[2023] IEHC 335

THE HIGH COURT
JUDICIAL REVIEW

[2021 No. 17 JR]

IN THE MATTER OF SECTION 50, 50A AND 50B OF THE PLANNING AND DEVELOPMENT ACT 2000, AS AMENDED
AND IN THE MATTER OF THE PLANNING AND DEVELOPMENT (HOUSING) AND RESIDENTIAL TENANCIES ACT 2016

BETWEEN:

FOUR DISTRICTS WOODLAND HABITAT GROUP, BCM RESIDENTS ASSOCIATION, RATHCOOLE PARK RESIDENTS ASSOCATION AND FOREST HILL RESIDENTS ASSOCIATION

APPLICANTS

AND

AN BORD PLEANÁLA, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

ROMEVILLE DEVELOPMENTS LIMITED

NOTICE PARTY

JUDGMENT of Humphreys J. delivered on the 21st day of June, 2023

1. Ministerial guidelines entitled Guidelines for Planning Authorities on Sustainable Residential Development in Urban Areas (Cities, Towns and Villages) were adopted in 2009.

2. The South Dublin County Council Development Plan applicable to the impugned development came into force in 2016.

3. Subsequent to that, further ministerial guidelines were adopted in 2018 entitled Urban Development and Building Heights, Guidelines for Planning Authorities.

4. A pre-application consultation meeting took place on 27th November, 2019 in respect of what became an application for a development of 204 residential units, a childcare facility and associated works, together with a demolition of existing buildings, at Stoney Hill Road, Rathcoole, County Dublin.

5. The board's inspector reported on the proposed application on 11th December, 2019, concluding that further information was required. A board direction to that effect issued on 17th December, 2019.

6. The formal application under the Strategic Housing Development (SHD) procedure was made on 27th July, 2020.

7. The applicants made submissions objecting to the development. The county council reported negatively on the application on 21st September, 2020, echoing concerns it had expressed at the pre-application stage. It concluded *inter alia* that:

> "The Planning Authority expressed serious concerns in relation to the proposal during the SHD process and in assessing previous planning applications on the site. It is considered that the submitted proposal does not overcome these concerns.
>
> The proposed strategic housing development is generally in accordance with the Core Strategy of the SDCC Development Plan and the general area plan approach provides adequate connection opportunity for future development to the east.
>
> Notwithstanding this, the Planning Authority has significant concerns in relation:
>
> - the poor integration of the existing Green Infrastructure Network into the site layout and design and the resultant removal of large numbers of trees and hedgerows;
> - the proposed access location from Stoney Lane and the absence of consideration of the vehicular access from the north west sector of the site;
> - the residential amenity of the lower level apartments; and
> - the functionality of the open space adjacent to the apartments, due to the dominance of the gradient; and
> - the design and layout of the apartment[s]. [Chief Executive's Report pp. 42-43]"

8. The board's inspector recommended on 26th October, 2020 that planning permission be granted subject to 31 conditions. The board generally adopted that report and granted permission on 12th November, 2020.

Procedural history

9. The proceedings challenging that decision were instituted on 12th January, 2021. As one of the pleaded grounds overlapped with an issue raised in *Waltham Abbey Residents Association v. An Bord Pleanála* [2021] IEHC 312, [2021] 5 JIC 1002 (Unreported, High Court, 10th May, 2021), the proceedings were adjourned pending the outcome of those proceedings. In addition, issues regarding Strategic Environmental Assessment (SEA) pleaded against the State were modularised.

10. The matter was listed again on 4th April, 2022 and adjourned to allow the applicants to put in a final replying affidavit. On 9th May, 2022, the matter was further adjourned to enable the opposing parties to consider that, and to allow the formal swearing and filing of the affidavit. Some further time was sought by the opposing parties in that regard and after adjournments sought to facilitate the notice party on 16th May, 23rd May, 20th June and 11th July, 2022, the matter was listed on 25th July, 2022, at which point the replying affidavit had been filed subject to a further affidavit to correct an error in that affidavit.

11. The matter was then adjourned for certification as ready to take a date, although that did not happen immediately and there were adjournments sought by the parties on 3rd October, 24th October, 7th November and 21st November, 2022 to enable the matter to be certified as ready. In addition, there was possibly some delay in uploading papers to ShareFile but ultimately the matter was certified and given a hearing date of 18th April, 2023.

12. In the meantime, on 16th January, 2023 an issue that overlapped with *Kerins and Stedman v. An Bord Pleanála, Ireland and the Attorney General (No. 3)* [2021] IEHC 733, [2021] 11 JIC 3001 (Unreported, High Court, 30th November, 2021) was modularised pending the finalisation of that case.

Reliefs sought

13. Reliefs 1 and 2 are as follows:

> "1. An order of certiorari quashing the decision of the Respondent granting planning permission for the demolition of existing residential units and the construction of 204 residential units, a childcare facility and associated works at Stoney Hill Road, Rathcoole, Co. Dublin on 12 November 2020 (ABP Ref 307698) (the 'Decision').
>
> 2. Such declaration(s) of the legal rights and/or legal position of the Applicant [*sic* – note that the pleadings use the singular quite liberally which gives them, perhaps inaccurately, a slightly cut-and-paste feel] and/or persons similarly situated and/or of the legal duties and/or legal position of the respondent(s) as the Court considers appropriate."

14. Those reliefs, particularly the first, now fall for consideration.

15. Relief 3 is as follows:

> "A declaration that (to the extent that they are not capable of bearing a conforming construction) sections 5, 6, and 7 of the Planning and Development (Housing) and Residential Tenancies Act, 2016 are invalid and incompatible with Article 6(4) of Directive 2011/92/EU (the 'EIA Directive') and/or the requirements of fair procedures and natural and constitutional justice."

16. That relief is not being pursued.

17. Relief 4 states as follows:

> "A Declaration that (to the extent that it is not capable of a conforming construction) section 9(6) of the 2016 Act is invalid and/or incompatible with the requirements of Directive 2001/42/EC (the 'SEA Directive')."

18. As noted above, that has been modularised pending the outcome of the present module.

19. Reliefs 5 to 7 are as follows:

> "5. A stay on works being carried out pursuant to the Decision pending the resolution of these proceedings.
>
> 6. An order that section 50B of the Planning and Development Act, 2000 (the '2000 Act'), and/or sections 3 and 4 of the Environment (Miscellaneous Provisions) Act, 2011, and/or Article 9 of the Aarhus Convention apply to the present proceedings.
>
> 7. Costs."

20. Nothing particularly arises under those headings for decision at this point.

Core grounds

21. Core ground 1 states as follows:

> "The Decision is invalid as the statutory pre-consultation procedures provided for in sections 5, 6, and 7 of the Planning and Development (Housing) and Residential Tenancies Act, 2016 (the '2016 Act') are invalid and incompatible with Article 6(4) of Directive 2011/92/EU (as amended) and/or the requirements of fair procedures and natural and constitutional justice."

22. That ground was not pursued.

23. Core ground 2 states as follows:

> "The Decision is invalid because the Board failed to comply with Article 299B of the Planning and Development Regulations, 2001 (the '2001 Regulations') and/or Article 4(4) of the EIA Directive."

24. That issue potentially arises now. While not being entirely a matter of EU law it is significantly affected by European law, so will be considered following the purely domestic law questions.

25. Core ground 3 provides as follows:

"The Decision is invalid because, contrary to the determination of the Board, the application constitutes a material contravention of the South Dublin County Council Development Plan 2016-2022 (the 'CDP')".

26. Most of this ground with its sub-grounds arises now as a domestic law point. As noted above, sub-ground 9 regarding the need for SEA of the area plan was modularised pending the outcome of *Kerins.*

27. Core ground 4 provides as follows:

"The impugned decision is invalid as the Board erred in its interpretation of section 3 of the Urban Development and Building Height Guidelines 2018 and/or failed to take into account a relevant consideration."

28. That matter was not pursued.

29. Core ground 5 provides as follows:

"The Decision is invalid as the material contravention procedure provided by the State in section 9(6) of the 2015 Act is incompatible with the requirements of Directive 2001/42/EC (['']the SEA Directive') and/or that the Board was required to but failed to ensure the effectiveness of the law of the European Union."

30. As noted above, that issue was modularised, but one can note in passing the painfully convoluted drafting of the claim. If one wants to challenge an Act, one should challenge the Act – not some kind of abstract "procedure provided by the State in … the ... Act". It is from the same type of mind-set that prefers not to challenge a concrete, tangible thing like a licence or permission but instead to pursue the will-o'-the-wisp of challenging only the aethereal, incorporeal and abstract, such as the "decision to grant" the permission, the "decision to publish" the permission, the "decision to adopt" a decision, or presumably the "decision to decide" to do any of these things, and so on.

31. Core ground 6 provides as follows:

"The Decision is invalid because the Board erred in failing to have any, or any adequate regard for the protection of bat fauna for the purposes of Annex IV of Directive 92/43/EEC ('the Habitats Directive')."

32. That issue was not pursued.

33. In the light of the foregoing, the two issues that potentially arise at the present time are the domestic law issue of material contravention of the development plan and the primarily European law issue of screening for Environmental Impact Assessment (EIA).

34. While the domestic law issue here sounds quite manageable – whether or not the application materially contravened the development plan – the submissions ranged across a series of fundamental questions in judicial review. To get to the answer involves quite a bit of limbering up in terms of examining the broad grounds of judicial review, the question of weight or discretion, the caselaw on the standard of review, conclusions on that standard, the statutory provisions on material contravention, the caselaw on that issue and the legal conclusions to be drawn, before finally applying that law to the facts here.

The broad grounds of judicial review

35. In the 7th edition of his masterwork, *Judicial Review Handbook* (Oxford, Hart, 2020), Fordham J. identifies the traditional three-fold classification of the grounds of judicial review: illegality, irrationality and procedural impropriety (para. 45.1) (see *Reid v. An Bord Pleanála (No. 1)* [2021] IEHC 230, [2021] 4 JIC 1204 (Unreported, High Court, 12th April, 2021) at para. 9).

36. These headings can be broken down further as follows:

(i) Illegality includes a range of situations:

(a) lack of jurisdiction, which may depend on a particular objective precedent fact situation (see Fordham, section 16.2);

(b) breach of a substantive legal obligation, such as breach of a rule of law or statutory provision, or a provision of EU law or of the European Convention on Human Rights (as incorporated into domestic law) or of the Constitution, including error of law or of legal interpretation;

(c) breach of legitimate expectations;

(d) defective decision-making procedures in administrative law terms, such as consideration of an irrelevant matter;

(e) material error of fact (see *per* Hogan J. in *N.M. (DRC) v. Minister for Justice, Equality and Law Reform* [2016] IECA 217, [2018] 2 I.R. 591, [2016] 2 I.L.R.M. 369, 2016 WJSC-CA 13795, [2016] JIC 1403 at para. 51); and

(f) situations where the decision strikes at the substance of constitutional or EU rights (*per* Hogan J. in *N.M.*).

(ii) Irrationality includes quasi-merits-based challenges such as:

(a) unreasonableness or irrationality (which are the same thing);

(b) situations where the decision is not factually sustainable; and

(c) disproportionality.

(iii) Procedural impropriety includes:

(a) lack of fairness of the procedure before the decision-maker;
(b) breach of *audi alteram partem*;
(c) breach of *nemo iudex in causa sua*;
(d) lack of reasons; and
(e) situations where any view taken by the decision-maker is not *bona fide* held.

37. It is only stating the obvious to point out that illegality, irrationality and procedural impropriety apply to all areas of judicial review. *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39, [1992] I.L.R.M. 237, [1991] WJSC-SC 1137, [1991] 2 JIC 1504 never exhausted the totality of planning law judicial review or judicial review generally, but rather, even in its heyday, that case only affected the very limited category of irrationality.

38. A clear understanding of which of these categories we are dealing with is essential to any approach to the standard of review, because this varies from category to category.

Whether the decision-maker's view of the law attracts weight

39. While in certain contexts there is reference in caselaw to deference or weight being given to the decision-maker's view, a proper understanding of that concept requires firstly clear definitions of those terms and secondly an appreciation of the different contexts that can arise.

40. As to definitions, there are essentially three concepts:

(i) **Consideration**: meaning that the (first instance) decision-maker's view will be taken into account and that thought will be given to it. Generally speaking, anybody considering any matter will want to give thought to how decision-makers at an earlier stage analysed things. That doesn't tip the scales even presumptively in favour of such earlier analysis, but it is generally something that will be taken into account in the sense of being considered. A good example might be that a High Court judge doesn't expect appellate courts to agree with her views of purely legal issues, even presumptively, but she would normally want to be part of the conversation and would anticipate that her legal analysis would be engaged with to at least some extent by the ultimate decision-maker. That is "consideration" – certainly it doesn't constitute weight. The losing party doesn't have an onus to displace the trial judge's view on pure law – such questions are reconsidered *de novo* by the appellate court. Nor does an appellate court "defer" to a trial court's view of the law – and rightly not; that would defeat the purpose of appeal.

(ii) **Weight**: meaning that the matter being afforded weight (such as, for example, a decision-maker's findings of fact made in the course of a decision being judicially reviewed, or a trial judge's findings of fact, after hearing oral evidence, made for the purpose of a judgment being appealed) is itself a factor that can tip the scale in favour of the decision being made by the reviewing or appellate body, or to put it another way, that there is an onus on the party disputing that conclusion to show it is wrong. Weight is considerably stronger than mere consideration because it creates a presumption that needs to be displaced, rather than being simply something to think about in a *de novo* reconsideration of everything.

(iii) **Deference**: meaning weight in the context where the decision-maker has a degree of expertise. Where that entity is quasi-judicial this is sometimes grandly called "curial deference", but that concept, deference *simpliciter* or common or garden weight all amount to the same thing, and derive ultimately from the separation of powers rather than being necessarily dependent on the decision-maker being a highly specialised expert. Even non-expert decision-makers are entitled to weight being given to their factual conclusions. A licence granted by a clerical officer or other generalist public servant attracts a presumption in its favour as does a reasoned written decision by a legally-qualified quasi-judicial tribunal member.

41. As to context, there is a basic distinction which we have touched on:

(i) the level, if any, of weight to be afforded to a decision-maker's view can only be relevant in the context of a view **on the facts** or on a mixed question of fact and law such as the application of the law to those facts, irrespective of how much discretionary decision-making power is involved.

(ii) Any **purely legal question** of interpretation of a development plan or other legal instrument as such is a matter of law, and review of legal issues (whether by way of appeal or judicial review) is non-deferential: *Minogue v. Clare County Council* [2021] IECA 98, [2021] 3 JIC 2902 (Unreported, Court of Appeal, 29th March, 2021) at para. 100. Referring to this decision, Murray J. (Haughton and Barniville JJ. concurring) said in *A.K. v. U.S.* [2022] IECA 65, [2022] 3 JIC 1601 (Unreported, Court of Appeal, 16th March, 2022) that "[a]t one end of the spectrum lie cases in

> which the appellate court simply forms its own view as to the matter in issue untrammelled by any finding that has been reached by the trial court. This is the standard applicable to findings of pure law" (para. 48).

42. Thus, when in *Jennings and O'Connor v. An Bord Pleanála* [2023] IEHC 14, [2023] 2 JIC 1711 (Unreported, High Court, 17th February, 2023) at para. 103 there is the comment that: "interpretation of the Development Plan and whether it has been contravened, and, if so, whether materially, are matters of law for the court to decide on a 'full-blooded review' basis rather than the attenuated irrationality review standard set in *O'Keeffe* and on these issues of interpretation, the views of the Board are entitled to appropriate weight but no particular deference on account of their source", the final clause concerning "appropriate weight" (and we will come to the earlier clause regarding "full-blooded review" in due course) must be interpreted as meaning "weight" in the informal sense of "consideration" rather than in the technical sense of "weight" as something that itself adds to the balance and that could itself be determinative, either alone or with other factors.

