APPROVED **THE HIGH COURT**

PLANNING AND ENVIRONMENT

[2024] IEHC 381

Record No. 2022/339 JR

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 50 OF THE PLANNING AND DEVELOPMENT ACT 2000, AS AMENDED

BETWEEN:

OCEANSCAPE UNLIMITED COMPANY

Applicant

and

DÚN LAOGHAIRE RATHDOWN COUNTY COUNCIL

Respondent

-and-

MINISTER FOR EDUCATION

Notice Party

Judgment of Ms. Justice Emily Farrell delivered the 27th day of June 2024.

Introduction and Undisputed Facts

1. These proceedings involve a challenge to the Dún Laoghaire-Rathdown Development Plan 2022-2028 and to the decision of the council to attach a Specific Local Objective in relation to the provision of primary and post-primary education facilities at Stillorgan Industrial Estate/ Benildus Avenue. Declaratory relief is also sought. Opposition papers have been filed by the Respondent, who contests each of the grounds relied upon by the

Applicant. The Statement of Opposition was filed by the Respondent on 14th October 2022 and an amended Statement of Opposition was filed on 11th January 2024.

2. Two motions are before the Court relating to section 153(2) of the Local Government Act, 2001. The Applicant seeks orders including an order striking out the Respondent's Statement of Opposition. The Respondent applies for the determination of a question regarding the interpretation of section 153(2) as a preliminary issue. It is necessary to interpret section 153(2) of the 2001 Act in order to determine each motion.

3. The parties agree that the interpretation of section 153(2) and determination of whether the Chief Executive has been expressly authorised, or is deemed to have been expressly authorised to defend the proceedings, must first be determined to rule on their respective applications. However, they each question the appropriateness of the motion brought by the other party. I have decided that the interpretation of the subsection, and whether there has been compliance therewith, should be decided first. I shall hear the parties further before making orders on these motions.

4. The Notice Party has also filed a Statement of Opposition but did not address the Court in relation to this issue.

5. Section 153(2) provides:

> *"(2) Where an action or other proceeding relates to the exercise or performance by the local authority of a reserved function, the [chief executive] for that authority shall, in the doing of any such act, matter, or thing referred to in subsection (1), act with the express authorisation of the elected council of such local authority, and in any proceedings such authorisation shall be deemed to have been given unless or until the contrary is shown."*

6. It is common case that judicial review proceedings come within the terms of section 153 and that these proceedings relate to the exercise or performance by the Respondent of a reserved function. Therefore, it is agreed that section 153(2) applies to these proceedings. It is also agreed that as a creature of statute, the council's powers are limited to those conferred by statute and must be exercised in accordance therewith.

7. Compliance with section 153(2) is not a matter which arises at the time of filing of the Statement of Grounds by the Applicant. Therefore, the complaint that the decision was not raised by the Applicant in the Statement of Grounds is not well founded. However, it is a matter that could have been raised subsequently, particularly from the filing of Opposition papers. This issue was raised by the Court when inviting submissions as to whether the proceedings should be adjourned to await the delivery of judgment in a case in which judgment had been reserved by Humphreys J. on very similar grounds to those in the Statement of Grounds herein. On 22nd May 2024, the solicitor for the Respondent wrote to the Court and the parties stating:

> "*No formal resolution was passed by the Elected Members, but that they are aware of the proceedings and were formally briefed by the chief executive in February 2023, in respect of the proceedings.*"

8. It was subsequently clarified, orally on 29th May 2024 and by letter dated 6th June 2024, that the elected members were formally briefed by the Chief Executive in March 2023, not February.

9. Affidavits were sworn by a solicitor on behalf of the Respondent in respect of both motions. An email dated 14th March 2023 and the enclosed letter from the Chief Executive dated 14th March 2023 are exhibited to each such affidavit. The email enclosed the letter of 14th March 2023 to each elected member "*for your information*". The letter, also described as a Briefing Note, stated:

> "*Dear Councillor,*
>
> *I attach below, update for your information.*
>
> ***<u>Preliminary</u>***
>
> 1. *As three separate challenges have been brought against these proceedings are currently before the High Court a detailed commentary is not appropriate and general summary of each case is provided below.*
> 2. *The cases are as follows: -*

Oceanscape Limited y Dun Laoghaire Rathdown County Council and the Minister for Education (Notice Party), High Court Record 2022/3393R

