THE HIGH COURT
JUDICIAL REVIEW

[2020] IEHC 586
[2020 No. 375 JR]

BETWEEN

BALSCADDEN ROAD SAA RESIDENTS ASSOCIATION LIMITED

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

AND

CREKAV TRADING GP LIMITED

NOTICE PARTY

AND

[2020 No. 293 JR]

BETWEEN

CHRISTIAN MORRIS

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

AND

CREKAV TRADING G.P. LIMITED

NOTICE PARTY

JUDGMENT of Mr. Justice Richard Humphreys delivered on Wednesday the 25th day of November, 2020

1. These cases relate to a significant development on Howth Head involving the excavation of an Ice Age esker and the removal of 78,000 m³ of soil, sand and gravel on the developer's estimate or 90,000 m³ on the applicants' estimate.

2. The site is in proximity to areas of both natural and built environmental significance. As regards the natural environment, Ms. Gráinne Mallon in her affidavit on behalf of the applicant in Balscadden points out that the area *"contains an extraordinarily high number of European sites"* (para. 64). Part of the area is covered by the Fingal County Council (Howth) Special Amenity Area Order (Confirmation) Order 2000 (S.I. No. 133 of 2000).

3. The Natura 2000 network consists of two types of designated habitats, Special Areas of Conservation (SACs) under Council Directive 92/43/EEC of 21st May, 1992 on the conservation of natural habitats and of wild fauna and flora; and Special Protection Areas (SPAs) under Directive 2009/147/EC of the European Parliament and of the Council of 30th November, 2009 on the conservation of wild birds.

4. There are 19 European sites including ten SPAs and nine SACs or candidate SACs (cSACs) within 15km of the development. One of them, the Howth Head cSAC, includes part of the site itself. That cSAC (reference 000202), was proposed as an SAC in May 1998 and transmitted to the European Commission on 28th February, 2000 according to the National Parks and Wildlife Service, who say that a formal statutory instrument will be adopted in due course.

5. The Howth Head Coast SPA (004113) was designated by the European Communities (Conservation of Wild Birds (Howth Head Coast Special Protection Area 004113)) Regulations 2012 (S.I. No. 185 of 2012).

6. The Ireland's Eye SPA (004117) was designated by the European Communities (Conservation of Wild Birds (Ireland's Eye SPA 0004117)) Regulations 2004 (S.I. No. 900 of 2004). The European Communities (Conservation of Wild Birds (Ireland's Eye Special Protection Area 004117)) Regulations 2010 (S.I. No. 240 of 2010) and the European Union Habitats (Ireland's Eye Special Area of Conservation 002193) Regulations 2017 (S.I. No. 501 of 2017).

7. As regards the built environment, the site is adjacent to a Martello Tower built around 1804 on an Anglo-Norman motte. The tower is a protected structure (RPS 570), and a recorded monument (DU 16-002092). The motte is also a recorded monument (RMP DU 16-00201).

8. The site of the proposed development is 1.55 hectares in size and is located between Balscadden Road in Howth and Asgard Park. It is made up of three separate sites. Firstly, the former Baily Court Hotel, secondly, a greenfield site to the south including the glacial esker that backs on to the dwellings at Asgard Park, and thirdly, the Edros building which is adjacent to the Martello Tower. The term "*Edros*" is a reference to an ancient name for Howth, Ἄδρου, set out in Ptolemy's 2nd century map of Ireland, which, while described as an island, was identified as being Howth by among others, Professor Thomas F. O'Rahilly, *Early Irish History and Mythology* (Dublin Institute for Advanced Studies, Dublin, 1946, 1984), p. 14.

9. The development involves the construction of 177 dwellings, two shops, a café and a community room and 146 car parking spaces. The land in question rises by over 50 feet from north to south, so that in order to ensure the stability of the ground there would be an extensive subterranean sheet piling structure which will be immediately adjacent to the dwellings in Asgard Park.

10. On 29th May, 2018 a first application for planning permission was made under the Strategic Housing Development (SHD) procedure directly to the board. The inspector reported on 24th August, 2018 and permission was granted on 17th September, 2018.

11. Leave to apply for judicial review in respect of that decision was sought on 15th November, 2018 [2018 No. 947 JR].

12. As that judicial review progressed, the developer decided to make a fresh application for the development and a pre-planning consultation took place in relation to the second application on 16th May, 2019. Of course, the first permission was regarded as valid at that point.

13. The inspector reported on the pre-planning consultation on 17th May, 2019.

14. On 30th October, 2019 an Appropriate Assessment Screening and Natura Impact Statement was submitted by Altemar Marine and Environmental Consultancy on behalf of the developer.

