AN CHÚIRT UACHTARACH
THE SUPREME COURT

Supreme Court Record No. 2022/12

High Court Record No. 2020/563 JR

Dunne J.
Charleton J.
O'Malley J.
Woulfe J.
Hogan J.

IN THE MATTER OF THE PLANNING AND DEVELOPMENT ACT 2000

Between/

SAVE CORK CITY COMMUNITY ASSOCIATION CLG

APPLICANT/APPELLANT

-and-

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

RESPONDENTS

-and-

CORK CITY COUNCIL

NOTICE PARTY

JUDGMENT of Mr. Justice Woulfe delivered on the 21st day of December, 2022

Introduction

1. The appellant appeals against the judgment of the High Court (Humphreys J.) delivered on the 28th July, 2021 ([2021] IEHC 509), and the order made in consequence thereof on the 10th December, 2021. The High Court decision was to dismiss the appellant's application for judicial review as to certain reliefs sought, to grant one declaration, and to adjourn one relief against the second, third and fourth named respondents (the "State respondents") generally with liberty to re-enter.

2. This case involves a challenge to the validity of a decision dated the 17th June, 2020, made by the first named respondent, An Bord Pleanála ("the Board"), to approve a development to be carried out by the notice party, Cork City Council ("the Council"), involving flood defence works at an area of Cork known as Morrison's Island that began as one of the marshes surrounding the city. It appears that the area is now a small part of the central island between the two channels of the River Lee that encircle the inner city.

3. The Council originally intended to carry out the proposed development pursuant to s.179 of the Planning and Development Act 2000 ("the 2000 Act") and the Regulations implementing that provision, Part 8 of the Planning and Development Regulations 2001 ("the 2001 Regulations"). However, judicial review proceedings were brought in 2018 (*inter alia* by the appellant) challenging the validity of that approach. On the 8th January, 2019, an order of *certiorari* was made by the High Court quashing the Council's decision to carry out the proposed development, the primary ground being that as the proposed development was development in respect of which an appropriate assessment ("AA") was required, the s.179/Part 8 procedure did not apply by virtue of s.179(6)(e) of the 2000 Act.

4. Having regard to the outcome of the judicial review, the Council was then required to apply to the Board for approval of the proposed development pursuant to s.177AE of the 2000 Act. The formal application for approval was submitted to the Board on the 13th December, 2018 and was accompanied by a Natura impact statement ("NIS"), and also by an environmental impact assessment ("EIA") screening report and an environmental report.

5. On the 10th March, 2020, the Inspector furnished a report which noted that there was no provision under s.177AE of the 2000 Act to require EIA screening for a project under that section. Notwithstanding this, it was noted that a considerable number of submissions from the public had raised the issue of the need for an EIA, and the related issues of project splitting, need to examine alternatives and cumulative effects with other projects. Furthermore, the applicant for approval had submitted an EIA screening report with the application. She therefore considered it appropriate for the Board to address this issue.

6. As part of her report the Inspector carried out a comprehensive screening for EIA and she concluded as follows (at para. 11.2.4):

> "Likely Significant Effects of Project
>
> The proposed scheme does not comprise a mandatory project requiring EIA as specified in either Part 1 or Part 2 of Schedule 5 of the Regulations 2001 (as amended), but does fall within subthreshold development. Although there is no legislative provision to carry out EIA screening for a project submitted under s.177AE of the Planning and Development Act 2000 (as amended), EIA screening has been carried out in light of the concerns raised in third party submissions to the Board. In light of the screening, it is considered that there is no potential for significant impact on the environment and that there is no requirement to undertake an environmental impact assessment."

7. As appears from the Board direction dated the 4th June, 2020, at a Board Meeting held on that date the Board decided to grant approval "generally in accordance with the Inspector's

recommendation", for the reasons and considerations set out therein and subject to the conditions set out therein. The decision was then formalised in a formal order of the Board dated the 17th June, 2020, which stated that having regard, *inter alia*, to the nature, scale and extent of the proposed development, it "would not adversely affect the environment".