3. *In these proceedings the Applicant, Oceanscape Limited Company, is seeking to quash (set aside) the Council's decision to make and adopt the Dun Laoghaire-Rathdown County Development Plan 2022-2028. In the alternative, the Applicant is seeking to quash the decision of the Council to attach a Specific Local Objective "to provide for primary and post primary education facilities... at Stillorgan Industrial Estate/Benidus Avenue". Various other related reliefs are also sought.*

4. *The Council has filed a Statement of Opposition in respect of all grounds of challenge made against it.*

5. *The Minister for Education has filed an affidavit supporting the position that the High Court should refuse the reliefs sought by the Applicant.*

6. *The Applicant brought an application to have these proceedings admitted to the Commercial Planning & Strategic Infrastructure Development list of the High Court on Monday 13 February 2023, which application was granted.*

7. *On Monday 13 March 2023 the Applicant was granted liberty to amend its Statement of Grounds to include additional grounds and the Council was granted liberty to amend its Statement of Opposition in accordance with the following schedule:*
   - *19 April 2023 for the Council to put in its amended Statement of Opposition*
   - *3 May 2023 for the Minister to furnish any updated reply*
   - *24 May 2023 for any reply from the Applicant*
   - *8 June 2203 for any final replying affidavits by any other party.*

8. *These proceedings are next listed in the Commercial Planning & Strategic Infrastructure Development list of the High Court for mention on 12 June 2023. No hearing date has been assigned yet.*"

10. None of the grounds on which the Applicant rely are set out in the letter, nor was any assessment or advice given in relation to the judicial review proceedings. Clearly the Respondent could not be expected to exhibit any material over which attracts legal professional privilege. However, no other information was given to the elected members by the Chief Executive or the Law Agent which would have enabled them to form their own view of the benefit or risk of defending the proceedings. The material, provided for the information of the elected members, did not refer to section 153, directly or inferentially.

11. The deponent also refers to, and exhibits, an article dated 25th May 2022 from the Irish Times which referred to the three sets of proceedings which were subsequently referred to in the letter of 14th March 2023. It was suggested that the elected representatives may also have been aware of the proceedings prior to March 2023 through the media. A request for an update from one of the elected members dated 16th December 2022 has also been exhibited. The deponent avers that, to the best of her knowledge and that of the Chief Executive's office, no subsequent queries were raised by email or through formal council business, nor did any of the elected members table a motion in respect of the proceedings after they were formally notified. This is not disputed.

Statutory Interpretation

12. The principles of statutory interpretation are not in dispute. The principles were summarised by McKechnie J. in *People (DPP) v. Brown* [2018] IESC 67, [2019] 2 IR 1 and reiterated by Murray J. in *Heather Hill v. An Bord Pleanála and Ors* [2022] IESC 43. It is clear therefrom that "*The first and most important port of call is the words of the statute itself, those words being given their ordinary and natural meaning*" (paras. 92 and 93 of *Brown,* and para. 106 of *Heather Hill*). However, as the Supreme Court has emphasised, "*those words must be viewed in context; what this means will depend on the statute and the circumstances ... and perhaps ... the mischief which the Act*

sought to remedy' (at para. 94; para. 106). In doing so, the Court relies on various canons, maxims, principles and rules of interpretation. If the resulting interpretation gives rise to an ambiguity, the Court will seek to discern the intended object of the Act and reasons it was enacted. (para. 95; para. 106).

13. Referring to the judgment of McKechnie J. in *Minister for Justice v. Vilkas* [2018] IESC 69; [2020] 1 IR 676, Murray J. noted that:

    > "*while McKechnie J. envisaged two stages to the inquiry – words in context and (if their remained ambiguity), purpose – it is now clear that these approaches properly viewed as part of a single continuum rather than as separated fields to be filled in, the second only arising for consideration if the first is inconclusive. To that extent I think that the Attorney General is correct when he submits that the effect of these decisions – and in particular of* Dunnes Stores *and* Bookfinders – *is that the literal and purposive approaches to statutory interpretation are not hermetically sealed. Indeed McKechnie J. later suggested as much in* Brown *(at para. 95) (and see more recently* O'Sullivan v. Ireland *[2019] IESC 33, [2020] 1 IR 413, 443 per Charlton J.) and* Dunnes Stores *(' subject matter .. and the object in view ... will inform the meaning of the words, phrases or provisions in question').*" (para. 108).

