THE HIGH COURT

JUDICIAL REVIEW

[2024] IEHC 704

2023/1410 JR

IN THE MATTER OF SECTION 50, 50A AND 50B OF THE PLANNING AND DEVELOPMENT ACT, 2000 (AS AMENDED)

BETWEEN

MINOA LIMITED

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

AND

BLUE AND WHITE DIAMOND LIMITED

FIRST NOTICE PARTY

AND

PERSIAN PROPERTIES

SECOND NOTICE PARTY

JUDGMENT of Mr. Justice Mark Heslin delivered on the 10th day of December 2024

Introduction

1. In these proceedings the applicant seeks to quash the respondent's decision to grant planning permission to the first notice party. This decision was the third in a series of permissions. The challenge is advanced on the basis of 9 separate grounds, all of which were pursued at the hearing which ran for 3 days. This judgement begins with a setting out, in chronological order, of the relevant history which includes separate legal proceedings concerning a disputed right of way as well as the first two planning permissions. This allows for the decision under challenge to be seen in context, following which each of the 9 grounds of challenge are addressed.

The site

2. To understand the background, it is useful to refer to the relevant property, which is described as follows in the report (ABP-313572-22) dated 3 March 2023 which was prepared by the respondent's inspector:

> *"1.1 The site is located at Merrion Street Lower in Dublin city centre. It is located on the eastern side of the street between Clare Street and Lincoln Place. It is situated between the Davenport Hotel and No. 1 Merrion Square North, which backs on to the subject site. The Mont Clare Hotel, on the western side of Merrion Street Lower, is located directly opposite the site. The site accommodates a wayleave vehicular access between the office block and the adjoining Davenport Hotel to the north. This provides access to the rear of nos. 1-4 Merrion Square adjacent to the southern boundary of the site"* (the "site").

Sale by the applicant to the second notice party

3. By indenture of Transfer dated 2 July 1992 (otherwise "Transfer") the second applicant, as purchaser, acquired the property described therein from the applicant Minoa Ltd (otherwise "Minoa"), as vendor.

4. The second notice party, Persian Properties Unlimited Company (otherwise "Persian Properties") and the first notice party, Blue and White Diamond Ltd, (otherwise "BWD Ltd") have common owners and directors.

Right of way

5. The Transfer reserved the vendor's right of way to pass over certain of the sold lands.

6. On 23 November, 2020 Cremin & Sutton Consulting Engineers ("CS Consulting") produced a report which had been commissioned by Persian Properties, comprising of a "swept path analysis", indicating the vehicular movements from Merrion Street Lower,

over the right of way through Persian Properties' lands, to the rear of the property owned by Minoa.

3 metre underpass

7. The conclusion reached by CS Consulting was as follows:

"The only vehicle that can complete the swept path vehicular movement from Merrion Street Lower, through our client's lands, over the existing right of way to the rear of the neighbouring landowner property complying with the ROW boundary is a large family saloon car.

All other larger vehicles sizes exceed the ROW boundary line for both scenarios and as the new proposed building line does not impede on the ROW boundary,

The new proposed building will only provide a clear 3m underpass but notwithstanding this limitation, a vehicle exceeding this height will in reality exceed the boundary of the existing ROW in any case." (emphasis added)

8. The said report by CS Consulting was provided to the applicant's solicitors in February 2021. The notice parties submit that the applicant has never engaged with the contents of the report by CS Consulting and there was certainly no evidence put before this Court to the contrary.

9. During the course of oral submissions, Counsel for the applicant suggested that the Latin phrase *cuius est solum eius est usque ad coelum et ad infernos* applied to the applicant's right of way entitlement (roughly translated: "*To whomsoever it belongs, it is his all the way to the heavens and all the way to hell*", being the principle that the owner of land owns the air above and the ground below the land in question).

10. As regard the foregoing, Counsel for the notice parties submits that, whilst this presumption applies to freehold ownership, it has no application to a right of way. Leaving aside the force in that submission, and the fact that there is certainly a 'right of way' dispute between the applicant and the notice parties, I want to make clear that this is a dispute which falls to another Court to determine. Nothing in this judgment should be interpreted as a view, either way, on that dispute. It is clear, however, that the backdrop to the present proceedings includes a right of way dispute which is both long-running and unresolved.

11. During the course of oral submissions, Counsel for the applicant opened certain correspondence which passed between the solicitors for the applicant and notice parties, respectively, in relation to the right of way dispute. Whilst I will refer to certain of it in due course, it is useful to turn at this stage to the relevant planning history to see how development on the site has progressed over the years.

Demolish existing building and construct 5-storey offices

12. In the context of seeking what became the first planning permission (reg. ref. 3725/18) SSA Architects, as agent for the applicant for permission, provided a response, dated 14 December 2018, to the request for further information which had been made by Dublin City Council (otherwise "DCC"), stating *inter alia*:-

> *"The current proposal to demolish this and construct a new contemporary building with restrained, rhythmical elevation that respects the surrounding Georgian buildings is more appropriate in this case. The new building will also create a step down from the Davenport to No. 1 Merrion Square that reinforces the notion of a streetscape. The setting back of the upper floors is also consistent with respect of the significance of Merrion Square as an important Georgian area of Dublin."*

13. It is common case that the first planning permission (planning ref. 3725/18 and ABP ref. PL29S.30P676, as amended by planning ref. 4296/19) permitted the demolition of a pre-existing building known as the Merrion Building and the construction of a five storey office building on the site of 1,232 square metres.

14. Minoa appealed DCC's decision to the respondent, An Bord Pleanála (otherwise "the Board").

Inspector's 2019 report

15. The Board's Inspector produced a report dated the 17th May, 2019 ("the Inspector's 2019 report). Para. 6.3 of the Inspector's 2019 report outlines Minoa's grounds of appeal. In summary, it was argued:

1. That the proposed development would encroach upon adjoining lands and that the proposed building would oversail the boundaries of 2-3 Merrion Square;

2. That the proposed office development would oversail an existing right of way and impede vehicular access to the rear of 2-3 Merrion Square;

3. That the proposed development did not protect the existing character of the area; and

4. That due to its scale, height and bulk, the proposed development was not in keeping with the area and would have adverse impact on the curtilage of numerous protected structures in the vicinity.

16. As can be seen from the foregoing, the right of way dispute has featured in the planning history for several years.

17. The Inspector's 2019 report went on to note the responses to the grounds of appeal. These included a specific response to the right of way issue in which reference was made, on behalf of the applicant for planning permission, to the 3 metre height over the right of way. Paragraph 7.5 of the Inspector's 2019 report includes:

> " *It is also stated that there is no blocking of the existing right of way. Furthermore, it is stated that this is a civil matter that is outside of the scope of the planning system. Drawings are submitted which illustrate that the proposal will have a minimal impact on services which can be provided along the right of way. The height over the right of way is confirmed as 3 metres minimum."*

18. The Inspector considered that the Board should uphold the decision of the planning authority and grant planning permission.

19. For reasons which will become obvious in due course, it is useful to note that at paragraph 10.0 of the Inspector's 2019 report, the following was stated as regards "Appropriate Assessment":

> *"Having regard to the nature and scale of the proposed development and nature of the receiving environment together with the proximity to the nearest European site, no Appropriate Assessment issues arise and it is not considered that the proposed development would be likely to have a significant effect individually or in combination with other plans or projects on a European site."*

Parent permission granted - 10 June 2019

20. The grant of planning permission by the Board in respect of the first application was made on 10 June, 2019 (i.e. the "parent permission" or "first permission"). The applicant did not seek to challenge the parent permission by way of an application for judicial review. As presently discussed, one of the 9 grounds advanced in these proceedings is the applicant's contention that a similar decision on the topic of Appropriate Assessment is unlawful.

October 2019 - application to amend (ref 4296/19)

21. An application was subsequently made under register ref. no. 4296/19 seeking amendments to the parent permission. This second planning application was made in October 2019 and sought various amendments to the parent permission, namely:

> *"(i) An increase of 178 sq.m. in total floor area across the ground, first, second, third and fourth floor levels to provide for an office development with a total growth floor area of c.1,410 sq.m.;*
> *(ii) An increase in the permitted building height from 17.83m to 18.36m;*
> *(iii) Minor elevational changes to include glazing on the eastern façade;*
> *(iv) Reconfiguration of the approved ground floor level to include a reception area, breakroom, W.C. & shower facilities, circulation areas and services; and*

(v) An increase in the total no. of bicycles parking spaces to be provided on site from 20 no. spaces to 30 no. spaces".

The second permission – 6 August 2020

22. Minoa made no objection to this application. The decision by Dublin City Council to grant permission on foot of the second application issued on 06 August, 2020. It is common case that Minoa did not appeal to the Board the grant of this "second permission".

Correspondence between the parties - 2021

23. Before coming to the third planning application and the third permission which is at the heart of these proceedings it is useful to note that the dispute concerning the right of way which featured when planning permission was first sought, remained a 'live' issue prior to the third application. Correspondence on the right of way issue passed between the solicitors for the applicant and notice parties, respectively.

February 2021

24. By way of example, on 16 February 2021, the applicant's solicitors wrote to the solicitors for the notice parties stating *inter alia*:

"We request that your client refrains from commencing any works which interfere with the right of way accepted and reserved to our client. If your client interferes with the said right of way in any manner, our client shall have no option other than to take the necessary steps to protect its rights including the seeking of interim and/or interlocutory relief…"

December 2021 - works commence

25. At para. 23 of the affidavit sworn in these proceedings by Mr. O'Callaghan (a Director of each of the notice parties) it is averred *inter alia* that: *"the works commenced in December 2021"*. This is an uncontroverted averment. Thus, work began at the site almost 3 years ago. In the manner presently explained the demolition of the previous building and the construction of the 5-story office block occurred before these proceedings were served by the applicant.

2022 correspondence

26. Jumping ahead in time to 26 July 2022, the applicant's solicitors stated *inter alia*:

"Lest there be any doubt, let us make it quite plain that our client enjoys an express and unrestricted right of way for all purposes over the laneway for the development of their property and for all other purposes. That necessarily includes a right of way appropriate for construction vehicles of any size. Your client has long been notified that our client intended to protect its rights and we refer to our

previous correspondence including correspondence dating back to 16 February, 2021.

It is not for our client to monitor your client's activities but for your client to respect our client's legal entitlements and not build in such manner as to restrict our client's legal property entitlement…"

27. Correspondence sent by the solicitors for the notice parties made their position equally clear. By way of example, in a letter of 2 August 2022 they stated *inter alia:*

"There appears to be a disconnect between our respective views as to the extent of your client's right of way. The dimensions of your client's right of way are clearly set out in the maps appended to the deed of transfer dated the 2nd July, 1992. In that regard we have previously furnished you with an engineer's report setting out the dimensions of vehicles that can pass within the confines of your right of way. It is physically impossible for construction vehicles or indeed any vehicle larger than a saloon car to traverse the right of way reserved in the 1992 transfer on account of the fact that the passageway and turn are too narrow to accommodate vehicles of greater size than this. It cannot be ignored that you have assiduously avoided addressing the contents of the Sutton and Cronin report despite being furnished with same in February 2021…"

28. It is sufficient to say that the correspondence discloses a stark difference of opinion as to the nature and extent of the right of way, including whether a 3-metre height clearance amounted to an interference with same.

August 2022 - Plenary proceedings by Minoa regarding the right of way

29. In August 2022, the applicant instituted plenary proceedings against the notice parties in relation to the right of way issue [entitled *Minoa Ltd v. Persian Properties Unlimited Company and Blue & White Diamond Ltd*, *High Court record number 2022 No. 4230P*] (otherwise the "right of way proceedings". As presently explained, those proceedings have yet to come to hearing.

Relief sought in the right of way proceedings

30. In the right of way proceedings, Minoa seeks declaratory relief as regards the nature and extent of the right of way; an injunction to restrain the notice parties from breaching or interfering in or restricting the applicant's right of way; an injunction to restrain the notice parties, their servants or agents, from trespassing on the plaintiff's lands; damages for trespass; aggravated or punitive damages for conscious interference with express rights; and damages for breach of duty, breach of contract and breach of statutory duty.

No injunction sought to prevent building works

31. Recalling that building works commenced in December 2021, it is relevant to note that, despite instituting plenary proceedings, the applicant has never sought interim or interlocutory relief to prevent the notice parties from carrying out building works at the site.

Procedural history of Minoa's plenary proceedings

32. The plenary summons was served on 12 August, 2022. A statement of claim was delivered by the applicant (as plaintiff) on 24 November, 2022. The notice parties (as defendants) served a notice for particulars on 8 December, 2022. The applicant (as plaintiff) provided replies to particulars on 19 December, 2022.

The third application for planning permission

33. Before leaving 2022, it is appropriate to note that on 21 January 2022 the first notice party applied for the planning permission which is at issue in these proceedings. It is appropriate to look at the planning history.

The first instance grant of permission by DCC – 19 April 2022

34. The proposal which was the subject of this third planning application was described in DCC's decision, as follows:

> *"Extension to the previously granted Reg. Ref. 4296/19, to extend the ground floor by an additional 68 sq. m. to the southeast, including staff shower facilities, drying rooms and break room together with a revised covered bicycle parking and plant area. It is also proposed to include minor elevational alterations to the northwest, northeast and southwest elevations".*

35. When granting permission at first instance on 19 April 2022, DCC stated:-

> *"Summary*
>
> *On balance, the proposed development will upgrade one of the most prominent locations in the city, contribute to the animation of the area, will allow for the construction of striking and innovative contemporary/modern building in an inner city location proximate to public transport and other amenities. The proposal exhibits a distinctive contemporary design which will make a positive contribution to the subject site and Dublin's urban fabric."*

36. I pause to say that the foregoing demonstrates that DCC looked at the third application for permission 'holistically' i.e. very much aware that it was an *amendment* to development which had been authorised previously.

Minor development

37. Without this Court purporting to have any planning expertise whatsoever, it seems fair to say that the third application sought only *minor* amendments to previously permitted development (bearing in mind that parent or first permission authorised the demolition of an existing building and the construction of a 5 story office building on the relevant site). Indeed, what was sought in this third planning application can fairly be considered to be minor, even compared to what was authorised by means of the second planning permission.

13 May 2022 - appeal by Minoa to the Board

38. On 13 May, 2022, the applicant appealed Dublin City Council's decision to the Board. The basis of the appeal was outlined in three sections which were summarised by the applicant, as follows, on the second internal page of the appeal:

> *"Observations:*
>
> *The basis of our appeal is outlined in three sections as follows:*
>
> 1. *The subject planning application should have been invalidated by Dublin City Council due to oversailing of adjacent lands – no letter of consent was sought nor is it appended to the planning application.*
> 2. *Subject planning application is invalid due to blocking of an existing right of way.*
> 3. *The development is not in keeping with the proper planning and sustainable development of the area:*
>   (a) *Loss of car parking.*
>   (b) *Poor office access facilities/amenity.*
>   (c) *Overlooking of adjoining properties.*
>   (d) *Impact on ability to develop adjoining properties.*
>   (e) *Visual and noise impacts from proposed location of external plant …"*
>
> (emphasis added)

39. Again, the right of way issue - by this stage the subject of separate legal proceedings - features large in the applicant's objections.

40. In circumstances where the third application for permission was made by the first notice party, it provided a response on 24 May 2022 addressing the grounds of appeal.

The Inspector's report – 3 March 2023

41. The Board's Inspector conducted a site inspection on 02 March 2023 and issued a report, dated 3 March 2023, which recommended a grant of permission, subject to certain conditions ("the Inspector's 2023 report" or "the Inspector's report").

Progress of the applicant's plenary proceedings in 2023

42. Meanwhile, on 10 March 2023, the notice parties (as defendants) delivered their defence in relation to the plenary proceedings brought by the applicant concerning the right of way dispute. On 11 July 2023, the applicant (as plaintiff) raised a notice for further and better particulars in the plenary proceedings. On 12 September 2023 further and better particulars were provided by the notice parties.

S.160 proceedings

43. Prior to the applicant's appeal having been determined by the Board, the notice parties unwisely began to carry out works on foot of DCC's decision, at first instance, to grant permission.

44. This prompted the applicant to issue proceedings pursuant to s.160 of the Planning and Development Act 2000 ("the 2000 Act') on or about 02 December 2022 ("the s.160 proceedings"). In the s.160 proceedings, the applicant sought *inter alia* to restrain the carrying out of development prior to the grant of permission by the Board.

18 January 2023 undertaking

45. On 18 January 2023, the notice parties provided an undertaking not to complete any further works, the subject of DCC's decision to grant permission, pending a decision by the respondent Board. It is common case that this undertaking was fully complied with. The s.160 proceedings were adjourned generally, with liberty to re-enter, having regard to the notice parties' undertakings which were recorded in an order made by this Court on 18 January 2023. The said order provided *inter alia* that the notice parties would pay the applicant's costs in respect of the s.160 proceedings.

46. Due to delays in processing appeals by the respondent, it was a further 9 months before the notice parties received notification that the applicant's appeal had been unsuccessful.

The Board's decision to grant the third permission – 28 September 2023

47. On 28 September 2023, the Board decided to grant permission generally in accordance with the recommendations in the Inspector's 2023 report.

Board Direction and Order

48. The exhibits include both the Board Direction (BD-013928-23) and the Board Order (ABP-313572-22) dated 17 October 2023, granting permission, subject to the conditions set out.

The decision challenged in these proceedings

49. The Board Order ABP-313572-22, dated 17 October 2023 (otherwise "the decision" or the "third planning permission") stated *inter alia*:

> *"Having regard to the Z8 zoning objective relating to the site as per the Dublin City Development Plan 2022-2028 where office development is a permissible use, it is considered that the size and scale of the proposed development, subject to compliance with the conditions set out below, would not seriously injure the amenities of the area or properties in the vicinity, would not be prejudicial to public health and would generally be acceptable in terms of traffic safety and convenience. The proposed development, would therefore, be in accordance with the proper planning and sustainable development of the area"* (emphasis added).

This is the decision which the applicant challenges in these proceedings.

