THE HIGH COURT

JUDICIAL REVIEW

[2023] IEHC 293

Record Number: 2021/699 JR

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

Between

GLASSCO RECYCLING LIMITED

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

JUDGMENT of Mr Justice Cian Ferriter this 25th day of May 2023

Introduction

1. In these judicial review proceedings, the applicant challenges a declaration made by the Respondent ("the Board") on 28 May 2021, pursuant to s.5(1) of the Planning and Development Act 2000 (as amended) ("the 2000 Act") that the increase in annual intake from 97,000 tonnes to 120,000 tonnes at its recycling facility in Naas, Co. Kildare is development and is not exempted development.

Background

2. The applicant occupies and operates a glass and can recycling facility on a site at Osberstown Business Park, Caragh Road, Naas, County Kildare ("the facility").

Between former and current ownership, the facility has been in continuous operation for some 20 years. The applicant says that facility is unique in that it handles the vast majority of glass bottle and jars recycled in the country.

3. The facility has a comprehensive planning history. The applicant was granted permission in March 2007 for the construction of a glass recycling plant at the facility. In 2009, permission was granted to extend the facility to provide additional parking and storage. Retention permissions were granted in 2010 for the change of use of an industrial space to an office space and in 2011 for the construction of a free-standing plant for glass recycling. As we shall come to, the conditions attached to the various permissions dealt with, *inter alia*, issues of traffic, dust and surface water.

The substitute consent decision

4. In 2012, the 2000 Act was amended to allow for applications for substitute consent, a procedure by which a party could apply to regularise the planning status of development (including permitted development) which had not, but ought to have been, subject to environmental impact assessment (EIA) (or screening for same). The applicant says that, having realised that the then parent planning permission for the facility ought to have been, but was not, subject to an EIA, it availed of the opportunity to apply for substitute consent under s.177E of the 2000 Act, submitting a remedial environmental impact statement (rEIS) in support of same. By decision dated 12 June 2014, the Board granted substitute consent for the facility. This substitute consent became the new parent permission for the facility.

5. The applicant says that the grant of substitute consent was not subject to any condition limiting the annual intake of glass and cans. The Board for its part contends that the permission was in respect of an intake of 97,000 tonnes, being the express basis of the application for substitute consent at the time. I will return to this issue later in the judgment.

Waste licensing history

6. The facility is also subject to a waste licence. A waste licence for the facility was first applied for in July 2011, and granted on 28 October 2014 (prior to then, the facility operated under a waste permit). Condition 1.2 of this waste licence provided for a limitation of 150,000 tonnes on the volume of waste which could be accepted annually.

7. On 3 December 2015, the Environmental Protection Agency granted a revised waste licence to the applicant for the operation of the facility. The licence was made subject to 12 conditions. As with the original waste licence, condition 1.2 of the revised waste licence provides for a limitation of 150,000 tonnes on the volume of waste which can be accepted annually. This licence remains in force.

8. Condition 1.6 of the current waste licence states that the licence is "*for the purposes of waste licensing under the Waste Management Act, 1996 as amended only and nothing in this licence shall be construed as negating the licensee's statutory obligations, or requirements under any other enactments or regulations*."

Post-Substitute Consent planning history

9. On 9 October 2014, Kildare County Council ("the Council") granted permission for "*an extension to existing glass recycling plant*". The applicant contends that this grant of permission also did not place any condition limiting the annual intake of glass at the facility, nor did the subsequent permissions granted in June 2016 and August 2018. The October 2014 and subsequent permissions also noted that the facility was subject to the terms of a waste licence; the 2 June 2016 permission (for "construction of surface water treatment plant") noted that "*The application relates to a proposed development which is for the purposes of an activity covered by waste licence W0279-01 issued by the Environmental Protection Agency*" and materially identical wording is found in a permission of 20 August 2018, when the Council granted permission for construction of an optical sorting unit within the existing glass recycling plant.

10. It is relevant to note that each of the planning permissions for the facility both prior to the substitute consent decision and subsequent to that decision contained conditions which in some shape or form addressed questions of surface water, dust and traffic

impact – unsurprisingly in light of the nature of the activity at the facility which involves regular daily truckloads of glass being dropped to the facility.

The section 5 process

11. On 13 February 2020, the applicant, through its consultant Tom Phillips Associates, referred a question to the Council pursuant to s.5, on the question of:

> "w*hether the proposed increase in annual intake from 97,000 tonnes to 120,000 tonnes at the Glassco Recycling facility is or is not development or is or is not exempted development within the meaning of the Act?"*

12. The applicant says that it referred the question on a precautionary basis to ensure that no question mark hung over the planning status of the facility. It appears that the facility had been handling annual intake in the region of 120,000 tonnes in the years preceding the s.5 referral in any event.

13. In its consultant's submission to the Council dated 13 February 2020, the applicant submitted that the increase in annual intake from 97,000 tonnes to 120,000 tonnes was below all relevant mandatory EIA thresholds in respect of the form of development in issue. It submitted that the proposed increase in annual intake would have negligible impact on the environment in particular in relation to air, noise and traffic impacts and submitted a number of specialist assessments regarding those matters, including an Axis Environmental Services opinion of 6 January 2020; a Patel Tonra Environmental Solutions report of July 2018 assessing, *inter alia*, impact on dust, noise and surface water; and a Traffic Impact Assessment report (TIA) of November 2019 prepared by Stephen Reid Consulting (the latter in fact prepared on the basis of a 127,000 tonnes annual intake). It submitted these assessments in order to support its case that the proposed increase in annual intake was not development and constituted exempted development.

14. The submission stated that "*the issue to be resolved is whether or not an intensification of use arises such that a 'material change in the use' of the site will occur, resulting in development and the requirement for planning permission*" and submitted (citing case

law and textbook commentary) that it was entirely possible for an existing business to intensify or increase operations without necessarily resulting in a material change of use, submitting that the applicant's facility was one such example.