14. *Heather Hill* itself highlights the need to forge a path between an overly literal interpretation of the words and the risk of pushing the analysis of the context of the provision too far. Murray J. identified four propositions for maintaining the clarity of the distinction between "*the permissible admission of* 'context' *and identification of* 'purpose'*, and the impermissible imposition on legislation of an outcome that appears reasonable or sensible to an individual judge or which aligns with his or her instinct as to what the legislators would have said had they considered the problem at hand*". (paras. 112- 116):
    - 'legislative intent is a misnomer as even the purpose of individual parliamentarians, if ascertainable, can never be reliably attributed to the collective assembly;
    - The court strives to ascertain the legal effect attributed to the legislation through the application of the maxims, principles and rules of interpretation which have developed for that purpose;

- "*The words of a statute are given primacy within this framework as they are the best guide to the result the Oireachtas wanted to bring about.... In deciding what legal effect is to be given to those words their plain meaning is a good point of departure, as it is to be assumed that it reflects what the legislatures themselves understood when they decided to approve it approve it*";
- the best guide for ascertaining the purpose of the legislation is the language of the statute read as a whole, although "*the* 'context' *that is deployed to that end and* 'purpose' *so identified must be clear and specific and, wielded to displace the apparently clear language of a provision, must be decisively probative of an alternative construction that is itself capable of being accommodated within the statutory language*".

15. As Murray J. emphasised, at para. 123 of *Heather Hill*, section 5 of the Interpretation Act 2005 is engaged only where there is obscurity, ambiguity, absurdity or a failure to reflect the plain intention of the Act when viewed as a whole.

16. The Respondent submits that if two interpretations are open, the appropriate interpretation is the one which is more coherent and consistent with the context of the 2001 Act generally. It was submitted by the Applicant, that the phrase "shall act" should be interpreted in the same manner in subsections (1) and (2) of section 153. Both of these submissions are consistent with the authorities and I accept them.

Interpretations advanced by the Parties

17. The Applicant submits that section 153(2) contains three essential components: a mandatory component requiring the Chief Executive to have the express authorisation of the elected council in the doing of any act, matter or thing in proceedings which relate to a reserved function; an evidential presumption that express authorisation has been given; and recognition that the evidential presumption may be rebutted. The Chief Executive is mandated to act on behalf of the council under both subsections.

18. This evidential presumption is explained by the Applicant as arising for reasons of administrative convenience and practicality as the need to produce the section 153

authorisation when the Chief Executive wishes to carry out any act or take a step in the proceedings is reduced. The Applicant submits that its interpretation is straightforward, clear and corresponds with the plain meaning of the statute. The Applicant contends that it has now been established that the elected members did not give the Chief Executive express authorisation to take the steps he considers appropriate to defend these proceedings and that, accordingly, the Chief Executive is defending these proceedings without a sufficient statutory basis.

19. The Respondent argues that the interpretation advanced by the Applicant is misconceived and it relies on the existence of a "deemed authorisation" under section 153(2). A "deemed authorisation" was explained by the Respondent as a legal fiction, which "*deems the Chief Executive to have an "express authorisation" although none exists; it is as if an "express authorisation" has been given.*" It is submitted that this obviates or displaces the need for the positive step requiring the Chief Executive to ask the elected members for (or presumably otherwise obtain) express authorisation for the doing of any act, matter or thing referred to in subsection (1). The Respondent states that the starting point is the existence of a "deemed authorisation" and that it is only where a positive step is taken by the elected members to 'actively direct the Chief Executive' not to do any act, matter or thing specified in section 153(1) that the contrary may be shown. This was described as a "de-authorisation". In its written submissions, the Respondent states "*in order to show the "contrary", it must be shown that there is no deemed "*express authorisation*"*."

20. It was conceded that it followed from the Respondent's argument that section 153(2) would authorise the Chief Executive to carry out any act, matter or thing referred to in subsection (1) in relation to proceedings which involved a reserved function even if the elected members were entirely unaware of the proceedings. In those circumstances, it would be impossible to rebut the deeming of the giving of authorisation– there could be no "de-authorisation". It was submitted that there may be an obligation on the Chief Executive to inform the elected members of the proceedings, and that he/she must respond to requests for information under section 136 of the 2001 Act.

21. As there has not been a resolution or other decision by the elected council disapplying the authorisation or directing the Chief Executive not to defend the proceedings or not

to carry out any acts to do so, the Respondent contends that the “deemed authorisation” under section 153(2) exists and the contrary has not been shown.