19 October 2023 – correspondence to the applicant

50. On 19 October 2023 the notice parties' solicitors wrote to the applicant's solicitors stating *inter alia*:

> *"Please now see enclosed herewith An Bord Pleanála Order ABP-313572-22. It will be noted that the Board has upheld the previous grant of permission register reference 3115/22. In that regard we refer you to clause 3 of the terms of agreement executed by our respective clients on the 18th of January 2023 bearing our client's undertaking ceases once the Decision of An Bord Pleanála is communicated to the parties."*

51. In light of the foregoing, as of 19 October 2023, the applicant was aware that the notice parties were 'at large' to complete the construction on site. In the manner presently discussed, this is what in fact occurred.

Recommencement of works on site

52. At para. 38 of Mr. O'Callaghan's 15 February 2024 affidavit he avers that once the Board's decision was received *"…the notice parties were obviously anxious to complete the development of the building in accordance with the Permission and works re-commenced to that end almost immediately"* (emphasis added).

53. Furthermore, at para. 41 of the same affidavit, Mr. O'Callaghan avers *inter alia* that *"…the applicant's solicitor was specifically notified by letter dated 19th October 2023 that the rejection of their client's appeal by An Bord Pleanála brought the notice parties' undertaking (to not complete the works) to an end, and as such works could now recommence. No response was ever received to this letter…".*

54. The foregoing constitutes uncontroverted averments. The applicant did not reply to the 19 October 2023 letter.

No notice given that judicial review would be sought

55. The applicant did not call upon the notice parties to *refrain* from completing the works. Nor did the applicant give *notice* that judicial review proceedings would be commenced.

Procedural history of these proceedings

56. The applicant's statement of grounds was filed on 06 December 2023. On 07 December 2023, an application seeking leave to apply for judicial review was opened and adjourned to 15 January 2024, when the leave application was moved substantively.

15 January 2024 – notice parties first become aware of these proceedings

57. It is common case that the applicant did not correspond with the notice parties prior to moving the leave application. It is averred on behalf of the notice parties that the first time they became aware of the present proceedings was by way of 'online' newspaper reports in the Irish Times published on 15 January 2024 (see para. 7 of the statement of opposition, the contents of which have been verified *per* para. 3 of the affidavit sworn by Mr. O'Callaghan on 21 March 2024).

24 January 2024 - Service of these proceedings on the notice parties

58. It is common case that these proceedings were not served on the notice parties until 24 January 2024. This was some 3 months after the third planning permission issued.

59. It is also common case that this was the first correspondence received by the notice parties since the letter of 19 October 2023 sent by the notice parties' solicitors (giving notice that the undertaking not to carry out works had ceased).

Status of development at the site

60. The progress of the development, and the status by the time the present proceedings were commenced / served, is clear from the following uncontroverted averments made on behalf of the notice parties.

61. At para. 23 of Mr. O'Callaghan's 15 February 2024 affidavit he avers *inter alia* that, as of June 2022: *"works on site were well underway…"*.

62. At para. 44 of Mr. O'Callaghan's 15 February 2024 affidavit he avers *inter alia:-*

"The building, with the exception of the alterations granted under the third permission… was complete in September 2023 at which time a certificate of practical completion was issued."

63. In his 14 May 2024 affidavit, Mr. McKeon avers *inter alia* the following on behalf of the applicant:-

> *"… I did not have access to the subject property. A large amount of the impugned works concerned internal configuration of the notice parties' building, including the addition of showers. I simply could not – and did not – know whether these were completed on 5th December 2023."*

64. Core Ground 2 as pleaded in the applicant's statement of grounds dated 5 December 2023 states *inter alia* that "*the proposed development seeks to amend an earlier planning permission which is currently under construction and practically complete."* (emphasis added)

65. Para. 18 of the affidavit sworn on 5 December 2023 to ground the *ex parte* leave application, Mr. McKeon, as director of the applicant, averred *inter alia* the following:-

> *"The proposed development is an amendment to a previously granted planning permission which is currently under construction and is nearing completion. Should the first notice party not be restrained from carrying out the development by way of a stay on the within planning permission, I say and believe there is an appreciable risk that the works would be carried out and, should the applicant herein be entitled to relief of this honourable Court, such relief may be set seriously impaired as a result."* [para. 18] (emphasis added)

66. The written submissions of the applicant, dated 4 January 2024, for the *ex parte* leave application stated *inter alia* the following:-

> *"It is understood that the proposed development which was granted permission is already underway and indeed may be completed."* [para. 27];
>
> "*The development in question has been undergoing works for an extended period of time."* [para. 30] (emphasis added)

67. At para. 44 of the said affidavit Mr. O'Callaghan avers *inter alia*:

> *"Upon receiving notification from An Bord Pleanála on 19th October 2023 upholding the decision to grant the third permission, finishing works recommenced approximately one week thereafter. The finishing works and fit out were completed by the first week in December with snagging and commissioning and mechanical and electrical installations taking place up to the Christmas break. With respect to the plenary proceedings, the applicant issued a motion seeking further and better particulars which was initially returnable to 22 January 2024 and adjourned to 28 February 2024."* (emphasis added)

68. At para. 41 of his 15 February 2024 affidavit, Mr. O'Callaghan makes the following averment in relation to 15 January 2024, when the *ex parte* application was moved:

> *"However, by this stage the works were effectively completed…"* (emphasis added).

69. Having regard to the foregoing, I am satisfied that the evidence allows for the following findings of fact. First, the works permitted by the first (i.e. parent) planning permission and by the second permission were complete as of September 2023. In other words, a five store office building was then in *situ*. Second, from 19 October 2023, the applicant was on notice that the works authorised by the decision challenged in these proceedings would go ahead. Third, within a week of that notice, the works did in fact go ahead. Fourth, these were complete or substantially complete *prior* to the applicant serving the present proceedings on the notice parties.

The notice parties' position

70. The notice parties' attitude to these proceedings is captured by certain averments made by Mr. O'Callaghan in his 15 February 2024 affidavit:-

> *"10. While I am advised and believe that good grounds exist for the within proceedings to be struck out in-limine by way of a preliminary application, and the notice parties reserve their position in relation to bringing such an application, I am advised that in the first instance, an attempt should be made to secure an early hearing of the proceedings, in order to avoid a proliferation of applications and demands on Court time".*
>
> *"31. These proceedings are the latest in what has been a concerted effort to increase litigation pressure on the notice parties in order to compel an economic settlement of the right of way of proceedings".*
>
> *"48…* [The applicant]… *has expressly sought relief at para. 3 of the notice of motion pursuant to s. 50 (b) of the Planning and Development 2000 and/or article 9 (4) of the Aarhous Convention and/or s. 3 and 4 of the Environment (Miscellaneous Provisions) Act, 2011 directed at shielding itself from any cost consequences in the event the proceedings are unsuccessful, despite the fact that the proceedings are manifestly being brought for a commercial purpose and serve no environmental end."*
>
> *"50. I believe that these proceedings amount to a collateral attack on the notice parties' property rights and an abuse of the planning process. I believe that in the circumstances it is imperative that the proceedings are afforded as early a hearing date as possible."*

The applicant's position

71. The applicant trenchantly objects to the foregoing characterisation of these proceedings. In his 14 May 2024 affidavit, Mr. McKeon avers *inter alia* the following on behalf of the applicant:-

> *"8. I say that the within application is one made by the applicant in an attempt to quash a decision by the respondent granting permission to the first notice party in a manner which is procedurally and legally flawed. The interest of the applicant in the matter arises primarily from its proximity to the site upon which the impugned works – as the neighbour of the first notice party – and desire to ensure that any development works to be carried out thereof have been fully and properly considered by reference to all applicable law and material considerations. I say this is invariably relevant to the applicant whose amenities will be impacted by any improper development and/or environmental damage which may arise as a result of improper planning.*
>
> *9. I wholly refute and reject any implication that these proceedings are brought in bad faith or without proper purpose or that there has been any material non-disclosure."*
>
> *"14. I therefore wholly reject the assertion that these proceedings are seeking to do anything other than ensure compliance with the requirements of proper and sustainable planning by adherence to planning and environmental requirements in the grant of a planning permission to an adjoining premises by the respondent."*

72. There was no application made by any party to these proceedings for oral evidence to be given at the hearing. Thus, the matter proceeded on the basis of the affidavits, as sworn, and legal submissions, both written and oral.

Legal submissions

73. At this juncture, I wish to record my gratitude to Counsel and their instructing solicitors. Counsel for each party produced detailed written submissions which articulated the position of their respective clients clearly and comprehensively. These were supplemented by oral submissions made with clarity and skill. During the course of this judgment, I propose to refer to the principal submissions made by the respective parties and to the authorities which appear to me to be of most relevance to determining the issues in dispute.

Relevant legal principles

74. Before looking, in turn, at each of the 9 grounds advanced by the applicant it is useful to keep in mind certain established principles which must inform this Court's approach to the present proceedings. In this regard, I gratefully adopt paras. 57 and 58 of the judgment of Mr. Justice Holland delivered on 31 May 2022 in *Monkstown Road*

Residents' Association & Ors v An Bord Pleanála & Ors [2022] IEHC 318, (*"Monkstown RRA")* wherein the learned judge stated:-

> *"57. The starting point in planning and environmental judicial review is that "…the Board's decisions enjoy a presumption of validity until the contrary is shown" – Ratheniska. The presumption is rebuttable but the applicant for judicial review bears the burden of rebutting it and so proving invalidity. This implies that an applicant must lay a proper basis for criticisms of the adequacy of the Board's planning and environmental assessments and decisions.*
>
> *58. The nature of judicial review and the standard by which the Court will review administrative decisions, including planning and environmental decisions, was recorded in Redrock Developments. I set out a somewhat edited version of that record below:*
>
> - *Judicial review does not correct errors in or review decisions so as to render the High Court a Court of appeal from those decisions. Judicial review is radically different from appeal. In an appeal, the Court is concerned with the merits of the decision appealed. In judicial review, the Court is concerned with its legality. On an appeal, the question is 'right or wrong?' On review, the question is 'lawful or unlawful?'"*
> - *In judicial review the burden of proof of error of law, or fundamental error of fact leading to an excess of jurisdiction, or of such unreasonableness as flies in the face of fundamental reason and common sense (i.e. irrationality), rests on the applicant.*
> - *By the Planning Acts the legislature unequivocally and firmly placed planning and environmental questions, questions of the balance between development and the environment and the proper convenience and amenities of an area, in the jurisdiction of planning authorities and the Board. They are expected to have special skill, competence and experience in such matters. The Court is not vested with that jurisdiction, nor it is expected to, nor can it, exercise discretion with regard to planning matters.*
> - *Bodies charged with roles in the planning process are required to exercise judgment as to what may be the proper planning and development of an area. In coming to such a view, such bodies must have regard to the matters which the law specifies (such as a development plan). Disputed questions of expert opinion (such as the likely effect of a proposed development) may be resolved in a manner similar to the way in which similar issues would be resolved in the Courts, by hearing and, if necessary, testing competing expert evidence. However such expert bodies may bring to bear a great deal of their own expertise as to matters which involve the exercise of expert judgment and as to what is the proper planning and development of an area.*

- *In consequence flows "the deference that a Court should give to the decisions of different administrative bodies, depending on their nature and the extent of their expertise" and "a presumption that the decisions of a body such as An Bord Pleanála are valid until the contrary is shown". "One must assume, in the absence of any evidence to the contrary, that statutory bodies such as the Board in this case, exercise their powers and discharge their functions in a lawful and proper manner."*
- *The Court should be slow to interfere with the decisions of expert administrative tribunals. Conclusions based upon an identifiable error of law or an unsustainable finding of fact by tribunals must be corrected. Otherwise it should be recognised, as to tribunals which have been given statutory tasks and exercise their functions, as is now usually the case, with a high degree of expertise and provide coherent and balanced judgements on the evidence and arguments heard by them, that it should not be necessary for the Courts to review their decisions by way of appeal or judicial review.*
- *The circumstances under which the Court in judicial review can interfere with a decision on the basis of irrationality are limited and rare. The Court cannot interfere for irrationality merely on the grounds that (a) it is satisfied that on the facts as found it would have raised different inferences and conclusions or (b) it is satisfied that the case against the decision made by the authority was much stronger than the case for it. Once there is any reasonable basis upon which the planning authority or the Board can make a decision in favour of or against a planning application or appeal, or can attach a condition thereto, the Court has no jurisdiction to interfere. To establish that a decision-maker has acted irrationally so that the Court can quash its decision, an applicant in judicial review must establish that the decision-maker had before it no relevant material to support its decision. This is the "O'Keeffe" standard."* (emphasis added)

75. Although these principles are both 'settled' law and well known - having been articulated in a range of decisions by the Superior Courts - the limited role of this Court in judicial review of planning decisions, and the importance of an applicant laying the ground for a challenge, deserve particular emphasis.

76. I also adopt, with thanks, the helpful summary of relevant principles set out at para. 57 of the (20 February 2024) decision by Ms. Justice Phelan in *St. Margaret's Recycling and Transfer Centre Limited v An Bord Pleanála* [2024] IEHC 94:-

> *"57. It is well established that one should avoid a "legalistic over-analysis of decisions" (Sweetman v An Bord Pleanála [2021] IEHC 390 (para. 28), MR v International Protection Appeals Tribunal [2020] IEHC 41 (paras. 6-7), Ratheniska Timahoe and Spink (RTS) Substation Action Group and Another v An Bord Pleanála [2015] IEHC 18) but decisions should be read "not solely from an applicant's point of view (an impossible standard), but from the starting point of it being valid rather than invalid where possible. One has to stand back and ask what the decision is fundamentally saying" (O'Donnell & Ors v. An Bord Pleanála [2023] IEHC 381 (para.54). Planning decisions, documents and policy "should be construed not as complex legal documents drafted by lawyers but in a way in which members of the public, without legal training, might understand them" (Dublin Cycling Campaign CLG v. An Bord Pleanála [2020] IEHC 587 (para. 29)). The exercise of interpreting planning decisions, documents and policy "is not to be undertaken in the same way in which Acts of the Oireachtas or subordinate legislation would be construed". Such documents should not be "read narrowly and restrictively" (Dublin Cycling (para. 63); and Ballyboden v. An Bord Pleanála [2022] IEHC 7 (para. 120)) but rather in a holistic manner (Sherwin v. An Bord Pleanála [2023] IEHC 26 (para. 126)). As per Humphreys J. in Clonres CLG v. an Bord Pleanála [2021] IEHC 303 "a statutory document like a development plan fits into a wider statutory framework". In Redmond v. An Bord Pleanála [2020] IEHC 151 Simons J. found that the interpretation of the development plan is a matter of law and the views of neither the planning authority nor An Bord Pleanála can be decisive (para. 84)."* (emphasis added)

77. The principle that this Court should not read documentation such as a report prepared by the respondent's Inspector *"narrowly and restrictively"* but should do so *"in a holistic manner"* is particularly relevant in the present claim.

Pleading a claim with specificity

78. It is also appropriate to refer to relevant principles concerning the pleading of a claim in which judicial review is sought. In a very recent decision by the Supreme Court in *Concerned Residents of Treascon and Clondoolusk v An Bord Pleanála and anors* [2024] IESC 28, Mr. Justice Murray stated *inter alia* the following at paras. 41 and 42:-

> *"41. …The governing principles can hardly be in doubt. The Statement of Grounds required to initiate an application for leave to seek judicial review must identify the relief sought, and the "particular grounds upon which each such relief is sought" (O. 84 R. 20(2)(ii)). It is not sufficient for these purposes to give as a ground "an assertion in general terms of the ground concerned", but must "state precisely each such ground" (O. 84 R. 20(3)). A Statement of Grounds may be amended both at the time of the leave application (O. 84 R. 20(4)) or thereafter (O. 84 R.*

23(2)), but absent such an amendment the Rules are emphatic in their stipulation that "no grounds shall be relied upon or any relief sought at the hearing except the grounds and relief set out in the statement" (O. 84 R. 23(1)). It is because of these provisions that it has been stressed that judicial review is a procedure in which "leave must be sought in relation to specific reliefs aimed at specific decisions, on specific grounds" (Khashaba v. Medical Council [2016] IESC 10 (per O'Malley J. at para. 56).

42. It is thus to be expected that both the importance of the manner in which a claim is pleaded, and the strictness with which that requirement will be enforced, has been consistently stated and restated (Casey v. Minister for Housing, Planning and Local Government [2021] IESC 42 at paras. 29-32 per Baker J.). Whatever flexibility may be demanded by the interests of justice in a particular case, it is axiomatic – and indeed the Trial Judge rightly framed the matter in these terms – that the power of the Court to grant reliefs that are not specifically claimed is conditioned by and must (at least unless the affected parties agree otherwise) be exercised within the contours of the case as defined by the pleaded grounds…"
(emphasis added)

79. The foregoing dicta emphasises strict requirements which this Court must have regard to. In the manner presently explained, 'pleading points' arose during the course of the hearing. It is also appropriate to make clear that no application was ever made to amend the applicant's statement of grounds prior to, or during, the hearing.

80. The importance of pleadings in judicial review was also emphasised and explained at paras. 52 – 54 of Ms. Justice Holland's decision in *Monkstown RRA*. With reference to the judgment of Barniville J. (as he then was) in *Rushe v An Bord Pleanála* [2020] IEHC 122, Holland J. stated the following towards the end of para. 54 in *Monkstown RRA*:-

"Barniville J observed that the rules as to pleading apply:

'… 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.'

And he concluded that:

"'…. 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 AP, 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'." (emphasis added)

The 9 grounds of challenge

81. Having referred to the background and to certain relevant legal principles, I now turn to the 9 grounds upon which the applicant seeks relief, each of which was pursued at the hearing without any, or any material, concession being made by the applicant. Insofar as I will refer to submissions in opposition, it is fair to say that the respondent adopted the submissions made by the notice parties, and vice versa, in relation to each of the 9 grounds.

Ground 1

82. The applicant articulated the first of the legal grounds in the following terms:-

*"**Core Ground 1***

The Decision is ultra vires and invalid as the first notice party, the applicant for permission, is not the legal land owner of the land upon which development is proposed and no consent from the legal land owner for the making of a planning application was exhibited or provided to the planning authority, contrary to Article 22 (2)(g)(i) of the Planning and Development Regulations 2001, as amended."

83. I pause to say that, in the manner explained earlier, there was no longer development *"proposed"* by the time the applicant served these proceedings. In the manner examined earlier in this judgment, the evidence allows for a finding that the works authorised by the decision under challenge had been completed by then.

