 2 I.R. 701 which considered how the principle of proportionality might be addressed in considering the reasonableness of a decision of an administrative body. It is not necessary to set these out in detail in this judgment, but I would like to refer briefly to one passage from the judgment of this Court in *Connelly v An Bord Pleanála* [2018] 2 ILRM 453, [2018] IESC 31 where Clarke C.J. stated at para 5.4: "…One of the matters which administrative law requires of any decision maker is that all relevant factors are taken into account and all irrelevant factors are excluded from the consideration. It is useful, therefore, for the decision to clearly identify the factors taken into account so that an assessment can be made, if necessary, by a court in which the decision is challenged, as to whether those requirements were met. But it will rarely be sufficient simply to indicate the factors taken into account and assert that, as a result of those factors, the decision goes one way or the other. That does not enlighten any interested party as to why the decision went the way it did. It may be appropriate, and perhaps even necessary, that the decision make clear that the appropriate factors were taken into account, but it will rarely be the case that a statement to that effect will be sufficient to demonstrate the reasoning behind the conclusion to the degree necessary to meet the obligation to give reasons."

39. It is contended on behalf of FIE that the development of the law relating to the provision of reasons for a decision since *O'Keeffe* must be taken into account in any application of curial deference. Further, it was argued that curial deference cannot justify a decision-maker's failure to demonstrate that it has asked itself the right questions or to give satisfactory reasons for a particular course of action or inaction. In essence, FIE contends that the High Court showed undue curial deference to the decision of An Bord Pleanála in rejecting the reference.

40. The Board, in its submissions, takes no issue with the extracts from academic commentary and case law relied on by FIE on the subject of curial deference, some of which is referred to above. Rather, it makes the point that that it is difficult to see how reliance on the issue of curial deference can avail FIE in relation to this appeal. The Board accepts a number of propositions derived from case law that matters such as the interpretation of statutory provisions, the interpretation of a development plan, questions as to whether there has been a breach of fair procedures and whether a decision has been vitiated by bias are all matters in which a court has full powers of review and is not required to show curial deference to the view of the decision-maker. The Board also agreed with the statement of Clarke J. in *Sweetman v An Bord Pleanála* referred to above. It was noted by the board that FIE appears to accept, as set out in the judgement of Denham J. in *Meadows v Minister for Justice, Equality and Law Reform* referred to previously, that the *O'Keeffe* principles still apply "…where the review is of a decision of a technical or skilled or professional decision maker in the area of that special technical or skilled knowledge" (para 143).

41. However, the Board takes issue with the submissions of FIE on the subject of curial deference where it was contended by FIE that "curial deference cannot justify a decision maker's failure to demonstrate that it has asked itself the right questions, or to give satisfactory reasons for a particular course of action or inaction". The Board makes the point that the questions of whether the decision maker asked itself the right questions and the adequacy of its reasons are distinct grounds of judicial review from the question of the reasonableness of the decision and the extent to which the standard by which its merits may be reviewed.

42. The Board then went on to make a number of distinct points in relation to the arguments of FIE in relation to curial deference. The first point made is that FIE has not made clear how it is alleged that the High Court misapplied the doctrine of curial deference. Secondly, insofar as it could be said that the High Court employed language of curial deference when it was stated (at para 30) "…I cannot conclude that the decision of the respondent to dismiss the referral was either irrational or unreasonable", this was not a "pure" exercise of planning judgment, rather it was the Board expressing its view as to whether or not it had adequate information with which to perform its task. The Board made the point that the Court is not in as good a position to make this assessment as the Board. Third, the Board noted the emphasis placed by FIE on the judgment of Fennelly J. in *Meadows* on the need for proportionality where fundamental rights are in issue but queried what fundamental rights of FIE came into play and were adversely affected by the Board's decision. Insofar as fundamental rights could come into play, the Board laid emphasis on the fundamental property rights and entitlements of the owners and occupiers of the lands at issue and contended that the decision of the Board to dismiss the referral was a proportionate balancing of interests and that to have made a decision without putting on notice those affected would have been disproportionate. Fourthly, it was contended that this was not an appropriate case in which to reconsider the scope of the doctrine of curial deference because even if this Court were to conclude that the High Court should have been prepared to substitute its own view as to whether the Board had adequate information, it is clear that the High Court judge was satisfied that the decision of the Board was reasonable in *O'Keeffe* terms but also that it was correct.

