[2023] IEHC 430

THE HIGH COURT
JUDICIAL REVIEW

[2021 No. 85 JR]

IN THE MATTER OF AN EX-PARTE APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW, AS PRESCRIBED UNDER SECTION 50 OF THE PLANNING AND DEVELOPMENT ACT 2000 AS AMENDED

BETWEEN

MICHAEL DUFFY

APPLICANT

AND

CLARE COUNTY COUNCIL

RESPONDENT

AND

PAT MCDONAGH

NOTICE PARTY

AND

THE HIGH COURT
JUDICIAL REVIEW

[2022 No. 1101 JR]

IN THE MATTER OF AN EX-PARTE APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW, AS PRESCRIBED UNDER SECTION 50 OF THE PLANNING AND DEVELOPMENT ACT 2000 AS AMENDED

BETWEEN

MICHAEL DUFFY

APPLICANT

AND

AN BORD PLEANÁLA AND CLARE COUNTY COUNCIL (BY ORDER)

RESPONDENTS

AND

PAT MCDONAGH

NOTICE PARTY

JUDGMENT of Humphreys J. delivered on the 24th day of July, 2023

Facts

1. On 23rd October, 2020, the notice party made a planning application to Clare County Council for a motorway service station and rest area adjacent to junction 12 of the M18 motorway, on lands situated at Kilbreckan, Doora, Ennis, Co. Clare. The application documents included an appropriate assessment ("AA") screening report and a Natura Impact Statement ("NIS").

2. On 24th November, 2020, the applicant made a submission to the council on the planning application which asserted that there would be an adverse impact on European sites.

3. On 10th December, 2020, internal reports were prepared by the council, including from the environmental assessment officer, which addressed AA screening and AA.

4. On 15th December, 2020, the council's planner's report was prepared. That contained, *inter alia*, conclusions on AA screening and AA, and noted the "comprehensive report" from the environmental assessment officer in relation to AA.

5. On 16th December, 2020, the council's planner's report and an AA determination were then signed by, *inter alia*, the council's senior planner on 16th December, 2020. The AA determination reflected the council's planner's report and the environmental assessment officer's report. The AA determination highlighted that conditions had been included in the grant of permission as a result of the AA.

6. On 16th December, 2020, the Chief Executive's report was signed granting permission and a notification of decision to grant permission was issued.

7. On 20th January, 2021, the council's decision was the subject of a number of third party appeals. The applicant did not himself appeal the council decision to the board but did act as an agent for one of the third party appellants.

Procedural history

8. On 9th February, 2021, the applicant made an *ex parte* application in the Judicial Review List in the first proceedings [2021 No. 85 JR] for leave to apply for judicial review of the council's decision. Leave was directed to be heard on notice and was adjourned from time to time thereafter, including for the purposes of awaiting the board's decision on the appeal. At no point did the applicant seek a stay in respect of the board determining the appeal.

9. On 4th August, 2022, the board's inspector reported recommending a grant of permission.

10. On 21st October, 2022, the board granted permission for the proposed development.

11. On 15th December, 2022, the applicant brought the second judicial review application in the Judicial Review List [2022 No. 1101 JR] by way of an *ex parte* application for leave to apply for judicial review of the board's decision.

12. On 6th March, 2023, that application was adjourned generally.

13. On 27th April, 2023, the council filed a motion to strike out the 2021 proceedings as moot.

14. On 15th May, 2023, on the notice party's application, both sets of proceedings were entered in the Commercial Planning and Environmental List.

15. On 22nd May, 2023, the council was joined as a respondent in the 2022 proceedings without prejudice to whether the applicant was disentitled to relief against the council by reason of failing to join them originally.

16. The two applications for leave on notice in both the 2021 and 2022 proceedings, and the council's motion to dismiss the proceedings against it, were heard on 6th July, 2023 when judgment was reserved. The board did not get involved in that hearing and did not contest leave against it. The council and the developer opposed the grant of leave in the 2021 proceedings and, insofar as concerned the council, in the 2022 proceedings.

Relief sought

17. The relief sought in the 2021 proceedings is:

"1. Leave to apply for Judicial Review based on the facts listed in this grounding statement, my verifying affidavit and exhibits herein.

2. A Declaration that the Planning Authority was precluded from making a decision because of lacunae in the mandatory Appropriate Assessment.

3. A Declaration that, due to the technical details prescribed by Irish Water, and conditioned in the decision, this application is a case of project splitting and in that regard, because of the connectivity and likely impacts on Natura2000 sites, any s.4 exemptions otherwise applying to Irish Water works do not apply in this instance.

4. An order of certiorari overturning the decision of the Respondent on the 16th day of December 2020 to grant planning permission in application 20/781.

5. A Declaration that the costs of these proceedings are covered by s.50B of the 2000 Act or should be measured on a not prohibitively expensive ('NPE') basis.

6. Such further Orders as the Court deems appropriate.

7. Liberty to apply.

8. The costs of the within proceedings."

18. The relief sought in the 2022 proceedings is:

"1. By virtue of Order 84 Rule 20 to grant me the relief of leave to apply for Judicial Review based on the facts listed in this grounding statement, my verifying affidavit and exhibits herein.

2. A Declaration that the Planning Authority was precluded from making a decision in the first instance in planning application 20/781 because of lacunae in the Planning Authority Appropriate Assessment.

3. A Declaration that given no valid planning permission existed the Respondent had no jurisdiction to carry out an appeal and/or a de novo assessment.

4. If necessary a Declaration that the Respondent was precluded from making a decision because of lacunae in its Appropriate Assessment carried out by the Inspector and adopted, and/or carried out, by the Respondent in appeal ABP-309207-21.

5. If necessary a Declaration that conditions required by a prescribed body, namely Irish Water, for connection to the municipal sewer, were not included in conditions applied by either the Planning Authority or the Respondent.