15. On 4th November, 2019 the second planning application was formally submitted under the SHD procedure. A covering letter dated 1st November, 2019 from Tom Phillips Associates sets out what counsel for the developer calls "*a vast amount of documentation*", in excess of a thousand pages of supporting material.

16. On 6th December, 2019 the applicant in Balscadden made submissions objecting to the application, signed by Gráinne Mallon, Chairperson.

17. On 9th December, 2019 a submission was made by MTW Consultants Limited, prepared by Mr. Tom Markham, supporting the applicants' objections.

18. On 23rd December, 2019 the statutory report of the Chief Executive of Fingal County Council was submitted. That relied to some extent on the contents and merits of the first planning decision which was later quashed, although it hadn't been quashed at that point.

19. On 16th January, 2020 the first judicial review was finalised with a consent order of *certiorari* on the basis that there had been inadequate consideration of the issue of excavation of material.

20. On 16th February, 2020 the board's inspector undertook a site inspection and the inspector submitted a report on 19th February, 2020.

21. On 26th February, 2020 the board gave a direction granting permission followed by a formal order on 2nd March, 2020.

22. On 8th June, 2020 McDonald J. decided on leave in the *Morris* case by way of a written judgment, *Morris v. An Bord Pleanála* [2020] IEHC 276 (Unreported, High Court, McDonald J., 8th June, 2020), granting partial leave on a number of grounds and refusing leave on other grounds.

23. Leave to apply for judicial review in the *Balscadden* case was applied for on 18th June, 2020 and duly granted. I have now received helpful submissions from Mr. Barney Quirke S.C. (with Mr. Michael O'Donnell B.L. and Mr. Christopher Hughes B.L.) for the applicant in *Balscadden*, from Mr. Christian Morris, *pro se*, in his own proceedings, from Mr. Rory Mulcahy S.C. (with Mr. Brian Foley S.C.) for the respondent and from Mr. Declan McGrath S.C. (with Ms. Suzanne Murray B.L.) for the notice party.

Domestic law issues

24. The myriad of issues raised by the applicants can essentially be divided into three headings:

    (i). domestic administrative law points;

    (ii). EU law points; and

(iii). if the decision is otherwise valid, the question of the validity of condition 2.

25. Whether the court should deal with domestic issues discretely from European issues and, if so, how, may vary from case to case, but in this instance I heard full arguments on the domestic law issues first, albeit in the context of a unitary hearing. To hear domestic law issues first where there are EU issues lurking in the background involves proceeding on the assumption that EU law doesn't superimpose a greater obligation than domestic administrative law. That is an assumption that an applicant is free to revisit if unsuccessful on the domestic administrative law points. So to be absolutely clear about the matter, insofar as the present judgment rejects any domestic law points, that in no way prejudges the question of whether under any given heading EU law imposes a greater obligation than normal Irish administrative law.

Predetermination

26. The Planning and Development (Housing) and Residential Tenancies Act 2016 provides that before making an SHD development, a developer shall engage in pre-application consultation with the board under s. 5.

27. The applicant in *Balscadden* makes a number of complaints regarding prejudgement, in particular, the fact that the board at the pre-application stage didn't scrutinise anything that had already been covered by the previous permission which was later to be quashed, the fact that the applicants were excluded from participation in the pre-application process and overall prejudgement arising from the pre-application process.

28. Much of the complaint seems to be an oblique attack on the validity of the 2016 Act. As the Act is not challenged in the proceedings, and as the board has complied with it, it doesn't seem that any complaint arising from such compliance can succeed, such as, for example, the complaint of exclusion from the process.

29. The fact of preplanning consultation without public input doesn't prevent third parties from making submissions that the relevant criteria are not met, and the board is required to deal with that at the substantive stage. Insofar as there is the problem that the preplanning consultation didn't revisit points in the original application (which was later quashed), given that that was simply a preliminary screening procedure that didn't predetermine the ultimate merits, even though there was a degree of contamination of that procedure by having regard to the quashed application, it wasn't a contamination that warrants an order of *certiorari*. One could offer an analogy with the court hearing a leave application and then determining the merits at a later stage. Even if some point is incorrectly taken into account at the screening stage of leave, say for example a case that is subsequently overturned on appeal, that doesn't prevent the court coming with a fresh mind to consider only relevant matters at the substantive stage. That is reinforced by s. 6(9) of the 2016 Act which precludes reliance on the preliminary view at the substantive stage.

Alleged inconsistency with zoning

30. The applicants argue that there is an inconsistency between the zoning of the land and the SHD criteria or the permission granted. The zoning details are set out in the exhibits

to the affidavit of Margaret O'Leary filed on 10th November, 2020. Residential development is expressly permitted in the lands zoned RA and TC, but it is also permitted in the lands zoned HA subject to footnote 4, which reads *"subject to compliance with the Rural Settlement Strategy"*. In the absence of anything showing breach of that strategy, I don't think there is anything to the zoning point.

