[2022] IEHC 687

THE HIGH COURT

JUDICIAL REVIEW

[2021 No. 61 JR]

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

BETWEEN:

THOMAS REID

APPLICANT

AND

AN BORD PLEANÁLA

IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

INTEL IRELAND LIMITED

NOTICE PARTY

(No. 5)

JUDGMENT of Humphreys J. delivered on the 9th day of December 2022.

1. While the leave procedure in judicial review is occasionally criticised, it has some advantages that outweigh any minor downsides. The main advantage by some distance is that it allows the court to review the papers from the beginning and, if necessary, to impose a degree of order, regularity and technical correctness on the pleadings at the outset that will reduce the potential for contentious correspondence, argument, dispute, misunderstanding, confusion and difficulty and that will save considerable time and costs further downstream. That is, for example, reflected in the detailed leave checklist currently applicable in the Commercial Planning and Strategic Infrastructure List. Without the leave procedure, it would be quite a messy operation to ensure reasonable consistency and clarity of pleadings, and would require a court to intervene at a later stage to uproot knotweeds in the papers that can much more easily be nipped in the bud under present arrangements. (Indeed the pointless sacrifice of that reviewing facility is probably the primary argument against the dubious procedure of the telescoped or rolled-up hearing.)

2. Leave on notice, on the other hand, may have a role in specific situations, but is problematic as a blanket approach. That isn't just my view: it is the view of the Oireachtas as articulated through the experiment of attempting such a general mandatory procedure for both planning (s. 50(4)(b) of the Planning and Development Act 2000 as enacted) and asylum (s. 5(2)(b) of the Illegal Immigrants (Trafficking) Act 2000 as enacted) and then having to abolish that procedure in both lists (s. 32, Planning and Development (Amendment) Act 2010; s. 34, Employment Permits (Amendment) Act 2014), presumably due to the delays and backlogs thereby caused. Indeed, at one point before the leave on notice requirement was abolished, there was a two-year waiting list to get one's leave application heard in asylum cases.

3. With that context, it is perhaps puzzling that such a procedure should have been mooted again in the planning context (it is a matter of record that a consultation to this effect was contained in head 4(1) of General Scheme of Housing and Planning and Development Bill 2019), although this hopefully may not represent the final position.

4. That said, in the individual case, a court has the discretion to make such an order or not, as s. 50A(2)(b) of the Planning and Development Act 2000 and O. 84 r. 24(1) RSC clearly recognise. But even in doing so at the level of the individual case, there are some cons as well as pros.

5. In certain reasonably well-defined situations, such as where the applicant is a litigant in person, and where the court may be particularly assisted by professional representation on the other side, such an order may add something specific. *O'Doherty v. Minister for Health* [2020] IEHC 209 (Unreported, High Court, Meenan J., 13th May, 2020) might be a good example.

6. Leaving aside such limited contexts, an order putting opposing parties on notice of a leave application can in some situations incentivise those parties into seeking a full hearing of that application (or even be taken by the parties or their lawyers as an invitation to do so), thus creating the possibility of two hearings in many cases where only one would otherwise arise. This has the potential to cause significant delay and to increase costs.

7. The uneasy compromise between the competing considerations involved in the commercial planning context that was arrived at in Practice Directions HC107 and HC114 applicable to the Commercial Planning and Strategic Infrastructure Development List is a provision that requires applicants to put other parties informally on notice by delivering all papers. That procedure allows for exceptional interventions if, for example, some critical piece of information has not been brought to the court's attention. But those parties are not formally on notice so as to invite or incentivise a contested leave hearing. In addition, it is a standard term of the grant of leave in the list that it is without prejudice to any point the opposing parties could have made at leave stage, which fully entitles all such parties to keep their powder dry for the main battle.

8. In general, respondents and notice parties would normally be better off reserving their objections for a full hearing. Speaking empirically rather than normatively, and leaving aside the limited cases where special considerations apply, the statistically modest possibility of a knockout leave rejection is more likely in practice to be outweighed by the statistical probability of leave being ultimately granted in some shape or form, with consequential extra delay or costs having accrued. Where the Aarhus Convention applies, these consequences may possibly end up being borne to some degree by the opposing parties themselves. Furthermore, creating two hearings where one would have done also impacts downstream on other litigants by exhausting court time, resources and energies. That is something that a court can have a legitimate interest in minimising, even in an adversarial context where parties in a particular case are pushing for such a procedure.

9. Ideally perhaps the exercise of the judicial discretion to hold or not to hold such a leave hearing on notice might be subject to a leave to appeal requirement in order to prevent the whole leave process from becoming a federal case in itself (or even limited to leapfrog

appeal to the Supreme Court as the sole appellate route). But blanket mandatory leave on notice is a problem best not inflicted on the system on yet a further occasion.

10. The leave application in the present case is in the relatively unusual category of matters where such a procedure calls for particular consideration, essentially because some quite similar points in certain respects were previously made by the same applicant in a previous failed judicial review relating to the underlying permission for which the impugned permission in the present case is merely a modification.

11. The present application follows a number of previous decisions in the applicant's first judicial review.

12. In *Reid v. An Bord Pleanála (No. 1)* [2021] IEHC 230, [2021] 4 JIC 1204 (Unreported, High Court, 12th April, 2021), I excluded certain evidence prior to the hearing.