6. A Declaration that this is a case of project splitting given that no Appropriate Assessment of the works to be carried out by Irish Water was carried out prior to a decision being made.

7. If necessary a Declaration that the Irish Water condition for connection is not exempt development given the likely significant effect on European Sites.

8. An order of certiorari overturning the decision of the Respondent made on the 21st day of October 2022 to grant permission for the proposed development in ABP-309207-21 (Planning Application 20/781).

9. A Declaration that the costs of the proceedings are covered by s.50B of the 2000 Act or should be measured on a not prohibitively expensive ('NPE') basis or, in the alternative, a declaration that section 3 of the Environment (Miscellaneous Provisions) Act 2011 apply to these proceedings.

10. If necessary, by virtue of Order 84 Rule 21(3), to grant me leave to extend the period within which an application for leave to apply for judicial review may be made on the grounds set out in paragraph 'e' herein.

11. Such further Orders as the Court deems appropriate.

12. Liberty to apply.

13. The costs of the within proceedings."

Grounds of challenge

19. The grounds of challenge in the 2021 proceedings are not formulated as required by Practice Direction HC119, understandably perhaps because the applicant is representing himself. They are as follows:

"1. I am a Chartered Civil Engineer and I reside in Kilfenora, Co. Clare and Ennis is my County town. This subject planning application is the 4th application for this particular project which is commonly known as an off-line motorway service area (MSA). I have made submissions in all four applications, including two appeals, one of which is current, to An Bord Pleanála on behalf of a Client who has an interest in the subject land. I have also made my own submissions on this subject application, and the previous one, on foot of underlying concerns I have with the process which I discovered when making submissions for my Client. I have concerns regarding the impact this proposal will have on the town of Ennis and on adjacent Natura2000 sites.

2. The first application 14/769 was substantial and included a request for further information which was then granted planning permission subsequently overturned on appeal. The second application 16/677 was similar and also included a request for further information. I, on behalf of a Client, made a substantial response to the further information furnished and 9 days later the application was withdrawn. The third application 18/564 was controversial from the outset because approximately 55 identically scripted submissions of support were lodged with the Planning Authority. The Planning Authority carried out enquiries regarding the legitimacy of these submissions but in any event the application proceeded to an onerous request for further information. An extension of time to [*sic*] was sought and granted to provide the further information but suffice to say the application was later withdrawn without any further information submitted. Interestingly twenty three of the statutory notifications of withdrawal sent by registered post to those who made submissions were returned undelivered to the Planning Authority.

3. When the subject application was advertised it was predictable who the objectors were going to be. It was also entirely expected that there would be further information required to address some or all of the issues raised in submissions and presumably regarding issues which the Planning Authority may have discovered from its consideration of the application. Most unusually for such a substantive proposal there was no further information sought and the Planning Authority made a decision to grant with conditions on the 16th December 2020. I should also add that it was reasonable to expect that any decision was likely to be appealed irrespective of the decision. Instead of seeking further information or clarification to significant planning matters the Planning Authority rushed a decision consigning important detail to 'prior to commencement' conditions 'to be agreed' with the Planning Authority. This was in spite of some internal expert reports seeking further information. I beg to refer to a copy of [*sic*] report of the Acting Assistant Roads Engineer in the Roads Design Office dated the 10th day of December 2020 which pinned together and marked with the letters and number 'MD1' I have signed my name prior to the swearing hereof.

4. I say and believe that there is a concerted effort to have this appeal heard before a draft of the proposed 2022-2028 County Development Plan is published or indeed the new plan is implemented in which there are submissions to de-zone the subject site.

5. I submitted an appeal on behalf of my Client but I did not appeal personally because I believe there is a procedural issue with the decision of the Respondent which may be ultra vires An Bord Pleanala. It is not clear to me whether, if the Respondent was precluded from making a decision, a de novo consideration can legally be carried out by the Board. If I am correct then I would be out of time to seek Judicial Review after a decision of the Board is made. As I understand matters if this Honourable Court is of a mind to grant me leave it is open to other parties to seek to adjourn these proceedings until such time as the Board make[s] its decision.

6. The proposal for this off-line MSA includes a proposal to partly treat the wastewater arising on the site and then to pump it approximately 3km through a rising main pipeline which will travel under the M18 motorway, then parallel to a duel carriageway link road, under the river Fergus (a Natura2000 site), under a rail line and onwards to the R458 road to discharge into a newly constructed man-hole to be provided by Irish Water.

7. The current arrangement for the routing of wastewater to the Clareabbey wastewater treatment plant (WWTP) is that it arrives at a point on the Clare Road (R458) near the Westfields housing estate. It then turns into Westfields to a pump chamber from which it is pumped onwards to the Clareabbey WWTP. The WWTP does not have a storm-water overflow in its own right. The storm-water overflow is from the pump chamber in

Westfields directly to the nearby river Fergus which is an SAC. During heavy rainfall events raw sewage in excess of that which can be accommodated in the WWTP is diverted untreated to the river.

8. The technical details prescribed by Irish Water involve Irish Water extending a gravity sewer from the man-hole turning into Westfields to a new man-hole into which the notice party is to discharge its rising main. I beg to refer to correspondence from Irish Water dated the 20th October 2020 which pinned together and marked with the letters and number 'MD2' I have signed my name prior to the swearing hereof.

9. The first item to be noted in this correspondence is that it is qualified that capacity is only confirmed 'at this moment in time'. I say that there is absolutely no commitment from Irish Water that it can deal with the proposed effluent arising from this proposed development with current infrastructure.

10. The second item of note is that it clearly states that Irish Water will construct the new rising main discharge man-hole and gravity sewer network extension on the public road. It further states that Irish Water will be responsible for obtaining all statutory consents associated with this infrastructure. Therefore by virtue of s.4 (4) of the Planning and Development Act 2000 as amended by s.5 and s.57 of the Planning and Development (Amendment) Act 2010 any exempt development which is likely to have a significant effect on a European Site is required to seek planning permission and to undergo appropriate assessment.