84. Art. 22(2) of the Planning and Development Regulations, 2001 ("PDR 2001") states that:

"(2)A planning application…shall be accompanied by –

(g)where the applicant is not the legal owner of the land or structure concerned-

(i) the written consent of the owner to make the application…"

The applicant's arguments

85. In written submissions, the applicant submits that the respondent has no jurisdiction to grant planning permission absent the landowner's written consent. The principal authority relied on by the applicant is the decision in *Sweetman v An Bord Pleanála* [2021] IEHC 16 ("*Sweetman*") wherein Hyland J. stated at para. 27 that:-

"…the requirements of Article 22(2)(g) of the PDR in my view go to the jurisdiction of the Board to deal with the application".

86. In oral submissions, it was asserted that an applicant for planning permission "*must be the owner of the property and the Board must be satisfied of this*".

87. The applicant submits that the absence of written consent from the landowner is fatal, rendering the planning decision *ultra vires* and invalid.

88. The gravamen of the applicant's submission is that the matter involves a simple 'binary' i.e. either the planning application was (i) sought by the owner of the property or with the owner's written consent, or (ii) it was not. The applicant contends that in the latter scenario, the planning decision is *ultra vires* and void.

89. The applicant submits that a purposive approach regarding Article 22(2)(g) of the Planning and Development Regulations 2001, as amended ("PDR, 2001") is entirely impermissible.

Opposing arguments

90. A number of points are raised by the notice parties and the respondent, collectively, in opposition to Core Ground 1. Their submissions can be summarised as follows. Core Ground 1 offends against the *jus tertii* rule. A purposive approach *is* permissible, and the purpose of Article 22 (2) (g) has been complied with. There was no breach of Article 22. Even if the foregoing were not so, the Court should exercise its discretion to refuse the relief in circumstances where the relevant landowner *opposes* the applicant's claim.

91. Reliance is also placed on the decision in *State (Alf-a-Bet) Limited v Monaghan County Council* [1980] ILRM 64 wherein Henchy J. stated (at 69) *inter alia* that:-

"…for what the legislature has prescribed, or allowed to be prescribed, in such circumstances as necessary should be treated by the Courts as nothing short of necessary, and any deviation from the requirements must, before it can be

overlooked, be shown, by the person seeking to have it excused, to be so trivial, or so technical, or so peripheral, or otherwise so insubstantial that, on the principle that it is the spirit rather than the letter of the law that matters, the prescribed obligation has been substantially and therefore adequately, complied with."
(emphasis added)

Jus tertii

92. It is appropriate to begin with the *jus tertii* issue. Insofar as the applicant seeks to rely on the decision in *Sweetman*, no *jus tertii* argument was raised in that case. On the contrary, the Court in *Walsh v An Bord Pleanála* [2021] IEHC 523, ("*Walsh*") distinguished *Sweetman* on that very basis, holding that the applicants were excluded from relying on Article 22 (2) (g) (i) in circumstances where they were not the landowners. The same situation applies in the present application. Minoa is simply not an affected landowner.

93. Mr. Justice Barrett began para. 11 of his decision in *Walsh* by stating:-

"11. In this regard, the Court has been referred, inter alia, to the judgment of Simons J. in *Heather Hill Management Co CLG v. An Bord Pleanála* [2019] IEHC 450 and, in particular, his observation that the purpose of Art.22(2)(g) "*is to guard against making of frivolous or vexatious planning applications by persons with no interest in the lands and, accordingly, with no prospect of being able to carry out the proposed development*", also noting in this regard that "*[I]t is doubtful whether An Bord Pleanála is required to interrogate issues of title at all*". All of this, with respect, seems perfectly correct;…".

94. Why the applicant's reliance on *Sweetman* is wholly misplaced can be seen from paras. 42 and 43 of the learned judge's decision in *Walsh*:-

" 42. Of more significance is the fact that the *jus tertii* point made in the within proceedings was not addressed by the judgment in *Sweetman* (nor does it seem from the judgment that it was even raised). Thus Hyland J. does not consider the proposition that Mr. Sweetman was not entitled to rely on grounds that in substance were grounded on the property rights of others; and hence *Sweetman* just does not address the *jus tertii* point that is being raised in the within application. As a consequence, this Court can reach its own view on the *jus tertii* point raised. In this regard the Court (a) holds firm to the truth that there is a distinction to be drawn between *locus standi* and *jus tertii* and (b) sees nothing in the PADA 2000 or otherwise in planning legislation to suggest that the Oireachtas intended to abandon this fundamental distinction in legal principle, the significance of which was touched upon by Hardiman J. in *A.* Neither does the Court see that in conferring landowner protection in Art.22(2)(g) (the object of which, to borrow again from *Heather Hill, op. cit.,* "*is to guard against* [the] *making of frivolous or vexatious planning applications by persons with no interest in the lands and,*

> *accordingly, with no prospect of being able to carry out the proposed development*") it was intended thereby to confer on all of us a power or entitlement to police the entitlements of private landowners.
> 43. Article 22(2)(g) falls to be complied with but the Court does not see that a universal right arises or was intended to arise to enforce it. A person may enjoy *locus standi* under s.50A, yet (as here) enjoy (through the application of the principle of *jus tertii*) no right to police compliance with Art.22(2)(g) by virtue of not being an affected landowner." (emphasis added)

95. In short, Minoa has no right to police compliance with Art. 22 (2) (g). Persian Properties has such a right but, far from alleging any breach of *its* rights, the second notice party has at all material times been aware of and in support of the planning applications made by the first notice party and the ensuing development on the site. Insofar as Core Ground 1 is concerned, the sole party entitled to raise the argument which the applicant seeks to advance is opposed to the applicant's claim.

96. The *jus tertii* point alone disposes of Core Ground 1. It should also be said that the applicant was aware of the decision in *Walsh* before the trial commenced. The significance of *Walsh* was set out at paras. 11-12 of the respondent's legal submissions dated 23 September 2024 and at paras. 37 and 38 of the notice parties' submissions dated 25 September 2004. Indeed, para 14 of the applicant's written submissions, dated 10 September also cites *Walsh,* albeit with the neutral citation "[2021] IEHC 453" (which would appear to be incorrect) and without quoting the relevant passages.

97. Para. 13 of the respondent's written submissions also cited *Heather Hill Management Co CLG v. An Bord Pleanála* [2019] IEHC 450 ("*Heather Hill 2019*") which Barrett J. cited with approval at paras. 11 and 43 in *Walsh* (as well as pointing out that the applicant had not referenced this, and other, relevant authority).

Worldport

98. In light of the foregoing, mention must be made of the principles set out in the judgment of Clarke J (as he then was) in *Hughes v Worldport Communication Inc.* [2005] IEHC 189 ("*Worldport"*), wherein the learned judge responded to the submission that he should re-consider the point at issue (which had previously been decided by Mr. Justice Kearns in *Re Industrial Services Limited* [2001] 2 I.R. 118). At para 14., he stated the following:

> "14. I have come to the view that it would not be appropriate, in all the circumstances of this case, for me to revisit the issue so recently decided by Kearns J. in *Industrial Services*. It is well established that, as a matter of judicial comity, a judge of first instance ought usually follow the decision of another judge of the same Court unless there are substantial reasons for believing that the initial judgment was wrong. *Huddersfield Police Authority –v- Watson* [1947] K.B. 842 at

> 848, *Re Howard's Will Trusts, Leven & Bradley* [1961] Ch. 507 at 523. Amongst the circumstances where it may be appropriate for a Court to come to a different view would be where it was clear that the initial decision was not based upon a review of significant relevant authority, where there is a clear error in the judgment, or where the judgment sought to be revisited was delivered a sufficiently lengthy period in the past so that the jurisprudence of the Court in the relevant area might be said to have advanced in the intervening period. In the absence of such additional circumstances it seems to me that the virtue of consistency requires that a judge of this Court should not seek to second guess a recent determination of the Court which was clearly arrived at after a thorough review of all of the relevant authorities and which was, as was noted by Kearns J., based on forming a judgment between evenly balanced argument. <u>If each time such a point were to arise again a judge were free to form his or her own view without proper regard to the fact that the point had already been determined, the level of uncertainty that would be introduced would be disproportionate to any perceived advantage in the matter being reconsidered</u>. In the absence of a definitive ruling from the Supreme Court on this matter I do not, therefore, consider that it is appropriate for me to consider again the issue so recently decided by Kearns J. and I intend, therefore, that I should follow the *ratio* in *Industrial Services* and decline to take the view, as urged by Counsel for the Bank, that that case was wrongly decided." (emphasis added)

99. *Worldport* was decided over two decades ago and, in the manner explained by the former Chief Justice, reflected long-established principles. Thus, the applicant was aware, before the trial, that where a point had already been decided upon by the Court, comity and consistency meant following the earlier decision and ruled-out re-analysis unless, in effect, substantial reasons existed for believing that the earlier judgment was wrong.

100. The applicant advanced no such reasons. The applicant did not suggest that the *ratio* in *Walsh* did not apply. The applicant advanced no basis for distinguishing *Walsh* and/or *Heather Hill* on *Worldport* principles. On the contrary, the applicant has simply not engaged with these authorities. Thus, the *jus tertii* point alone is fatal to the applicant's argument under Core Ground 1.

101. Without prejudice to the foregoing, I now turn to the next of the submissions made by the applicant, namely, that a purposive approach to Article 22(2)(g) is impermissible.

Purposive approach

102. The decision in *Walsh* makes perfectly clear a purposive approach <u>is</u> permissible.

103. Furthermore, in the 16 March 2022 decision of Mr. Justice Holland in *Heather Hill v An Bord Pleanála & Ors* [2022] IEHC 146, ("*Heather Hill 2022*") the learned judge stated (at para. 65):-

> *65. I respectfully agree with Simons J. and Barrett J. on this issue. In my view, and despite the blunt terms of Art.22(2)(g) PDR 2001 (for which in this case read Article 297(2)(a)), the Courts have, long-since, clearly and for good reason, taken a purposive, pragmatic and realistic approach to the owners' consent requirement and the view that its real purpose is to invalidate only frivolous and vexatious planning applications. The Courts properly seek to avoid having the Board enmeshed in title disputes outside its expertise or true role and function."*
> (emphasis added)

104. Art. 297 (2) (a), with which Holland J. was concerned, relates to strategic housing development, but 'mirrors' Art. 22 (2) (g).

105. In the manner examined, the jurisprudence, has made perfectly clear that the underlying *purpose* of Art. 22 (2) (g) is to guard against, what Simons J described in *Heather Hill 2019* as, the making of *"frivolous or vexatious planning applications by persons with no interest in the lands and, accordingly, with no prospect of being able to carry out the proposed development."*

106. How far divorced we are from the foregoing is illustrated by the reality that development not only commenced, by was complete, before the applicant served these proceedings. Furthermore, and recalling *Worldport,* the applicant has not sought to distinguish *Heather Hill 2019* or *Heather Hill 2022.*

107. In short, prior authority, which the applicant did not seek to distinguish on *Worldport* principes, wholly undermines the argument that a purposive approach to Art.22(2)(g) PDR 2001 is not permissible. As Mr. Justice Holland made clear in *Heather Hill 2022*, the Courts have "*long-since"* taken that very approach.

108. Without prejudice to the foregoing and lest I be wrong not to do so, I propose to look at relevant facts in the present case. This is because the facts illustrate very clearly that the underlying purpose of Article 22 (2) (g) *was* secured, following appropriate enquiries and a consideration of relevant information.

Relevant facts

109. As touched on earlier, the second notice party, Persian Properties, is the full owner of the relevant site. This can be seen from Part 2 of Folio 189643F which confirms that the address of Persian Properties is:"*16/20 South Cumberland Street, Dublin 2".*

110. The planning application for what became the parent permission specifies the self-same address for the applicant, being the *"O'Callaghan collection"*.

111. The names of the company's directors are listed and these include Mr. Charles O'Callaghan who has averred that he is a director of Persian Properties *and* the first notice party, BWD Ltd.

112. Similar comments apply in relation to the second planning application which was also made in the name of the "*O'Callaghan collection"*.

113. The third planning application named the same company directors, including Mr. Charles O'Callaghan, and confirmed that the registered address of the company was the same: *"16-20 South Cumberland Street, Dublin 2"*. However, this time, the applicant was identified as BWD Ltd, which later became the first notice party. This planning application was received by Dublin City Council on 21 January 2022 and named *"SSA Architects",* as agent.

Issue raised

114. On 23 February 2022, the Solicitors for Minoa wrote to DCC with an objection which stated *inter alia: "the inclusion of land not in the ownership of the applicant and without a letter of consent from the legal owner is contrary to the Planning and Development Regulations, 2001"*.

DCC request for information

115. On 16 March 2022, DCC wrote to SSA Architects seeking additional information and stating *inter alia* that: *"…the applicant is requested to demonstrate sufficient legal right to develop on the subject lands. It should be noted that the planning system is not designed as a mechanism for resolving disputes about title to land or premises or rights over land; these are ultimately matters for resolution in the Courts. In this regard, it should be noted, as s. 34 (13) of the Planning Act states, a person is not entitled solely by reason of a permission to carry out any development"* (emphasis added)

Information provided

116. On 21 March 2022, SSA Architects replied to DCC stating *inter alia*:-

> *"The applicant does have a sufficient legal right to develop the subject site and we enclose the relevant supporting folios. The applicant, Blue & White Diamond Limited and Persian Properties (named on the enclosed folio) are group companies with common ownership.*
>
> *The building does not sit within or oversail the trapezoidal portion identified by the adjoining landowner, so would not impact on the legal entitlement to build in any event. See below photograph and plan extract"* (emphasis added)

Qualified lawyer

117. During oral submissions at the hearing before me, it was contended on behalf of the applicant that the foregoing confirmation (that the applicant for planning permission

did have sufficient right to develop the site and that both are group companies with common ownership) should *not* have been relied upon, in circumstances where "*it was not an opinion by a qualified lawyer*".

118. With respect, the applicant for planning permission nominated SSA Architects as their agent. In that capacity, the agent conveyed information which was, in fact, entirely correct.

119. It is also important to say that the contents of the information provided by SSA Architects has never been impugned – not then, not since, not now.

120. Furthermore, it was never suggested that the application for planning permission was frivolous or vexatious.

Consideration by DCC

121. Having sought and been furnished with additional information on the question of the first notice party's legal entitlement to develop the lands, the subject of the third planning application, the following was recorded by DCC's planning and development department as of 22 April 2022:-

> *"DCC Planning Department comments*
> *Based on the documents submitted, it would appear that the applicant has sufficient legal right to develop on the subject lands. It should be noted that the planning system is not designed as a mechanism for resolving disputes about title to land or premises or rights over land; these are ultimately matters for resolution in the Courts. In this regard, it should be noted, as s. 34 (13) of the Planning Act states, a person is not entitled solely by reason of a permission to carry out any development."* (emphasis added)

122. This evidences DCC's consideration of the additional information sought by, and furnished to, it.

Guidelines

123. The foregoing also reflects compliance with the *"Development plans guidelines for planning authorities"* (2007), specifically, s. 5.13 which is entitled *"Issues relating to title to land",* and provide *inter alia*:-

> *"…where in making an application, a person asserts that he/she is the owner of the land or structure in question and there is nothing to cast doubt bone fides of that assertion, the planning authority is not required to enquire further into the matter. If, however, the terms of the application itself, or a submission made by a third party, or information which may otherwise reach the authority, raise doubts as to the sufficiency of the legal interests, further information may have to be sought under Article 22 of the Regulations. Only where it is clear from the response that*

the applicant does not have sufficient legal interest should permission be refused on that basis. If not withstanding any further information, some doubt still remains, the planning authority may decide to grant permission. However, such a grant of permission is subject to the provisions of s. 34 (13) of the Act referred to above…" (emphasis added)

124. In the present case, there is simply no evidence to suggest that the applicant for planning permission did *not* have sufficient interest to develop the site. Nor has the applicant proffered any evidence that the application for permission was *frivolous* or *vexatious* and the applicant has not pleaded that the planning application was either of those things.

Appeal to the Board

125. As can be seen from the Inspector's 2023 report, Minoa raised the same issue when appealing DCC's grant of permission. Section 6.2 of the Inspector's report begins as follows:-

"6.2 A third-party appeal by Minoa Limited, owners of nos. 2-3 Merrion Square, was lodged to the Board on 13th May 2022 opposing the local authority's decision. The grounds of appeal can be summarised as follows:

- *A trapezoidal portion of the site is not owned by the Applicant and a letter of consent has not been issued by the neighbouring owner to include it within the planning application. As such, the applicant should been invalidated by the local authority. Request the Board to deem the application invalid or refuse permission on this basis."* (emphasis added)

126. Section 7.1.1 the Inspector's 2023 report refers to the request for further information by DCC and the response to same. Reference is also made to the "*Development management guidelines for planning authorities*" (2007).

127. The consideration given to the issue is evident from para. 7.1.2 to 7.16 of the Inspector's report and it is plain that the Board had sufficient information to be satisfied that the application was neither frivolous nor vexatious.

128. There was also an explicit awareness of the 'safeguard' found in s. 34 (13) of the 2002 Act (which states: *"A person shall not be entitled solely by reason of a permission under this section to carry out any development"*).

129. In short, even if the *jus tertii* point was not dispositive of this aspect of the applicant's challenge (and it is), the evidence demonstrates that the respondent's

approach was entirely consistent with the provisions of Article 22 (2) (g) (i) of the Planning and Development Regulations 2001, as amended, and involved no legal error.

Frivolous or vexatious

130. There was never any question of the planning application being frivolous or vexatious. The present case involves two 'sister' companies within the same group, with common ownership, common directors and a common address, one acting as developer and the other as landowner, both opposing the applicant's claim.

131. Furthermore, and as touched on earlier, far from there been *"no prospect"* of development being carried out, the entire works were *complete* before papers were served by the applicant.

Insubstantial

132. Therefore, and recalling the guidance given by Henchy J. in *State (Alf-a-Bet) Limited*, even if there had been any technical breach (and I am satisfied that there was none) it could only be: "*so trivial, or so technical, or so peripheral, or otherwise so insubstantial that, on the principle that it is the spirit rather than the letter of the law that matters, the prescribed obligation has been substantially and therefore adequately, complied with"*.

Discretion

133. Even if the applicant had established a *prima facie* entitlement to relief under Core Ground 1 (and, for the reasons set out above, it has not) I am satisfied that, having regard to the principle articulated in *State (Alf-a-Bet) Limited,* the proper exercise of the Court's discretion, given the particular facts of this case, would have been to refuse relief on this ground.