13. In *Reid v. An Bord Pleanála (No. 2)* [2021] IEHC 362, [2021] 5 JIC 2705 (Unreported, High Court, 27th May, 2021), (Noted Douglas Hyde BL (2021) 3(1) *I.P.E.L.J* 3-13), I dismissed the applicant's judicial review on the merits.

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

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

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

The SAC

17. Intel's facility, adjacent to Rye Water near Leixlip, County Kildare, is located near a Special Area of Conservation (SAC) defined by the European Union Habitats (Rye Water Valley/Carton Special Area of Conversation 001398) Regulations 2018 (S.I. No. 494 of 2018). The area of the SAC was defined in Schedule II of the 2018 regulations as follows:

> **"**The area known as Rye Water Valley/Carton Special Area of Conservation 001398 is situated in the counties of Kildare and Meath being the land and waters enclosed on the map (contained in Schedule 1) within the inner margin of the red line and hatched in red and is situated in whole or in part in the townlands of Blakestown (E.D. Maynooth), Carton Demesne, Confey, Kellystown, Leixlip and Leixlip Demesne in County Kildare and Moygaddy in County Meath."

18. Schedule III defined the habitat and species which were the qualifying interests for the European site. The habitat was defined as "[p]etrifying springs with tufa formation (Cratoneurion)*" ["In this list the sign [*] indicates a priority habitat type as defined in the Directive."]. The species for which the site was protected were defined in Schedule III as "1014 Narrow-mouthed Whorl Snail *Vertigo angustior*" and "1016 Desmoulins Whorl Snail *Vertigo moulinsiana*" (named for the French naturalist Charles des Moulins (1798-1875)).

19. Some definitions are called for, and, in the absence of anything else, one has to have regard to dictionaries and other public domain material:

(i). "*Cratoneuron*" (referred to for some reason as Cratoneurion in the habitats directive) or Cratoneuron moss is a genus of plants in the family *Amblystegiaceae* (Encyclopaedia of Life (https://eol.org/pages/53810));

(ii). "bryophyte" means any plant of the group *Bryophyta* of small primitive cryptogams, comprising the liverworts and mosses (*The New Shorter OED* (Oxford, Clarendon Press, 1993), vol. I, p. 292);

(iii). "petrifying springs" are lime-rich water sources that deposit tufa (Lyons, M.D. & Kelly, D.L. (2016) Monitoring Guidelines for the Assessment of Petrifying Springs In Ireland. *Irish Wildlife Manuals*, No. 94. National Parks and Wildlife Service, Department of Arts, Heritage, Regional, Rural and Gaeltacht Affairs, Ireland, p. iv);

(iv). "tufa" is "a friable porous stone formed of consolidated, often stratified material ... Now us[ually] ... a soft porous calcium carbonate rock formed by deposition around mineral springs" (*The New Shorter OED*, vol. II, p. 3417).

20. In short, tufa is a mineral formation whereas *Cratoneuron* are plant forms, specifically mosses. The protected habitat consists of the ensemble of both together. The applicant says as much anyway. Thus, the relevant interest goes beyond tufa *simpliciter* to a more complex habitat. The fact that there may be tufa to the north of the site affected by the earlier permissions is therefore not automatically game, set and match to the applicant.

2017 - first permission

21. While Intel have operated in the area with which we are concerned for a number of years, the first planning application relevant for present purposes was made in 2016 and related to an extension of their manufacturing facility. Due to its proximity to the European site, that was accompanied by a Natura Impact Statement (which is exhibited here, unlike in the earlier proceedings).

22. The 2016 NIS shows a tufa location on a map at a point to the north of the Intel facility at the junction of Rye Water and another river which I am told is called the Hamway River (see map at p. 14 and figure 3.23 at p. 74). A third map (p. 66, figure 3.22) shows the two formations at a slightly different location, to the east of the junction of the two rivers. On either version, this tufa formation is within the SAC as set out in the map scheduled to the 2018 regulations, submap 3193b. At p. 30 the NIS states that "the habitat likely corresponds with the priority Annex I habitat '[p]etrifying springs with tufa formation [7220], which is a qualifying interest features for which the Rye Water Valley/Carton SAC has been designated'".

23. The board granted permission for the development on 5th October, 2017. In doing so, it carried out an environmental impact assessment. The only recorded basis for having done so was the submission by the developer of an environmental impact statement rather than on the basis of a finding that EIA was otherwise statutorily required.

2019 – second permission

24. On 1st February, 2019, Intel made a further application to develop their facility. That was granted by Kildare County Council subject to 34 conditions on 17th May, 2019. Appeals were lodged to the board, both a third-party appeal by the applicant here and an appeal by the developer.

25. The inspector reported on 8th October, 2019, recommending a grant of permission subject to conditions.

26. On 21st November, 2019, the board granted permission with conditions. Again, insofar as the board carried out an environmental impact assessment this was because an environmental impact assessment report (EIAR) was submitted and not because the development was expressly deemed to come within sch. 5 of the Planning and Development Regulations 2001.

27. This permission was challenged in the applicant's previous set of judicial review proceedings, *Reid v. An Bord Pleanála* [2020 No. 54 JR]. As noted above, that challenge was dismissed.