11. I say that any additional wastewater, even partly treated effluent, will increase the volume of storm-water overflows and therefore is likely to have a significant effect on the adjacent European site. Irish Water will require separate planning permission, including appropriate assessment of that application, for the conditioned discharge man-hole and gravity sewer because of its connectivity to the European site. Therefore the subject proposal is project splitting in that it cannot proceed without Irish Water having an extant planning permission for the connecting link. There is no guarantee that Irish Water will receive such permission.

12. Notwithstanding that, I say that the attempt by the Respondent to fulfil its statutory duty regarding likely effects on European sites was irregular, irrational and fatally flawed.

13. Section 177U of the Planning and Development Act as amended requires that the competent authority shall carry out an appropriate assessment screening of the proposal. That did not happen. Reference is made to the appropriate assessment screening report submitted by the applicant. That is not what is required by s. 177U. It must be the competent authority (in this case defined in s.177S as the Planning Authority) who carry out the screening assessment.

14. I beg to refer for comparison to the Planners Report in another application 17/8002 which pinned together and marked with the letters and number 'MD3' I have signed my name prior to the swearing hereof. This is an example of long established practice in this Planning Authority whereby the Planner conducts appropriate assessment screening and then appropriate assessment when required before making any assessment on the merits of an application. This is intuitive because a decision cannot be made until proper appropriate assessment has been carried out.

15. I beg to refer to a Determination in this subject application which pinned together and marked with the letters and number 'MD4' I have signed my name prior to the swearing hereof. This is highly irregular with how the Respondent usually deals with appropriate assessment. It fails to give any overview of what was considered with respect to Natura2000 sites in the area. It does not follow the long established format of listing the qualifying interests of the sites nominated to be in the zone of influence or addressing if and how they may be impacted.

16. It is irrational that any competent Planning Authority would consider this Determination to come anywhere near what is required to fulfil the onerous responsibility to protect European sites. It is completely lacking is [*sic*] scientific detail or evidence that likely impacts were considered at all. While it makes a fleeting reference to the connectivity of the proposal to European sites it does not address that connectivity or potential impacts. It makes no reference to any regard it had to submissions of 3rd parties which raise this very issue.

17. The 'Determination' or Appropriate Assessment, if that is what it is intended to be, is fatally flawed. In the second paragraph of 'MD4' the writer states 'I refer to grant of permission for development associated with P20-781'. Clearly the application was decided and granted permission prior to any attempt at fulfilling the prior statutory duty of Appropriate Assessment. It also states that 'this Determination is a record of the Planning Authorities conclusion in accordance with the appropriate assessment which was carried out.'

There is no other Natura2000 assessment on the planning file. The assessment, for what it is worth, is contained within the 'Determination' which includes conditions imported from the already determined decision. It is well established that s.177V (3) requires proper appropriate assessment to be carried out prior to the making of any decision in an application for permission.

18. In the premises I pray this Honourable Court for the reliefs sought herein."

20. The grounds in the 2022 proceedings are as follows:

"1. I am a Chartered Civil Engineer and I reside in Kilfenora, Co. Clare and Ennis is my County town. This subject planning application is the 4th application for this particular project which is commonly known as an off-line motorway service area (MSA). The first application in 2014 was granted permission and subsequently overturned on appeal by the Respondent. The next two applications in 2016 and 2018 were withdrawn during the course of the process. I made a submission in the current application leading to this appeal decision. I have concerns regarding the impact this proposal will have on adjacent Natura2000 sites.

2. I currently have Judicial Review proceedings 2021/85 JR at leave on notice stage which were adjourned on 11 occasions since March 2021 challenging the decision of the Planning Authority in this subject planning permission on the same, or very similar, grounds. The current adjournment is to allow that Respondent time to file a motion of mootness in those proceedings given this Respondent has now made a decision in the appeal. At the last adjournment on the 6th December 2022 I sought leave of the Court for liberty to join this Respondent in those proceedings. The Court was not of a mind to do so.

3. I did not participate in the appeal on the basis that I consider the Planning Authority's decision to be invalid for procedural reasons and to appeal would have been in conflict with that position. Furthermore I believe that the reasons for invalidity were not matters that this Respondent had jurisdiction to address. I did however appeal to the Respondent as an agent on behalf of a client. Reference is made in paragraph 3 of the Inspector's Report to my submission and the basis for it. I beg to refer to the Inspector's Report, Board's Direction and Order which pinned together and marked with the letters and number 'MD1' I have signed my name prior to the swearing hereof.

4. In proceedings 2021/85, which are in time, I am challenging the procedural validity of planning application 20/781. The kernel of that case is that the Planning Authority was precluded from making a planning decision given that there are significant lacunae in the Appropriate Assessment (AA) carried out. It is well established that s.177V (3) requires proper appropriate assessment to be carried out prior to the making of any decision in an application for permission or an appeal. 177V (3) Notwithstanding any other provision of this Act, or, as appropriate, the Act of 2001, or the Roads Acts 1993 to 2007 and save as otherwise provided for in sections 177X, 177Y, 177AB and 177AC, a competent authority shall make a Land use plan or give consent for proposed development only after having determined that the Land use plan or proposed development shall not adversely affect the integrity of a European site. [Sections 177X, 177Y, 177AB and 177AC relate to imperative reasons of overriding public interest] which is not claimed in this instance.

5. My primary ground in this case is that this Respondent had no jurisdiction to carry out an appeal of what I say was an invalid planning permission. I realise this will be a matter for legal submissions as part of a substantive hearing but I believe that this case is distinguishable from the seminal O'Keefe case and others.

