AN CHÚIRT UACHTARACH
THE SUPREME COURT

MacMenamin J
Charleton J
O'Malley J
Baker J
Hogan J

[2022] IESC 30
S:AP:IE:2021:000147

Between/

PEMBROKE ROAD ASSOCIATION

Appellant

AND

AN BORD PLEANÁLA, THE MINISTER FOR HOUSING, LOCAL GOVERNMENT AND HERITAGE

Respondents

AND

DERRYROE LIMITED AND DUBLIN CITY COUNCIL

Notice Parties

S:AP:IE:2021:000146

Between/

WALTHAM ABBEY RESIDENTS ASSOCIATION

Applicant/Respondent

AND

AN BORD PLEANÁLA

Respondent/Appellant

AND

IRELAND AND THE ATTORNEY GENERAL

Second and Third Respondents

AND

O'FLYNN CONSTRUCTION CO. UNLIMITED COMPANY

Notice Party

JUDGMENT of Mr. Justice Gerard Hogan delivered the 4th day of July 2022

I. Introduction

1. *Si monumentum requiris, circumspice* ("if you seek (his) monument, look around"). This was the famous epitaph of the greatest architect and master builder of his day, Sir Christopher Wren. Yet the modern architects and builders who look around in this State are as likely to be daunted by the sight of an almost impossibly complex system of planning laws and regulations as much as being enthralled by any great architecture or vaunted public buildings. In their own way these two appeals (which were heard together) provide ample testimony of all of this, presenting as they do issues of statutory interpretation of no little difficulty and complexity.

2. These appeals arise out of two separate decisions of the High Court: the first is the decision of Owens J. in *Pembroke Road Association v. An Bord Pleanála* [2021] IEHC 403 (dated 16th June 2021) and the second is the decision of Humphreys J. in *Waltham Abbey Residents Association v. An Bord Pleanála* [2021] IEHC 587 (dated 10th May 2021). In its Determination dated 1st March 2022 this Court considered that it would be appropriate to deal with both appeals together because both decisions raise an identical question of law, namely, whether the word 'statement' in Article 299B(1)(b)(ii)(II)(C) of the Planning and Development Regulations 2001 ("the 2001 Regulations") (as inserted by the European Union (Planning and Development) (Environmental Impact Assessment) Regulations 2018 (S.I. No. 296 of 2018)) requires

a distinct identifiable document to be included in a planning application for a strategic housing development. This is the central issue to be determined.

3. There are, however, two further issues that arise out of Pembroke Road Association only. The first issue concerns the use of s. 146A of the Planning and Development Act 2000 ("the 2000 Act") in order to allow the An Bord Pleanála to amend Condition 26 in its grant of planning permission along with the related question of whether the High Court was correct to consider this amendment to be non-material. This issue therefore essentially raises a question as to the scope of the jurisdiction granted to the Board by s. 146A(1)(iii) of the 2000 Act. The second issue concerns the interpretation of the Urban Development Building Height Guidelines ("Building Height Guidelines") and, in particular, whether the Board is required to expressly consider whether the relevant Development Plan is consistent with the National Planning Framework or whether the Board can consider this to be 'self-evident'.

4. I propose to set out and address the background and issues concerning the interpretation of the Article 229B question first, before turning to the two additional issues which arise in the Pembroke Road appeal.

II. Article 299B

5. Article 299B(1)(b)(ii)(II)(C) of the 2001 Regulations requires the Board to satisfy itself that a developer has provided a "statement indicating how the available results of other relevant assessments of the effects on the environment carried out pursuant to European Union legislation other than the Environmental Impact Assessment Directive have been taken into account." The question to be determined by this Court is whether this "statement" must be provided in a separate identifiable document or whether the obligation under this article can be fulfilled if, to the Board's satisfaction, the relevant

information has been included generally in the planning application and can be ascertained from a reading of that document.

6. In Waltham Abbey Humphreys J. held that Article 299B(1)(b)(ii)(II)(C) of the 2001 Regulations does require a distinct identifiable document to be included as part of an application for planning permission for a strategic housing development. He accordingly found in favour of the Waltham Abbey applicant having concluded that there was no such document included in the developer's planning application. It followed, therefore, that the Board's decision to grant permission was invalid.

7. In Pembroke Road, however, Owens J. disagreed with this decision and held that Article 299B(1)(b)(ii)(II)(C) of the 2001 Regulations instead requires simply some evaluative material to be included in the planning application which the Board can then assess and consider at its own accord – and with a due margin of appreciation – to determine whether the article has been complied with. Owens J. held that this information had been included in the planning application and therefore found in favour of the Board, even though it was not in fact contained in a separate accompanying statement.

8. This Court is accordingly called upon to determine which of these decisions is correct. Before proceeding to a consideration of this issue, however, it is first necessary to set about some details concerning the background to these appeals.

***Pembroke Road Association v. An Bord Pleanála* [2021] IEHC 403**

9. The Pembroke Road Association proceedings concerned a planning application in which the developer sought permission for a development which included an apartment building comprising of 112 units, an 'aparthotel' with 10 suites, and associated development at Herbert Park in Ballsbridge in Dublin. Pembroke Road Association challenged the validity of a decision of An Bord Pleanála to grant planning permission

for this development on the basis that, inter alia, the application failed to include a statement prescribed by Article 299B(1)(b)(ii)(II)(C) of the 2001 Regulations and that the Board ought to have refused to entertain the application for planning permission as a result.

10. In his judgment dated 16th June 2021, Owens J. indicated that he was aware of the judgment of Humphreys J. on the same issue but, having given the parties an opportunity to make further submissions in light of the judgment, he determined that he had not changed his view as a result. For his part Owens J. considered that it was necessary to interpret the word "statement" in its surrounding context rather than giving the word a stand-alone meaning (see paragraph 81 of the judgment). He considered that in light of Article 4(4) of Directive 2014/52/EU of the European Parliament of the Council of 16 April 2014 ("the Directive") it is clear that the requirement prescribed in Article 299B(1)(b)(ii)(II)(C) of the 2001 Regulations will be satisfied if the developer provides a contextualised evaluation which refers to the results of relevant assessments generally in the planning application.