2020 – third permission

28. On 31st March, 2020, Intel applied to Kildare County Council for permission to modify the 2017 and 2019 permissions. The inspector described the works proposed at para. 2.1 of the report as follows:

> "The proposed development comprises the following elements which comprise modifications to development permitted under An Bord Pleanala Refs. ABP-.304672-19 and PL09.248582 and incorporate the following specific elements:
>
> - Alterations and reconfigurations to the roof mounted service ducting on the permitted manufacturing building. These alterations would result in the overall height of the buildings increasing by between 3 and 6 metres.
> - The addition of steel framed service platform to allow access to the 2 no. previously permitted flue stacks to the roof of the permitted waste water treatment building. These platforms are proposed to measure c. 6.6 metres wide, 11.5 metres in length and to be approximately 8.6 metres in height above the finished roof level.
> - Alterations to the existing silane pad comprising the replacement of the existing pad mounted gas cylinders with a removable gas trailer."

29. The applicant made a submission to the council on 26th April, 2020, which was received on 1st May, 2020. The council decided to grant permission on 9th July, 2020.

30. The applicant then appealed on 31st July, 2020. The board's inspector carried out a site inspection on 21st October, 2020 and prepared a report dated 30th October, 2020.

31. The board decided to grant permission on 12th November, 2020. At that time, it had the file for the 2017 permission before it, although it doesn't appear to have had the file relating to the 2019 permission at board level, apparently because the challenge to that permission was still ongoing.

32. The board order is dated 30th November, 2020. Neither the order nor the direction contains express findings in relation to the need for appropriate assessment (AA). There is a general statement that the development "would not impact negatively on ecology or

designated sites in the vicinity". In addition the direction states that "the board decided to grant permission generally in accordance with the inspector's recommendation".

2019 – EPA industrial emissions licence application

33. Intel appears to have originally applied for an industrial emissions licence on 6th December, 1996. That was granted on 17th December, 1997 (reference P0207-01). That appears to have been renewed or extended on three occasions, and a fourth and current renewal or extension was applied for on foot of the 2019 permission on 29th November, 2019 (P0207-05). In the context of that application, EWN Consultants on behalf of Intel wrote to the EPA on 28th October, 2020 , noting that the EPA had requested a modelling of emissions on the basis of a 0.8µg/m^3 of NH_3 emissions. The qualifying interests are illustrated in a map in the EWN letter at p. 17, figure 8, which shows yellow dots around Louisa Bridge to the east of the site (being qualifying interests within the SAC), and a brown dot slightly to the west of the yellow dots (being a qualifying interest outside the SAC). The further tufa formation to the north is not shown on this map.

Procedural history

34. The applicant filed a statement of grounds dated 29th January, 2021, the primary relief sought being an order of *certiorari* in respect of the 2020 permission.

35. On 1st February, 2021, these proceedings were mentioned in the Judicial Review *ex parte* List. Intel appeared and indicated that they wished to consider the papers with a view to deciding whether to apply to have the matter admitted to the Commercial List. The matter was further adjourned for such consideration on 22nd February, 2021. The applicant then wrote to Intel seeking confirmation of the position on 9th March, 2021, and on 12th March 2021, Intel replied indicating that they did not intend to make such an application. On 24th March, 2021, an order was perfected allowing liberty to make a minor amendment to the statement of grounds and the matter was adjourned to 26th April, 2021.

36. On the latter date, the matter was adjourned for mention to 14th July, 2021 in the judicial review *ex parte* List.

37. On 14th July, 2021, the matter was adjourned generally with liberty to re-enter, there being no appearance on behalf of the applicant.

38. The board's solicitors then wrote to the applicant's solicitors who replied on 21st July, 2021 stating that the present proceedings would be sought to be re-entered at the first opportunity in the event that the proposed appeal of *Reid v. An Bord Pleanála (No. 2)* was not permitted (which it ultimately wasn't).

39. On 24th May, 2022, following the conclusion of the first Reid proceedings, the matter was listed for mention in the Judicial Review List and was adjourned to 5th July, 2022 to allow an application to be made to the Commercial List, Intel having obviously changed its mind about that in the meantime. Affidavits for that purpose were sworn on 10th June, 2022 and a notice of motion filed on 13th June, 2022.

40. The application was made on 20th June, 2022, and an order admitting the proceedings into the Commercial List was made on 22nd June, 2022. The matter was then transferred to the Commercial Planning And Strategic Infrastructure Development List.

Thereafter, I made an order (perfected on 2nd August, 2022) assigning 25th October, 2022 for a 1.5 day hearing of a contested leave application.

41. I granted liberty to file an amended statement of grounds on 10th October, 2022, and a further amended statement on 17th October, 2022, without prejudice to any points that the opposing parties could have made.

42. In the run-up to the hearing, a further procedural skirmish broke out, in that on 11th October, 2022, the board wrote stating that the file for the impugned permission could not be located. Subsequently it was found, and that was communicated by letter on 14th October, 2022. I have been told that it was found in the on-site archive although it isn't clear why it wasn't located there originally.

43. On 25th October, 2022, on the morning when the matter was heard, the board wrote stating that the file regarding the 2017 permission (which had been before the board at the time of making the impugned decision) had not been located but that searches were continuing.

44. Judgment was reserved following the hearing, but in the course of considering that, I invited the parties to make further submissions on specified issues, the major one being the extent to which it was appropriate to determine contested legal issues at the leave stage. I deal with that further below. Written submissions were received and a further oral hearing then took place on 21st November, 2022 in relation to such issues.

Should the applicant's amendments to the statement of grounds be allowed?

45. As noted above, the amendments that were allowed on 10th and 17th October, 2022, were in effect permitted on a provisional basis without prejudice to the right of the opposing parties to object in due course. In fact, at the leave hearing, no particular objection was strenuously advanced to the amendments being made, although obviously their substance and merit was very much contested. On that basis, I see no sufficient reason to revisit the order allowing the amendments and will let those amendments stand.