Failure to refer to Mr. Morris as an observer

31. Mr. Morris pleads that the board failed to list him as an observer in its decision. The board is of course obliged to consider all submissions received, and in certain circumstances failure to recite a submission could give rise to an inference of non-consideration (a good example is *B.C. (Zimbabwe) v. The International Protection Appeals Tribunal* [2019] IEHC 488, [2019] 7 JIC 0207 (Unreported, High Court, 2nd July, 2019)); but this isn't such a case. On the facts, it seems that the board did have regard to Mr. Morris' submission and the contents of the inspector's report do seem to indicate this, because the report appears to allude to the constitutional argument that he made. Thus, the omission of his name is simply an error and is not a basis in itself for quashing the decision.

Alleged contravention of Objective DMS174 in the County Development Plan

32. The alleged contravention of Objective DMS174 which relates to avoiding coastal erosion is pleaded in *Morris.* It is not specifically referred to in *Balscadden*, but is touched on in written submissions. The relevant planning objective is quoted at p. 16 of the inspector's report. The relevant map, Green Infrastructure 2, Sheet No. 15, Map Objectives, in Fingal Development Plan 2017 - 2023, sets out the areas which are within 100 m of the coastline and vulnerable to erosion. Those areas do not include this site and on that basis this point is not a ground for *certiorari* here.

Administrative law complaints regarding the manner in which submissions were addressed

33. A range of grounds were pleaded generally regarding the way in which submissions were addressed, such as grounds 15-24, 27-28 and 33 in *Balscadden*. Those complaints could be viewed under a number of different headings such as unreasonableness, failure to have regard to relevant matters, failure to engage with submissions and lack of reasons. I propose to consider these issues generally first and then turn to some specific sub-headings of complaint, so the general discussion is not meant to derogate from more specific points raised later by the applicants.

34. As regards unreasonableness, which is pleaded in a general way in ground 66, it doesn't seem to me that the decision could in general be said to be irrational in the legal sense, that is, one that is not open to the board given all the material before it.

35. As regards the various pleas of failure to have regard to submissions or ignoring submissions such as ground 18, those are not made out. The applicants make the classic error of confusing lack of narrative discussion with failure to have regard to something. Failure to "*engage with*" submissions is pleaded for example in grounds 19 and 20, but there is no obligation to "*engage with*" submissions in the sense advocated by the applicants, which effectively amounts to some sort of discursive, hand-to-hand combat as

opposed to the obligation to give reasons. For similar reasons the corresponding points in *Morris* are also not well founded.

36. It seems to me the core complaint of the applicants in relation to the way submissions were dealt with really boils down to a lack of reasons, as pleaded, for example in ground 57.

37. The main guidance regarding reasons, especially in the planning context, is *Connelly v. An Bord Pleanála* [2018] IESC 31, [2018] 2 I.L.R.M. 453. While the applicants place much reliance on *Balz v. An Bord Pleanála* [2019] IESC 90, [2020] 1 I.L.R.M. 637, I don't read that as creating an additional layer of obligation as to reasons. O'Donnell J., at para. 57 of Balz commented that, *"[i]t is a basic element of any decision-making affecting the public that relevant submissions should be addressed and an explanation given why they are not accepted, if indeed that is the case. This is fundamental not just to the law, but also to the trust which members of the public are required to have in decision making institutions if the individuals concerned, and the public more generally, are to be expected to accept decisions with which, in some cases, they may profoundly disagree, and with whose consequences they may have to live."* That is a comment rather than a holding, but it is also a comment made in the context of rejection of a point *in limine* by the decision-maker. More fundamentally though, the concept of submissions being "*addressed*" is not to be confused with engaging with submissions in a discursive-type judgment.

38. Situated in the context of the caselaw overall, especially the decision of the Supreme Court in *Connelly,* what this means is that where submissions are rejected, at least those relating to the main issues, the decision-maker should "*address*" them in the sense of giving reasons, but the standard of reasons remains as in *Connelly.* We are talking about broad reasons regarding the main issues, not micro-specific addressing of every detail in a narrative, discursive correspondence.