15. On 10 March 2020, the Council issued a declaration that the proposed increase the subject of the referred question was development and was not exempted development.

16. The Council approached the referred question by effectively treating the proposed increase as involving an increase in annual intake to 127,000 tonnes as opposed to 120,000 tonnes, leading it to form the view that a mandatory EIA was required such that the increase was not exempted development and, rather, required the submission of a planning application or an application for substitute consent accompanied by an EIA.

17. The applicant sought a review by the Board of the Council's declaration, as it was entitled to under s.5(3). On 30 April 2020, the applicant's consultant (Tom Philips Associates) lodged a submission with the Board in support of the review. This addressed the same question addressed by the Council i.e. *"Whether the proposed increase in annual intake from 97,000 tonnes to 120,000 tonnes at the Glassco Recycling Facility is or is not development or is or is not exempted development within the meaning of the Act?"*

18. In its consultant's submissions to the Board on the s.5 review application, the applicant submitted that the Council's approach (in forming the view that a mandatory EIA was required such that the increase was not exempted development) was in error and both the Board's inspector in his report and the Board itself accepted that the Council's approach in this regard was in error.

19. However, the applicant in its consultant's submission of 30 April 2020 to the Board in support of the review application did not confine its submissions to this aspect of the erroneous approach of the Council. It submitted, in short, that the increase in annual intake to 120,000 tonnes would not result in material planning impacts such that planning permission was required on that basis alone. It (correctly) stated that "*for planning permission to be required, intensification of use would need to occur to such*

an extent that material planning impacts were apparent". The submission stated that "*the issue to be resolved is whether or not an intensification of use arises such that a 'material change in the use' of the site will occur, resulting in development and the requirement for planning permission*." It then re-iterated the submission made to the Council to the effect that it was entirely possible for an existing business to intensify or increase operations without necessarily resulting in a material change of use, submitting that its facility was one such example.

Inspector's report and recommendations

20. The Board assigned an inspector to consider the review application. In his report, the inspector considered the matter by reference to the Council's referral decision, the relevant legislation, the relevant planning history, and the submissions of the applicant on the review.

21. The inspector in his report summarised the Council's report and declaration and the applicant's submissions on the referral. He referenced the history of the site and the relevant statutory provisions. In the assessment section of his report, the inspector said that he proposed to undertake his assessment by reference to the precise question referred (para. 10.1). In addressing the question as to whether the proposed increase in tonnage intake would represent an intensification of use, such that a material change in the use of the site arose, resulting in development and a consequent requirement for planning permission, the inspector noted that the applicant had submitted environmental and traffic assessments which concluded:

> "*that no significant new or material impacts arise from the 23,000-tonne intake increase. Therefore, no material change of use is considered to arise in this instance, and as no development is proposed in terms of additional buildings or processes, such that would require planning permission.*
>
> *The* [applicant] *states that no change to the character of the existing recycling use will occur as a result of the increased tonnage intake and that the main use will remain as recycling. I consider it reasonable for the* [applicant] *to intensify*

and increase operations on site without necessarily resulting in a material change of use."

22. The inspector then went on to conclude that a mandatory EIA was not required given that the proposed 23,000 tonne increase was below the relevant mandatory EIAR thresholds and that it could be considered as exempted development. His conclusion was that the proposal to increase the annual tonnage intake at the facility is not development and is exempted development and he provided a recommended decision to the Board on that basis.

Board's Decision and Order

23. The Board held a meeting on 17 May 2021 at which it decided (as reflected in its direction dated 25 May 2021) that the increase in annual intake from 97,000 tonnes to 120,000 tonnes at the facility is development and is not exempted development. The Board identified four reasons for its determination which were carried over to the decision embodied in an order of the Board made on 28 May 2021 (as set out below).

24. In its decision and order of 28 May 2021 ("the Board's decision"), the Board stated that "*a question has arisen as to whether the proposed increase in annual intake from 97,000 tonnes to 120,000 tonnes at* [the facility]*is or is not development or is or is not exempted development*". The decision sets out that in considering the referral, the Board had regard *inter alia* to the planning history of the site, the report of the inspector and the applicant's submissions.

25. The Board's decision states that "*in exercise of the powers conferred on it by section 5(3)(a) of the 2000 Act, it hereby decides that the proposed increase in annual intake from 97,000 tonnes to 120,000 tonnes at the* [the facility] *is development and is not exempted development*."

26. The reasons for the decision were set out as follows:

    a. *The increase in the annual tonnage intake at the facility of 23,000 tonnes is material in terms of additional volume compared to the annual tonnage of*

97,000 tonnes as permitted under [the substitute consent decision];

b. *The increase in the annual tonnage intake at the facility would raise material planning issues including potential impacts from additional traffic movements to/from the subject site onto the public road network, from additional storm discharge levels and from additional dust deposition levels;*

c. *The increase in the annual tonnage intake at the facility would therefore constitute a change in the use of the facility that is a material change in the use by reason of intensification;*

d. *There is no provision in planning legislation by which such development could be deemed exempt.*

27. For ease in this judgment, I will refer to these reasons as "reason (a)", "reason (b)" and so on.

28. The decision also recorded that:

> *"In deciding not to accept the recommendation of the Inspector, the Board determined that while the increase in annual intake of 23,000 tonnes would fall below the threshold of 24,250 tonnes whereby a mandatory Environmental Impact Assessment Report (EIAR) would be triggered in this instance and the provisions of article 9(1)(c) of the Planning and Development Regulations, 2001, as amended, would apply, this did not mean that such an increase in annual tonnage would not raise material planning issues. In addition, the Board considered that limits set within a Waste Licence do not automatically preclude any planning implication arising from an increase of 23,000 tonnes in annual intake at this waste facility. On the basis of the information on file, the Board did not share the view of the Inspector that such an increase would not raise material planning issues as described above."*

Summary of parties' positions

29. The applicant's case, in short, is that the Board's decision was arrived at in breach of fair procedures; that the decision contains an error of law in its interpretation of the scope of the substitute consent decision; that the decision is vitiated by irrationality (both in substance and in the *O'Keeffe/Keegan* sense); and that the decision is unlawful as being in breach of the Board's obligation to give reasons. The Board mounted a vigorous defence of all the grounds of challenge and contended that the Board did not act in breach of fair procedures; that it correctly interpreted the substitute consent decision; that the decision is not irrational (there being ample evidence in the material before the Board enabling it to arrive at the decision it did), and that the decision is adequately and properly reasoned.