11. Owens J. went on to explain that, accordingly, whether an applicant has provided material that complies with the requirement prescribed in Article 299B(1)(b)(ii)(II)(C) is a question best left to the discretion of the Board, which must determine this issue in exercise of its right to determine questions when examining whether to assume jurisdiction. In this respect the trial judge considered that he was precluded from interfering with a decision of the Board unless exceptional circumstances could be established which demonstrate clearly that the substance of what is required by the Regulations was not provided by an applicant or that the decision of the Board to accept the adequacy of material as fulfilling the requirement was irrational or unreasonable (in accordance with the principles laid down by this Court in *O'Keefe v. An Bord Pleanála*

and Ors [1993] 1 IR 39). Owens J. concluded that he saw no basis for the assertion that the Board did not consider the requirements of Article 299B(1)(b)(ii)(II)(C) in a manner that could be considered irrational or unreasonable. He therefore dismissed the application for judicial review on this issue.

***Waltham Abbey v. An Bord Pleanála* [2021] IEHC 587**

12. The Waltham Abbey proceedings concerned a decision of An Bord Pleanála to grant planning permission pursuant to an application made under the Planning and Development (Housing) and Residential Tenancies Act 2016 ("the 2016 Act") for a strategic housing development at Old Fort Road, Ballincollig, Cork. This application comprised of 123 residential units and associated works. Waltham Abbey sought to challenge the validity of the Board's decision to grant planning permission on the basis that, as above, the developer had failed to comply with Article 299B(1)(b)(ii)(II)(C) and, therefore, that the Board should not have entertained the planning application.

13. In his substantive judgment dated 10th May 2021, Humphreys J. granted the application for judicial review holding that the developer had not complied with Article 299B by not including a clear and unambiguous "statement" of the analysis of the effects of the project under other EU law. Humphreys J. analysed and distinguished (at paragraph 21) the use of the words "statement" and "information" in the 2001 Regulations. He considered that the word "statement" is "clearly a term of art in the environmental context" which calls for a "distinct identifiable document constituting a statement of all the relevant matters for the purposes of [Article] 299B(1)(b)(ii)(II)(C)" and an identification of how those matters have been taken into account (see paragraphs 21 and 24). Humphreys J. explained (at paragraph 24) that this is not just a matter of form and the Board cannot grant permission just because the required information is contained elsewhere in the planning application. This is because "the requirement of a

statement is absolutely clear and mandatory, and the consequences of not providing it are spelled out." It should be noted, however, that in his subsequent judgment granting leave to appeal ([2021] IEHC 597) Humphreys J made it clear that a "statement" for the purposes of Article 299B could in fact be a specific section within a broader document, provided that it was still distinct and identifiable: see paragraph 21.

14. Returning to the main judgment Humphreys J. also noted that it would be inappropriate to refuse relief on the grounds of discretion. He considered (at paragraph 31) that because the "consequences of non-compliance are set out in the regulations themselves", this is not a case where the court may exercise some discretion in order to refuse relief. He reasoned (at paragraph 39) that if he were to do so, he would be "more or less compelled" to refuse relief in every case, "which would amount to a usurpation of the legislative function and a rewriting of the regulations by in effect deleting the obligation for a statement altogether."

15. Humphreys J. also did not accept the argument that Government policy, and the importance of provision of housing in general, and strategic housing in particular, is such that relief should be refused on a discretionary basis. In this respect he repeated his view that he did not think that the Regulation allows for such discretion in light of the fact that it expressly states that the Board must "refuse to deal with" an application which does not provide the information required in the article.

III. The proper construction of Article 299B

16. It is against this background that we can now proceed to consider the proper construction of Article 299B. The first thing to note is that these provisions were inserted by Article 94 of the European Union (Planning and Development) (Environmental Impact Assessment) Regulations 2018 (S.I. No. 296 of 2018) ("the 2018 Regulations). The 2018 Regulations amended the Planning and Development

Regulations 2000 (S.I. No. 600 of 2001) and are to be collectively construed with these provisions: see Article 1(3) of the 2018 Regulations. The 2018 Regulations themselves were made by the Minister for Housing, Planning and Local Government pursuant to s. 3 of the European Communities Act 1972 (as amended).

17. Before, however, examining the questions of interpretation presented by Article 299B, it is necessary first to say something about the Planning and Development (Housing) and Residential Tenancies Act 2016 ("the 2016 Act"). Conscious as the Oireachtas was of an incipient and growing housing crisis, the Long Title to the 2016 Act declares that the legislation seeks to the give effect to the Government's policy plan: "Rebuilding Ireland – Action Plan for Housing and Homelessness." To that end, the 2016 Act provides for an expedited planning system in respect of applications for permission in respect of strategic housing developments. Specifically, the application is determined at first instance by the Board with no further provision for appeal. Where, moreover, the application is determined without an oral hearing, the Board is (generally speaking) required to make a decision within 16 weeks of the lodging of the application (s. 8(9)). One objective of the Act, therefore, is to provide for the expedited determination of planning applications of this nature.

18. The 2016 Act further provides for a system of advance consultation with the Board (s. 6). Critically, however, for our purposes, s. 7(1) of the 2016 Act permits developers to request the Board to make a determination as to whether a proposed strategic housing development application which does not exceed existing environmental impact assessment ("EIA") thresholds could nonetheless have a significant effect on the environment. Section 7(1)(b) also allows developers to request the Board to provide certain advance information in respect of the type of information which will be required to be contained in an environment impact assessment or a Natura impact statement "in

relation to the proposed strategic housing development" (s. 7(1)(b)). As it happens, neither developer in either Pembroke Road or Waltham Abbey made such a request.

19. Article 299B of the 2001 Regulations (as amended) is part of a suite of legislative measures designed to give effect the latest iteration of the Environmental Impact Assessment Directive: Directive 2011/92/EU as amended by Directive 2014/52/EU. Article 4(1) of EIA Directive prescribes a mandatory EIA Report ("EIAR") where the proposed development exceeds certain thresholds. This does not arise in the present case.

