[2024] IEHC 27

THE HIGH COURT
PLANNING & ENVIRONMENT

[H.JR.2021.0000061]

THOMAS REID

APPLICANT

AND
AN BORD PLEANÁLA, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND
INTEL IRELAND LIMITED

NOTICE PARTY

(No. 7)

JUDGMENT of Humphreys J. delivered on Wednesday the 24th day of January, 2024

Judgment history

1. In *Reid v. Industrial Development Agency* [2013] IEHC 433, [2013] 6 JIC 1907 (Unreported, High Court, 19th June, 2013), Hedigan J. dismissed a challenge by the applicant to the compulsory acquisition by the Industrial Development Agency (IDA) of his house and lands.

2. In *Reid v. Industrial Development Agency* [2015] IESC 82, [2015] 4 I.R. 494, [2016] 1 I.L.R.M. 1, [2015] 11 JIC 0502, McKechnie J. for the Supreme Court, set aside Hedigan J.'s decision and held that the IDA's proposed acquisition was invalid.

3. In *Reid v. An Bord Pleanála (No. 1)* [2021] IEHC 230, [2021] 4 JIC 1204 (Unreported, High Court, 12th April, 2021), I excluded certain evidence prior to the hearing of proceedings challenging a permission granted to the notice party in 2019 (the 2020 proceedings).

4. In *Reid v. An Bord Pleanála (No. 2)* [2021] IEHC 362, [2021] 5 JIC 2705 (Unreported, High Court, 27th May, 2021) (see Kieran Lynch (2021) 3 I.P.E.L.J, 138), I dismissed the 2020 proceedings.

5. In *Reid v. An Bord Pleanála (No. 3)* [2021] IEHC 593, [2021] 10 JIC 0606 (Unreported, High Court, 6th October, 2021), I refused leave to appeal and made no order as to costs.

6. In *Reid v. An Bord Pleanála (No. 4)* [2021] IEHC 678, [2021] 11 JIC 0202 (Unreported, High Court, 2nd November, 2021), I confirmed the costs order after the applicant sought to reopen it for the purpose of making additional arguments.

7. In *Reid v. An Bord Pleanála* [2022] IESCDET 39, the Supreme Court refused leapfrog leave to appeal.

8. In *Reid v. An Bord Pleanála (No. 5)* [2022] IEHC 687, [2022] 12 JIC 0902 (Unreported, High Court, 9th December, 2022), I granted leave in the present proceedings challenging a permission granted in 2020 by way of modification of the 2019 permission.

9. In *Reid v. An Bord Pleanála (No. 6)* [2023] IEHC 154, [2023] 3 JIC 2801 (Unreported, High Court, 28th March, 2023), I allowed an amendment in the present proceedings but refused leave to appeal the leave to apply refusal in the No. 5 judgment. I also declined to allow the applicant to agitate the validity of the 2019 permission itself at this late stage, either by reopening the No. 2 judgment, or by bringing fresh proceedings.

Facts

10. As appears from the statement of case, the applicant is a full-time farmer of c. 74 acres of lands at Hedsor House, Blakestown, Co. Kildare, comprising folio KE1104.

11. On 5th October, 2017, the board granted development consent to Intel (the 2017 permission) for works including a revised design and configuration of the manufacturing building at the Intel campus, over four levels (parapet height of 31m), with a total floor area of 88,740m², including support areas and roof mounded stacks and equipment, ranging in height from 6 metres to 24 metres above parapet (board file Ref. PL09.248582; Kildare Co. Co. Ref. 16/1229).

12. On 21st November, 2019, the board granted development consent to Intel (the already-referred to 2019 permission) for an extended and revised manufacturing facility (granted previously under PL09.248582) including reconfigured and extended buildings, water tanks, manufacturing utility support buildings, building links and yard equipment, road works and new mobility centre building, new air separation units and other ancillary works. (Board file Ref. 304672-19; Kildare Co. Co. Ref. 19/91).

13. On 26th November, 2019, Intel made an application to the Environmental Protection Agency for a review of its Industrial Emissions Licence.

14. In January, 2020, the applicant brought an application for judicial review of the 2019 Permission, which was later dismissed as noted above.

15. On or about 31st March, 2020, the notice party submitted its planning application to Kildare County Council for modifications to the development previously permitted under the 2017 and 2019 Permissions, which would result in alterations and reconfigurations to the roof mounted service

ducting increasing the overall height of the buildings by between 3 and 6 metres, the addition of steel framed service platforms measuring c. 6.6 metres wide x 11.5 x 8.6 metres in height above the finished roof level; and alterations to the storage arrangements for the chemical 'silane'.

16. By letter dated 26th April, 2020, the applicant submitted observations to Kildare County Council.

17. On 9th July, 2020, the council granted planning permission for the proposed modifications.

18. On 31st July, 2020, the applicant lodged an appeal against that decision with the board. This is an idiosyncratic document consisting of six handwritten pages in block capitals together with some attachments. Much of this material deals with matters not obviously relevant to procedures under the Planning and Development Act 2000, such as "killer robots".

19. Overall the appeal has little or no actual detail or tangible substance. Insofar as the applicant's input is at all relevant to the 2000 Act, it is generic and unparticularised. Intel's description of this notice of appeal as "perfunctory" could conceivably be viewed as charitable in the circumstances.

20. More specifically, the applicant submitted a print out of an article entitled "Amazon, Microsoft and Intel may be putting world at risk through killer robot developments, study says" [a version of which, I can note, is available at https://www.thejournal.ie/amazon-microsoft-intel-robots-study-4777434-Aug2019/], and an article in The Guardian, "'Tsunami of data' could consume one fifth of global electricity by 2025" [https://www.theguardian.com/environment/2017/dec/11/tsunami-of-data-could-consume-fifth-global-electricity-by-2025].

21. The body of the appeal makes a number of points which can reasonably be summarised as follows:

(i) a previous application involved project splitting with a separate application by EirGrid;

(ii) in three cases the applicant requested an oral hearing "BUT SURPRISE SURPRISE THOSE ORAL HEARINGS HAVE BEEN BLOCKED BY THE U.S. MILITARYS (sic) INTELLIGENCE AGENCY THIS APPLICANT"; it is also alleged that the "POLITICAL ESTABLISHMENT PLAYED THEIR PART";

(iii) "RIGGING" of environmental assessment took place in a number of cases;

(iv) there were impacts (unspecified) on the Rye Water Valley / Carton SAC;

(v) there had been "MAJOR CONCEALMENT" of relevant information;

(vi) there were major impacts on protected structures (unspecified) and landscape and risks to health and safety, and major air emissions and impacts on roads;

(vii) "MAJOR POLITICAL CONSULTATIONS WITH THE APPLICANT BEHIND CLOSED DOORS";

(viii) major impacts on architectural and cultural heritage (unspecified);

(ix) the construction of a development which was under judicial review - in that regard "THE CONSTRUCTOR AND SUPPLIERS TO THOSE DEVELOPMENTS SHOULD ALSO BE MADE LIABLE AND THEIR ASSETS SEIZED";

(x) reference was made to an article entitled "Intelligence report Russia paid Taliban to attack troops 'not credible' – Trump" [a version available at https://www.independent.ie/world-news/north-america/intelligence-report-russia-paid-taliban-to-attack-troops-not-credible-trump/39327273.html];

(xi) the project "BREACHES ALL E.U. DIRECTIVES … MAY ALSO BREACH MANY OTHER E.U. DIRECTIVES"; and

(xii) the application should be "ANNULLED CULLED AND QUASHED".

22. On 30th October, 2020, the board's inspector submitted a report to the board which recommended that planning permission be granted subject to conditions.

23. Following a meeting to decide the application held on 12th November, 2020, the board's decision to grant permission is recorded in its Direction dated 13th November, 2020. By Order of 30th November, 2020, planning permission for the proposed development was granted by the board.

24. The applicant avers that he was not notified by the board of the making of the decision and was not supplied with a copy of the decision by the board.

25. The board's records indicate that a letter notifying the applicant was issued on 1st December, 2020. The board avers that a Case Formally Decided Form was signed on 1st December, 2020. It confirms that the Board Order was signed, sealed and issued to all parties.

26. The inspector's report and the board direction were published on the website of the board at the time. However the Board Order was not published on the board's website until 28th July, 2022.

Procedural history

27. The application for leave to apply for Judicial Review was opened on 1st February, 2021 in the Judicial Review List, where leave was directed to be on notice, and was adjourned on a number of occasions until it was adjourned generally by Meenan J. on 14th July, 2021.

28. Intel did not at that time apply to enter the proceedings into the Commercial List to travel with the related proceedings *Reid v. An Bord Pleanála* [2020 JR No. 54] (commenced on 24th January, 2020) in circumstances where the 2020 Proceedings were at an advanced stage and heard in May 2021 and where the roof modifications permission is a modification of the 2019 permission meaning that, if the 2019 permission had been quashed in the 2020 proceedings, it followed that the roof modifications permission would also fall away.

29. Following the outcome of the 2020 Proceedings, which upheld the 2019 permission, Intel applied for such an order, and on 20th June, 2022, the proceedings were entered into the Commercial list and were transferred to the Strategic Infrastructure and Commercial Planning List (as it was then known) on 27th June, 2022. On 25th July, 2022, I fixed a hearing date for the leave application and directed written submissions.

30. On 10th October, 2022 I gave liberty to make certain amendments to the statement of grounds in anticipation of the leave application, with a further correction permitted on 17th October, 2022.

31. The contested, on-notice, application for leave to apply for judicial review was heard on 25th October, 2022. Judgment was delivered on 9th December, 2022 (the No. 5 judgment) on foot of which the applicant was granted leave to apply for Judicial Review on Sub- Ground E(20) pleaded under Core Ground No. 3 (which is now pleaded as Core Ground No. 5A), Core Ground No. 5, Core Ground No. 6 (save in relation to Class 10(b)), Core Ground No. 8 (only as a ground for declaratory relief), Core Ground No. 9 (only as a ground for declaratory relief) and Core Ground No. 10.

32. On 17th November, 2022 the EPA granted Intel's application for an emissions licence associated with the permission and the underlying permissions. Part of the EPA's consideration related to the impact of emissions on European sites.

33. On 4th January, 2023, the applicant served a "Further, Further, Further Amended Statement of Grounds" which broadly reflected the grounds of challenge on foot of which leave to apply for Judicial Review was granted in the judgment of 9th December, 2022.

34. By Motion dated 4th January, 2023, the applicant sought leave to amend ground E24.

35. On 23rd January, 2023, the reliefs against the State were formally modularised.

36. The amendment application was granted on foot of a judgment delivered on 28th March, 2023 (the No. 6 judgment) and by Order of the High Court of 2nd May, 2023. That judgment also refused an application for a certificate for leave to appeal in respect of the grounds on which the applicant had been refused leave to apply for judicial review.

37. On 8th May, 2023 a "Further, Further, Further, Further Amended Statement of Grounds" was served by the Applicant.

38. Directions were then given for delivery of opposition papers by 16th June, 2023 by the board and by 23rd June, 2023, by the developer. There was some slippage in compliance with these directions and those for further affidavits, so the directions were extended by consent.

39. On 24th July, 2023 the Statement of Opposition on behalf of the board was served. On 28th July, 2023 the Statement of Opposition on behalf of the Notice Party was served.

40. On 5th October, 2023 a revised and corrected "Further, Further, Further, Further Amended Statement of Grounds" (fifth amended statement of grounds) was served by the applicant. The problem had been that the applicant made the previous amendment to the wrong version of the statement of grounds.

41. On 23rd October, 2023, I directed a timetable for written submissions and fixed a hearing date. The parties did not take up an offer of a hearing date in Michaelmas, 2023.

42. On 18th December, 2023, I expressly directed the preparation of a statement of case in compliance with the newly-commenced Practice Direction HC124. However an express direction should not be necessary – the intention of the Practice Direction is to apply to proceedings in being so parties generally need to activate its procedures themselves even if less stringent directions were made in a given case prior to the commencement of the Practice Direction.

43. The matter was heard on 16th and 17th January, 2024, when judgment was reserved.

Relief sought

44. The reliefs sought in the fifth amended statement of grounds are as follows:

> "1. An Order of *Certiorari* by way of application for judicial review to quash a decision made by the Respondent on or about 30 November 2020 to grant development consent for modifications to development permitted under previous planning decisions reference ABP-304672-19 (Kildare Co. Co. Ref. 19/91) and PL09.248582 (Kildare Co. Co. 16/1229) at Intel Campus, Collinstown, Leixlip, County Kildare, which would result in alterations and reconfigurations to the roof mounted service ducting increasing the overall height of the buildings by between 3 and 6 metres, the addition of steel framed service platforms measuring c. 6.6 metres wide x 11.5 x 8.6 metres in height above the finished roof level; and alterations to the storage arrangements for the chemical 'silane'.