43. Two further points are made by the Board. With regard to the suggestion that the Board could dispense with notice under section 250(7) of the act of 2000, the Board noted that the trial judge found that the Board's approach was reasonable and that the approach contended for by FIE was unreasonable as he stated at para 32:

> "…In light of the property rights involved, I do not think that it would have been reasonable for the Board to have dispensed with the necessity to give notice as it could well be anticipated that doing so would cause 'injury or wrong' to those involved".

44. In dealing with the suggestion that the Board could have used its power to affix notices on the lands under section 250(1), the court stated as follows at para 34:

"The affixing of a notice 'on or near the land' involved may be suitable where the respondent is dealing with a particular portion of land or structure but not in the situation that presents from the folio maps in question. Therefore, I do not think it unreasonable that a course of action, such as that submitted by the applicant, was not followed by the respondent."

45. The Board made the point that whilst the last sentence from the passage referred to above may suggest the application of curial deference, the first sentence made it clear that the trial judge took the same view as the Board. Accordingly, the Board submitted that when one reads the High Court judgement as a whole it is clear that the trial judge concluded not only that the Board's decision was reasonable but that it was correct on its merits. Accordingly, it is contended that the doctrine of curial deference does not avail FIE.

Decision on the issue of Curial Deference

46. In order to consider the impact, if any, of the doctrine of curial deference in this case, it is necessary to consider the decision of the Board in dismissing the referral from FIE. The full decision of the Board is set out above and is succinct. It refers to the different parcels of land involved in the referral and notes that they appear to be in multiple ownership, of varying sizes of holdings and with numerous parties involved. In those circumstances and having regard to the absence of certainty regarding the ownership of the lands in question and what the Board described as the "individual circumstances of the plots (not necessarily adjoining)" the Board considered that the referral was not sufficiently particular or detailed enough to carry out its obligations under the Act of 2000. Reference was also made by the Board to the diversity of circumstances involved and the Board expressed the view that this militated against a thorough evaluation of the referral.

47. It should be borne in mind that the procedure under which a referral is made under s. 5 of the Act of 2000 requires the referring party to provide to the planning authority "any information necessary to enable the authority to make its decision on the matter." Quite clearly, the Board took the view that it did not have sufficient information before it to enable it to deal with the matter. The problem was that it was asked to consider a referral in respect of three separate areas of land, the ownership of which was not clear and where it was not certain as to how many parties might be in occupation of the land. It goes without saying that the Board was not in a position to make a declaration under s.5 of the Act of 2000 in respect of the lands which could have an adverse impact on the owners and occupiers of the land without giving an opportunity to those owners and occupiers to be heard on the matter referred. To do otherwise would run the risk of infringing the property rights of those owners and occupiers.

48. As I have mentioned previously, there is little or no dispute between the parties as to the areas in which the doctrine of curial deference could apply. In general terms, curial deference may be appropriately afforded to the decision of a planning authority, including the Board, within the area of its specialist expertise but has no part to play in a consideration by a Court of such matters as statutory interpretation, vires, fair procedures and so on. It seems to me that the decision made by the Board in this case had little to

do with the Board's "special skill, competence and experience in planning matters" but everything to do with the application of "fair procedures" to the issue it was being asked to decide. At the heart of the decision of the Board was a consideration of whether or not it would be appropriate to proceed with the referral in circumstances where there was uncertainty surrounding the ownership and occupation of the three parcels of land involved. As such, it is hard to see how the decision of the Board was one to which the doctrine of curial deference should apply.

49. It is difficult to discern any concrete assertion by FIE as to the manner in which the High Court judge demonstrated that he had shown any or, indeed, any undue curial deference to the decision of the Board. The trial judge did refer at para. 28 of the judgment to the submission of the Board that "…it was best placed to assess whether it had the information necessary to make a determination and also to comply with its legal obligation to follow fair procedures, in particular, to hear from those who may be affected by the determination". However, it is difficult to see that the trial judge "accepted" that proposition as contended by FIE. Having outlined the submissions of the Board, the trial judge went on to consider whether the decision was either irrational or unreasonable and he concluded that it was not. It is also said that the Board did not give any indication that it considered using any of the range of powers available under the Act of 2000 to deal with the issue that concerned the Board and thus it is suggested that there was curial deference shown to the Board when it failed to give satisfactory reasons for not doing more to try to ascertain the identities of the owners/occupiers of the lands and put them on notice of the referral. However, as was pointed out on behalf of the Board, the High Court judge made it clear that he considered that it was reasonable for the Board not to have taken any of the steps now suggested by FIE to give notice such as affixing a notice on or near the land or to dispense with the giving of notice altogether. It is not as though the trial judge accepted an assertion that the Board knew best what to do in terms of giving notice or dispensing with notice to those affected by a referral. Rather the trial judge came to an independent conclusion to the effect that the approach of the Board was reasonable and not irrational for the reasons explained by the trial judge. I find it very difficult to see how these conclusions of the trial judge amount in any way to the affording of curial deference to the Board by the High Court. In truth, I cannot see any basis for impugning the judgment and order of the High Court on the basis that undue curial deference was shown to the decision of the Board.