20. In other cases, however, Article 4(2) requires that Member States screen proposed developments as to whether an EIA is required. Article 4(4) provides that where Member States opt for such screening, "the developer shall provide information on the characteristics of the project and its likely significant effects on the environment." This is the general background to Article 299B. Article 299B(1)(a) first states that what follows applies only where the planning application is for a sub-threshold development and the application was not accompanied by an EAIR and no previous request to the Board under s. 7 had been made.

21. Article 299B(1)(b) then requires the Board to conduct a preliminary examination of "at least, the nature, size or location of the development". Should it conclude that there is "significant and realistic doubt" in regard to the likelihood of significant effects on the environment arising from the proposed development, Article 299B(II) states that the Board shall "satisfy" itself that the applicant has provided to the Board:

> "(A) the information specified in Schedule 7A,
>
> (B) any further relevant information on the characteristics of the proposed development and its likely significant effects on the environment, and

> (C) a statement indicating how the available results of other relevant assessments of the effects on the environment carried out pursuant to European Union legislation other than the Environmental Impact Assessment Directive have been taken into account."

22. Article 299B(1)(c) states that the "information" referred to in paragraph (b)(ii)(II) may be accompanied by a description of the proposed development and the measures taken to mitigate any such effects on the environment. Article 299B(2) then states that where this information was not supplied, the Board "shall refuse to deal with the application pursuant to s. 8(3)(a)" of the 2016 Act. (Section 8(3)(a) of the 2016 Act provides that the Board "may decide to refuse to deal with any application made to it under s. 4(1)" if it considers that either the application or the EAIR or Natura statement is inadequate.)

23. As I have already observed, the difference between the outcome of the two cases is that in Waltham Abbey Humphreys J considered that the reference to "statement" in Article 299B(1)(b)(ii)(II)(c) means that "an identifiable document" must be submitted by the developer which itemises, for example, the assessments conducted under a range of other EU environmental legislative measures such as the Habitats Directive (Directive 92/43/EEC) and the Water Framework Directive (Directive 2000/90.EC). In the circumstances of that case the failure to submit such a document was therefore held to be fatal.

24. As Humphreys J observed (at paragraphs 23-24):

> "It is clear that no such statement was submitted. There is no reference to such a statement in either the inspector's report or the board's decision. It is true that for example there are some references to some of the relevant directives in the EIA screening report and other documents, but they do not individually or collectively comply with reg. 299B(1)(b)(ii)(II)(C) by indicating "how the

available results of other relevant assessments of the effects on the environment carried out pursuant to European Union legislation other than the Environmental Impact Assessment Directive have been taken into account." That would have required four clear elements:

(i) a distinct identifiable document constituting a statement of all the relevant matters for the purposes of reg. 299B(1)(b)(ii)(II)(C);

(ii) identification of the relevant assessments that are available;

(iii) identification of the results of those assessments; and

(iv) identification of how those results have been taken into account.

This is not just a matter of form. But even if it was just a matter of form, the regulations were not complied with. There is a mandatory requirement to refuse an application if the information referred to in sub-article (1)(b)(ii)(II) was not provided by the applicant, by virtue of reg. 299B(2)(a). Admittedly, this provision uses the word "information", but in that specific instance, that must logically include the "statement" as there would be no reason why only that element of the mandatory information would not be necessary. Indeed, that would undermine the whole scheme of the regulation."

25. In Pembroke Road Owens J took a different view, saying that the requirement was largely one imposed for the requirements of good administration and there was no "absolute requirement that the analytical material referred to as 'a statement indicating how…' in sub-article 299B(1)(b)(ii) must always be presented in the form of one distinct identifiable document." In any event he noted that the developer had in fact prepared an extensive document containing an environmental impact screening report.

That document itself recorded that the EIA screening report "had been prepared in response" to an opinion of the Board dated 10 December 2019 "having regard to Article 299B(1)(b)(ii)(II) and Article 299B(1)(c) of the Planning and Development Regulations 2001-2018."

26. Quite obviously the word "statement" if taken in isolation is capable of a variety of different meanings. Thus, for example, a statement made to Gardaí has a different connotation than, for example, a bank statement or a statement of earnings. In other contexts one can encounter political statements or even fashion statements. Like many English words, the word 'statement' derives its meaning from the context in which it appears.

Interpreting the word "statement" by reference to Article 299B alone

27. In the context of Article 299B *alone*, I agree that the reference to the word 'statement' must be understood as a definite and clearly identified expression of views in a particular document. This is clear from the relevant words of this provision: "a statement indicating how the available results of other relevant assessments of the effects on the environment… have been taken into account." This suggests the existence of a document (or, at least, an identifiable and separate part of a document) which describes just this. While I do not think that the drafters ever intended to be prescriptive as to the precise form which the statement must take, these very words nonetheless convey the requirement that the developer must supply a self-contained document (or a self-contained and separate part of a document) describing in a readily identifiable way how these other results have been taken into account. One might add that the consistent distinction drawn by the drafters throughout the 2001 Regulations between the use of the term "statement" in contra-distinction to "information" is too invariable and pronounced to be simply ignored.

28. It is, perhaps, significant that the Article 299B requires the Board to be "satisfied" that the requisite statement has been supplied by the developer. It is long established that the use of the statutory formula whereby a decision maker is required to be "satisfied" of a certain state of affairs connotes a requirement that the donee of that statutory power must discharge those powers in a manner which is *bona fide,* factually sustainable and not unreasonable: see, e.g., the decision of this Court in *The State (Lynch) v. Cooney* [1982] IR 337 at 361 per O'Higgins CJ and that of Blayney J in *Kiberd v. Hamilton* [1992] 2 IR 333. To this one might add that it is necessarily implicit in all of this that the decision-maker has correctly defined the ambit of the statutory power.

29. For my part, I find it difficult to see that the Board could properly have been "satisfied" in this sense in respect of either case. No such statement was prepared in Waltham Abbey. It is true that both an EIA Screening Report and a Stage 1 Appropriate Assessment Screening Report were submitted by the developer in this case. In the case of the AA screening report, it addressed the question of whether the proposed development was likely to have a significant potential impact on the Cork Harbour SPA from which the Ballincollig site is some 10km. distant. But while this latter report is a valuable one, it does not – as Humphreys J pointed out – set out in an identifiable form the various assessments which were carried out and the results of those assessments.