43. Any higher body that is called on to interpret something, even on a *de novo* basis, will normally and naturally have a lively interest in how that something was interpreted by a lower body. In fairness to the court in *Jennings*, previous caselaw did not attempt a definition of the various terms concerned to distinguish shades of meaning. Having now essayed such an enterprise, the reference in *Jennings* is perhaps best thought of in terms of "consideration" rather than "weight" formally so-called, with the latter term meaning something which creates an onus on a disputing party to displace. In the latter sense, any discussion in *Jennings* must have been intended to attribute weight (in that technical sense) to the board's views only insofar as issues of interpretation are factual or mixed-factual ones and are not ones of pure law.

44. We can come shortly to the concept of full-blooded review, but on the subsidiary issue as to whether the views of the board on legal issues are entitled to appropriate weight but no particular deference, utilising the definitions referred to above results in a conclusion that the views of the board normally warrant appropriate consideration but not weight or deference, in exactly the same way that say for example, the views of the High Court on pure law normally warrant at least some consideration by appellate courts but not weight or deference. Or where a domestic court expresses a view on a question referred to the CJEU, that is "considered" as part of the pan-European dialogue in Luxembourg potentially involving other member states, EU institutions and other actors, but beyond being part of the conversation, the national court's views don't carry any "weight". Contrast that with the "weight" usually ascribed to a discretionary exercise of power by an initial decision-maker.

45. I appreciate that there is a terrible danger of semantics here. But given that the reference in *Jennings* to "weight" is in effect a reference to "consideration", then there is no difference of substance with that decision under this heading.

46. So yes I agree with *Jennings* that appropriate consideration should (as a natural *desideratum* and as a practical matter rather than a legal requirement) be given to the board's views on anything, but no weight (in the sense of tilting the scales or creating an onus) or deference (in the more special sense of weight deriving from expertise specifically) is attached to the decision-maker's assessment of law, because that is a matter for the court to determine on a *de novo* basis. The concept of weight so defined implies that the person who disagrees with the view being afforded weight or deference has some onus however defined, to demonstrate that the view should be overcome or disagreed with. But the decision-maker that is adopting a *de novo* approach to interpretation of law does not defer or give weight to the interpretation of the law by anybody else (other than a higher court obviously), so doesn't give "weight" to the views of a lower court or an administrative entity. It ideally (and often does) should give *consideration* to those views as part of a mutually respectful inter-institutional dialogue, but weight in the sense defined – no.

47. While *Jennings* cites *Redmond v. An Bord Pleanála* [2020] IEHC 151, [2020] 3 JIC 1003 (Unreported, High Court, 10th March, 2020) at para. 36 as authority for the proposition (which was in fact agreed rather than decided in that case) that the court is not required to show deference to the views of the board or of the planning authority as to the interpretation of the plan, the authority for the proposition that the views of the board have weight with the court appears to be given as being *Cicol Ltd v. An Bord Pleanála* [2008] IEHC 146, [2008] 5 JIC 0810 (Unreported, High Court, Irvine J., 8th May, 2008). However, there is some semantic issue here because Irvine J. essentially uses the word "weight" in the opposite sense (and therefore uses it in the sense that I have outlined above). In that case she rejected the idea that the views of a planning decision-maker as to the meaning of the plan had any "special weight" or "special primacy". What she says at para. 65 is:

> "As to the applicant's submission that the Board, in exercising its jurisdiction, ought to have afforded some special primacy to the Planning Authority's interpretation of its own Development Plan, I cannot accept this submission. Simply put, if, as accepted by the parties in the course of the hearing, it is for the court on a hearing such as this to decide whether or not a proposed development contravened a particular Development Plan and in

> so doing is charged with interpreting the Development Plan through the prism of a reasonably intelligent person having no particular expertise in law or town planning, it cannot be the case that the Board, on hearing an appeal, should attach any special weight to the Planning Authority's own interpretation of its plan."

48. So therefore what Irvine J. is saying is that the board should not attach "any special weight" to the planning authority's views on interpretation, and similarly the court in judicial review should not attach any special weight to the views of the board as to interpretation of the development plan or indeed any other issue of law. There is no significance in the word "special" here; the position is that the court does not attach any weight at all to the views of any administrative entity or lower court on any legal issue including the interpretation of a plan (insofar as that is a legal issue – acknowledging that mixed questions of fact and law may separately arise in which context weight may well arise). It will normally consider those views of course, but consideration is not a question of either weight or deference (which normally come to the same thing anyway). All of that reinforces the conclusion that the word "weight" in *Jennings* is being used in a sense that means "consideration", not in a sense that creates an onus for any differing party to displace.

Major cases on the standard of review in judicial review

49. From one point of view, it seems almost unbelievable to be still asking what is the standard of judicial review after so many appellate court decisions on this subject, but the situation is somewhat more complicated than it appears at first sight – indeed it isn't even immediately obvious how many standards of review there are.

50. At the risk of another wearying journey through the jurisprudence, one can identify at least some major stepping stones towards the current understanding of the standard.

51. In *The State (Lynch) v. Cooney* [1982] I.R. 337, [1982] I.L.R.M. 190, [1983] I.L.R.M. 89, O'Higgins C.J. referred to the standard that an impugned decision: "must be one which is *bona fide* held and factually sustainable and not unreasonable" (at p. 361).

52. In *The State (Keegan) v. Stardust Victims' Compensation Tribunal* [1986] I.R. 642, [1987] I.L.R.M. 202, Henchy J. (Hederman J. concurring) said at pp. 657-658 that "it is only a particular aspect of logic that could be applicable in testing the validity of a decision when it is subjected to judicial review on the ground of unreasonableness, namely, whether the conclusion reached in the decision can be said to flow from the premises. If it plainly does not, it stands to be condemned on the less technical and more understandable test of whether it is fundamentally at variance with reason and common sense." While not writing for the court, this statement has been accepted subsequently.

53. In *O'Keeffe*, Finlay C.J. held at p. 72 that "in order for an applicant for judicial review to satisfy a court that the decision-making authority has acted irrationally in the sense which I have outlined above so that the court can intervene and quash its decision, it is necessary that the applicant should establish to the satisfaction of the court that the decision-making authority had before it no relevant material which would support its decision".

54. In *Meadows v. Minister for Justice* [2010] IESC 3, [2010] 2 I.R. 701, [2011] 2 I.L.R.M. 157, [2010] 1 JIC 2101, the Supreme Court recognised proportionality as an element of irrationality in the *Keegan* sense. Hogan J. later said at para. 48 of *N.M*. that this was to recognise proportionality "in respect of all decisions affecting fundamental rights", but the qualification "fundamental" respectfully seems superfluous (and indeed in another part of *N.M.,* Hogan J referred to rights *simpliciter*). Murray C.J. did not so limit it: at para. 62 he said that "[i]t is inherent in the principle of proportionality that where there are grave or serious limitations on the rights *and in particular* the fundamental rights of individuals as a consequence of an administrative decision the more substantial must be the countervailing considerations that justify it" (emphasis added). A principal authority he referred to was the judgment of Keane J. in *Radio Limerick One Limited v. I.R.T.C.* [1997] IESC 3, [1997] 2 I.R. 291, [1997] 2 I.LR.M. 1, [1997] 1 JIC 1602, saying: "Keane J., with whom other members of the court concurred, acknowledged, if to a qualified extent, that the principle of proportionality may have a role to play in examining whether an administrative decision could be considered to be invalid on the grounds of irrationality." That wasn't a case about fundamental rights.

55. More specifically, by viewing proportionality as an aspect of unreasonableness, the court in *Meadows* effectively acknowledged that (as Hogan J. was to put it in *N.M*.) "the *O'Keeffe* test has been re-interpreted and clarified to take fuller account of the earlier judgment of Henchy J. in *The State (Keegan)*".

56. Denham J. said of *O'Keeffe* at p. 738 that "[t]he skilled nature of the decision maker in issue required such a refined approach. However, the application of the strict nature of the test in *O'Keeffe v. An Bord Pleanála* is limited to decisions of skilled or otherwise technically competent decision makers. I am satisfied that *O'Keeffe v. An Bord Pleanála* has been construed too narrowly and in that manner applied too broadly. The decision in *O'Keeffe v. An Bord Pleanála* related to a specialised area of decision making where the decision maker has special technical or professional

skill. A court should be slow to intervene in a decision made with special competence in an area of special knowledge. The *O'Keeffe v. An Bord Pleanála* decision is relevant to areas of special skill and knowledge, such as planning and development."

57. Importantly, she said at p. 739 that "[j]udicial review should be an effective remedy."

58. At p. 743 she said that "[t]he nature of the proportionality test is that, as described above, it must be rationally connected to the objective; not arbitrary, unfair, or irrational. The inherent similarity may be seen in the requirement in *O'Keeffe v. An Bord Pleanála* ... that the decision not be irrational, or at variance with reason or common sense".

59. Her summary of the position at pp. 743-744 began with the uncontroversial points that the court does not enter into the merits but deals with process, and that the onus is on the applicant, and then went on to say:

> "(iv) in considering the test for reasonableness, the basic issue to determine is whether the decision is fundamentally at variance with reason and common sense;
>
> (v) the nature of the decision and decision maker being reviewed is relevant to the application of the test;
>
> (vi) where the legislature has placed decisions requiring special knowledge, skill, or competence, for example as under the Planning Acts, with a skilled decision maker, the court should be slow to intervene in the technical area;
>
> (vii) the court should have regard to what Henchy J. in *The State (Keegan) v. Stardust Compensation Tribunal* [1986] I.R. 642 referred to as the 'implied constitutional limitation of jurisdiction' in all decision making which affects rights. Any effect on rights should be within constitutional limitations, should be proportionate to the objective to be achieved. If the effect is disproportionate it would justify the court setting aside the decision."

60. All of this means that there are not so much two separate doctrines – some kind of bare extreme irrationality test for planning cases and expansive proportionality for everything else (or at least everything that affects rights). Rather there is a single doctrine of irrationality including proportionality; but in cases of "special technical or professional skill" the court "should be slow to intervene in the technical area". Where Denham J. refers to "rights" here, she does not limit that to constitutional rights – and in any event, the critical relevant provisions of the Constitution, such as to a right of access to the court, apply to anyone seeking to enforce any right, even one merely conferred by statute law or the common law. So while the origin of any given right may be sub-constitutional, once the right exists, there comes into being a constitutional right to enforce that right and to have access to the court, or to have an effective remedy in Denham J.'s phrasing.

61. Insofar as planning law may have been traditionally hived off into some kind of domestic law side-shunt having no intersection with rights, unfortunately for enthusiasts for that position, developments in Europe have fundamentally recalibrated the status of environmental and planning law. Judgments don't update themselves – it takes litigants to bring forward issues to show that things have changed since any original pronouncement, however hallowed.

62. When Finlay C.J. announced the result in *O'Keeffe* on 15th February, 1991, there was no habitats directive (1992), no Aarhus Convention with its right to an effective remedy (1998), no EU ratification of Aarhus (2005), no EU Charter of Fundamental Rights with its treaty-level right to an effective remedy (2009), no decision of the CJEU in Case C-240/09 *Lesoochranárske zoskupenie VLK v. Ministerstvo životného prostredia Slovenskej republiky* (Court of Justice of the European Union, 8th March, 2011, ECLI:EU:C:2011:125) obliging national courts to interpret domestic law to comply with Aarhus (2011), no updated EIA directive (2011), no amended EIA directive (2014), no mountain of national and European caselaw and Geneva Aarhus compliance committee decision-making on the issues thereby created. Standing back after thirty years of what cumulatively amounts to radical change, the solid bulwark of Hibernian legal thought that would have imposed a bargain-basement rudimentary standard of judicial review for planning law, on the premise that it has nothing to do with rights or effective remedies, has been eroded to sand by a relentless incoming tide from Europe.

63. *N.M.* was a case under the asylum procedures directive 2005/85. Importantly for the issue we are discussing, art. 39 of the directive begins as follows:

> "Article 39
>
> The right to an effective remedy
>
> 1. Member States shall ensure that applicants for asylum have the right to an effective remedy before a court or tribunal, against the following:
>
> (a) a decision taken on their application for asylum, including a decision:
>
> (i) to consider an application inadmissible pursuant to Article 25(2),
>
> (ii) taken at the border or in the transit zones of a Member State as described in Article 35(1),
>
> (iii) not to conduct an examination pursuant to Article 36;
>
> (b) a refusal to re-open the examination of an application after its discontinuation pursuant to Articles 19 and 20;

(c) a decision not to further examine the subsequent application pursuant to Articles 32 and 34;

(d) a decision refusing entry within the framework of the procedures provided for under Article 35(2);

(e) a decision to withdraw of refugee status pursuant to Article 38."

64. So the legal context for the whole analysis in *N.M.* is the European law right to an "effective remedy". That is crucial in terms of understanding that the logic of *N.M.* cannot be crammed into a watertight compartment separate from planning law.

65. The critical part of *N.M*. begins at para. 55 where Hogan J. referred to the trial judge's comments that judicial review dealt with process rather than merits:

> "All of this is in its own way true. But, perhaps, with respect, this passage may be thought to underplay the scope of contemporary, post–*Meadows v. Minister for Justice* [2010] IESC 3, [2010] 2 I.R. 701 judicial review. While the judicial review court cannot review the merits of the decision, it can nonetheless quash for unreasonableness or lack of proportionality (as in *Meadows v. Minister for Justice* [2010] IESC 3) or where the decision simply strikes at the substance of constitutional or EU rights: see, *e.g.*, *P.S. v. Minister for Justice, Equality and Law Reform* [2011] IEHC 92, (Unreported, High Court, Hogan J., 23 March 2011); *O'Leary v. Minister for Justice* [2012] IEHC 80, [2013] 1 I.L.R.M. 509. The court can further examine the conclusions reached and ensure that they follow from the decision-maker's premises. The court can further quash for material error of fact."

66. At para. 58 Hogan J. went on as follows:

> "I accept that the 'no relevant material' standard prescribed by the Supreme Court in *O'Keeffe v. An Bord Pleanála* ... would not satisfy the *Samba Diouf v. Ministre du Travail* (Case C-69/10) [2011] E.C.R. I-7151 requirements, since in practice it would not be possible to subject the reasons given by the decision-maker to a 'thorough review' by the judicial review judge if that were indeed the applicable test. Nevertheless, for the reasons essentially set out by Cooke J. in *I.S.O.F. v. Minister for Justice, Equality and Law Reform* [2010] IEHC 457, (Unreported, High Court, Cooke J., 17 December 2010) and by me as a judge of the High Court in *Efe v. Minister for Justice* [2011] IEHC 214, [2011] 2 I.R. 798, I consider that *O'Keeffe v. An Bord Pleanála* test can no longer be applied to judicial review applications in asylum matters such as the present one in which the protection of either constitutional rights or EU law rights are engaged. The Supreme Court has, in any event, made this clear: this, at least, is the clear implication of major post-*O'Keeffe v. An Bord Pleanála* decisions such as *Clinton v. An Bord Pleanála (No. 2)* [2007] IESC 19, [2007] 4 I.R. 701 and *Meadows v. Minister for Justice* [2010] IESC 3, [2010] 2 I.R. 701. Even if that were not so, this court's duty of loyal co-operation with the requirements of EU law would, in any event, require us to ensure that our domestic law of judicial review is remoulded in this manner in order to accommodate the requirements of article 39(1)."