Reserved Functions

22. The importance of the role of democracy in local government is highlighted by Article 28A of the Constitution and the concept of the reserved function. The Oireachtas clearly divided the functions of a local authority between reserved functions and executive functions. Reserved functions may only be carried out by elected members, whereas executive functions are performed by the Chief Executive, subject to the power of the elected members to pass a resolution under section 140 of the 2001 Act (formerly a ‘section 4 resolution’).

23. Section 131 of the 2001 Act provides that, subject to section 131A, the elected council of the local authority or the members of the joint body shall directly exercise and perform a resolution at a meeting of the local authority or body every reserved function. Reserved functions are designated by statute including various provisions of the Local Government Acts 1925 to 2014 or by Order of the Minister for so long as such an Order is in force.

24. The Chief Executive of a local authority is obliged to carry into effect all lawful directions of the elected council in relation to the exercise or performance of the reserved functions of the local authority under section 132(1). The duties of the Chief Executive include advising and assisting the elected council generally as regards the exercise or performance by it of its reserved functions and the council is required to have regard to that advice or assistance: section 132(3). Every function of a local authority which is not a reserved function is an executive function by virtue of section 149(4). Reserved functions under the 2001 Act include the appointment of a Chief Executive under section 6 of the Local Authorities (Officers and Employees) Act 1926 by virtue of a recommendation of the Chief Executive of the Public Appointments Service, and the suspension or removal of the Chief Executive under section 146: section 145. The making of development plans is a particularly significant reserved function under the Planning and Development Act 2000.

25. Section 149 provides for the responsibilities of the Chief Executive; these include the efficient and effective operation of the local authority and ensuring the implementation, without undue delay, of the decisions of the elected council under section 132. The Chief Executive performs the executive functions of the local authority for the purposes of discharging the responsibilities under section 14, and she/he carries and manages and controls generally the administration and business of the authority.

Interpretation of section 153(2)

26. Section 153 provides:

> "***153.*** *(1) The [chief executive] for a local authority—*
>
> *(a) shall act for and on behalf of the local authority in every action or other legal proceeding whether civil or criminal, instituted by or against the local authority, and*
>
> *(b) may do all such acts, matters, and things as he or she may consider necessary for the preparation and prosecution or defence of such action or other proceeding in the same manner in all respects as if (as the case may require) he or she were the plaintiff, prosecutor, defendant or other party to that action or other proceeding.*
>
> *(2) Where an action or other proceeding relates to the exercise or performance by the local authority of a reserved function, the [chief executive] for that authority shall, in the doing of any such act, matter, or thing referred to in subsection (1), act with the express authorisation of the elected council of such local authority, and in any proceedings such authorisation shall be deemed to have been given unless or until the contrary is shown."*

27. Section 153 must be interpreted in the context of the Oireachtas having clearly divided the functions which can be exercised by a local authority between reserved functions and executive functions.

28. The Oireachtas has provided that the Chief Executive shall act for and on behalf of local authorities in all proceedings, whether related to the exercise or performance of

reserved functions or not. This is provided for by section 153(1)(a), which states that the Chief Executive for a local authority "*shall act for and on behalf of the local authority in every action or other legal proceeding whether civil or criminal, instituted by or against the local authority*".

29. The power to "*do all such acts, as matters and things as he or she may consider necessary for the preparation and prosecution or defence of such action… as if (as the case may require) he or she were the… defendant or other party to that action or other proceeding*" is provided for separately. This power is contained in subsection 1(b) for proceedings generally. Specific provision is made in section 153(2) for proceedings which involve the exercise or performance of reserved functions.

30. The Oireachtas seperated the duty of the Chief Executive to act for and on behalf of the local authority in proceedings, thereby providing human agency to enable the local authority to act in proceedings from the power to carry out steps to prepare for, and prosecute or defend, those proceedings. If the power to take such steps were included within the term "*act for and behalf of*", section 153(1)(b) would be superfluous. The parties agree there is a presumption against otiose language in a statute. I am also satisfied that such a presumption applies and that it has not been rebutted in this case.