30. In the case of Pembroke Road the developer's planning consultants produced a lengthy and complex document entitled "Environmental Impact Screening Report" from which the results of these environmental assessments could be ascertained. It is at one level a "statement" of these results, but it is not, I think, a "statement" in the sense required by Article 299B. As I have just said, this requirement presupposes the existence of a self-contained document (or part of a document) from which these results can be quickly and easily ascertained and digested. While the Environmental Impact Screening Report

is admirably comprehensive, it requires a good deal of study and evaluation – even, perhaps, in the hands of a specialist – before these results can be understood and appreciated.

31. To that extent, therefore, I prefer the construction of the word "statement" in the context of Article 299B favoured by Humphreys J in Waltham Abbey as compared with that adopted by Owens J in Pembroke Road. I further agree that the language ("shall") of Article 299B(1)(b)(ii)(II) and Article 299B(2)(a) would normally convey a mandatory legislative obligation, non-compliance with which cannot lightly be overlooked: see, e.g., *Monaghan UDC v. Alf-A-Promotions Ltd*. [1980] ILRM 64. If, *certeris paribus*, matters remained as they stood then, of course, the applicants would have to succeed by reason of this non-compliance with a statutory requirement.

Interpreting the word "statement" in Article 299B by reference to an interpretation of the Regulations as a whole: the rule as to context

32. I do not think, however, that all other things are quite equal in this case because for the reasons I am about to set out, I do not think that one can read the word "statement" as it appears in Article 299B in isolation from the rest of the Regulations. Put simply, if the Court were to adopt an interpretation of the word "statement" by reference to the language of Article 299B alone, it would lead (as we shall see) to an interpretation which was contradictory and incoherent. In these circumstances, it behoves us to look at the Regulations *as a whole* with a view to ascertaining the proper interpretation of these provisions.

33. The difficulties of interpretation of this aspect of Article 299B may therefore be said to present a classic instance of where the principle of *noscitur a sociis* ("known by its companions") or the rule as to context comes into play. This point was well made by

Black J. in *The People (Attorney General) v. Kennedy* [1946] 517 at 536 where he said that:

> "A small section of a picture, if looked at close-up, may indicate something quite clearly; but when one stands back and looks at the whole canvass, the close-up of the small section is often found to have given a wholly wrong view of what it really represented. If one could pick out a single word or phrase and, finding it perfectly clear in itself, refuse to check its apparent meaning in the light thrown upon it by the context of other provisions, the result would be to render the principles of *ejusdem generis* and *noscitur a sociis* utterly meaningless; for this principle requires frequently that a word or phrase or even a whole provision which, standing alone, has a clear meaning must be given a quite different meaning when viewed in the light of its context."

34. The decision of this Court in *Kennedy* itself presents a good illustration of the application of this very principle. Here the question was whether s. 29 of the Courts of Justice Act 1924 enabled the prosecution to appeal a decision of the old Court of Criminal Appeal to this Court. The section allowed for the grant of leave to appeal either by the Court or the Attorney General. In this case the Attorney General had purported to issue a certificate of leave to appeal to himself. This Court held that this was not a valid exercise of the s. 29 power such that no proper leave to appeal had been granted.

35. The section had admittedly allowed for an appeal in general terms, but the point which this Court made in holding that such an appeal did not lie was that such general words were nonetheless negatived by a consideration of the other words of the section when it was read as a whole. As Murngahan J observed ([1946] IR 517 at 530) it would be a "curious practice" if "the Attorney General could apply for a certificate [of leave to

appeal] to the Court of Criminal Appeal and then…being refused, could himself grant a certificate in order to appeal against an order of acquittal."

36. The principles espoused in *Kennedy* have frequently been applied and endorsed by this Court: see, e.g., *The People (Director of Public Prosecutions) v. Brown* [2018] IESC 67, [2019] 2 IR 1 and *ELG v. Health Service Executive* [2022] IESC 14. As we shall presently see, something similar arises in the present case.

37. In looking at the relevant context, therefore, it may first be noted that the requirement regarding the statement is addressed t*o the Board* and not to or for the benefit of *the general public.* The public have no role in this pre-screening process since the dialogue here *at this stage* is exclusively between the developer and the Board. It is, of course, for the Board to ascertain and ensure that the requirements of the various EU environmental law directives have been satisfied. Any decision of the Board granting a development permission which, viewed objectively, did not comply with these requirements would, of course, fall to be quashed in judicial review proceedings.

38. That, however, is not the precise situation here. These provisions are instead directed towards the Board. They seek to ensure – as Owens J put it – in the interests of good administration that the Board has all the relevant information readily at its disposal. A statement of this kind would doubtless facilitate the Board in its overall task by providing a ready means of ascertaining the degree of compliance with these requirements of EU environmental law. I stress again, however, that these requirements are in the interests of good and simplified administration.

39. The failure to supply such a statement was not, of course, in any sense a real impediment to the discharge by the Board of its statutory functions, at least if the present cases were anything to go by. The Board was perfectly capable of interpreting the data and the analysis furnished by the developers and it is well used to navigating

complex environmental and planning documents. While in Waltham Abbey Humphreys J suggested (at paragraph 30 of his principal judgment) that the AA Screening Report had not supplied all of the requisite information regarding the nature of the assessments carried out etc., it must nonetheless be said that at least so far as the appeals to this Court are concerned there has been no real suggestion in either case that the Board did not conduct such an evaluation or assessment in the manner which EU environmental law requires.

40. The second critical aspect of the case bearing on the relevant statutory context is that if this Court were to hold that the requirements of Article 299B imposed a mandatory obligation on developers to supply a statement of this kind, the breach of which led to the invalidation of the permission, it would lead to a strange and contradictory state of affairs because, simply put, no *other* relevant statutory provision – whether it be the 2001 Regulations, the 2000 Act or, for that matter, the 2016 Act – imposes such a requirement. Adapting, therefore, the words of Murnaghan J. in *Kennedy* it certainly would be a "curious practice" if a permission were to be invalidated for the failure on the part of the developer to supply such a statement when there was no such obligation on the part of the developer to lodge such a statement with the planning application in the first place.