67. *N.M.* had to allow for expansive judicial review *not* because it was an asylum case (if lawyers in whatever role excel at anything, we can pride ourselves on an ability to come up with completely *ad hoc* explanations for any illogical exceptionality, but that is not a particularly socially beneficial skill – there is no convincing reason why asylum should in itself be somehow exceptional when there are other equally valid areas where judicial review is important), but because it involved constitutional and EU law rights where the right to an effective remedy is engaged. These considerations are not confined to asylum or even to human rights law. Thus insofar as the court is required to make available a right to an effective remedy (as under art. 39 of the 2005 directive, but now more generally across the whole EU law field under art. 47 of the EU Charter), then an extensive and effective judicial review jurisdiction must be available.

68. Article 9(4) of the Aarhus convention provides: "... the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive ...". Thus in planning law we find ourselves firmly in the centre of *N.M*. territory.

69. Insofar as there is reference in para. 39 of *Jennings* to the effect that *N.M.* occurred "in the context of fundamental constitutional rights and/or standards of review required by EU law", whereas *O'Keeffe* applies "in planning and environmental matters", that must be read as merely an acknowledgment of the differing positions in caselaw over the decades but not an assertion of the legal validity of such a distinction. Those differing positions now need to be synthesised – and the synthesis is that there is no such distinction. In vast tranches of planning and environmental matters, there is a standard of review required by EU law which therefore involves an effective remedy. The logic of *N.M.* applies in those contexts. And incidentally Hogan J. at para. 58 didn't say that only "fundamental" constitutional rights warranted full judicial review. He referred to constitutional rights *simpliciter*. A probably unnecessary final footnote is that the "and/or" in *Jennings* para. 39 is perhaps over-cautious (a forgivable tendency in any legal context) – Hogan J.

clearly envisaged both situations as covered by the doctrine ("either constitutional rights or EU law rights").

70. Hogan J. in *N.M.* also makes the important point at para. 53 that judicial review generally has evolved above and beyond the context of the EU law right to an effective remedy:

> "…. Whatever might have been the situation within the narrow and artificial confines of *O'Keeffe v. An Bord Pleanála* ..., it is clear from other important authorities that the decision of the Minister must satisfy the requirements of factual sustainability (*The State (Lynch) v. Cooney* [1982] I.R. 337) and the reasons for that decision can furthermore be fully scrutinised within the parameters of the judicial review procedure (Meadows v. Minister for Justice). There is, in any event, well-established case law whereby the court can quash decisions by judicial review for material error of facts: see generally, Daly, 'Judicial Review of Factual Error in Ireland' (2008) 30(1) *Dublin University Law Journal* 187; *Hill v. The Criminal Injuries Comp. Tribunal* [1990] I.L.R.M. 36; *A.M.T. v. Refugee Appeals Tribunal* [2004] IEHC 219, [2004] 2 I.R. 607; *V.C.B.L. v. Refugee Appeals Tribunal* [2010] IEHC 362, (Unreported, High Court, Cooke J., 15 October 2010) and *H.R. v. Refugee Appeals Tribunal* [2011] IEHC 151, (Unreported, High Court, Cooke J., 15 April 2011)."

71. *N.M.* came to be considered with approval by the Supreme Court in *A.A.A. v. Minister for Justice* [2017] IESC 80, [2017] 12 JIC 2106 (Unreported, Supreme Court, 21st December, 2017). Charleton J. also said of *Meadows* at para. 22 that "[i]n *Meadows*, the concept of proportionality was held to operate within the confines of the irrationality test", which again supports the broad point of synthesis of the various doctrines across the field of judicial review rather than seeing them as airtight siloes, squatting *incommunicado* as between themselves.

72. In *A.B. v. Clinical Director of St. Loman's Hospital* [2018] IECA 123, [2018] 3 I.R. 710, [2018] 2 I.L.R.M. 242, [2018] 5 JIC 0303, Hogan J. had this to say at para. 73:

> "It is true that, post–*Meadows* ..., the High Court's power of review in an application touching on the constitutional right to liberty is more extensive than the rather old-fashioned *O'Keeffe* test of 'no evidence' (*O'Keeffe v. An Bord Pleanála* ...): see, *e.g.*, *Meadows v. Minister for Justice* ... *Efe v. Minister for Justice* [2011] IEHC 214, [2011] 2 I.R. 789, *N.M. v. Minister for Justice* ... and *A.A.A. v. Minister for Justice* ... It is, accordingly, clear that if the decision of the responsible consultant psychiatrist was to decline to exercise the power to discharge the patient under s. 28(1), this could be challenged in judicial review proceedings and the High Court could subject the reasoning of the psychiatrist in those proceedings to what I described – admittedly in the context of EU law, rather than purely domestic law – in *N.M. ...* as a form of 'thorough review'."

73. He went on to say at para. 74:

> "But even this form of review is some way off a review on the merits of the decision and still less could the High Court effectively declare in such proceedings that the patient no longer suffered from a mental disorder."

74. That emphasises the point that even "thorough review" is itself very deferential and does not attempt to review the merits *de novo*.

75. In *Friends of the Irish Environment v. Government of Ireland* [2020] IESC 49, [2020] 2 I.L.R.M. 233, [2020] 7 JIC 3107, the Supreme Court said as follows at para. 5.58:

> "Adopting the approach taken by this Court in *Donegan v. Dublin City Council* [2012] IESC 18 and *AAA v. Minister for Justice* [2017] IESC 80, the trial judge found that, where an issue of fundamental rights is agitated, it is appropriate to apply the *O'Keeffe* irrationality test viewed through the prism of a *Meadows* type proportionality analysis. However, the trial judge also emphasised that the court's review must be accommodated within the existing judicial review regime. On that basis, it was considered by MacGrath J. that the level of scrutiny required is perhaps greater than the 'no evidence' standard required by *O'Keeffe*, but at the same time he was of the view that the review must be within the tenets of those principles and cannot be a merit-based review. MacGrath J. approached the assessment of FIE's claims on this basis."

76. In *Jennings*, at para. 112, there is a suggestion that where the development plan on a proper interpretation "allows appreciable flexibility, discretion and/or planning judgement to the decision-maker", review was for irrationality, but if not it was "full-blooded".

77. I agree with the substance of that sentiment; my only reservation is semantic. It might not simplify an already complex area of law to promote the introduction of yet further terminological biodiversity. It doesn't immediately appear likely that the phrase "full-blooded" review is really sufficiently precise to be the term of choice in this context. *Jennings* refers back to *Ballyboden Tidy Towns Group v. An Bord Pleanála* [2022] IEHC 7, [2022] 1 JIC 1001 (Unreported, High Court, 10th January, 2022) at para. 113, which in turn referred to para. 41 of the judgment of Simons J. in *Heather Hill Management Company clg v. An Bord Pleanála* [2019] IEHC 450, [2019] 6 JIC 2103 (Unreported, High Court, 21st June, 2019). But I think that Simons J. was originally using that term

as a kind of illustrative or literary flourish, rather than as unveiling a new proposed technical term that would introduce some new concept that would develop a life of its own in later jurisprudence.

78. A possibly loosely-defined term like "full-blooded" has multiple meanings: *de novo* review or some kind of intermediate category between *de novo* and minimalistic *O'Keeffe* irrationality of which there are several possible candidates – review of factual findings that adds factors beyond mere irrationality and top-of-the-range factual review that remains deferential but falls short of *de novo* consideration. An even more awkward problem is that if what is intended by the phrase full-blooded is *N.M.*–style review that is necessitated by the EU law right to an effective remedy, that in itself is only in an intermediate position that falls short of the even-more-full-blooded concept of *de novo* review of legal questions. And conversely, the *N.M.* take on proportionality only applies within the irrationality strand of judicial review (illegality and procedural impropriety being primarily legal and thus primarily *de novo*). The irrationality strand is essentially highly deferential, even if rights-related issues involve somewhat less deference than non-rights related issues. On that basis, "full-blooded" doesn't fit very comfortably when viewed from that perspective either. So even if one was attracted to the term (which I have to confess I amn't particularly), it is potentially confusing and I would respectfully suggest the following alternative way to phrase the issue of the standard.

Conclusions on the standard of review

79. To answer the question posed at the outset, there are three standards of review applicable in the context of judicial review, broadly mirroring the discussion in *Minogue* of the three standards of appellate review:

(i) **Non-deferential or *de novo* review:** *de novo* review applies generally to the determination of all legal issues (*A.K. v. U.S., Minogue*) under all headings of judicial review, but most markedly in relation to illegality and procedural impropriety. The judicial review court can in certain circumstances make *de novo* factual findings in limited and defined situations (see generally *Reid No. 1*), particularly as regards procedural impropriety in order to establish what happened before the decision-maker, or to identify material error of fact (*Baile Éamoinn Teoranta v. An Bord Pleanála* [2020] IEHC 642, [2020] 12 JIC 0405 (Unreported, High Court, 4th December, 2020), Barr J. (at para. 82)). The approach to new factual findings regarding jurisdictional issues depends on whether jurisdiction must be established independently of any evaluation by the decision-maker (in which case the court can receive evidence on this and determine the question of fact *de novo*) or whether, more typically, the point is one for the decision-maker to evaluate first (in which case there must be some deference – not all "jurisdictional" points can be saved for judicial review (*Reid No. 1*)). In terms of reasons, it will be for the court, not the decision-maker, to determine non-deferentially what were the main issues and whether the main reasons were given on those issues.

(ii) **Somewhat deferential review:** Insofar as mixed issues of fact or law are concerned, the reviewing court must be somewhat deferential to the decision-maker's evaluation of the factual component. Any such deference however does not extend to issues of legal interpretation. Relatedly, even if a decision-maker's view of the facts, whether on a pure question of fact or a mixed question, would otherwise fall within the realm of what the court would see as permissible, the issue of whether the decision-maker addressed herself to the correct issues and lawfully considered such issues is itself one of law for the court.

(iii) **Highly deferential review:** Purely factual assessments by a decision-maker attract a high degree of deference: *O'Keeffe* remains relevant as part of the test in the negative sense that if there is no material supporting a decision, it will be quashed. But even if there is such material, a decision may still be quashed by reference to the reasonableness and proportionality standards of *Keegan*, *Meadows* and other cases. There is no separate watertight set of doctrines for different areas of the law – reasonableness and proportionality cover all types of judicial review insofar as there is always *some* form of right at issue (the comments of Denham J. in *Meadows* are relevant to the rationale for this), but the application of those doctrines varies with context across a spectrum. Any review of purely factual findings remains highly deferential in principle (subject to the point made above that even a finding of pure fact can be set aside if the decision-maker asks the wrong question or fails to conduct the exercise in a manner provided for by law), but there is nonetheless a range of deference within that. At one end of the spectrum, where a decision affects either constitutional or EU law rights, which are now subject to a requirement for an effective remedy generally (Charter, art. 47), judicial review will be particularly attentive to that legal context. At the other end, the court will normally be slow to second-guess a purely factual decision made with special competence in an area of

special knowledge. However, most planning law decisions, while made by experts, are also subject to an EU law right to an effective remedy (as in *N.M.*), which must take priority over any national law rule, such as regarding extra deference to experts (the principle of supremacy – Case *6/64, Costa v. ENEL* (Court of Justice of the European Union, 15th July, 1964, ECLI:EU:C:1964:66). Indeed, the CJEU has pitched the status of EU law very high for this purpose – where the court concludes that there can only be one lawful outcome, it must in an EU law context have a power and indeed a duty to bring that result about. Order 84 RSC allows this, either by *mandamus* or by directions following *certiorari*, but where a member state's law does not so provide, and the decision-maker produces an inconsistent decision following any given judgment, the national "court or tribunal must vary that decision which does not comply with its previous judgment and substitute its own decision for it as to the application ... disapplying as necessary the national law that would prohibit it from proceeding in that way": Case C-556/17 *Alekszij Torubarov v. Bevándorlási és Menekültügyi Hivatal* (Court of Justice of the European Union, 29th July, 2019, ECLI:EU:C:2019:626). Applied to the Irish context, that is a lot less dramatic than it sounds, because the High Court already has the required jurisdiction although it is rarely called for in practice.

80. With those issues addressed we can now turn to the specific question of the approach to material contravention.

Statutory provisions regarding material contravention

81. Section 9(6) of the Planning and Development (Housing) and Residential Tenancies Act 2016 provides as follows:

> "(a) Subject to paragraph (b), the Board may decide to grant a permission for a proposed strategic housing development in respect of an application under section 4 even where the proposed development, or a part of it, contravenes materially the development plan or local area plan relating to the area concerned.
>
> (b) The Board shall not grant permission under paragraph (a) where the proposed development, or a part of it, contravenes materially the development plan or local area plan relating to the area concerned, in relation to the zoning of the land.
>
> (c) Where the proposed strategic housing development would materially contravene the development plan or local area plan, as the case may be, other than in relation to the zoning of the land, then the Board may only grant permission in accordance with paragraph (a) where it considers that, if section 37(2)(b) of the Act of 2000 were to apply, it would grant permission for the proposed development."

82. That sub-section references s. 37(2)(b) of the Planning and Development Act 2000, as amended, which is in the following terms:

> "Where a planning authority has decided to refuse permission on the grounds that a proposed development materially contravenes the development plan, the Board may only grant permission in accordance with paragraph (a) where it considers that–
>
> (i) the proposed development is of strategic or national importance,
>
> (ii) there are conflicting objectives in the development plan or the objectives are not clearly stated, insofar as the proposed development is concerned, or
>
> (iii) permission for the proposed development should be granted having regard to regional spatial and economic strategy for the area, guidelines under section 28, policy directives under section 29, the statutory obligations of any local authority in the area, and any relevant policy of the Government, the Minister or any Minister of the Government, or
>
> (iv) permission for the proposed development should be granted having regard to the pattern of development, and permissions granted, in the area since the making of the development plan."

83. Thus, in an SHD context, the board is to proceed essentially on the same basis as if the council had decided to refuse permission on grounds of material contravention.

84. The general law in relation to material contravention raises a number of critical questions, including who decides on the question of contravention, when is there contravention and when is the contravention material. To make sense of those questions it is appropriate to look first at previous caselaw.

Survey of the approach to material contravention by reference to examples in the caselaw

85. Magisterial overviews of the entire corpus of law in any given area are magnificent exercises to watch but they are rather hard to conduct. Apart from the ephemerality that comes with any attempt to generalise (because lawyers' ingenuity means that it just takes one subsequent case to upset the applecart), the main problem with such exercises is that, unless one is prepared to get a lot of blood on one's shirt by distinguishing into irrelevance the cases that don't sit comfortably

together, one ends up running the risk of having to engage in some contortions to make everything fit. This leads to a risk of over-inclusive terminology or approaches that on one view might cause some misunderstandings.

86. It will nonetheless be instructive to look at the precise terms of the caselaw, and I am doing so with great assistance from the parties here. The parties helpfully prepared a 76-page Scott schedule in that regard, from which I will liberally borrow wording, in an endeavour to try to throw more light on how the approach to material contravention has worked in practice.

87. While conscious of the differences, I do not find the British cases as unhelpful as the applicants have suggested. Overall, the critical inflection point is not so much a distinction between general clauses and specific clauses, but between clauses that confer significant planning judgement and those that don't. Even a generally-worded clause may have the effect that significant planning judgment is not thereby conferred.

88. It is agreed that the prior question of whether the plan as properly interpreted confers a discretionary decision-making power on the competent authority is itself a matter of interpretation of the development plan, which is one for the court.

89. *Jennings* is an extremely useful overview of much of the law on material contravention, and I will have to confess that I have drawn heavily on its survey of the caselaw for the purposes of the present judgment.

90. In passing as an initial point, I might mention that while there was some discussion of the question raised by the board as to whether the application of a properly-interpreted plan to particular facts was itself one of planning judgement, I don't think this is really a problematic issue, because for this to arise at all, the plan properly interpreted has to confer a zone of judgement in the process of such application. So either the plan allows for judgement in its application, or it doesn't; and if the latter, the competent authority can't "apply" it in some sense that creates a zone of judgement out of nothing.