6. In addition to the fundamental ground the Respondent's decision is ambiguous and irrational as to whether the Board carried out AA, simply adopted the Inspector's AA, or adopted some of the Inspector's AA and completed the process itself. There is no evidence that the Board carried out any assessment and/or scientific enquiry to complete the AA as it states. Article 6(3) of the HABITATS DIRECTIVE 92/43/EEC as transposed requires the decision maker's assessment to contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the proposed works on European sites. I beg to refer to exhibit 'MD1' when presented.

7. The Respondent claims that it considered the NIS and all other submissions on the file including the Inspector's assessment and carried out an AA of the implications of the proposed development on relevant European Sites. It states that the Board was satisfied that the information before it was adequate to allow the carrying out of an AA. It goes on to list items 'in particular' which the Board considered. This list inter alia did not include submissions regarding impacts on adjacent European Sites from an increase in wastewater loadings or the capacity of the Clareabbey WWTP. It then states 'in completing the Appropriate Assessment' the Board accepted and adopted the AA of the Inspector. It further states 'In overall conclusion, the Board was satisfied that the proposed development, by itself or in combination with other plans or projects would not adversely affect the integrity

of European sites' and 'this conclusion is based on a complete assessment of all aspects of the proposed project and there is no reasonable doubt as to the absence of adverse effects'. I believe that the Planning Authority, the Inspector and the Board ignored submissions regarding unmonitored stormwater overflows and questioning the capacity of the Clareabbey WWTP and likely significant impacts it has on European Sites. In the original Planner's Assessment in application 20/781 reference is made to a previous adjacent planning application 07/798 which was refused permission. One of the reasons for refusal, stated in the assessment, was that the Planning Authority was not satisfied that capacity exists at the Clareabbey WWTP. That was in 2007 and no development has occurred at the Clareabbey WWTP since to increase the capacity of the plant. I beg to refer to extracts from the Planner's Reports in application 20/781 and extracts from application 18/1004 which pinned together and marked with the letters and number 'MD2' I have signed my name prior to the swearing hereof.

8. There was no consideration, by the Planner, the Inspector or the Board in their Appropriate Assessments of the connection of all wastewater arising in the Clarecastle agglomeration which is being diverted to the Clareabbey plant. This is only one example of in-combination impacts on both the unmonitored stormwater overflow from the pump-station, additional loading on an already overloaded plant with consequential impacts on the discharge from the treatment plant directly to the SAC. Other planning permissions granted since 2006 are likely to be causing in-combination impacts on the SAC also. The Planning Authority recognised in 2006 that the Clareabbey WWTP was overloaded. While some ancillary works are on-going in that plant there is no additional capacity authorised to date. I beg to refer to an Irish Water press release which pinned together and marked with the letters and number 'MD3' I have signed my name prior to the swearing hereof.

9. There is absolutely no evidence that the Board carried out an AA, applied itself to readily available scientific data, or had all the available information before it to enable it 'in completing the Appropriate Assessment'. In the list of what it considered, it did not refer to submissions questioning the capacity of the Clareabbey WWTP or the unmonitored discharges from the associated pump-station. Among some of the readily available data, which was not considered by the Planning Authority, the Inspector or the Board, is copious information and data regarding the Clareabbey WWTP on the EPA licensing portal. This calls into question the impugned decision of the Board and, in particular, its statement that its 'conclusion is based on a complete assessment of all aspects of the proposed project'. For the avoidance of any doubt it is well settled that it is the duty of the decision maker, whether the Planning Authority or the Board, to fully inform itself using the best scientific information available in carrying out Appropriate Assessment without lacunae and not to simply depend of [*sic*] information submitted by the Applicant in a Natura Impact Statement. The Planning Authority's and the Board's attention was drawn to this issue but neither had regard to the submissions and both failed to inform themselves of the readily available information. The Planning Authority in particular failed in this regard as it was the body which was aware of issues with capacity as far back as at least 2006 in relation to a planning application for an adjacent temporary wastewater plant 06/1754 (see discharge licence application in exhibit MD3) and a refusal of permission for another connection to the plant in 07/798 (exhibit MD2). It also more recently granted permission to Irish Water 18/1004 (exhibit MD2) for upgrade works to the inlet apparatus and a stormwater tank in which it clearly stated that there was no increase in the Population Equivalent or treatment capacity of the plant. I beg to refer to the Clare County Council discharge licence application to the EPA, Annual Environment Reports (AER's), a Site Visit Report (SVR), EPA Licence and amendment for the Clareabbey WWTP which pinned together and marked with the letters and number 'MD4' I have signed my name prior to the swearing hereof.

10. In section 3.1 of the Inspector's Report reference is made to 'conditions of note' in the Planning Authority's decision. Notwithstanding the illusionary concept of a statutory de novo assessment one of those conditions relates to details of the wastewater connection to the sewer. There is no reference to any wastewater connection in the decision of the Board and no reference linking the Board's decision with that of the Planning Authority or the conditions attached to it. Most importantly there is no reference in either decision to the connection conditioning specified by Irish Water in its prescribed body response. Given that it is a prescribed body it is intuitive that its response is of relevance and that regard, or even particular regard, should be had to it. Irish Water will require separate planning permission, including appropriate assessment of that application, for the conditioned discharge man-hole and gravity sewer because of its connectivity to European Sites. Therefore this subject proposal is classic project splitting as it cannot proceed without Irish Water having an extant planning permission for the connecting link and that prospect has not had Appropriate

Assessment or proper Appropriate Assessment. There is no guarantee that Irish Water will receive such planning permission. I beg to refer to the Irish Water prescribed body response in the subject application which pinned together and marked with the letters and number 'MD5' I have signed my name prior to the swearing hereof.