Jurisdictional requirements

46. Any planning judicial review must comply with a number of jurisdictional requirements, the most pertinent of which are as follows:

(i). a showing of substantial grounds (s. 50A(3)(a) of the 2000 Act), and I deal with that further below;

(ii). time limits (s. 50(6) and (7)) - no issue was taken on that front;

(iii). capacity of the applicant (as a matter of general law) - that is not an issue here (it is only an issue in applications by unincorporated bodies);

(iv). standing (s. 50A(3)(b)(i)) - again that was not particularly contested at the relevant overall level of whether the action could be brought at all (as noted above the applicant was a participant in the planning process here), although it was said that the applicant should not be allowed to pursue certain points;

(v). exhaustion of remedies (s. 50A(3)(c) inserted by s. 22 of the Planning and Development, Maritime and Valuation (Amendment) Act 2022, which has been in force since 20th October, 2022 by virtue of the Planning and Development, Maritime and Valuation (Amendment) Act 2022 (Commencement of Certain

Provisions) (No. 3) Order 2022 (S.I. 523 of 2022)) – that is not an issue as there is generally no adequate administrative remedy for the decisions of the board.

47. In all the circumstances, including the lack of any major contest on these issues (apart from substantial grounds), I consider that the jurisdictional requirements have been satisfied by the applicant, subject to further consideration of the substantial grounds test below.

Material before the court

48. For the benefit of the record, the materials placed before the court by being uploaded to the ShareFile platform for this case included books of submissions, authorities, pleadings, exhibits, statement of grounds, judgments, affidavits, letters and other documentation, running to a combined total of 2,241 pages.

Reliefs

49. Assuming for the sake of argument that the applicant shows substantial grounds insofar as that is necessary, the reliefs as pleaded are broadly appropriate although some reorganisation or reordering would be preferrable. Two particular matters can be noted at this point.

50. Firstly I am minded to permit the addition of specific declarations in circumstances which I will deal with further below.

51. In addition, as regards the costs relief, which is relief 9, the applicant indicated that he wished to pursue the Aarhus Convention interpretative obligation as a matter of EU law were that to arise, and I would allow an amendment to that relief to make explicit reference to the interpretative obligation. That would appear to have been overtaken by the Supreme Court decision in *Heather Hill v. An Bord Pleanála* [2022] IESC 43 in the interim, but I will allow the amendment all the same.

Other provisions of the statement of grounds

52. The preambular matter in the statement, and the factual grounds, are not insuperably problematic. It may be that some of the phrasing of the factual allegations might be viewed as slightly argumentative or disputable but that can be dealt with in evidence and opposition papers if and insofar as that becomes necessary.

53. The only specific change that seems to me to be required is that the heading of the statement of grounds refers only to the orders permitting amendments made on 10th and 17th October 2022 whereas it should also refer to the order perfected on 24th March, 2021, and to the order that will be made on foot of the present judgment. Subject to that, it seems to me that these provisions of the statement of grounds are broadly in order for the grant of leave. I turn now specifically to the question of grounds.

The requirement for substantial grounds

54. As noted above s. 50A(3)(a) of the 2000 Act requires that, in judicial reviews to which that provision applies, the grounds be substantial.

55. I should also note here that core ground 10 regarding regulatory invalidity only requires arguable grounds rather than substantial grounds.

56. Subject to that qualification, I will examine the core grounds individually to assess them against the statutory metwand of substantial grounds. However, there is one

important issue to be addressed regarding the appropriate approach to a contested leave application.

The court's discretion in relation to resolving disputed questions at the leave stage

57. One can think of the issues arising at the leave stage as primarily breaking down into three headings:

(i). jurisdictional requirements (such as time, standing, capacity, exhaustion of remedies),

(ii). factual allegations necessary to sustain the legal arguments, and

(iii). legal propositions.

58. In *G. v. D.P.P.* [1994] 1 IR 374, Finlay C.J. identified the jurisdictional pre-requisites for leave, and referred to the factual and legal prerequisites as follows: "(b) That the facts averred in the affidavit would be sufficient, if proved, to support a stateable ground for the form of relief sought by way of judicial review. (c) That on those facts an arguable case in law can be made that the applicant is entitled to the relief which he seeks."

59. As regards jurisdictional requirements, the logic of the leave procedure, as interpreted in *G. v. D.P.P.,* is that the court must determine those issues in some form at the leave stage, albeit that, for example, a decision to extend time could be revisited later if a party that hadn't been heard comes forward with something determinative that wasn't taken into account in the original order.

60. As regards to factual issues (and leaving aside the distinction between arguability and substantial grounds), *G. v. D.P.P.* implies that one starts by taking the facts averred to at their high water mark. However it is also clear that the court can have regard to facts averred to by the opposing parties, such that it may become apparent even at leave stage that the necessary factual basis for any given point may not arise.

61. As regards legal issues, the wording of *G. v. D.P.P.* implies that frequently any legal contention will only be finally determined at the substantive hearing. But there are some exceptions to that. One is where the point has already been clarified, but that requires a little qualification.