41. Here it may be observed that Form 14 is the statutory application form prescribed by the 2001 Regulations (as amended) in respect of applicants seeking to make a strategic housing development application. Form 14 is contained in Schedule 12 (as inserted by the 2018 Regulations). Paragraph 14 of that form contains a list of six statements which are to be completed by the developer. Thus, for example, paragraph 14.2 of Form 14 requires the developer to enclose "a statement setting out how the proposed strategic housing development will be consistent with the relevant objectives of the relevant

development plan." There is, however, nothing in either Schedule 12 or Form 14 which indicates that developers are required to complete a *separate* statement for the purposes of Article 299B regarding the available results of other environmental assessments carried out pursuant to the requirements of various EU environmental Directives.

42. If this Court were now to hold that the failure to comply with the statement requirements of Article 299B lead to the invalidation of the subsequent grant of permission, this would in effect amount to a judicial endorsement of a contradictory interpretation of the relevant planning legislation. Developers who had scrupulously and dutifully complied with the requirements of Schedule 12 by giving the requisite statements prescribed by Form 14 could justly complain if their applications were subsequently to be faulted – and the grant of planning permission invalidated – by reason of their failure to comply with a requirement regarding a statement which was itself not prescribed for the purposes of the schedule and its various forms.

43. There is clear judicial authority for the proposition that statutory provisions should be read, where possible, so as to produce a workable and coherent interpretation, thereby avoiding interpretations which were either incongruous or which imposed unfair or anomalous obligations on private citizens in particular. Thus, for example, as far back as *Frescati Estates Ltd. v Walker* [1975] IR 177 at 187 this Court held that the Planning Acts should, where possible, not be interpreted in a way which would lead to "strange incongruities." In a subsequent Housing Act case, this Court rejected an interpretation of what constituted the relevant dates for the service of notices to treat for the purposes of the making of compulsory purchase orders under the Housing Act 1966 where it concluded that such an interpretation such render the legislation effectively unworkable: see *In re Murphy* [1977] IR 243 at 251 per Henchy J.

44. Much of this judicial thinking now finds statutory expression in s. 5 of the Interpretation Act 2005. This provision permits the court to depart from the literal interpretation of the statutory words in certain circumstances, including absurdity or obscurity. Thus, s. 5(2)(b) of the 2005 Act provides that in construing a non-penal provision of a statutory instrument and the court is confronted with an interpretation which would be absurd or which would "fail to reflect the plain intention of the instrument as whole in the context of the enactment (including the Act) under which it was made", that provision shall then be given a construction that "reflects the plain intention of the maker of the instrument where that intention can be ascertained from the instrument as a whole in the context of that enactment."

45. It is, admittedly, unclear as to whether the omission of the Article 299B statement requirement in Form 14 as set out in the 12th Schedule of the Regulations was deliberate or was the result of a simple oversight. One way or the other, however, this Court cannot ascribe an intention to the Minister when making the Regulations that developers could in effect be penalised for failure to supply a statement which satisfied the precise requirements of Article 299B by the annulment of any subsequent grant of planning permission. This is particularly so when such a statement was *not* required from developers in the very place in which it might be expected to have been required – given that the provisions of the 12th Schedule required developers to supply *other* statements of this kind relevant to the planning application – or, for that matter, any other relevant legislative provision.

46. While the Board is still required to ensure that the developer supplies all the results of the relevant environmental assessments to its satisfaction such that these may properly be considered and assessed, the consequence of all of this is that the developer's failure to supply a "statement" in the narrow and particular sense envisaged by Article

299B(i)(b)(ii)(II)(c) cannot *in itself* result in the invalidation of any subsequent grant of planning permission.

47. All of this means is that the ordinary and natural meaning of the word "statement" as it appears in Article 299B and as viewed in isolation by reference to this provision must, to some degree, be viewed as having been overridden by a consideration of the Regulations as a whole. In other words, this case is another example of where the application of the principles of *noscitur a sociis* espoused in *Kennedy* and other relevant case-law (and, indeed, s. 5 of the 2005 Act) is properly called for.

48. It follows, therefore, that I would allow the appeal in the Waltham Abbey appeal and dismiss the appeal in the Pembroke Road Association so far as it concerned the Article 299B issue. It is next necessary to consider the other two issues arising in the Pembroke Road appeal, commencing with the issue of the application of s. 146A of the 2000 Act.

IV. The use of s. 146A of the 2000 Act

49. The Dublin City Council Development Plan 2016-2020 ("the Development Plan") contains a requirement that 10% of the site of new residential developments should be reserved for public open space. The Development Plan, however, permits a developer to commit to the payment of a financial contribution in lieu of the provision of public open space which is used to support the provision and enhancement of open space and landscape in the locality.

50. In Pembroke Road the developer lodged a planning application for a proposed development that did not include the provision of any public open space. Given, however, the proposed development's proximity to Herbert Park, the Chief Executive Officer's Report indicated that the payment of a financial contribution in lieu of public open space was acceptable. The Inspector agreed with that recommendation and the Board attached condition 26 to the grant of planning permission which required the

developer to make a payment of a financial contribution "as a special contribution under section 48(2)(c) of the Planning and Development Act, 2000 in lieu of the provision of public open space within the site" with the amount to be agreed with the Planning Authority.

51. In his first judgment dated 16th June 2021, however, Owens J. in the High Court held that condition 26 was invalid as the Board had wrongly relied on s. 48(2)(c) of the 2000 Act. He considered (at paragraph 14) that condition 26 was not severable since "it is clear that the Board would not have granted this permission without requiring financial contribution in lieu of public open space." In his supplemental judgment dated 29th July 2021, Owens J. decided to adjourn the proceedings in order to allow the Board to correct the error it had identified in Condition 26, to be amended by the Board pursuant to s. 146A(1)(iii) of the 2000 Act. In doing so, he considered that he was exercising his discretion as to remedies in recognition of the fact that the nature of the identified error was, in the Court's view, not one which required an order of *certiorari*. He also considered (at paragraph 25) that the wording of s. 146A(1)(iii) of the 2000 Act was wide enough to permit the Board to correct the mistake in Condition 26 as the "operation" of the permission would be "otherwise facilitate[ed]" by a similar, legal provision which implemented the Board's decision.