The High Court Proceedings

8. The appellant obtained leave to challenge the Board's decision by way of an application for judicial review on a number of grounds. The relevant ground for the purposes of the present appeal was an alleged lack of jurisdiction on the part of the Board to carry out EIA screening *via* s.177AE of the 2000 Act.

9. In dismissing this ground of challenge Humphreys J. noted that the statement of opposition of the Board, like the Inspector's report, stated that s.177AE did not provide for EIA screening. The trial judge felt that clearly, in context, these references meant that the section did not expressly so provide. He felt the issue was whether EIA screening was implicitly provided for.

10. Insofar as it was argued that s.177AE(6), which provides for taking into account environmental impacts, provides such a basis, the trial judge felt that that came nowhere near providing transposition of the detailed procedures in the 2011 and 2014 EIA Directive.

11. Humphreys J. regarded as relevant s.177AE (15), which provides that where a proposed development to which s.177AE applied was also required to be submitted to the Board under s.175 (EIA being required), it shall be sufficient for the applicant to make one application to the Board provided that the applicant complies with both s.177AE and s.175, and in such a case the Board shall issue one decision in relation to the application under s.177AE and s.175.

He held that the Board must thus have a necessarily implied jurisdiction to determine whether the application should be dealt with by way of compliance with s.177AE alone, or in conjunction with s.175. That being the case, that necessarily involves a determination as to whether s.175 applies by virtue of Schedule 5 to the 2001 Regulations, and that amounts to a screening decision in all but name. If EIA was required in an application under s.177AE, then the application would have to be the refused or alternatively further information sought to enable s.175 to be complied with (assuming that were a valid procedural option, which Humphreys J. felt he did not have to decide for present purposes).

12. Despite the fact that he felt the jurisdiction to conduct EIA screening, therefore, arises in the legislation in a highly indirect manner, Humphreys J. was of the view that it could properly be read into the section by necessary implication from s.177AE (15).

13. The appellant sought leave to appeal to the Court of Appeal under s.50A(7) of the 2000 Act, but this application was dismissed by Humphreys J. in a second judgment delivered by him on the 16th November, 2021 ([2021] IEHC 700).

Determination

14. This Court granted the appellant leave to appeal by a determination dated the 5th May, 2022: see [2022] IESCDET 57. The Court was of the view that a matter of general public importance did arise in respect of the jurisdiction to conduct an EIA screening in an application for approval of proposed development made under s.177AE of the 2000 Act. Furthermore, the Court was of the opinion that this issue may arise in a number of other cases, and it was in the public interest to obtain further clarity.

15. The Court was satisfied that the threshold for a "leapfrog appeal" of "exceptional circumstances" was met in the circumstances of this case, including the circumstances whereby

there had been a refusal of leave to appeal to the Court of Appeal, and where the outcome of the appeal may afford greater legal certainty in this area.

Submissions in this Appeal

Submissions of the Appellant

16. The appellant submits that the issue this Court has to decide is very simple, namely, does the Board have a jurisdiction to conduct an EIA screening exercise – whether pursuant to section 177AE (15) of the 2000 Act as was found by the trial judge, or as now pursued as an additional ground by the Board in this Court, by virtue of a conforming interpretation? The appellant states that the "obvious and correct" answer to this question is "no", by simply reading the relevant section.

17. The appellant goes on to consider the relevant section in the context in which it arises. It notes that section 177AE applies to local authority own development that requires appropriate assessment, and refers to the requirements in s.177AE(1), (2) and (3). It states that the balance of s.177AE addresses the procedure by which the Board is to assess any proposed development submitted pursuant to the section, and that two subsections are of particular significance. Firstly, it argues that the Board may request additional information on the effects on the environment of the proposed development pursuant to sub-section 177AE (5), but has no jurisdiction to request the submission of an EIA report ("EIAR") and no jurisdiction to carry out any EIA. The appellant states that, "remarkably", there is no mention anywhere in s.177AE of the EIA Directive in any shape or form.

18. Secondly, it cites the text of s.177AE (15) and makes two observations on this provision. Firstly, the provision is designed to address situations where both AA and EIA are required, and is designed to avoid the cost and time involved in making two similar applications in respect of the same proposed development via two different statutory mechanisms.