31. Section 153(2) provides:

    "*Where an action or other proceeding relates to the exercise of performance by the local authority of a reserved function, the chief executive …in the doing of any such act, manner, or thing referred to in subsection (1), act with the express authorisation of the elected council of such local authority, and in any proceedings such authorisation shall be deemed to have been given unless or until the contrary is shown.*"

32. The point of dispute between the parties as to the effect of section 153(2) is whether:
    - the Chief Executive is empowered to take whatever steps or matters she/he considers necessary for the defending of these proceedings by virtue of a "*deemed authorisation*" unless the elected members positively direct her/him not to take such steps; or

- the Chief Executive must be given "*the express authorisation of the elected council*", and that there is an evidential presumption that such authorisation has been given, unless displaced.

33. Section 153 is similar to section 32 of the County Management Act, 1940, since repealed.

34. The Respondent relied upon judgment of O'Donnell J. (as he then was) in *Cullen v. Wicklow County Manager & Others* [2010] IESC 49, [2011] 1 IR 152 and the, admittedly *obiter* comments of Holland J. in *Colbeam v. Dun Laoghaire-Rathdown County Council* [2023] IEHC 450.

35. *Cullen* related to a costs application in proceedings brought by the elected members of Wicklow County Council against the County Manager in respect of the grant of planning permission contrary to a resolution passed by the elected members under section 4 of the City and County Management (Amendment) Act 1955. Those proceedings did not relate to the exercise or performance a reserved function. Save insofar as a tentative argument was advanced, and rejected, that the decision to institute proceedings mentioned in section 3 of the Borough Funds (Ireland) Act 1888 was a reserved function, the Supreme Court did not consider reserved functions. The nature of a section 4 resolution was the subject of comment by O'Donnell J. at para. 6 of *Cullen.* He observed that section 4 "*gave the elected members the power to override the executive, but only if the very technical procedural provisions of this section were complied with.*"

36. The Respondent refers to para. 47, in which O'Donnell J stated:

> "*... No attention seems to have been paid to important and familiar features of the County Management Act 1940. In particular, under s. 32 of that Act, the county manager was to act for the county council in all legal proceedings and to do all such acts matters and things as he might consider necessary for the preparation and prosecution or defence of such proceedings. It is hard to see therefore how there could ever have been a justification for the councillors seeking to control the litigation themselves. Furthermore, s. 19 of the same Act provided that in those matters in which a county manager was acting, which*

would require to be taken by resolution if it was to be carried out by the council, his action was to be taken by a manager's order. In this case, the proceedings were initiated and commenced without either resolution or a manager's order. Those difficulties were never addressed."

37. The Respondent also relies on paragraph 82, in particular the *dictum* of O'Donnell J. to the effect that he "*would be extremely reluctant to resolve this issue on the limited factual and legal basis upon which it is presented in this Court, particularly because it has no wider significance than the resolution of this case, since by the Act of 2001 it appears clear that legal proceedings can only be initiated by a decision of the County manager, something which indeed accords with the practice which appears to have applied prior to 2001*." (emphasis added)

38. I do not consider that this *dictum*, which is *obiter*, assists me in ascertaining whether the Chief Executive was entitled to take steps to defend these proceedings in the absence of an express authorisation under section 153(2) of the 2001. Insofar as O'Donnell J. considered section 32 of the 1940 Act (since repealed), no consideration was given to the application of that section to proceedings involving reserved functions nor to any question regarding the need for authorisation by the elected members; those issues did not arise in the proceedings.

39. *Cullen* related to the making of a section 4 resolution which gave a binding direction to the county manager as to the exercise of an executive function, and this did not involve the exercise or performance of a reserved function.

40. As O'Donnell J. held at paragraph 45

    "*There was no formal manager's order, and no resolution by councillors to commence proceedings… The councillors themselves can hardly have been unaware of formality and its significance. The formality of council proceedings with standing orders, motions and resolutions is a distinctive and pervasive feature of local government*."

41. A decision to institute legal proceedings is included in Schedule 15 to the 2001 Act, as one of the executive functions which must be done by Manager's Order. Section 151

applies to every executive function, including those mentioned in Schedule 15. This is not inconsistent with a requirement that the Chief Executive do such acts, matters or things to prepare for, prosecute or defend proceedings with the express authorisation of the elected members. Proceedings which relate to the performance or exercise of reserved functions would generally, if not exclusively, arise where a decision of a local authority is challenged. Legal proceedings such as prosecutions or enforcement actions under various statutory codes or applications for recovery of possession of local authority housing would not relate to the performance or exercise of reserved functions.