134. Before proceeding to look at the next of the grounds advanced by the applicant, it seems appropriate to say the following.

135. It will be recalled that, whilst the Notice Parties took the view that "*good grounds exist for the within proceeding to be struck out in limine by way of a preliminary application*" and reserved their position in that regard, no such application was ever brought. In other words, neither the respondent nor the notice parties brought any preliminary application seeking to have the claim struck out as bound to fail, unsustainable, frivolous, vexatious or an abuse of process. To say this is not to criticise. For example the approach taken clearly avoided the possibility of, not one but two, time-consuming and costly court hearings (e.g. if a preliminary application to strike out the claim *in limine* proved unsuccessful).

136. Instead of a preliminary 'strike-out application', attempts were made *"to secure an early hearing of the proceedings, in order to avoid a proliferation of applications and*

demands on court time". That resulted in the 3-day hearing before me when the application was fought on the *merits*, rather than an assertion that the claim was bound to fail.

137. The fact that, as a result of an *ex-parte* application, the applicant was granted leave to seek judicial review necessarily means that this Court was satisfied, albeit at a *prima facie* level, and without having had the benefit of any counter-arguments, that there were substantial grounds for contending that the decision under challenge was invalid or ought to be quashed and that the applicant had a substantial interest.

138. Despite this not being an application to dismiss on a preliminary basis I feel it appropriate to say that a close analysis of Core Ground 1 with the benefit of an *inter partes* hearing reveals that this ground entirely *lacks* substance.

139. It will be recalled that the essence of Core Ground 1 was the proposition that unless an application for planning permission was by the owner of the property or with their written consent the planning decision is ultra vires, a purposive approach to Art. 22(2)(g) being allegedly impermissible. The foregoing is simply wrong, in light of authority decided prior to the present application being brought. In my view, despite the range of arguments made in support of Core Ground 1, none had any prospect of success. This is because prior authority ruled out that prospect and at no stage did the applicant seek to distinguish these authorities on *Worldport* principles.

Ground 2

140. The second of the 9 grounds advanced by the applicant is put as follows:-

> *"**Core Ground 2***
>
> *The Decision is irrational, unreasonable ultra vires and invalid in that it requires the agreement of a Construction Management Plan prior to the commencement of the development which is irrational and amounts to an impermissible delegation of decision-making powers contrary to inter alia Article 74(2)(h) of the Planning and Development Regulations 2001, as amended, in circumstances where the proposed development seeks to amend an earlier planning permission which is currently under construction and practically complete."* (emphasis added)

Pleading point

141. Before proceeding further, it should be noted that the provision relied on in applicant's pleaded in the case (Article 74(2)(h) of the 2001 Regulations) has nothing whatsoever to do with the respondent's power to impose conditions.

142. Article 74(2)(h) provides:-

> *"A notice referred to in sub-article (1) of a decision on an appeal under s. 37 of the Act shall specify –*
>
> *….*

(h) In the case of a decision to grant a permission – any conditions specifying points of detail relating to a grant of permission to be agreed by the planning authority and the person to whom the permission is granted." (emphasis added)

143. Earlier, I referred to principles governing the pleading of applications for judicial review, in particular, planning challenges. It seems to me that the application of those principles is fatal to Core Ground 2.

144. Lest I be wrong in that view, I propose to look at the substance of the argument made.

The applicant's argument

145. The applicant contends that condition 4 of the decision *"…constitutes an impermissible delegation of power by the respondent"*.

Condition 4

146. For the sake of clarity, condition 4 (as it appears in the respondent's Order, dated 17 October 2023) states the following:-

"4. The construction of the development shall be managed in accordance with a Construction Management Plan, which shall be submitted to, and agreed in writing with, the planning authority prior to commencement of development. This plan shall provide details of intended construction practise for the development, including hours of working, noise management measures and off-site disposal of construction/demolition waste.
Reason: In the interests of public safety and residential amenity."

The power to impose conditions

147. Neither the applicant's statement of grounds, nor legal submissions, refer to the respondent's power to impose conditions. This can be found in Section 34 of the 2000 Act, which states:-

"34 (1)
Where -
(a) an application is made to a planning authority in accordance with permission regulations for permission for the development of land, and
(b) all requirements of the regulations are complied with,
the authority <u>may decide to grant the permission subject to or without conditions</u>, or to refuse it." (emphasis added)

148. By virtue of s. 37 (1) (b) of the 2000 Act, the respondent Board enjoys the foregoing power.

149. Section 34 (4) specifies a long list of conditions which may be imposed under subsection (1) without prejudice to the generality of that sub-section. A Construction Management Plan (or "CMP") is certainly within the jurisdiction of the Board to impose by way of a condition. Furthermore s. 34 (5) specifies that:-

> *"(5) The conditions under subsection (1) may provide that points of detail relating to a grant of permission be agreed between the planning authority and the person carrying out the development…"*

150. The sole authority relied on by the applicant is *Boland v An Bord Pleanála* [1996] 3 I.R. 435 (at 466) wherein the Supreme Court examined what the Board is entitled to have regard to, when imposing *"a condition that a matter be left to be agreed between the developer and the planning authority"*.

151. However, the applicant has simply not engaged with relevant authority such as the decision of Mr. Justice Haughton two decades later in *Alen-Buckley v An Bord Pleanála & Ors* [2017] IEHC 541 ("*Alen-Buckley*") wherein (at para. 64) the learned judge stated:-

> *"This Court in People Over Wind v An Bord Pleanála [2015] IEHC 271 found conditions such as the requirement to submit a Construction Management Plan as being valid, notwithstanding that this involved leaving matters over to be finalised by agreement between the Developer and the Planning Authority."* (emphasis added)

152. Earlier, I quoted condition 4 *verbatim* and I am satisfied that the imposition of that condition did not offend the *Boland* principles, which were set out in full at para. 8.8 of the judgment of Mr. Justice Hedigan in *Dunnes Stores v An Bord Pleanála* [2016] IEHC 226 ("*Dunnes Stores*").

153. Furthermore, having referred to matters covered in a CMP, Hedigan J. went on to state, at para. 8.10 of the *Dunnes Stores* decision: -

> *"It seems to me that they are clearly in the nature of the technical details of construction which cannot be practically dealt with by way of individual conditions."*

154. It will be recalled that, in the present case, condition 4 requires that the CMP to be agreed shall provide details of *"intended construction practise for the development, including hours of work, noise management measures and off-site disposal of construction/demolition waste"*. To borrow from the final sentence of para. 8.10 of the *Dunnes Stores* decision, condition 4 *"is the appropriate way to deal with the construction details and falls well within the Boland test",* in my view.

155. The gravamen of the applicant's submission is that a CMP falls foul of *Boland*. However, the applicant has, again, failed to engage with authority which is directly to the contrary.

156. Once more, *Worldport* principles apply. There was no effort to distinguish the *Alen-Buckley* or *Dunnes Stores* decisions (both of which are referred to at para.25 or the respondent's written submissions).

157. On the topic of pleadings, Mr. Justice Haughton had the following to say in the *Alen-Buckley* decision (at para. 15):-

> *"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."*

158. In short, authorities with which the applicant has failed to engage are dispositive of this aspect of the claim, even if it had been correctly pleaded (which it was not).

Already underway

159. The applicant also contends that the Board's decision was irrational and ultra vires because construction works were already underway. As a matter of fact, the works already underway comprised development *authorised* by the parent permission and by the first amendment thereto.

160. With no disrespect intended, this argument fails to appreciate that the CMP referred to in condition 4 of the decision under challenge is specific to the works authorised by *that* decision.

161. In other words, the CMP required by condition 4 of the third permission relates to the works authorised by that third permission.

162. The applicant's misunderstanding of the position is illustrated by the submission that condition 4 *"cannot be complied with by reason of impossibility where the respondent has already begun development"* (see para. 17 of the applicant's written legal submissions).

163. The foregoing ignores the fact that the works which were underway on site, from 2021 onwards, were authorised pursuant to the parent permission.

Parent permission CMP

164. It is also important to note that the parent permission contained a condition requiring a CMP. The Inspector's 2019 report (dated 17 May 2019 re ABP303676-19)

refers to conditions at section 14.0. These conditions, inter alia, requires a CMP to be submitted and agreed with the planning authority.

Board Order – 10 June 2019

165. Conditions 6 and 7 of the Board's order (ABP-303676-19) dated 10 June 2019 state inter alia:-

> *"6. Construction and demolition waste shall be managed in accordance with a construction waste and demolition management plan, which shall be submitted to, and agreed in writing with, the planning authority prior to commencement of development."*
>
> *"7. The construction of the development shall be managed in accordance with a Construction Management Plan, which shall be submitted to, and agreed in writing with, the planning authority prior to commencement of development. This plan shall provide details of intended construction practise for the development, including hours of working, noise management measures and off-site disposal of construction/demolition waste.*
> *Reason: In the interests of public safety and residential amenity."* (emphasis added)

Similar CMPs

166. The wording in condition 7 of the parent planning permission (which was issued in June 2019) is similar to the wording in condition 4 of the third planning permission (which was issued in October 2023). The applicant did *not* seek judicial review to challenge the CMP required in the conditions of the 2019 parent permission.

167. More importantly, the CMP concerning works authorised by the 2019 parent permission could not conceivably relate to works covered by the third planning permission which issued in 2023.

168. The applicant in the present case has failed to properly interpret the Board's decision and has failed to understand that the CMP required by condition 4 of the Decision relates to works approved by *that* Decision (not works authorised by the parent permission and covered by the CMP condition in the parent permission).

169. Echoing comments I made in relation to Core Ground 1, and acknowledging entirely that this Court, by granting leave to seek judicial review, made a decision at the *ex parte* stage that there were substantial grounds for contending that the decision under challenge was invalid or ought to be quashed, close analysis of Core Ground 2 with the benefit of an *inter partes* hearing on the merits reveals that this ground also *lacks* substance. With the benefit of arguments made by the Respondent and Notice Parties, it is now clear that Core Ground 2, as pleaded, never had any prospect of success (Article

74(2)(h) of the 2001 Regulations, being of no relevance to the power to impose conditions).

170. Furthermore, even if Core Ground 2 had been pleaded correctly (and it was not) it was bound to fail. This is because (i) this Court is bound by authority which the applicant has not sought to distinguish on *Worldport* principles; and (ii) the applicant has simply misinterpreted and misunderstood the respondent's decision. For these reasons, I feel it appropriate to say that Core Ground 2 had no prospect of success.

Ground 3

171. The third ground advanced by the applicant is put as follows:-

> *"**Core Ground 3***
> *The Decision is unreasonable, irrational, without evidential basis, ultra vires and invalid, in circumstances where the Board treated the first notice party's application as validly evidencing ownership of the lands in issue by preferring evidence as to title provided by the first notice party and unlawfully disregarding and/or failed to consider evidence and observations to the contrary provided by the applicant".*

172. It will be immediately obvious that the foregoing ground is similar in certain respects to Core Ground 1. Therefore, addressing this third ground will involve some repetition. That said, at the 'heart' of Core Ground 3 is an argument based on the duty to give *reasons* and an alleged failure in that regard. This is made clear from para. 21 of the applicant's written submissions, dated 10 September 2024, which states:-

> *"21. The applicant accepts that it is not the function of the respondent to definitively determine the question of the first notice party's title to the land the subject of the prosed development. It is, however, obliged to examine title 'where a submission by a third party raises doubts'. The applicant's observation did or ought to have 'raised doubt's' such that the respondent was obliged to enquire. Instead, the respondent preferred the first notice party's submission that the proposed development did not include works on the applicant's property. <u>The respondent gave no reasons for preferring the first notice party's submissions over the applicant's observation and there is no discernible basis for same included in the Inspector's</u>* (sic) *<u>of 2 March 2023.</u> The respondent plainly failed to understand the mandated enquiry into the first notice party's interest in the proposed development despite the applicant reaching the threshold of casting 'doubt' on it."*
> (emphasis added)

Reasons

173. As Clarke C.J. made clear in the oft-cited decision of the Supreme Court in *Connelly v An Bord Pleanála & Ors* [2018] IESC 31 (at 771, para, 54): *"… the reasons for*

a decision may be derived in a variety of ways, either from a range of documents or from the context of the decision, or in some other fashion".

174. The Board's reasoning must be understood by reference to the purpose of Art. 22(2)(g), as examined earlier in this judgment. It is clear from a consideration of what was before the Board that the central *reason* for granting planning permission and withstanding the applicant's objections was that the Board was satisfied that the application was *not* frivolous or vexatious.

175. The context of the decision was, of course, whether the planning application was frivolous or vexatious *per* Art. 22(2)(g) and this context was readily apparent to the applicant, given the sequence of events in which it was involved.

176. As touched on earlier when looking at Core Ground 1, the observations made to DCC by Minoa Limited, on 23 February 2022, began by stating:-

> *"1. Subject planning application is invalid due to oversailing of adjacent lands – no letter of consent was sought nor is it appended to the planning application;*
> *2. Subject planning application is invalid due to blocking of an existing right of way".* (emphasis added)

177. The local authority plainly considered the foregoing submission and sought further information, by request dated 16 March 2022, in which DCC stated *inter alia*:-

> *"2. Having regard to the claim within the objection, the applicant is requested to demonstrate sufficient legal right to develop on the subject lands".* (emphasis added)

178. This request went to the 'heart' of the matter, given the purpose of Art. 22(2)(g) of the 2001 Regulations.

179. The response by SSA Architects, dated 21 March 2022, has already been referred to when addressing Core Ground 1. For ease of reference, it will be recalled that the response to DCC's request for further information included:-

> *"2. The applicant does have a sufficient legal right to develop the subject site and we enclose the relevant supporting folios. The applicant, Blue & White Diamond Limited and Persian Properties (named on the enclosed folio) are group companies within common ownership.*
> *The building does not sit within or over sail the trapezoidal portion identified by the adjoining landowner, so would not impact on the legal entitlement to build in any event. See below photograph and plan extract."*

180. The planning report by DCC makes clear that the local authority was satisfied with the ability of the applicant for permission to carry out the development.

181. Although I previously quoted from DCC's 22 April 2022 report when addressing Core Ground 1, it is convenient to quote from the same document once more:-

> "Additional information has been submitted indicating that the Applicant does have sufficient legal right to develop the subject site and have enclosed relevant supporting folios. In addition, the Applicant states that the building does not site within or over sail trapezoidal portion identified by the adjoining landowner.
> *DCC Planning Department Comments*
> *Based on the documents submitted, it would appear that the Applicant has sufficient legal right to develop on the subject lands. It should be noted that the planning system is not designed as a mechanism for resolving disputes about title to land or premises or rights over land; these are ultimately matters for resolution in the Courts. In this regard, it should be noted, as s. 34 (13) of the Planning Act states, a person is not entitled solely by reason of a permission to carry out any development."* (emphasis added)

182. The foregoing illustrates that DCC was perfectly clear that its role was not to determine disputes concerning title to or rights over land, the core issue being whether the applicant for permission had established sufficient legal right to develop on the lands in question.

183. Following DCC's decision to grant permission at first instance, Minoa repeated, in its appeal to the respondent, the objections it canvased before DCC (see Minoa's 13 May 2022 appeal). On 24 May 2022, SSA Architects wrote to the respondent stating *inter alia*:-

> *"The appellant claims that the red line is incorrect and therefore the original application should be invalidated. In this regard, we refer to our application submission to Dublin City Council, in particular our letter of the 21st March where we demonstrated the applicant's sufficient legal interest in the red line area.*
> *The appellant claims that there is an infringement on the right of way to the access between the new building and the Davenport Hotel and that this causes an obstruction which impacts the accessibility for emergency vehicles (for fire and other servicing parties) to the rear of the units on Merrion Square. In this regard, we would note that we have been granted a fire safety certificate by DCC. Accordingly, Dublin Fire Brigade and its Fire Officer are satisfied that there is no risk to the proposed building or any of the other buildings on Merrion Square (including the appellant's). Furthermore, it is noted that none of the other properties at Merrion Square have unfettered access to rear gardens and that Dublin Fire Brigade broadly relies upon fire tender access from the front.*

The right of way and free-meter clearance issues is moot and has no bearing on any aspect of the planning application. This is covered in the Right of Way Agreement…" (emphasis added)

184. The foregoing submissions were plainly considered by the Board, as is evident from the contents of the Inspector's 2023 report. That report set out, at length, the grounds of Minoa's appeal (s. 6.2) and the response to the appeal (para. 6.3). There was a detailed assessment of what was described as *"ownership and right of way issues"* (from paras. 7.1.2 to 7.1.6). The submissions by each party were considered with reference to the "*Development Management Guidelines for Planning Authorities*" (2007) and the purpose of landowner consent. The Board's reasoning is perfectly clear from paras. 7.1.2 to 7.1.6.

185. Whereas the applicant pleads that the respondent unlawfully: *"treated the first notice party's application as validly evidencing ownership of the lands in issue by preferring evidence as to title provided by the first notice party"* and "*unlawfully disregarding and/or failed to consider evidence"* put forward by the applicant, it is clear from the evidence that:-

(i) the Board expressly considered the Applicant's submissions;
(ii) the Board was conscious of the purpose of Art. 22(2)(g);
(iii) the Board was aware that its role was not to determine ownership conclusively or to determine disputes concerning title to or rights over property;
(iv) the Board applied the 2007 Guidelines;
(v) the Board was aware of s. 34(13) of the 2000 Act; and
(vi) the Board reached the view, for reasons which are clear from the face of the Inspector's 2023 report, that the applicant for permission had demonstrated sufficient legal right to develop on the subject lands.

186. Recalling the essence of the plea, a careful consideration of the evidence before this court allows for a finding that the Respondent did not "*unlawfully disregard"* and/or *"fail to consider"* any evidence. Having had the benefit of an inter partes hearing on the merits, I am satisfied that the applicant has not established any entitlement to relief pursuant to Core Ground 3.

Core Ground 4

187. The fourth ground advanced by the applicant is put as follows:

"***Core Ground 4.***

The Decision is ultra vires and invalid in that it failed to take account of the impact of the proposed development on the adjoining buildings and structures, including their facades and the maintenance of same, in circumstances where such adjoining buildings and structures include protected structures and the proposed development is located in an Architectural Conservation Area. In this regard, the

decision is contrary to objectives BHA2 and BHA7 of the Dublin City Development Plan 2022-2028 and reached without any evidential or reasonable basis to so conclude."