Secondly, in circumstances where the EIA Directive is nowhere mentioned anywhere in s.177AE, the applicant is not aware of an even remotely analogous example where a jurisdiction to conduct substantive EIA for the purpose of the EIA Directive has been implied into a statutory section which deals with, in effect, an administrative clarification as to the non-duplication of applications.

19. The appellant submits that the High Court's implication of jurisdiction was entirely inconsistent with the approach adopted by any of the respondents or by the notice party. It argues that the Council made an unequivocal determination that the proposed development had been screened out for the purposes of EIA. In doing so, the Council excluded the necessity to apply to the Board under s.175 of the 2000 Act, and thereby avoided the operation of Article 120 of the 2001 Regulations, pursuant to which a third party may apply to the Board for a screening determination.

20. The appellant argues that the Board's statement of opposition accepted that it had no statutory jurisdiction to carry out an EIA screening assessment, and contends that it is no answer to a case alleging the absence of a jurisdiction to, in effect, argue that the *ultra vires* assessment was carried out correctly. The appellant acknowledges that the State argued that the Board had a jurisdiction to carry out a screening exercise, however nowhere in its statement of opposition did the State identify the statutory source for this alleged jurisdiction. It contends that the closest the State gets is to identify provisions in s.177AE whereby the Board is required to consider the likely effects on the environment of the proposed development, and whereby the Board is empowered to seek further information, to require the applicant to publish and notify further information and to hear evidence, in relation to the likely effects on the environment of the proposed development. The appellant argues that it is difficult to credit this argument, and that it was correctly dismissed by the High Court in summary fashion.

21. It is submitted that the High Court judge was incorrect to imply the jurisdiction to conduct EIA screening into s.177AE for the following additional reasons. Firstly, the appellant states that it is trite law that the Board is a creature of statute and cannot exercise powers outside of its statutory remit. Secondly, if the legislative drafters had intended to give the Board a jurisdiction to make a screening determination for the purposes of s.177AE, they would have done so expressly. The High Court did not engage at all with the oddity that the drafters had seen fit to include elaborate, specific detailed provisions in respect of this question in the 2001 Regulations but, for reasons necessarily unexplained, left that jurisdiction to be implied into s.177AE. Thirdly, on no construction of s.177AE(15) does it constitute "screening in all but name", having regard to the fact that the screening exercise is a substantive exercise of significant complexity that involves a careful consideration of environmental information submitted, and an elaborate statutory scaffolding as to how that information is to be assessed.

22. Fourthly, the fact of the Board having an entirely generalised obligation to consider environmental impacts pursuant to s.177AE(6) does not, even remotely, confer on the Board a jurisdiction to carry out screening for EIA. Fifthly, the High Court was wrong to dismiss the relevance of a hypothetical scenario where the Board had conducted a screening assessment and concluded that an EIAR was required for the proposed development. In that scenario the Board would have no jurisdiction, pursuant to s.177AE, to take various steps, and a whole series of additional jurisdictions would have to be implied in turn. Sixthly, the phrase "required to be submitted" in s.177AE(15) can only refer to a determination made prior to submission of the application, as there is no mechanism in either s.177AE or s.175 for the Board to determine the appropriate statutory section(s) pursuant to which a local authority must apply. The use of the past tense supports, it is submitted, the appellant's contention that the statutory scheme envisages a situation where by the time an application has been submitted, the question as to the appropriate statutory route has already been determined.

23. The appellant then considers the Board's argument that the legislation must be given a conforming interpretation, in light of obligations which arise under EU law. It submits that there are two fundamental problems with this reliance on a conforming interpretation. Firstly, the conforming interpretation proposed requires the creation, by reading in, of an entirely new, complex and elaborate requirement for screening for EIA (and the subsequent carrying out of an EIA if necessary) into a statutory section that says nothing at all about screening or the EIA Directive.