50. While the submissions touched on the questions of the scope and extent of the doctrine of curial deference, including the concept of proportionality in the context of judicial review, any further discussion of the scope and extent of the doctrine and the role of the concept of proportionality in decision making, should await a case in which these questions clearly arise.

Section 5 of the Act of 2000 and Article 2(1) of the EIA Directive

51. Section 5 of the Act of 2000 has been set out above. Article 2(1) of the EIA Directive provides as follows:

"Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects. Those projects are defined in Article 4."

52. Before embarking on a discussion of this aspect of the appeal it is worth reiterating what was said by Irvine J. in the course of her judgment of the 26th July, 2019 referred to previously in relation to the scope of this appeal at paragraph 29 and 30 thereof:

"29. Applying the same reasoning to the facts of the present case, given that the proper construction of s. 5 and/or s. 250 of the 2000 Act properly falls within the scope of the appeal, the deployment of Article 2(1) on the interpretive question can therefore properly be regarded as a refinement of the argument which the appellant seeks to advance in favour of what he contends are the obligations of the Board, and should thus be permitted in accordance with the jurisprudence earlier discussed. The appellant should not be excluded from making an argument as to how those provisions are to be construed in light of Article 2(1) of the EIA Directive even if this results in the applicant being afforded some considerable latitude in light of its failure to pursue such an argument in the course of the High Court proceedings. In so deciding I am mindful of the supremacy of EU law and the risk that if the Court was to take an overly restrictive approach to the scope of the appeal, such a restriction could interfere with its obligation to ensure that the relevant statutory provisions are properly construed against the backdrop of EU law. The Supreme Court, as the final appellate court, could not allow itself be placed in a position where it might incorrectly construe a statute by reason only of the fact that in the court below the applicant had failed to argue the effect of European Union law on that construction.

30. Finally, it is important to make clear the limited extent to which the appellant is entitled to rely upon Article 2(1) of the EIA Directive in the course of the upcoming appeal. The appellant is not being afforded the liberty of making any stand-alone argument or point based upon European law. EU law is only to be deployed as part of an argument as to the proper interpretation of the 2000 Act insofar as such an argument might be categorised as a permissible refinement of the argument made in the court below. Consequent on this judgment, I would propose that the parties be afforded an opportunity to amend their submissions."

53. As a result of the judgment of the Court on the issue of the scope of the appeal both parties submitted amended legal submissions to take account of the decision of the Supreme Court. I now propose to consider those submissions.

54. It may be useful to start by looking at s. 5 itself. It provides an opportunity to any member of the public to request from a planning authority a declaration as to what is or is not development or exempted development in any particular case. The role of the

procedure so provided was described in the Inspector's report in this case as follows at page 23 of 41:

> "Section 5 should therefore be regarded as a simple and relatively inexpensive process that can provide comfort to a prospective developer regarding the status of clearly defined proposals in relation to the requirement to obtain permission under the Planning Acts. It does not provide an appropriate mechanism to determine allegations of unauthorised development because the Board has neither the legal powers nor the expertise to investigate prior acts by persons; or to resolve conflicting accounts of such acts; or to make judgments of such acts that would carry penal or other legal consequences. This is why the courts are given the central role in the enforcement procedures set out in Part VII of the Act, and the Board none at all. The Board should therefore avoid making any declaration under s. 5 of the Act that strays outside the narrow confines of that section into the realm of enforcement either because the declaration is based on accounts of fact that are open to reasonable dispute, or because it implies any persons' prior acts were culpable in a legal sense."

55. O'Malley J. in the case of *Michael Cronin (Readymix) Ltd. v. An Bord Pleanála* [2017] 2 IR 658 observed concerning s. 5 at para 41:

> "…The procedure is an expedient method of determining the status, within the regulatory regime, of a particular development about which some doubt may exist.