Merits

188. Before looking at objectives BHA2 and BHA7, it seems to me that at the 'heart' of Core Ground 4 is a challenge to the *merits* of the respondent's decision. Para. 22 of the applicant's written submissions include the allegation that the respondent "*failed to adequately consider the impact of the proposed development on the adjoining buildings and structures*…" (emphasis added). Notwithstanding the subtlety with which the allegation is phrased – i.e. a tacit acknowledgement that there was a consideration but the contention that the consideration was not adequate - the central complaint would appear to be with the *outcome*, not the process.

189. Judicial review is concerned with the *legality,* not the *merits,* of a decision. A wealth of authority makes that clear (including the seminal decisions in *State (Keegan) v Stardust Compensation Tribunal* [1986] I.R. 642; and *Meadows v Minister for Justice, Equality and Law Reform* [2010] IEHC 364). In the manner presently examined, the process was without legal error.

190. In the present case, the Board found that the development would "*be in accordance with proper planning and sustainable development of the area".* The Board agreed with the Inspector's 2023 report, wherein the Inspector concluded *inter alia:*

> *"…having regard to the minor nature of the proposed development, including the elevational alterations proposed, I do not consider that it would have any visual impact on the surrounding area including Protected Structures".*

191. The foregoing were decisions within the particular competence and expertise of the Board, which is a specialist body established by statute.

Independent expert reports

192. With reference to the foregoing, the applicant submits that the Inspector did not consider "*any independent expert reports"* or "*consider whether one should have been obtained"* (see para. 26 of the applicant's written submissions). However, the applicant does not identify any such reports when making what can fairly be called 'bald' or mere assertions.

Conservation reports

193. In the context of the parent permission, a conservation report was prepared which is described in the following terms at para. 4.1.4 of the Inspector's 2019 report (ABP 303676-19, dated 19 May, 2019):

"4.1.4 A separate Conservation Report was prepared by Padraic Murray which assesses the impact of the proposed development on Nos. 1-3 Merrion Square to the immediate south which are protected structures. It describes the surrounding environment and the site on which the proposal is located. The report concludes that the proposal will have no discernible impact on protected structures and that the proposal protects the existing architectural and civic design character of the area and improves the visual amenities of Merrion Street Lower. It is also considered that the proposal is fully in accordance with the conservation zoning objectives for the site." (emphasis added)

194. The respondent also had the benefit of a report by Padraig Murray, conservation architect, as received by DCC on 21 January 2022. This report stated *inter alia:*

"Site of the proposed structure

…

3.3 The Merrion Building itself is an inoffensive three-storey building, but with a predominantly grey tiled finish and a horizontal emphasis, neither of which are particularly appropriate for its location. The associated car park is to the rear of numbers 2 and 3 and the building and car park together form the site for the proposed structure.

4. The proposed works

4.1 The proposed works involve the demolition of the existing Merrion building and its replacement with a new five-storage structure that essentially covers the entire available site, while leaving the car park to the rear as covered open space for car parking. In deference to its location, the two upper floors are set back, along Merrion Street Lower and on the façade facing the Protected Structures. Furthermore, fenestration has been arranged to avoid overlooking the protected structures.

4.2 The design of the proposed structure also affects its location, for example the fenestration facing onto Merrion Street is vertical with classical proportions and that fact, together with the use of brickwork, creates a much more appropriate presence on the street.

4.3 The location of the proposed development relative to the Protected Structures will have little or no impact on the light available in those structures, having regard to the fact that the proposed development is located to the north of the protected structures."

Technical reports

195. Furthermore, Section 3.2.2 of the Inspector's 2023 report refers to technical reports, namely, those of the Drainage Division (28 January 2022); Transportation Planning (7 March and 12 April 2022); and: City Archaeologist (7 March 2022).

Site visit by Inspector

196. It is also perfectly clear from the face of the Inspector's report that she visited the property and conducted a site inspection on 2 March 2023. Therefore, it is beyond doubt that the Inspector was fully aware of the proposed development in the context of what surrounds the site. Indeed, paras. 1.2 and 1.3 contain a detailed description of the site, its location and the protected structures adjacent.

197. Insofar as the applicant asserts that there was a failure on the part of the Inspector (and the Board which agreed with her) to adequately consider the visual impact of works authorised by the third planning permission in the context of the overall development authorised by the parent and second planning permission, the facts paint an entirely different picture.

198. The Inspector and the Board were also well aware of the planning history and that this third permission would constitute amendments to previously authorised development. Indeed, this is clear from the first sentence of the Inspector's report which states:-

> *"**Development*** *Extension to the previously granted Reg. Ref. 4296/19, to extend the ground floor by an additional 68 sqm and minor elevational alterations to the North West, North East and South West elevations."* (emphasis added)

199. The Inspector's report of 2 March 2023 makes explicit reference (at s. 3.2) to the planning reports by DCC, dated 15 March and 19 April 2022, respectively. The 22 April 2022 report by DCC's Planning & Development Department (to which I referred to earlier) considered the proposed development in the context of the policies and objectives of the 2016-2022 Development Plan, and the Local Authority came to the view that:-

> *"On balance, the proposed development will upgrade one of the most prominent locations in the city, contribute to the animation of the area, will allow for the construction of striking and innovative contemporary/modern building in an inner city location proximate to public transport and other amenities. The proposal exhibits a distinctive contemporary design which will make a positive contribution to the subject site and Dublin's urban fabric."*

200. Neither the applicant's pleadings nor submissions engaged with the terms of Chapter 11 of the Dublin City Council Development Plan, wherein objectives BHA2 (*"development of protected structures"*) and BHA7 (*"architectural conservation areas"*) can be found.

BHA2

201. Objective BHA 2 of the development plan concerns *"development of protected structures".* The proposed development is *not* such a structure. Therefore BHA2 simply does not apply. There was no development of a protected structure. Rather, a pre-existing building was demolished and a new one was constructed.

BHA7

202. Objective BHA7 includes:-

> *"(c) Ensure that any new development or alteration of a building within an ACA, or immediately adjoining an ACA, is complementary and/or sympathetic to their context, sensitively designed and appropriate in terms of scale, height, mass, density, building lines and materials, and that it protects and enhances the ACA. Contemporary design, which is in harmony with the area will be encouraged."* (emphasis added)

Planning judgment

203. To ensure that development within an ACA (i.e. "architectural conservation area") is "*sympathetic to their context* as well as "*sensitively designed"* and "*appropriate"* constitutes an exercise of planning judgment. In the present case, both DCC and the respondent Board were fully aware of the relevant context and, based on relevant material before them, came to the view that there would be no negative effect.

204. In this judgment I have made reference to the material which was, without doubt, before the Inspector and the Board when, as specialist bodies, they reached decision within their particular competence and expertise. There is simply no evidence of any failure to have regard to the objective of ensuring that development was *"sympathetic to the special character of the ICA".* The applicant's submission that the Board *"failed to have regard to the requirements of Chapter 11 of the Dublin City Development Plan"* is manifestly wrong. The applicant has not established that the decision was *"contrary to objectives BHA2 and BHA7*", as pleaded.

Relevant policies

205. Without identifying them, the applicant contends that there was a failure to consider "*relevant policies"* (see para. 22 of the applicant's written submissions).

206. It is clear from the face of the Inspector's 2023 report that the proposed development was considered and assessed with reference to the applicable policies and objectives in the Development Plan. This could hardly be clearer from a reading of s. 5 of the Inspector's 2 March 2023 report, which states:-

> *"5.0 Policy Context*

5.1 Dublin City Development Plan 2022-2028

5.1.1 Since the Local Authority issued a notification of decision to grant permission for the proposed development, a new Development Plan has been prepared and adopted for the City. The relevant Development Plan to this assessment is the Dublin City Development Plan 2022-2028, which was adopted on 2nd November, 2022 and came into effect on 14th December 2022.

5.1.2 The site is zoned Z8 'Georgian conservation areas' which aims:

'To protect the existing architectural and civic design character, and to allow only for limited expansion consistent with the conservation objectives.

5.1.3 The site is located within a Conservation Area and all sites contiguous to the subject site, including the building fronting onto Merrion Square North and the Davenport Hotel, are protected structures.

5.1.4 This site is also located within a zone of archaeological interest.

5.1.5 Chapter 11 of the Development Plan relates to built heritage and archaeology."(emphasis added)

Visual impact

207. In oral submissions, the applicant contends that the analysis of visual impact was *"cursory"*; *"superficial"*; and *"inadequate"*, having regard to the obligations on the Board. With respect, these submissions are unsupported by evidence and entirely undermined by the facts. It is very clear that that the Inspector's consideration and assessment of the proposed development was made by reference to the surrounding area and structures. Section 7.3.1 of the Inspector's 2023 report states:-

"7.3.1 The proposed development includes for a number of alterations to the north-west, north-east and south-west elevations. This includes omitting the previously permitted projecting windows on the south-west elevation and replacement with windows flush to the façade. In addition, the windows' configuration will be altered slightly. As highlighted by the Applicant, planning permission has already been secured for windows on this façade. The proposal will not result in a significant increase of overlooking of the neighbouring properties beyond what is already permitted. Furthermore, having regard to the minor nature of the proposed development, including the elevational alterations proposed, I do not consider that it would have any visual impact on the surrounding area including the Protected Structures." (emphasis added)

208. As apparent from the order made by the Board on 17 October 2023, the respondent granted permission, stating:-

> "***Reasons and considerations***
>
> *Having regard to the Z8 zoning objective relating to the site as per the Dublin City Development Plan 2022-2028 where office development is a permissible use, it is considered that the size and scale of the proposed development, subject to compliance with the conditions set out below, would not seriously injure the amenities of the area or properties in the vicinity, would not be prejudicial to public health and would generally be acceptable in terms of traffic safety and convenience. The proposed development would, therefore, be in accordance with the proper planning and sustainable development of the area."*

209. The plea that the respondent failed to "*take account of the impact of the proposed development on the adjoining buildings and structures"* is entirely undermined by the evidence, which demonstrates that the Board was fully aware of the relevant context, considered relevant information, and reached a decision *intra vires*.

210. At this juncture, it is useful to refer, again, to the role of this Court in an application for judicial review.

211. In *M28 Steering Group v. An Bord Pleanála* [2019] IEHC 929, MacGrath J. re stated the following well established principle:

> "77. In order to show that the Board has acted irrationally, it is necessary for the applicant to establish that the Board "*had before it no relevant material which would support its decision"*. Thus, the Court's jurisdiction to intervene is not unlimited." (emphasis added)

212. In *Kenny v An Board Pleanála* [2020] IEHC 290, MacGrath J. (at para. 90) stated:

> "…I accept as a correct summary of the position, that the assessment of whether a particular development is in accordance with proper planning and sustainable development is a matter within the particular competence and expertise of the Board, a specialist body established by statute. Such decision may only be reviewed on the grounds of irrationality, as described in *O'Keeffe* as accepted in *Meadows*, where the Supreme Court expressly confirmed that the test in *O'Keeffe* continues to apply to the decisions of bodies such as the Board. Reliance is placed on dicta of Denham J., as she then was who observed in a case where a decision maker has a special technical skill such as in *O'Keeffe v. An Bord Pleanála*, the test should be applied strictly. In *Alen-Buckley v. An Bord Pleanála & Ors*. [2017] IEHC 541, Haughton J. accepted as a correct statement of law the principles

outlined by McGovern J. in *Navan Co-Ownership v. An Bord Pleanála & Ors* [2016] IEHC 181that: -

> "Section 37 applies this statutory restriction equally to the respondent when determining a planning appeal. Whether a particular development is in accordance with proper planning and sustainable development is a matter within the particular competence and expertise of the planning authority, or, as the case may be, An Bord Pleanála, a specialist body established by statute. Such an assessment would only be subject to **very** limited review on the grounds of unreasonableness or irrationality following *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39 and *Meadows v. Minister for Justice and Equality* [2010] 2 I.R. 201'." (emphasis added)

213. The substance of the plea that "*The Decision is ultra vires and invalid …. and reached without any evidential or reasonable basis to so conclude"* (emphasis added) is a claim of irrationality. Once subjected to analysis with reference to the evidence, this can be seen to lack merit. The Board's decision was a matter of planning judgment and involved no irrationality.

214. The contention that the board acted *ultra vires* is no more than a 'bare' assertion, and the proposition that there was not evidential basis for the decision is utterly undermined by the facts, in particular, the Decision itself (comprising of the Inspector's 2023 report; and the Board's 17 October 2023 Order).

215. The decision to which the Board came was lawfully made on the basis of relevant information. It was made by a body which, unlike this Court, has been given the task of decision-making by the Oireachtas and possesses specialist knowledge and expertise, which was deployed in the decision challenged.

216. Having had the opportunity to interrogate the evidence, and with the benefit of arguments made by the Respondent and Notice Parties which were not available at the *ex parte* stage, this court can confidently say that Core Ground 4 lacks substance. Core Ground 4 comprises unsupported assertions which, in reality, invite this Court to engage in a merits-based assessment and to substitute the applicant's assertions for the views of the Inspector/Board which were lawfully made, having regard to material before the decision maker.

Ground 5

217. The fifth ground advanced by the applicant is as follows: -

> "***Core ground 5.***

The Decision is ultra vires and invalid in that the Board seeks to impose conditions requiring development contributions pursuant to both s.48 and 49 of the Planning and Development Act, 2000, as amended, contrary to s.49(5) of the said Act."

218. The principles concerning pleadings in judicial review are also relevant to this ground. Neither the applicant's pleadings, nor their submissions, refer to the actual terms of the 'development contribution scheme' or 'supplementary scheme', nor were they exhibited on behalf of the applicant. I will presently refer to both. Before doing so, it is useful to understand the contents and purpose of s.49(5) of the 2000 Act.

'Double – charging'

219. Section 49(5) of the 2000 Act prevents 'double charging' by providing:

"49.(5) A planning authority shall not, pursuant to a condition under *subsection 1(1)*, require the payment of a contribution in respect of a public infrastructure project or service where the person concerned has made a contribution under *section 48* in respect of public infrastructure and facilities of which the said public infrastructure project or service constituted a part."

S.48

220. During the course of submissions, Counsel for the respondent opened the provisions of the DCC Development Contribution Scheme 2020-2023 (pursuant to s.48 of the 2000 Act) Appendix II of which lists projects (class 1 being *"roads"*; class 2 being *"drainage (surface water) infrastructure and facilities"*; class 3 being *"parks & open space facilities & amenities"*; class 4 being *"community facilities & amenities"*; and class 5 being *"urban regeneration facilities & amenities"*).

S.49

221. Conspicuous by its absence is any reference to the 'Luas Cross City Project'. This is because DCC's Supplementary Development Contribution Scheme (under s.49 of the 2000 Act) concerns *"Luas Cross City (St Stephen's Green to Broombridge Line)"* and, during submissions, Counsel for the respondent opened the contents of same.

222. In short, the applicable 's.48 scheme', namely DCC's 2020-2023 development contribution scheme does *not* include the 'Luas Cross City Project' as an infrastructure project under the scheme.

223. Rather, and separately, the 'Luas cross city supplementary development contribution scheme' applies to the site in question.

224. Thus, even a cursory consideration of the evidence, with reference to the relevant contribution provisions, makes perfectly clear that there has been no 'double charging' for the *same* public infrastructure in the present case.

225. In essence, the Board imposed conditions relating to the development contribution scheme (condition 7) and a supplementary development contribution scheme *i.e.,* Luas cross city (condition 8).

Contributions under s. 48 and s. 49 in 'parent' permission

226. It should also be noted that the parent permission included *inter alia* the following conditions:

> *"13. The developer shall pay to the planning authority a financial contribution in respect of public infrastructure and facilities benefitting development in the area of the planning authority that is provided or intended to be provided by or on behalf of the authority in accordance with the terms of the Development Contribution Scheme made under section 48 of the Planning and Development Act 2000, as amended. The contribution shall be paid prior to commencement of development or in such phased payments as the planning authority may facilitate and shall be subject to any applicable index social provisions of the Scheme at the time of payment. Details of the application of the terms of the Scheme shall be agreed between the planning authority and the developer or, in default of such agreement, the matter shall be referred to An Bord Pleanála to determine the proper application of the terms of the Scheme.*
>
> ***Reason:*** *It is a requirement of the Planning and Development Act 2000 (as amended, that a condition requiring a contribution in accordance with the Development Contribution Scheme made under section 48 of the Act be applied to the permission."* [See internal page 8 of the Board's order ABP-303676-19, dated 10 June 2019].
>
> *14. The developer shall pay to the planning authority a financial contribution in respect of Luas Cross City (St Stephen's Green to Broombridge Line) in accordance with the terms of the supplementary development contribution scheme made by the planning authority under s.49 of the Planning and Development Act 2000, as amended. …*
>
> ***Reason:*** *It is a requirement of the Planning and Development Act 2000, as amended, that a condition requiring a contribution in accordance with the supplementary development contribution scheme made under s.49 of the Act be applied to the permission."* [See internal page 9 of the Board's 10 June 2019 order] (emphasis added)

227. Two points deserve emphasis. First, although explicitly set out in the 'parent' permission, the applicant never suggested these conditions were *ultra vires* or invalid. Second, these conditions do not impose any financial obligations *on* the applicant.

Contributions under s. 48 <u>and</u> s. 49 in the decision under challenge

228. Turning to the permission under challenge, the Board's order of 17 October 2023 contains the following conditions:

> *"7. The developer shall pay to the planning authority a financial contribution in respect of public infrastructure and facilities benefitting development in the area of the planning authority that is provided or intended to be provided by or on behalf of the authority <u>in accordance with the terms of the development contribution scheme made under s.48 of the Planning and Development Act 2000,</u> as amended…*
>
> ***Reason:** It is a requirement of the Planning and Development Act 2000, as amended, that a condition requiring a contribution in accordance with the Development Contribution Scheme made under s.48 of the Act be applied to the permission.*
>
> *8. The developer shall pay to the planning authority a financial contribution in respect of the Luas cross city scheme <u>in accordance with the terms of the supplementary development contribution scheme made by the planning authority under s.49 of the Planning and Development Act 2000</u> as amended…*
>
> ***Reason:** It is a requirement of the Planning and Development Act 2000, as amended, that a condition requiring a contribution in accordance with the supplementary development contribution scheme made under s.49 of the Act be applied to the permission."* (emphasis added)

229. It is also appropriate to note that, at first instance, DCC granted permission subject to conditions which required *both* a development contribution in accordance with the s.48 Development Contribution Scheme and a development contribution in respect of the Luas Cross City Scheme under s.49. When making an appeal to the respondent Board, the applicant raised no issue with the contributions (which, as I say, was required *not* from the applicant but from the developer).