30. Before addressing the case made by the applicant, it is necessary to address the question of the standard of review which should be applied by this Court in evaluating the applicant's case.

Standard of review

31. Counsel for the applicant submitted that the standard of review to be applied by the Court on a judicial review of a Board decision on a s.5 declaration review should not be limited to *O'Keeffe* deference but, rather, that this Court has jurisdiction to subject the Board's s.5 determination to *"full blooded review of the merits of the decision"*. He relied in this regard on the analysis of that issue in Browne, *Simons on Planning Law* (3rd Ed., Roundhall, 2021) ("*Simons*") from paras. 2-362 to 2-374.

32. He argued that whether a particular act is or is not development (or is or is not exempted development) is a question of law because the determination involves the application of the legal concept of *"development"* or *"exempted development"* to a particular set of facts, or the interpretation of the legislative provision which defines the particular class of exempted development applicable to a particular set of facts. Because this involves a question of law, it is argued that, as with any alleged error of law, this Court has full jurisdiction to correct any error in arriving at the conclusion of law. It is argued that this analysis is consistent with the scheme of the Local Government (Planning and Development) Act 1963 ("the 1963 Act") which provided a right of appeal to the High Court against a determination of the Board on a s.5 referral, which statutory appeal took

the form of a full appeal involving a re-examination of the merits of the decision being appealed from, with the Court having jurisdiction under that regime to substitute its view for that of the Board (see *Glancré Teoranta v. Cafferkey (No.1)* [2004] 3 IR 401 ("*Glancré*")). While the enactment of the s.5 reference procedure in the 2000 Act involved a removal of the statutory right of appeal to the High Court, and the jurisdiction of the High Court on a challenge to a s.5 decision can now only be invoked by way of an application for judicial review, it is argued that the retention of a full-blooded review on the merits would be consistent with the prior approach and would also be consistent with the approach taken in enforcement proceedings, where the High Court has full jurisdiction to decide, as a question of law, whether a particular act is development or not.

33. As part of its analysis, *Simons* notes (at para. 2-367) that:- *"It is at least arguable that the question of whether a particular act constitutes development involves a question of law. This is especially so where the question turns on the correct interpretation of planning permission." Simons* goes on to note (at para. 2-368) that *"In practice, however, the courts simply treat the decision on a s. 5 reference as any other planning decision, and only set aside An Bord Pleanála's decision if it is shown to be unreasonable or irrational",* citing a series of authorities in which that approach is taken by the courts including *Quinlan v An Bord Pleanála* [2009] IEHC 228; *Satke v An Bord Pleanála* [2014] IEHC 230 and *Ógalas v An Bord Pleanála* [2014] IEHC 487.

34. Counsel for the Board accepted that where a decision on a s.5 referral involved an error of law on a question of law such as the interpretation of a planning permission, then the Court could intervene by way of judicial review to correct any such error. Accordingly, it was accepted by the Board in this case that the Court could determine the legal question of the scope of the substitute consent permission and correct any error of law in relation to that. However, counsel for the Board submitted that, if the decision of the Board as to whether or not a particular act or use is or is not development fundamentally turned on the exercise by the Board of its expert planning judgment on the facts before it, the High Court on a judicial review could not intervene unless *O'Keeffe* irrationality had been established.

35. It appears fair to say that since the enactment of the 2000 Act, the courts have generally taken the approach that a merits based review does not apply in the context of a judicial review of a s.5 Board referral decision, but rather *O'Keefe* deference is appropriate: apart from the three cases cited in *Simons* (as set out above), that approach was also taken by McMenamin J. *Treacy v An Bord Pleanála* [2010] IEHC 13 (at paras. 28 and 62) where he drew on the analysis of Keane C.J. in *Grianán an Aileach v Donegal County Council* [2004] 2 IR 625. Very recently, Collins J. in *Narconon Trust v. An Bord Pleanála* [2021] IECA 307 (at para. 7) observed that *"the scope for challenging the merits of the decision of the planning authority or* [the Board]*, as the case may be* [in a judicial review of a s.5 declaration] *will clearly be limited"*. However, the issue of the precise standard of review in a judicial review challenge to a s.5 decision does not appear to have been decided *per se* since the enactment of the 2000 Act. Accordingly, it is necessary to examine the matter from first principles.

36. It is instructive to look at how the issue of the scope of an appeal to the High Court under s.5 of the 1963 Act was considered in *Glancré*. In *Glancré*, Finnegan P. addressed the issue of the scope of an appeal to the High Court under (then) s.5(3) of the 1963 Act which provided for an appeal to the High Court from a decision of the Board on the question of what was or was not development or exempted development (the Board under s.5 of the 1963 Act effectively made the first instance decision and the planning authority had no role). Finnegan P. approached the matter as follows (at pp. 404/405):

> "*In Dunne v Minister for Fisheries [1984] IR 230, Costello J quoted at p 237 with approval from Wade's Administrative Law (5th ed at p 34):-*
>
> > "The system of judicial review is radically different from the system of appeals. When hearing an appeal the court is concerned with the merits of the decision under appeal. When subjecting some administrative act or order to 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?'."