42. In *Grianan an Aileach Interpretative Centre v. Donegal County Council* [2004] 2 I.R. 625 the Supreme Court held that, having regard to the availability of the s. 5 procedure, the High Court had no jurisdiction to grant a declaration that certain proposed activities at a venue were covered by the terms of its planning permission. While such a question might legitimately come before the courts in, for example, enforcement proceedings, the jurisdiction to determine the issue in the first place had been conferred on the planning authority and on the Board. In *Wicklow County Council v. Fortune* [2013] IHC 397 Hogan J held that this reasoning must be taken as impliedly precluding the High Court from finding that a development was exempted where there was an unchallenged decision by the Board that it was not. I agreed with his conclusion in my judgement in *Wicklow County Council v O'Reilly* [2015] IEHC 667.

43. It follows that the primary role in determining whether a development is exempted or not is given to (depending on circumstances) either the planning authority or the Board. A decision by one of those bodies is an authoritative ruling on the issue, subject to the potential for judicial review. However, it plainly does not, and could not, result in a determination of guilt or innocence of a criminal offence. There was no suggestion to the contrary at any stage of these proceedings. In my view, therefore, it is entirely inappropriate to read the provisions of section 4 as if they related to 'the imposition of a penal or other sanction'. But they are concerned with

is the exemption of categories of development from the general requirement to obtain permission."

56. Thus, as can be seen, s. 5 is not there for the purpose of granting permission for a development and it is not a mechanism for the enforcement of compliance with the Planning Acts. That is not to say that a declaration under s. 5 of the Act is of no importance. Clearly, if a declaration is given that a particular activity is or is not development or is or is not exempted development, that will be of assistance in bringing proceedings to stop a development for which the appropriate development consent has not been obtained or alternatively in bringing enforcement proceedings in respect of any such development but that is as far as it can go. It is an important mechanism in providing clarity as to the status of a particular project. That being so, a declaration under s. 5 will obviously affect the rights of the person engaged in the activity at issue. Finally, it should be noted that the party seeking a declaration is obliged to provide the planning authority with any information necessary to enable the authority to make its decision on the matter.

57. The principal point made by FIE is that the procedure under s. 5 of the Act of 2000 has to be interpreted in the context of Ireland's obligations under the Directive to ensure that developments are subject to development consent. To that extent it is contended by FIE that the investigative powers of the Board and the modes of service provided for in s. 250 of the Act of 2000 are relevant to the proper interpretation of s. 5 in the context of the obligation to ensure the effective application of EU law within the primary legislation governing development consent. It is pointed out that the Board has expertise in the question of what constitutes development and has power to obtain the information it needs to address that question. It is also said that the Board has the means of effecting service on any party. FIE adds that the primacy of EU law requires that bodies called upon, within the exercise of their respective powers, to apply EU law are obliged to adopt all the measures necessary to ensure that EU law is fully effective. Perhaps the core of the argument made on behalf of FIE can be seen in the following statement to be found in the statement of grounds by which these proceedings were commenced in which it is stated as follows:

> "The applicant considered that obtaining a declaration in relation to the status of the development being carried out was an important first step in enforcing compliance with the statutory requirements to obtain planning permission and carry out an EIA."

58. I would pause to observe at this point that whilst FIE may have considered that obtaining such a declaration in relation to the status of the development being carried out was "an important first step in enforcing compliance", it must be observed that it is not an obligatory step required by the Act of 2000 prior to the enforcement of the statutory requirements to obtain planning permission or to engage the enforcement machinery provided for within the Act of 2000. Neither is it a step in enforcing compliance with any obligation to obtain an EIA. Undoubtedly, the procedure provided for in s. 5 is very useful

in establishing the status of a particular development and whether there is in fact a development or whether an activity is an exempted development. But insofar as it may be a step, and indeed an important step, in enforcing compliance as suggested, it is not a necessary step. Proceedings can be taken independent of seeking a declaration against a party carrying on a development which is said to require development consent or said not to be an exempted development or one which requires an EIA without first obtaining a declaration pursuant to s. 5 of the Act of 2000.

59. As pointed out by the Board, it is a procedure that has been successfully utilised by FIE in other cases in which, following a referral, declarations have been granted as sought by FIE in respect of whether peat extraction activities in other parts of County Westmeath were or were not exempted development. The question that arose in those referrals concerned whether or not the peat extraction works there being carried out were required to have an EIA. The Board in those cases determined the referrals in FIE's favour. Those referrals having been determined in favour of FIE were the subject of judicial review proceedings which were heard by the same trial judge together with the application for judicial review, the subject of this appeal. The Board made the point that it addressed the substantive issue of planning and environmental law in those cases which was similar to that being pursued in these proceedings and further, the point was made by the Board that it demonstrates that where FIE had made a referral with sufficient particularity to allow the relevant owner or operator of the peat extraction works to be identified so that it could participate and provide information to the Board as to the history, nature and extent of peat extraction on the relevant sites, the Board proceeded to determine the referrals. The judicial review proceedings brought against the Board by the owners/occupiers of those lands were not successful. In other words, given sufficient information and detail as to the owners/operators/occupiers of the lands at issue in any given referral, the Board will deal with the matter.