230. In short, core ground 5 is entirely misconceived and could never have succeeded. There has been no contravention of s.49(5) and the applicant is not entitled to any relief on this ground.

Ground 6

231. The sixth ground of challenge is put as follows:-

> *"**Core Ground 6***
>
> *"The Decision is irrational, unreasonable, unsupported by any evidence before the Board, and ultra vires and invalid, in that the Board failed to have regard to, or failed to have adequate regard to, the proposal to reduce parking facilities by three parking spaces, in particular by reference to the cumulative impact the proposed development would have."*

232. In the applicant's written submissions it is contended that *"a transport report or mobility management plan"* was required and the assertion is made that the Inspector and, in turn, the Board *"had insufficient evidence available"* to reach the view they did. It is also asserted that the Inspector *"did not give any consideration to the capacity of public transport (or lack thereof) that is serving the area"* (with respect to the foregoing, see para. 29 of the applicant's written submissions).

233. The sole authority relied upon by the applicant is the decision of Mr. Justice Holland in *Ballyboden Tidy Towns Group v An Bord Pleanála* [2022] IEHC 7 ("*Ballyboden*"). Specifically, the applicant cites from para. 7 of the learned judge's decision as follows:-

> *"… I think I can take judicial notice that from their frequency and knowledge of the capacity of a bus when empty, an Inspector can draw some conclusions about theoretical capacity. However, the practical conclusions are a different matter and are what matters and are what the Board must address. The obvious question is as to what extent the theoretical capacity is already taken up by the needs of the population already using the buses in question and by the expected populations of developments already permitted in reliance on existing public transport – of which the MPA Technical Note identifies 1,440 residential units. Perhaps precision is unattainable in this regard but neither, it seems to me, can the issue be ignored when the guidelines clearly require that it be addressed."* (emphasis added)

Guidelines

234. Nowhere does the applicant identify the *"guidelines"* in question. In the manner presently explained, the guidelines referred to in *Ballyboden* have no relevance whatsoever to the present case and the applicant's reliance on *Ballyboden* is entirely misplaced.

Strategic housing development

235. As Holland J. set out in the introduction to his judgment in *Ballyboden*, the impugned decision concerned the grant of planning permission on foot of an application made directly to the Board for permission for a strategic housing development pursuant to s. 4 of the Planning and Development (Housing) and Residential Tenancies Act, 2016 ("the 2016 Act") and concerned the proposed construction of 496 apartments in three blocks as well as a créche, two retail units and associated development.

236. The issues at play in *Ballyboden* concerned the exceeding of building height limitation and a material contravention of the Development Plan as to building height. In short, a reading of the *Ballyboden* decision makes clear that the *"guidelines"* have no relevance whatsoever to the case before this Court.

Height guidelines

237. Rather, the guidelines in question were *"The urban development and building heights guidelines for planning authorities*", prepared by the Department of Housing, Planning and Local Government in December 2018 ("the Height Guidelines 2018") and *Specific Planning Policy Requirement 3,* ("SPPR 3") (see para 11 *f*) of the *Ballyboden* judgment).

238. As explained by Holland J. at para. 21 of *Ballyboden,* s. 9 (3) of the 2016 Act: *"…requires the application of SPPR's to decision of planning applications where 'relevant'. Section 9 (6) permits permissions in material contravention of the development plan if the criteria of s. 37 (2)(b) PDA 2000 are met"*.

239. The learned judge went on to explain that subsection (3)(a) requires the Board to apply, where relevant, *"specific planning policy requirements of guidelines issued by the Minister under s. 28 of the Act of 2000"*. Subsection (3)(c) makes clear that *"specific planning policy requirements"* means the policy requirements *"identified in guidelines issued by the Minister to support the consistent application of Government or National Policy and principles by planning authorities, including the Board, in securing overall proper planning and sustainable development"*.

240. At para. 23 in *Ballyboden,* Holland J. explained that Section 28 of the 2000 Act provides that *"the Minister, may at any time, issue guidelines to planning authorities…"*

241. Why *Ballyboden* provides no support for Core Ground 6 it is perfectly clear from para. 33 of the decision in *Ballyboden*:

> *"33. As will have been seen, the Board decided to grant permission in material contravention of the Development Plan as to building height. A considerable part in that decision, and in discussion at trial, was played by the Height Guidelines 2018. Ground 7 asserts that the Board erred in its interpretation of section 3 of those Guidelines. And so it is necessary to set out relevant content below. The Height Guidelines 2018 were made under S. 28 PDA 2000. They are based in important part on the NPF.*
>
> *34. It is important first to acknowledge that the clear thrust of the Height Guidelines 2018 is to advocate increased building height in appropriate urban and suburban locations – not least to optimise the effectiveness of public transport…" (*emphasis added)

242. In the manner explained by Holland J. from para. 41 of *Ballyboden*, chapter 3 of the Height Guidelines 2018 was the subject of particular debate at the trial and, at para. 43, the learned judge referred to the part those guidelines played during the hearing before him:-

> "43 Section 3.2 sets out criteria the satisfaction of which the planning applicant *'shall demonstrate'.* They include that the site be *'well served by public transport with high capacity, frequent service and good links to other modes of public transport'*. A posited distinction between public transport capacity and public transport frequency was also a particular focus at trial." (emphasis in judgment)

243. The Height Guidelines 2018 are simply not engaged in the present case. The applicant has failed to establish that the Inspector was obliged to have a transport report or mobility management plan, or transport capacity assessment. The decision – i.e. whether the loss of 3 car parking spaces was or was not acceptable - constituted an exercise of planning judgment.

Relevant facts

244. To understand the manner in which that judgment was exercised, it is appropriate to turn, once more, to the Inspector's 2023 report in which the following can been seen at para. 7.4.1:-

> *"7.4.1 The Appellant states that there is no transport report or mobility management plan with the application to justify the omission of three car parking spaces. Having regard to the scale of the proposed development and its location within the site, in close proximity to various modes of public transport, there is no requirement for a transport report or mobility management plan. The omission of the three car parking spaces will encourage sustainable travel reducing the volume of cars in the city and as such is in accordance with the proper planning and sustainable development of the area."*

245. From the foregoing, it is clear that the Inspector directed her mind to the relevant questions. The Inspector gave active consideration as to whether a transport report or mobility management plan was required in order to come to a decision on the question and came to the view that this was not required. That view also involved the exercise of planning judgment.

246. Contrary to the applicant's submissions, the Inspector/Board *"entirely neglected"* nothing. Rather, having considered relevant factors and in exercise of planning judgment, the Inspector/Board came to the view, for stated reasons, that the loss of 3 car parking spaces accorded with the proper planning and sustainable development of the area. This was, very obviously, a decision which involved the exercise of planning judgment by an expert decision-maker.

247. Any objective reading of the Inspector's report entirely undermines the plea that decision under challenge was "*unsupported by any evidence".* The material before the Board is wholly apparent from the reasons upon which the Inspector (and, in turn, the Board) based their decision in relation to the loss of 3 car parking spaces, namely: *"the scale of the proposed development and its location within the site, in close proximity to various modes of public transport";* and: *"The omission of the three car parking spaces will encourage sustainable travel reducing the volume of cars in the city…".*

248. As touched on earlier, the very first words in the Inspector's 2023 report make clear that she was aware that the works authorised by the third permission did not constitute development 'in a vacuum'. In other words, the Inspector was perfectly well aware (as was the Board) that the development constituted an "*Extension to the previously granted Reg. Ref. 4296/19*…" (see the very first para. on the first page of the Inspector's 2023 report opposite the word "*Development*").

249. As also examined earlier, the Inspector set out the "Planning History" in detail (see section 4.0 of the Inspector's report). In short, any fair and objective reading of the Inspector's report entirely undermines the plea that there was a failure to consider what the applicant describes as: "*the cumulative impact the proposed development would have"* (without, it must be said, the applicant proffering any evidence whatsoever of what it contends this "*cumulative impact*" to be).

250. In summary, the sole authority relied upon by the applicant and the "*guidelines*" with which it was concerned are of no relevance. The plea that the respondent came to a decision *"without sufficient evidence"* is no more than a 'bare' assertion which is undermined by relevant facts. The applicant has failed to establish that any issue was ignored.

251. With the benefit of an inter partes hearing and arguments not available at the *ex parte* stage, it is clear that Core Ground 6 provides no basis for relief. Analysed with reference to the evidence (in particular, the Inspector's 2023 report read as a whole and in the context of the material before the respondent) Core Ground 6 is entirely undermined.

Core Ground 7

252. The applicant's seventh ground of challenge to the Decision is put as follows:

> *"**Core Ground 7***
>
> *The Decision is ultra vires and invalid in that the Board failed to publish all documentation upon which its decision was based contrary to, inter alia s. 38 of the Planning and Development Act 2002, as amended and contrary to the requirements of the Aarhus Directive, and in particular to failed to publish the photographs relied upon by the Inspector taken at the site of the proposed development on 2nd March 2023, and appended to the Inspector's report."* (emphasis added)

253. Earlier in this judgment, I referred to principles which, at the risk of both repetition and oversimplification, might be 'distilled' to the proposition that, when seeking judicial review, an applicant is confined to its pleaded case. This applicant, as I have already pointed out, has never made any application to amend its statement of grounds in any respect.

Pleading point

254. Bearing the foregoing in mind, s. 38 of the 2000 Act, upon which the applicant relies, does not place *any* obligation on the Board. Rather, it concerns an obligation on the planning authority.

255. Thus, Core Ground 7 is misconceived and, as pleaded, cannot succeed, nor could ever have succeeded.

256. Lest I am wrong in this view, I propose to assess the argument as if Core Ground 7 had been pleaded with reference to s. 146, subsection (5), which is the way in which the arguments against relief on this ground were deployed during the trial. S. 146 states:-

> *"(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 places, or*
>
> *(ii) By electronic means,*
>
> *as the Board considers appropriate."*

Photographs

257. Having regard to the evidence before this Court, it is a matter of fact that the "*photographs*" referred to in Core Ground 7 comprise the following:-

- 2 photographs which were obviously taken from the opposite side of the road showing the street view of the development under construction and are stated to be *'permitted five story office development currently under construction on the site'*.;
- A single photograph taken from outside entitled *'car parking area to the rear of the subject site and nos. 1-4 Merrion Square'*;
- A single photograph taken from outside, showing the *'Rear of nos. 2-3 Merrion Square'*; and
- A single photograph, taken from outside, showing the *'Southwest elevation of permitted office scheme under construction'*.

258. The applicant has not established, in evidence, that the Board failed to comply with any obligation under s. 146 (had it pleaded this section, rather that s. 38).

Significance

259. Quite apart from the foregoing, it is impossible to understand the significance of the photographs. There is no evidence to suggest that the applicant was prejudiced in any way, even if it did not have access to these photographs, all of which were taken from outside.

260. In *Clifford v An Bord Pleanála* [2021] IEHC 459 ("*Clifford*") the learned judge set out the reasons for his conclusion that the applicant's complaint (that there had been a breach of publication requirements) was not a ground for *certiorari*. In findings which apply equally to the present case, Humphreys J. began para. 77 of his judgment in *Clifford* by stating that:-

> *"The applicants have not averred that they were unable to make submissions and there has been no evidence that they were themselves deterred from making submissions."*

261. The applicant in this case has not established that it was unable to make (or deterred from making) submissions as a result of the alleged unavailability of the photographs referred to in the Inspector's 2023 report. Nor has the applicant given any indication of what submissions it could or would have made, had the photographs been in its possession (even if it had established in evidence that the photographs were not available to it, which it has not).

262. In short, having carefully considered the evidence, and with the benefit of arguments not available at the *ex parte* stage, I am satisfied that even if it had been properly pleaded, Core Ground 7 does not entitle the applicant to any relief.

263. Furthermore, bearing in mind that the relief sought by the applicant is an order of *certiorari* quashing the Board's decision of 17 October 2023 and also keeping in mind that

judicial review is at the discretion of the Court, I am entirely satisfied that even if the applicant 'brought home' this ground (and it has not) the proper exercise of this Court's discretion would have been to refuse relief.

Ground 8

264. The eighth and penultimate ground of challenge is articulated as follows:-

*"**Core Ground 8***

The Decision is invalid in that it fails to adequately consider the impact of the proposed development, in accordance with the EAI Directive (Directive 2011/92/EU as amended), having regard to the development as a whole and previous grants of permission, thereby constituting a decision which impermissibly amounts to project splitting."

Directive 2011/92/EU

265. EU Directive 2011/92/EU aims to ensure that environmental impacts are considered in the planning process and requires member States to assess the effects of projects on the environment before approval. The said Directive mandates 'Environmental Impact Assessment' ("EIA") for projects likely to have significant effects on the environment, so as to ensure transparency and public participation in the assessment process. The Directive was transposed into national law through the Planning and Development Act, 2000 (otherwise "PDA 2000") and regulations made thereunder.

S. 172(1) PDA 2000

266. Section 172 (1)(b) PDA 2000 states:-

"(1) An environmental impact assessment shall be carried out by the planning authority or the Board, as the case may be, in respect of any application for consent for proposed development where…

(a) (i) The proposed development would be of a class specified in Part 2 of Schedule 5 of the Planning and Development Regulations 2001 but does not equal or exceed, as the case maybe, the relevant quantity, area or other limit specified in that part, and

(ii) It is concluded, determined or decided, as the case may be, -…

(II) by the Board, in exercise of the powers conferred on it by this Act or those regulations…

that the proposed development is likely to have a significant effect on the environment." (emphasis added)

Art. 109 PDR 2001

267. For the purpose of these proceedings, it is Article 109 of the Planning and Development Regulations 2001 (or "PDR 2001") which is relevant. This is entitled

"Planning Appeals" and concerns *"Requirement to submit EIAR"* (being a reference to an 'environmental impact assessment report').

Mandatory projects

268. Schedule 5 of Art. 109 PDR 2001 concerns what might be called 'mandatory' projects i.e. where 'environmental impact assessment' ("EIA") is required. Examples include: a crude oil refinery; thermal power station; nuclear power station, works for the smelting of cast iron and steel; installation for the extraction of asbestos; line for long distance railway traffic, or an airport with a basic runway length of 2,100 metres or more etc. If the thresholds identified in Schedule 5 of Art. 109 PDR apply, EIA is required. There was no mandatory requirement for EIA in the present case.

3 'tiers' of environmental impact assessment

269. It is fair to say that there are three 'tiers' of environmental impact assessment, namely; (i) preliminary examination; (ii) EIA screening; and (iii) full EIA.

Preliminary examination

270. The concept of EIA "*preliminary examination*" as to whether EIA is needed for sub-threshold development (where, as in the present case, EIA is not mandatory) was explained in the judgment of Mr. Justice Holland in *Shadowmill v An Bord Pleanála* [2023] IEHC 157 ("*Shadowmill*") at paras 41 and 42:-

"41. By way of transposition specifically of Article 4.3 of the EIA Directive as to pre-screening screening for EIA, Article 109(2) PDR 2001 provides for Preliminary Examination of the question whether EIA is needed. It provides as follows:

"(a) Where an appeal relating to a planning application for subthreshold development is not accompanied by an EIAR, the Board shall carry (out) a preliminary examination of, at the least, the nature, size or location of the development.

(b) Where the Board concludes, based on such preliminary examination, that -

(i) there is no real likelihood of significant effects on the environment arising from the proposed development, it shall conclude that an EIA is not required,

(ii) there is significant and realistic doubt in regard to the likelihood of significant effects on the environment arising from the proposed development, it shall,…. require the applicant to submit….. the information specified in Schedule 7A for the purposes of a screening determination unless the applicant has already provided such information, or

(iii) there is a real likelihood of significant effects on the environment arising from the proposed development, it shall —

- *conclude that the development would be likely to have such effects, and*

- *…… require the applicant to submit … an EIAR and to comply with the requirements of article 112."*

42. Article 109(4) requires the Board, in making a Screening Determination, to have regard to the criteria set out in Schedule 7 PDR 2001, whereas Article 109(2) requires the Board, in Preliminary Examination to examine *"at the least, the nature, size or location of the development."* The contrast is notable. Schedule 7 transposes Annex III of the EIA Directive as to its non-quantified criteria to determine whether projects require EIA. It does so in terms very similar to those of Annex III. Of some present interest, both Annex III and Schedule 7:
So, "biodiversity, with particular attention to species and habitats protected under the Habitats Directive…." is explicitly a concern of EIA.

- in describing " *Location"* refer to the environmental sensitivity of geographical areas likely to be affected by the proposed development, with particular regard to, inter alia, the relative abundance, availability, quality and regenerative capacity of natural resources, including biodiversity, in the area.

- in describing *"Types and characteristics of potential impacts",* refer to the likely significant effects on the environment of proposed development with regard to their impact, inter alia on *"biodiversity, with particular attention to species and habitats protected under the Habitats Directive…'."* (emphasis added)

EIA Screening

271. From para. 52 of his judgment in *Shadowmill*, Holland J. explained the interplay between preliminary examination and "*EIA screening*", the former being, in effect, 'pre-screening' for EIA screening :-

"52. Typically, a case-by-case decision as to whether sub-threshold development is required is done by a formal "EIA Screening", for which Article 4 EIA Directive and Article 109(4) PDR 2001 provide. However, it was found in practice that even formal EIA Screening was unnecessary and wasteful in respect of many, typically small, sub-threshold developments of which it was in truth obvious that they were not likely to have significant effects on the environment and did not require EIA. Nonetheless, some form of determination was necessary as to whether such developments required EIA. Hence, in 2014, what may be considered a pre-screening screening process, was provided for in Article 4 EIA Directive. In reliance on that provision, "Preliminary Examination" for EIA was introduced in Ireland in 2018 in the form of Article 109(2) PDR 2001.