37. He went on to say at p 237:

"However, this does not mean that in every case the court's jurisdiction on a statutory appeal is the same; in every case the statute in question must be construed. In construing a statute it does not seem to me to be helpful to apply by analogy the rules of judicial review since, by granting a statutory appeal, the legislature must have intended that the court would have powers in addition to those already enjoyed at common law. Accordingly, where the court is given an appellate jurisdiction it must construe the words used by the legislature to see whether the court has power to substitute its own opinion for that of the decision maker if it considers that the impugned act was wrong on the merits and not merely wrong in law. In Dunne v Minister for Fisheries *[1984] IR 230 Costello J started from the premise that the Oireachtas, in conferring the appellate jurisdiction, must have intended that the jurisdiction on appeal should be wider than the court's powers when exercising its inherent jurisdiction at common law of review. He had regard to the fact that the section under consideration there did not expressly limit the appeal to one on a point of law. Adopting this approach in the present case I am satisfied that s 5 of the Local Government (Planning and Development) Act 1963 confers upon the High Court a full power of appeal and not some more limited form of review. There is nothing in the wording of the section to suggest any restriction and in these circumstances the High Court has full appellate jurisdiction*."

38. As can be seen, Finnegan P. took the view that by providing for an (unrestricted) right of appeal to the High Court the Oireachtas must have been taken to confer a wider jurisdiction on appeal than would have been available to the High Court on judicial review and that such wider appeal jurisdiction extended to a full review of the merits of the decision. The Oireachtas chose by the enactment of the 2000 Act to remove the statutory right of appeal on a s.5 referral which existed under the 1963 Act, and with it a mechanism for appeal on the merits to the High Court, leaving parties such as the applicant confined to a remedy in judicial review under s.50 of the 2000 Act. This may at least in part be explained by the fact that under s.5 of the 2000 Act, the planning authority is typically (although not always) the first instance decision-maker, with a full right of appeal from its decision to the Board i.e. the appeal on the merits is now typically available before the Board and not the High Court; thereafter the more limited remedy of judicial review is available if the Board's decision on appeal is sought to be

challenged. In any event, the Oireachtas chose to remove the power of this Court to conduct a full merits-based review by way of appeal of a decision of the Board under s.5 and to confine parties instead to a remedy in judicial review with the restrictions that inevitably entails on the Court's ability to interfere with the merits of the decision under review, given that judicial review is concerned with the lawfulness of the decision under review and generally not with its merits.

39. However, it does not necessarily follow that the court is confined to *O'Keeffe* irrationality when assessing the lawfulness of a s.5 decision. I accept the fundamental point made in *Simons* that the question under s.5 as to whether a particular use is or is not development or is or is not exempted development is ultimately a legal question (albeit often with a factual appraisal) and that in principle the court has power on a judicial review to intervene to correct legal error (subject, perhaps, to a question as to the level of legal error required before the court will intervene; there remain some unresolved questions in the jurisprudence as to the extent to which such legal error must go to the jurisdiction of the decision-making body: see the discussion in Hogan & Morgan *Administrative Law in Ireland* (fifth edn., 2019) paras. 10-54 to 10.101).

40. The question in any given case as to whether a particular use is or is not development or is or is not exempted development might resolve to a question of "pure law" (such as the proper interpretation of a statutory exemption) or might raise a mixed question of law and fact (such as whether the legal concept of intensification is made out on the facts) and it seems to me that the Court's power to intervene in a judicial review will depend on the precise type of error said to have been made in the context of the decision under review. For example (and as is accepted by the Board here), if in the course of determining the question of whether something is or is not development or is or is not exempted development, the Board takes a decision on a matter which involves a pure legal question such as one of interpretation of a planning permission or a substitute consent decision or a section of an act, and gets that wrong, the Court will in principle have jurisdiction on a judicial review to correct that error (assuming the error is material to the ultimate question before the Board). The position may be different however if a mixed question of law and fact arises. A number of permutations may arise in such a scenario: if the correct legal question was posed before being applied to the facts then the Court will not have jurisdiction to interfere by way of judicial review in the Board's

assessment of the proper application of the legal test to the facts (at least absent some manifest and material error of fact). If the wrong legal question was posed before being applied to the facts then the Court will more likely have jurisdiction to intervene by way of judicial review.

41. Turning to apply those principles to the case before me, it was not suggested here, for example, that the Board had got the law wrong in setting out the legal test as to the appropriate approach to the question of material change of use by way of intensification amounting to development; if it had, the Court would have been entitled in principle to intervene to correct that error. Here, the question of whether intensification had been made out involved a fact-driven assessment on the part of the Board as to whether the facts gave rise to such a material degree of impact on planning matters (such as traffic impact, dust levels, water discharge levels) as to amount to intensification. That assessment was inherently fact-driven and involved an assessment of the facts by the Board in a planning judgment context. In my view, the Court's role on a judicial review challenge to such an assessment is necessarily limited; the Court does not have the power to substitute its own view on the merits as to whether the facts gave rise to intensification sufficient to constitute material change of use. As no case in error of law on the test for intensification and no case in manifest error of fact was sought to be made in this case, it seems to me that the applicant is confined (on this aspect of its case) to the conventional *O'Keeffe* irrationality challenge it made to the decision in the alternative to its merits-based challenge.

Fair procedures

42. The applicant pleaded a fair procedures case to the effect that the Board in arriving at its decision acted in breach of fair procedures in not providing the applicant with an opportunity to address the Board's view that the application involved development, by reason of a level of intensification amounting to a material change of use. Sensibly, this case was not particularly pressed at the hearing before me. It is clear that the applicant expressly put up its case to the Board on the basis that the increase in tonnage from 97,000 to 120,000 per annum was not at a level which amounted to material change of use by reason of intensification such as to amount to development and sought an answer to the referred question on that basis. The Board arrived at its decision having

considered the applicant's submissions on that very issue and no want of fair procedures was involved.

Error in interpretation of Substitute Consent as being limited to 97,000 tonnes

43. It will be recalled that in reason (a) of its decision, the Board stated that "*The increase in the annual tonnage intake at the facility of 23,000 tonnes is material in terms of additional volume compared to the annual tonnage of 97,000 tonnes as permitted under* [the substitute consent]."