60. The fact that the Board in other cases may have dealt with referrals because they were of the view that they were in a position to do so does not resolve the issue in this case. The issue is whether or not the Board should have utilised its powers under the Act of 2000 to effect service on the owners and occupiers of the relevant sites. It is in this context that FIE relies on the Directive to say that there was an obligation on the Board to go further than it actually did in the circumstances of this case.

61. In the course of their submissions FIE have referred to a number of decisions of the Court of Justice of the European Union on the effect of Article 2(1) of the EIA Directive and have addressed the role of the "competent authorities" in ensuring compliance with Article 2(1). This was mainly for the purpose of establishing that Article 2(1) has direct effect in this jurisdiction, a point which is not disputed by the Board. Thus reference was made to the cases of *Case C-244/12 Salzburger Flughafen, Case C-72/95 Kraaijeveld, Case C-201/02 Wells, Case C-420/11 Leth*, *Case C-215/06 Commission v. Ireland* and *Case C-378/17 Minister for Justice and Equality and Anor v. Workplace Relations Commission*. In the *Wells* case it was stated at paragraph 61 as follows:

"... in circumstances such as those of the main proceedings, an individual may, where appropriate, rely on Article 2(1) of Directive 85/337, read in conjunction with Articles 1(2) and 4(2) thereof."

Further, at Paragraph 65 it was said:

"... it is for the competent authorities of a Member State to take, within the sphere of their competence, all the general or particular measures necessary to ensure that projects are examined in order to determine whether they are likely to have significant effects on the environment and, if so, to ensure that they are subject to an impact assessment (see, to this effect, *Case C-72/95 Kraaijeveld and Others* ... paragraph 61, and *WWF and Others*, ... paragraph 70). Such particular measures include, subject to the limits laid down by the principle of procedural autonomy of the Member States, the revocation or suspension of a consent already granted, in order to carry out an assessment of the environmental effects of the project in question as provided for by Directive 85/337."

62. It might be observed that the procedure under s. 5 would not result in the revocation or suspension of a consent already granted.

63. It would also be useful to refer to a passage from the judgment of the CJEU in *Commission v. Ireland* in which it was stated at paragraphs 51 – 53 as follows:

"51. ... Article 2(1) of that directive must necessarily be understood as meaning that, unless the applicant has applied for and obtained the required development consent and has first carried out the environmental impact assessment when it is required, he cannot commence the works relating to the project in question, if the requirements of the directive are not to be disregarded.

52. That analysis is valid for all projects within the scope of Directive 85/337 as amended, whether they fall under Annex I and must therefore systematically be subject to an assessment pursuant to Articles 2(1) and 4(1), or whether they fall under Annex II and, as such, and in accordance with Article 4(2), are subject to an impact assessment only if, in the light of thresholds or criteria set by the Member State and/or on the basis of a case by case examination, they are likely to have significant effects on the environment.

53. A literal analysis of that kind of Article 2(1) is moreover consonant with the objective pursued by Directive 85/337 as amended, set out in particular in recital 5 of the preamble to Directive 97/11, according to which 'projects for which an assessment is required should be subject to a requirement for development consent [and] the assessment should be carried out before such consent is granted'."

64. For completeness, I should also refer briefly to a passage referred to from the decision of the CJEU in the case of *Minister of Justice v. Workplace Relations Commission* where it was stated at paragraph 39:

". . . the principle of primacy of EU law requires not only the courts but all the bodies of the Member States to give full effect to EU rules."

The Court went on to say at paragraph 50:"It follows from the principle of primacy of EU law, as interpreted by the Court in the case-law referred to in paragraphs 35 to 38 of the present judgment, that bodies called upon, within the exercise of their respective powers, to apply EU law are obliged to adopt all the measures necessary to ensure that EU law is fully effective, disapplying if need be any national provisions or national case-law that are contrary to EU law. This means that those bodies, in order to ensure that EU law is fully effective, must neither request nor await the prior setting aside of such a provision or such case-law by legislative or other constitutional means."

65. Having referred to those passages from the case law of the CJEU, I would reiterate the point already made that an application for a declaration pursuant to s. 5 of the Act of 2000 is not one in which development consent is sought nor is it part of the enforcement procedure provided under the Act to restrain development which does not have development consent or, alternatively, requires an EIA before development takes place.