52. Pembroke Road now appeals this decision to this Court. The parties agree – and this Court accepted – that there are two issues to be determined under this heading: (a) whether the High Court was correct that it was entitled to adjourn proceedings to allow the Board to amend Condition 26 pursuant to section 146A(1)(iii); and (b) whether the High Court was correct to determine that the proposed amendment was non-material and that section 146A(1)(iii) was available to cure the Board's error.

53. To answer these questions, it is first appropriate to consider the nature of the remedy of *certiorari. Certiorari* is, of course, the traditional remedy granted in the course of judicial review proceedings. It serves to quash and set aside the administrative decision which has been impugned by means of a judicial annulment. The remedy is – for good reasons – a powerful and effective one. Experience has, however, shown that the remedy of annulment may sometimes amount to a form of excessive enthusiasm on the part of the legal system and that a more finely tuned remedy may be required.

54. This, indeed, was recently recognised by this Court in *Balz v. An Bord Pleanála* [2020] IESC 22 where in the course of holding that in some instances it would be appropriate to place a stay on the order of *certiorari*, O'Donnell J. observed (at paragraph 28 of his judgment) that the ability to place a stay on an order for *certiorari* was:

"…an important element in the court's capacity to do justice in any individual case. Otherwise, the court would be unable to distinguish between cases of flagrant, deliberate, and serious breach on the one hand, and perhaps innocent and limited error for which the party indeed may not themselves be responsible, but where, nevertheless, serious and disproportionate consequences could ensue if effect was given to an order of the court immediately."

55. Section 146A of the 2000 Act seeks to address this issue by empowering the Board to rectify errors in the grant of permission. It provides**:**

> "(1) Subject to *subsection (2)*—
>
> (*a*) a planning authority or the Board, as may be appropriate, may amend a planning permission granted by it, or
>
> (*b*) the Board may amend any decision made by it in performance of a function under or transferred by this Act or under any other enactment,
>
> for the purposes of—

(i) correcting any clerical error therein,

(ii) facilitating the doing of any thing pursuant to the permission or decision where the doing of that thing may reasonably be regarded as having been contemplated by a particular provision of the permission or decision or the terms of the permission or decision taken as a whole but which was not expressly provided for in the permission or decision, or

(iii) otherwise facilitating the operation of the permission or decision.

(2) A planning authority or the Board shall not exercise the powers under *subsection (1)* if to do so would, in its opinion, result in a material alteration of the terms of the development, the subject of the permission or decision concerned."

56. This is by no means the first example of legislative intervention of this kind designed to mitigate the effects of the remedy of certiorari. One can go all the way back to the Summary Jurisdiction Act 1857 for measures of this kind: that particular legislative measure sought to simplify what constituted the "record" of magistrates' courts so that such decisions could no longer be quashed on certiorari for what might merely have amounted to routine clerical errors. Section 146A is in its own way much in the same vein.

57. One might equally say that s. 146A is a response to past judicial observations: thus, for example, in *Bord na Móna v. An Bord Pleanála* [1985] IR 205 Keane J said that he thought that "it was wrong that a planning permission should be treated as of no effect simply because a condition attached to it, which has nothing to do with planning considerations, is found to be *ultra vires*."

58. In order to appreciate the background to all of this, one may first note that Chapter 16 of the Dublin Development Plan contains a requirement that 10% of the site of any

residential development should be reserved for the provision of public open space. The development plan also permits a contribution to be made *in lieu* of the provision of such space.

59. As it happens, the application in Pembroke Road did not contain any provision for open public space. The proposed development would, however, be immediately adjacent to Herbert Park and, as I observe above, both the Dublin City Council and the Board's Inspector agreed that in such circumstances a payment in lieu was acceptable. A financial condition of this kind was accordingly imposed by the Board pursuant to .48(2)(c) of the 2000 Act.

60. In the High Court Owens J held that the imposition of the condition was, in the circumstances, ultra vires. The judge noted that this sub-section was designed to deal with the "specific exceptional costs" which a local authority may incur in connection with the proposed development. The difficulty here, however, was that the City Council had not in any sense specified what exceptional costs in respect of matters such as infrastructure and facilities they might incur as a result of this development. As Owens J observed, there might not be any such costs. He considered that the power to impose such a condition came within the general power to levy contributions contained in s. 9(4) of the 2000 Act, rather than s. 48(2)(c).

61. In the subsequent judgment delivered on 29th July 2021 ([2011] IEHC 545) Owens J concluded (at paragraphs 21 and 22) that it would be appropriate to adjourn the proceedings in order to enable the Board to exercise its powers under s. 146A(1)(ii) to correct the error:

> "21. If a power to correct an error can be exercised by an administrative body, there may be no necessity to grant an order of *certiorari.* The power can be exercised before judicial review proceedings have commenced or at any time

during the currency of those proceedings. Such proceedings may be adjourned, even after judgment, to permit this to happen.

22. I see no reason why this corrective exercise should not happen in this case. I am not persuaded that I must or should set aside this planning permission at this stage. Only a small part of the process has miscarried as a result of an error by the Board. The Board relied on an inappropriate statutory provision to impose a condition requiring a financial contribution."

62. He went on to hold (at paragraph 25) that s. 146A(I)(ii) was broad enough to enable the Board to correct the mistake in the condition:

"25. The wording of s.146A(1)(iii) of the 2000 Act is wide enough to permit the Board to correct the mistake in condition 26 in its decision and order granting permission for this development. The "operation" of the permission will be "otherwise facilitat[ed]" within the statutory language if the Board amends its decision and order by removing condition 26 and replacing it with something legally effective which implements its decision that the developer should make a financial contribution to Dublin City Council in lieu of provision of public open space. The Board has indicated that it is prepared to utilise s.146A(1)(iii) to correct condition 26 and I propose to give it an opportunity to do so. This correction will not involve "a material alteration of the terms of the development"."

63. For my part, I cannot but agree with Owen J's analysis of this sub-section. The Board clearly intended that a financial contribution should be levied, but identified the wrong statutory provision for this purpose. The Board sought to rectify this error by amending the condition so as to include the correct reference. This correction does not in any sense materially affect the original permission: it would be different if, for example, the

Board now sought to amend the condition so as to impose a financial contribution for the first time.