44. The applicant submitted that the Board erred in interpreting the substitute consent as having permitted a *limit* of 97,000 tonnes annually in circumstances where there were no conditions in the substitute consent (or any other relevant planning permission) imposing any capacity limit on the facility's operation.

45. The Board, for its part, submitted that there was no such error of interpretation; the plans and particulars submitted with the substitute consent application (which included, most materially, the rEIS discussed below) had been legitimately taken into account in order to ascertain the extent of what was permitted by the substitute consent. In particular, the Board said it was very clear that the substitute consent application was expressly premised on an annual intake of 97,000 tonnes.

46. There is no dispute as to the legal principles applicable to the interpretation issue although there is dispute as to the outcome of the application of those principles to the facts. Those principles are set out in *Lanigan v Barry*, where Clarke C.J. endorsed the *dicta* of McCarthy J. in *Re XJS Investments Ltd* [1986] IR 750 at 756 as follows:

> "*Certain principles may be stated in respect of the true construction of planning documents: (a) to state the obvious, they are not acts of the Oireachtas or subordinate legislation emanating from skilled draftsmen and inviting the accepted canons of construction applicable to such material, (b) they are to be construed in their ordinary meaning as it would be understood by members of the public, without legal training as well as by developers and their agents,*

unless such documents, read as a whole, necessarily indicate some other meaning, (c) …".

47. The applicant relied on *dicta* of Clarke C.J. in *Lanigan v Barry* to the effect that the fact that the planning authority, when granting the substitute consent, did not impose a specific limit on the annual tonnage intake, when it could have done so if it wished, *"a significant factor to be taken into account"* per Clarke C.J. (at para. 32). Clarke C.J. went on to state in that paragraph that *"to interpret a general clause such as condition 1 (which imposes an obligation to carry out the development in accordance with the drawings and specifications submitted) in a way which imposes very specific obligations in the absence of a specific condition does, in my view, require that what might reasonably be considered to be the drawings and specifications be clearly of a nature designed to identify specific and precisely enforceable parameters for the development (including its use)"*. However, the Board pointed out that in *Lanigan v. Barry*, at para. 27, Clarke C.J. held that even in the absence of a specific limiting condition "*it would always be open to a court to consider whether* [operation] *significantly outside the parameters which were contemplated by the planning application itself might amount, in all the circumstances, to a sufficient intensification of use (over the use impliedly authorised by the permission) so as to justify a finding of a material change*". Ultimately, the Board submitted that the appropriate approach, as explained by Clarke C.J. in *Lanigan v Barry*, is *to "consider the text used in the context of the circumstances in which the document concerned was produced including the nature of the document itself"* (at para. 30).

48. In my view, the Board did not fall into error in its decision when it referred, at reason (a) of its decision, *"to the annual tonnage of 97,000 tonnes as permitted* [under the substitute consent]*"*. I do not see the absence of an express condition in the substitute consent limiting the intake or the capacity for planning purposes of the facility to 97,000 tonnes as being dispositive of the issue. On the facts here, the content of the rEIS submitted in support of the substitute consent application clearly and repeatedly stated that the application related to an annual intake of up to 97,000 tonnes and this part of the application was, to use Clarke C.J.'s formulation, of "*a nature designed to identify specific and precisely enforceable parameters for the development including its use*".

49. The Board's substitute consent decision in its reasons and considerations had regard to the remedial rEIS submitted with the application for substitute consent and the *"nature and scale of the development"* the subject of the substitute consent application. Condition 1 of the substitute consent stated that:*" The grant of substitute consent shall be in accordance with the plans and particulars submitted with the application and the further information submitted on 9 July 2013 and 24 February 2014. All mitigation measures set out in the REIS and the further information of 9 July 2013 and 24 February 2014 shall be implemented in full."* The relevant plans and particulars clearly encompassed the rEIS which was a bedrock document submitted in support of the substitute consent application.

50. The rEIS expressly stated that the application related to an annual intake up to 97,000 tonnes. In the rEIS, the summary of the *"project description"* to which the substitute consent related was *"for the purpose of regularising an existing glass recycling facility and ancillary activities"* at the site (para. 2.1). At table 2.2 of the rEIS, the applicant set out the input tonnages to the facility in the years 2008 to 2012. In this table, it described the *"application tonnage, per annum"* as 97,000. Immediately after this table (at para. 2.3.11), the rEIS stated that the applicant *"seeks to accept up to 97,000 tonnes per annum under this application"*. There are other references to the application based on a 97,000 tonnes per annum intake. For example, at para 2.16 of the rEIS, it was stated *"for the purposes of the rEIS, the total intake at the facility is up to 97,000 tonnes of material per annum"*. That was said to be *"based on the most recent data available for a 12 month period"* (being the period from February 2012 to January 2013). That represented the existing use of the facility to which the substitute consent application was directed.

51. In my view, it is clear that the substitute consent was granted in respect of the level of intake specified in the application for substitute consent and, in particular, as set out in the rEIS which was a core part of the substitute consent application and which specifically stated that the substitute consent application was made in respect of an annual intake of 97,000 tonnes.

52. Indeed, it is notable that the applicant, through its consultant's submission of 13 February 2020 to the Council in support of the s.5 declaration referral, stated that it was

seeking a declaration under s.5 *"as to whether an increase in annual intake to its recycling facility from 97,000 tonnes per annum (as assessed during the substitute consent (SC) application pertaining to the site permitted by An Bord Pleanála (ABP) in June 2014) to 120,000 tonnes per annum is or is not development or is or is not exempted development within the meaning of the Act."* (emphasis added)

53. I do not see that the fact that, at the time of the substitute consent application, the applicant had a waste licence application before the EPA for the facility based on a facility capacity for waste purposes of up to 150,000 tonnes and subsequently obtained a waste licence for processing up to 150,000 tonnes of waste annually means that the substitute consent application should be properly read as not amounting to a permission for planning purposes of an intake of up to 97,000 tonnes per annum.