91. Overall there are a limited number of situations that may arise:

(i) No significant planning judgement – contravention;
(ii) No significant planning judgement – no contravention;
(iii) Significant planning judgement – contravention on the facts;
(iv) Significant planning judgement – contravention on an irrationality basis;
(v) Significant planning judgement – no contravention;
(vi) Tension between two general provisions;
(vii) Tension between a general and a specific provision; and
(viii) Tension between two specific provisions.

No significant planning judgement – contravention

92. The following cases are examples where plan provisions did not leave open an appreciable zone of discretion, and where a contravention was identified. These generally indicate that in the absence of scope for significant judgement, contravention or otherwise is a matter of law for the court:

(i) *O'Leary v. Dublin County Council* [1988] IR 150 – a park was zoned as a High Amenity Area and "Caravan Park-Residential" was not permitted, hence a halting site was a material contravention.

(ii) *Tennyson v. Corporation of Dun Laoghaire* [1991] 2 I.R. 527 (Barr J.). The development plan provided specified densities for houses with some discretion for maisonettes and the like:

> "Silchester Road comprises a residential area most of which is of long standing. At the St. Paul's Church end there is an actual density of 28 houses on 23 acres and the average house size is 300 square metres. The site for the proposed development is within that sector. Except for a small part at the Dun Laoghaire end of the road, the remainder of the area comprises 22 mostly semi-detached houses on 7.6 acres and having an average house size of 210 square metres. The 1984 development plan of the planning authority provides that, with the exception of a small section at the Dun Laoghaire end of Silchester Road, the entire area, including that part where the development site is situated, is categorised as being density class 'C', which provides that the maximum number of houses which shall be allowed is 3 per acre, based on house sizes considered normal for the appropriate density class. In Silchester Road this appears to be not less than 210 square metres. The plan also provides at paragraph 17.4 that purpose built flat developments may be allowed with a maximum of 4 flats for each house permissible on the site, subject to a maximum gross floor area of 210 square metres for each such permissible house. In short, the plan provides that a development comprising not more than 3 houses per acre may be allowed

> at Silchester Road subject to a floor area of approximately 210 square metres per house. Alternatively, a development comprising purpose built flats may be allowed there on the basis of up to 12 flats per acre and a maximum total floor area of 630 square metres. However, a further possible variation is provided for in the final sentence of paragraph 17.4 .... 'Forms of development consisting of maisonette or mixed flat and house development or other intermediate forms of development may be allowed a density between that for flats and for houses in the relevant area" (p. 531).

However, the development itself involved small houses, not flats/maisonettes:

> "It is not in dispute that the proposed development for which permission has been granted by the planning authority comprises 17 new self-contained single dwelling units, 7 of which are detached; 6 are semi-detached and 4 are terraced. Each will be built on its own particular site with a private walled garden; some have on-site car-parking and others have car-parking in communal areas. Unit sizes range from 74 square metres to 118 square metres. Most are under 100 square metres. Access to the proposed development from Silchester Road is by way of a private avenue, a cul-de-sac, which will serve all units. It is intended that, like other communal areas within the scheme, the avenue will remain in the joint ownership of all the occupiers" (p. 532).

Hence the house density rules applied, and those rules were contravened.

(iii) *Roughan v. Clare County Council* (unreported, High Court, 18th December, 1996) (Barron J.):

> "So far as it is material, the development objectives of the plan in relation to housing are set out in Part II of the plan. The particular site is located in a special development zone. The designation of such zones is to ensure that development within such zones shall take place only within the boundaries of existing settlements or development clusters. The settlement and development location objectives of the plan are set out in Clause 2.3.1. So far as it is material, the relevant portions of that clause are as follows:-
>
> > 'To designate areas as development zones:
> >
> > > - generally to prohibit development outside the development boundaries of settlements and development clusters located within those areas designated as special development zones.
> >
> > This development objective would not apply to: [certain exceptions that did not arise in the case]'" (p. 2).

As the project involved residential accommodation outside the boundary of the settlement, and did not engage the exceptions set out in the development plan, there was a contravention.

(iv) *Maye v. Sligo Borough Council* [2007] IEHC 146, [2007] 4 I.R. 678, [2007] 4 JIC 2704 (Clarke J.): the plan provided for a linear park. Clarke J. held that, while in the context of the length of the proposed linear park the amount which would be lost was relatively small relative to its entire length, the interference with the objectives specified in the development plan was still material as it would prevent the respondent creating a continuous pleasant walking area. At para. 6.11 he said:

> "The question of judgment which I must exercise is as to whether the attesting of that infringement would amount to a material contravention of the plan. On balance I have come to the view that the development would, in that respect, amount to a material contravention of the development plan. While it is, of course, the case, as was argued by counsel for the applicant, that it is unlikely to prove possible to have such a grassy area along the entire route, it nonetheless remains an objective of the development plan. To actually go backwards and remove a portion of the grassy area would seem to me to be in conflict with that objective. The fact that an objective may not be capable of being completely achieved does not take away from the fact that developments, in order to conform with the development plan, should at least move in the right direction. Where, to a material extent, the development not only fails to move in the right direction but actually goes against the objectives of the development plan, then it seems to me that has a potential to amount to a material contravention of that plan."

(v) *Heather Hill Management Company v. An Bord Pleanála* (Simons J.): the court quashed the Board's decision to grant permission and in this regard held, *inter alia*, that the proposed SHD development of 197 residential units would involve a material

contravention of the Galway County Development Plan in two respects, first, the scale of the proposed development would breach the population allocation for Barna as set out in the core strategy and settlement hierarchy, and as affirmed by a variation made to the County Development Plan on 23rd July, 2018 and secondly, part of the application site lay in an area which had been identified as being at risk of flooding. The County Development Plan provided that proposals for development works in this area are to be subject to a development management "justification test". This was not done.

(vi) In *Redmond v. An Bord Pleanála* (Simons J.), the development exceeded parameters set out in the plan:

> "78. The proposed development involves a material contravention of the relevant development plan policy in respect of housing density. Policy RES 5, which is set out at §2.1.3.5 of the development plan, addresses the housing density applicable to institutional lands as follows.
>
> > 'In the development of such lands, average net densities should be in the region of 35 - 50 units p/ha. In certain instances higher densities will be allowed where it is demonstrated that they can contribute towards the objective of retaining the open character and/or recreational amenities of the lands.'
>
> 79. The proposed development has a housing density of approx. 67 units per hectare. ....
>
> 85. The proposed development also involves a material contravention of the relevant development plan policy in respect of open space provision. The development plan requires a minimum open space provision of 25% of either (i) the total site area, or (ii) a population based provision, whichever is the greater. This open space provision must be sufficient to maintain the open character of the site. ....
>
> 88. The position is correctly stated by the planning authority at page 17 of the chief executive's report as follows.
>
> > 'The second requirement for 'INST' sites is that 25% of the site area or a population-based equivalent, whichever is higher, of public open space be provided 'sufficient to maintain the open character of the site'. The applicant asserts that 28.9% of the 'red line' site is provided as public open space. However, it is the planning authority's assertion that this 25% requirement should apply to the entirety of the campus, rather than in a piecemeal fashion. The intention of the policy is clearly to retain the 'open character' of the site, and this can only be done by way of a comprehensive approach. Heretofore, the planning permissions on site have developed the campus to a relatively high intensity, while the western and south-western portions of the campus have remained effectively greenfield, preserving the open nature of the campus, and maintaining the aggregate open space at above 25%. It is only the subject application that has the potential to drop the open space across the campus to below the 25% mark. As such, it is at this point that the matter must be given serious consideration.
> >
> > There has been no assessment of the public open space provision across the campus provided by the applicant, but it is evident from a cursory consideration of the proposed layout that a level of 25% would not be achieved. As such, the planning authority considers that the proposed development is contrary to the policies of the CDP, and should be refused on this basis.'"

(vii) In *Jennings*, there were four headings of material contravention argued. The argument that the development materially contravened the Institutional designation of the lands in the Development Plan as to: "(b) the requirement to maintain the open character of the lands" rested on a specific provision of the plan and was upheld:

> "So, the Inspector and the Board failed properly to interpret the Development Plan and to consider whether the Proposed Development would materially contravene the Development Plan by failing to retain the open character and/or recreational amenity of the Campus *'wherever possible'* – words which, as I have said, denote a significant degree of ambition.

Accordingly, the Impugned Decision will be quashed on this account" (para. 180).

(viii) The second relevant heading in *Jennings* was that the development materially contravened the Institutional designation of the lands in the Development Plan as to: "(c) densities". That involved a departure from a specific provision of the plan by the board which was based on a misinterpretation:

> "Accordingly, I cannot see how in logic, sense or lawfulness, the Board could invoke RPO 5.4, thereby necessarily invoking §5.10 of the 2009 Guidelines as to density, as its justification for permitting higher densities than allowed by Development Plan RES5 and in material contravention thereof, when §5.10 and RES5 are explicitly consistent with each other and §5.10 is not permissive of higher densities than allowed by RES5. Indeed, I consider counsel for the Applicants to be correct in asserting that, far from differing from and so justifying a departure from RES5, national policy as to density in residential development of Institutional lands, as expressed in §5.10 of the 2009 Guidelines is given expression in RES5" (para. 228).

No significant planning judgement – no contravention

93. The following illustrate cases where there was no significant planning judgement and no contravention. These are cases where the decision-maker correctly complied with a requirement that had a clear meaning not involving significant judgement:

(i) *Hopkins Homes Ltd v. Secretary of State for Communities and Local Government and another; Cheshire East Borough Council v Secretary of State for Communities and Local Government and another* [2017] UKSC 37, [2017] 1 W.L.R. 1865 is a dense and almost unclassifiable case but appears to be about interpretation of national policy rather than development plans. The relevant provision of the policy, para. 49 of the National Planning Policy Framework, provided that "[relevant] policies for the supply of housing should not be considered up-to-date if the local planning authority cannot demonstrate a five-year supply of deliverable housing sites." That had a specific albeit non-legalistic meaning, and in one of the two cases dealt with together this had been correctly interpreted by the inspector (in the other it wasn't).

(ii) In *Jennings*, the argument that the development materially contravened the Institutional designation of the lands in the Development Plan as to: "(a) the minimum 25% open space requirement for the overall holding" was rejected on the facts as the open space exceeded that amount."

Significant planning judgement – contravention on facts

94. The following illustrate situations where some discretion was conferred on the decision-maker, but nonetheless a contravention took place:

(i) *Ballyboden Tidy Towns Group v. An Bord Pleanála* [2022] IEHC 7, [2022] 1 JIC 1001 (Unreported, High Court, 10th January, 2022) (Holland J.). The development plan requirement was phrased in ball-park terms, but the actual decision was outside the ball-park so specified. Holland J. quashed the Board's Decision to grant SHD permission for 496 residential units at an average density of 142 dph, *inter alia*, on the basis that the density permitted was in material contravention of – in excess of the average density contemplated in – H8 Objective 3 and §5.10 of the Urban Residential Guidelines 2009 as to Institutional Lands as it was out of the ball-park of acceptability of what the Court identified to be the "numbers" used as to density in the Development Plan (*i.e.*, "say up to" 70dph for part of the site and an average density of at least 35-50dph). This was a situation where the significant planning judgement was to be exercised only within an identified ball-park.

(ii) *Wicklow Heritage Trust Ltd v. Wicklow County Council* [1998] IEHC 19, [1998] 2 JIC 0502 (Unreported, High Court, 5th February, 1998) (McGuinness J.). In this case, a proposed council waste disposal facility was held to be contrary to very general provisions phrased in terms suggestive of significant planning judgment:

> "It is now necessary to look at the planning objectives as actually set out in the 1989 plan in so far as they would apply to Ballynagran and the surrounding area. Under the heading 'Rural Areas Policy' the plan sets out at paragraph 2.2:-
>
> > 'The policy of the Council is to generally discourage sporadic development in rural areas, especially in rural landscape areas. This policy is necessary to preserve scenic amenity, to protect high quality agricultural land (see map Number 2) and to conserve the attractiveness of the county for the development of tourism and the

> creation of tourist related employment. It is an objective to preserve for farming purposes those areas of agricultural land containing a very wide use-range soils coupled with low altitude and low rainfall and to prevent the encroachment of building development on those areas of potential high output.'
>
> When one looks at Map No. 2 it is clear that the Ballynagran area is included as an area of high quality agricultural land. Paragraph 2.2 of the plan goes on to state:-
>
> 'It is recognised that County Wicklow has a wealth of beautiful scenery, which is the county's greatest attraction to tourists and day trippers and is an essential residential amenity for residents of the county. It is therefore the policy of the Council that:-
>
> (a) physical developments should not detract from the scenery of mountain, moorland or coastal areas,
>
> (b) archaeological, historical and architectural features be preserved intact,
>
> (c) the abundance of hedgerow and woodland trees be retained and planting be carried out to replace trees lost because of commercial demand, disease or age,
>
> (d) the rural scenery of the county should be preserved in support of the most attractive areas.
>
> Modern farming trends are resulting in detrimental changes to the landscape of the county caused by the removal of hedgerows and the felling and clearance of trees and woodlands. The removal of these natural features can create large featureless tracts of land, without the traditional vegetation or field pattern. Accordingly, the Council will, through the use of Tree Preservation Orders, endeavour to retain the most important natural features and field patterns.'
>
> In paragraph 2.6 the Development Plan goes on to deal with Tourism Policy and states:-
>
> '*With the growth of affluence, mobility and leisure time tourism is one of the major growth areas of the national economy*. With its wealth of visual scenery, that still remains largely unspoilt, and its close proximity to the Dublin Metropolitan Area which is the point of entry to the country for most foreign visitors. Co. Wicklow is particularly well placed to benefit economically from tourism.'"
>
> The board in the present case comments robustly and legitimately as follows:
>
> "[The] Board would submit this case was wrongly decided for the reasons Holland J set out in *Ballyboden* and mis-quotes prior jurisprudence which are better viewed as examples not of 'clean slate' review but examples of where irrationality or unreasonableness was shown on the facts."
>
> I broadly agree, both with Holland J. in *Ballyboden* and with the opposing parties here on this issue – the *Wicklow Heritage* decision is unpersuasive given the clear planning judgement involved in the provisions quoted (unless the more specific situations in those provisions applied, which may conceivably have been the case, but that isn't set out in the judgment), and is respectfully best viewed as to be confined to its own special facts.

Significant planning judgement – contravention on irrationality basis

95. Situations where discretion was conferred but the particular exercise of the discretion was outside that of any reasonable decision-maker include the following. These do not raise any complex issue of law because any decision, no matter how discretionary, can be reviewed for irrationality:

(i) *Attorney General (McGarry) v. Sligo County Council* [1991] 1 I.R. 99, [1989] I.L.R.M. 768, [1989] WJSC-SC 1891, [1989] 5 JIC 0505 – a case involving a Council proposal to put a refuse dump in a sand and gravel pit at the site of the Carrowmore Passage Grave Cemetery (the latter being an important archaeological site which the development plan had listed for preservation or protection). McCarthy J. in the Supreme Court held that such proposed use of the quarry was a clear and material contravention of the development plan.

(ii) *Wilkinson v. Dublin County Council* [1991] I.L.R.M. 605, [1990] WJSC-HC 2419, [1990] 9 JIC 0701, (Costello J.):

> "A development may still amount to a material contravention of the plan if it is one which was not consistent with the proper planning and development of the area. Accordingly, the question can be posed, as it was in *O'Leary's*

> *case*, suppose a private individual had applied for permission to erect 'a residential caravan park' on this site catering for 84 caravans and about 400 persons in accordance with the exiguous plans now proposed, would planning permission have been given? I have no hesitation in concluding that no reasonable planning authority could conclude that such a development would be consistent with the proper planning and development of the area. Let me suppose that a concerned voluntary organisation applied to erect a 'halting site' for members of the travelling community, as now proposed, would planning permission be granted? It is perfectly clear it is the policy of the Council that halting sites should only be small in size but I conclude that, apart from this consideration, no planning authority could regard a development of this magnitude, catering for so many persons in such barely adequate conditions, as being consistent with the proper planning and development of the area."