62. In her much-quoted holding in *McNamara v. An Bord Pleanála* [1995] 1 I.L.R.M. 424, 1995 WJSC-HC 1122, Carroll J. noted that a substantial ground was one that "must be reasonable, arguable, and weighty, and not be trivial or tenuous." She said that "for example, where the point has already been decided in another case" the ground would not be substantial. But on that front, one downside of the common law method is that hallowed sayings are handed down and repeated almost to the point that they lose all meaning. Each generation of lawyers has to be able to look anew at the jurisprudence – the legal incarnation of Hannah Arendt's principle of natality. While the concept that already-rejected points are not "substantial" (logically they shouldn't even be regarded as "arguable" for mainstream judicial review purposes) is of course perfectly reasonable as a general rule, one must not lose sight of the possible qualification that an applicant might come forward with something solid as to why the original decision was wrong or why the law has evolved in some respect since then.

63. Minor quibbles or mere disagreement doesn't cut the mustard, but something more solid might. No decision realistically stands forever, but to dislodge a previous decision, one must come up with something of substance. And while some people approach *stare decisis* as if, in practice, only Supreme Court decisions were determinative, that is a bit of a misconception. Even a High Court decision could be a basis to refuse leave if an applicant can't come up with any plausible reason why it could be wrong. It's the inherent logic of the original decision and the existence or otherwise of a reasonable prospect of dislodging it (in view of legal evolutions since then or arguments not made in the previous case), rather than solely the hierarchical level of the court that handed it down, that is relevant. Because even a Supreme Court decision could be nuanced if, say for example, one can point to a relevant change in the statutory framework since it was handed down.

64. In *Kenny v. An Bord Pleanála (No. 1)* [2001] IR 565 at para. 7, McKechnie J. referred to the resolution of disputed issues in a contested leave application and said "obviously I should not attempt to resolve conflicts of fact or express any concluded view on complex questions of law or indeed anticipate the long term result, nonetheless within existing limitations, I should, I feel make some evaluation of the factual matrix and should, where with certainty I can, form some view of the appropriate statutory provisions and the relevant and material case law."

65. In *Arklow Holidays Limited v. An Bord Pleanála* [2006] IEHC 15 at para. 3.9, Clarke J. noted that "[i]t is frequently the case that an argument which sounds superficially attractive on first presentation may become insubstantial (and thus not sufficient to allow leave on that ground) when it is critically analysed with the benefit of argument by an opposing party. Furthermore opposing parties may draw attention to other relevant aspects of the factual situation which may place all of the facts in context and which may lead to a conclusion that certain grounds are insubstantial." And at para. 3.11: "Thus, where, even after having had the benefit of argument on both sides, the court remains of the view that there are substantial or weighty arguments either way, the court should not express any view on the relative strengths of those arguments. Rather, leave should be granted and it is for the court dealing with the substantive application to weigh the strengths of the relative arguments."

66. The upshot it seems to me is that there are essentially three distinct categories of situations that may arise in a leave context regarding determination of legal issues, and that the best approach in these situations depends primarily on a blend of the novelty of the point and its complexity.

67. To put it summarily, the three categories can be described as being:

> Category (i) – already-clarified legal points;
>
> Category (ii) – legal points that have not been clarified already but that are readily clarifiable within the limited confines of a leave hearing;
>
> Category (iii) – all other legal points (viz., that are neither already-clarified nor readily clarifiable).

68. This may require some further explanation:

(i). Where the law has been clarified already (in the sense of having been set out in a previous judicial decision), the court can simply apply that clear law to the facts. A "clear" law for this purpose includes law as clarified by the High Court or the Court of Appeal as well as purely by the Supreme Court, assuming that the party arguing for an alternative position doesn't put up any plausible argument as to why the position as so set out is wrong. And even a settled authority (even occasionally a Supreme Court decision if one dare say so) may need to be distinguished or clarified over time as statute law changes or as new situations arise in a complex society. Otherwise the law would fossilise and the necessary evolution of law as a practical and living instrument of human government would grind to a halt.

(ii). If the law has not been clarified, but is not particularly complex and is readily able to be clarified with some certainty in the limited forum of a leave hearing, the court can decide such issues at leave stage, rather than parking them for a later full trial. The necessity for this to be a process that can be readily conducted within the limited confines of a leave hearing is an important feature. Considerations of practicality and jealous husbandry of limited judicial resources strongly militate against turning any and every leave application into something that would rival a full blown substantive hearing with an equivalent level of argument.

(iii). If the law has not been already clarified (or if it has been clarified, but the applicant can advance substantial grounds for distinguishing, clarifying, nuancing or arguing for the need for evolution in that law), and if, even bearing in mind the perspective that a point that seems complex initially might appear more straightforward in the light of submissions of the opposing parties, the precise legal position can't be determined to the appropriate level of certainty within the limited confines of a leave hearing, then the court can grant leave provided that sufficient facts are averred to in order to provide a basis for relief having regard to the legal proposition being advanced, and that any other procedural and jurisdictional requirements are met. In such a case any determination of the merits of that legal argument will be a matter for the substantive hearing.

69. With that classification in mind, I will turn to the specific issues raised by the applicant here.

Core ground 1 – facts

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

71. That is not a legal ground as such. Insofar as it adds anything, it should be deleted from the core grounds section and relocated to the factual grounds section.

Core ground 2 – lack of sufficient information

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

73. Unfortunately for the applicant, the problem with this provision goes back to *Reid v. An Bord Pleanála (No. 2)*. For the board to have failed in its duties under the habitats directive (directive 92/43/EEC) in relation to the quality of its analysis, there would have had to be either material before the board creating a doubt as to effects on a European site, or a demonstration that a reasonable expert in the position of the board would have seen such a doubt on the face of the materials. This point thus comes into category (i) in categories of legal issues above – points where the law has previously been clarified and where the applicant has not put up any plausible reason requiring that to be revisited.