54. In this regard, Counsel for the applicant made reference to the fact that condition 1 of the substitute consent expressly referenced the mitigation measures in the rEIS and that those mitigation measures (set out at section 12.8 of the rEIS) expressly stated that *"waste activities will be subject to ongoing waste management regulatory and enforcement requirements",* footnoting in that context the application for a waste licence at the time lodged with the EPA. The rEIS had also noted (at para. 12.5.8) under the heading *"Waste recovery infrastructure"* that the facility *"is and will continue to be subject to waste regulatory requirements"* (as adverted to). He also relied on the fact that planning permissions subsequent to the grant of the waste licence made reference to the activity at the site being activity licensed by the waste licence (as set out at para 9 of this judgment).

55. The fact that the waste licence was for a facility of up to 150,000 tonnes and the fact that subsequent permissions make reference to the activity at the site being activity licensed by the waste licence, does not in my view lead to the conclusion that the proper interpretation of the substitute consent is that it was a planning permission for an annual intake of up to 150,000 tonnes. As set out at para. 8 of this judgment, the waste licence itself make clear that the terms of the waste licence (which include the capacity intake for waste licence purposes) could not negate the applicant's other obligations which of course include its obligations under planning permissions such as the substitute consent. The fact that none of the subsequent planning permissions imposed a specific limit on

intake does not undermine that conclusion, as this is consistent with those permissions not altering the fundamental parameters of the substitute consent (including the annual intake of 97,000 tonnes) as the parent permission.

56. Equally, the fact that there were specific conditions and limits imposed in relation to dust, surface water and other matters in the substitute consent, and in prior and subsequent permissions, but not in relation to annual intake capacity does not, in my view, detract from the fact that the substitute consent application and its grant were clearly premised on an operation involving an annual intake of up to 97,000 tonnes. That was the permitted tonnage level for which the substitute consent was granted.

57. Accordingly, in my view, the proper interpretation of the substitute consent is that it involves a permission for an intake of up to 97,000 tonnes per annum. That was the whole basis upon which the application and the rEIS (as a critical component supporting the application) was based and it was the core premise on which the application was assessed. In my view, it follows from condition 1 of the substitute consent that the substitute consent was granted in accordance with the plans and particulars submitted which included the rEIS which made clear that the substitute consent application was based on an acceptance of up to 97,000 tonnes per annum.

58. Accordingly, in my view, the Board did not err in law in its decision when describing the substitute consent as permitting an annual tonnage of 97,000 tonnes.

The irrationality case

59. I turn next to the applicant's case as to alleged irrationality of the Board's decision. In order to put the irrationality case in context, it is necessary to set out again reasons (b) and (c) of the Board's decision, where the Board stated that:

> b) *the increase in the annual tonnage intake at the facility would raise material planning issues including potential impacts from additional traffic movements to/from the subject site onto the public road network, from additional storm discharge levels and from additional dust deposition levels*

c) *the increase in the annual tonnage intake at the facility would therefore constitute a change in the use of the facility that is a material change in the use by reason of intensifications*

60. The applicant pleaded that the Board had no evidential basis upon which to determine that the annual tonnage intake at the facility would raise the material planning issues identified (traffic movements, storm discharge levels and dust deposition levels – which, for ease, I will refer to as "traffic, surface water and dust"). The applicant submitted that in fact there was no evidence to support the Board's conclusions; it contended that the only evidence before the Board was to the effect that the issues of traffic, surface water and dust did not have a material planning impact. Accordingly, the applicant submitted, it was irrational of the Board to find to the contrary in the absence of evidence supporting such contrary conclusions. It submitted that no reference is made in the decision to specific facts; no justification is offered for the "potential" impacts. In the absence of same, and in the absence of any treatment of each of those three issues, it contended that the Board's conclusions did not follow from any specific premise and was therefore irrational in the *O'Keeffe*/*Keegan* sense; mere mention alone of these issues was not, it submitted, a sufficient premise upon which to reach the impugned conclusions.

61. The Board submitted that it could not be tenably contended that there was no evidence to support the Board's findings in the *O'Keeffe s*ense. Counsel for the Board spent some time at the hearing identifying aspects of the contents of the material before the Board (including analysis of, *inter alia*, dust deposition, surface water and traffic issues in the rEIS and the treatment of such matters in prior planning permissions) in order to demonstrate that there was material before the Board which entitled it to reach the conclusion it did. He also went through the Patel Tonra expert environmental report submitted by the applicant with the s.5 referral application addressing, *inter alia*, dust deposition and surface water issues and identified arguments as to why it would have been open to the Board to reject the conclusions and opinions reached in that report and to take a view, contrary to the conclusions in that report, that there were in fact material planning issues arising from those matters such that there was intensification amounting to a material change of use and, therefore, development. Likewise, arguments were advanced by counsel on behalf of the Board as to why it would have been open to the

Board to form a different view to that expressed in the expert TIA submitted on behalf of the applicant on the question of the traffic impact of the increase in tonnage.

62. I do not believe it can be said is that the decision is irrational in *O'Keeffe/Keegan* terms. The fact that there was no responding or refuting evidence before the Board to the applicant's expert evidence on the questions of potential impact on traffic, surface water and dust arising from the increased intake does not mean that there was no material before the Board on which it could have arrived at the decision it did. The Board was perfectly entitled to evaluate the material tendered on behalf of the applicant in the s.5 referral process (including its expert reports) and to come to a contrary view on the planning matters addressed by that material, in exercise of its expert planning judgment. It is clear from the planning history of the site (which was before the Board when making its decision) that issues of traffic, surface water and dust have always been "in play" in relation to the site which of course stands to reason where the very nature of the activity at the site that involves accepting truck load deliveries of potentially dirty glass material on a regular daily basis. The applicant in its own submissions, in seeking to argue that the increased tonnage would not amount to a material change of use by intensification, and therefore development, squarely addressed those planning matters and the alleged immaterial impact of same by virtue of the increased tonnage.