66. Essentially, the point made by FIE is that the peat extraction work being carried on at the lands at issue in these proceedings is such that it would require an EIA in order to comply with the Directive. That being so, in order to comply with European obligations set out in the EIA Directive, the Board should have considered further the options available under the legislation and was obliged by virtue of our European obligations in terms of Article 2(1) to properly interpret and apply s. 250 in the context of ensuring that projects likely to have significant effects on the environment by virtue, *inter alia* of their nature, size or location are made subject to a requirement for development consent and in not doing so it is contended that the Board failed in its obligations under European law to take all the necessary measures to ensure that the objects of the Directive was fulfilled. It is not contended by FIE that Article 2(1) obliged the Board to determine the application regardless of the concerns of the Board in relation to identifying parties whose rights might have been affected. Rather the point is made that EU law obliges the Board to use all the means at its disposal to address its concerns. Thus, at the heart of this appeal is the question of whether or not the Board should have done more to address its concerns by utilising the machinery provided under the Act for service of proceedings.

67. The Board does not dispute FIE's submissions to the effect that Article 2(1) has direct effect in this jurisdiction as observed previously. It refers to the argument now put forward by FIE to the effect that Article 2(1) "obliges the Board to use all means at its disposal to address" its concerns in relation to the lands at issue in this particular case to enable it to determine the referral.

68. By way of response, the Board points to the lack of any authority to support the contention that Article 2(1) has such a bearing on the proper construction of s. 5 and s. 250 of the Act of 2000. It points out that s. 5 was not one of the procedures designed to give effect to the Directive and is not part of the measures required by the Directive to be put in place. It is noted that the procedure provided for in s. 5 was first introduced

pursuant to s. 5 of the Local Government (Planning and Development) Act 1963 long before the enactment of the EIA Directive or the State's membership of the European Economic Community as it then was.

69. Having said that, it is accepted by the Board that Article 2(1) may have some bearing in considering a s. 5 referral. It is pointed out that s. 4(4) of the Act of 2000 provides that development which would otherwise be exempt from the requirement to obtain planning permission shall not be exempted development if it requires an EIA. Therefore as part of its consideration as to whether certain development is or is not exempted development under s. 5, the Board must consider whether the obligation to carry out an EIA arises. Thus, the Board notes that in the other s. 5 referrals to which reference has previously been made, the Board concluded that an EIA was required and accordingly peat extraction in the case of those referrals was not exempt from the requirement to obtain planning permission. However, the Board goes on to point out that the s. 5 process is not required by the EIA Directive or by European law more generally and in those circumstances the Board contends that it is difficult to see how Article 2 of the Directive could be said to affect the Board's procedural decision as to whether it has sufficient or adequate information to determine the issue in the referral and as to whether it is satisfied that it has sufficient or adequate information to enable it to process the referral in a manner that does not breach the constitutional fair procedures rights of the owners and occupiers of the lands to which the referral relates. It is emphasised that this is all the more so bearing in mind that the "right to be heard" is a fundamental principle of European law and is reflected in Article 41(2) of the Charter. In addition, the Board contends that FIE has not identified any authority which would support its contention that Article 2 of the Directive has any bearing on the Board's consideration of whether or not to invoke its powers under s. 250(1) and/or s. 250(7) of the Act of 2000 in relation to the giving of notice or the dispensing of the need to give notice. The Board points out that if it is not satisfied on the facts of a particular s. 5 referral that those powers are not an effective means of putting landowners likely to be affected on notice of same, then it is entitled to dismiss the referral under the provisions of s. 138(1) of the Act.

70. The Board goes on to point out that it is necessary to look at the facts of this case in considering FIE's contention that the Board was obliged "to use all means at its disposal to address" any concerns it had about ensuring that in determining the referral it afforded fair procedures to those whose rights could be affected by a determination on the referral. It is pointed out that the Board did conduct an investigation and attempted to ascertain the identity of the owners and occupiers of the lands in question. It is pointed out that the High Court judge agreed that "in the situation that presents from the folio maps in question", affixing a notice at or near the lands did not present an adequate means of addressing the Board's concerns in accordance with the provisions of s. 250(1)(d) of the Act of 2000.

71. Likewise, it was held by the trial judge that it would not have been reasonable for the Board to have dispensed with the necessity to give notice altogether as provided for under s. 250(7) because, as the trial judge pointed out at para 32, "…it could well be

anticipated that doing so would cause 'injury or wrong' to those involved". Bearing in mind those findings of the trial judge, the Board contends that it is unclear how reliance on Article 2(1) of the EIA Directive could give rise to a finding that the Board erred in deciding not to proceed to determine the referral in the subject matter of these proceedings. Finally, the Board noted that in the judgment refusing leave to appeal under s. 50A(7) of the Act of 2000 it was always open to FIE to furnish more information to the Board or alternatively to submit a more focused referral but it did not do so.