42. In *Colbeam v. Dun Laoghaire-Rathdown County Council,* Holland J. quoted section 153 in a footnote when he stated "*In the ordinary way, the Chief Executive of DLRCC acts for DLRCC and decides its course of action in proceedings*", when referring to the suggestion, made in written submissions, that the fact that the recommendation of the Chief Executive had not been followed by the elected members, in making the impugned rezoning decision, was relevant. The Respondent agrees that the interpretation or effect of section 153(2) did not arise in that case.

43. An observation was made in submissions that section 32 of the 1940 Act and section 153 have been in force for over 80 years without this issue being determined by the courts. There is no evidence before the court as to the manner in which section 153(2), or previously section 32 of the 1940 Act, were operated or interpreted by local authorities. No doubt this is due to the fact that express authorisation is deemed to have been given unless or until the contrary is shown. The purpose of the section, on the interpretation advanced by the Applicant, is to avoid the need for the Court to 'look behind the curtain' in every case, but rather that the existence of express authorisation is presumed, or deemed, unless and until the contrary is established.

44. Furthermore, I am satisfied that even if it were demonstrated that there was an established common practice on the part of local authorities as to how section 153(2) should be operated, such a practice would have minimal, if any, relevance to the interpretation of the statutory provision. For example, in *Izevbekhai v. Minister for Justice* [2010] IESC 44, the Supreme Court held (Fennelly J.) that the Minister did not have a discretion to consider an application for subsidiary protection for a category of persons, despite the Minister believing that such discretion existed under the European

Communities (Eligibility for Protection) Regulations 2006, which Regulations had been made by that Minister. Furthermore, there were a number of judgments of the High Court, commencing with *NH v. Minister of Justice* [2007] IEHC 27, [2008] 4 IR 452, which were found to have erroneously interpreted Regulation 4(2) of the Regulations as providing for such a discretion. In *NH,* the Minister had submitted that he had an implicit discretion to consider applications which did not come within the scope of the Regulations. My finding that a practice has very limited utility in the interpretation of a statutory provision is consistent with the judgment of the Court of Appeal in England and Wales in *Knight v. Goulandris* [2018] EWCA Civ 237, in particular para. 13 in which it was held that little or no weight could be attached to the fact that the government and most members of the legal profession interpreted a statutory provision in the same way.

45. As the Supreme Court has made clear, the starting point in interpretating a provision is that the words of the statute must be given their ordinary and natural meaning, and they should be read in context.

46. The Respondent submitted that the starting point is a "deemed authorisation" and relied upon dictionary definitions of the word "deem" from Murdoch's Dictionary of Law (6th edition) and Black's Law Dictionary (9th edition) which define that which is deemed as treating a thing as something other than what it is, or a legal fiction. Whilst nothing turns on it in this case, care should be taken in relying on American legal dictionaries. The definition of the word "deemed" is not in dispute. It was submitted that the term "express" in section 153(2) must be read in the context of "deemed" and means "*specific to a particular purpose, (as opposed to stated or conveyed)*" and that it does not mean the opposite of implied.

47. Having regard to the way in which section 153(2) is phrased, and in particular the reference to "*such authorisation*" in the second clause thereof, I am satisfied that the starting point is the first clause which refers to "express authorisation" and not the deeming provision.

48. Murdoch's Dictionary of Law (6th edition) (online) defines "express" as "*directly and distinctly stated, rather than implied eg an express trust*". Black's Law Dictionary (8th

edition) defines "express" as "*clearly and unmistakably communicated; directly stated. Cf IMPLIED*".

49. The Respondent points to the use of the word "express" in sections 13(1)(h), 131(2)(c), 160(2)(e) and 216(1)(e) of the 2001 Act. I am satisfied that the word "express" is used in those sections in a manner which is consistent with these dictionary definitions, which I consider reflect the plain and ordinary meaning of the word.

50. It was further submitted that, had the Oireachtas intended the giving of authorisation under section 153(2) to be a reserved function, it would have been expressly stated, having regard to section 149(4) of the Act. In contrast, section 142(5A)(e) of the 2001 Act (as inserted) provides that the grant of authorisation, by the elected council, of one of its members to represent the authority at a meeting or event is a reserved function. I do not consider it was necessary for the Oireachtas to designate the giving of authorisation to do an act, matter or thing in proceedings relating to the exercise or performance of a reserved function to be a reserved function. Under section 140, the passing of a resolution is not described as a reserved function, but it can only be carried out by the elected members.