11. In what is supposed to be a de novo assessment the Inspector commences with a recital of most of the conditions in the decision of the PA, including prescribed body submissions and 3rd party submissions. However in reference to planning history the Inspector notably ignores a reference by the Planner to permission 07/798 (exhibit MD2) as discussed in paragraph 7 herein. That crucially contained a decision by the Planning Authority that it was not satisfied that the Clareabbey WWTP had adequate capacity. The Inspector either erred, or otherwise chose to ignore, the Planner's reference to this refused permission and the reasons for refusal. This inter alia created a lacuna in the Inspector's AA and precluded a decision.

12. In section 7.5.4 of the Inspector's report reference is made 'based on the information on the file' that Irish Water has 'no objection' to the proposal and that there is 'sufficient capacity' in the WWTP. Despite submissions to the contrary questioning this capacity and a paucity of regard to those submissions, a lack of acknowledgement of one of the reasons for refusal in 07/798, and lacunae in Appropriate Assessment to consider all impacts and/or in-combination impacts, the Inspector states that the development is connecting to a municipal wastewater treatment plant designed to cater for the urban settlement of Ennis and therefore is a reasonable arrangement. Clearly the infrastructural requirements of the urban settlement of Ennis have altered since this WWTP was designed in or about 1981. I have to date been unsuccessful in accessing design drawings and details for this plant which was initially built by the Local Authority as exempt development. However in its licence application (exhibit MD 4) in 2008, to the EPA, Clare County Council conceded that the plant was operating above the design capacity of 6,000 PE. In implicit mitigation it referred to a temporary private WWTP which had been granted permission with conditioning that a large proportion of the Clareabbey wastewater would be immediately diverted to the temporary plant upon commissioning. That temporary plant was never constructed yet Clare County Council continued to permit development in the catchment area to the present day without any extension of capacity in the plant.

13. The Inspector has fallen into the presumptive trap that municipalities carry out duties in accordance with rules and regulations. The first duty of the Inspector was to ensure, on the basis of the best scientific knowledge available, that this proposal, on its own or in-combination with other projects, is not likely to have significant impacts on European Sites. The Inspector and the Board manifestly failed to do so. Without prejudice to the validity of the appeal in the first instance, an appropriate assessment with lacunae precluded the making of an appeal decision.

14. Any reasonable consideration, and not necessarily a scientific assessment, of the Irish Water submission would recognise that there is absolutely no guarantee of capacity or indeed a connection to the municipal system. The coyness expressed subliminally in the Irish Water submission is tacit acknowledgement that there are capacity issues if highlighted and challenged. Therefore it is not correct to make a planning decision, or more importantly, provide an Appropriate Assessment determination, based on what was in that submission without at the very least further scientific enquiry. I again make the point that there was no consultation or reference to the EPA discharge licence portal or indeed the EPA itself regarding this application. The Planning Authority is on record of being aware of the Irish Water proposal to pipe all the wastewater arising in the Clarecastle agglomeration to the Clareabbey WWTP notwithstanding that it was not satisfied about the available capacity in 07/798 and has no evidence of such capacity since. In fact this Planning Authority recognised that this plant was operating above design capacity as far back as 2006 in planning application 06/1754 (exhibit MD4).

15. The Clareabbey plant is currently operating in breach of its discharge licence. An amendment to the licence in December 2021 required certain actions to be taken in respect of the Stormwater Overflow (SWO) associated with this plant at the Westfields pump station. There is no monitoring or measurement of volumes or frequency of discharges from this SWO. The EPA amendment to the licence was caused by a decision of the ECJ against Ireland for not managing such SWO's. In effect this SWO has operated as a pressure release valve when this plant was not capable of dealing with the flows. This is balanced by accelerating the volume of wastewater through the plant, reducing the residence time and reducing or eliminating appropriate treatment. Once sampling avoids such events they will never be discovered or highlighted. The physics are undeniable in that the volume of wastewater arriving at the Westfields pump station either passes through the plant, at

whatever rate, or the excess is disposed through the unmonitored SWO. As can be seen from the ECJ Judgement this is not in accordance with the relevant European Directive. There was no appropriate assessment, or no proper appropriate assessment, of likely significant effects, either individually or in-combination with other projects, on adjacent European Sites with respect to the additional wastewater loading and/or cumulative or in-combination wastewater loadings, via the unmonitored stormwater overflow to the SAC or, via the discharge from the Clareabbey WWTP to the SAC. I beg to refer to the Judgement of the ECJ in case C-427/17 which pinned together and marked with the letters and number 'MD6' I have signed my name prior to the swearing hereof.

16. I intend to file this statement and associated affidavit on Thursday 15th December 2022 and thereafter have the matter opened to comply with the 8 week rule in s. 50 of the Planning and Development Act as amended which falls on the 15th December. As a result of the decision on the 6th December in proceedings 2021/85 JR I had to compile this application since then. As a litigant in person I must travel to Dublin to stamp, file and open the application. It was impossible to do so within the current timelines associated with the Judicial Review Ex-Parte Monday list. Therefore if necessary I will make the case that this is good and sufficient reason and the circumstances that resulted in the failure to make the application for leave within the period mentioned were outside my control. (exhibit MD6)

17. In the premise I pray this Honourable Court for the reliefs sought herein."

The law in relation to leave

21. The main requirements in relation to leave to apply for judicial review under *G. v. D.P.P.* [1994] 1 I.R. 374 (Finlay C.J.) as that applies to planning cases, bearing in mind the adjustments to that test required by amendments to O. 84 RSC since then and by statutory modification, were referred to in *Reid v. An Bord Pleanála (No. 5)* [2022] IEHC 687, [2022] 12 JIC 0902 (Unreported, High Court, 9th December, 2022). However, this case illustrates a couple of refinements required to that list.