63. Accordingly, I could not hold in *O'Keeffe* terms that there was not material before the Board from which it could have arrived at the conclusion it did. It cannot be said in the circumstances that it was irrational of the Board to arrive at the conclusion it did.

64. However, the fact that it may have been open to the Board, in exercise of its expert planning judgment, to lawfully arrive at a view on these issues did not absolve the Board from the legal obligation to *"enlighten any interested party as to why the decision went the way it did"* (to use the language of Clarke C.J. in *Connelly v An Bord Pleanála* [2018] 2 ILRM 453 ("*Connelly*") at para. 5.4). I accordingly turn next, and finally, to the question of whether the Board discharged its duty to provide adequate reasons for its decision.

Reasons

65. Section 5(6)(a) of the 2000 Act provides that "*the Board shall keep a record of any decision made by it on a referral under this section and the main reasons and considerations on which its decision is based and shall make it available for purchase and inspection*".

66. That provision reflects the generally understood legal position as to the duty of a statutory decision-maker such as the Board to give reasons for its decisions. It is common case that the purpose of the duty to give reasons is to allow a party to understand the decision and the reasons for it, so that the chances of an appeal or court challenge can be assessed, and so that the Court can review the decision. The most recent authoritative statement of the applicable principles is found in *Connelly*.

67. There is a helpful summary of the applicable principles by Humphreys J. in *Balscadden Road Residents Association v An Bord Pleanála* [2020] IEHC 586 ("*Balscadden*"), at para. 39 as follows:

> *"(i). the extent of reasons depends on the context;*
> *(ii). what is required is the giving of broad reasons regarding the main issues;*
> *(iii). there is no obligation to address points on a submission-by-submission basis - reasons can be grouped under themes or headings;*
> *(iv). it is not up to an applicant to dictate how a decision is to be organised - the selection of headings or order of material is, within reason, a matter for the decision-maker;*
> *(v). there is no obligation to engage in a discursive, narrative analysis - the obligation is to give a reasoned decision;*
> *(vi). there is no obligation to set out the reasons in a single document if they can be found in some other identified document; and*
> *(vii). reasons must be judged from the standpoint of an intelligent person who has participated in the relevant proceedings and is apprised of the broad issues involved, and should not be read in isolation."*

68. This summary was recently adopted by Phelan J. in her decision in *Stanley v An Bord Pleanála* [2022] IEHC 177 ("*Stanley*"), at para. 67.

69. The applicant relied on the following observations of Clarke C.J. in *Connelly*, at para 5.4:

> *"…One of the matters which administrative law requires of any decision maker is that all relevant factors are taken into account and all irrelevant factors are excluded from the consideration. It is useful, therefore, for the decision to clearly identify the factors taken into account so that an assessment can be made, if necessary, by a court in which the decision is challenged, as to whether those requirements were met. But it will rarely be sufficient simply to indicate the factors taken into account and assert that, as a result of those factors, the decision goes one way or the other. That does not enlighten any interested party as to why the decision went the way it did. It may be appropriate, and perhaps even necessary, that the decision make clear that the appropriate factors were taken into account, but it will rarely be the case that a statement to that effect will be sufficient to demonstrate the reasoning behind the conclusion to the degree necessary to meet the obligation to give reasons."* (emphasis added)

70. The applicant submitted that the Board's decision in this instance failed the *Connelly* test outright, by reference to the underlined sections of the passage above. It submitted that the decision in its reasons simply indicated the factors which were taken into account (traffic, surface water, dust) and asserted that as a result of those factors there was intensification of the degree amounting to material change of use and therefore development, without at all explaining or reasoning why those factors were regarded as being sufficiently material on the facts to constitute intensification of a degree amounting to material change of use and therefore development. The absence of meaningful reasons is said to be all the starker here where the Board's inspector had arrived at a different view and where, in fact, the only part of the Board's decision which seeks to explain why it departed from the inspector's view which addresses the inspector's analysis of the intensification question is the last line of the decision which merely states "*on the basis of the information on file, the Board did not share the view of the inspector that such an increase would not raise material planning issues as described above.*" (The reference to "as described above" is a reference to the planning issues of dust, surface water and traffic referred to in reasons (b) and (c).)

71. In my view, for the reasons set out below, the decision here falls on the wrong side of the line as regards the Board's duty to give reasons.

72. Counsel for the Board took the Court through a close reading of the applicant's expert report on issues of dust and surface water impact with a view to making good the contention that the report's conclusion (that an increase in tonnage would not have a negative impact on dust levels or surface water levels) was in fact based on an analysis of relatively minor increase in tonnage between 2015 and 2017 but did not in terms address the likely impact on dust and surface water from an increase in intake from 97,000 tonnes to 120,000 tonnes. This might have been the reason the Board regarded the increase in tonnage as raising material planning matters in respect of these issues such as to amount to material change of use by intensification; however, we simply do not know whether that is the case as the reasons given by the Board do not illuminate in any *why* the Board considered that the increase in tonnage would have a material planning impact on these matters to the level of change of use by intensification and/or why the applicant's expert's reports on these matters should not be accepted. Counsel for the Board also submitted that there was evidence on the file associating increase in dust with an increase in intake at the facility. Again, that may be so, but there is not even a line in the reasons setting that out or the degree of materiality of such increase, if in fact that was the basis upon which the Board decided that issue.

73. Counsel for the Board accepted that the traffic impact assessment expert report submitted by the applicant in support of its referral application did involve a valid comparison of traffic impact as between annual intake of 97,000 tonnes and intake of 120,000 tonnes. He said it was open to the Board not to accept the applicant's expert conclusion that, notwithstanding that the increase in intake would lead to extra trucks coming and going from the site every day, there was no material planning impact and that it was open to the Board to take the view in exercise of its expert judgment that the impact of the extra traffic would be material in planning terms such as to amount to a material change of use by reason of intensification. Again, that might well be so, but it is not possible to discern such a reason from the terms of the decision itself.