51. A requirement that "express authorisation" be given to the Chief Executive supports rather than undermines the scheme of the Act which clearly divides functions between executive and reserved functions. Where proceedings involve the exercise or performance of functions which are within the domain of the elected members, such as the making of a development plan in this case, it is appropriate that the Chief Executive be required to have the express authorisation of the elected members to take steps in those proceedings. As stated above, the Respondent accepts that its interpretation of the section would permit a Chief Executive to take whatever steps he or she considers appropriate in proceedings relating to reserved functions even where the elected members were unaware of the proceedings. In those circumstances they would obviously be unable to take the step of "de-authorising" the Chief Executive from doing so.

52. The deeming provision arises "*in any proceedings*". Therefore, the deeming provision is one which assists the court, and a local authority in the proceedings, not in relation

to its internal workings. This is an evidential presumption which may be rebutted. I am satisfied that the deeming provision within section 153(2) is the secondary clause and that it does not obviate the need for the Chief Executive to have express authorisation.

53. The deeming provision enables the Chief Executive to take steps in, and in relation to the proceedings without providing evidence that he or she has express authorisation, for example to file papers. This provides an appreciable benefit to local authorities; it cannot be said that the interpretation relied upon by the Applicant renders the deeming provision of section 153(2) superfluous, as has been submitted by the Respondent. Deeming authorisation to have been given, unless otherwise shown, also provides an answer to an application for the dismissal of proceedings, or striking out of the defence of proceedings, at end of a hearing simply by reason of the non-production of the express authorisation. Unlike proceedings issued in the name of a next friend who also acts for an on behalf of a litigant, the Chief Executive is not required to demonstrate authority or consent before taking steps such as filing documents.

54. Therefore, I find that section 153(2) requires a positive step in that the elected members must provide express authorisation, by clearly and directly communicating their consent to the Chief Executive doing any act, matter or thing, to prepare for and/or conduct the litigation. I reject the contention that the subsection creates a legal fiction known as a "deemed authorisation" and that the only means by which it can be demonstrated that the Elected Council has not given express authorisation is by the production of evidence of a direction prohibiting the Chief Executive from taking the steps referred to in section 153(2) or defending the proceedings.

55. I reject the submission by the Respondent that the positive act envisaged by section 153(2) is the "de-authorisation" of the Chief Executive and that the Act permits her or him to do any act, matter or thing unless the elected members intervene to negate a "deemed authorisation". That is not what the provision says. Such an interpretation is not consistent with the plain and ordinary meaning of the section, whether read on its own or as part of the statutory scheme.

56. The section would not be rendered unworkable or absurd by the application of the plain words i.e. by requiring the elected members to expressly authorise the taking of steps,

and that this is deemed to have occurred unless or until the contrary is shown. To read the section as authorising the Chief Executive to take such steps unless actually directed otherwise by the elected members would be to render the words “express” and “such” in section 153(2) otiose and reverse the plain meaning of the provision. It must be recalled that this provision only applies in relation to functions which have been reserved by statute to the elected members. Had the Oireachtas intended to give the Chief Executive the same powers to take steps in proceedings relating to executive and reserved functions, subject only to the elected members having a right to object, it could have done so in clear language.

57. Requiring express authorisation of the elected members under section 153(2) is consistent with the democratic nature of local authorities and in particular the reservation of specified functions to the elected members. It is not consistent with the reservation of functions to the elected members that proceedings, in which acts taken by them in exercise of their reserved functions, are controlled by the Chief Executive unless the elected members take the positive step of intervening to prevent that. The onus is on the Chief Executive to ensure that she or he has the authorisation of the elected members to take steps to defend the manner in which they have exercised or performed their reserved functions.

58. I do not consider that section 153(2) requires the elected members to pass a resolution each time any document is to be filed or any step is to be taken in proceedings, however, I find that it is necessary for the elected members to give their express authorisation for the defence of the proceedings, in accordance with the plain meaning of the section.

59. The fact that a resolution had not been passed was clearly stated in the email of 24th May 2024, confirmed in court on 29th May 2024 and in the letter dated 6th June and the concession made at the hearing of these motions, that no express authorisation exists is sufficient to satisfy me that such authorisation cannot be deemed to have been given in this case i.e. the contrary has been shown.

60. In those circumstances, I do not consider it necessary to assess the adequacy of information in the Briefing Note dated 14th March 2023 provided by email to determine the issues before the court.

61. I shall hear the parties in relation to the effect of these findings on the proceedings and as to the orders which should be made in relation to both motions.

Emily Farrell