39. Considering a range of caselaw in relation to the question of reasons, including *RPS Consulting Engineers Ltd. v. Kildare County Council* [2016] IEHC 113, [2017] 3 I.R. 61; *Sliabh Luachra Against Ballydesmond Windfarm Committee v. An Bord Pleanála* [2019] IEHC 888 (Unreported, High Court, McDonald J., 20th December, 2019); *Friends of the Irish Environment CLG v. Government of Ireland* [2020] IEHC 225 (Unreported, High Court, Barr J., 24th April, 2020*); O'Neill v. An Bord Pleanála* [2020] IEHC 356 (Unreported, High Court, McDonald J., 22nd July, 2020); *Crekav Trading G.P. Ltd. v. An Bord Pleanála* [2020] IEHC 400 (Unreported, High Court, Barniville J., 31st July, 2020); and *Leefield Limited v. An Bord Pleanála* [2012] IEHC 539 (Unreported, High Court, Birmingham J., 4th December, 2012), one can draw a number of conclusions as follows:

    (i). the extent of reasons depends on the context;

    (ii). what is required is the giving of broad reasons regarding the main issues;

(iii). there is no obligation to address points on a submission-by-submission basis - reasons can be grouped under themes or headings;

(iv). it is not up to an applicant to dictate how a decision is to be organised - the selection of headings or order of material is, within reason, a matter for the decision-maker;

(v). there is no obligation to engage in a discursive, narrative analysis - the obligation is to give a reasoned decision;

(vi). there is no obligation to set out the reasons in a single document if they can be found in some other identified document; and

(vii). reasons must be judged from the standpoint of an intelligent person who has participated in the relevant proceedings and is apprised of the broad issues involved, and should not be read in isolation.

40. The constitutional and natural justice requirement is for the main reasons, not for every micro-specific reason. Mr. McGrath at one point sought to argue that whatever the reason giving obligation of courts is, the obligation of administrative bodies must be significantly less. That doesn't particularly follow logically. Indeed, over time there has been a levelling-up whereby various rights such as fair procedures and reasons have worked their way down from judicial bodies to quasi-judicial and administrative bodies, even in the context of statutory absolute discretion. That results in, as I say, a levelling-up process, not some kind of artificial exercise where administrative bodies are kept to a depressed standard of rights obligations that must by definition be significantly below what courts must follow.

41. The other problem with the courts *versus* administrative bodies argument is that it also has the effect of driving up the level of obligations on courts, which are already at such a level as to lead to an unsustainable quantity and length of written judgments. Of course as emphasised by the Court of Appeal recently *in Protégé International Group (Cyprus) Ltd. v. Irish Distillers Ltd.* [2020] IECA 80 (Unreported, Court of Appeal, Costello J. (Haughton and Ní Raifeartaigh JJ. concurring), 2nd April, 2020), at para. 75, it is a "*basic proposition*" that "*the essential duty*" of a judge is to give reasons for decisions. But even in that context it is important to emphasise that *"there is no obligation for a judge to go on and give, as it were, reasons for his reasons*", *per* Munby L.J. in *In Re A. & L. (Children)* [2011] EWCA Civ. 1611, at para. 35.

42. As the Supreme Court identified in *Connelly v. An Bord Pleanála* [2018] IESC 31 at para. 2.3, the question in that case was whether one should focus only on the conclusions or alternatively examine reasoning elsewhere in the decision and look at both the whole of the decision (see *e.g. Ratheniska v. An Bord Pleanála* [2015] IEHC 18 (Unreported, High Court, Haughton J., 14th January, 2015)) as well as the documents and evidence before the decision-maker. The court ultimately decided that question in a way I consider to be basically dispositive of the applicants' complaints about the reasoning of the board's

decision here. The foregoing discussion however doesn't derogate from the two specific points of irrelevant considerations and inadequate drawings which I deal with separately below.

Ownership

43. The applicant in *Balscadden* complained about the adequacy of the engagement with the submissions regarding ownership of the site. Mr. McGrath complained that this point wasn't pleaded, which was the only pleading objection made by the notice party. I will leave that to one side for the moment.

44. The 2016 Act at s. 3 defines a "*prospective applicant*" as meaning a person who meets various criteria including being the owner of the land concerned or having the consent of the owner. Simons J. in *Heather Hill Management Company CLG v. An Bord Pleanála* [2019] IEHC 450 (Unreported, High Court, 21st June, 2019) at paras. 183-185 viewed the purpose of the ownership requirement as to guard against the making of frivolous or vexatious planning applications and considered that it was doubtful whether the board was required to interrogate issues of title.

45. It seems to me that principles of *stare decisis* mean that I should follow that judgment here. And that it follows that while the point is indeed jurisdictional, it is not a point on which detailed reasons are required in the absence of significant contrary evidence. Accordingly, it seems to me that the reasoning here is adequate.