Respectfully, this is unpersuasive and appears to enter into the planning merits, and is best viewed as decided on its own special facts. The judgment doesn't specify any basis for saying that the "policy" of the council is that halting sites should be small, or that this was part of the plan itself as opposed to some separate and non-legally binding policy, or that the living conditions in the development were "barely adequate" (and anyway, adequacy of conditions sounds very much in the zone of planning judgement). However, whatever about its application to the facts, the legal principle involved is totally unproblematic – an irrational decision should be quashed, whether it involves planning judgement or not.

Significant planning judgment – no contravention

96. The following cases illustrate areas of significant planning judgement where there was no contravention:

(i) *Ferris v. Dublin County Council* [1998] WJSC-SC 7023, [1990] 11 JIC 0704 (Unreported, Supreme Court, Finlay C.J., 7th November, 1990): There was a generally permissive zoning for halting sites, but said to have been amended by later policy decisions to restrict the sizes of halting sites. The Court rejected the notion that this restriction had actually occurred. Finlay C.J. held therefore that the halting site was *prima facie* within the zoning permitted. The wording effectively conferred a discretion as it did not constrain the size of halting sites:

> "An amendment to the Development Plan which was passed in the year 1989 provided as a permitted use for lands in Zone A1 the provision of halting sites, and it also provided a comprehensive definition of halting sites which contained no reference to any particular limitation of the number of caravan parking places in any given halting site."

(ii) *Byrne v. Wicklow County Council* [2000] WJSC-HC 440, [1994] 11 JIC 0302 (Unreported, High Court, Keane J., 3rd November, 1994). The plan stated:

> "Development will be controlled in landscape areas to maintain scenic values, recreational utility, and existing character. In any landscape area or other rural area development which requires the destruction of trees or woodlands which are part of the general scene or which contribute to the amenity of the locality will generally not be permitted. In any landscape area or other rural area, development which is obtrusive because of its isolation from other existing development or lacking in natural screening or prominent against a skyline will not be permitted. Special consideration will be given to an application by a native resident for permission to build a house for his own family and not as a speculation."

Whether a proposed interpretative centre was "obtrusive" was held to be a matter of planning judgement.

(iii) *Ryan v. Clare County Council* [2009] IEHC 115, [2009] 3 JIC 1102, (2009) 16 I.P.E.L.J. 125 (Unreported, High Court, 11th March, 2009) (Hedigan J.): a case where, as regards the development plan, it was contended that the proposed development did not run contrary to any specific provision of the development plan but contrary to the general objectives of that plan. The court was of the view that the proposed development did not contravene the development plan.

(iv) *Navan Co-Ownership v. An Bord Pleanála* [2016] IEHC 181, [2016] WJSC-HC 17872, [2016] 4 JIC 1203 (Unreported, High Court, 12th April, 2016) (McGovern J.): this essentially turned on general wording in the plan to which the board was entitled to apply judgement:

> "8 … the 'B1' zoned lands comprised distinct areas including (i) the 'Town Centre area'; and (ii) the 'Town Centre expansion area'. It argues that it was entitled to make a finding that the proposed development in the Town Centre expansion area would conflict with the desire to enhance the vitality of the Town Centre area. ...
> 24 …. In deciding that the development was premature in the context of the delivery of, and inter-relationship with, a central railway station in the vicinity of the site, it cannot be said that the respondent had regard to an irrelevant or illegitimate factor which must be disregarded. ...
> 26 I can see nothing wrong with the way in which the respondent interpreted the development plan and, in particular, the meaning of zone 'B1' and 'Town Centre' in its various manifestations as expressed in the plan."

(v) In *Jennings*, the argument that the development materially contravened the institutional designation of the lands in the Development Plan as to: "(d) future institutional use/additional facilities" was based on a quite permissive provision – "[w]here no demand for an alternative institutional use is evident or foreseen, the Council may permit alternative uses subject to the zoning objectives of the area and the open character of the lands being retained." There was no contravention because this clause afforded considerable judgement.

Tension between two general provisions

97. Tension between two provisions of a development plan is almost inevitable because plans seek multiple objectives, much like anybody managing anything complicated. Such tension should not be equated with conflict which is equivalent to material contravention. Otherwise the whole plan could be circumvented and materially contravened by the board under s. 37, because normally one can find something in a development plan to support any given development. To argue that such high-level-of-generality tension in differing directions amounts to "conflicting objectives" triggering s. 37(2)(b)(ii) of the 2000 Act rather than as something to be reconciled by planning judgement is to over-interpret the term "conflict", and would also erode the meaning and status of the plan by leaving it open to material contravention. Normally interpreters try to reconcile the meaning of documents rather than go looking for contradictions, and that applies here. Conflicting objectives only arise if reconciliation isn't possible – and it normally is.

98. There are three possible scenarios, the first being tension between two general provisions. This normally creates a zone of discretion for the decision-maker:

(i) *Tesco Stores Limited v. Dundee City Council* [2012] UKSC 13 per Lord Reed at para. 19:

> "As has often been observed, development plans are full of broad statements of policy, many of which may be mutually irreconcilable, so that in a particular case one must give way to another. In addition, many of the provisions of development plans are framed in language whose application to a given set of facts requires the exercise of judgment. Such matters fall within the jurisdiction of planning authorities, and their exercise of their judgment can only be challenged on the ground that it is irrational or perverse: *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759, 780, per Lord Hoffmann. Nevertheless, planning authorities do not live in the world of Humpty Dumpty: they cannot make the development plan mean whatever they would like it to mean."

(ii) *William Davis Limited v. Secretary of State for Communities and Local Government* [2013] EWHC 3058 (Admin) followed the *Tesco Stores Limited* approach.

(iii) *Chase Milton Energy Limited v. Secretary of State for Communities and Local Government* [2014] EWHC 1213 (Admin) involved tension between three general policies, which was for the competent authority to resolve:

> "13. ... Policy BE1, Design and Siting of Development; this policy signifies amongst other things that the borough council will seek to ensure a high standard of design in order to secure attractive development and to safeguard and enhance the existing environment. Planning permission will be granted where the development - and then there is a sequence of lettered criteria – complements or enhances the character of the surrounding area with regard to certain matters, and then it goes on: avoids the loss of open spaces, being the next one, and having regard to the safety and security of individuals, incorporates design features which reduced energy consumption, incorporates landscaping to a high standard, and refers to certain other criteria which I do not need to read out.

14. BE27 is a policy expressly designed to deal with wind power and indicates that planning permission for wind farms and individual wind turbines will be approved where the council is satisfied that the proposal is capable of supporting the generation of wind power, the proposed development is sensitively located in relation to the existing landform and landscape features so that its visual impact is minimised and the proposal would not be unduly prominent in views from important viewpoints. Then there are a number of other criteria which I do not need to mention.

15. Policy NE5 deals with development in the countryside and records that the countryside is to be protected for its own sake, planning permission will be granted for built and other forms of development in the countryside provided that the development is either important to the local economy and cannot be provided within or adjacent to an existing settlement or for the change of use, reuse of extension of existing building or for sport or recreation and only where the following criteria are met, the first of which is that it does not have an adverse effect on the appearance or character of the landscape."

(iv) *Dignity Funerals Limited v. Breckland District Council v Thornalley Funeral Services Limited* [2017] EWHC 1492 (Admin), [2017] All E.R. (D) 162 (Jun) at para. 68:

"68 …. Conflict with one particular policy may be treated as having an adverse impact and yet of relatively little weight. At the same time, the decision-maker may consider that compliance with other policies designed to secure that development in general takes place without causing significant harm to a range of environmental factors, does involve a greater degree of compliance with the development plan than the non-compliance. The decision-maker is entitled to regard compliance with those policy considerations (even in the sense of simply avoiding harm) as having a greater priority or importance than the non-compliance with a policy designed to protect one other aspect, such as the landscape. As Sullivan J pointed out in the *Rochdale* case at paragraph 48 (approved in paragraph 21 of *SSCLG v BDW Trading Limited* [2016] EWCA Civ 493):

'The local planning authority has to make a judgment bearing in mind such factors as the *importance* of the polices which are complied with or infringed, and the *extent* of compliance or breach.' (emphasis added)

The Claimant's argument is inconsistent with that principle, not least because it fails to allow any proper room for the decision-maker to assess the importance or weight to be attached to any compliance or non-compliance with a particular policy or policies."

In short, resolution of conflict of two general provisions is a matter of judgement.

Tension between a general and a specific provision

99. While the authorities are not altogether consistent, it seems that the best view of the law is that any tension between a general clause and a specific provision is best resolved by favouring the specific provision, on the basis of *generalia specialibus non derogant*:

(i) *An Taisce v. Dublin Corporation* [1973] 1 JIC 3101 (Unreported, High Court, O'Keeffe P., 31st January, 1973) was an old case about a conflict between a fairly specific provision that Bull Island as a recreational area and "bird sanctuary" would be "retained and developed", versus general provisions about waste disposal. The court read these provisions as creating two views that could only be resolved by the decision-maker. This respectfully seems unpersuasive, particularly so in the light of a vast amount of later jurisprudence, and is best read as confined to its own special facts.

(ii) *O'Reilly v. O'Sullivan* [1996] IEHC 6, [1996] 7 JIC 2501 (Unreported, High Court, 25th July, 1996) (Laffoy J.) was another unusual case. The zoning had the effect that "halting sites, which, in my view, includes temporary as well as permanent halting sites, are 'permitted in principle' on the site at Blackglen Road 'subject to compliance with relevant policies, standards and requirements' set out in the Development Plan." At the same time, "it is an objective of the 1993 Development Plan to preserve views along roads in the upland area including Blackglen Road, but the quality of the view to be preserved is taken into account in considering any specific proposal for development. In reality, preserved views are often blocked by foliage and sometimes buildings. The view at the proposed site is limited to one field in depth and is also restricted in part by buildings, rising ground and some

shrubbery. The general policy to preserve views must be balanced against the legitimate need for some development which is compatible with the provisions of the Development Plan and also the stated objective to provide halting sites." The court dealt with this as an issue of compliance with policies that was to be resolved on a reasonableness standard. However, I think it is best classified as a case where the court saw a conflict between a general provision (zoning) and a specific provision (preserving views), but resolved that in favour of the general provision in the relatively unusual situation that the impact on the interest protected by the specific provision was minimal. While views may differ, I am respectfully inclined to think this case possibly may be best regarded as turning on its own special facts, or potentially as a case where the real point to be extracted from the decision was that any contravention was not material, acknowledging that the court didn't specifically put it that way (which isn't determinative – *stare decisis* allows a subsequent court to consider the *ratio* as being narrower than the original court expressed matters at the time).

(iii) *Alen-Buckley v. An Bord Pleanála* [2017] IEHC 541, [2017] 9 JIC 2602 (Unreported, High Court, 26th September, 2017) (Haughton J.) is best viewed as a case about a conflict or tension between a general and a specific provision. The general provision, relied on by the council, was rural amenity:

> "2. Notwithstanding the site location in a strategic area for wind energy in the Development Plan, taking cognisance of the nature, scale and location of the proposed development on an elevated, visually vulnerable and sensitive site set within a rural landscape which contains a significant number of built and natural heritage assets of special interest it is considered that the development, taken in combination with the adjacent wind farm and the ancillary connections to the national grid, would detract from the visual and rural landscape amenity of the area. The development would therefore contravene the policies of the development plan and be contrary to the proper planning and sustainable development of the area."

The specific provision was set out as follows:

> "52 The location of the proposed development is then identified in the Waterford County Wind Energy Strategy ('WES'), which is incorporated into the Plan in Appendix 8. It is contained within a 'Strategic Area ....'"

In such circumstances, the board preferred the specific provision to the general provision, and the court upheld that.

(iv) *Heather Hill Management Company clg v. An Bord Pleanála* (Simons J.) is also an example of preferring a specific clause to a general objective insofar as it was argued (and this was rejected) that other very general provisions in the development plan operated to permit breach of the much more specific Barna allocation.

Tension between two specific provisions

100. The caselaw cited to the court didn't provide much in the way of examples of equally specific provisions of a plan that were in tension with each other. However, where two specific requirements point in opposite directions, I think in terms of ordinary language one can here properly speak of a conflict.

101. The comments of Simons J. at para. 3 of *Heather Hill Management Company clg* apply to such a conflict between specific provisions (as discussed above, these comments don't apply to the ordinary process of interpretation such as reconciling different broad objectives through judgement, or preferring the specific to the general through interpretation):

> "The fact—if fact it be—that there is a conflict between two objectives of a development plan does not allow a decision-maker to contravene one of the objectives and to dismiss that contravention as immaterial. Rather, the solution which the Oireachtas has put in place to address the contingency of conflicting objectives is that provided for under section 37(2)(b) of the Planning and Development Act 2000 (as applied to 'strategic housing development' by section 9(6) of the PD(H)A 2016)."

Conclusions regarding material contravention

102. In the light of all of the foregoing, I would endeavour to summarise the law in relation to material contravention as follows:

(i) Like any public law decision, a finding on material contravention, or indeed a failure to make such a finding, is reviewable for illegality or procedural impropriety as well as merely for irrationality.

(ii) The court's review of a decision on the basis of illegality or procedural impropriety is generally *de novo* – for example the court will quash a decision on material contravention, like any other public law decision, if the body being reviewed failed

to correctly interpret or apply the law, failed to follow the framework of analysis or steps of consideration implied or specified in law, or asked itself the wrong question.

(iii) Where the plan does not confer significant judgement on the decision-maker, the issue of contravention is also generally one of law for the court, so that a contravention will arise if the decision-maker does not comply with the requirements of the plan as interpreted by the court.

(iv) In terms of irrationality, if the relevant provision of the plan *does* confer significant judgement on the decision-maker, a contravention may nonetheless arise if the provision delineates rough parameters or ball-park figures for the exercise of the judgement, and the decision-maker goes beyond such a ball-park, in the view of the court.

(v) In review for irrationality, and where there is significant judgement conferred with no specified ball-park, a high degree of weight will be given to the evaluative judgement of the decision-maker.

(vi) Even in such a situation, any factual decision (including a highly discretionary one) can be reviewed for irrationality. Thus if the conclusion on contravention was one that would be evident to any reasonable decision-maker, the court can act on the basis of that conclusion even if the decision-maker in fact (irrationally) decided otherwise. Likewise, any otherwise potentially permissible factual decision can be reviewed if some illegality was committed in the process of reaching it, such as failing to ask the right question.

(vii) Tension between two provisions of a development plan is almost inevitable because plans seek multiple objectives. Such tension should not be equated with conflict or as equivalent to a basis for material contravention. Resolution of such tension is normally a matter for the decision-maker. Where two general provisions of the plan are in tension, such resolution normally falls into a zone of planning judgement.

(viii) Where a general provision is in tension with a specific provision, resolution of this tension is more likely to be required to be in favour of the specific provision as a matter of law on the basis of *generalia specialibus non derogant*.

(ix) Where two specific provisions of the plan collide, this is likely to constitute a contradiction in the plan, resolution of which either way will involve a material convention.

Application of law to the facts in the present case

103. We now turn from all of that general discussion in order to apply the legal conclusions to the facts of the present case. Five areas of potential material contravention were raised on behalf of the applicants and I will take each of these in turn.