74. Neither the applicant nor anyone else put material before the board to create a doubt in relation to the applicant's complaints regarding lack of information and specifically the lack of access to the scientific model for air emissions, and nor was such material otherwise before the board. As regards to whether a reasonable expert would have seen this as a lacuna, such a conclusion has to be established evidentially. Although the applicant has been on notice since *Reid v. An Bord Pleanála (No. 1)* of the need to have admissible evidence regarding the establishment of shortcomings of this kind, no such evidence is provided in the present proceedings. The applicant moves on his own affidavit, and obviously he is not a scientific expert. Overall, it simply has not been established evidentially (to the level of substantial grounds) that such gaps as there were in the board's information were ones that a reasonable expert would have seen on their face as creating a doubt as to the impact on any European site.

75. The applicant seeks to extend the notion of what was before the board to include a suggestion of a claim of corporate knowledge of all matters canvassed in the earlier litigation, but it seems to me that that is a category (ii) point and can be dealt with now. There is no realistic basis to suggest that a decision maker could or should have immediately factored in information in an ongoing and uncertain litigation process. It doesn't help that the information could easily have been made part of the present development consent process but never was. Ultimately the position is that the inspector noted at para. 7.6.4 of the report that there would be no changes in the onsite processes or increase in production capacity or significant changes in emissions as a result of the modifications that are the subject of the impugned permission, and essentially came to a conclusion of no impact on European sites as stated at para. 7.6.8 of the report. The onus is on the applicant to establish evidentially

that a reasonable expert would have seen that approach as flawed on its face, and it seems to me that substantial grounds to that effect have not been demonstrated.

76. Leave to pursue core ground 2 and the associated sub-grounds must be refused.

Core ground 3 – lack of statement of complete findings

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

78. Insofar as this is a claim regarding a lacuna in the board's assessment, the same situation broadly applies. This is also a category (i) situation – the law has been clarified in *Reid No. 2*, and the applicant has not put up anything to plausibly suggest that that is wrong.

79. In terms of information disclosing a lacuna, the applicant did not put such information before the board, nor did anybody else, nor was such information otherwise available to the board, and nor has the applicant established evidentially to the level of substantial grounds that a reasonable expert would have seen what was before the board as flawed.

80. However, a separate point is made in sub ground 20 which states as follows: "Neither the Board's Order nor its Direction contains an Appropriate Assessment or screening for same or findings and conclusions. The only reference by the First Respondent in its impugned decision to impacts on ecology is a statement that "[the proposed development] would not impact negatively on ecology or designated sites in the vicinity". No assessment or screening is reported, or no reasons are stated. While the board's Direction states that "the Board decided to grant permission generally in accordance with the Inspector's recommendation", it does not state if the recommendations of the Inspector in relation to Appropriate Assessment Screening were adopted."

81. The main thrust of the applicant's case under this heading is as set out in submissions that "the Board's Direction and Order do not refer to the EIA directive at all".

82. It is true that domestic law is to some extent unfavourable to the submission made, but the issue essentially is one of European rather than domestic law.

83. In fairness, the board did not hugely dispute that this overlaps with question 6 in *Eco Advocacy v. An Bord Pleanála (No. 2)* [2021] IEHC 610, [2021] 10 JIC 0406 (Unreported, High Court, 4th October, 2021). In those circumstances the logic of the current situation is, I think, to grant leave on this point in order to allow it to be pursued, given that a point actively under appellate or European consideration would normally have to be regarded as substantial for leave purposes. (Otherwise there could be inconsistency and inequality if the

applicant in such a "lead" case were to succeed on a future date whereas the applicant in the "trailing" case was refused leave.) When we get to the point of certification of readiness for the full hearing, the parties can give their views on whether this point needs to be modularised in the light of progress in the reference to the CJEU in *Eco Advocacy.*

84. The notice party suggested that even if the applicant ultimately won on this point, he should not get *certiorari,* but we can cross that bridge if and when we come to it.

85. The net effect of all that is that leave to pursue core ground 3 and the associated sub-grounds (other than sub-ground 20) is refused. Leave to pursue sub-ground 20 is granted, and this can be inserted as a new core ground in the amended statement of grounds to be filed on foot of this judgment.

Core ground 4 – lack of exclusion of doubt

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

87. That seems to me to be a repeat in essence of core ground 2, and the same conclusion applies. This is also a category (i) issue – the law has been clarified and the applicant hasn't displaced that to the level of substantial grounds.

88. The lacuna was not raised on or otherwise contained in the materials before the board, and the proposition that a reasonable expert would have seen such a lacuna on the face of the materials has not been established evidentially to the level of substantial grounds (or indeed at all).

89. Hence, leave to pursue core ground 4 and the associated sub-grounds is refused.

Core ground 5 – remedial obligation

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

91. The applicant relies on CJEU case law to the effect that there is a remedial obligation to address any defective or missing appropriate assessment, in particular Case C-201/02 *Wells v. Secretary of State for Transport, Local Government and the Regions* (Court of Justice of the European Union, 25th September, 2003), ECLI:EU:C:2003:502*;* Case C-348/15 *Stadt*

Wiener Neustadt v. Niederösterreichische Landesregierung (Court of Justice of the European Union, 17th November, 2016), ECLI:EU:C:2016:882*;* Case C-399/14 *Grüne Liga Sachsen eV and Others v. Freistaat Sachsen* (Court of Justice of the European Union, 14th January, 2016), ECLI:EU:C:2016:10. He then contends that the board has failed to satisfy such an obligation here. The applicant maintains an entitlement to advance this argument notwithstanding that his challenge to the previous permission failed.