2. Such Declaration(s) of the legal rights and/or legal position of the applicant and/or respondents and/or persons similarly situated as the Court considers appropriate.
2A. A Declaration that insofar as Reg 109(2) PDR 2001 as amended permits the Board to dispense with screening for EIA on the basis of a preliminary examination as therein described it is inconsistent with the requirements of the EIA Directive and fails to validly transpose same.
2B. A declaration that Reg 109(2)(a) and (b)(i) PDR 2001 as amended are invalid.
2C. A declaration that such other parts of Reg 109 PDR 2001 as depend on the validity of the concept of a preliminary examination as therein described are invalid".
2D. A declaration that the impugned decision is invalid in that it contravenes art. 74 of the Planning and Development Regulations 2001, as amended and s.34(10) of the Planning and Development Act, 2000, as amended in that the Respondent failed to notify the Applicant of the making of the decision and failed to notify to the Applicant the main reasons and considerations on which the decision is based.
2E A declaration that the impugned decision is invalid in that it contravenes sections 146(5) and 146(7)(b) of the Planning and Development Act 2000, as amended and or was contrary to fair procedures in that the Respondent failed to make the impugned decision available for inspection at its offices by members of the public or for inspection on its website by electronic means in accordance with its own established procedures.
3. An Order providing for the costs of the application pursuant to Art. 9(4) of the Aarhus Convention and as transposed into and an Order pursuant to Section 50B of the Planning and Development Act, 2000, as amended and or Section 3 of the Environmental (Miscellaneous Provisions) Act 2011, as amended with respect of the costs of this application.
4. Further and other orders including interim orders."

Grounds of challenge

45. The core grounds of challenge are as follows:

"~~1. The facts and matters relied upon in support of each of the grounds pleaded herein and each of the reliefs sought herein are identified in the verifying affidavit sworn by Thomas Reid. The said facts and matters together with the contents of the said affidavit and the documents exhibited thereto are incorporated herein by reference. Without prejudice to the forgoing, the central facts and matters relied upon in support of each of the grounds pleaded herein and each of the reliefs sought herein are further identified hereunder.~~

PART 1 - CORE GROUNDS

EU Law Grounds

Contrary to Habitats Directive and related Irish Legislation

~~2. The decision of 30 November 2020 to approve modifications to the development permitted under previous planning decisions reference ABP 304672 19 (Kildare Co. Co. Ref. 19/91) and PL09.248582 (Kildare Co. Co. 16/1229) ('the impugned decision') is invalid in that it contravenes art. 6(3) of the Habitats Directive by failing to determine on the basis of objective information that the plan or project would not have significant effects on a European site and in the circumstances where there was doubt as to the absence of significant effects, an Appropriate Assessment ought to have been carried out. Further particulars are set out in Part 2 below.~~

3. ~~Without prejudice to the foregoing, the impugned decision is invalid in that it contravenes art. 6(3) of Directive 92/43/EEC ('the Habitats Directive) by failing to contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the proposed works on European sites. Further particulars are set out in Part 2 below. The Habitats Directive is transposed by and or implemented by of the Planning and Development Act 2000, as amended in particular but not limited to Part XAB; and the Planning and Development Regulations 2001 as amended in particular but not limited to Part 20 thereof; and/or SI 477 of 2011; all of which must be interpreted in accordance with the Habitats Directive. Further, by section 1A PDA 2000 "Effect or further effect, as the case may be, is given by this Act" to the Habitats Directive.~~

~~4. The impugned decision is invalid in that it contravenes sections 177U (1), (2), (4) and (5) of the Planning and Development Act, 2000, as amended, in that the First Respondent failed to make a screening for Appropriate Assessment prior to the granting of consent to assess, in view of best scientific knowledge, if the proposed development, individually or in combination with another plan or project is likely to have a significant effect on any European site and failed to determine properly or at all if it could or could not be excluded, on the basis of objective information, that the proposed development, individually or in combination with other plans or projects, would have a significant effect on a European site. Further particulars are set out in Part 2 below.~~

5. The impugned decision is invalid in that the Board failed to have regard to its remedial obligation under EU law to conduct a new Appropriate Assessment in light of the defects in the assessment conducted by it for planning decision reference ABP-304672-19 (Kildare Co. Co. Ref. 19/91). This engages Art 6(2) Habitats Directive which is transposed by and or implemented by of the Planning and Development Act 2000, as amended including Part XAB and s.177S(1) in particular and/or Reg 27 of SI 477 of 2011 which must be interpreted in accordance with art.6(2). Further, by section 1A PDA 2000 "Effect or further effect, as the case may be, is given by this Act" to the Habitats Directive.

5A. Neither the Board's Order nor its Direction contains an Appropriate Assessment or screening for same or findings and conclusions. The only reference by the First Respondent in its impugned decision to impacts on ecology is a statement that "[the proposed development] would not impact negatively on ecology or designated sites in the vicinity". No assessment or screening is reported, or no reasons are stated. While the Board's Direction states that "the Board decided to grant permission generally in accordance with the Inspector's recommendation", it does not state if the recommendations of the Inspector in relation to Appropriate Assessment Screening were adopted.

Contrary to EIA Directive

6. The impugned decision is invalid in that it contravenes Articles 4(2) to 4(6) of Directive 2011/92/EU as amended by Directive 2014/52/EU where the First Respondent failed determine properly or at all to whether the proposed development should be made subject to an Environmental Impact Assessment in accordance with Articles 5 to 10, in circumstances where Ireland has set certain thresholds or criteria to determine when projects shall be made subject to mandatory environmental impact assessment without first undergoing a screening but has not set any thresholds or criteria to determine when projects need not undergo a screening or an EIA. Further particulars are set out in Part 2 below. ~~Further particulars are set out in Part 2 below.~~ The EIA Directive is transposed by and or implemented by the Planning and Development Act 2000 as amended, in particular but not limited to Part X thereof, and the Planning and Development Regulations 2001 as amended in particular but not limited to Part 10 thereof. Further, by section 1A PDA 2000 "Effect or further effect, as the case may be, is given by this Act" to the EIA Directive.

~~Contrary to Seveso Directive~~

~~7. The impugned decision is invalid in that it contravenes Article 13 of Directive 2012/18/EU ('the Seveso III Directive) by failing to ensure that the Notice Party provided to the Respondent sufficient information on the risks to the environment (including to vegetation and habitats and species) from emissions to air of gases and vapours arising from the establishment in the event of a major accident; and or by failing to ensure that appropriate technical advice on those risks was available to the Respondent when the impugned decision was taken or by failing to rely on technical advice; and by failing to attach conditions to protect areas of particular natural sensitivity or interest in the vicinity of the impugned development in the event of a major accident; and by failing to have in place appropriate consultation procedures between the Respondent and the HSA to ensure that the objectives of preventing major accidents and limiting the consequences of such accidents for aspects of the environment that may be impacted by such air emissions were taken into account in the impugned decision. The impugned decision also contravenes Article 15(5) of the Seveso Directive in failing to make available to the public the content of the decision and the reasons for the decision and the results of the consultations held before the decision was taken and an explanation of how they were taken into account in the decision. Further particulars are set out in Part 2 below.~~

Domestic Law Grounds

Contrary to Fair Procedures and National Legislation on Public Notification

8. The impugned decision is invalid in that it contravenes art. 74 of the Planning and Development Regulations 2001, as amended and s.34(10) of the Planning and Development Act, 2000, as amended in that the Respondent failed to notify the Applicant of the making of the decision and failed to notify to the Applicant the main reasons and considerations on which the decision is based. Further particulars are set out in Part 2 below.

9. The impugned decision is invalid in that it contravenes ~~art.~~ sections 146(5) and 146(7)(b) of the ~~Planning and Development Regulations 2001~~ Planning and Development Act 2000, as amended and or was contrary to fair procedures in that the Respondent failed to make the impugned decision available for inspection at its offices by members of the public or for inspection on its website by electronic means in accordance with its own established procedures. Further particulars are set out in Part 2 below.

Invalidity Ground and/or Transposition Ground

Incompatibility of National Legislation with obligation to transpose EIA Directive

10. Without prejudice to any pleading against the First Respondent, art. 109(2) of the Planning and Development Regulations, 2001, as amended, is incompatible with the State's obligations under Articles 4(2) to 4(6) of Directive 2011/92/EU as amended by Directive 2014/52/EU in that it provides for a case-by-case examination of a so called 'sub-threshold development' to determine if an EIA is required, without taking into account the relevant selection criteria set out in Annex III of the EIA Directive, without placing any obligation on the developer to provide information on the characteristics of the project and its likely significant effects on the environment, without making available to the public the main reasons for the determination with reference to the relevant criteria listed in Annex III of the directive and without any obligation to make the determination within an appropriate timeframe. Further particulars are set out in Part 2 below."

46. Core grounds 8 and 9 relate only to declaratory relief as set out in the leave judgment. The leave judgment directed that the wording of the core grounds make that clear, which hasn't been done, but that failure doesn't change the fact that they don't go to *certiorari* for the reasons already explained. Core ground 10 has been modularised, as noted above. Thus the only core grounds that fall for direct consideration now are core grounds 5, 5A and 6 as to *certiorari* and core grounds 8 and 9 as to declaratory relief. However it is agreed that the issue of whether core ground 10 arises at all will follow from the decision in relation to the core grounds that I am now considering.

Legislation under which relief is sought

47. The legislation under which relief is sought includes:

(i) s. 177U of the Planning and Development Act 2000;
(ii) arts. 74(1) and 109 of and sch. 5 to the Planning and Development Regulations 2001;
(iii) European Communities (Birds and Natural Habitats) Regulations 2011 (S.I. No. 477 of 2011), arts. 2, 27(2) and 27 (3);
(iv) Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora;
(v) EIA Directive (2011/92/EU, as amended by 2014/52/EU); and
(vi) Directive 2012/18/EU of the European Parliament and of the Council of 4 July 2012 ("Seveso III").

Relevant pleading requirements

48. It is useful in the circumstances to note some of the critical pleading requirements that apply to judicial review generally, and complex EU-law related planning please in particular.

49. The general rule in relation to pleadings at its most basic is that as was stated by Fitzgerald J. in *Mahon v. Celbridge Spinning Company Limited* [1967] I.R. 1 at p. 3 (and cited by Clarke J. in *Mooreview Developments Ltd. & Ors v. First Active Plc & Anor* [2005] IEHC 329, [2005] 10 JIC 2004 at para. 7.2):

"The whole purpose of pleading, be it a statement of claim, defence or reply, is to define the issues between the parties, to confine the evidence at the trial to the matters relevant to those issues, and to ensure that the trial may proceed to judgment without any party being taken at a disadvantage by the introduction of matters not fairly to be ascertained from the pleadings. In other words a party should know in advance, in broad outline, the case he will have to meet at trial."

50. Order 84 r. 20(2) and (3) provides:

"(2) an application for such leave shall be made by motion *ex parte* grounded upon:
(a) a notice in Form No 13 in Appendix T containing:
(i) the name, address and description of the applicant,
(ii) a statement of each relief sought and of the particular grounds upon which each such relief is sought,
(iii) where any interim relief is sought, a statement of the orders sought by way of interim relief and a statement of the particular grounds upon which each such order is sought,
(iv) the name and registered place of business of the applicant's solicitors (if any), and
(v) the applicant's address for service; and
(b) an affidavit, in Form No 14 in Appendix T, which verifies the facts relied on. Such affidavit shall be entitled:
THE HIGH COURT
JUDICIAL REVIEW
BETWEEN
A.B.... APPLICANT
AND
C.D.... RESPONDENT
(3) It shall not be sufficient for an applicant to give as any of his grounds for the purposes of paragraphs (ii) or (iii) of sub-rule (2)(a) an assertion in general terms of the ground

concerned, but the applicant should state precisely each such ground, giving particulars where appropriate, and identify in respect of each ground the facts or matters relied upon as supporting that ground."

51. In *A.P. v. Director of Public Prosecutions* [2011] IESC 2, [2011] 1 I.R. 729, [2011] 2 I.L.R.M. 100, [2011] 1 JIC 2501 Murray C.J. stated as follows at pp. 731-733:

> "In the course of her judgment Denham J. refers to the scope of the Court's jurisdiction in judicial review proceedings as being confined to the grounds specified in the order granting leave to bring judicial review proceedings, or any additional grounds arising from an amendment to that order.
>
> Because there has been a not insignificant number of appeals in which there was a lack of clarity and even confusion as to the precise issues which were before the High Court I propose to make a number of observations in that regard.
>
> Judicial review constitutes a significant proportion of the cases which come before the High Court and before this Court on appeal. A party seeking relief by way of judicial review is required to apply to the High Court for leave to bring those proceedings and can only be granted such leave on specified grounds when certain criteria, required by law, are met. In most cases the applicant must demonstrate that he or she has an arguable case in respect of any particular ground for relief and there are also statutory provisions setting a somewhat higher threshold for certain specified classes of cases.
>
> In the interests of the good administration of justice it is essential that a party applying for relief by way of judicial review set out clearly and precisely each and every ground upon which such relief is sought. The same applies to the various reliefs sought.
>
> It is not uncommon in many such applications that some grounds, and in particular the ultimate ground, upon which leave is sought are expressed in the most general terms as to the alleged frailties of the decision or other act being impugned, rather in the nature of a rolled up plea, and alluding generally to want of legality, fairness or constitutionality. This can prove to be quite an unsatisfactory basis on which to seek leave or for leave to be granted particularly when such a ground is invariably accompanied by a list of more specific grounds.
>
> Moreover, if, in the course of the hearing of an application for leave it emerges that a ground or relief sought can or ought to be stated with greater clarity and precision then it is desirable that the order of the High Court granting leave, if leave is granted, specify the ground or relief in such terms.
>
> There has also been a tendency in some cases, at a hearing of the judicial review proceedings on the merits, for new arguments to emerge in those of the applicant which in reality either go well beyond the scope of a particular ground or grounds upon which the leave was granted or simply raise new grounds.
>
> The court of trial of course may, in the particular circumstances of the case, permit these matters to be argued, especially if the respondents consent, but in those circumstances the applicant should seek an order permitting any extended or new ground to be argued. This would avoid ambiguity if not confusion in an appeal as to the grounds that were before the High Court. The respondents, if they object to any matter being argued at such a hearing because it goes beyond the scope of the grounds on which leave was granted, should raise the matter and make their objection clear. Although it did not arise in this particular case, it is also unsatisfactory for objections of this nature to be raised by the respondents at the appeal stage when no objection had been expressly raised at the trial or there is controversy as to whether this was the case.
>
> In short it is incumbent on the parties to judicial review to assist the High Court, and consequentially this Court on appeal, by ensuring that grounds for judicial review are stated clearly and precisely and that any additional grounds, subsequent to leave being granted, are raised only after an appropriate order has been applied for and obtained."