22. One can attempt to summarise the requirements for the grant of leave in planning cases as follows:

(i) that the applicant has standing by way of having a sufficient interest (O. 84 r. 20(5) RSC, s. 50A(3)(b)(i) of the 2000 Act);

(ii) that the facts averred in the affidavit would be sufficient, if proved, to support a substantial ground for the form of relief sought by way of judicial review (*G. v. D.P.P.* as modified by s. 50A(3)(a) of the 2000 Act);

(iii) that on those facts a substantial case in law can be made that the applicant is entitled to the relief which he seeks (*G. v. D.P.P.* as modified by s. 50A(3)(a) of the 2000 Act);

(iv) compliance with time limits, normally 8 weeks in the planning context (s. 50(6) and (7));

(v) capacity of the applicant (as a matter of general law – only an issue in applications by unincorporated bodies);

(vi) exhaustion of remedies, or as put in *G. v. D.P.P.*, that the only effective remedy, on the facts established by the applicant, which the applicant could obtain would be an order by way of judicial review or, if there be an alternative remedy, that the application by way of judicial review is, on all the facts of the case, a more appropriate method of procedure (s. 50A(3)(c) inserted by s. 22 of the Planning and Development, Maritime and Valuation (Amendment) Act 2022, which has been in force since 20th October, 2022 by virtue of the Planning and Development, Maritime and Valuation (Amendment) Act 2022 (Commencement of Certain Provisions) (No. 3) Order 2022 (S.I. 523 of 2022)) (whether that provision should be applied to the 2021 proceedings isn't decisive because it is essentially declaratory);

(vii) compliance with relevant procedural requirements, particularly other provisions of O. 84 RSC or the terms of High Court Practice Direction HC119 – although normally this would affect the specifics of any leave in how the reliefs and grounds should be worded, rather than whether leave should be granted at all; and

(viii) that there are no other grounds to warrant refusal of leave on a discretionary basis (see *North East Pylon Pressure Campaign Limited & Ors v. An Bord Pleanála (No. 1)* [2016] IEHC 300; 2016 WJSC-HC 4214, [2016] 5 JIC 1215 (Unreported, High Court, 12th May, 2016), which refers to triviality or lack of good faith for example).

Whether leave should be granted here

23. Applying the foregoing to the leave applications here, the position is as follows:

(i) sufficient interest – this was not hugely disputed although there may be an issue in due course about the applicant's failure to appeal the council decision – possibly not

a huge issue though given that the applicant is primarily making EU law points which don't require prior participation in the process;

(ii) that the facts averred in the affidavit would be sufficient, if proved, to support a substantial ground – that did not really raise an independent issue in itself; the objection to the case against the council was of a legal nature;

(iii) that on those facts a substantial case in law can be made that the applicant is entitled to the relief which he seeks – likewise, that doesn't raise a separate issue not addressed under another heading;

(iv) compliance with time limits – that was not disputed other than the objection regarding the late joinder of the council in the 2022 proceedings, but that in itself is a subsidiary issue compared to whether the council should be sued at all;

(v) capacity of the applicant – not an issue;

(vi) exhaustion of remedies – that *was* an issue but only as against the council and I deal with that below;

(vii) compliance with relevant procedural requirements, e.g., O. 84 RSC, Practice Direction HC119 – there was significant non-compliance in the papers which I will attempt to the extent practicable to address in the form of the order; and

(viii) discretion – that wasn't argued on any basis other than as reinforcing the other objections.

24. The law on exhaustion of remedies is reasonably well clarified at this stage: *North East Pylon Pressure Campaign Limited v. An Bord Pleanála (No. 1)* and as applied by the Court of Appeal in *Spencer Place Development Company Limited v. Dublin City Council* [2020] IECA 268, [2020] 10 JIC 0202 (Unreported, Court of Appeal, Collins J., 2nd October, 2020), *North Westmeath Turbine Action Group & Anor v. Westmeath County Council* [2020] IEHC 505, [2020] 10 JIC 2205 (Unreported, High Court, 22nd October, 2020), *EPUK Investments Limited v. Commission for Regulation of Utilities & EPA* [2023] IEHC 59, [2023] 2 JIC 1009 (Unreported, High Court, Holland J., 10th February, 2023), *The State (Abenglen Properties Limited) v. Corporation of Dublin* [1984] I.R. 381, [1982] I.L.R.M. 590, 1982 WJSC-SC 1, [1982] 2 JIC 0505 (in particular *per* O'Higgins C.J.), *Sheehan v. Solicitors Disciplinary Tribunal & Ors* [2021] IESC 64, [2022] 1 I.R. 78, [2022] 1 I.L.R.M. 1, [2021] 9 JIC 1601, Dunne J., *Kinsella v. Dundalk Town Council* [2004] IEHC 373, [2004] 12 JIC 0303 (Unreported, High Court, Kelly J., 3rd December, 2004).

25. The applicant's claim to be entitled to sue the council rests on the misconception that the first-instance decision is a nullity because it mishandled the appropriate assessment issue. That isn't the sort of legal irregularity that justifies by-passing administrative appeal (see *Sweetman v. Clare County Council* (Sweetman XII) [2018] IEHC 517, [2018] 7 JIC 3143 (Unreported, High Court, Binchy J., 31st July, 2018), *Mount Juliet Estates Residents Group v. Kilkenny County Council* [2020] IEHC 128, [2020] 3 JIC 1001 (Unreported, High Court, Simons J., 10th March, 2020)). Calling AA "jurisdictional" doesn't solve that problem. Yes, there are exceptions (*Harding v. Cork County Council & Anor* [2006] IEHC 295, [2006] 10 JIC 1203 (Unreported, High Court, Clarke J., 12th October, 2006)): one can go straight to court if there is an inevitability of injustice, or something that taints the process in an ongoing way, or some flagrant breach of fairness that deprives the person of any real first-instance consideration and warrants immediate intervention. But that doesn't apply here. There is no inevitability of injustice – the issue of AA could be fully revisited *de novo* on appeal: see *Derivan v. Waterford City and County Council* (*ex tempore*, not circulated, High Court, Burns J. (T), 20th July, 2018) and *Sweetman v. Clare County Council* (Sweetman XII). The board appeal is by way of a *de novo* reconsideration (*Alen-Buckley v. An Bord Pleanala (No. 2)* [2017] IEHC 541, [2017] 9 JIC 2602 (Unreported, High Court, Haughton J., 26th September, 2017) at para. 43) so the question of whether the council erred is not a ground in itself.