92. One would have to say that the law regarding the alleged remedial obligation seems to fall short of being unquestionably clear, at least in terms of the practical mechanics of carrying out such an obligation, and it is hard to see how such a complex legal point could be satisfactorily determined within the limited confines appropriate to a leave application. That places the point in category (iii) which allows for a grant of leave and the benefit of fuller argument.

93. Thus leave to pursue core ground 5 and the associated sub-grounds is granted.

Core ground 6 – lack of thresholds for screening in Irish law

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

95. A more detailed sub ground 24 provides as follows "No EIA screening was conducted for the impugned development. The First Respondent's Inspector excluded the need for an EIA "at preliminary examination" without making an EIA screening determination. The Board Decision and Order is silent on the issue of EIA even though the scale of the development that is being extended is such that it meets the threshold for more than one category in Schedule 5 Part 2 of the Planning and Development Regulations 2001, as amended namely 10(a) Industrial Estate Development and 10(b) Urban Development, and requires screening pursuant to paragraphs 10 and 13 of Annex II of the EIA Directive."

96. This point really turns on whether this development could come within sch. 5 of the 2001 regulations. The specific references in the grounds to how that could come about are to:

(i). Industrial estate development projects, where the area would exceed 15 hectares. (sch. 5, pt. II, para. 10(a));

(ii). Urban development which would involve an area greater than 2 hectares in the case of a business district, 10 hectares in the case of other parts of a built-up area and 20 hectares elsewhere (sch. 5, pt. II, para. 10(b)(iv)).

97. The applicant indicated an intention to seek to add reference to a third category, para. 6(d) of part 2 of sch. 5, which refers to: "(d) Storage facilities for petrochemical and chemical products, where such facilities are storage to which the provisions of Articles 9, 11 and 13 of Council Directive 96/82/EC apply."

98. I will look at these three in turn. The first category depends firstly on whether this is an "industrial estate development project" as envisaged by class 10(a).

99. As regards the factual foundation of this point, I would be prepared to assume in favour of the applicant that, on the basis of the affidavit of Niall Dillon if nothing else, the Intel campus is located within an industrial estate being Collinstown Industrial Park. If one turns to the European Commission *Guidance on the Interpretation of Definitions of Project Categories of Annex I and II of the EIA directive*, the Commission notes at p. 49 that "a few member states use the term 'industrial or business parks' when defining this project category". On that approach, industrial parks and industrial estates are essentially interchangeable terms. That is also the normal meaning of language anyway.

100. The precise meaning of class 10(a) is hasn't been judicially determined, having the consequence that this isn't a category (i) point. Having heard argument, it doesn't seem to lend itself to simple and straightforward determination within the confines of a leave application either, so I think it's best not viewed as a category (ii) point either. That suggests that this should be treated as a category (iii) point where the court should be disposed towards granting leave to allow a full discussion at the hearing.

101. As regards to the second type of development argued to be relevant for EIA purposes, the claim that the development might come within class 10(b), "Urban Development", is not particularly deposed to on behalf of the applicant. A one-line statement that the facts contained in the statement of grounds are verified (see para. 2 of affidavit of applicant) only takes one so far, and a court is entitled to regard such a bare averment as insufficient where there are unanswered questions on the papers or other evidential indications in a contrary sense. That is the case here. The applicant states that his 74-acre farm is directly adjacent to Intel's property and that his farm is bounded to the west by the Carton Estate and to the north by the Rye Water River (see paras. 4 and 6 of applicant's affidavit). That doesn't sound very urban. Likewise, the affidavit of Niall Dillon sworn on behalf of Intel indicates that the Intel campus is located on "a 160-hectare site within the Collinstown Industrial Park, approximately 2.5 km west of the town of Leixlip in north-east Kildare on the northern side of the R158 (Leixlip to Maynooth road). It is bounded by the Sligo to Dublin railway line and the Royal Canal to the east, by Kellystown Lane to the west and by the river Rye to the north. The R449 road leads from the south of the site to the M4 motorway."

102. On either version it is hard to see any substantial evidence that this is an "urban development". In those circumstances, it seems to me that the applicant hasn't established

to the substantial grounds threshold the facts necessary to underpin the argument that class 10(b)(iv) of pt. 2 of sch. 5 to the 2001 regulations could have possible application.

103. The applicant's fall-back position was that the industrial estate was itself the equivalent of a mini-town. But that is clearly a category (ii) point – one not already decided but one that is readily capable of being decided. The *New Shorter OED*, vol. II, p. 3527, notes that the primary meaning of "urban" is "[o]f, pertaining to, or constituting a city or town" and a secondary meaning is "[r]esident in a city or town". A non-residential industrial park is not an urban development unless it is located in an independently urban area. One can't have an *urbs* without residents, any more than one can have a country without citizens. Unfortunately there is simply nothing in the applicant's point under this heading.

104. Hence leave to pursue core ground 6 and the associated sub-grounds (save in relation to class 10(b)) is granted. Leave to pursue those grounds insofar as they refer to class 10(b) is refused.