53. It is as well to observe however that the EIA Directive, though in substance providing for them, refers to "Screening" only in its recitals and does not refer at all to "Preliminary Examination" — which is a phrase used in Article 109(2) PDR 2001 to describe the Irish transposition of the pre-screening screening procedure

for which Article 4(3) of the EIA Directive provides. That observation has no legal consequence but may assist in considering the legislation." (emphasis added)

272. At para. 57 of *Shadowmill*, Holland J. further explained the nature and purpose of preliminary examination and EAI screening, respectively:-

"57. Preliminary Examination under Article 109(2) PDR 2001 and EIA Screening under Article 109(4) PDR 2001 do not differ in the subject matter of their inquiry: the question in both processes is ultimately whether significant effect on the environment is likely, such as to require EIA. Indeed the phrase "at least, the nature, size or location of the development" in Article 109(2) PDR 2001 is taken directly from Article 2 EIA Directive which obliges Member States to ensure EIA of all "… projects likely to have significant effects on the environment by virtue, inter alia, of their nature, *size or location .."* (emphasis added)

273. Before proceeding further, it is fair to say that, as pleaded, Core Ground 8 neither refers to, nor engages with Article 109 (2) PDR 2001, which lays down the relevant test.

Significant effect

274. At para. 55 of the *Shadowmill* judgment, *"significant effect"* was the subject of analysis and, having considered a range of authorities - in particular *R (Thakeham Village Action) v Horsham District Council* [2014] EWCH 67 (Admin) - Holland J. noted *inter alia* that:-

"• The word *"significant"* does not lay down a precise legal test.

• Whether a project was likely to have significant effect on the environment is a question of degree which calls for the exercise of judgement – a function for which *"the Courts are ill-equipped"*.

• Significance of effect is *"not a question of hard fact to which there can only be one possible correct answer in any given case".*

• The screening decision determination of *"significance"* is a matter for the administrative authorities — reviewable as to its merits only for irrationality." (emphasis added)

275. The foregoing analysis was made with regard to EIA screening but logically must also apply to preliminary examination. As Holland J. also observed at para. 55:-

"Ultimately, the standard for concluding that EIA is required or not required is necessarily the same in Preliminary Examination as in EIA Screening – i.e. *"that there is no real likelihood of significant effects on the environment arising from the proposed development"*."

276. Before looking once more at the Inspector's 2023 report, it is useful to note that the development which was authorised by the parent permission (being sub-threshold) was subject to preliminary examination and the result was a screening out for EIA purposes.

Result of preliminary examination

277. Returning to the impugned decision, Section 5.3 of the Inspector's 2023 report states the following:-

> *"5.3 EIA Screening*
>
> *5.3.1. Having regard to the modest nature of the development comprising of a minor extension (68 sq m) and elevational alterations to a permitted scheme on a site area of c. 0.0544 hectares located within a city centre environment, it is reasonable to conclude that there is no real likelihood of significant effects on the environment arising from the proposed development. The need for an environmental impact assessment can therefore be excluded by way of preliminary examination."* (emphasis added)

Planning judgment

278. The Inspector/Board came to the view, in exercise of specialist planning judgment, that there is no real likelihood of significant effects on the environment arising from the proposed development. To borrow a phrase (used by Mr. Justice McDonald in *Sliabh Luachra Against Ballydesmond Windfarm Committee v An Bord Pleanála* [2019] IEHC 888) which Holland J cited in his judgment, this was a decision by "*an expert body…in a much better position than the Court to form a view".*

279. In light of the foregoing, the irrationality standard would appear to apply to any challenge, yet the applicant tendered no evidence to support an *irrationality* argument, even if irrationality had been specifically pleaded in Core Ground 8 (and it was not).

280. The view reached by the Inspector/Board was consistent with the obligations set out in Article 109 of the 2001 Regulations. In coming to this view, the Inspector/Board applied the correct legal test based on a consideration of relevant information and factors.

281. The Inspector's reference to the *"permitted scheme"* plainly evidences that the Inspector's consideration included the wider context, namely, the scheme of development beginning with the 'parent' permission. This utterly undermines the submission that the Inspector and, in turn, the Board took too an overly "*narrow*" view when conducting the test.

Changes and extensions

282. Despite the fact that s. 13 of Part 2 of Schedule 5 Art. 109 PDR 2001 explicitly concerns *inter alia "changes"* and *"extensions"* of development (precisely what the decision under challenge concerned) the applicant does not plead that the impugned decision resulted in a sub-threshold development *ceasing* to be such, or becoming a development which required any different approach to the one taken by the Inspector/Board. The relevant provisions are as follows:-

> "Schedule 5
>
> … Part 2
>
> … *13. changes, extensions, development and testing*
>
> (b) Any change or extension of development already authorised, executed or in the process of being executed (not being a change or extension referred to in Part 1) which would.. –
>
> (i) result in the development being of a class listed in Part 1 or paragraphs 1 to 12 of Part 2 of this Schedule and
>
> (ii) result in an increase in size greater than –
>
> - 25 per cent, or
> - An amount equal to 5.0 per cent of the appropriate threshold, whichever is the greater.".

283. Insofar as the applicant contends that there was an error in the approach taken by the Inspector which flowed from her alleged failure to appreciate an increase in building size, over time, any objective reading of the Inspector's report entirely undermines this.

284. It is perfectly clear - because the Inspector states it explicitly - that she was not considering development in isolation. Rather, the development concerned what she described as *"extension to the previously granted reg. ref. 4296/19, to extend the ground floor by an additional 68 sq m and minor elevational alterations to the northwest, northeast and southwest elevations"* (emphasis added)

Context

285. It clear that the Inspector considered this development in the appropriate context i.e. both in terms of the entire planning history (which is set out at section 4.0) and as regards the nature, size and location of the development in its physical context. As noted earlier in this judgment, it is equally clear that the Inspector visited the site on 2 March 2023 and, thus, was familiar with the physical location of the site in the context of what surrounds it.

Size

286. Among the submissions made on behalf of the applicant is that *"the Inspector did not take account of the increase in size"*. With respect, the facts paint an entirely

different picture. The Inspector was plainly aware of the nature, size, and location of the permitted scheme and of the increase in size, were planning permission to be granted in relation to the extension/elevational alterations. That is clear from the face of the Inspector's report.

287. Para. 38 of the applicant's 10 September 2024 written submissions state *inter alia*:-

> *"the applicant maintains that the cumulative effect of the* [first and second] *permissions (which, inter alia, increased the size of the building by approximately 20% to 1,478 sq m) when considered together with the Decision, is such that the respondent ought to have given careful consideration to whether an EIA screening and/or assessment was required, which the respondent failed to do."* (emphasis added)

288. Although the applicant refers to "*cumulative effect*", it says nothing about what this cumulative effect actually *is.* No evidence whatsoever is proffered as to the cumulative effect asserted.

289. The submissions at para. 38 constitute what the applicant says is the total increase in the size of the development, authorised by the parent permission, if one were to add together the amendments authorised by the second permission and the decision under challenge.

290. However, the second permission has *not* been challenged. Furthermore, the applicant has not established in evidence the accuracy of the 20% asserted.

291. Even if that were not so, the evidence establishes without doubt that the Inspector/Board did give *"careful consideration to whether an EIA screening and/or assessment was required".* The submission that the respondent "*failed to*" is no more than a 'bald' assertion, wholly undermined by the evidence.

292. In further written submissions handed in during the course of the trial, it was contended by the applicant that the Inspector *"assessed the project and determined that the second amendment on its own would not be likely to have a significant effect on the environment"* (emphasis in submissions).

293. Again, this submission is fatally undermined by the facts. The Inspector applied the correct test. She did so fully aware of the nature, size and location of the development and knowing that the extension/elevational alterations, for which permission was sought, would amount to an extension to previously - permitted development. Indeed she explicitly described the development as being: a 68 sq m

extension and alterations to "*a permitted scheme on a site area of c. 0.0544 hectares located within a city centre environment*" (section 5.3.1 of the Inspector's 2023 report).

'Project splitting'

294. The applicant alleges that the respondent impermissibly allowed *"project splitting"*. The term is not found in legislation but, as this Court understands it, project splitting refers to a situation where a project, which would otherwise require EIA, is 'divided up' or 'split' into separate projects in an effort to avoid EIA obligations.

295. In the Supreme Court's decision in *Fitzpatrick v An Bord Pleanála* [2019] IESC 23, Ms. Justice Finlay Geoghegan noted (at para. 13) that the appellants relied by analogy on:-

> "*…the well-established line of authority which seeks to prevent avoidance of assessment pursuant to the EIA Directive by the splitting of projects which, if taken together, are likely to have significant effects on the environment and meet the thresholds for assessments in accordance with Article 4 of the EIA Directive and Annexes referred to therein, see, inter alia, Ecologistas en Acción-CODA v Ayuntamiento de Madrid (Case C-142/07) [2008] E.C.R. I-06097 at para. 44:-*
>
> > *'44. Lastly, as the Court has already noted with regard to Directive 85/337, the purpose of the amended directive cannot be circumvented by the splitting of projects and the failure to take account of the cumulative effect of several projects must not mean in practice that they all escape the obligation to carry out an assessment when, taken together, they are likely to have significant effects on the environment within the meaning of Article 2(1) of the amended directive (see, as regards Directive 85/337, Case C-392/96 Commission v Ireland [1999] ECR I 5901, paragraph 76, and Abraham and Others, paragraph 27).'"* (emphasis added)

296. The parent permission concerns a development project which was sub-threshold, not a mandatory project for the purposes of EIA. In the manner already examined, the applicant has not pleaded that the decision under challenge, which concerned the *"change or extension of development already authorised"* (explicitly dealt with in s. 13 of Part 2 of Schedule 5 Art. 109 PDR 2001) resulted in a sub-threshold development *ceasing* to sub-threshold.

297. Insofar as it is alleged, incorrectly, that the Board failed to consider any likely effects on the environment of the works comprising the third permission in combination with the works authorised by the parent permission, there are *no* likely effects. The outcome of the preliminary examination carried out in respect of the parent project ruled out any such effects and there was no challenge to that decision. Preliminary examination was also conducted in respect of the development authorised by the decision under challenge and the outcome was a screening out.

298. In summary, and wholly unlike project splitting (i) the development was not divided up at in an effort to avoid EIA obligations; (ii) the Inspector carried out preliminary examination in the proper manner; (iii) in so doing, the Inspector was well aware of the nature of the proposed works in the context of previously permitted development; and (iv) the applicants have failed to proffer any evidence as to the *"effects of the development at the property in totality"* (see para. 38 of the applicants written submissions) which they say the Inspector should have considered.

Burden of proof

299. It must also be kept in mind that the burden of proof rests 'squarely' on the applicant, as Mr. Justice Holland stated in *Environmental Trust Ireland v An Bord Pleanála* [2022] IEHC 540 (at 277):-

> *"Generally in judicial review, including planning and environmental judicial review, the impugned decision, is presumed valid and the onus of proving otherwise lies on the applicant for judicial review…"* (emphasis added)

Holland J. went on to cite from *Monkstown RRA Road,* in which the learned judge put matters as follows:-

> *"The starting point in planning and environmental judicial review is that "…the Board's decisions enjoy a presumption of validity until the contrary is shown" – (Ratheniska v An Bord Pleanála [2015] IEHC 18 per Haughton J.). The presumption is rebuttable but the applicant for judicial review bears the burden of rebutting it and so proving invalidity. This implies that an applicant must lay a proper basis for criticisms of the adequacy of the Board's planning and environmental assessments and decisions."* (emphasis added)

300. In the present case, the applicant has not attempted to 'lay a proper basis', by means of any evidence from an environmental expert, or otherwise.

301. In short, having had the benefit of arguments which were not available to the court at *the ex parte* stage, and having considered the evidence with the benefit of a contested hearing, it is clear that the applicant is not entitled to relief on this ground.

Ground 9

302. The nineth and final ground upon which the decision is challenged is pleaded as follow-

> *"**Core Ground 9***
>
> *The Decision is ultra vires and invalid in that it fails to adequately address the requirements of the Habitats Directive and in particular fails to adequately assess/consider and screen the proposed development for Appropriate Assessment as a whole, both individually cumulatively with regard to other plans and projects in the area, including the previously permitted developments on the site, contrary*

to Article of 6 of EU Directive 92/43/EEC ("Habitats Directive"), Part XAB and Section 177U of the Planning and Planning and Development Act 2000, as amended."

Habitats Directive - Article 6 (3)

303. Article 6 (3) of the Habitats Directive 92/43/EEC provides:-

"Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public." (emphasis added)

Protected European site

304. The *"site"* referred to in Article 6 (3) is a protected European site. Article 6 of the Habitats Directive was implemented by means of Part XAB of the 2000 Act.

S. 177U (1)

305. Section 177U (1) of the 200 Act states:-

"A screening for appropriate assessment of a draft Land use plan or application for consent for proposed development shall be carried out by the competent authority to assess, in view of best scientific knowledge, if that Land use plan or proposed development, individually or in combination with another plan or project is likely to have a significant effect on the European site." (emphasis added)

Screening

306. In the foregoing manner, Article 6 (3) of the Habitats Directive and s. 177U of the Planning and Development Act 2000 ("the 2000 Act") deal with 'screening' for appropriate assessment.

307. In *Eoin Kelly v An Bord Pleanála* [2019] IEHC 84, Barniville J. (as he then was) conducted a detailed analysis of authorities, domestic and European, in relation to screening for appropriate assessment and identified a range of principles, at para. 68 of his judgment, which it is helpful to set out here:-

"It seems to me that for present purposes, the following principles applicable to the screening stage for appropriate assessment (stage 1 screening) be derived from Article 6(3) of the Habitats Directive, as interpreted and applied by the CJEU, and from s. 177U of the 2000 Act, as interpreted and applied by the Irish Courts:

(1) The threshold test in Article 6(3) of the Habitats Directive and s.177U (1) of the 2000 Act is that an appropriate assessment will be required if the proposed development is ' likely to have a significant effect' on the protected site (i.e. a 'European site' under part XAB of the 2000 Act), either individually or in combination with other plans or protects. That this is the threshold test is clear from the decision of the High Court (Finlay Geoghegan J.) in Kelly (at para. 40), as approved by the Supreme Court in Connelly (at para. 8.14).

(2) It is not necessary, in order to trigger the requirement to proceed to stage 2 appropriate assessment, that the proposed development will 'definitely' have significant effects on the protected site but such a requirement will arise if it is a 'mere probability' that such an effect exists (Waddenzee, para.41). This was developed by the CJEU in Waddenzee (at para.43) where the Court stated that the requirement to carry out an appropriate assessment will be satisfied if there is a 'probability or a risk' that the development will have 'significant effects' on the protected site.

(3) In light of the precautionary principle, such a 'risk' will be found to exist if 'it cannot be excluded on the basis of objective information' that the particular development 'will have significant effects' on the protected site (Waddenzee, para. 44)(see also People over Wind, para. 34).

(4) Under s177U(4) of the 2000 Act an appropriate assessment will be required if, on the basis of objective information, a ' significant effect' on a European site ' cannot be excluded'.

(5) Under s177U(5), an appropriate assessment will not be required if, on the basis of objective information, a ' significant effect' on a European site ' can be excluded'.

(6) In the case of 'doubt as to the absence of significant effects' an appropriate assessment must be carried out (Waddenzee, para. 44). The requirement to conduct an appropriate assessment will arise where, at the screening stage, it is ascertained that the particular development is 'capable of having any effect' (albeit this must be any 'significant effect') on the European site (para.46 of the opinion of Advocate General Sharpston in Sweetman).

(7) The ' possibility' of there being a ' significant effect' on the European site will give rise to a requirement to carry out an appropriate assessment for the purposes of Article 6(3). There is no need to 'establish' such an effect and it is merely necessary to determine that there 'may be' such an effect (para. 47 of opinion of Advocate General Sharpston in Sweetman).

(8) In order to meet the threshold of likelihood of significant effect, the word ' likely' in Article 6(3) and S. 177U(1) should be read as being less than the balance of

probabilities. The test does not require any 'hard and fast evidence that such a significant effect was likely'. It merely has to be shown that there is a 'possibility' that this significant effect is likely (per Haughton J in Alen-Buckley, para. 83).

(9) The assessment of whether there is a risk of 'significant effect' on the European site must be made in light, inter alia, of the 'characteristics and specific environmental conditions of the site concerned' by the relevant plan or project (see, most recently, People Over Wind, para. 34).

(10) Plans or projects or applications for developments which have 'no appreciable effect' on the protected site are excluded from the requirement to proceed to appropriate assessment. If all applications for permission for proposed developments capable of having ' any effect whatsoever 'on the protected site were to be caught by Article 6(3) (or s.177U) ' activities on or near the site would risk being impossible by reason of legislative overkill' (Opinion of Advocate General Sharpston in Sweetman, para. 48).

(11) While the threshold at the screening stage of Article 6(3) and s.177U is ' very low' (Opinion of Advocate General Sharpston in Sweetman, para.49; judgment of Finlay Geoghegan J. in Kelly, para.30), nonetheless it is a threshold which must be met before it is necessary to proceed to the stage 2 appropriate assessment stage."

Parent permission - screened out

308. At para. 43 of the applicant's written submissions, it is suggested that the development in the parent permission was 'screened in' for the purposes of AA. This is simply not so.

309. The Inspector's report dated 13 May 2019 (ABP303676-19) deals explicitly with appropriate assessment and, at section 4., the Inspector states:-

"4.1.6 A stage 1 screening for appropriate assessment was also submitted by McCutcheon Halley Planning Consultants. It concludes that there will be no risks of significant negative impacts on any European site as a result of the proposed development either alone or in combination with other plans and projects and, as such, a stage 2 appropriate assessment is not required."

310. The determination with respect to AA screening is set out at section 10.0 of the Inspector's 2019 report as follow:-

"10.0 Appropriate Assessment

Having regard to the nature and scale of the proposed development and nature of the receiving environment together with the proximity to the nearest European site, no Appropriate Assessment issues arise and <u>it is not considered that the proposed development would be likely to have a</u>

> *significant effect individually or in combination with other plans or projects on a European site."* (emphasis added)

In the foregoing manner, the screening test was clearly applied and (contrary to para. 43 of the applicant's written submissions) what it described as the *"previous proposed development"* was not screened in.

Mistake

311. This mistake fundamentally undermines the applicant's submission that it was *"not possible or rational to screen-in the previous proposed development for the purposes of the Habitats Directive and simultaneously conclude, taking account of the former screened-in proposal, that future further development on the site is screened out."*

312. Among the applicant's submissions is to claim that no AA screening assessment took place with respect to the decision under challenge. Again, this is simply incorrect.