74. In *Stanley* (at para. 68)**,** Phelan J. took the view that *"the proper application of the test to determine whether a change in use is material necessarily requires an identification in the decision-making process of the following:*

> (i) *the actual change in use;*
> (ii) *what effects, impacts or consequences in planning terms arise from the said change and,*
> (iii) *the scale of those impacts and if they give rise to concerns."*

75. Counsel for the Board submitted that, applying the approach of Phelan J. in *Stanley* to the case here, the Board's decision identified that it is based, firstly, on a change by material increase in intake; secondly, the effects on traffic, dust and surface water stemming from such increase and, thirdly, its view that such increases were material in planning terms such as to constitute a change in use that was a material change in use by reason of intensification. Accordingly, it was submitted that the Board asked itself the right question and that its decision flowed from its premises. He submitted, in reliance on *Balscadden* that there was no obligation to engage with the applicant's submissions on a "hand-to-hand combat" basis, to use the colourful description deployed by Humphreys J. in *Balscadden* and that the decision was adequately reasoned in all the circumstances.

76. However it is relevant to note that in *Stanley*, after the paragraph quoted above, Phelan J. went on to state as follows (at para 69):

> *"In other words, while it is well established that there is no requirement for a discursive judgment on the part of the respondent, it must be clearly established on the record of the decision-making process (which includes the inspector's report and the materials on the file) what the change is, how it gives rise to an impact and what that impact is. In my view, it is necessary to see these three elements addressed to consider whether the respondent has applied the legal test properly because this is what is required for the applicant to be advised as to whether the decision is legally sound."*

77. I agree with counsel for the applicant when he says that the decision here fails for adequacy reasons on the application of the approach taken by Phelan J. in *Stanley.* The Board's decision here simply states a conclusion (material planning impact and material change of use by intensification in relation to dust, surface water and traffic) without explaining even in the most headline of terms why the increase in tonnage would lead to a material impact for each of those three issues such as to amount a material change of use by way of intensification. I do not see that the reasons can be said to be found elsewhere in the documentation before the Board. The intensification assessment cannot be divined from the inspector's report (as he took the view there was no such intensification) or otherwise from the material before the Board (the issue of intensification not having been considered previously). It is totally unclear, for example, as to whether the Board formed the view that the applicant's expert analysis was unreliable on its own terms and, if so, why; or otherwise on what broad basis the Board decided that the impact in planning terms of the increase in annual intake on the three identified matters was at a level to amount to material change of use by intensification.

78. It is not explained, in even the broadest terms, what effects or impact the increase in tonnage would have on the question of traffic, storm discharge and dust deposition and, crucially, why those impacts are said to be at a level to constitute a material change of use by reason of intensification. The applicant's case, as supported with expert evidence, was that the impact of the annual tonnage increase on traffic movements, surface water and dust levels would not be so material as to the amount to a material change of use by reason of intensification. The Board's inspector agreed with that. There is simply no indication at all as to why it was said that the Board disagreed with that analysis and arrived at a different view. The "reasons" found in the decision are really a statement of conclusions unsupported by any even broad reasons.

79. Counsel for the Board correctly submitted (as reflected in Humphreys J.'s summary in *Balscadden*) that the appropriate standard when assessing whether the duty to give reasons has been complied with is that of a person participating in the process. However here, the applicant participated in the process and yet, in my view, could not reasonably or objectively be able to discern from the decision why it was that the Board regarded the impact of the increase in annual intake as being so material in relation to traffic,

dust and surface water as to constitute a material change of use by intensification particularly when the applicant's expert evidence and the Board's inspector believed that the impact of same was not at such a level of materiality.

80. As regards the reasons given by the Board for not following the inspector's recommendation, in my view, the Board's decision falls foul of what was said by Clarke C.J. in *Connelly*, at para. 9.7, that where the Board differs from its inspector *"there is clearly an obligation for the Board to set out reasons for coming to that conclusion in sufficient detail to enable a person to know why the Board differed from the inspector and also to assess whether there was any basis for suggesting that the Board's decision is thereby not sustainable"*. I accept that the inspector's analysis of the intensification issue was itself a reasonably high level one. It was, nonetheless, expressly rooted in an acceptance of the position revealed by the expert reports tendered by the applicant in support of its application. If the Board decided not to follow the inspector on the basis that it took a different view of the contents of those reports, it behoved the Board to set out at least some broad basis for that position.

81. The Board's explanation for not accepting the recommendations of the inspector (as set out at para. 28 above) does not materially advance the question of why it disagreed with the inspector on the intensification issue. The only part of the passage which relates to the Board's disagreement with its inspector on the intensification/development issue is the last sentence which states that *"on the basis of the information on file, the Board did not share the view of the inspector that such an increase would not raise material planning issues as described above"*. It is not in any way clear, even in the broadest of senses, what information on file the Board was relying on or taking into account in arriving at this view.

82. As regards the other matters adverted to by the Board in that section of its decision explaining why it did not accept the inspector's recommendation, the inspector did not rely on the question of the 23,000 tonnes increase in annual intake falling below the threshold of 24,250 tonnes at which a mandatory EIAR would be triggered in arriving at his view that the increase in annual intake would not amount to material change of use by way of intensification. Likewise, the inspector did not rely on the limits within the waste licence in arriving at his conclusions on that issue. Accordingly, those matters

do not meaningfully explain why the Board disagreed with its inspector's analysis on the intensification issue.

83. I wish to make clear that I am not holding that the Board on a proper assessment of the material before it could not arrive at the conclusion it did. Rather, it behoved the Board, in discharge of its legal duty to give reasons for its decision, to give reasons from which it could be discerned as to *why* it was that questions of traffic, dust or surface water arising from an increased annual intake at the facility would raise material planning issues to a degree that such an increase amounted to a material change of use by intensification and therefore development.

Conclusion

84. For the reasons set out above, I will grant an order of *certiorari* quashing the decision and remit the matter to the Board. I will discuss the precise form of the appropriate order with counsel.