72. There are a number of observations that can be made in relation to the relationship between s. 5 and Article 2(1) of the EIA Directive. Firstly, it is worth considering again the terms of Article 2(1). It provides that before consent is given to a project, a project likely to have significant effect on the environment is subject to a requirement for development consent and an assessment with regard to the effect on the environment of the particular project. Secondly, it must be noted, as pointed out previously, that the procedure provided for under s. 5 of the Act of 2000 is not one which leads to the grant or refusal of development consent. Nor is it part of the machinery provided for under the Act of 2000 for the enforcement of planning regulations. As Simons J. put it in *Friends of the Irish Environment v. Minister for Communications* [2019] IEHC 555 at paragraph 45(3):

> "(iii). Section 5 of the PDA 2000 provides a simple procedure whereby the question of whether a particular development (including peat extraction) requires planning permission can be determined, initially, by the planning authority and, thereafter, on review by An Bord Pleanála."

73. There is no doubt that, as Simons J. and O'Malley J. in the case of *Michael Cronin (Readymix) Ltd. v. An Bord Pleanála*, referred to previously, have indicated, s. 5 is a useful method of clarifying an issue as to the planning status of any particular project. It is also relevant to note, as has been accepted by the Board, that Article 2(1) has a bearing on a consideration of whether or not something is exempted development having regard to the provisions of s. 4(4) of the Act of 2000. Where relevant, the Board has to consider whether an obligation to carry out an EIA arises in a particular case. To that extent, the parties do not appear to be in dispute.

74. The Board in this case dismissed the referral because of the Board's inability to identify the owners/occupiers of the lands at issue in the referral and FIE has argued that the Board had an obligation having regard to the provisions of Article 2(1) to use all of the powers under the provisions of s. 250 of the Act of 2000 to ensure that the referral could be determined. Could it be said that FIE is correct in asserting that the Board is under such an obligation? It does not appear to me to be in dispute that a determination of a referral under s. 5 has the potential to adversely affect the property rights of the landowners/occupiers of the lands at issue. That being so, it seems to me that the Board could not proceed to carry out a determination without putting those landowners/occupiers on notice of the referral. This view is reinforced by reference to the provisions of s. 129(1) of the Act under which the Board is obliged to give a copy of the

referral to "each other party". It is in those circumstances that FIE has maintained that the Board should have utilised the provisions contained in s. 250 to alleviate the concerns of the Board by either affixing a notice to the lands in question or by dispensing with the requirement for notice. To paraphrase s. 250(1) it provides that where a notice is required to be served on or given to a person, it shall be served *inter alia* "by affixing it in a conspicuous place on or near the land or premises" (s. 250(1)(d)). Alternatively, FIE suggested that use should have been made of the provisions of s. 250(7) which allows the Board, if satisfied that reasonable grounds exist for dispensing with the serving of notice and if also satisfied that dispensing with the service of notice will not cause injury or wrong, it may dispense with the serving of the notice.

75. Assuming for the sake of argument that FIE is correct in its contention that the Board is obliged to interpret and apply s. 250 of the Act of 2000 in accordance with the obligation to ensure the correct application of European law as found in Article 2(1) of the Directive, what possible interpretation of s. 250 could give rise to a different outcome in this case? The fundamental problem was the identification of those owners/occupiers engaged in the process of peat extraction in the lands involved. The lands were substantial in area. There were multiple owners involved, some of whom were capable of being identified by reference to Land Registry folios, although that was not entirely straightforward. Not all of the lands were registered. Therefore, not all of the owners could be identified by means of a Land Registry search. Identification of the owners of the lands alone would not have sufficed as there were others engaged in the activity of peat extraction. I have previously referred to a map depicting numerous subdivisions of the lands which appear to be demonstrative of this fact. How in those circumstances could the Board have given notice by, for example, affixing a notice to the lands involved? It would have been virtually impossible on a practical basis and to that extent I agree with the observations of the trial judge at paragraph 34 of his judgment. I simply do not think it would have been reasonable for the Board to have engaged in a process of affixing notice to the multiplicity of subdivisions of the land at issue. As the trial judge noted, such a course of action may be of assistance when there is a particular portion of land or structure at issue but that was not the situation here. Insofar as it might be suggested that the Board could have exercised its power under s. 250(7) to dispense with the giving of notice, this also seems to me to be a proposition that simply cannot stand up. In order to dispense with consent under s. 250(7) the Board has to be satisfied that dispensing with notice "will not cause injury or wrong". It is difficult to see how the Board could have come to any other conclusion but that determining the referral without giving notice would have caused injury or wrong to those affected. I find it difficult to see how dispensing with notice could have been done in the circumstances of this case and I agree with the trial judge who concluded at para 32 that it would not have been reasonable for the Board to dispense with the necessity to give notice "…as it could well be anticipated that doing so would cause 'injury or wrong' to those involved". Nothing in the State's obligations under Article 2(1) of the EIA Directive leads, in my view, to any other conclusion.