64. It is true that the invocation of an incorrect statutory provision is rather more serious than the commission of a pure clerical error. In some circumstances an error of this kind might so fatally weaken the very integrity of the impugned administrative decision that it would lie beyond the capacity of the remedial provisions of s. 146A to cure. That, however, is not the case here. To repeat, the error here was a purely venial one, not otherwise affecting the integrity of the decision. If the Board are correct, the error can readily be corrected by the simple expedient of substituting the correct statutory reference in the planning decision.

65. It follows, therefore, that I consider that Owens J was correct in holding that the Board was entitled to invoke s. 146A in order to correct its previous error. But beyond the issue of the appropriate statutory vires for this purpose, Pembroke Road also contend that Owens J wrongly exercised his discretion for this purpose. They argue that the appropriate remedy in the circumstances was that the High Court should have simply quashed the grant of planning permission and remitted the matter in the ordinary way to the Board in accordance with the provisions of Ord. 84, r. 27.

66. This issue arises in the following way: No. 40 was among the houses on Pembroke Road which were demolished by the developer on 29th September 2020. As it happens, No.40 Pembroke Road was the house of The O'Rahilly, the most senior Volunteer officer to be killed in action in Easter Week 1916 and the subject of the eponymous Yeats poem.

67. Some of the opposition to the proposed application was that it entailed the demolition of No. 40, a house with these significant historical connections. Yet the house itself was not a listed building and no one in these proceedings has contended that the Board's

decision to grant permission on 31st August 2020 was in and of itself unreasonable merely by reason of the fact that it sanctioned the demolition of this particular house. The objection here is rather that it is contended that the developer subsequently abruptly and suddenly demolished the three properties a few weeks after the grant of such permission in circumstances where (it is said) pre-commencement conditions were not complied with, so that (on this argument) this development was unauthorised.

68. In passing I should observe that the Court was informed at the oral hearing that Dublin City Council have commenced enforcement proceedings in respect of this alleged misconduct on the part of the developer. In the circumstances I will abstain from making any comment of the merits of this issue which, in any event, was not directly before the Court. The point rather here is that it is argued that in view of the developer's (alleged) planning misconduct the High Court should not have exercised its discretion in favour of the developer by allowing the Board to correct the error under s. 149A: a sort of "not coming to equity with clean hands" argument in reverse. Instead – it was said – the Court should simply have quashed the permission and remitted the matter to the Board. Had this occurred the process would have had to start again, with manifest delays and inconvenience to the proposed project.

69. *If* the developer was guilty of the misconduct alleged – and, in fairness, it is only appropriate to record that such has been denied – I would not seek to minimise its potential seriousness. Yet equity does not permit her discretion to be exercised against those who have (allegedly) misbehaved in order simply to punish them or to exact some form of vengeance. Rather, when the court's discretion is exercised against those who have not come with clean hands it is because that very conduct is relevant to the issue before the court. That is not, however, the case here.

70. A range of views are possible in respect of whether No. 40 Pembroke Road should have been protected from demolition. Yet the Board expressly sanctioned its demolition. This is a critical consideration, because, for example, had the developer sought to create a *fait accompli* by unilaterally demolishing it in advance of seeking permission with a view to stealing a march on those who might otherwise have opposed the grant of permission, entirely different considerations would have arisen.

71. Rightly or wrongly, however, the Board had *already* granted permission for this demolition, so the fact of the demolition of No. 40 (even if unauthorised by reason of the breach of the pre-commencement conditions as contended by the applicant) was not relevant to the question of the existence of *an entirely different type of condition*, namely, one relating to financial contributions. In these circumstances, even if there was indeed misconduct on the part of the developer (which, I again stress, it has denied) this would have no bearing on the precise issue to hand, namely, whether the Board should be allowed to cure the error in its decision relating to financial contributions.

72. In these circumstances, I consider that Owens J was correct in the circumstances of this case to adjourn the judicial review proceedings in order to allow the Board to avail of the s. 149A jurisdiction and, in turn, to correct the statutory reference because this was simply an error which did not go to the heart of the question of whether the Board had been correct to accept a financial contribution in lieu of the requirement to provide public open space.

V. The Building Height Guidelines

73. The third issue raised in Pembroke Road relates to the height of buildings in the proposed development. The complaint made was that the height of the building involves a material contravention of the Development Plan and that the Board failed to consider whether it could be demonstrated that implementation of policies and

objectives of the Development Plan does not align with and support of the objectives and policies of the National Planning Framework.

74. Under s. 9(6)(c) of the 2016 Act, the Board may grant planning permission in material contravention of a Development Plan provided its decision can be justified by reference to s. 37(2)(b) of the 2000 Act. Section 37(2)(b)(iii) allows permission to be granted in material contravention of a Development Plan where the Board considers that it should be granted having regard to certain matters including guidelines issued under s. 28 of the 2000 Act. The Board contends that it had due consideration of such matters in this respect having determined that permission should be granted notwithstanding the material contravention of the development plan because of the proposed development's strategic or national importance and also having had regard to SPPR 3 ("specific planning policy requirement") contained in the ministerial guidelines.

75. The particular objection raised by Pembroke Road is that if the Board wants to rely on SPPR 3 for the purposes of s. 37(2)(b)(iii) then it must "demonstrate" – in accordance with s. 3.1 of those Guidelines – that the Development Plan is not in alignment with the National Planning Framework. In the High Court, Owens J. held – and the parties accepted – that a material contravention of the Development Plan did arise in respect of the Building Height Guidelines. Accordingly, in light of the Board's reliance on SPPR 3, the High Court went on to consider whether the Board had demonstrated that the Development Plan was not in compliance with the National Planning Framework. Although Owens J. appeared to accept that there was no express statement to this effect made by the Board in its grant of planning permission, he considered that the obligation under section 3.1 of the Guidelines had been satisfied notwithstanding, since it was "self-evident" that the Development Plan and National Planning Framework did not align.