Local area plan

104. While there were some complaints about the applicants' pleadings under this heading, I think the point being made is acceptably clear. The land use objectives are set out at Table 11.1 of the plan and the objective for the relevant lands, which have zoning RES-N is "[t]o provide for new residential community in accordance with approved area plans". The natural meaning of "approved area plan" is an area plan as understood under the legislation by virtue of which the development plan was made, that is a local area plan adopted under ss. 18 to 20 of the 2000 Act. Words in a subordinate instrument have the same meaning as in the parent legislation: see ss. 2 (definition of statutory instruments) and 19 (interpretation of expressions in statutory instruments) of the Interpretation Act 2005. Admittedly the term used is not exactly the same, but "area plan" has a normal understanding, which is a local area plan. Even if I am wrong about that, there is no "approved" area plan in any sense for the lands in question.

105. The only issue under this heading is whether the development plan intended that it be mandatory that there be such an area plan before there can be development in an RES-N zoned area. Even accepting that the wording of the zoning objective is different from that for RES zoning, the real problem for the applicants here is that two of the objectives in the development plan H8 objective 6 and H9 objective 5 envisaged developments of an RES-N lands even in the absence of an area plan. Those provisions state as follows:

> "H8 objective 6:
>
> To apply the provisions contained in the Guidelines for Planning Authorities on Sustainable Residential Development in Urban Areas, DEHLG (2009) relating to Outer Suburban locations, including a density range of 35-50 units per hectare, to greenfield sites that are zoned residential (RES or RES-N) and are not subject to a SDZ designation, a Local Area Plan and/or an approved plan, excluding lands within the M50 and lands on the edge or within the Small Towns/ Villages in the County.
>
> ...
>
> H9 Objective 5:

> To restrict general building heights on 'RES-N' zoned lands south of the N7 to no more than 12 metres where not covered by a current statutory Local Area Plan."

106. Insofar as the applicants claimed that this means that there was a conflict within the plan which itself involved a necessary material contravention, I cannot improve on the board's beautifully elegant answer to that in written legal submissions:

> "However, there is no need (nor is it appropriate) to read in a conflict in the Development Plan where none exits. There is a much simpler position which involves no such contrived conflict – the Applicants are wrong in their interpretation of the Development Plan."

107. In other words, the much more logical way to read the plan is to interpret the objective of RES-N as meaning that developments have to be in accordance with the adopted local area plan *if there is one* and as involving an implicit aim towards adopting such a local area plan for those lands. On such an interpretation there isn't any conflict and therefore there isn't any material contravention that arises here.

Section 28 guidelines

108. The applicants' pleadings came in for some battering from the opposing parties under this heading as well. While the issue of the s. 28 guidelines is raised under the heading of material contravention (which appears to cover sub-grounds 5 to 24 inclusive), the actual plea in relation to this particular issue is "[i]t was the Applicant's case that the Board was under an obligation to have regard to these Guidelines and/or to justify why it departed from the Guidelines" (sub-ground 10).

109. There is certainly a contradiction in the applicants' pleadings here because despite the heading of material contravention, the point seems to be pleaded as a failure to consider the guidelines. No real basis to link that to a material contravention has been made out, and anyway that isn't how it is pleaded.

110. As far as failure to consider the guidelines is concerned, these are guidelines subject to a have-regard-to obligation, and they are referred to expressly by the board. Thus, there is an onus on the applicants to show that they were not considered, which has not been discharged.

111. The primary relevant aspect of the Guidelines for Planning Authorities on Sustainable Residential Development in Urban Areas (Cities, Towns and Villages) 2009 relied on is para. 2.14: "Planning authorities shall not consider extensive proposals for new development, including residential development, in smaller towns (in the 2,000 – 5,000 population range) in the absence of an adopted local area plan". Section 19(1)(b)(ii) of the 2000 Act originally imposed a mandatory requirement for a local area plan for towns with a population of over 2,000 within any county, and the 2009 guidelines were made in the light of that provision. That was amended by the Local Government Reform Act 2014, which substituted a population threshold of 5,000, which would have taken Rathcoole out of the area of mandatory local area plans.

112. Properly interpreted, the provision of the guidelines relied on does nothing more than draw attention to the law as it then stood. Clearly it is not a free-standing requirement. The subsequent repeal of that law means that the sentence in the guidelines doesn't have any continuing normative effect, so the decision cannot be quashed for failure to have regard to that sentence specifically. Indeed it would have been erroneous for the board to have hypothetically refused the application for permission on the basis of that sentence alone, given that legislation had subsequently been enacted for a different standard, and that such primary legislation had priority. The 2014 legislation was the operative one, and the fact that the 2009 guidelines have not been expressly updated to reflect it does not give the reference to a standard rooted in repealed law any force or effect that it would not otherwise have. Whether one thinks in terms of the 2009 guidelines as having been impliedly revoked or impliedly amended to that limited extent or simply having, to that extent, ceased to be in force, it all comes to the same thing, which is that there was no legal obligation to have regard to that first sentence and indeed it would have been unlawful to do so.

113. As far as the alleged failure to give reasons is concerned, having regard to something does not in itself impose a requirement to give reasons for not accepting that something, albeit that the something concerned may be one of the main issues, in which case the main reasons would be independently required (see *Cork County Council v. Minister for Housing, Local Government and Heritage, Ireland and The Attorney General (No. 1)* [2021] IEHC 683, [2021] 11 JIC 0502 (Unreported, High Court, 5th November, 2021) at para. 57). In that regard, reasons of a sort are given by the inspector for approving the development notwithstanding the lack of an adopted local area plan (see paras. 12.2.6 and 12.2.7). I don't think that these reasons are in fact totally correct in law, because the concept of an approved area plan as referred to in the development plan much more naturally and appropriately means an area plan under the legislation, but in fact the *lawfulness* of these reasons was not challenged by the applicants. Rather, the complaint made by these applicants on the pleadings was that there *were no such reasons* – but there are reasons.

Attenuation tanks

114. IE Objective 5 of the development plan states that it is an objective "[t]o limit surface water run-off from new developments through the use of Sustainable Urban Drainage Systems (SUDS)

and avoid the use of underground attenuation and storage tanks". The plan goes on at p. 224 to state:

> "In general, all new developments will be required to incorporate Sustainable Urban Drainage Systems (SUDS). SUDS include devices such as swales, permeable pavements, filter drains, storage ponds, constructed wetlands, soakways and green roofs. In some exceptional cases and at the discretion of the Planning Authority, where it is demonstrated that SUDS devices are not feasible, approval may be given to install underground attenuation tanks or enlarged pipes in conjunction with other devices to achieve the required water quality. Such alternative measures will only be considered as a last resort."

115. The developer here made a case to depart from the default in the development plan at p. 15 of the infrastructure report as follows:

> "The objectives indicate key SuDS features such as green roofs and/or walls, integrated constructed wetlands, permeable surfaces, filter strips, ponds, swales and basins.
>
> In a response to items 1 and 2, all these features have been considered for inclusion in the SuDS strategy, however some of them have been found incompatible with the topography of the site and the nature of the proposed development. Integrated constructed wetlands, ponds, swales and basins by their nature slow the flow of the water, store and treat runoff while draining it through the site and encouraging biodiversity. Positioning these types of SuDS on the site layout is not possible to achieve for the following reasons:
>
> - The ground falls from south to north at an average gradient of approximately 1:20 (gradients vary between 1:15 and 1:25). The majority of the SuDS systems require a longitudinal slope of less than 1:100 or a maximum velocity at full flow conditions of 2m/s;
> - For the wetlands/detention ponds & basins to function they need to be constructed relatively flat and sufficiently deep to accept runoff by gravity from the contributing impermeable surfaces. This would be particularly difficult to achieve considering that the inlets of the attenuation tanks are very deep. If provided, the attenuation ponds/basins would be extremely deep and potentially unsafe for children at play. To ensure general health and safety of the public a fence would be required, which would negate the use of the open space.
> - To provide the development densities expected of these lands, the layout has been driven by ensuring usable space provision in key areas for future residents. There is also a requirement for provision of public/communal open space concentrated centrally in three locations and a landscaped verge along the north-western boundary serving as an embankment to assist with level changes at the interface with Stoney Hill Road. Excluding the footprint of the houses/apartment block and the public open spaces, the remaining site area is hardstanding (i.e. covered by roads and footpaths).
>
> Based on the above, as part of the surface water drainage proposal, other several number of SuDS measures have been provided to treat surface water runoff, to replicate the natural characteristics of the greenfield runoff and minimise the environmental impact. The proposed SuDS are listed below, and further explanation of these measures is given on sections 2.3.1 to 2.3.6 of this report.
>
> - Permeable Paving;
> - Rainwater Butts,
> - Porous Asphalt;
> - Green Roof;
> - Filter Drains;
> - Petrol Interceptor;
> - Storage Tank (Arch Structure – Stormtech).
>
> In a response to item 3, it was noted at the SHD pre-application meeting with ABP and SDCC that a coordinated approach with regard to the SuDS /tree pit design is to be provided as part of the formal application. It was noted that there were conflicting tree pit designs put forward as part of the pre-application; one being a fully functional SuDS tree pit design by AECOM; and a constructed tree pit design based on the 'Stockholm' system by doyle +o'troithigh landscape architects. It was agreed that a harmonized SuDS/tree pit design would be developed in order to alleviate any ambiguity."

116. Where this report refers to "items" 1, 2 and 3, these are references to objections set out at p. 13 of the report as follows:

> "1. The applicant has failed to comply with the objectives of the development plan regarding SuDS.
>
> 2. The provision of SuDS is a requirement for all new developments and cannot be omitted because they can [be] difficult to achieve on site.

> 3. There are inconsistencies between the SuDS Strategy document and the landscape plan. Measures listed in the SuDS strategy such as use of filter drains do not appear on the drainage drawings. The tree pits proposed in the SuDS strategy differ from the tree pit design on the landscape plans."

117. The approval of the application must be construed in context as an implicit acceptance of the developer's material, which also clearly has the implication that this is one of the cases where full SUDS measures were not practicable, thus triggering the discretion referred to in the development plan. In such circumstances, the board's decision must be construed as an activation of a flexibility expressly articulated in the development plan, not as an implicit contravention of the development plan.

Density

118. H8 objective 1 of the development plan reads as follows:

> "To ensure that the density of residential development makes efficient use of zoned lands and maximises the value of existing and planned infrastructure and services, including public transport, physical and social infrastructure, in accordance with the Guidelines for Planning Authorities on Sustainable Residential Development in Urban Areas, DEHLG (2009)."

119. The wording of the development plan is critical here. The 2009 guidelines in and of themselves are not binding. They are only subject to a have-regard-to obligation. However, the council is free in the development plan to give the guidelines an imperative status that they would not otherwise have, and indeed clearly did so here with the wording quoted above. The council did not say that the objective was to promote development "having regard to" the guidelines, but rather "in accordance with the guidelines". Accord or accordance means compliance. The distinction between regard and compliance is fundamental in planning law and in law generally. Guidelines phrased using mandatory language (in the absence of SPPRs) are merely the Minister's view of what should be done. So are guidelines phrased in the language of recommendations. A council only has to consider the Minister's view, rather than treat those views as being requirements that something should happen. But where that something is then incorporated as a requirement in the development plan, such a something then becomes a requirement. Obviously the wording of the pre-existing guidelines remains unchanged, as stating the Minister's view that something should be or is recommended to be done, but the legal effect of that is elevated.

120. Crucially, the board in submissions could not point to any paragraph in the guidelines that plausibly would allow flexibility. There is no specific text that qualifies the relevant provision of the guidelines in any way. The opposing parties only point to the various flexibilities in the guidelines as a whole, which either occur in parts of the guidelines that don't apply to small towns at all, or which are phrased in highly general terms, clearly influenced by the fact that the guidelines when adopted were adopted merely as guidelines.

121. At p. 56, the guidelines ask "[a]re the densities being promoted in line with the densities recommended in these guidelines?" At p. 69 they say "Chapters 5 & 6 provide guidance on density standards in Cities & Large Towns and Small Towns & Villages respectively. Planning authorities should refer to these and set plot ratios, appropriate to their area, in Local Area Plans". It is obvious that the guidelines themselves were adopted as guidelines and thus phrase themselves in terms of recommendations and guidance. That does not mean that they cannot be given a higher status by the development plan at a later point in time, which happened here.

122. The board places outsize reliance on a general statement about the benefits of higher density housing in para. 5.4, but unfortunately that only applies to cities and larger towns in chapter 5, not small towns and villages which are dealt with within chapter 6. In any event, general phrases about the desirability of higher densities would not detract from a specific articulation of particular densities in a more explicit way in defined contexts. Otherwise, it would mean that any specific density could be increased without limit merely on the basis that "increased densities should be encouraged". That is not a normal or reasonable interpretation and, in any event, *generalia specialibus* applies here.

123. Similarly, one can deal with the provisions of paras. 5.8 and 5.10 and other related sections of the guidelines. These do not apply to chapter 6. But in any event, merely because *some* provisions of the guidelines are indicative (*e.g.*, "say up to 70" dwellings per hectare) does not mean that *all* provisions of the guidelines are indicative.

124. Page 49 of the guidelines at least does apply to small towns and villages, so that argument (unlike most of the opposing parties' submissions under this heading) at least can make it to the starting gate. Paragraph (c) notes that: "[h]igher densities are appropriate in certain locations" and states as follows:

> "Significant enhancement of the scale and density of development in small towns and villages may be appropriate in locations close to Gateways and Hubs designated under the NSS, that are served by existing and/or planned high quality public transport corridors and that have been earmarked for particular development functions in regional planning guidelines and

> development plans. In other locations, increased densities of development can be acceptable as long as they contribute to the enhancement of town or village form by reinforcing the street pattern or assisting in the redevelopment of backlands. In all cases, special care will be required to protect the architectural and environmental qualities of small towns and villages of special character."

125. This was not relied on by the board in the actual decision so can't be a basis to uphold the permission here (judicial review is a process of examining the decision that was in fact made, not writing a new one), but in any event this actually emphasises the point being made by the applicants to the effect that higher densities can be appropriate in certain locations which are defined at p. 49 of the guidelines, but the present development does not come within any of the categories so defined.

126. There is no basis to suggest, nor did the board find, that this particular development would reinforce the street pattern or assist in the redevelopment of back lands. Rather it is simply an outward expansion of the settlement into currently rural areas. That is not the "redevelopment" of "back lands". The crucial part of the guidelines which does apply here is para. 6.11 which relates to what are called, and what the board found to be, "edge of centre sites". This states:

> "The emphasis will be on achieving successful transition from central areas to areas at the edge of the smaller town or village concerned. Development of such sites tend to be predominantly residential in character and given the transitional nature of such sites, densities to a range of 20-35 dwellings per hectare will be appropriate including a wide variety of housing types from detached dwellings to terraced and apartment style accommodation."

127. The board was reduced to the awkward position in submissions of having to adopt the contorted stance that "will" is not a rule and that "will" is not prescriptive.

128. The basis for this posture was an attempted reliance on "context", but that claim unfortunately foundered because there isn't anything in the context to dilute the imperative nature of that term. The board found itself unable to point to any identifiable provision of the guidelines which had the effect of expressly qualifying this term or creating a discretion to depart from it. Used in this sort of manner, "context" is whatever you're having yourself; a developer's penumbra to the bill of rights.