24. Secondly, and perhaps more fundamentally it is argued, there is no "gap" that this Court has to fill by reading in a jurisdiction by reference to the conforming interpretation. The clear legislative intent is that the screening decision will be made by the Council pursuant to Article 120 of the 2001 Regulations, with an appeal to the Board. The appellant refers to the limits of the conforming interpretation approach as considered by this Court in *An Taisce v. An Bord Pleanála* [2020] IESC 39 ("*An Taisce*"). At para. 135, McKechnie J. stated that the Court cannot read in a right which directly contradicts the clear objectives behind the legislative provisions in question. The appellant submits that the implication of a screening jurisdiction into s.177AE(15) would therefore be *contra legem* for the purposes of the relevant principles as identified in the case law.

Submissions of the Board

25. As regards the determination it made that the proposed development did not require EIA, the Board submits that the appellant does not dispute that such a determination was necessary, and in fact contends that such a determination was necessary, as it is a requirement of EU law. The Board's submission is that it complied with the requirements of the domestic legislation when read in light of the requirements of EU law, and it complied with EU law. It

is argued that in circumstances where that last proposition is not even in dispute, the appellant's complaint is wholly devoid of substance.

26. The Board submits that it is useful for s.177 AE to be understood in the overall context of the 2000 Act, and the manner in which development which is carried out by local authorities is subject to consent procedures. It notes how development by a local authority in its functional area is exempted development by virtue of s.4(1)(aa) of the 2000 Act. It further notes how s.179 of 2000 Act and Part 8 of the 2001 Regulations set out procedures governing local authority own development, and how s.179(6) disapplies certain proposed development from these procedures, including proposed development which "(e) is development in respect of which an appropriate assessment is required under section 177 AE, or under any other enactment."

27. The Board notes that in this instance the application for approval was made under section 177 AE of the 2000 Act, which applies where an AA is required in respect of a development to be carried out either by or on behalf of or jointly or in partnership with a local authority. The Board highlights a number of provisions in s.177AE which it says are relevant to the issue now arising. Section 177AE(4) provides that before a local authority makes an application for approval, it should publish a notice inviting the making of submissions and observations to the Board relating to the likely effects on the environment of the proposed development. Section 177AE(5) empowers the Board to require the local authority to furnish to the Board such further information in relation to "the effects on the environment of the proposed development" as the Board may specify, and in addition to require that any further information be subject to public participation by way of submissions or observations. Section 177AE(6) provides that before making a decision to grant approval under that section, the Board shall consider any submissions or observations made in accordance with subs. (4) or (5)

and any other information furnished in accordance with subs. (5) relating to "the likely effects on the environment of the proposed development".

28. The Board states that while it has always accepted that s.177AE does not provide an express power to carry out a screening for EIA, the entitlement to conduct that screening is a necessary incident of the powers granted to the Board having regard to the structure of the Act, insofar as it governs development by a local authority. The reference in s.177AE(15) to "is also required to be submitted to the Board under s.175" means, in this context, "also requires EIA". In order to determine whether s.177AE(15) applies, it is clearly necessary for the Board to determine whether an EIA is required. Although not an express obligation to carry out screening for EIA in every case, it is a necessary implication of the Board's powers under s.177AE that it is empowered to ask and determine whether EIA is required. There was, therefore, nothing *ultra vires* about the Board's determination.

29. The Board also notes that the appellant's submissions engage with the contents of Article 120 and Article 81 of the 2001 Regulations, which the Board submits are of limited relevance to the issue before this Court as those provisions relate to the procedures which are to be adopted by a local authority where it proposes to carry out a sub-threshold development. In the present case, however, those provisions were inapplicable by virtue of s.179(6) of the 2000 Act.

30. Finally, the Board submits that the screening decision, and the statutory scheme in which that decision was taken, must be considered in the light of the obligations which arise in EU law, and the legislation must be given a conforming interpretation. It cites how that principle of conforming interpretation was reaffirmed, in the context of decisions taken under the 2000 Act, in *Callaghan v. An Bord Pleanála* [2017] IESC 39, and notes how the 2000 Act is legislation which transposes the EIA Directive. It submits that having regard to the aim and content of that Directive, it is entirely appropriate to read s.177AE in a manner which permits

the Board, when considering whether EIA is required, to do so having regard to the requirements of the EIA Directive, and in particular Article 4(4) and (5) of that Directive.