76. Pembroke Road contend that the High Court fell into error in this respect. It contends that the wording of section 3.1 demonstrates that express consideration of the alignment between the Development Plan and National Planning Framework must be undertaken and thus this obligation cannot be satisfied even where non-alignment is "self-evident". The Board and Derryroe, however, point out that this argument was rejected by Owens J. They contend that it would be contrary to the objectives of the Building Height Guidelines, the National Planning Framework, and the Development Plans, if the Board were precluded from granting planning permission where it was "self-evident" that the National Planning Framework and Development Plan did not align.

VI. The correct interpretation of the Building Height Guidelines

77. One defining feature of the Dublin City landscape is that, with a few exceptions, it contains very few high rise buildings. In this respect, Dublin stands comparison with other cities such as London, Frankfurt and, most obviously, New York and Chicago. In 2016, however, the Government decided that this general policy should change and that more high rise buildings should be permitted in order to address issues of urban sprawl and the housing crisis generally.

78. As I have already noted, the Oireachtas agreed with this policy and the 2016 Act seeks to give it effect. One of the ways in which the 2016 Act seeks to do this is by allowing the Board to override elements of the city development plan and to carry such change over the objections of the local representatives who had been responsible for the development plan in the first place. One might add that in many cases developments have been adopted at local level before this general change of planning policy was manifested at national level.

79. Section 9(6) of the 2016 Act thus permits the Board to grant a strategic housing development permission which would materially contravene a provision of the

development plan if this is accordance with s. 37(2)(b) of the 2000 Act. Section 37(2)(b)(iii) of the 2000 Act allows the Board to depart from the development plan when it considers that this is warranted having regard to matters such as ministerial guidelines issued pursuant to the s. 28 of the 2000 Act. These guidelines also reflect Government policy as reflected in the National Planning Framework. (This power does not, however, extend to overriding the development plan in matters of land zoning: see s. 9(6)(b) of the 2006 Act.)

80. The reasons for the change of policy are well expressed in paragraph 1.4 of the Building Height Guidelines:

> "….in recent years, local authorities, through their statutory development and local area plan processes, have begun to set generic maximum height limits across their functional areas. Frequently such limits have resulted from local level concerns, like maintaining the character or an existing built-up area, for example. However, such limits, if inflexibly or unreasonably applied, can undermine wider national policy objectives to provide more compact forms of urban development as outlined in the National Planning Framework and instead continue an unsustainable pattern of development whereby many of our cities and towns continue to grow outwards rather than consolidating and strengthening the existing built-up area. Such blanket limitations can also hinder innovation in urban design and architecture leading to poor planning outcomes."

81. Paragraph 1.9 goes on to record that there was "significant scope" to accommodate future population growth and paragraph 1.21 states that increasing prevailing building heights has a "critical role" in ensuring more compact growth in urban areas. The Guidelines accordingly seek to preclude generic building height limitations in local development plans which are not based on what are termed "performance criteria."

82. As Owens J pointed out in his judgment, it is perfectly evident that the current Dublin City Development plan does contain blanket height restrictions, subject only to exceptions at a range of discrete locations such as the Docklands, Heuston, Connolly and George's Quay areas, none of which apply to this Ballsbridge site. In the present case the proposed structure would be approximately 45m tall.

83. In its decision the Board invoked s. 37(2)(b)(i) and (ii) of the 2000 Act, saying:

> "The Board considers that, while a grant of permission for the proposed Strategic Housing Development would not materially contravene a zoning objective of the Development Plan, it would materially contravene the Plan with respect to building height limits. The Board considers that, having regard to the provisions of section 37(2)(b)(i) and (iii) of the Planning and Development Act 2000, as amended, the grant of permission in material contravention of the development plan would be justified for the following reasons and considerations:
>
> In relation to section 37(2)(b)(i) of the Planning and Development Act 2000 (as amended):
>
> The proposed development is considered to be of strategic or national importance by reason of its potential to contribute to the achievement of the Government's policy to increase delivery of housing set out in Rebuilding Ireland – Action Plan for Housing and Homelessness issued in July 2016, and to facilitate the achievement of greater density and height in residential development in an urban centre close to public transport and centres of employment.
>
> In relation to section 37(2)(b)(iii)of the Planning and Development Act 2000 (as amended):

> Permission for the development should be granted having regard to guidelines under section 28 of the Act, specifically SPPR 3 of the Building Height Guidelines which states that where a development complies with the Development Management Criteria in section 3.2, it may be approved, even where specific objectives of the relevant development plan or local area plan may indicate otherwise and national policy in Project Ireland 2040 National Planning Framework (in particular objectives 13 and 35). An assessment of the proposed development was carried out to determine that the proposed development conforms with the development management criteria in section 3.2 of those guidelines.
>
> In accordance with section 9(6) of the 2016 Act, the Board considered that the criteria in section 37(2)(b)(i) and (iii) of the 2000 Act were satisfied for the reasons and considerations set out in the decision."

84. The argument of the applicants is that the Board could invoke these powers only where it was clear that there was an identified want of alignment between the height requirements and objectives of the Dublin Development Plan on the one hand and the ministerial Guidelines (and, by extension, the National Planning Framework) on the other and that the Board had expressly noted this and had expressly availed of its power from the Guidelines in its grant of permission. The simplest answer to this is to say that in the present case such a want of alignment so far as the height requirement was concerned between these documents was obvious. It is (at least) necessarily implicit in the Board's determination that it was perfectly aware of this and that it in its decision it paid appropriate attention to the general objectives of the Guidelines and the need to comply with the combined requirements of s. 9(6) of the 2016 Act and s. 37(2)(b) of the 2000 Act.

85. The Court is obviously not called upon to address the planning merits of this decision or to pronounce on matters such as whether a departure from the general low-rise character of Dublin City is or is not desirable. These are matters in which the Court has no expertise or, just as importantly, any democratic accountability. It is accordingly sufficient to say that I cannot fault the impeccable analysis of this issue conducted by Owens J in the High Court. I consider that it has not been shown that the Board erred in law in the manner in which it departed from the development plan.

VII. Overall conclusions

86. In the circumstances, therefore, I would dismiss the applicant's appeal in Pembroke Road Association. As I have already indicated, I would allow the appeal of the Board in Waltham Abbey.