52. In *Keegan v. Garda Síochána Ombudsman Commission* [2015] IESC 68, [2015] 7 JIC 3001 O'Donnell J. said at para. 42:

> "It is not merely a procedural complaint that the ground upon which the case was decided was not one upon which leave was sought or indeed granted nor was there an appropriate amendment. The purpose of pleadings is to define the issues between the parties, so that each party should know what matters are in issue so as to marshal their evidence on it, and so that the Court may limit evidence to matters which are only relevant to those issues between the parties, and so discovery and other intrusive interlocutory procedures limited to those matters truly in issue between the parties. This is particularly important in judicial review, which is a powerful weapon of review of administrative action".

53. Costello J. in *Alen-Buckley v. An Bord Pleanála* [2017] IEHC 311, [2017] 5 JIC 1211, condemned an attempt to launch a non-transposition claim that was not set out on the pleadings:

"40. Even if it were the case that the court was somehow obliged to treat the order granting leave to seek judicial review as deciding that the proceedings were neither frivolous nor vexatious nor bound to fail, the order in this particular case does not assist the applicants. By reason of their own pleadings, Noonan J. did not in fact give the applicants leave to seek any relief against the State defendants. Therefore the argument that the order of the 20th February, 2017, precludes an argument that the pleadings disclose no cause of action or are frivolous or vexatious or are bound to fail is *nihil ad rem*.

41. It is noteworthy that the applicants advanced no explanation as to why they did not seek any relief expressly against the state defendants. It was open to them, had they so wished, to have sought declaratory relief to the effect that the Directive had not been properly transposed into Irish law, if that was the case which they wished to advance. Of course, such a case would have to be properly pleaded in accordance with the requirements of O. 84, r. 20 (3). In addition, it would have to be pleaded when the leave application was moved and to have been within the time limited for bringing judicial review proceedings. No explanation was provided to the court as to why the applicants did not seek to identify any provisions of either the Directive or Irish statute law or regulations upon which they wish to advance their case that Irish law had failed properly to transpose the Directive.

42. It appears that the applicants wished to reserve their position to see what position was adopted by the Board. Once the Board had clarified its position then the applicants would respond. This was made clear in the letter of the 20th March, 2017, which I have quoted above. They stated that "… the extent to which any such domestic law provision appropriately transposes the requirements of the Directives must be reviewed …" once the Board has made clear which if any provision of domestic law it may rely upon. It expressly stated that the issues will become clearer when these statements of opposition and replying affidavits are filed.

43. The implications of the letter are inescapable. The applicants wish to finalise their case in relation to the alleged or possible failure properly to transpose the Directive into national law when they have received opposition papers from the Board. This is clearly impermissible and contrary to the rules of court. The applicants are required to advance the case they wish to make in full in the statement of grounds. They must do so within time. Leave to amend their statement of grounds must be specifically sought and the permission granted pursuant to O. 84, r. 23 (2). The rules cannot be implicitly circumvented.

44. In my opinion, the proceedings in fact seek no relief whatsoever against the State defendants, notwithstanding the attempt of the applicants to argue to the contrary. Therefore, the continued maintenance of these proceedings against these respondents is vexatious and amounts to an abuse of process. On the pleadings as they stand, even if the applicants were to succeed entirely in the case they have advanced to date, no relief could be granted against the State defendants. It follows inescapably in my opinion that the proceedings fail to disclose a cause of action on their face within the meaning of O. 19, r. 28.

45. While it is not necessary for the purpose of my decision, I wish to record that I agree with the submissions of the State defendants based upon O. 84, r. 20 (3) and 22 (5), though this does not form part of my decision.

46. While I am of course aware that the jurisdiction to dismiss a case on the basis of O. 19, r. 28 or the inherent jurisdiction of the court should only be exercised sparingly and in the clearest of cases, this is a case where it is appropriate to exercise the jurisdiction. The continuance of these proceedings against the State defendants is an abuse of process for the reasons I have identified. Accordingly, I dismiss the proceedings against the State defendants on the basis of O. 19, r. 28 and separately on the basis of the inherent jurisdiction of the court."

54. In *Alen-Buckley v. An Bord Pleanála* [2017] IEHC 541, [2017] 9 JIC 2602 Haughton J. dealt with a preliminary pleading objection as follows, by reference to *A.P.*:

"11. Before addressing these arguments, it is necessary to consider an objection which arose during the hearing. The respondent and notice party submitted that new arguments were advanced by the applicants both in the later affidavits of Ann Mulcrone and by counsel during the course of the hearing which were not pleaded in the Statement of Grounds. In a letter dated 13 June, 2017, the applicants were notified by solicitors for the Board of their belief that such arguments had been raised in Ms Mulcrone's third affidavit, stating 'we will strenuously object to attempts to introduce new grounds and arguments regarding the validity of the Board's decision that are outside the scope of the Statement of Grounds on which leave was granted.' They contend that arguments which are not sufficiently pleaded are not properly before the Court and rely on Order 84, rule 20(3) of the Rules of the Superior Courts which states: '20(3) It shall not be sufficient for an applicant to give as any of his

grounds for the purposes of paragraphs (ii) or (iii) of sub-rule (2)(a) an assertion in general terms of the ground concerned, but the applicant should state precisely each such ground, giving particulars where appropriate, and identify in respect of each ground the facts or matters relied upon as supporting that ground.'

12. Counsel also directed the Court to the case of *AP v DPP* [2011] IESC 2. In that matter the respondent claimed that many arguments made during the course of the hearing were not sufficiently pleaded in the Statement of Grounds and that the Court should disregard them as a result. In discussing pleadings in judicial review Murray CJ. stated: 'A party seeking judicial review is required to apply to the High Court for leave to bring these proceedings and can only be granted such leave on specified grounds when certain criteria, required by law, are met. … In the interests of good administration of justice it is essential that a party applying for relief by way of judicial review sets out clearly and precisely each and every ground upon which relief is sought.'

13. Examples of the allegedly new arguments found in the third affidavit of Ms. Ann Mulcrone include, inter alia, insufficient site visits by the Inspector, the alleged effect of Woodhouse Windfarm on the community, defects in photomontages/photographs versus the human eye, the effect of the development on Glenbeg National School, the effect on Strancally Castle, etc. Further arguments were raised by counsel during the course of the hearing – a great deal of time was spent discussing the effect of the proposed development on the Whooper Swan, for example, which was not referenced in the Statement of Grounds or even any affidavit before the Court.

14. In response to this, counsel for the applicants during the course of the hearing stated that many of these issues were raised by the applicants during the course of the planning application and that many of the documents relating to the application contained reference to such issues, such as the Whooper Swan. He also submitted that many submissions could be linked back to grounds pleaded. For example, counsel contended that the Whooper Swam issue could be linked back more generally to the Statement of Grounds where it was pleaded that the manner in which the appropriate assessment was carried out was fundamentally incorrect.

15. After much consideration of the Statement of Grounds and the above submissions, it seems to me that a number of new arguments which were not pleaded sufficiently or at all in the applicants' Statement of Grounds were advanced in both documentation and oral submissions. The rules of pleading governing judicial review are quite clear and require applicants to state specifically each ground advanced and to particularise matters as appropriate. Linking new matters back to generally pleaded grounds is not permissible, nor is pointing to information which was before the Board. The Court is concerned with the contents of the documentation before the Board only in the context of arguments which have been correctly pleaded.

16. Where new arguments or evidence arises, an application should be made to amend the pleadings to include such arguments or evidence (as *per* O.84, r. 20, s.4). Such an application was not made in this instance. I find that these arguments, including those related to the Whooper swan, were not pleaded and so the Court cannot have regard to the submissions which fall outside those pleaded in the Statement of Grounds as detailed above.

17. Furthermore, a large portion of the third affidavit of Ms. Mulcrone purports to argue that planning permission should not have been granted at all on the basis of the substance or content of the application for permission and the appeal. It is important at this juncture to note that the Court's function in judicial review proceedings is not to examine the decision on its merits and assess whether or not planning permission should have been granted on that basis but instead to examine whether proper procedure was followed during the course of the decision-making process and to determine the legality of the permission in the light of this. Therefore, the Court cannot have regard to any arguments advanced by Ms Mulcrone on behalf of the applicants which purport to invite the Court to decide the suitability or otherwise of the development proposed. Instead the Court will assess the legality of the decision-making process only."

55. In *Sweetman v. An Bord Pleanála* [2020] IEHC 39, [2020] 1 JIC 3104 (*Sweetman XV* – see numbering system in *Sweetman v. An Bord Pleanála (Sweetman XVII)* [2021] IEHC 662, 2021 10 JIC 2601), McDonald J. said as follows at para 103:

"103. In my view, the case against the State respondents was never properly pleaded in Part E of the statement of grounds. As Costello J. observed in *Alen-Buckley* [[2017] IEHC 311, [2017] 5 JIC 1211] at para. 43 ..., an applicant for judicial review is required to advance the case he or she wishes to make in full in the statement of grounds. It is not sufficient to plead a case of alleged failure to transpose an EU Directive without properly setting out full particulars of the basis on which it is contended that a specific provision of Irish law fails to

comply with a specific obligation imposed by the Directive concerned. An allegation of a failure to transpose an obligation of EU law is a serious and significant allegation and accordingly it is particularly important, in such a case, that the requirements of O. 84 r. 20 (3) should be observed. It is unacceptable that an applicant should make an allegation of failure to transpose purely on the basis that the applicant apprehends that the relevant competent authority (in this case the Board) may be in a position to demonstrate, in an area of activity ultimately governed by European law that it has acted fully in compliance with its obligations under the relevant Irish law implementing the EU law measure in question. That is precisely the form of procedure which was condemned by Costello J. in *Alen-Buckley*."

56. Barniville J. said as follows in *Rushe v. An Bord Pleanála* [2020] IEHC 122, [2020] 3 JIC 0502:

"111. McDonald J. also had cause to consider the requirements of O. 84, r. 20(3) and the principles in AP in *Sweetman* [XV]. He concluded that in that case the applicant had failed properly to plead his case against the State respondents in relation to the alleged failure by the State to properly transpose the EIA Directive. McDonald J. held that the case against the State respondents had not been properly pleaded in the statement of grounds. In particular, he held that it was not sufficient to plead a case of alleged failure to transpose an EU Directive without properly setting out full particulars of the basis on which it was being contended that a particular provision of Irish law failed to comply with a specific obligation imposed by the EU Directive concerned. He stressed that it was particularly important, in the case of an allegation of a failure properly to transpire an obligation under EU law, that the requirements of O. 84, r. 20(3) be observed. McDonald J. dismissed the applicant's claim against the State respondents on the ground that the statement of grounds failed properly to plead a case against those respondents as required by Order 84, rule 20(3).

112. The obligation upon an applicant (and indeed also upon a respondent who wishes to oppose an application for judicial review) to plead its case with particularity, as described in the authorities just referred to, applies with even greater force in the case of a planning judicial review having regard to the requirements of s. 50A(5) of the 2000 Act. That subsection provides that if a court grants leave to apply for judicial review in respect of a planning decision, 'no grounds shall be relied upon in the application for judicial review' under O. 84 RSC 'other than those determined by the court to be substantial' under s. 50A(3)(a), on the application for leave. An applicant is, therefore, under an even greater obligation than in ordinary judicial review cases, by reason of this additional statutory provision, to ensure that any ground relied upon by it at the hearing is one which the court granting leave to apply for judicial review has determined to be substantial. That does not necessarily preclude an applicant from seeking to amend its statement of grounds, either before or at the hearing, subject, of course, to the time limits and provision for an extension of time provided for in ss. 50(7) and 50(8) of the 2000 Act, and the attitude of the opposing party or parties and the court.

113. In my view, these pleading obligations imposed upon an applicant in planning judicial review proceedings are particularly important where those cases involve issues of very considerable complexity and give rise to issues under EU Directives, such as the Habitats Directive and the EIA Directive. It is especially important in those types of cases, involving such complex issues, that the applicant's case is clearly and precisely pleaded in order that the parties opposing the application (whether they be the respondents or the notice parties or both) are clearly aware prior to the hearing of the application for judicial review of what precisely the case is. Such precision is also required, as Murray C.J. pointed out in *A.P. v. D.P.P.*, to ensure that there is no doubt, ambiguity or confusion as to what the applicant's case is before the High Court, in the context of any appeal from the judgment of that Court to the Court of Appeal or the Supreme Court. It is not appropriate that a case brought on a particular basis, in which reliefs are sought on stated grounds is, when the case comes on for hearing, transformed into one in which different or additional grounds are sought to be advanced in support of the reliefs sought or new and additional reliefs are sought. Such a course would be unfair on the parties opposing the application for judicial review and on the court."