31. The Board refers to the two objections raised by the appellant to a conforming interpretation in this instance, and submits that both must be rejected for the reasons set out. It argues that the appellant's reliance on the decision of this Court in *An Taisce* is misplaced, as a conforming interpretation was not available in that case because the Court concluded that the "clear legislative intent…was to exclude public participation" in respect of an application for leave to apply for substitute consent. No such clear intent arises in this instance, as there is nothing in either s.177AE or s.175 which indicates that the Board is not entitled to consider issues relating to EIA to determine whether an EIA is required in respect of a proposed development.

Submissions of the State Respondents

32. The State respondents analyse the legislative scheme and submit that the overall thrust of s.177AE, even before one gets to subs. (15), is to empower the Board to investigate matters in relation to environmental impact. They argue that the precise language in s.177AE(15) is important. The Board's duty to ensure compliance with the requirements of s.175 does not depend on whether the local authority chooses to apply under both s.177AE and s.175, but rather arises where a situation exists as a matter of objective fact that the "proposed development …is… required to be submitted to the Board under s.175". The Board submits that contained therein, of necessity, is an implicit power granted to the Board, in respect of an application made on the basis that an AA is required, to determine whether an EIA is also required, which involves carrying out an EIA screening exercise.

33. The State respondents cite various authorities dealing with principles of statutory interpretation. They submit that the overall principle which emerges is that where a Court

attempts to construe the intention of the Oireachtas in a particular enactment, the Court will not seek to parse the text in blinkered, grammatical isolation, especially where to do so would clearly undermine the statutory object of the provision, would produce "administrative chaos" or render the statute "incapable of operation", but rather the Courts will have regard to the statutory pattern as a whole and will prefer a reading, where available, "that will truly effectuate the particular legislation", and in particular will aid rather than undermine the smooth operation of the legislative scheme. The Board submits that this principle holds with the greatest force where a reading of the provision (as urged by the appellant in this case) means that the Board cannot exercise its functions, namely to determine whether an EIA is required in respect of a sub-threshold development.

34. As regards considering the ambit of the statutory scheme as an aid to interpretation, the State respondents state that under s.177AE(15) the Board has a duty to ensure that an applicant for approval has also complied with the requirements of s.175, where the proposed development is one which is also required to be submitted under s.175. That is the statutory scheme which ought to operate smoothly. Their simple contention is that inherent in that duty is the power, and therefore a jurisdiction, to make a determination as to whether the application is one which is required to be submitted under s.175 – whether it in fact has been or not. It submits that any other reading leaves the scheme unworkable, or leaves EU law requirements to be defeated by the simple expedient of not applying under s.175 for any sub-threshold development.

35. The State respondents refer to certain authorities which deal with implied statutory powers. It submits that the Board in considering an application under s.177AE must have the jurisdiction to verify that an EIA is also not required in respect of a sub-threshold development. Without such an implicit power to screen for EIA, s.177AE makes no sense and is inoperable. It is submitted that the Oireachtas clearly intended that the Board would be able to carry out a

screening under s.177AE, as otherwise it would be left without the ability to screen sub-threshold developments for which approval is sought under that section.

36. The State respondents conclude by considering some authorities dealing with the principle of conforming interpretation. They submit that the Board was required by EU law to carry out a screening exercise on the sub-threshold development, and that the Board considered that it could carry out that function in the context of an application made under s.177AE. They argue that the duty to seek a conforming interpretation favours the conclusion of the High Court that the provision allows the Board to determine as to whether s.175 applies, and that amounts to a screening decision in all but name.

Submissions of the Council

37. The Council submits that the appellant's entire case rests on a narrow, literal and formalistic reading of s.177AE. However, this approach ignores the established principle that central to ascertaining the meaning of a statutory provision is a consideration of that provision in its context. In considering the statutory context, it was submitted that the Oireachtas, in disapplying entirely the Part 8 procedure where an EIA or AA was required (s.179(6)), must be taken as having intended that the Board, when seised of an application for development consent for a proposed local authority development under s.177AE, would have the power to carry out an EIA screening in respect of same. This is because the alternative construction posited by the appellant – that the Council was obliged to carry out the EIA screening under Article 120 of the 2001 Regulations – not only (on the appellant's own case) offends Article 9(a) of the AA Directive, but also results in an absurdity. The absurdity is that one body, the Board, would be seized of the application for planning approval and the requirement to carry out an AA, but could not consider the requirements of the EIA Directive, whereas another body, the developer itself, would carry out a ring-fenced EIA.