105. As regards to the proposed amendment, the interests of justice militate in favour of the applicant being allowed to make any amendment application in a proper manner, that is based on a properly prepared draft amended statement of grounds and grounded on affidavit explaining the failure to make the point originally. Once those documents are before the court, the matter can be considered at that point.

Core ground 7 – Seveso Directive

106. Core ground 7 regarding the Seveso directive (directive 2012/18/EU) is not being pursued.

Core ground 8 – unlawful failure to notify the applicant

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

108. The law on whether a failure of notification should go to *certiorari* even if it didn't in fact hinder the applicant specifically in making an application has already been determined – see *Clifford v. An Bord Pleanála (No. 1)* [2021] IEHC 459 (Unreported, High Court, 12th July, 2021), para. 77. Thus, as far as that relief is concerned, this is a category (i) situation and the applicant hasn't displaced that or shown plausible reasons why it is wrong. It would be an improvident and inappropriate use of the discretionary power of *certiorari* to quash a decision on such a basis where the applicant was not actually disadvantaged or prevented from seeking judicial review. A claim for *certiorari* must be confined to matters that properly go to the validity of the decision rather than to ancillary or related matters. Such matters can be dealt with by way of declaration (see by analogy *Hellfire Massy Residents Association v. An Bord Pleanála* [2022] IESC 38 (Unreported, Supreme Court (O'Donnell C.J.), 11th October, 2022)).

109. In the light of the applicant's affidavit, it seems to me that there are substantial grounds for the point made, but only as a basis for declaratory relief. The fact that the

applicant wasn't personally disadvantaged is not as significant a bar to a declaration as it is to *certiorari,* especially where, in a series of cases, there have been allegations (some substantiated) of failures in notification by the board. In such circumstances it is perhaps increasingly important that if any breach is established (and whether that is actually the case in relation to the present matter obviously doesn't fall to be decided now) then that should be marked in an appropriate way.

110. To avoid any confusion down the line it seems to me that it's appropriate to allow the applicant to amend the statement of grounds to claim a specific declaration as a relief in terms broadly of core ground 8, and to require that core ground 8 be amended so as to relate only to this relief.

111. Thus, leave to pursue core ground 8 and associated sub-grounds is granted, but only for declaratory relief and on the basis of the amendments specified above.

Core ground 9 – failure to notify the public

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

113. Again, similar considerations apply, and I would grant leave on this basis but confined to seeking declaratory relief. I will also allow a specific declaration to that effect to be added, and will require that core ground 8 be amended so as to relate only to this relief.

114. As a basis for *certiorari*, this is also a category (i) point and has already been decided. A failure to notify the public could be a basis for *certiorari* at the suit of a person who was improperly shut out from a process as a result of a failure of notification, but this applicant is not such a person, and he can't seek to invalidate the decision by reference to the constitutional rights to due process of somebody else. Granted, there is no rule that a planning judicial review applicant must be personally affected by the points she makes (so for example an applicant doesn't have to be affected by failure to conduct scientific surveys, remove scientific doubt, conduct environmental impacts assessments, comply with statutory provisions and so forth), but the constitutional rights of others, particularly the constitutional right to fair procedures, fall into a different category. In relation to that category, it would be an inappropriate exercise of the court's discretionary power on judicial review to permit an applicant to assert the fair procedure rights of third parties, barring some serious or culpable systemic failure that required the sanction of *certiorari*.

115. Nonetheless, rule of law considerations militate in favour of allowing even an applicant who has not been personally harmed to seek purely declaratory relief as to a breach of public notification provisions. If I was in doubt about that, which I am not particularly, it would be reinforced by a pattern in some recent case law whereby informational obligations on the part of the board have not been seen to be fully observed. In those circumstances it seems to me particularly important that an applicant should not be shut out from ensuring

that such matters are placed on the record and marked appropriately in the form of declaratory relief.

116. Thus leave to pursue core ground 9 and associated sub-grounds is granted, but only for declaratory relief and on the basis of the amendments specified above.

Core ground 10 – regulatory invalidity

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

118. This issue may or may not arise depending on whether this turns out to be an EIA project at all. That means that this is not a common or garden non-transposition argument, but a submission that hinges on factual conclusions to be resolved in the administrative law part of the challenge. In those relatively unusual circumstances I think the best thing to do with this ground is to grant leave (the standard being arguability as noted above) but to modularise this element to await the outcome of the rest of the challenge.

119. On that basis, leave to pursue core ground 10 and associated sub-grounds is granted.

Order

120. Accordingly, the order will be as follows:

(i). I will grant leave to the applicant to seek judicial review on the basis of a further amended statement of grounds to be filed in accordance with this judgment.

(ii). The amended statement should make the amendments set out in the judgment and should delete the matters withdrawn or on which leave has been refused including all relevant sub-grounds. Such amendments and deletions are without prejudice to any procedural rights that the applicant might exercise in due course if dissatisfied with the present judgment.

(iii). I will allow the applicant one week (within term) from the date of delivery of this judgment to file the amended statement of grounds and a further week (within term) to serve the substantive notice of motion with a return date to be notified by the List Registrar.

(iv). The applicant will also have liberty to bring a motion seeking the proposed further amendment to the statement of grounds, returnable for the same date.

(v). The relief against the State will be adjourned to a later module and the State is excused from further participation in the current module with liberty to apply.

(vi). The question of the costs of the leave hearing can be addressed on the return date of the notices of motion.