57. In *Casey v. Minister for Housing, Planning and Local Government & Ors.* [2021] IESC 42, [2021] 7 JIC 1606 at §§29 and 31, Baker J. said:

"29. The way a claim is pleaded is a factor of some importance in judicial review as O. 84 r. 23(1) RSC provides that, subject to r. 23(2), no ground may be relied on or any relief sought at the hearing except the grounds and relief set out in the statement of grounds, save where amendment is permitted. Express provision is contained in O. 84 r. 20(4) RSC itself to permit such amendment, and for the purposes of the present judgment the statement of grounds does perform the same function as pleadings generally, and in the case of judicial

review, having regard to the requirement to obtain leave to bring judicial review on the grounds pleaded, the requirement for clarity and specificity in pleadings and the extent to which the statement of grounds defines and confines the issues to be determined at trial could be regarded as more strict. …

31. A matter may arise in the course of argument beyond the scope of a particular ground in which leave was granted, leave to amend should be sought to permit any extended or new ground to be argued: see *AP v. DPP* [2011] IESC 2, [2011] 1 I.R. 729, *per* Murray C.J."

58. Overall, the rules of pleading are well-established, clear and mandatory, and are of particular importance in a context of special complexity such as technical EU-heavy areas of planning law. While exact specification of every jot and tittle of a case is an impossible standard, an applicant can only be permitted to advance at a hearing a point that is acceptably clear from the express terms of the statement of grounds, subject to the grant of any order allowing an amendment.

EU law issues

59. In the absence of any purely domestic law issues relating to *certiorari*, we start with the European law issues, encapsulated in core grounds 5, 5A and 6.

Core ground 5

60. The parties' positions as recorded in the statement of case are summarised as follows:

"Applicant - The previous decisions were central to the in-combination assessment for the modification permission. However, the decision on the 2019 Permission failed to identify all relevant tufa locations; and when assessing the effects on plant life of Ammonia in air (NH3), the 2019 NIS, considered by the Board for the 2019 permission, erroneously applied a 'critical level in ambient air for the protection of vegetation' of 3 µg/m3 when the correct limit to be used to assess the effects on the priority habitat petrifying springs with tufa formation is the lower limit of 1 µg/m3 appropriate for the Ammonia-sensitive bryophytes that are characteristic of and present in that habitat. This was apparent to the Board from the 2020 Proceedings and from the EPA Report which the Applicant unsuccessfully attempted to exhibit in the 2020 Proceedings.

'..if EU law assessments were not carried out properly in relation to an original permission, and the developer (or someone benefitting from a previous consent) seeks an extension of the consent, or an amendment of it, the remedial obligation may have the consequence that the body giving consent to such subsequent application is obliged to rectify the failure to conduct a correct assessment originally. If such rectification is not put in place, then a given applicant can challenge the subsequent consent on that basis. This does not extend to a retrospective challenge to the original consent.' (*Carrownagowan Concern Group v An Bord Pleanála* [2023] IEHC 579 para 91).

Board - The challenge brought by the Applicant to the 2019 Permission (including the appropriate assessment completed by the Board) was dismissed by the High Court. Thus, the starting point for the consideration of the issue in this case is that there was no defective appropriate assessment and no breach of EU Law and, consequently, a remedial obligation does not arise. The Applicant has not identified the legal or factual basis upon which it is asserted that a remedial obligation arises. The Board relies on the principles of collateral attack, res judicata and the rule in *Henderson v. Henderson.* The Applicant did not request the Board to carry out a remedial appropriate assessment.

Intel – Similar to the Board. Given that there was no defective AA and no breach of EU Law a remedial obligation does not arise. Without prejudice, should a remedial obligation be found to have arisen due to defects in the AA conducted before the decision to grant the 2019 Permission with regard to emissions, it fell to be discharged and in fact was discharged by the EPA as part of the EPA licensing process, rather than the Roof Modifications Appeal. The EPA granted an Industrial Emissions Licence to Intel on 17 November 2022 and in doing so, the EPA's AA concluded that the operations 'will not affect the preservation of [European] sites at favourable conservation status if carried out in accordance with this licence and the conditions attached thereto' for reasons including the following:

'The licence specifies emission limit values for main emissions to air from the installation, and air dispersion modelling has demonstrated that emissions which comply with these limits will not cause breaches of relevant air quality standards or critical levels for ammonia. Therefore, air emissions will not have a significant effect on the qualifying interests of any European site'."

61. There are multiple fatal problems with the applicant's attempt to assert the invalidity of the decision based on the EU law remedial obligation. In essence, reliance on the remedial obligation to challenge a subsequent decision that failed to revisit an early AA is dependent on a series of logical steps, most of which are missing here. The necessary steps are as follows:

(i) the issue must be properly pleaded having regard to settled caselaw under O. 84 RSC;

(ii) there must have been an earlier decision which is alleged to have been adopted without the necessary AA/EIA required by EU law, and that prior breach of EU law must be established by order of the CJEU or a domestic court, subject to consideration of the argument (the correctness of which has yet to be established) that an applicant should have the option of evidentially establishing such a breach in the proceedings challenging the subsequent decision;

(iii) the applicant should not be precluded from raising the point, by virtue for example of a final order in a case unsuccessfully challenging the previous assessment, subject to consideration of the argument (the correctness of which has yet to be established) that EU law precludes finality in this context;

(iv) the applicant must call on the decision-maker to carry out the remedial obligation, because the process is totally unworkable otherwise; and

(v) the particular decision-making process concerned must be an appropriate way to give effect to the remedial obligation.

62. As regards the application of these necessary conditions in the present case the position is as follows:

(i) Firstly, the plea fails to specify in what respect the previous appropriate assessment was invalid, referring vaguely only to "the defects in the assessment conducted by it", whatever that means. That is simply not a proper plea and does not meet the standard set in the caselaw on pleadings generally or O. 84 RSC in particular. That would be bad enough in itself, but is compounded by further problems on the merits.

(ii) The remedial obligation is normally predicated on a prior finding that there was a breach of EU law (at the time of the 2019 permission) which requires to be remediated. There is no such finding. Insofar as the applicant wants to push the envelope to argue that he should be allowed in the present proceedings to in effect obtain such an order, even assuming in his favour that that is a valid procedure, it requires sufficient evidence. A blatant case where AA or EIA was totally disregarded would be one thing (that was the argument in *Carrownagowan*, under appeal), but normally to show that an AA/EIA that was actually conducted was defective would require expert evidence. The applicant's total failure to adduce such evidence in the present proceedings means this point never gets out of the starting gate. Even on the most applicant-friendly assumptions, the pre-existing defective AA still has to be evidentially established as a matter of probability in the absence of any previous court order to that effect. In the total absence of expert evidence and cross-examination, the applicant hasn't come anywhere near even attempting that.

(iii) The applicant faces the problem of his earlier failed challenge to the underlying permission. Admittedly it is implicit in the doctrine of the remedial obligation that something has gone unaddressed at an earlier stage when it could have been addressed, so failure to challenge something can't logically be always disqualifying for arguing for a remedial obligation at a later stage (for example, if an unchallenged decision was made which failed to engage in appropriate assessment at all – again, that was the *Carrownagowan* allegation). Things would be more problematic if an applicant actually did allege a breach of EU law and the court found that there was no such breach. In the present case, as set out in the *Reid (No. 2)* judgment particularly at paras. 75 and 76, the applicant contended that scientific doubt had not been excluded as to the effect on a European site, but failed to bring forward evidence showing that a reasonable expert would have viewed the developer's science before the board as not excluding such doubt. As a matter of domestic law, the applicant is precluded from now raising the point under *Henderson v. Henderson* (1843) 3 Hare 100, 67 ER 313, having failed in his challenge to the 2019 permission. Insofar as he makes the argument that EU law precludes finality in this context, that sounds implausible on a first hearing but I don't need to decide that having regard to the other fatal problems.

(iv) Crucially, the applicant didn't call on the board to give effect to the alleged remedial obligation. That obligation doesn't feature in the applicant's appeal to the board or any other demand made to it prior to the decision complained of. The applicant only thought of the point when he hired lawyers after the event, which is a procedure that frequently dooms the point from the outset and certainly does so here: see *Reid v. An Bord Pleanála* (No. 1) [2021] IEHC 230, [2021] 4 JIC 1204, *North Great George's Street Preservation Society v. An Bord Pleanála* [2023] IEHC 241 [2023] 5 JIC 1503. In the absence of any independent finding of a domestic or European court to the effect that a breach of EU law had occurred, that is a totally unworkable and unacceptable procedure and no applicant can be entitled to succeed on a

remediation point launched in that manner after the event. The board very understandably says that it is "really important" to it that such an obligation is nipped in the bud, and I totally endorse that. To condemn the board after the event for an alleged failure, never put to it, to engage in an unworkable, roving, autonomous obligation to consider any and all previous decisions whether by it or other bodies such as the EPA to see if there was anything that could be improved on the EIA/AA front, would be to create an extreme standard by reference to which the whole process of decision-making would grind to a halt. The board submits with considerable understatement that this is "a recipe for unworkability and gridlock".

(v) Even if I am wrong about all of the foregoing, there is a further fundamental stumbling-block on the facts. If there was a remedial obligation on the part of emanations of the State, the much more appropriate way to implement that was in relation to the emissions licence process before the EPA which considered the impacts of emissions on European sites. The EPA considered that issue and granted the licence, a grant which was unchallenged. The prior decision by the board to allow a modification to the roof of the building, which did not in itself authorise any emissions capable of affecting a European site, was simply not an appropriate vehicle to address any alleged shortcomings in prior AA regarding emissions, and certainly was not the most appropriate vehicle to do so. Irrespective of the theoretical position, as a matter of actual fact the issue has been superseded by the subsequent analysis by the EPA. There would be no purpose to be served by quashing the roof decision where the emissions position has been fully analysed subsequently, so one could taxonomically also view that problem as one of the court's discretion, which would inevitably have to be exercised against the grant of pointless relief.

63. Accordingly this point fails to get off the drawing board, in any event lacks merit, and whatever way you look at it is not a basis for relief.

Core ground 5A

64. The parties' positions as recorded in the statement of case are summarised as follows:

"Applicant - Neither the Board's Order nor its Direction contains an Appropriate Assessment or screening for same or findings and conclusions. Case C 721/21 *Eco-Advocacy* §43 - the competent authority must state to the requisite standard the reasons why it was able, prior to the granting of such authorisation, to achieve certainty, notwithstanding any opinions to the contrary and any reasonable doubts expressed therein, that there was no reasonable scientific doubt as to the possibility that that project would significantly affect that site. An invalid screening exercise deprives the decision maker of jurisdiction to grant development consent - *Sweetman* [XV;] *Connelly v An Bord Pleanála* [2018] IESC 31."

"Board – The Applicant has not identified the legal basis upon which it is asserted that there is an obligation on the Board to record its screening for appropriate assessment or appropriate assessment in the Board Order or Direction. Without prejudice to the foregoing, the Board submits that the screening for appropriate assessment completed by it can be found in the Inspector's Report with which the decision of the Board was taken generally in accordance. The Board Direction and Order also record the conclusion that the proposed development would not impact negatively on ecology or designated sites in the vicinity.

Intel – Similar to the Board. Further, Intel relies in particular on the information set out at §§45 to 55 of the Affidavit of Enda Murphy, verifying Intel's Statement of Opposition, concerning the importance of the Roof Modifications in terms of the ongoing operation of the Intel manufacturing facility, as providing strong justification for not quashing the decision if the complaint in core ground 5A is made out. A quashing of the decision would be entirely disproportionate in circumstances where there is no doubt as to the Board's determination on appropriate assessment ("AA") screening."

65. In the judgment of 15 June 2023, *Eco Advocacy*, C-721/21, ECLI:EU:C:2023:477, the Court of Justice concluded at para. 2 of the curial part of the judgment that:

"Article 6(3) of Directive 92/43 must be interpreted as meaning that:

although, where a competent authority decides to authorise a plan or project likely to have a significant effect on a site protected under that directive without requiring an appropriate assessment within the meaning of that provision, that authority is not required to respond, in the statement of reasons for its decision, to all the points of law and of fact raised during the administrative procedure, it must nevertheless state to the requisite standard the reasons why it was able, prior to the granting of such authorisation, to achieve certainty, notwithstanding any opinions to the contrary and any reasonable doubts expressed therein, that there was no reasonable scientific doubt as to the possibility that that project would significantly affect that site."

66. In the present case, the inspector's conclusion on impacts on the environment and ecology included the following:

> "7.4.4. On the basis of the information available with regard to the nature of the works proposed and the fact that the basic processes on site, types of materials used and output are not proposed to change from that previously permitted, it is considered reasonable to conclude that the proposed development would not have a significant impact in terms of air quality relative to the existing permitted layout on site."

67. While the applicant majors on the possibly loose language of that paragraph, one has to look at the inspector's report as a whole.

68. Section 7.6 of the Inspector's decision, headed "Appropriate Assessment Screening", concluded as follows:

> "In conclusion, having regard to the above, the proposed development is not likely to have significant effects on the River Rye Water / Carton SAC or any other European sites in light of the conservation objectives for these sites."

69. The board direction of 13th November, 2020 includes the following:

> "The Board decided to grant permission generally in accordance with the Inspector's recommendation, for the following reasons and considerations, and subject to the following conditions."