38. The Council goes on to consider the terms of s.177AE itself. It highlights the objective language as to whether a proposed development is also "required" to be submitted to the Board under s.175. It submits that the provision is not framed by reference to whether the local authority determines or has determined that an EIA is required and that a s. 175 application was therefore being made; rather, the question is whether, as an objective matter of fact and law, an EIA is required. Implicitly, therefore, this is something that the Board can consider in an application made to it under s.177AE, and it is clearly something that it ought to consider where, as here, submissions are made to it by third parties arguing that an EIA is required and that, therefore, s.177AE(15) is engaged.

39. It is submitted that s.177AE(15) moreover must be read in the context of the earlier references to the Board being required to consider "the likely effects on the environment of the proposed development". The Council submits that it is utterly illogical and absurd to suggest that the Board is obliged to consider likely effects on the environment, but to close its mind as to whether those effects are such that an EIA is required and that, therefore, the requirements of s.175 also apply.

40. To the extent that it is necessary to do so, the Council also relies on the obligation of the Courts to construe national legislation, as far as possible, in a manner consistent with EU law. It suggests that the appellant invites the Court to adopt a construction which would frustrate the proper and efficient implementation of the requirements of the EIA Directive. It submits that, faced with such arguments, the Courts should prefer an available construction which would give effect to the requirement for EIA screening by a competent authority.

41. Finally, and strictly in the alternative, the Council submits that even if the Court considers that the Board did not have the *vires* to conduct an EIA screening as a matter of national law, the Board nevertheless acted in conformity with the substantive requirements of EU law by carrying out an EIA screening. In these circumstances, the Council submits that the

Court should, in the exercise of its discretion, decline to grant an order quashing the Board's decision.

Decision

42. In my opinion the following issues arise, or may arise, for decision in this appeal:

(a) Whether the Board has jurisdiction to conduct a screening for EIA in an application made under s. 177AE of the 2000 Act; and

(b) If the answer to (a) is no, whether the Court should grant the discretionary remedy of *certiorari* in the circumstances of the present case.

The First Question: Jurisdiction

43. As set out above, the trial judge was of the view that the Board's jurisdiction to conduct EIA screening could properly be read into s. 177AE by necessary implication from s. 177AE(15). I am satisfied that the trial judge was correct in reaching this conclusion, for the following reasons.

44. Firstly, it is necessary to consider s. 177AE(15) in the light of its statutory context, and having regard to s. 5 of the Interpretation Act 2005. Subsection (15) provides as follows:

> "Where a proposed development to which this section applies is also required to be submitted to the Board under section 175, it shall be sufficient for the applicant to make one application to the Board provided that the applicant complies with this section and section 175 and in such a case the Board shall issue one decision in relation to the application under this section and section 175."

45. I accept the appellant's submission that this provision is ultimately dealing with a matter of administrative convenience, *i.e.* it is designed to address a situation where both AA is required (under s. 177AE) and EIA is also required (under s.175). It provides that two separate

applications in respect of the same proposed development can be avoided, and that a single application for approval can be made, provided that the applicant complies with the requirements of both s.177AE and s.175.

46. However, the trigger for this potential easing of the administrative burden is that the proposed development, to which s.177AE applies because an AA is required, "is also required to be submitted to the Board under s.175". Clearly somebody may have to make a determination, on an application under s.177AE, as to whether the provision has been triggered because an EIA is also required, which determination is the equivalent in substance of a "screening" determination. Section 177AE is not explicit as to who is to make that determination, but it appears that there are only two possible candidates. The appellant says it must be the local authority, who are the applicant for approval, while the respondents and the notice party say it must be the Board.