313. Before looking at the AA screening which occurred in relation to the decision under challenge, it is important to recall that the Inspector's report must be read as a whole and it seems useful to refer to certain of the contents of her report which precede the AA screening.

314. The "*Site Location and Description*" is set out in detail at Section 1.0 and, (although I quoted from same at the beginning of this judgment) it states:

> *"The site is located at Merrion Street Lower in Dublin city centre. It is located on the eastern side of the street between Clare Street and Lincoln Place. It is situated between the Davenport Hotel and No. 1 Merrion Square North, which backs on to the subject site. The Mont Clare Hotel, on the western side of Merrion Street Lower, is located directly opposite the site. The site accommodates a wayleave vehicular access between the office block and the adjoining Davenport Hotel to the north. This provides access to the rear of nos. 1-4 Merrion Square adjacent to the southern boundary of the site"* (emphasis added)

315. In the manner examined earlier in this judgment, any objective reading of the Inspector's report puts beyond doubt that the Inspector (who has visited the site, in person, and who accurately set out the planning history) was well aware of the size, scale, nature and location of the proposed development, i.e. "*in Dublin city centre*".

316. Section 2 referred to the *"Proposed Development".* S.3 dealt with the decision of DCC at first instance. S. 4 set out the "*Planning History*". Section 5.1 of the 2023 report made reference to the "*Dublin City Development plan 2022-2028*" which had come into effect on 14 December 2022. S.5.1.2 noted that the site was *"zoned Z8 'Georgian*

conservation areas" and referred to the relevant aims, being "*To protect the existing architectural and civic design character, and to allow for limited expansion consistent with the conservation objective".* S. 5.1.3 noted that the site was "*located within a Conservation Area and all contiguous sites including the buildings fronting onto Merrion Square North and the Davenport Hotel, are Protected Structures*". S. 5.1.4 noted the site was "*also located within a zone of archaeological interest".* S. 5.1.5 referred to "*Chapter 11 of the Development Plan"* which relates to *"Built Heritage and Archaeology".*

317. S. 5.2.1, which concerned *"Natural Heritage Designations"*, noted that *"The site is not located within or close to any European site."* Read in the context of the entire report, there is no inaccuracy in the foregoing. The site is neither *"within or close to"* a European site on any common-sense understanding of the foregoing statement. The site is (as accurately described in S. 1.1 of the same report) in "*Dublin city centre*", between the Davenport Hotel and No. 1 Merrion Square North, which backs onto it and directly opposite the Mont Clare Hotel.

Error of fact

318. No error of fact was pleaded, nor was consent sought during the trial to amend the Statement of Grounds in order to include a plea that s. 5.2.1 contained any error of fact. Even if it had been pleaded (and it was not) there is no error of fact in the Inspector's 2023 report, still less one which would render the decision *ultra vires* and invalid.

319. Despite the skill with which oral submissions to this effect were made, they can fairly be said (i) to flow from taking a sentence in isolation, out of context, as opposed to considering the Inspector's report as a whole; and (ii) to be undermined by a proper reading of the report.

320. Returning to its contents, s. 5.3 deals with "*EIA Screening*"; s. 6 refers to the "*Grounds of Appeal*" and the Inspector's *"Assessment"* is dealt with at s. 7.

321. Paragraph 7.4.1 of the Inspector's 2 March 2023 report states *inter alia* that: *"…there is no mandatory requirement to submit an AA screening assessment"*. The foregoing is a correct statement of the law.

322. The Inspector goes on to says: *"This matter is discussed in further detail in section 7.4 below".* Nothing turns on the minor typographical error (AA being dealt with further, in section 7.5).

323. Paragraph 7.4.1 of the Inspector's report concludes: *"I am satisfied that the planning application contains sufficient information to assess the potential impacts from same and make a determination"*. The foregoing plainly represents an exercise of

judgment by the competent authority as to the adequacy of information before it, in the context of the decision making with which it is tasked. The applicant does not claim that the Inspector/Board erred in being so satisfied. Moreover, the irrationality standard would apply and the applicant's case comes nowhere near meeting that standard.

"Cumulative effect"

324. In para. 39 of the applicant's written submissions it is asserted that: *"The respondent failed to adequately consider whether an appropriate assessment was necessary, particularly having regard to the cumulative effect of the proposed works permitted by the Decision, the first and second grant."* Before turning to the Inspector's 2023 report, it should be noted that the phrase "*cumulative effect*" is not found in the legislation. Screening for appropriate assessment concerns whether the proposed development *"is likely to have a significant effect on the European site"* be that "*individually or in combination"* with other development. It will also be recalled that the phrase "*cumulative effect*" was also employed in relation to Core Ground 8, whereas the applicant used the term *cumulative impact* in seeking to advance Core ground 6. It is appropriate at this point to look at section 7.5 of the Inspector's report where AA is addressed:

> *"7.5* ***Appropriate Assessment***
>
> *Having regard to the nature and scale of the proposed development and nature of the receiving environment together with the proximity to the nearest European site, no Appropriate Assessment issues arise and it is not considered that the proposed development would be likely to have a significant effect individual or in combination with other plans or projects on a European site."*
> (emphasis added)

325. The first observation to make is that applicant's claim that no AA screening assessment took place is demonstrably wrong. On the contrary, Section 7.5 comprises the application of the correct test, consistent with Section 177U of the 2000 Act.

326. As to the *cumulative effect* argument, the applicant has advanced no evidence whatsoever as to what it contends to be the cumulative effect on any protected site. Furthermore, the evidence puts beyond doubt that the Inspector was well aware of all relevant information, including the fact that this would be the third in a series of planning permissions concerning works at the site.

327. As examined earlier, the Inspector set out (at s.4.0 of her report) the "*Planning History",* wherein she describes in detail the works *previously* authorised by the 'parent' permission (i.e. ABP 29S.303676) and the second permission (i.e. DCC Ref 4296/19), respectively.

328. Moreover, the Inspector's view was reached on the basis of an explicit consideration of the potential for effect of the development "*in combination with other plans or projects".*

329. In short, the evidence entirely undermines the applicant's assertion of a failure to have regard to what the applicant describes as "*the cumulative effect of the proposed works".*

Identify by name

330. During the course of submissions it was also asserted that the Inspector failed, in section 7.5, "*to identify by name*" the relevant European sites. With respect, that submission is made without the applicant having identified any obligation on her to 'name check' European sites.

331. It is also fair to say that, whilst the applicant spoke in positive terms about section 10.0 of the Inspector's 2019 report (i.e. the AA screening determination concerning the parent permission/development), no European site was identified *by name* when the parent permission was 'screened out' for the purposes of AA, in a process the applicant took no issue with.

No evidence of effect on an European site

332. Not only have the applicants adduced no evidence in relation to any *effect,* cumulative or otherwise, on any European site, they have not even identified any European site said to be affected. Nor have they produced any evidence of risk regarding any conservation objective. This is despite the burden on an applicant which is clear from a range of authorities.

333. In *Thomas Reid v An Bord Pleanála (No.1)* [2021] IEHC 230 ("*Thomas Reid*"), Mr. Justice Humphreys made the following clear (at para. 19):"*…if the issue is whether scientific doubt as to effect on a European site precluded the grant of permission, an objector has to bring something into the process that raises such a doubt, if doubt wouldn't otherwise arise."* By contrast, the applicant in the present case merely *asserts* invalidity without laying any evidential basis for the assertion.

334. It should also be noted that, in *Thomas Reid*, Humphreys J. was addressing the general obligation to raise points, first, with the decision-maker (as opposed to raising grounds in a Court challenge which had not been raised prior to the grant of permission). In the present case, a range of issues were *not* raised by the applicant on appeal to the Board. The applicant did not raise any EIA issue and did not point to any likely significant effects in the appeal to the Board. The applicant did not raise the question of development contributions pursuant to Sections 48/49. Nor did the applicant raise any issue regarding the construction management plan.

Issues not raised with the Board

335. AA was raised by Minoa in its 13 May 2022 submissions to the Board, on appeal. However, the furthest this went was to state that the application was deficient in relation to *"non provision of AA screening assessment"*. The substance of that submission is that no AA screening assessment took place at first instance. That is simply incorrect. Other than this incorrect assertion, there was no evidence put forward in relation to adverse effect on any European site or conservation objective in the applicant's appeal to the respondent. The balance of para. 19 of the learned judge's decision in *Thomas Reid* also merits attention:-

> *"Failure to do so maybe doesn't preclude being allowed to go through the motions of a challenge later but it renders the challenge empty, and devoid of any prospect of success, because the issue in that challenge would be whether there was doubt by reference to the material before the decision-maker, not by reference to new matters the applicant thought of after the event."*

Evidential deficit

336. In the present case there was *no* doubt, by reference to the material which was before the decision-maker, as regards AA. In short, the applicant has merely raised an assertion in these proceedings without proffering any evidence whatsoever to underpin it. Speaking to the burden on an applicant who maintained an AA challenge, Holland J. noted at para. 292 of his judgment in *Monkstown RRA* that:-

> *"…the Applicants adduced no evidence of risk posed… The Applicants pleadings say nothing of any specific risk to European sites, much less having regard to their conservation objectives. Nor were these issues raised before the Board. In my view the Board's points are well-made. The Applicants cannot raise these issues now."*

Showers

337. The furthest the applicant goes is to assert that the impugned decision brought about an increase in shower facilities in the building. Based on that assertion, it is submitted that an increase in water-use would arise. Two points deserve emphasis. First, these assertions are not linked to any *effect*, still less an adverse effect, on any conservation objective in respect of any European site. Second, a careful consideration of the evidence before this Court does not support a finding of fact that the decision resulted in *any* increase in shower facilities in the development as a whole. Nor has the applicant established that the decision results in any increase in the use of water.

338. Whilst this submission was made the applicant's Counsel with reference to various drawings prepared by SSA Architects which showed *inter alia*, the location of toilet and shower facilities on the ground floor, it is also the case that other drawings depict shower facilities having been removed from a previous location and relocated. As I say, nothing whatsoever turns on this. If anything, it illustrates that the 'height' of the

applicant's argument comprises of submissions which lack any evidential foundation and simply do not address whether there could have been a reasonable scientific doubt concerning any effect on a European site. In relation to the relevant test, Humphreys J. stated the following in *Thomas Reid* (para. 45):*"The test is whether the applicant has demonstrated that a 'reasonable expert' (a reasonable person with the relevant sufficient expertise and aware of, and in a position to fully understand and properly evaluate, all the material before the decision-maker) could have a reasonable scientific doubt as to whether there could be an effect on a European site."*

339. The applicant has come nowhere near meeting this test. For the reasons set out in this judgment, I am satisfied that Core Ground 9 lacks also substance as it goes no further than unsubstantiated assertion undermined by evidence. Therefore, the applicant is not entitled to relief.

340. In summary, having had the benefit of arguments which were not available to the court at *the ex parte* stage, and having carefully considered the evidence, I am satisfied that Core Ground 9 is entirely undermined by the facts. The applicant is not entitled to relief on this final (or on any other) ground.

Refined submissions regarding Grounds 8 and 9

341. By the third day of the trial, the submissions made on behalf of the applicant were "refined" and "narrowed" to a point where the case advanced under both Core Grounds 8 and 9 can be summarised as follows:-

- The applicant does not contend that the *'preliminary examination'* (EAI Directive) was flawed or that the *'appropriate assessment'* ("AA/AA Screening") (Habitats Directive) was wrong;
- The applicant makes no criticism of the quality of either of the foregoing assessments;
- The applicant asserts that the Inspector considered only the *"narrow project"* (i.e. the development authorised by the impugned decision) rather than the *"cumulative effect"* (i.e. development as authorised by (i) the parent permission; (ii) the second permission; and (iii) the impugned decision);
- The gravamen of the applicant's "refined" case under both grounds 8 and 9 is that what was before the Inspector was not the *"entire"*, but the *"smaller"* project (i.e. the third permission) only;
- In this manner, the applicant contends that *"the correct screening of the entire of the project did not occur"*;
- Counsel for the applicant also made an oral submission to the effect that *"if the Inspector correctly understood her task"* and *"had the correct preliminary examination or screening occurred"* the outcome "*may have*

been the same" (i.e. no further engagement with either the EIA Directive or the Habitats Directive);

- The applicant's Counsel characterises grounds 8 and 9 as constituting *"a definitional or construction case"* in which the applicant was "*not required*" to put any scientific or other evidence before the Court (in particular, how the development impacts the environment or conservation objectives);
- The challenge under both grounds 8 and 9 was ultimately put by the applicant's Counsel, as follows: *"The way in which the Inspector approached her task was impermissibly narrow; and on the basis of it being impermissibly narrow, it is fundamentally flawed"*.

342. Whilst these submissions no doubt reflect Counsel's great skill, an unfailing commitment to his client's case, and no little ingenuity, they are fatally undermined by the evidence.

343. In the manner examined earlier, neither EIA nor AA was approached in an impermissibly "*narrow*" fashion. An objective reading of the Inspector's report demonstrates that (i) she applied the correct test in respect of both EIA and AA; and she did so (ii) fully aware of the relevant planning history, including, that this was the third in a series of permissions commencing with the parent permission; and (iii) conscious of the nature, location, size scale of the proposed development.

344. As examined earlier, the Board's EIA decision (contained at s.5.3.1 of the Inspector's 2023 report) made clear that the development consisted of minor "*extension… and…alterations to a permitted scheme on a site area of c. 0.0544 hectares located within a city centre environment".* A consideration of the evidence, including the foregoing, fatally undermines the assertion that an "impermissibly narrow' (and, therefore, allegedly "fundamentally flawed") approach was taken.

345. Similarly, as regards AA, the Board determined (as seen in section 7.5 of the Inspector's report) that the proposed development would not *"have a significant effect individually or in-combination with other plans or projects on a European site"*. In short, the very words used in the Inspector's report rules out the proposition that there was a failure to consider the proposed development *"cumulatively"* (to use the term deployed on behalf of the applicant).

346. In short, the Inspector and, in turn, the Board properly understood the proposed development and carried out a lawful EIA preliminary examination and AA screening. Thus, the 'refined' submissions fail in circumstances where they are fatally undermined by facts which emerge from the evidence.

Alleged non-disclosure

347. An element of the notice parties' case is that there was material non-disclosure by the applicant. As I indicated to Counsel at the conclusion of the hearing, it seemed to me that the issue of alleged non-disclosure would only be relevant to the question of the exercise by this Court of discretion to *refuse* judicial review in favour of an applicant who had otherwise established a ground or grounds for same. Thus, the issue would be of no relevance if the applicant did not establish an entitlement to relief. In response, Counsel agreed, confirming that if the outcome of this Court's consideration was a refusal on the merits, there would be no need to engage with or to make any findings regarding alleged non-disclosure.

348. For the reasons set out in this judgment, I am satisfied that the applicant is not entitled to relief on any of the 9 grounds advanced. Therefore, it has been unnecessary to engage with the issue of alleged non-disclosure, other than to make the following brief comment.

349. As was touched on during the course of the hearing, there is a fundamental difference between (i) an assertion that a party to legal proceedings has engaged in misconduct; and (ii) a claim of professional misconduct against a legal professional. In these proceedings, the latter was never even suggested and this was made explicit, in open Court.

Conclusion

350. The skill, commitment and ingenuity deployed by the applicant's Counsel in service of his client was plain to see. However, the outcome of these proceedings does not hinge on *submissions*, irrespective of how valiantly made. The outcome must be determined by the application of *legal principles* to the relevant *facts* which emerge from a consideration of the *evidence.* Having undertaken this exercise with respect to each of the 9 Core Grounds, the applicant's challenge fails on all 9.

351. By way of a preliminary view on the question of costs, the 'default' position, pursuant to s. 50B of the 2000 Act, is that each party to the proceedings shall bear its own costs. Section 50B(3) entitles the court to award costs against a party if the court considers it appropriate to do so: (a) because the court considers the claim to be *"frivolous or vexatious";* (b) because of the manner in which the party has *conducted* the proceedings; or (c) where the party is in *contempt* of court.

352. There is no question of (c) applying. Nor would (b) appear to apply, given the fact that it has been unnecessary to engage with evidence as to conduct, and no adverse findings have been made. With the regard to (a), several comments seem appropriate

353. First, the 3 day hearing was one in which the applicant's claim was opposed on its merits, not one in which it was asserted that the entire of the applicant's claim was "*frivolous"* (in the sense of being clearly unsustainable or bound to fail). Second, for perfectly understandable reasons, a preliminary application to strike out the application *in limine* was never brought. Third, although I have expressed the view that certain of the applicant's grounds were bound to fail, that is not a view taken in relation to all grounds.

354. As to whether the proceedings were "*vexatious"*, it is perfectly clear that the notice parties regard the application as being brought for an ulterior motive and improper purpose. It will be recalled that in his 15 February 2024 affidavit, Mr. O'Callaghan averred, *inter alia,* that *"the proceedings are manifestly being brought for a commercial purpose and serve no environmental end",* also averring that *"these proceedings amount to a collateral attack on the notice party's property rights and an abuse of the planning process"*. However, it will also be recalled that the applicant strenuously objects to the foregoing. In his 14 May 2024 affidavit, Mr. McKeown averred *inter alia* that: *"the within application is one made by the applicant in an attempt to quash a decision by the respondent granting permission to the first notice party in a manner which is procedurally and legally flawed",* also averring: *"I wholly refute and reject any implication that these proceedings are brought in bad faith or without proper purpose…"*

355. Neither side sought to cross-examine the other and no oral evidence was given during the 3-day trial. That is certainly not a criticism, but it is a fact and, that being so, it seems to me that this Court cannot fairly make any determination in relation to whether or not the proceedings were brought for an ulterior purpose (i.e. can be considered *vexatious*), in circumstances where starkly different positions are averred to and no oral testimony has been given.

356. These are preliminary views only. If it is contended that there should be a depart from the 'default' position articulated in s. 50B, the notice parties and respondent have until Friday 20 December to furnish written legal submissions and the applicant has until Friday 17 January to furnish any written submissions in response.

357. I will list the matter 'for mention' on Friday 24th January, but if there is agreement on the final form of order, an agreed draft should be furnished as soon as possible, in advance of that date.