70. While the applicant sought to make a variety of points under this heading we are going to have to stick fairly closely to what was actually pleaded in Core Ground 5A. This breaks down as follows:

(i) "Neither the Board's Order nor its Direction contains an Appropriate Assessment or screening for same or findings and conclusions." That is just a statement of fact based on an approach that interprets the word "contains" as meaning "expressly contains". No legal basis is asserted as to why this is legally problematic. If and insofar as there is an implication that this renders the decision invalid, that is contrary to a landslide of jurisprudence to the effect that the board can adopt the inspector's report. The board refers to some of this, including *Maxol Ltd v. An Bord Pleanála & Ors* [2011] IEHC 537, [2011] 12 JIC 2113, (Clarke J.), *Ogalas Ltd v. An Bord Pleanála* [2015] IEHC 205, [2015] 3 JIC 2008 (Baker J.), *Buckley & Grace v. An Bord Pleanála and others* [2015] IEHC 572, [2015] 7 JIC 0909 (Cregan J.), *Ahearne and others v. An Bord Pleanála and others* [2015] IEHC 606, [2015] 10 JIC 0605 (Noonan J.), *Dunnes Stores v. An Bord Pleanála* [2016] IEHC 226, [2016] 5 JIC 0405 (Hedigan J.), *Redrock Developments Limited v. An Bord Pleanála* [2019] IEHC 792, [2019] 10 JIC 2107 (Faherty J.), *Ardragh Wind Farm Ltd v. An Bord Pleanála* [2019] IEHC 795, [2019] 10 JIC 2206 (Simons J.), *Dublin City Council v. An Bord Pleanála* [2022] IEHC 5, [2022] 1 JIC 0702, *PKB Partnership v. An Bord Pleanála* [2022] IEHC 542, [2022] 10 JIC 0303 (Ferriter J.). The EU law argument to the effect that there is an obligation to specify exactly in which documents the reasoning is to be found, which was referred to the CJEU but not answered (due to the answer to a prior question) in the judgment of 15 June 2023, *Eco Advocacy*, C-721/21, ECLI:EU:C:2023:477, is not pleaded.

(ii) "The only reference by the First Respondent in its impugned decision to impacts on ecology is a statement that '[the proposed development] would not impact negatively on ecology or designated sites in the vicinity'." That again is just a statement of fact, and again there is no basis asserted as to why that renders the decision invalid. In the absence of any asserted, still less demonstrated, basis as to why the board could not supplement the quoted comment by its express adoption, in its direction, of the inspector's report, this single reference to ecology could not reasonably be interpreted as nullifying the more detailed reasoning in the report.

(iii) "No assessment or screening is reported, or no reasons are stated." That is little more than criticism of a statement that doesn't purport to be an appropriate assessment, so the criticism isn't decisive. If alternatively this sentence purports to relate to the appropriate assessment then it doesn't add much to the first sentence already dealt with above.

(iv) "While the Board's Direction states that 'the Board decided to grant permission generally in accordance with the Inspector's recommendation', it does not state if the recommendations of the Inspector in relation to Appropriate Assessment Screening were adopted." Again that is true but it doesn't get the applicant very far. The points made under the first sentence above apply here.

71. Overall, I won't be breaking any new ground or delivering any surprises to the board by saying that it is preferable if the board is more explicit on key issues like EIA and AA. I agree with Holland J.'s views in this regard in *Ballyboden TTG v An Bord Pleanála* [2022] IEHC 7, [2022] 1 JIC 1001 §15 and *Shadowmill v An Bord Pleanála* [2023] IEHC 157, [2023] 3 JIC 3106 §78-92. But in the absence of a demonstrated legal requirement to the contrary, the explicit or (if reasonably clear) implicit adoption by the board of the inspector's report on such matters is not in itself a basis to

quash a decision. The possible EU law requirement to the contrary, which had been raised in *Eco Advocacy* although not part of the statement of grounds here, would need to be expressly pleaded and argued.

72. The crux of the applicant's oral submission was the unpleaded point that there was a horrific contradiction between the allegedly *blasé* way the board (and indeed the inspector) dealt with ecological impacts and the strict test applicable to appropriate assessment. But that is to read the decision in a way that renders it invalid rather than valid. Even if the point had been properly pleaded, it is more appropriate to read the decision as lawful, namely to view the comments about ecology as relating to acceptability of impacts generally, and to view the board's adoption of the inspector's report as an endorsement of the correct test as set out in section 7.6 of that report. The general point is that the board decision should be read in the light of the material overall: *Connelly v. An Bord Pleanála* [2018] IESC 31,[2021] 2 I.R. 752, [2018] 2 I.L.R.M. 453, [2018] 7 JIC 1701 (Clarke J.) at §§75-80.

73. What does for the applicant under this heading is the point which I discussed in *M.U.A. (Pakistan) v. Refugee Appeals Tribunal* [2019] IEHC 739, [2019] 10 JIC 1804 at para. 4, that the overall principle must be one of a presumption of validity of an executive act: see *per* Finlay J. in *Re Comhaltas Ceoltóirí Éireann* (Unreported, High Court, 14th December, 1977). If a decision can be construed in a way that renders it valid and if reasons can be construed in a way that makes sense, that is how the court should construe them. It would be just as much a breach of separation of powers to fail to construe reasons in a way that renders the decision valid, assuming such interpretation to be legitimately open, as it would be to fail to construe legislation in a way that renders it valid, assuming such an interpretation is legitimately open. An interpretation of the board's decision that makes sense is totally available in the present case and should be adopted.

74. Even if I am wrong in relation to all of the foregoing, Intel's submission that it is "blameless" in relation to the "form of recording" of the reasons is compelling in the circumstances. An order of *certiorari* would be disproportionate here. The position is well summarised in the affidavit of Enda Murphy:

> "Intel's need for the development permitted by the 2017, 2019 and the Roof Modifications Permissions
>
> 45. Since Intel's acquisition of the site in 1989, it has invested approximately €30 billion turning the Intel facility into one of the most technologically advanced manufacturing locations in Europe. I say and believe that this is the largest private investment ever made in the history of the State. Several factors have helped Intel to invest and grow in Ireland. These include, but are not limited to, a well-educated workforce and the availability of experienced management and operational personnel; a competitive incentive environment, coupled with a vibrant research and development sector with strong government support for productive collaboration between industry and academia; an advanced telecommunications infrastructure with international connectivity; capital investment opportunities; and its strategic location within the EU.
>
> 46. The Intel facility and the operations being carried out thereon have consistently played a central role within Intel's global manufacturing network. They have leveraged Intel's manufacturing capability and world class infrastructure to develop new competencies for Intel in the areas of research and design. As such, Intel's Irish operations are absolutely central and critical to Intel's global development, but the facility also effectively competes for ongoing and future investment with other Intel manufacturing operations around the world, as part of Intel's ongoing consideration of its global operations.
>
> 47. The work which is undertaken at the Intel facility is world class and unique in terms of its scale and complexity and has a very significant impact on both the local and national economy in many ways. For example, it is estimated that Intel contributes €2.75 billion each year to the Irish economy and supports 17,339 full-time equivalent jobs in the economy including direct, indirect and induced employment associated with both capital and operational investment at the Intel facility. I say and believe that this figure is an updated estimation (updated from the figure of 6,669 referenced in the Affidavit of Niall Dillon sworn on 10 June 2022) which is based on updated data in relation to Intel's capital and operational investment at the Intel facility, including in respect of the REMF. This figure includes Intel's own current direct workforce of approximately 4,900, which is anticipated to increase by 1,600 full-time employees once the REMF is fully operational. In addition, it is estimated that Intel supports 771 Irish suppliers since 2007, spending approximately €284 million on Irish suppliers each year. In the past three years, Intel has donated more than €5 million to communities across Ireland and every year it contributes €1.75 million to education initiatives. These figures represent an increase to the figures referenced in the Affidavit of Niall Dillon sworn on 10 June 2022 based on updated data in relation to Intel's donation to communities across Ireland and contributions to education initiatives.

48. Intel's Irish operations are to the forefront globally in the production of Intel's most advanced process technology. The cutting-edge silicon microprocessors which are manufactured at the Intel facility are at the heart of a wide variety of platforms and technology advancements which are essential to modern living and working. The operations at the REMF will enable the production of Intel 4, which is the company's most advanced process technology, at the time of its release.

49. The scope of Intel's manufacturing facility design rapidly evolved from when the 2017 Planning Permission was obtained, such that a new planning application was considered necessary to extend and revise the development permitted under the 2017 Planning Permission. The development approved on foot of the 2019 Planning Permission represented a revised design, capturing improvement in knowledge and technology, involving the building of an extended and revised manufacturing facility, incorporating utilities and services provisions meeting the size and scale of a potential next generation integrated circuit manufacturing facility in a way which meets ever-increasing demand for microprocessors using ever more sophisticated manufacturing technology. The Roof Modifications Permission merely involved minor amendments to the development permitted under the 2019 Planning Permission at roof level.

50. The expansion of the Irish facility on foot of the 2019 Planning Permission was considered by Intel to be essential to ensuring that it remains a key location globally in the production of such cutting-edge technology. It is also part of the strategic initiative by Intel to ensure that its Irish facility is optimised and is in a competitively placed position to compete for next generation investment within Intel as major future capital investment decisions are being considered.

51. The works undertaken on foot of the 2017 Planning Permission and the 2019 Planning Permission and the Roof Modifications Permission resulted in the creation of approximately 6,000 construction jobs. As stated above, when the REMF is operational, it is expected to result in approximately 1,600 full-time additional manufacturing jobs at the Intel facility, in addition to Intel's current direct workforce of 4,900. In addition, further works will continue past the main four year construction programme. For example, items of plant and equipment, such as stacks, bulk gases, pipe bridges etc. will continue to be installed and adjusted. In that regard, the 2019 Planning Permission has a duration of 10 years.

52. The total sum expended by Intel in implementing the 2017 Planning Permission and the 2019 Planning Permission and the Roof Modifications Permission is approximately €17 billion.

Importance of the Roof Modifications For Intel's Operations

53. Although the Roof Modifications constitute minor amendments to the 2019 Planning Permission in terms of their physical character, they are absolutely critical and integral to the functioning and operation of the REMF constructed under the 2017 and 2019 Planning Permissions and therefore, to Intel's operations as a whole and to the maintenance of the jobs, existing and anticipated, on foot of the REMF. The Roof Modifications are required for the REMF to operate and the implications of them being unavailable, even for a temporary period, would be to preclude such extended operations at the Intel facility, notwithstanding that they have been permitted under the revised Industrial Emissions Licence. This would have enormous financial implications for Intel and its Irish operations and its existing staff, to say nothing of the intended 1,600 additional manufacturing jobs intended to be created as a result of operations in the REMF.

54. The development undertaken on foot of the 2017 Planning Permission, the 2019 Planning Permission and the Roof Modifications Permission is considered essential in ensuring that the Intel facility in Ireland remains a key location globally in the production of cutting-edge technology so that the Irish facility is ready and competitively placed to compete for investment within Intel when major future capital investment decisions are being considered.

55. Against that backdrop, having regard to the minor physical nature of the Roof Modifications and the fact that the Applicant's principal complaints regarding the Board's treatment of ammonia emissions from the revised facility (which are not accepted) have been the subject of assessment by the EPA in the context of Intel's application for a revised Industrial Emissions Licence which has been granted by the EPA, as well as the fact that the validity of the 2019 Planning Permission has been upheld and the 2017 Planning Permission was never challenged, I say and believe and am advised that the Applicant's grounds of challenge are misconceived."

75. In the circumstances here, any defect under this heading (if I am wrong in saying that there is no such defect) would be purely formalistic and thus would more properly be addressed by an

order other than *certiorari*. It is highly relevant for the purposes of such a discretionary exercise that the applicant's appeal to the board didn't make any specific points about appropriate assessment beyond bland generalities about alleged major impacts (unspecified) on European sites and breaches (unspecified) of "all EU directives" and "many other EU directives" (quite a feat, but in this context a comment more in the high spirits of Buzz Lightyear rather than the logic of Georg Cantor or Kurt Gödel). Much of the applicant's overheated word salad of generalities was of no relevance to planning issues at all. That wouldn't necessarily have put him in a strong starting position if the court's discretion was being called on to frame a more proportionate order, had that arisen.

Core ground 6

76. The parties' positions as recorded in the statement of case are summarised as follows:

"Storage facility for chemical products

Applicant - the relevant provisions of the Seveso Directive apply. It is the fact of storage of chemical products, not the circumstances or purpose of it, which is relevant.

Board - The combined use of the word 'for' and the heading of 'chemical industry' suggests that the class of project is intended to capture specific storage facilities used within the chemical industry the purpose of which is to store petroleum, petrochemical and chemical products. The Intel facility does not meet that description. The Directive does not refer to 'facilities at which chemicals are stored'.

Intel – Similar to the Board. The class as a whole is directed towards the chemical industry. Intel's manufacturing facility is involved in the manufacture of integrated circuits and circuit boards. Whilst there is storage of petrochemical and chemical products at the Intel facility, it is ancillary to the manufacturing activity. Intel's facility is not a chemical industrial facility. Even if the Applicant does establish that the Roof Modifications comes within one or other of the identified classes, it is clear that the Inspector reached a conclusion at §5.3 of his report that an EIA of the proposed development was not required, having regard to the minor nature of the proposed development.

Industrial Estate Development

Applicant – relies on the Commission Guidance on EIA project categories - The key element is zoning for industrial purposes, and provision of the necessary infrastructure. Also relies on the address of the facility; and the presence of other companies.

Board - this class of development relates to the development of an industrial estate. Zoning for industrial purposes is not sufficient; nor is the address or the other companies.

Intel – Similar to the Board. The infrastructure at the Intel facility has been put there specifically to service existing or potential future manufacturing operations of Intel alone. No other business or 'other companies' shares the Intel facility with Intel. Intel does not share buildings or services with any other business or 'other companies', other than operators who specifically service and support the Intel manufacturing facility."

77. There mere fact of grant of leave (and in that regard the existence of a contest at that stage is not decisive) doesn't mean that a point may turn out to be fairly simple having heard full argument. This is such a point. It can be noted here that the complaint under Annex II para. 10(b), urban development, was dismissed at leave stage as meritless, and leave to appeal that was refused.