Stability of this site

46. The stability of the ground was obviously a crucial issue for the applicants. Leaving aside the question of whether the quashed permission was improperly relied on and the adequacy of the drawings (points I deal with separately below), it seems to me that the answer to the applicants' complaints about the extent to which submissions were addressed can be found in *Connelly* (at para. 9.8), where Clarke C.J. said, *"[i]t seems to me, therefore, that the reasons for the Board's development consent decision in this case can, at a minimum, be found in the Inspector's report and the documents either expressly or by necessary implication referred to in it, the s. 132 notice and the further information and NIS subsequently supplied, as well as the final decision of the Board to grant permission including the conditions attached to that decision and the reasons given for the inclusion of the conditions concerned."* This jurisprudence has the effect that if a document is either expressly or by necessary implication referred to in a decision, it's normally reasonable to suppose that insofar as the document contains reasoning supportive of the decision, that reasoning has been adopted, and that one can, therefore, look to that other document to find reasons or other reasons for the decision. The decision-maker doesn't have to undertake discursive engagement with submissions, rather he or she must simply give adequate reasons.

47. In the present case at para. 11.3.3 of the inspector's report, which was in turn relied on by the board, it is stated that details submitted with the application demonstrate that proper consideration was given to ground works, and a report from an engineer submitted by the applicant is referred to. This is the Geotechnical Engineering Report by GDG

Consultants attached to a report from OCSC, submitted by the developer. That amounts to adopting the report within the meaning of the *Connelly* jurisprudence, which has to amount to satisfying the requirement for broad reasons for the major issues, albeit that Mr. Markham was to later critique that. Nonetheless, a decision-maker is entitled to prefer one item of evidence to another.

48. I emphasise the point that I am considering this only from the point of view of domestic law on the assumption that EU law doesn't provide anything additional. At the risk of repetition, if it were to become necessary to consider the EU law position, one would have to reopen the heading of adequacy of reasons from an EU point of view.

Logistics of removal

49. Complaint is made that the inspector's report inadequately deals with submissions regarding the logistics of removal of the large amount of material concerned. Details regarding construction traffic were set out in the OCSC report, Construction Environmental Management Plan and Mitigation Measures, dated 30th October, 2019. The report is expressly referred to in the inspector's report at 11.5.1 and it seems to me that on the logic of *Connelly* that constitutes tacit adoption, and consequently, the provision of sufficient reasons in the sense of preferring the analysis of the developer on such issues.

Irrelevant considerations

50. Grounds 13, 35 and 36 allege that regard was had to irrelevant considerations, in particular, the previous grant of permission by the board for the previous iteration of the same development. Mr. Mulcahy makes a mild pleading objection that while there is a pleaded complaint that there was reliance on the previous decision as an irrelevant consideration, the applicant in *Balscadden* didn't say expressly *why* it was irrelevant (*i.e.*, that this was because the previous decision was later quashed). I don't think there is much in that objection - the point is sufficiently pleaded. Planning pleadings are prolix enough already.

51. Insofar as the applicants say that the zoning and the previous branch of permissions in the area is not relevant to the question of whether the geomorphology is suitable for a housing development such as this application, I don't accept that as a general principle, but nor do I accept that it would have been correct to have any regard to the content and merits of a quashed permission in deciding whether a future permission should be granted.

52. It is true that *certiorari* doesn't mean that a decision is to be disregarded for all purposes: *The State (Abenglen Properties) v. Corporation of Dublin* [1984] I.R. 381 (an invalid decision is still a decision preventing a default permission from arising), *Barry v. The Commissioner of An Garda Síochána* [2020] IEHC 307 (Unreported, High Court, 8th June, 2020) (*certiorari* doesn't mean that documents are unavailable for subsequent discovery), *Crekav Trading G.P. Ltd. v. An Bord Pleanála* [2020] IEHC 400 (Unreported, High Court, Barniville J., 31st July, 2020), at para. 115 (a quashed decision may be referred to as part of the factual context in which a remitted application has to be considered). None of

these authorities give any basis to say that it is lawful to rely on the substantive content of a quashed decision when making a fresh decision. It is not. And indeed to do so undermines essential principles of the rule of law. There is no analogy with what happened in *Promontoria (Aran) Ltd. v. Hughes* [2017] IEHC 592 (Unreported, High Court, McGovern J., 18th October, 2017), which was in a completely different context and arose on very special facts.

53. Mr. Mulcahy submits that the reference to previous permissions of the council and the board should be construed as a reference to valid permissions and not as including the quashed permission. However, when one looks at the planning history as set out at paras. 4.1 to 4.4 of the inspector's report, there is only one potential permission of the board in that category. The permission referred to at para. 4.1 was the one quashed by the High Court. Paragraph 4.2 relates to three applications: one granted by the council and upheld by the board, the second one granted by the council, and the third one refused by the board. The application referred to at para. 4.3 was refused by the board, and the one at para. 4.4 was pending at that time. However, it doesn't make a great deal of sense to read the inspector's report referring to previous permissions as referring to just the one valid permission of the board as referred to at para. 4.2, because one couldn't draw much of an inference about the stability of the ground from much smaller scale developments. The more natural reading is to read it as a reference to the quashed decision for a similar development. But that is only a first problem.