129. Ultimately, the board's distortion of the clear meaning of para. 6.7 of the guidelines does violence to language. The natural and ordinary meaning of para. 6.11 of the guidelines is that the Minister's view is that in a development of the type with which we are concerned here, the appropriate density will fall in the range of 20 to 35 dwellings per hectare. The adoption of the guidelines by the members when making the development plan as something in accordance with which development must take place elevates that from being *the Minister's view* as to what should happen to being what *should* happen. As a side-note, para. 6.13 of the guidelines states that:

> "The quality of new development will also be determined by many other factors additional to the achievement of an appropriate density of development. However, *adherence* to the guidance outlined above, coupled with effective local planning can offer a positive path forward in managing the process of development of Ireland's distinctive and attractive smaller towns and villages." [emphasis added]

130. The Minister, by definition, was not in a position to anticipate the extent to which individual development plans would subsequently incorporate the guidelines in whole or in part. So the fact that the guidelines are phrased as guidelines is not determinative. Or to put it another way, the fact that as of 2009 they only have the status of recommendations does not stop the status from being subsequently elevated to requirements in the event of any particular guideline being adopted by a council as part of its development plan. It's the incorporation in the plan, not the fact that the guidelines are framed as guidelines, that enhances any recommended requirements into being actual requirements.

131. A similar issue arose, and was dealt with similarly, in *Ballyboden Tidy Towns Group v. An Bord Pleanála* [2022] IEHC 7, [2022] 1 JIC 1001 (Unreported, High Court, 10th January, 2022): see paras. 134, 167 and 176. Admittedly, Holland J. there was dealing with a provision which on its own terms was "indicative"; that is, a particular provision of the guidelines concerned which was phrased in approximate terms. Here, the relevant provision is not phrased in indicative terms (it doesn't say density of "say up to" a particular amount). Thus one should not over-interpret the reference in *Ballyboden* to the provision being "indicative". What made that provision indicative was its own peculiar wording, not the mere fact that it is a provision in guidelines.

132. This point was also addressed similarly by Simons J. in *Heather Hill Management Company clg*: see in particular paras. 83 to 89. The observation of Simons J. at the start of para. 89 is of particular relevance here:

> "Much of the difficulty in the present case has arisen because of a failure on the part of An Bord Pleanála and the Developer to appreciate that the policy underlying the guidelines finds

practical expression through the medium of development plans. The starting point for any flood risk assessment should, therefore, be the provisions of the relevant development plan. To elaborate: the guidelines require planning authorities to identify areas at risk of flooding in the development plan. Once this is done, then individual planning applications fall to be assessed by reference to the identified flood risk zones. A planning authority is entitled to indicate that in respect of particular areas the carrying out of a justification test will always be required."

133. Of critical relevance is the inspector's actual finding, in which context we must bear in mind that the current process is reviewing the decision actually made, and not writing a new one. The inspector states as follows at paras. 12.2.10 to 12.2.18 of the report:

"12.2.10. The proposed net density is 40 no. units/ha. The Planning Authority have not raised an objection to the density but do note that it is the maximum that the site is suitable for. Observer submissions have stated that the density is excessive.

12.2.11. In relation to density, policy at national, regional and local level seeks to encourage higher densities at appropriate locations. In particular, Project Ireland 2040: National Planning Framework (NPF) seeks to deliver on compact urban growth. Of relevance, objectives 27, 33 and 35 of the NPF seek to prioritise the provision of new homes at locations that can support sustainable development and seeks to increase densities in settlements, through a range of measures. I consider that the application site complies with those objectives and supports government policy seeking to increase densities and thereby deliver compact urban growth.

12.2.12. In relation to Section 28 Guidelines, the 'Urban Development and Building Height, Guidelines for Planning Authorities' 2018, 'Sustainable Urban Housing: Design Standards for New Apartments, Guidelines for Planning Authorities' (2018) and Sustainable Residential Development in Urban Areas, Guidelines for Planning Authorities (2009) all support increases in density, at appropriate locations, in order to ensure the efficient use of zoned and serviced land.

12.2.13. Applying the criteria within the Guidelines for Planning Authorities on Sustainable Residential Development in Urban Areas, DEHLG (2009), Rathcoole would fall within small town category (defined as those with a population ranging from 400 to 5,000 persons), as the 2016 census data indicates that the town has a population of 4,351 as of 2016. I consider the proposal site can be defined as an 'edge of centre' site, given its proximity to the town of Rathcoole. The Sustainable Residential Development in Urban Areas Guidelines for Planning Authorities (2009) set out a density range of 20-35 units per hectare for such sites. While the proposed density of 40 units per hectare is above this, it is not a fundamental breach of the principles of the guidelines however.

12.2.14. The Guidelines also set out general goals of which are to which are inter alia to prioritise walking, cycling and public transport, and minimise the need to use cars and to provide a good range of community and support facilities where and when they are needed and that are easily accessible.

12.2.15. In terms of the accessibility of the site, the site is located approximately 500m from the centre of the town, which equates to an approximately 6 minute walk.

12.2.16. In terms of community and support facilities, the town of Rathcoole provides a range of services, as set out in Social Infrastructure Audit submitted with the application.

12.2.17. Also of relevance is Paragraph 3.4 of the Building Heights Guidelines (2018) which state the following: 'Newer housing developments outside city and town centres and inner suburbs, *i.e.* the suburban edges of towns and cities, typically now include town-houses (2-3 storeys), duplexes (3-4 storeys) and apartments (4 storeys upwards). Such developments deliver medium densities, in the range of 35-50 dwellings per hectare net. The proposal is therefore in line with this guidance.

12.2.18. In conclusion, I consider the density to be acceptable in principle, having regard to the considerations above. However, the acceptability of this density is subject to subject to appropriate design and amenity standards, which are considered in the relevant sections below."

134. The word "unit" here isn't defined but appears to mean dwelling irrespective of size.

135. The inspector states "while the proposed density of 40 units per hectare is above this [*i.e.* 20 to 35], it is not a fundamental breach of the principles of the guidelines". That implies a tacit acceptance that the density is in "breach" of the principles of the guidelines, but that the inspector thinks that this breach is not fundamental. When one adds the status of the guidelines in a situation like this as something incorporated within the plan, in line with what was previously held in *Ballyboden* and *Heather Hill Management Company clg*, it follows inexorably from such an implicit acceptance of a "breach" that there was a contravention of the plan, and that the inspector thinks this was not "fundamental", without specifically addressing whether it is "material".

136. One can represent it syllogistically thus:

(i) the guidelines are incorporated in, and thus have become in effect part of, the development plan (*Ballyboden* and *Heather Hill Management Company clg*);

(ii) the project was in breach of the guidelines (*per* the board's inspector, whose report was generally adopted by the board);

(iii) therefore the project was in breach of the development plan.

137. The inspectors' wording is a separate and independent reason for coming to the conclusion outlined above. The contravention arises from the failure to comply with the range set out in the guidelines as incorporated in the development plan, but independently and separately reinforcing that, the inspector has tied the board into the same conclusion, given that, as we know, the board generally adopted the inspector's report.

138. Much of the opposition to this point was a totally misconceived emphasis on the question of a "ballpark of acceptability" as referred to by Holland J. in *Ballyboden* at para. 179. The board came close to suggesting that that comment means that anything in guidelines carries with it a ball-park of acceptability. But that would be to brutally wrench a term from the factual moorings which are essential to give it meaning, and then to fallaciously generalise from the dislocated fragment thus artificially created.

139. That term was used by reference to a very specific and unusual fact-situation. What Holland J. was dealing with there was the interpretation of a phrase that specifically and expressly was couched in ball-park terms: para. 5.10 of the 2009 guidelines which refers to "the objective of retaining the opening character of the lands achieved by concentrating increased densities in selected parts (*say up to* 70 dph)" [emphasis added].

140. Contrary to the implication of the board's argument, the fact that a ball-park phrase is to be construed in a ball-park manner does not have the implication that a non-ball-park phrase must also be construed in a ball-park manner.

141. The critical para. 6.11 of the guidelines does not say that densities will be "up to say" the levels referred to. It simply provides a range of 20 to 35 dwellings per hectare.

142. The second line of defence was that the development accorded with other national policies such as the Urban Development and Building Height Guidelines, 2018. That may or may not be so, but the problem with that argument is that the development plan was binding whereas para. 3.4 of the 2018 guidelines was only a have-regard-to obligation. There were hints of an argument that the board could have overridden the development plan by reference to national policy (other than the 2009 guidelines), such as the 2018 guidelines, pursuant to its power to materially contravene the plan, but it did not purport to do that; and any such exercise would have to be done expressly (see *Redmond v. An Bord Pleanála*).

143. Insofar as the board submits that the objective, which seeks to ensure the density of residential development makes sufficient use of zoned lands in a way that maximises the value of existing infrastructure and services "in accordance with" the guidelines, itself affords appreciable flexibility, discretion or planning judgement to the decision-maker, the problem with that submission is that any flexibility, discretion or planning judgement thereby conferred does not include a flexibility, discretion or planning judgement to act otherwise than in accordance with the guidelines.

144. The requirement for densities to accord with the guidelines is a clear provision and raises a question of interpretation which is a matter for the court.

145. Insofar as the board argues that the objective is "framed in broad terms", that is one view, but merely because a requirement is framed in broad terms does not mean that it cannot be a mandatory, imperative and binding requirement, or that it must be capable of being circumvented by subjective judgement.

146. Insofar as the board argues that "the application of same to a given set of facts requires the exercise of a planning judgement by the board as the decision maker", that replicates the board's fundamental conceptual confusion. No such application can be effected otherwise than in accordance with the guidelines. Sure, insofar as such application involves factual planning judgements, the decision-maker has a margin of appreciation, but that does not save the board here because it is not relevant to the particular context. The context is a range of action within which the judgement is to take place and which is actually specified in the guidelines. If the board had acted within the range of 20 to 35 dwellings per hectare, they would indeed have had appreciable flexibility, discretion or a planning judgement as the decision-maker, but going beyond that involves a contravention.

147. I don't think the applicants are precluded from succeeding on this point merely due to the limited emphasis on it in their submissions, although that isn't fatal anyway because Marsden Planning Consultancy on behalf of Rathcoole Park did make a reference to density. There is an autonomous duty on the decision-maker to comply with the law regarding material contravention. That implies an obligation to consider whether the application materially contravenes the development plan. The board is required to do that whether or not anybody raises the issue. And

the board did actually consider the point in substance: what the inspector said effectively conceded that there was a contravention but it was not "fundamental", whatever that means.

148. As regards materiality, it is true as just noted that the applicants did mention density in one submission. Other observer submissions did complain about excessive density as noted by the inspector at para. 12.2.10, and indeed density tends to be a controversial issue in planning generally, as noted by Holland J. in *Ballyboden*. While it is not possible to be clear mathematically about what the development would have looked like had the upper limit of five units per hectare been observed, a rough estimate would suggest that compliance with such a requirement would have yielded approximately 179 dwellings which is 35/40ths of the consented 204 dwellings. An additional 25 dwellings on top of a hypothetical 179 dwelling development is, I think on any view, a material increase, and any contravention is a material contravention in such a context, even bearing in mind that the materiality is linked to the extent to which a contravention could reasonably have been the subject of objection as opposed to the extent to which it actually was the subject of objection.

149. In short, applying the discussion of law above to the facts here, the requirements of the development plan are sufficiently specific in setting parameters for the board as not to confer appreciable planning judgement to go outside that. Densities in the particular sort of development here are to be found within a specified range, which was exceeded. Planning judgement and flexibility only apply within that range. The legal interpretation of the plan is for the court, and on that basis there was a contravention. The quantum of excess is such that it must be regarded as material.

150. Separately but reinforcingly, the inspector treated the excess provision as a contravention (albeit of the guidelines, but they are part of the plan), but failed to consider the materiality of that contravention. Hence there was a failure to give lawful consideration to the issue.

151. Overall, the basic problem for the board is that the crucial legal point here has already come up twice before, in *Heather Hill Management Company clg* and *Ballyboden Tidy Towns Group*. It isn't clear to me why the board thought that a radically different approach should be taken on the third go-around. That isn't how *stare decisis* is meant to work.

Hedgerows and trees

152. Turning to the final limb of alleged material contravention, in relation to hedgerows and trees, the developer's arborist report at para. 5.6.0 sets out the proposed impact of the development on trees, tree lines, shrub borders and hedges. Paragraph 5.6.0 of the report sets out the impact envisaged:

> "5.6.0 Impact
> 5.6.1 To facilitate the proposed development, it will be necessary to remove the following tree and hedge vegetation from this site area:
> Category U Tree Nos. 0851, 0861 & 0862.
> Category B Tree Nos.0852, 0855 & 0860.
> Category C Tree Nos. 0853, 0854, 0856, 0857, 0858, 0685, 0686, 0687, 0859 & 0863
> Tree Line Nos. 1 & 3.
> Hedge No.1 – c.36m of hedge No.1A + c.24m of hedge No.1B
> Hedge No.2 – c.69m of hedge No.2A + c.107m of hedge No.2B
> Hedge No.4 – c.87m of hedge No.4A + all (c.20m) of hedge No.4B plus all (c.30m) hedge No.4C.
> Hedge No.5 – c.29m hedge No.5A + c.15m of hedge No.5B.
> Hedge No.6 – all (c.103m) of this hedge.
> Hedge No.7 – c.50m of this hedge.
> Hedge No.10 – all (c.66m) of this hedge.
> Hedge No.11 – all (c.27m) of this hedge.
> Hedge No.12 – all (c.11m) of this hedge.
> Shrub Borders Nos. 1, 2 & 3.
> 5.6.2 So in summary, 16No.of the individually tagged trees included within this assessment area along with 2No.Tree Lines, 3No. Shrub Borders and c.674 linear meters (48.9%) of hedges out of a total of c.1,378 linear meters within the sites redline boundary are required to be removed to facilitate the proposed development works.
> The trees for removal are made up of the following categories:
> o 3 category 'U' trees
> o 3 category 'B' trees
> o 10 category 'C' trees + 2No. Tree Lines, 2No. Shrub Borders and 674m of hedging."

153. As regards definitions of the terms used these are set out in the report as follows:

> "Summary
> Main categories

Category U – Those trees in such a condition that any existing value would be lost within 10Years. Most of these will be recommended for removal for reasons of sound Arboricultural practice.
Category A - Trees of high quality/value with a minimum of 40 years life expectancy.
Category B – Trees of moderate quality/value with a minimum of 20 year life expectancy.
Category C – Trees of low quality/value with a minimum of 10 years life expectancy
Sub categories
1 – Mainly Arboricultural Values
2 – Mainly Landscape values
3 - Mainly Cultural and conservation value
Note: Whilst 'C' category trees will usually not be retained where they would impose a significant constraint on development, young trees with a stem diameter of less than 150mm should be considered for relocation.
If a layout design places Category 'U' trees in an inaccessible location such that concerns over public safety are reduced to an acceptable level, it may be preferable or possible to defer the recommendation to fell.
The terms 'Group, woodland or tree line' is intended to identify trees that form cohesive Arboricultural features either aerodynamically (e.g. trees that provide companion shelter), visually (e.g. avenues or screens) or culturally including for biodiversity (e.g. parkland or wood pasture), in respect to each of the three subcategories."

154. Thus approximately 674 linear metres of hedges are being removed from the site. The definitions on categories of vegetation removed are said to be in accordance with British standard BS 5837:2012, Trees in relation to Design, Demolition and Construction – Recommendations. The British standard itself was not exhibited and no point was pleaded to suggest that the arborist report was not in accordance with it, possibly because that question just didn't occur to the applicants, or because there is total compliance with the standard, we don't know.

155. The County Development Plan defines the green infrastructure network as follows at para. 8.1.0:

"Green Infrastructure Network The County's Green Infrastructure network comprises an interconnected network of green spaces that possess a broad range of ecological elements including inter alia: core areas such as the County's three Natura 2000 sites; proposed Natural Heritage Areas (pNHA), the Liffey Valley, Dodder River Valleys and the Grand Canal; and individual elements such as watercourses, parks, hedgerows/tree-lines and sustainable drainage features in park lands."