78. The conclusion I now can come to is that insofar as the EIA directive and transposing legislation refers:

(i) in Annex II para. 6(c) to "Storage facilities for petroleum, petrochemical and chemical products", this means facilities constructed for the primary purpose of such storage, not facilities in which such substances are incidentally stored for other purposes; and

(ii) in Annex II para. 10(a) to "Industrial estate development projects", this means the development *of* industrial estates, that is developments that relate to the functioning of the industrial estate as an industrial estate, not developments internal to particular undertakings within such estates that do not in themselves contribute to the operation and use of the industrial estate in its wider context as such an estate.

79. The board's submission comes devastatingly to the point:

"80. Put simply, a facility which manufactures circuits and circuit boards is not an industrial estate development project nor is it a facility for the storage of chemicals. The argument made by the Applicant in respect of both classes of development does not require a broad interpretation of the EIA Directive, it requires a fundamental change to the meaning of the words used in the Directive."

80. The overall problem for the applicant is that for EIA to apply at all, the project has to come within one of the Annexes to the Directive. As put by the board:

"64. Unless the development is one which falls within a class of development in respect of which EIA is required, none of the obligations in respect of EIA which arise as a matter of

domestic or EU Law apply to the development. In *Sweetman* [XV] the High Court (McDonald J) rejected an argument that the Board had erred in law when it determined that that an EIA was not required for a solar energy development as it was not a class of development identified in the EIA Directive."

81. The fact that there may be more rigorous regulation of incidental chemical storage under other directives or legislation doesn't mean that incidental storage comes within the EIA directive. It is not in dispute that the Intel facility is a Tier 1 establishment for the purposes of the Seveso III Directive 2012/18 or that chemicals such as silane are kept onsite for use in the manufacturing process undertaken by Intel (2nd affidavit of Enda Murphy §6).

82. The heading to para. 6 is headed "6. CHEMICAL INDUSTRY (PROJECTS NOT INCLUDED IN ANNEX I)". That indicates that incidental storage of chemicals for the purposes of other industries are not intended to be covered by para. 6(c). The overall envelope for para. 6(c) is the heading to para. 6 overall. The applicant's interpretation means that the construction of *any* building on which chemicals are held for the purposes of the building's primary purpose would be covered by para. 6(c). That is totally implausible given how many substances could conceivably fall within the category of chemicals (which includes cleaning products – products that could be stored anywhere such as in a domestic residence), and is inconsistent with the way in which the issue is discussed in the Commission guidance. Paragraphs 6(a) and (b) would also be redundant on the applicant's interpretation (see analogously *per* O'Moore J. in *Kavanagh v. An Bord Pleanála* [2020] IEHC 259, [2020] 5 JIC 2906).

83. Insofar as the applicant relies on the Commission document, Interpretation of definitions of project categories of annex I and II of the EIA Directive, 2015, p. 49, that states as follows:

> "However, summarising information provided by some Member States, some common characteristics emerge, and these could be used for describing this project category. An industrial estate development project could be understood as specific area (land), which is zoned (developed) for industrial or for joint industrial and business purposes and where the necessary infrastructure is provided. The term 'infrastructure' is widely interpreted and includes, for example, roads, power, and other utility services, provided to facilitate the growth of industries. It is common practice for industrial estate development projects to be intended for simultaneous use by several companies that are in close proximity. These companies may be provided with infrastructure for joint industrial or business utilisation. Industrial estate development projects constitute an area where potential overlaps between the EIA and SEA Directives, as referred to in section 1.4, can occur more frequently than in other areas. These projects are included in Annex II(10)(a) of the EIA Directive but plans or programmes for industrial estates will come under the SEA Directive if they have the criteria contained in the latter. For example, in one national legal system, industrial estates would usually be considered as part of the development plan for an area and would be subject to a separate strategic environment assessment. [footnotes omitted]"

84. The emphasis here is on the sharing of facilities and of infrastructure provided as necessary for the industrial estate, not as wholly internal to a particular undertaking.

85. If the EIA directive had the extensive meaning contended for by the applicant it would have been phrased in a very different manner. Furthermore, no logical purpose is served by requiring EIA consideration in relation to what could be very minor and incidental works within an industrial estate, or in relation to works that incidentally involve storage of chemicals and the like within a project that itself is not subject to EIA. While people sometimes affect to need smelling salts when one refers to the legislative purpose, they can't complain about purpose in a European context. But even in a domestic context, the language of any provision, and the text of the document overall, gain colour, context and meaning from the purpose of that document. All three dimensions inform each other rather than there being some form of trump card in the form of the decontextualised dictionary meaning of the literal words.

86. The net effect of the foregoing is that it is clear that this is not an EIA project for the simple reason that it does not come within Annexes I and II of the EIA directive. That is a similar form of logic to that which was upheld by McDonald J. in *Sweetman XV* and O'Moore J. in *Kavanagh*.

Possible reference to the CJEU

87. Before finalising the proposed rejection of the *certiorari* claim, I need to consider the applicant's request for a reference to the CJEU.

88. The parties' positions as recorded in the statement of case are summarised as follows:

> "The questions set out below are proposed by the Applicant. The Board and Intel do not accept that it is necessary for a reference to the CJEU to be made in this case and are not therefore engaging with the proposed text of the questions below at this juncture.
>
> (i) Should Annex II, paragraph 6 (c) of the consolidated Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment ('the consolidated EIA

Directive') be interpreted to include storage facilities for chemicals in upper-tier establishments to which Articles 9, 11 and 13 of Council Directive 2012/18/EU ('the Seveso Directive') apply?

(ii) Should Annex II, paragraph 10(a) of the consolidated Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment ('the consolidated EIA Directive') be interpreted as meaning that 'industrial estate development projects' within the meaning of the Directive relates only to projects for the development by a public body of an estate to facilitate the future development of industries and does not include development of an industrial complex on an industrial estate or the development by a private sector developer of a large industrial campus for their own use and/or for use by their agents or assigns?

(iii) Is a rule of domestic procedural law which precludes a subsequent challenge to an Appropriate Assessment already unsuccessfully challenged, inconsistent with the remedial obligation as stated in Case C-348/15 *Stadt Wiener* and Case C-278/21 *AquaPri*?

(iv) Is the remedial obligation an independent obligation on the decision maker or must the obligation to remediate a prior breach in EU law be raised before the decision maker by a participant in the development consent process?"

89. Questions 1 and 2 are not necessary because no plausible basis has been shown for the extremely expansive interpretation offered by the applicant. No authority whatsoever expressly supporting the applicant's answers to these issues has been brought forward. In his written submission, reference is made to the judgment of 30 April 2009, *Mellor*, C-75/08, ECLI:EU:C:2009:279 at para. 57: "third parties, as well as the administrative authorities concerned, must be able to satisfy themselves that the competent authority has actually determined, in accordance with the rules laid down by national law, that an EIA was or was not necessary". That is merely a general statement with no relevance to the actual issues. Likewise reliance on Browne, *Simons on Planning Law* (3rd Ed.) para. 14-603, *Waltham Abbey Residents Association* [2021] IEHC 312, [2021] 5 JIC 1002 and Holland J. in *Ballyboden TTG v. An Bord Pleanála* [2022] IEHC 7, [2022] 1 JIC 1001 §15 are simply about the general need for clarity, not about classes 6(c) and 10(a). The applicant's reliance on "The wording of the EIA Directive indicates that it has a wide scope and a broad purpose" (the judgment 24 October 1996, *Kraaijeveld and Others*, C-72/95, ECLI:EU:C:1996:404, paragraph 31) is again not specific to the issues, and nor does it nullify the specific wording of the Annexes to the Directive, a point alluded to by O'Moore J. in *Kavanagh v. An Bord Pleanála* [2020] IEHC 259, [2020] 5 JIC 2906 . The Commission document relied on does not cast doubt on the conclusion referred to above. The applicant hasn't come forward with any judgment of any court in Ireland, or in any other member state or former member state, showing support for the extremely expansive interpretation of these specific clauses that is contended for. Nor is there any judgment of the Court of Justice or an opinion of an Advocate General creating doubt about the conclusion proposed in this judgment, or even any academic material doing so. Not a scrap of paper in a continent of 448 million people. The reference procedure isn't for any and every possible imaginative question – only for questions on which there can be a real dispute (see *Toole v. Minister for Housing (No. 3)* [2023] IEHC 378, [2023] 7 JIC 0302 paras. 86-87). No basis for such a dispute has been shown here.

90. Question 3 does not arise because I am not basing the decision on a definite finding that the applicant cannot make the point because of his previous failed challenge. There were multiple reasons to reject the remediation obligation point, and on this one I did not make a final finding, so no reference is necessary. The other objections were fatal in any event.

91. Question 4 has no substance because the decision-making process would be totally unworkable unless somebody asked for remediation before challenging the failure of remediation, at least in the absence of an existing court finding, and again there is no authority to support the applicant's expansive claim in this particular context. The question is tendentious here because it merely asserts "a prior breach in EU law" which has not been found or demonstrated in the present case. Even if I am wrong on that, the overall core ground fails on the basis of the other fundamental objections to the remedial obligation point set out above. So the reference is not necessary or appropriate because even if the CJEU said that a party didn't need to raise the point in the process, this applicant can't win anyway on these facts in this case for the other multiple detailed reasons already discussed.

92. There is thus no basis for a reference here.

Declaratory relief

93. We can turn now to core grounds 8 and 9 which were limited at the leave stage to declaratory relief and were also only relevant to be pursued as against the board, not Intel. I intended that the grounds would be amended to reflect that they only related to the declarations, but the applicant failing to do that doesn't give him any entitlement he didn't get in the order granting leave.

Core ground 8

94. The parties' positions as recorded in the statement of case are summarised as follows:

"Applicant – Mr Reid avers he did not receive such notification. The Board's systems are not infallible.

Board - It can be seen from that evidence that the obligations placed on the Board by the 2001 Regulations were discharged.

Intel - More appropriately addressed by the Board."

95. The critical point is that the board's records prepared in ordinary course of its operations include a form entitled "Submission of Draft/Directed Order". This records that the Order and letters to the parties were drafted on 24th November, 2020 and that those letters were checked on 26th November, 2020. It is identified that notifications had to issue to the council, the applicant and the notice party. The board's computer system records that a letter to notify the applicant was generated and that the notification issued on 1st December, 2020. The Case Formally Decided Form, which confirms that the Order was signed, sealed and issued to all parties, was signed on 1st December 2020. The applicant avers that he never received this letter.

96. Of course, both the board's records and the applicant's affidavit could both be correct in that the letter could have issued but could have been lost in the post or mis-delivered so that it was not received by the applicant himself.

97. Article 74(1) of the Planning and Development Regulations 2001 provides:

"The Board shall, as soon as may be following the making of a decision on an appeal or referral, notify any party to the appeal or referral and any person who made submissions or observations in relation to the appeal or referral in accordance with section 130 of the Act."

98. "Notify" normally means send notification to the recipient by means likely to bring it to her attention, not guarantee it actually comes to her attention, which would be pretty much impossible. The board makes the common-sense point that if all an applicant has to do to get a declaration is to aver that she didn't get a letter then, unacceptably, declarations and costs would be there for the asking at the instance of any applicant willing to go that route. So the applicant has to do more than merely prove that he didn't get the letter, but also that it wasn't sent. To do that he would have had to cross-examine the board's deponents, which he didn't do. In the absence of cross-examination, their evidence has to be accepted (see *RAS Medical Ltd v. The Royal College of Surgeons in Ireland* [2019] IESC 4, [2019] 1 I.R. 63, [2019] 2 I.L.R.M. 273 , [2019] 2 JIC 0501 (Clarke C.J.). The applicant in oral submissions sought to raise various drafting issues in the board's copy of the letter but none of that gets him anywhere in the absence of putting such criticisms to the board's witnesses. The legal answer to that is that lack of receipt of a letter cannot be sufficient evidence of it not being sent in the face of an unchallenged averment as to recording of the letter being sent in the sender's ordinary business records.

99. So the applicant fails to overcome the burden of proof under this heading.

Core ground 9

100. The parties' positions as recorded in the statement of case are summarised as follows:

"Applicant - The Board's published guidance on public access to decision files confirms its policy that the Inspector's report, Board's direction and Board's order may be viewed and downloaded from the Board's website at no cost. The Board accepts that 'In this instance, a technical error led to the Board Order not being published on the Board's website though both the Board Direction and the Inspector's Report were published. … The Board Order was published on the Board's website on 28 July 2022.' The Board Order is clearly a crucial document.

Board - section 146(7)(b) does not apply as it is not an EIA project. Without prejudice, section 146(7)(b) when read in conjunction with section 146(5)(b), does not mandate the publication of the Board Order on the website of the Board. However, if the statutory scheme is to be read as requiring the publication of the Board Order on the website, no breach has arisen where the nonpublication arose from a technical error which occurred during the upload process and where the Inspector's Report and Board Direction were published. In this regard, it is also relevant that the Board Order (along with the Direction and Inspector's Report) are now published on the website and will remain there for the period of time indicated by section 146(7)(b)."

101. This issue also goes to declaratory relief only, as determined at the leave stage. As I pointed out in *Clonres CLG v. An Bord Pleanála* [2021] IEHC 303, [2021] 5 JIC 0706 at para. 22, since the placing of materials on the website under s. 146(5) and (6) occurs *after* the decision, non-compliance cannot be a basis for quashing the decision. Also the claim in relation to fair procedures fails because no actual unfairness to this particular applicant contrary to his constitutional rights has been demonstrated.