54. If there is any doubt about the interpretation of the inspector's report, even more fundamentally, the board received a statutory submission from the Chief Executive of Fingal County Council dated 23rd December, 2019 which relied on the contents and merits of the (later to be quashed) first decision on the crucial issue of excavation. At paragraph 2.4.15, the Chief Executive said that, *"[g]iven that permission has already been permitted by An Bord Pleanala for development on the subject site, it is considered that matters relating to management and monitoring of works by a suitably qualified engineer having regard to the relevant Eurocode can be evaluated by the Board and if they so wish, can be dealt with by condition in the event of a grant of planning permission."* Of course, the Chief Executive didn't know it would be quashed at that point. Mr. Quirke makes the very powerful point that sauce for the goose is sauce for the gander and that the board and the developer have relied on the reference to documents as constituting adoption for the purposes of reasons. Likewise, the converse must apply where the board adopts or refers to a document which contains irrelevant and inappropriate considerations, even if they only crystallise as irrelevant and inappropriate after the date of the document. That infects the decision of the board unless such a relevant matter is expressly identified and disregarded, which wasn't done here.

55. The council's submission is expressly cited at para. 8.11 of the inspector's report and there is a direct read-across to the crucial conclusion of the inspector on the issue of subsidence at para. 11.3.3. Even the language of that conclusion is reflective of the language of the statutory submission by the Chief Executive. For all of those reasons the board must be viewed as having had regard to the merits or content of the original

permission for this development, either directly or *via* the council's report or probably both, and thus as having had regard to an irrelevant consideration.

Inadequacy of drawings

56. If taking into account irrelevant considerations was the only problem with the decision, I would consider remitting it to the board for reconsideration at the point in time immediately prior to when the problem arose; that is immediately before the statutory submission by the council. But there is a more fundamental problem.

57. Grounds 29 to 31 in *Balscadden* complain about the lack of adequate and consistent plans. While the statement of grounds in *Balscadden* refers loosely to the "*obligations under the Planning and Developments Acts*" the specific regulations were identified in argument.

58. Regulation 297(4)(a) of the Planning and Development Regulations 2001 (S.I. No. 600 of 2001) (inserted by reg. 5 of the Planning and Development (Strategic Housing Development) Regulations 2017 (S.I. No. 271 of 2017)), provides that *"[a]n application referred to in sub-article (1) shall be accompanied by such plans (including a site or layout plan and drawings of existing and proposed floor plans, elevations and sections which comply with the requirements of article 298) and such other particulars as are necessary to describe the works to which the application relates together with any information specified by the Board under article 285(5)(b)."*

59. Regulation 298(1)(a) (also inserted by the 2017 regulations) says that plans, drawing and maps accompanying an application shall be in metric scale and comply with the following requirements: *"(a) site or layout plans shall be drawn to a scale (which shall be indicated thereon) of not less than 1:500 or such other scale as may be agreed with the Board prior to the submission of the application in any particular case, the site boundary shall be clearly delineated in red, and buildings, roads, boundaries, septic tanks and percolation areas, bored wells, significant tree stands and other features on, adjoining or in the vicinity of the land or structure to which the application relates shall be shown".*

60. Regulation 298(1)(f) goes on to say, "*plans and drawings of floor plans, elevations and sections shall indicate in figures the principal dimensions (including overall height) of any proposed structure and the site, and site or layout plans shall indicate the distances of any such structure from the boundaries of the site".*

61. These issues arise because there are no planning drawings for the largely although not entirely subterranean sheet piling structures, which consist of five huge structures up to 15 metres high. The only drawings are sketches with incomplete dimensions that are for proof of concept purposes only and not as construction drawings. This is not an academic issue. The board has purported to grant permission in accordance with the drawings, but those drawings don't define where the structures are located, in particular how close to the boundary with dwellings on Asgard Park, or what size they are to be.

62. Mr. Mulcahy submits that there is nothing in the regulations to say that the descriptions of a structure should include a subterranean structure. But that argument doesn't hold water. Let's start with the ordinary meaning of "structure".

63. The *Shorter Oxford English Dictionary* (3rd ed., Oxford, 1944, 1973), Vol. II, p. 2156, gives among the definitions of "*structure"* the following: *"[t]hat which is built or constituted; a building or edifice of any kind, esp. one of considerable size or imposing appearance 1615… an organised body or combination of mutually connected and dependent parts or elements."* Examples given expressly include a subterranean which is "*Of the internal S[tructure] of the Earth, Goldsm[ith]"*. That is a reference to Chapter VII of Oliver Goldsmith*, A History of the Earth, and Animated Nature* (London 1774). So one of the very definitional examples of the term "structure" is subterranean.