47. In the circumstances s. 177AE could be viewed as obscure or ambiguous on the issue of who has jurisdiction to make such a determination. Section 5 of the Interpretation Act, 2005 provides that in construing a provision of any Act that is obscure or ambiguous, the provision shall be given a construction that reflects the plain intention of the Oireachtas, where that intention can be ascertained from the Act as a whole. (For a very good recent analysis of the origin and effect of this section, see the judgment of Murray J. for this Court in *Heather Hill Management Company CLG v. An Bord Pleanála* [2022] IESC 43, at paras. 117 – 128). In my opinion the plain intention of the Oireachtas can be ascertained from the 2000 Act as a whole, and the intention was that the Board would have jurisdiction to make an EIA screening determination during the course of a s. 177AE application.

48. It is clear that the Board is the competent authority which the Oireachtas designated as responsible for granting approval for applications under both s. 177AE and s. 175. It is also clear that the Oireachtas intended that the Board, when dealing with an application under s.

177AE, would consider issues relating to potential environmental impact. This can be seen from a consideration of how the provision actually operated in the present case.

49. Section 177AE(4)(a)(iii) envisages the making of submissions and observations by third parties to the Board relating to "the likely effects on the environment of the proposed development", and in the present case the appellant did make such submissions in their Planning Submission dated February, 2019. By letter dated the 21st May, 2019, the Board required the Council to furnish further specified information in relation to "the effects on the environment of the proposed development", in accordance with s. 177AE(5)(a)(i) of the Act, and the Council furnished that further information by a report dated the 11th July, 2019.

50. Section 177AE(6) then provides that the Board, before making a decision as to approval of a proposed development, shall consider any such submission or observations or information relating to, *inter alia*, "the likely effects on the environment of the proposed development". In the present case it is clear that the Board did consider potential environmental effects as part of the decision-making process under s. 177AE. As set out at para. 7 above, the Board decided to grant approval "generally in accordance with the Inspector's recommendation", which recommendation had included an EIA screening determination whereby she considered that there was no requirement to undertake an EIA. The formal order of the Board approving the proposed development stated that having regard, *inter alia*, to the nature, scale and extent of the proposed development, it "would not adversely affect the environment".

51. Having regard to the explicit power and duty of the Board to consider the likely effects on the environment of the proposed development, it seems to me that the Board must have, as a necessary incidental power, the power to make the determination which may arise under s. 177AE(15). While the subsection "could have been more felicitously drafted" (as per Lynch J. in *McGlinchey v. Governor of Portlaoise Prison* [1988] I.R. 671, at 681) so as to declare expressly by whom the determination was to be made, in my opinion the intention of the

Oireachtas, which can be ascertained from the Act as a whole in accordance with s. 5 of the 2000 Act, was that this determination was to be made by the Board.

52. I accept the submission made on behalf of the Council that the alternative construction posited by the appellant, that the Council must make the necessary determination, would result in an absurdity. The absurdity would be that the Board is designated as the competent authority generally responsible for performing the duties arising under s. 177AE (and indeed under s. 175), including the express duty to consider the likely environmental effects of the proposed development, but the developer itself would make the determination as to whether there is a real likelihood of significant effects, and thereby determine whether EIA is also required. Such a construction would not reflect the intention of the Oireachtas, in my opinion.

53. The intention of the Oireachtas can also be ascertained from s.179 of the Act, and from a consideration of the effects of that provision on relevant parts of the 2001 Regulations. A central aspect of the appellant's argument at the hearing was that it is unnecessary for the Court to find an implicit jurisdiction for the Board to make an EIA screening determination under s. 177AE, as there are already elaborate provisions governing such screening, where a local authority proposes to carry out a sub-threshold development, located in Article 120 of the 2001 Regulations. Under these provisions it is the local authority who makes a screening determination in the first instance, and if it determines that an EIA is not required, then it must indicate that conclusion in the notice which it is required to publish pursuant to Article 81 of the 2001 Regulations. A third party then has a right to apply to the Board for a screening determination within four weeks "beginning on the date of publication of the notice referred to in Article 81(2)", by virtue of Article 120(3)(b).