102. Section 146(5) of the Planning and Development Act 2000 provides:

"(5) Within 3 days following the making of a decision on any matter falling to be decided by it in performance of a function under or transferred by this Act or under any other enactment, the documents relating to the matter—
(a) shall be made available by the Board for inspection at the offices of the Board by members of the public, and
(b) may be made available by the Board for such inspection—
(i) at any other place, or
(ii) by electronic means,
as the Board considers appropriate."

103. Paragraph (b) sounds discretionary ("may") but in fact is ultimately mandatory when one turns to sub-s. (7):

"(7) The documents referred to in subsection (5) shall—
(a) where an environmental impact assessment was carried out, be made available for inspection on the Board's website in perpetuity beginning on the third day following the making by the Board of the decision on the matter concerned, or
(b) where no environmental impact assessment was carried out, be made available by the means referred to in subsection (5)(b) for a period of at least 5 years beginning on the third day following the making by the Board of the decision on the matter concerned."

104. Thus the board "shall" make the documents available by the means referred to in sub-s. (5)(b) if no EIA applies. As regards the duration for which the order should be available, since no EIA was conducted, the 5-year publication in s. 146(7)(b) applies rather than the indefinite publication in s. 146(7)(a).

105. While the board tries to characterise the process as discretionary, that is therefore misconceived. The "may" in sub-s. (5) is qualified by the "shall" in sub-s. (7). The board could not exercise any discretion in sub-s. (5) in a way that would nullify the "shall" in sub-s. (7). In practice that means that the board "may" do (5)(a) or it "may" do (5)(b) but it "shall" do either (a) or (b). Thus the "may" can only mean "shall" do one or the other of the sub-s. (5) options. That is perfectly harmonious because the board retains a discretion - but not a discretion to do nothing. The board completely exaggerates the difficulty of statutory interpretation here. The harmonious reading is obvious and straightforward.

106. The board submitted, highly imaginatively, that the substitution of sub-s. (7) by the European Union (Planning and Development) (Environmental Impact Assessment) Regulations 2018 (S.I. No. 296 of 2018), reg. 12(b), made under the European Communities Act 1972, for the previous version inserted by the Planning and Development (Strategic Infrastructure) Act 2006 s. 29 (which didn't have a provision relating to sub-s. (5)(b)) means that it could only deal with EIA and can't be interpreted as referable to non-EIA matters.

107. Section 3(2) of the 1972 Act provides that:

"(2) Regulations under this section may contain such incidental, supplementary and consequential provisions as appear to the Minister making the regulations to be necessary for the purposes of the regulations (including provisions repealing, amending or applying, with or without modification, other law, exclusive of this Act)."

108. Thus, there are four options regarding the content of regulations under the 1972 Act:

(i) the content involves transposition of EU law;
(ii) the content involves incidental, supplementary and consequential provisions that appear to the Minister making the regulations to be necessary for the purposes of the regulations;
(iii) the content in its ordinary meaning falls outside either of the foregoing but is capable of being interpreted as confined to matters of EU law; and
(iv) if the content falls outside the 1972 Act and is incapable of being construed as confined to EU law transposition, then the regulations are *ultra vires*.

109. Applying that here, the position is as follows:

(i) There was no submission that regulating publication of all non-EIA decisions comes within EU law in this context. However, one can note that some non-EIA decisions are covered by EU law, a point that arises under the second heading.
(ii) We will come back to the argument that the provision is legitimately supplementary.
(iii) The board argued for the third option. But the problem with that submission is that it calls for an interpretation that is *contra legem*. The new sub-s. (7)(b) expressly covers non-EIA matters. That speaks for itself.
(iv) Possibly one could envisage an arguable case that sub-s. (7)(b) is invalid because the 2018 regulations are ultra vires the 1972 Act, but nobody has made that argument here.

110. Returning then to the argument that the regulations are legitimately supplementary, that is the only option left standing so it has to be the one to be adopted by the court. "How often have I

said to you that when you have eliminated the impossible, whatever remains, however improbable, must be the truth?" (Sherlock Holmes in Arthur Conan Doyle, *The Sign of the Four* (1890, London, Spencer Blackett) p. 111). For good measure, it is a conclusion that respects the separation of powers, and also has some obvious merit in that many decisions that fall outside EIA nonetheless come within EU law, for example due to the need to consider AA – as here. That makes dealing with non-EIA matters potentially supplementary. So the logic of the board's implicit suggestion that this decision had nothing to do with EU law can't be correct and doesn't call for any departure from the clear wording of sub-s. (7)(b). And in any event, a provision that merely imposes an administrative obligation on a public body to publish documents doesn't contravene human rights, constitutional rights or any other rights, at least in the absence of any argument (which wasn't made here) that the obligation should be more extensive than it is. So it's hard to see how any challenge to the acceptance of the ordinary meaning, still less of the validity, of the 2018 regulations in this respect could ever get off the ground. Assuming that we are not talking about any inadequacy in the content and scope of publication, the issue of which body publishes what and when is almost by definition a kind of indoor management issue within the public sector, and if that isn't incidental or supplementary, I don't know what is.

111. Even if I am wrong in all of the above, there is a further irretrievable problem for the board's "discretion" argument.

112. Any exercise of discretion requires actual deliberation on the part of the board. The possible choice of deciding to make the materials available in "any other place" as opposed to "by electronic means" has to be "as the Board considers appropriate" – it is not something that can happen by accident or in one's sleep. In fact the board actually decided that it was appropriate to publish the order on its website but failed to carry that out. It failed to have, or at least to operate, a system of checking to ensure that the appropriate documents were in fact uploaded. Furthermore it failed to act for an 18-month period having been notified of the problem.

113. This is reinforced by the board's published and stated policies, which by definition encapsulate what the board considers "appropriate" for statutory purposes. As the applicant points out in submissions:

> "99. The Board's published guidance on public access to decision files confirms its policy that the Inspector's report, Board's direction and Board's order may be viewed and downloaded from the Board's website at www.pleanala.ie at no cost."

114. Insofar as sub-s. (5)(a) is concerned, it hasn't been shown that this was not complied with. I appreciate that the COVID-19 emergency restricted and certainly discouraged visits to the board's office in person, even though access was not entirely prohibited, but it would be an extremely improvident and inappropriate use of the power of the court to grant equitable relief to consider any declaration that there may have been any theoretical and technical non-compliance with the publication legislation due to measures that were deemed essential for the purposes of public health in a pandemic context.

115. Insofar as relates to sub-s. (5)(b), the order was not put online between 3rd December, 2020, which would be 3 days after the decision of 30th November, 2020, and its eventual publication on 28th July, 2022. The applicant first complained about this in the Statement of Grounds filed on 29th January, 2021, On 1st February, 2021 a OneDrive link to the documents, including the statement of grounds, was emailed to the solicitors for the board. So it took the board 18 months to act on that information and publish the order.

116. Why wasn't it put online? I am not sure that excuses are hugely decisive in the face of a statutory obligation like this, but let's look at the board's answer. The affidavit of Pearse Dillon says at para. 21:

> "The Board uses a particular computer application to prepare and publish documents to its website. I am advised by the ICT section of the Board that the application operates in the following manner. It has a two stage, automated process to prepare those documents. At the first stage, it identifies all decision documents on cases for a specific date range and produces an Excel spreadsheet displaying which documents have passed (no duplicate documents, document named correctly, and specific document matches the specific case type) and which ones have failed. The ICT user checks all the documents identified as a 'Fail' in the spreadsheet and must manually download and convert these to pdf because they require a manual check by the user first to see what exactly the issue is, i.e., to identify them and why the automated system has 'failed' them. The ICT user carrying out this check may also need to follow up with the appropriate staff member in certain circumstances. The Board Order which is relevant to these proceedings showed as a 'Pass' at this point. As a result, there was no reason for the ICT staff member to check this particular document as it had passed in the spreadsheet and was presumed to work for and progress to the next step."

117. Mr Dillon goes on at para. 22:

> "The second step the computer application carries out is converting all documents which have 'passed' from Microsoft Word documents to PDFs, downloading them and storing them in the relevant categorised folders. Unfortunately, in this case the Word document version of the Board Order relevant to these proceedings had a 'draft' watermark on it. That watermark was not known to the ICT staff member at the time that it passed the first stage of the process. The presence of the watermark caused a corruption in the document during the conversion from a Word document to a PDF. As a result of this corruption, the document did not download. Therefore, when all documents were being copied over to the website server that morning, the Board Order for these proceedings was not included and it was not published on the website. The Board Direction and Inspector's Report were both published."

118. This raises more questions than it answers. One obvious point is that the number of documents uploaded would not have corresponded to the number sent for upload. There is no reference to any system or check in that regard. Further, it seems on a first principles basis unlikely that this document and this document alone was given a "draft" watermark. The inherent logic of the situation is that the problem that occurred here could in principle have happened any time or on any other case file to any watermarked document. The board hasn't averred as to when it became aware of the watermark issue or what systemic measures it put in place to avoid this happening in other cases. It is of course within the realm of the possible that this was a once-off error, although the board doesn't say that and didn't strongly press for the right to put in a further affidavit on the matter (which I wouldn't have ruled out but also wasn't particularly looking for because it would have delayed matters further), but on the face of things the inherent probabilities of the situation would seem to be against that.

119. The board was however able to give me some further information which, while not on affidavit, was not objected to by the applicant, which is that the problem has now come to an end - not because the board instituted some form of checking system but because of a change-over to a new publication format in April, 2021. The board now publishes scanned PDFs of the final version rather than converted PDFs of the word document version.

120. As regards what happened after the document corruption occurred, Mr Dillon uninformatively avers at para. 23:

> "The Board Order was published on the Board's website on 28 July 2022."

121. But he doesn't explain why it wasn't published between the date the board became aware of the problem in February 2021, and the eventual date of publication in July 2022. The board in submissions sought to explain that by way of oral submissions by reference to not consulting lawyers until mid-2022 due to the limited progress of the proceedings, a matter to which we will return. Again I note that that information wasn't positively objected to which I think constitutes acquiescence. But I am not sure it gets the board very far.

122. The fact that the direction and inspector's report were available online doesn't detract from the absence of the order. The similarity of content is not an answer, and indeed the public would not have been certain of the extent of similarity in the absence of the order (see by analogy *Southwood Park Residents Association v. An Bord Pleanála* [2019] IEHC 504, [2019] 7 JIC 1003 (Simons J.)).

123. The fact that the applicant didn't go looking for the order from the board is a bit of a case of victim-blaming. It isn't up to the public concerned to force statutory bodies to comply with their public participation obligations. Those bodies need to grapple with those obligations themselves.

124. In *Southwood Park Residents,* Simons J. held that a failure to publish a bat report as required as part of a planning application should not be treated as immaterial. That conclusion led to an order of *certiorari* in that case.

125. In *Sweetman XV,* McDonald J. held that a week's delay by the board in notification required by art. 72 of the 2001 regulations was substantial so as to warrant the grant of relief. That was in the context of a non-extendible short period of 4 weeks to make submissions.

126. *Sweetman v. An Bord Pleanála (Sweetman XIII)* [2021] IEHC 259, [2021] 4 JIC 1403 (O'Regan J.) doesn't help the board as much as they think. There, the decisions were made on 24th October, 2018, and should therefore have been published by 27th October, 2018, but were not uploaded until 17th December, 2018, something around 6 weeks later. This delay was "due to an ongoing information technology systems upgrade", whatever that means (para. 48), although such a phrase is suggestive of a temporary or one-off situation. The court did not think that a declaration was warranted. And presumably it might not be if the lapse was fairly one-off. But looking at the matter from the vantage point of the present case, there have now been quite a number of instances in which the board hasn't fully attended to its publication requirements, and indeed for good measure in the present case we are talking about a delay of 18 months during which the board was aware of the problem, as opposed to 6 weeks when it wasn't as in Sweetman XIII.

127. In *Clifford and Sweetman v. An Bord Pleanála & Others (No. 1*) [2021] IEHC 642, [2021] 10 JIC 1502 (Unreported, High Court, 12th July, 2021) I said at para. 77 that the applicants had not

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

128. In *Save Cork City v. An Bord Pleanála & Ors* [2021] IEHC 509, [2021] 7 JIC 2802 I granted a declaration that the council concerned had failed to comply with s. 177AE of the 2000 Act by failing to make the Natura impact statement properly available. At para. 64 I said that it would be an inappropriate exercise of the power of *certiorari* to quash a decision based on the fair procedures rights of third parties absent an egregious disregard of legal requirements. I also noted at para. 65 that disregard of or non-compliance with legal requirements (even if on a first occasion it might not amount to egregious disregard of the law) could still be a matter to be properly considered as appropriate to address with declaratory relief, not least because it puts down a formal marker so that any future non-compliance can be assessed by reference to whether there has been a pattern of action or inaction that amounts in effect to disregard of the legal obligations concerned. I went on to say at para. 71 the issue was sufficiently minor not to warrant *certiorari*, but was more than *de minimis* in that the level of contradictory reactions to the requests for information suggested a systems issue rather than a one-off lapse. At para. 72 I finally noted that allegations of a lack of compliance with public participation requirements were becoming a recurrent feature of this type of planning and environmental litigation. Possibly against that background it was worth considering whether even minor noncompliance should be addressed by way of declaration in the interests of promoting the rule of law. But I did not need to be concerned about that because this was more than a purely minor one-off lapse.

129. In *Clifford v. An Bord Pleanála (No. 3*) [2022] IEHC 474, [2022] 8 JIC 1502, I granted a declaration as to failure to publish various documents on the board's website, in breach of s. 51 of the Roads Act 1993, although I had earlier held that there was no prejudice to the applicant so that *certiorari* was not an appropriate relief.