64. "*Structure*" is defined by the Planning and Development Act 2000 s. 2(1) as meaning "*any building, structure, excavation, or other thing constructed or made on, in or under any land, or any part of a structure so defined, and—(a) where the context so admits, includes the land on, in or under which the structure is situate ...*". So the Act reinforces the ordinary meaning in that respect by expressly referencing subterranean structures. Obviously, meanings in an instrument are normally those in the parent Act (Interpretation Act 2005, s. 19), and the 2001 regulations albeit amended by subsequent legislation are themselves made under the 2000 Act.

65. The language of the 2001 regulations is mandatory. Consistent with *Monaghan U.D.C. v. Alf-a-Bet Promotions Ltd*. [1980] I.L.R.M. 64, a significant departure from a proper description renders an application a nullity. The fact that *Alf-a-Bet* was decided in the default context doesn't change the principle. Departure from a mandatory requirement regarding a description, whether of an application or an appeal, would normally go to validity unless the matter was covered by the *de minimis* principle or as alternatively put by McDonald J. in *Dalton v. An Bord Pleanála* [2020] IEHC 27 (Unreported, High Court, 28th January, 2020), the party concerned had *"substantially complied with the obligation*" (para. 41).

66. In the SHD context there is a specific provision at s. 8(3)(a) of the 2016 Act (as amended) that *"[t]he Board may decide to refuse to deal with any application made to it under section 4(1) where it considers that the application for permission, or the environmental impact assessment report or Natura impact statement if such is required, is inadequate or incomplete, having regard in particular to the permission regulations and any regulations made under section 12 , or section 177 of the Act of 2000, or to any consultations held under section 6 ."*

67. That, however, is by no means a blanket setting-aside of mandatory statutory requirements at the discretion of the board, and nor is it phrased as such. To read it in that manner would be to effectively create a Henry VIII Clause which would allow normal statutory provisions to be set at naught at the discretion of the decision-maker. That would raise significant constitutional issues. No definite principles or policies are set out for what is suggested to be an implied discretion to treat an application as valid

notwithstanding breach of the statute or regulations - having regard to regulations isn't much of a principle or policy if the actual issue is whether those regulations should be set aside. At an absolute minimum, even if such a power to set aside the regulations was intended to be conferred, which I don't accept to be the case, it would have to be exercised expressly, which certainly wasn't done here.

68. Mr. McGrath submits that reference to floor plans means only reference to buildings and he says that if that is extended to structures it would lead to "*absurd results*", because it would lead to requirements to provide dimensions of every light standard, metre box, post box, wall fence or sign. But I don't see that there is any absurd result whatsoever here. Where any structure is of a significant size, its dimensions and location constitute necessary information, and to interpret the regulations as meaning that is not only not remotely absurd but absolutely necessary. It is both what the regulations say and also makes complete sense because it allows the application to be properly processed and also allows informed submissions and public participation as envisaged by the legislative scheme.

69. Obviously, the "*principal*" dimensions means the principal relevant dimensions, so where structures such as signs or fences for example don't have any particular depth, the relevant dimensions required will relate to their location and height rather than trying to track every dimension on a millimetre-by-millimetre basis.

70. Mr. McGrath submits that this would mean one would have to give dimensions of foundations for houses or other buildings which you would "*never ever get on planning drawings."* That submission unfortunately invites the response "why not?" It seems highly desirable if not essential that the dimensions of foundations would be shown so that the planning decision-maker could be satisfied that they were adequate to stability. That would be so even if, counterfactually, this wasn't what the regulations said.

71. Mr. McGrath submits that the proposition put forward by the applicants is "*actually quite radical"* and would have a "*huge impact*" which would "*lead to the invalidation of nearly every single application before any planning authority anywhere in the country*." While one has to admire the ambition of that floodgates argument, I don't accept that such a consequence is the case. The real problem here is that the sheet piling structures are not a *de minimis* subterranean structure. They are quite massive, up to 15m in height. The precise location of the five structures concerned is of critical importance to the objectors and their exact spacing will determine the slope concerned and the impact on the neighbours' properties. The regulations specifically require the distance of the structure to the boundary, but none of this information is actually provided in the legally binding plans and drawings submitted. The only limited information is in the proof of concept which is not intended to be binding for construction purposes and which is inadequate even if it was because in the absence of dimensions one can't know the slope involved.

72. The present decision insofar as it relates to the need to show the dimensions and location of subterranean structures doesn't invalidate every planning permission in the pipeline. The floodgates argument is overblown in at least four respects:

(i). It doesn't apply if there are no subterranean structures.