156. The applicants point out that the final qualifier, "in parklands", can only apply to sustainable drainage features and not to all of the previous categories such as water courses, for the simple reason that "parks" is included in that list. The planning authority considered that the application was in breach of G2 objectives 1, 2, 9 and 13 at the pre-planning stage.

157. G2 objectives 1, 2, 3, 6, 9 and 13 read as follows:

"G2 Objective 1:
To reduce fragmentation of the Green Infrastructure network and strengthen ecological links between urban areas, Natura 2000 sites, proposed Natural Heritage Areas, parks and open spaces and the wider regional Green Infrastructure network.
G2 Objective 2:
To protect and enhance the biodiversity value and ecological function of the Green Infrastructure network.
G2 Objective 3:
To restrict development that would fragment or prejudice the Green Infrastructure network.
G2 Objective 6:
To protect and enhance the County's hedgerow network, in particular hedgerows that form townland, parish and barony boundaries, and increase hedgerow coverage using locally native species.
G2 Objective 9: To preserve, protect and augment trees, groups of trees, woodlands and hedgerows within the County by increasing tree canopy coverage using locally native species and by incorporating them within design proposals and supporting their integration into the Green Infrastructure network.
G2 Objective 13:
To seek to prevent the loss of woodlands, hedgerows, aquatic habitats and wetlands wherever possible including requiring a programme to monitor and restrict the spread of invasive species such as those located along the River Dodder."

158. In the pre-planning report the Council said as follows:

"Existing trees and hedgerows

The proposed development will remove 40% of existing hedgerows and 86% of existing individually tagged trees on site. It is considered that the proposed layout fails to sufficiently adapt the design of dwellings and streets to the existing physical attributes of the site resulting in the proposed removal of 551 m of existing hedgerows and 13 trees. The removal of such will fragment or remove green infrastructural elements that support bat species and biodiversity. The proposed development is contrary to several policies and objectives contained within the South Dublin County Development Plan 2016-2022. namely G2 Objective l, 2, 9 and 13. G6 Objective l and HCLJ 5 Objective 3. It is the Planning Authority's opinion that the proposed development should be redesigned to reduce the extent of hedgerow removal. A greater extent of existing hedgerows should be retained thereby mitigating against significant habitat and green infrastructure loss. A bat survey should be provided to assess bat activity onsite."

159. In the substantive report the Council said as follows:

"The Parks Department has raised the following main concerns:

- Considerable loss of existing hedgerows (48.9%) and trees and the fragmentation of local green infrastructure.
- Lack of street trees throughout the development.
- Lack of natural SUDS features.
- Lack of detailed sections/elevations through landscape proposals
- Poor Play provision.

The Parks Report states:

'16 of the individually tagged trees included within this assessment area along with 2 Tree Lines, 3 Shrub Borders and c.674 linear meters (48.9%) of hedges out of a total of c.1,378 linear meters within the sites redline boundary are required to be removed to facilitate the proposed development works.

To facilitate the proposed development, it will be necessary to remove the following tree and hedge vegetation from this site area:

Category Grade No. of Trees
Category U Tree Nos 0851, 0861 & 0862
Category B Tree Nos 0852, 0855 & 0860.
Category C Tree Nos 0853, 0854, 0856, 0857, 0858, 0685, 0686, 0687,
0859 & 0863
Tree Line Nos 1 & 3.
Hedge No.1 c.36m of hedge No.1A + c.24m of hedge
No.1B
Hedge No.2 c.69m of hedge No.2A + c.107m of hedge
No.2B
Hedge No.4 c.87m of hedge No.4A + all (c.20m) of hedge
No.4B plus all (c.30m) hedge No.4C.
Hedge No.5 c.29m hedge No.5A + c.15m of hedge No.5B
Hedge No.6 all (c.103m) of this hedge.
Hedge No.7 c.50m of this hedge.
Hedge No.10 all (c.66m) of this hedge.
Hedge No.11 all (c.27m) of this hedge.
Hedge No.12 all (c.11m) of this hedge.
Shrub Borders Nos. 1, 2 & 3.

The proposed development layout fails to sufficiently adapt the design of dwellings and streets to the existing physical attributes of the site resulting in the proposed removal of 674 meters of existing hedgerows, 16 Individual trees and two tree lines. The proposed development if granted will fragment or remove green infrastructural elements that support bat species, biodiversity in general, and which help to mitigate against climate change. The scheme should be redesigned to retain more of the existing hedgerows thereby mitigating the proposed significant habitat and green infrastructure loss'.

They also state:

- Insufficient numbers of street trees have been proposed, contrary to the SDCC CDP 2016-2022, 6.4.3 Road and Street Design (i) Design of Urban Roads and Streets.
- The applicant has failed to comply with the objectives of the SDCC development plan regarding SUDS.
- The applicant has not provided a taking in charge drawing that clearly outlines what is proposed to be taken in charge by SDCC.
- Appropriate cross sections drawings throughout the development are required to consider ease of maintenance and usability of the open spaces.
- Retaining walls should be avoided in the landscape.

- Any houses siding onto open space should have dual aspect in order to have all areas overlooked and avoid hidden areas where anti-social activity predictable occurs.
- The play proposal is insufficient for a development of this size and fails to meet the requirements of the children.

As outlined in the Planning Authority Stage 2 report, it is the Planning Authority's opinion that the proposed development should be redesigned to reduce the extent of hedgerow removal. A greater extent of existing hedgerows should be retained thereby mitigating against significant habitat and green infrastructure loss. Having regard to the details submitted and the Parks Section report, it is considered that the proposed development is contrary to the policies of the South Dublin County Council Development Plan 2016-2022, namely Policy G1 Overarching and Policy G2 Green Infrastructure Network. In particular, the proposal is contrary to the following objectives:

G2 Objective 1:

To reduce fragmentation of the Green Infrastructure network and strengthen ecological links between urban areas, Natura 2000 sites, proposed Natural Heritage Areas, parks and open spaces and the wider regional Green Infrastructure network.

G2 Objective 2:

To protect and enhance the biodiversity value and ecological function of the Green Infrastructure network.

G2 Objective 3:

To restrict development that would fragment or prejudice the Green Infrastructure network.

G2 Objective 5:

To integrate Green Infrastructure as an essential component of all new developments.

G2 Objective 6:

To protect and enhance the County's hedgerow network, in particular hedgerows that form townland, parish and barony boundaries, and increase hedgerow coverage using locally native species."

160. The applicants complain in submissions that the inspector did not engage with or "come to grips with" this reasoning, but again their pleadings are wanting, and no complaint as to reasons is set out in this regard.

161. More peculiarly, the applicants have only pleaded G2 objectives 1, 2 and 3, and not G2 objectives 6, 9 and 13, G6 Objective l or HCLJ 5 Objective 3, despite these being explicitly referred to by the council. No reason is apparent or was even suggested for this confounding approach to pleading.

162. Whether one phrases the interpretation of pleadings as a "fair and reasonable reading" (*People Over Wind & Anor v. An Bord Pleanála & Ors (No. 1)* [2015] IEHC 271, [2015] WJSC-HC 23191, [2015] 5 JIC 0106 (Unreported, Haughton J., 1st May, 2015)) or, as I have put it, by asking whether the point being made is "acceptably clear": *Atlantic Diamond Ltd. v. An Bord Pleanála* [2021] IEHC 322, [2021] 5 JIC 1403 (Unreported, High Court, 14th May, 2021), which I think amount to the same thing, the applicants are clearly confined to G2 objectives 1 to 3. There is no legitimate way to read the pleadings as conferring an entitlement on them to argue any other objectives under this heading.

163. It is true that the notice party's landscape design report dated June 2020 set out endeavours to retain hedgerows where possible, and that that report and the ecological assessment did have regard to relevant objectives, including by reinforcing the boundary of the scheme and taking mitigating measures, including re-planting. It is also true that the inspector regarded the overall impact as minimal, having regard to the mitigating measures. Nonetheless, it is just not possible to see how removing 680 metres of hedgerows, even with mitigating measures, protects and enhances the biodiversity value and ecological function of the green infrastructure network, reduces fragmentation, or restricts development that would fragment or prejudice the network, bearing in mind that hedgerows in the county are defined as being part of the network.

164. It could not be assumed that any given meterage of hedgerow can be removed as long as a similar amount of hedgerow is planted. Hedgerows are simply not amenable to the sort of life-span estimates that are used in relation to trees. Hedgerows can essentially continue indefinitely and indeed can be regarded as potentially immortal even though obviously the individual flora within them are not. But the descendants of such flora can continue to flourish on the ground where their ancestors grew. Mature or indeed ancient hedgerows are just not equivalently replaceable by freshly created ones. It is well-known (albeit that this is not an issue here) that hedgerows can be roughly dated by species variety, the English rule of thumb being that the number of shrubby species in a 30-yard length of hedge represents the hedgerow's approximate age in centuries. There are hedgerows in existence today which have stood since at least 800 CE, dating from the Anglo-Saxon period, as evidenced by documentary material. While I wouldn't for a moment suggest that the hedgerows under sentence of removal here are remotely in the same category of irreplaceable

heritage, we must bear in mind when dealing with hedgerows that tree-type expectations of lifespan simply don't apply in the same way.

165. The point remains that hedgerows are not a fungible item that can simply be removed and replaced with fresh vegetation. Therefore "mitigating" measures – the planting of new hedgerows – just don't have the same value in replacing the losses, especially if the hedgerows being culled have any degree of maturity. Even taking it that ecological value of the particular hedgerows here was low (a conclusion which was not challenged by the applicants in their pleadings), we still need to consider the question of whether the hedgerow removal constitutes a contravention of the development plan.

166. The opposing parties' argument, predictably, is that the objectives in relation to the green infrastructure network "all allow appreciable flexibility, discretion and/or planning judgement" – something that is in danger of becoming a new mantra to be trotted out automatically, whether relevantly or otherwise. But the same misunderstandings about the broad terms of the objectives and their application to particular facts are also duplicated under this heading by the board; and the same problems naturally arise.

167. Unfortunately, the board's argument involves reading quite a lot into the development plan that is not there. There are no qualifications on the objectives which set out any appreciable flexibility, discretion or planning judgement that would apply in such a way as to permit the destruction of 680 metres of hedgerows, even with mitigating measures, or the felling of almost all of the trees.

168. The inspector thought that loss of hedgerows was justified having regard to the need to ensure the efficient use of the site (para. 12.3.7). But this is not something that qualifies the green infrastructure network objectives in the development plan itself. Even the mitigating measures are ones which will only offset the negative effects of habitat laws arising from the development "over time". That implies that the initial impact will be negative, a situation which does not particularly assist the argument that there was no deviation from the objectives of protection of the green infrastructure network as set out in the development plan.

169. Given that the quantity of removal is virtually 50% of the hedgerows on site, and that almost all of the trees will also be removed, this cannot but constitute the sort of "fragmentation" envisaged by the objectives of the plan. As in *Heather Hill* at paras. 55 to 58, the inspector and the board did not pause to consider whether the plan was being contravened, and if so whether this would be material, but rather proceeded directly to the question of whether permission should be granted. The fact that the inspector considered that the ecological impact was minimal was phrased as an answer to *that* problem, rather than addressing the question of material contravention at all.

170. As regards whether the contravention is material, the inspector's view is the overall impact would be minimal is a factor to be considered, but one has to bear in mind that even that alleged minimal impact would only occur "over time". Secondly, perhaps more importantly, this was not phrased as a consideration of materiality of the contravention. A contravention can still be material even if there may be mitigating measures put in place at a later stage. The destruction of valuable green infrastructure was an issue raised by Forest Hill Residents Association in their submission, albeit by reference to the Council's Climate Change Action Plan 2019 and the Regional Spatial and Economic Strategy 2019 to 2031, rather than the development plan as such.

171. Also relevant to materiality is the quantum of removal of hedgerows and trees relative to the quantum of hedgerows and trees on the site. In that context the removals are clearly very substantial. There is an analogy with *Maye v. Sligo Borough Council* where Clarke J. held that a loss of land reserved for a linear park was material even though, as David Browne puts it "the amount which would be lost was relatively small relative to its entire length" (*Simons on Planning Law*, 3rd ed. (Dublin, Round Hall, 2021) p. 21).

172. The applicants might have been better advised in their pleadings to frame this issue as a failure to lawfully consider the question of material contravention, but it would be an excessively formalistic approach to the defects in the applicants' pleadings to view their failure to do so as a bar to raising the material contravention here at all, and in fairness the applicants did point out at para. 23 the limited nature of the consideration of the point, albeit in narrative rather than legal terms.

173. To apply the general discussion regarding the law here, the development plan set out a single set of objectives in quite specific terms to reduce fragmentation of the green infrastructure network and restrict development that would fragment or prejudice that network. While that does confer *some* discretion, it is limited discretion – when do limited works constitutes fragmentation or prejudice may be something on which reasonable people could disagree in a particular case where there was clearly equivalent and immediate mitigation. The objectives do not confer *significant* discretion – there is a clear direction of travel set out (*Maye v. Sligo Borough Council*). The board diverged from that in favour of a policy qualification not set out in the development plan – the desirability in their view of efficient use of the site. There was no consideration to whether this was a contravention, or if so whether it was material.

174. Separately, given the limited nature of the fact-related discretion involved, the interpretation of the plan is one for the court, so even if the board had properly considered the matter (which it didn't), the removal of nearly all of the trees and about half of the hedgerows on-site is not consistent with objectives G2 1 to 3. Nor can that be dismissed as immaterial given the reasonable potential for it to be a significant issue in public participation.

175. Consequently, the applicants have demonstrated a material contravention under this heading as well.

EU law points

176. As the matter can be disposed of on a domestic law basis, it is unnecessary to get into the EU law-related question of defective EIA screening.

177. I note in passing however that the applicants under this heading point out that the board's direction (p. 3) and order (p. 5) referred to what is said to be the wrong provision of the Local Government Regulations 2001, referencing art. 109(3) rather than 299B. Unfortunately for them, this point was not pleaded.

178. There was also a strong objection as regards whether the applicants should be allowed to make a point on these pleadings in relation to the *content* of the information provided in relation to assessments under non-EIA directives, as opposed to the *form* of the information and in particular the lack of a recognisable statement. Fortunately for the court, this does not need to be resolved in view of the disposition of the issues on the basis of purely domestic law.

179. Finally, the applicants only sought to rely on art. 4(4) of the EIA directive (to the effect that although national law doesn't require a single statement of non-EIA assessments, EU law does so require to the extent that the information must be recognisable as such), at the reply stage of submissions, meaning that the opposing parties did not have the opportunity to address that issue. Again, it is fortunate that I do not need to consider the implications of that sub-optimal procedure. But the reply is not the ideal time for massive new points, especially points that could legitimately justify a reference to Luxembourg.

Order

180. Given the numerous defects in the applicants' pleadings, the shortcomings in their procedural approach, as just noted, the number of potentially winning points that they did not plead, and the unfounded nature of most of the points that they did plead, it might perhaps appear unfortunate from the opposing parties' point of view that the applicants somehow managed to come up with two winning arguments. That only goes to illustrate the general proposition that an applicant only has to win on something whereas the opposing parties have to win on everything. It will be no consolation whatsoever to those parties to say that that is a feature of the system rather than a bug, but the court should bear in mind that asymmetry when considering in other contexts how procedures overall can contribute towards a reasonable degree of balance between the parties.

181. For the foregoing reasons, it will be ordered that:

(i) there be an order of *certiorari* in terms of relief 1;
(ii) any issues not decided including the modularised grounds be adjourned generally;
(iii) the State respondents continue to be excused from any further involvement in consequential issues;
(iv) the matter be listed for mention on a date to be notified by the List Registrar; and
(v) in the absence of any written legal submission to the contrary lodged with the court within 7 days from the date of this judgment, the foregoing order be perfected on the basis of an order for the applicants' costs against the board, including reserved costs.