130. *Keshmore Homes Ltd. v. An Bord Pleanála* [2023] IEHC 369, [2023] 6 JIC 2702 (Phelan J.) was another recent example of delayed publication by the board of an order and other decision documents, which in the circumstances was accepted as a basis for an extension of time.

131. In *Carrownagowan v. An Bord Pleanála* [2023] IEHC 579, [2023] 10 JIC 2704 (under appeal) at para. 134, I refused a declaration regarding long-past issues as there is no particular need for a purely historical declaration as to the legal situation 13 years ago. As with O'Regan J. in *Sweetman XIII*, that would be an academic exercise – that is not the purpose of declaratory relief.

132. One can summarise the position regarding breach of publication requirements and similar obligations as follows:

(i) If it is clear that the applicant was not in any way prejudiced by the breach, then *certiorari* is generally not appropriate unless there is an egregious disregard of legal requirements (*Clifford No. 1*, *Save Cork*) but the court can consider whether a declaration may be the correct relief. Thus a breach that merely impacts on a hypothetical third party participant is one that does not prejudice the applicant and so would normally only ground declaratory relief in the absence of egregious disregard of legal requirements;

(ii) A breach that involves failure to publish material that was part of the application (*Southwood*) or failure to take a step that had a meaningful impact on the integrity of the process could be capable of at least indirectly prejudicing an applicant so as to warrant consideration of *certiorari*;

(iii) A minor breach may not warrant a declaration if it is once-off, historic or academic such that no purpose is served by a declaratory relief *(Sweetman XIII*, *Carrownagowan*); and

(iv) On the other hand, a breach that is not minor, because for example it would have been significant on those to which it applied (*Sweetman XV*) or that it was capable of repetition or was part of a pattern (*Clifford No. 3*), may warrant a declaration.

133. The board didn't particularly dispute this summary – the issue was more how to apply that to the facts here. The board's best point was that the irregularity was minor, historic and academic. In deciding whether the discretionary, equitable remedy of a declaration is appropriate, it appeared to be agreed that the court needs to consider all of the relevant circumstances "holistically and in

the round" as put by the board. Donnelly J. used an analogous phrase in a different context, referring to the need for a "holistic view of all the relevant circumstances" when considering the question of extension of time (*Heaney v. An Bord Pleanála* [2022] IECA 123, [2022] 5 JIC 3123 (Unreported, Court of Appeal, Donnelly J., 31st May, 2022), para. 95), which I might respectfully say is a useful formulation in a number of contexts.

134. The relevant circumstances as to whether to grant a declaration include the following:

(i) The importance of the provision not complied with. Here, the public participation requirements are core obligations of EU law and the Aarhus Convention, as well as of the relevant transposing domestic law. Actual participation of interested parties and the public concerned, including their right of access to appeal or other effective remedy, is often in practice predicated on such obligations being complied with. Failure to publish the actual decision cannot be regarded as insignificant in such a context.

(ii) The extent of the non-compliance. Here the non-compliance was not total in the sense that the other materials, many of which overlapped considerably with the content of the board order, were published. And of course all documents were available in the board's offices. That said, the actual decision itself is an important document on any analysis. The applicant makes a valid point when he says that "If the Board Direction had the qualities the Board now seek to attribute to it, the Board Order would not be necessary. Publication of only some of the documents has the capacity to confuse the public into thinking that there are no other documents."

(iii) The lack of prejudice to the applicant or anyone else is a factor, although that has already been taken into account by ruling out *certiorari* so does not in itself provide a sufficient reason to refuse all relief regardless of other circumstances. While no prejudice to the applicant has been demonstrated, one cannot rule out the at least theoretical possibility of some other party being affected. That is relevant as a circumstance to be considered as part of a holistic overview and not as a backdoor way for the applicant to impermissibly enforce third party rights. That said, in the circumstances here, any such prejudice was probably not major given that the direction was published.

(iv) Whether the issue was once-off. While it is within the realm of the possible that this was a one-time lapse, there is no averment that it was once off, and the inherent probability of the matter is that there is nothing unique about this particular document. Certainly nothing unique has been alluded to. The evidence establishes a situation from which it follows logically that the problem could have occurred in relation to any other watermarked document. The lack of evidence as to similar incidents isn't decisive since that is within the special knowledge of the board and its deponent did not provide any information on that. The inherent probability of the matter going beyond the once-off arises logically and naturally from the facts averred to.

(v) Whether the issue is purely historic and cannot reoccur. Here, the system for uploading documents has changed since the problem occurred, so the exact problem here won't reoccur in exactly the same way.

(vi) The level of deliberation involved in the error and the extent to which reasonable steps were taken to prevent or identify such an error. The board made the point that the volume of material to be published meant that mistakes were bound to occur. That said, the affidavit of Mr Dillon implies that there was no system to check that the scanned document corresponded to the original word document or even that the number of documents uploaded corresponded to the number of documents sent for upload.

(vii) Whether the error was rectified promptly when it came to light. Here, the board were informed of the problem in February, 2021. However, lawyers were not asked for advice until mid-2022 because, for various reasons including the interaction with another case between the parties, the proceedings were not progressing in the judicial review list and remained at leave stage, albeit on notice. The proceedings were in effect parked until about June, 2022 when the board sought legal advice so the problem was only corrected at that stage. While that is understandable, it doesn't seem particularly reasonable. It is not too much to ask the board to consider problems once they are brought to its attention, or for somebody within the board to at least consider whether *prima facie* any complaint regarding non-publication needs to be looked at, since that is an ongoing obligation and not just a claim for *certiorari* in relation to matters regarding which the board is *functus officio*. So it is an inherently defective system to fail to attend to allegations regarding breach of

ongoing obligations until such time as the progress of a case warrants the instructing of lawyers.

(viii) Whether there is a pattern of non-compliance. Without being unduly critical of the board, and without forming any unduly definite conclusions, and fully bearing in mind the size of its operation, the volume of material and the inevitability of human error, as an empirical matter it can't be said that allegations of non-publication are rare and occasional. In fact such allegations are painfully frequent in planning litigation, and, again speaking empirically, when those issues are reached by the court they are frequently upheld as a matter of fact, as illustrated by the caselaw already referred to. Even the most favourable judgment for the board (that of O'Regan J. in *Sweetman XIII,* the only decision not to result in an effective order in that regard) was premised on a finding that there had been a breach of obligations. This is at least the sixth case where there is a *finding* of failure to comply with publication requirements (we are probably well into double figures in terms of undetermined *allegations* of such failures). In four of the five previous cases that came to my attention for the purposes of the present case (and there may be others), that led to an effective order (*certiorari*, extension of time, and declarations). So a declaration here would be five out of six – not in any way an outlier. Maybe such an order will encourage the board towards greater efforts in publishing its documents, maybe not. But while not a matter for me, I am sure it would be welcomed if, in consultation with its stakeholders, it might review the issue of how it goes about making information available, and whether it can do better in terms of timing, content, comprehensiveness and fail-safe checks. Such a review might allow the articulation and addressing of concerns of participants in the board's processes and cut down litigation on these sort of points if the long run.

(ix) Any other relevant circumstances. No other circumstances were particularly pointed to here.

135. Overall here it seems to me on a holistic overview of all of the circumstances that there are sufficient factors to take the non-publication of the order out of the category of the minor. Thus a declaration is warranted, particularly to put down a marker about the importance of compliance with public participation requirements.

Legislative validity/ transposition issues

136. As noted in the No. 5 judgment, whether the modularised ground against the State arises at all depends on whether this project is subject to EIA. Thus while the State did not get involved in this module, they are affected by the outcome, a point I confirmed with the parties at the call-over on Monday 15th January, 2024. In the light of the finding above that this is not an EIA project, the transposition claim does not arise and can be dismissed at this stage.

Conclusion and costs

137. The elaborate-sounding confection of legal points launched in this case as a basis for *certiorari* bears no resemblance – none whatsoever – to the applicant's notice of appeal to the board. A little *esprit d'escalier* is legally permissible (where EU law so allows, or where issues post-date the notice of appeal, for example), but the rest of it makes a mockery of the procedures for evaluating planning considerations under the 2000 Act. Where we now are with this case is that by virtue of a six page handwritten appeal, making unbuttoned complaints about a wide variety of actors, but failing to contain any meaningful relevant specifics, and by virtue of the consequent judicial review, the applicant has succeeded in delaying the finality of the permission for a period from 31st July, 2020 to today's date. The Planning & Environment List can't take much responsibility for that delay, because the parties did not seek the admission of the case to the list until quite late in the day, and when they did so, directions were swiftly given and within a couple of weeks a date was fixed for the leave application. The opposing parties' decision to contest leave, while of course forensically open to them and while not without some advantage, did nonetheless cause delay, because that had to be heard and determined by way of a written judgment with a further judgment required on leave to appeal that decision. Once that was delivered, further directions for case management were given promptly. Some time was extended by consent, and the parties then did not take up my offer of a hearing in Michaelmas 2023. I did however give the earliest available hearing date in Hilary 2024. That perhaps illustrates the wisdom of Thomas Sowell's aphorism that there are no solutions, only trade-offs. One can save costs by trying to cut back the pleaded case by interlocutory procedures, but that causes delay. If on the other hand, in other or future cases, parties want to prioritise speed, the court will be on stand-by to assist, within its allocated resources. Speed would generally be the court's inclination anyway, all other things being equal. But in an adversarial system, the court cannot act faster than the fastest party to the litigation.

138. With a view to *certiorari*, the applicant's lawyers have expended admirable efforts in trying to erect a towering legal superstructure of objection on the applicant's notice of appeal, but that

construction is ultimately founded on sand. It collapses for various reasons, not least because, on certain issues, the critical points were not put before the board. The context here is that this is a relatively minor modification to two previous permissions, one of which was unchallenged and the other of which was challenged unsuccessfully. If and insofar as interesting legal points were touched on (which is inevitable given the enormous efforts made by the applicant's lawyers), such points, insofar as they are not being dismissed on their merits now, can be saved for a case in which they properly arise. The challenge to the validity of the permission therefore fails.

139. All that said, the applicant has separately established a shortcoming in the subsequent actions of the board regarding the making available of material to the public. Whether I am right in viewing it as a duty doesn't in fact matter because even if, counterfactually, the question of online publication is totally discretionary, the board actually invoked such discretion and decided to operate the procedure to put the order online. It then failed to carry that out, and did not have an effective system to pick that omission up. For good measure, it also failed to act for 18 months when the problem was drawn to its attention. That is not a minor or insignificant matter and warrants being marked appropriately by a declaratory order.

140. Without giving the matter too much thought at this stage, it seems appropriate to indicate a default order as to costs subject to contrary submission. Normally it makes no sense to try to cheese-pare a costs order against a winning party, except in a long case (at least over the 2-day mark), because the costs of that exercise will be disproportionate to the "benefit" involved: see *Cork County Council v. Minister for Housing (II) (No. 3)* [2022] IEHC 473, [2022] 8 JIC 1501, *Hickwell Ltd and Hickcastle Ltd v Meath County Council (No. 2)* [2022] IEHC 631, [2022] 11 JIC 1803, *Jennings & Anor v. An Bord Pleanála & Ors* [2023] IEHC 14, [2023] 2 JIC 1711 (Holland J.), *EPUK Investments Ltd. v. EPA* [2023] IEHC 138, [2023] 3 JIC 2203 (Holland J.), *Egan v. Egan* [2023] IEHC 434, [2023] 7 JIC 2006 (Twomey J). The real question to be asked in any given case is not whether the winner could have been more economical (the answer is always trivially affirmative to that) but whether there are any discrete, identifiable and allowable units of costs that can be isolated for adjudication purposes that would have been saved had the winner confined herself to winning issues. Here that is undoubtedly the case – the main hearing would not have gone into a second day for example. So it is appropriate that the default order would depart from the normal simple order as to full costs to the applicant but instead provide that the applicant should get costs on a basis that reflects the costs that would have been incurred had he confined himself to the relief he ultimately got.

141. While the parties are of course free to contend for a different order, I should perhaps point out the possibility that the existence of costs protection does not obviously carry with it the guarantee that if, hypothetically, further costs were to be incurred unnecessarily following the propsal of a default limited order as to costs in favour of an applicant, such additional costs might not be potentially deducted from the default award of costs being proposed, if incurred at the instance of the applicant, or indeed added to that default order, if incurred at the instance of the first named respondent. That is just flagging an issue, not expressing a view on it at this stage.

Order

142. For the foregoing reasons, it is ordered that:

(i) there be a declaration on foot of relief 2E as follows:
"a declaration that the first named respondent contravened sections 146(5)(b) and (7)(b) of the Planning and Development Act 2000, by failing to make the board order available by the means referred to in subsection (5)(b) during the period 3rd December, 2020 to 28th July, 2021";

(ii) the proceedings other than in respect of the foregoing be dismissed, including as to the reliefs against the State;

(iii) unless any party applies otherwise by written legal submission within 14 days from the date of this judgment, the foregoing order be perfected forthwith thereafter on the basis that there be an order for costs (including the costs of written submissions and certifying for two counsel in respect of all relevant court applications) to the applicant against the first named respondent in respect of the proceedings, limited to the costs that would have been incurred had the applicant confined his proceedings to the issue on which he prevailed, and that any issue as to the extent of the costs that would have arisen in that circumstance be determined, in default of agreement, by way of legal costs adjudication; and

(iv) the matter be listed on Monday 12th February, 2024 to confirm the foregoing or, in the event of an application being made by way of written legal submissions lodged within the period of 14 days referred to, to fix a date for the hearing of such application.