26. The case against the council is misconceived.

27. That conclusion is copper-fastened by the fact that the board has now actually decided the appeal anyway, and further reinforced, if such were necessary, by s. 37(1)(b) of the 2000 Act (see *Yennusick v. Wexford County Council* [2023] IEHC 70, [2023] 2 JIC 1303 (Unreported, High Court, Ferriter J., 13th February, 2023), *McCallig v. An Bord Pleanála (No. 1)* [2013] IEHC 60, [2013] 1 JIC 2404 (Unreported, High Court, Herbert J., 24th January, 2013) (at para. 83)). But even without an express statutory provision, the quashing of an appellate decision does not revive the underlying first-instance decision unless the court specifically orders otherwise – otherwise the administrative process would become endless, circular, unworkable and unfair. The process simply has to commence again.

28. While I have carefully considered the points made and caselaw cited in the applicant's submission, those points are not a basis to come to a different conclusion. The legal and now statutory requirement to exhaust remedies does not create some lawless zone whereby first instance decision-makers can do what they like, as the applicant in effect submitted. The procedure of administrative appeal is the check and balance, with judicial review of the first instance decision

available in truly exceptional circumstances. That demonstrates that the legal system has to accommodate multiple objectives, including workability and the orderly functioning of the administrative system, and husbandry of judicial resources, rather than elevating total and immediate judicial scrutiny of everything that moves as being the sole objective. Another example of Thomas Sowell's immortal insight – there are no solutions, only trade-offs.

29. This doesn't affect the case against the board, which wasn't contested at this stage, but the form of that case needs to be reprogrammed in the light of the failure of the leave application as against the council as well as having regard to the applicable procedural requirements.

Detail of the leave order

30. Bearing the foregoing in mind, no case for leave against the council is made out so leave should be refused in the 2021 proceedings and the council should be removed as a respondent and, as they suggested, made a notice party in the 2022 proceedings. Leave wasn't opposed against the board but the format of papers needs to be streamlined.

31. The reliefs need to be reformulated as follows. The explanations in square brackets are for information and should not be included in the applicant's amended statement of grounds.

"1. ~~By virtue of Order 84 Rule 20 to grant me the relief of leave to apply for Judicial Review based on the facts listed in this grounding statement, my verifying affidavit and exhibits herein.~~ [To be struck out – this relief is being addressed now by being refused]

2. ~~A Declaration that the Planning Authority was precluded from making a decision in the first instance in planning application 20/781 because of lacunae in the Planning Authority Appropriate Assessment.~~ [To be struck out for reasons explained in the judgment]

3. ~~A Declaration that given no valid planning permission existed the Respondent had no jurisdiction to carry out an appeal and/or a de novo assessment.~~ [To be struck out for reasons explained in the judgment]

4. ~~If necessary a Declaration that the Respondent was precluded from making a decision because of lacunae in its Appropriate Assessment carried out by the Inspector and adopted, and/or carried out, by the Respondent in appeal ABP-309207-21.~~ [Unnecessary and superseded by general declaration *per* High Court Practice Direction HC119 below]

5. ~~If necessary a Declaration that conditions required by a prescribed body, namely Irish Water, for connection to the municipal sewer, were not included in conditions applied by either the Planning Authority or the Respondent.~~ [Unnecessary and superseded by general declaration *per* Practice Direction HC119 below]

6. ~~A Declaration that this is a case of project splitting given that no Appropriate Assessment of the works to be carried out by Irish Water was carried out prior to a decision being made.~~ [Unnecessary and superseded by general declaration *per* High Court Practice Direction HC119 below]

7. ~~If necessary a Declaration that the Irish Water condition for connection is not exempt development given the likely significant effect on European Sites.~~ [Unnecessary and superseded by general declaration *per* High Court Practice Direction HC119 below]

8. An order of certiorari overturning the decision of the Respondent made on the 21st day of October 2022 to grant permission for the proposed development in ABP-309207-21 (Planning Application 20/781).

<u>8A. Such declaration(s) of the legal rights and/or legal position of the applicant and persons similarly situated and/or of the legal duties and/or legal position of the respondent as the court considers appropriate</u> [New relief to be added *per* High Court Practice Direction HC 119 para. 70]

9. A Declaration that the costs of the proceedings are covered by s.50B of the 2000 Act or should be measured on a not prohibitively expensive ('NPE') basis or, in the alternative, a declaration that section 3 of the Environment (Miscellaneous Provisions) Act 2011 apply to these proceedings.

10. If necessary, by virtue of Order 84 Rule 21(3), to grant ~~me~~ leave to extend the period within which an application for leave to apply for judicial review may be made on the grounds set out in paragraph 'e' herein.