54. While the above argument appears attractive at first glance, in my opinion it ignores the implications of s. 179(6) of the 2000 Act. Article 81 is contained in Part 8 of the 2001 Regulations, which Part implements and supplements s.179 of the Act, whereby certain

prescribed local authority development is required to undergo a form of public consultation procedure. However, s.179(6)(e) provides that s.179 shall not apply to proposed development which "is development in respect of which an appropriate assessment is required under s. 177AE, or under any other enactment".

55. In the present case it was clear from at least the date of the High Court order in the previous judicial review, *i.e.* the 8th January, 2019, that the proposed development was development in respect of which an AA was required. As a consequence, the s. 179 procedure was disapplied by virtue of s. 179(6)(e), including the detailed procedure in Part 8 of the 2001 Regulations made pursuant to s. 179(2), which part included the notice requirement in Article 81 of the Regulations. The additional consequence was that Article 120 was rendered inoperable and inapplicable to local authority sub-threshold development requiring AA, as that Article could not apply in circumstances where there is no Article 81(2) notice to trigger the operation of Article 20(3)(b).

56. While the above excursion through the legislative maze may appear somewhat convoluted, this may be partly a consequence of the legislative history, whereby the AA provisions were subsequently superimposed upon the original provisions governing local authority development. Nevertheless, in my opinion the same intention of the Oireachtas can again be ascertained from s. 179(6) of the Act, *i.e.* the intention that, in respect of development where AA is required, EIA screening should not be carried out in the usual way by the local authority developer, but instead should be carried out by the Board as the competent authority under s. 177AE.

57. Secondly, the fact that the AA screening cannot be lawfully carried out by the Council pursuant to Article 120 provides another justification for holding that the Board has an implied jurisdiction pursuant to s. 177AE. It was common case at the hearing of this appeal that an EIA screening determination is required by EU law, and therefore some competent authority

has to do that screening. "There is clear judicial authority for the proposition that statutory provisions should be read, where possible, so as to produce a workable and coherent interpretation": per Hogan J. in his judgment for this Court in *Pembroke Road Association v. An Bord Pleanála* [2022] IESC 30, at para. 43. In the present case the above interpretation as to the Board's implied jurisdiction is the only possible interpretation which produces a workable interpretation of the statutory scheme.

58. Thirdly, the appellant relied on an argument relating to the "practical implications" of the Board making a screening determination under s. 177AE(15) to the effect that EIA was also required. It argued that, having exercised any such jurisdiction, the Board would then have no jurisdiction to require an applicant to submit an EIA report, or to refuse the application if the applicant refused to furnish an EIA report, or to assess the adequacy of the information if an EIA report was submitted.

59. In my opinion this argument ignores an important part of the express terms of s. 177AE(15). If the Board makes a screening determination under that provision to the effect that EIA is required, then the applicant for approval has two options. It can make a separate application for approval under s. 175 if it chooses to do so. Alternatively, it can make or continue to make the one application to the Board "provided that the applicant complies with" both s. 177AE and s. 175. In that scenario, as part of also complying with s. 175, the applicant may have to comply with various requirements arising under s. 175, such as the submission of an EIA report under s. 175(1), or the furnishing of further information under s. 175(5)(a). If the applicant fails to comply with any such requirement, then the Board has the power to refuse approval, when issuing "one decision in relation to the application" under s. 177AE and s. 175, as per s. 177AE(15).

The Second Question: Discretionary Remedy

60. As regards the second question, the Court notes the submission made by the Council that it would be disproportionate in the circumstances to quash the approval granted by the Board, even if it were held that there had been a technical procedural error. These circumstances include the fact that the Board had a duty to consider the likely effects on the environment before making a decision to grant approval under s. 177AE(6), and the fact that the appellant has taken no issue with the substantive lawfulness of the Board's EIA screening conclusion. While in my opinion there seems to be a great deal of force in this submission, it is unnecessary for the Court to give a definitive answer to this question in the light of the above answer to the first question.

Conclusion

61. In conclusion, I agree with the trial judge that the Board does have jurisdiction to conduct a screening for EIA in an application made under s. 177AE of the 2000 Act. I would therefore dismiss the appeal.