(ii). It doesn't apply if there are adequate dimensions and locations for any subterranean structures shown in the drawings submitted with the application.

(iii). Nor does it apply if the omissions are *de minimis*.

(iv). And obviously it doesn't apply to permission already granted more than eight weeks before any challenge is launched.

73. The proof of concept can't be acceptable because it is not part of the grant of permission, which is stated to be in accordance with the plans submitted. Indeed the proof of concept has itself been diluted because a greater degree of dimensions was set out in the original geotechnical engineering report (at p. 8). But following criticisms from the applicant the first time around, based on making calculations from the information provided, some of that information has simply been deleted from the report for the current application. The omission of those dimensions of the structures may be convenient for reducing the opportunity for detailed calculations and criticisms but it certainly doesn't help the respondent and notice party answer the point made by the present proceedings.

74. Mr. Mulcahy submits that the court should adopt a purposive approach and regard the information as to the exact location of the sheet piling and its exact spacing as being unnecessary because it would serve no useful purpose. But that is an entirely misconceived submission. Clearly such information would serve an essential purpose (even if it wasn't statutorily required, which it is). It is essential to know where the subterranean structures are located in order to know that they are to be properly constructed and what the impact is on the overall environment. That fairly obvious point applies to subterranean structures generally, for example underground car parks or even building foundations.

75. Mr. Mulcahy also said that the inspector was satisfied with the adequacy of the information. Indeed he was, that's why we're here; but of course that isn't the point. The issue is not whether the inspector is satisfied with the adequacy of the information - the issue is compliance with the regulations by providing all of the principal dimensions of the structures to be erected and their locations, which among other things allows proper consideration of the application and informed public participation.

76. Ultimately then there are two fundamental problems with the lack of formal drawings showing the dimensions and locations of the sheet piling. Firstly, that it is a breach of the requirement to submit drawings in accordance with the regulations. It is not cured by some sort of implicit acceptance of the application by the board under s. 8 because that does not confer a jurisdiction to proceed despite breach of mandatory requirements, and even if it did that would have to be exercised expressly. Secondly, the actual grant of permission is devoid of meaning because the permission is to construct the development in accordance with the plans submitted, but those plans do not include adequate details as to the location and dimensions of the sheet piling.

Remittal to the board

77. While I have considered the question of remittal under O. 84, r. 27(4) RSC, that is not appropriate here. As discussed in *Clonres CLG v. An Bord Pleanála* [2018] IEHC 473 (Unreported, High Court, Barniville J., 31st July, 2018), the general principle is to rewind the matter to before the problem arose, but here the problem was there on day one with the application itself. So it is inappropriate to remit the matter because the shortcoming in the drawings regarding subterranean structures is so fundamental to the key point made by the applicants in the whole submissions process regarding the risk of subsidence and stability of the ground.

78. To allow the application to proceed would be essentially to allow the dimensions and location of the structure to be determined during the process itself, which would override the statutory process for grant of permission: see by analogy *White v. Dublin City Council* [2002] IEHC 68 (Unreported, High Court, Ó Caoimh J., 21st June, 2002); and *White v. Dublin City Council* [2004] IESC 35, [2004] 1 I.R. 545. The inadequacy of the drawings affects all subsequent steps in the process, so it would be inappropriate and incorrect to remit the application back to the board. I will simply quash the decision without remitting it back.

79. Having regard to the foregoing, the EU law points and the issue regarding condition 2 don't arise. I emphasise in case of any misunderstanding that insofar as I haven't accepted any points of domestic law, that is not to be read as rejecting those points if they're viewed in the light of relevant EU law obligations, if it were to be contended that EU requirements impose a higher level of obligation than domestic law. But it is not necessary to decide that.

Order

80. Accordingly, I propose to uphold the issues of irrelevant considerations and inadequacy of drawings and reject the other domestic law points made by the applicants with the caveat that I am not deciding the EU law position. Subject to hearing the parties as to the form of the order I would propose to order as follows:

    (i). To grant *certiorari* in *Balscadden* in the form sought at para. D(i) of the statement of grounds, because the issues on which I find for the applicants more centrally arise in *Balscadden* rather than *Morris*.

    (ii). The *Morris* case essentially becomes moot on the basis that the decision has now been quashed. But I am not dismissing *Morris* either, because in *Morris* the applicant would be entitled to revisit the issues if we were viewing them in an EU law context, but we didn't get to that point. In case matters go further I would be inclined to make no separate order in *Morris*, but to make an order consolidating the two sets of proceedings so that Mr. Morris would remain a party if matters go further.

    (iii). I don't propose to remit the application back to the board for the reasons stated.

(iv). I propose to give liberty to the parties to make submissions on the precise form of the order following consideration of the present judgment.