76. It has to be remembered that the obligation to ensure the application of fair procedures in the circumstances of this case by allowing those parties who might be affected by a

determination on a referral under s.5 to participate in the hearing is not only required by Irish law but is also reflected in European law on the right to be heard. It is somewhat surprising therefore to have an argument which would have the effect that the obligations of the State under article 2(1) could somehow necessitate that important requirement to be set at naught. The practical reality of this case is such that neither the affixing of notices on the lands at issue nor the use of s. 250(7) to dispense with the giving of notice would have been appropriate given the complexity of the land ownership and multiplicity of users of the lands. Therefore, I am satisfied that Article 2(1) could not have any possible effect on the construction of s. 250 of the Act of 2000 such that it would require the Board to have determined the referral without regard to its obligation under s. 129 of the Act to give notice of the referral to those affected and more to the point, no construction of s. 250 informed by Article 2(1) could be relied on to obviate the obligation.

77. For completeness, I should add that in my view, the interpretation of s. 250 of the Act of 2000 is a matter of national law and I cannot see any basis for a reference to the CJEU.

Some observations

78. The protection of peatlands is something to which a high value has been given as can be seen from the terms of the EIA Directive. It is important to ensure that any necessary development consent is in place with respect to activities which could have an effect on an important part of the environment. It is also important to bear in mind that the primary role in enforcing planning law in its functional area rests on the local authority, in this case Westmeath County Council, however difficult that may be in any given case. The difficulty in identifying the owners/occupiers of any particular parcel of land does not mean that the local authority can avoid its responsibility in this regard but I recognize the difficulty that arose in this case because of the extensive area of lands involved and the multiplicity of owners/occupiers concerned. That is not to say that other interested parties such as FIE do not have a role in ensuring compliance with the planning code. FIE have been instrumental in the parallel cases to which reference has been made in ensuring that EIAs be required for the carrying out of such activities. It is important that in acting on such a referral, the Board complies with the obligation in Irish law and in EU law to ensure that parties whose rights may be affected by such a referral are heard on any determination of the referral. Nothing in Article 2(1) suggests that EU law would require the Board to complete a determination in the absence of giving appropriate notice to those whose rights may be affected. The trial judge in this case noted in his judgment of the 7th December, 2018 on the application for leave to appeal pursuant to the provisions of s. 50A(7) of the Act of 2000, the submission of the Board that had the necessary information been provided by the applicant, the respondent could have made a determination and noted that this still remains the case. He went on to say in his conclusions at paragraph 13 of that judgment:

> "…Indeed, as has been referred to at para. 5 above, if the applicant obtains basic information concerning the identities of the owners and/or occupiers of the

lands involved then it can renew its application for a determination under s. 5 of the Act of 2000."

79. It is important to bear in mind that FIE has not been precluded from the possibility of making a further referral in relation to the lands or indeed making a number of referrals in relation to specific parts of the lands where it is possible to ascertain the identities of the owners/occupiers of the lands in question. In that way, legitimate concerns in relation to the activities carried out on the lands can be considered and the Board can determine whether or not an EIA is required for the developments taking place and whether or not the developments taking place are or are not exempted developments.

Conclusions

80. The Court in this case was asked to consider the scope and extent of the doctrine of curial deference. In circumstances where I have concluded that this issue simply does not arise on the facts of this case it is not appropriate to embark on a full consideration of the extent and scope of that doctrine.

81. There is no dispute between the parties as to the fact that Article 2(1) has a bearing on s. 5 of the Act of 2000. However, for the reasons set out above it seems to me that Article 2(1) of the EIA Directive does not result in an interpretation or application of the provisions of s. 250 of the Act of 2000 which would obviate the necessity to give notice to those who might be affected by a referral under s. 5 of the Act.

82. For the reasons set out above I would dismiss this appeal.