11. Such further Orders as the Court deems appropriate.

12. Liberty to apply.

13. The costs of the within proceedings."

32. The grounds need to be reformulated as follows (again omitting the explanations below in square brackets):

"1. ~~I am a Chartered Civil Engineer and I reside in Kilfenora, Co. Clare and Ennis is my County town. This subject planning application is the 4th application for this particular project which is commonly known as an off-line motorway service area (MSA). The first application in 2014 was granted permission and subsequently overturned on appeal by the Respondent. The next two applications in 2016 and 2018 were withdrawn during the course~~

~~of the process. I made a submission in the current application leading to this appeal decision. I have concerns regarding the impact this proposal will have on adjacent Natura2000 sites.~~ [This is not a legal ground]

2. ~~I currently have Judicial Review proceedings 2021/85 JR at leave on notice stage which were adjourned on 11 occasions since March 2021 challenging the decision of the Planning Authority in this subject planning permission on the same, or very similar, grounds. The current adjournment is to allow that Respondent time to file a motion of mootness in those proceedings given this Respondent has now made a decision in the appeal. At the last adjournment on the 6th December 2022 I sought leave of the Court for liberty to join this Respondent in those proceedings. The Court was not of a mind to do so.~~ [This is not a legal ground]

3. I did not participate in the appeal on the basis that I consider the Planning Authority's decision to be invalid for procedural reasons and to appeal would have been in conflict with that position. Furthermore I believe that the reasons for invalidity were not matters that this Respondent had jurisdiction to address. I did however appeal to the Respondent as an agent on behalf of a client. Reference is made in paragraph 3 of the Inspector's Report to my submission and the basis for it. I beg to refer to the Inspector's Report, Board's Direction and Order which pinned together and marked with the letters and number 'MD1' I have signed my name prior to the swearing hereof. [This is relevant to the legal grounds only as a statement of the applicant's beliefs not as a statement of the legal position]

4. ~~In proceedings 2021/85, which are in time, I am challenging the procedural validity of planning application 20/781. The kernel of that case is that the Planning Authority was precluded from making a planning decision given that there are significant lacunae in the Appropriate Assessment (AA) carried out.~~ It is well established that s.177V (3) requires proper appropriate assessment to be carried out prior to the making of any decision in an application for permission or an appeal. 177V (3) Notwithstanding any other provision of this Act, or, as appropriate, the Act of 2001, or the Roads Acts 1993 to 2007 and save as otherwise provided for in sections 177X, 177Y, 177AB and 177AC, a competent authority shall make a Land use plan or give consent for proposed development only after having determined that the Land use plan or proposed development shall not adversely affect the integrity of a European site. ~~[~~Sections 177X, 177Y, 177AB and 177AC relate to imperative reasons of overriding public interest~~]~~ which is not claimed in this instance. [Leave should not be granted in relation to any complaints against the council]

5. ~~My primary ground in this case is that this Respondent had no jurisdiction to carry out an appeal of what I say was an invalid planning permission. I realise this will be a matter for legal submissions as part of a substantive hearing but I believe that this case is distinguishable from the seminal O'Keefe case and others.~~ [There is no basis for this complaint for the reasons set out in the judgment]

6. ~~In addition to the fundamental ground~~ the Respondent's decision is ambiguous and irrational as to whether the Board carried out AA, simply adopted the Inspector's AA, or adopted some of the Inspector's AA and completed the process itself. There is no evidence that the Board carried out any assessment and/or scientific enquiry to complete the AA as it states. Article 6(3) of the HABITATS DIRECTIVE 92/43/EEC as transposed requires the decision maker's assessment to contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the proposed works on European sites. I beg to refer to exhibit 'MD1' when presented.

7. The Respondent claims that it considered the NIS and all other submissions on the file including the Inspector's assessment and carried out an AA of the implications of the proposed development on relevant European Sites. It states that the Board was satisfied that the information before it was adequate to allow the carrying out of an AA. It goes on to list items 'in particular' which the Board considered. This list inter alia did not include submissions regarding impacts on adjacent European Sites from an increase in wastewater loadings or the capacity of the Clareabbey WWTP. It then states 'in completing the Appropriate Assessment' the Board accepted and adopted the AA of the Inspector. It further states 'In overall conclusion, the Board was satisfied that the proposed development, by itself or in combination with other plans or projects would not adversely affect the integrity of European sites' and 'this conclusion is based on a complete assessment of all aspects of the proposed project and there is no reasonable doubt as to the absence of adverse effects'. I believe that ~~the Planning Authority,~~ the Inspector and the Board ignored submissions regarding unmonitored stormwater overflows and questioning the capacity of the Clareabbey WWTP and likely significant impacts it has on European Sites. In the original Planner's Assessment in application 20/781 reference is made to a previous adjacent planning application 07/798 which was refused permission. One of the reasons for refusal, stated in

the assessment, was that the Planning Authority was not satisfied that capacity exists at the Clareabbey WWTP. That was in 2007 and no development has occurred at the Clareabbey WWTP since to increase the capacity of the plant. I beg to refer to extracts from the Planner's Reports in application 20/781 and extracts from application 18/1004 which pinned together and marked with the letters and number 'MD2' I have signed my name prior to the swearing hereof.

8. There was no consideration, by ~~the Planner,~~ the Inspector or the Board in their Appropriate Assessments of the connection of all wastewater arising in the Clarecastle agglomeration which is being diverted to the Clareabbey plant. This is only one example of in-combination impacts on both the unmonitored stormwater overflow from the pump-station, additional loading on an already overloaded plant with consequential impacts on the discharge from the treatment plant directly to the SAC. Other planning permissions granted since 2006 are likely to be causing in-combination impacts on the SAC also. The Planning Authority recognised in 2006 that the Clareabbey WWTP was overloaded. While some ancillary works are on-going in that plant there is no additional capacity authorised to date. I beg to refer to an Irish Water press release which pinned together and marked with the letters and number 'MD3' I have signed my name prior to the swearing hereof.

9. There is absolutely no evidence that the Board carried out an AA, applied itself to readily available scientific data, or had all the available information before it to enable it 'in completing the Appropriate Assessment'. In the list of what it considered, it did not refer to submissions questioning the capacity of the Clareabbey WWTP or the unmonitored discharges from the associated pump-station. Among some of the readily available data, which was not considered by ~~the Planning Authority,~~ the Inspector or the Board, is copious information and data regarding the Clareabbey WWTP on the EPA licensing portal. This calls into question the impugned decision of the Board and, in particular, its statement that its 'conclusion is based on a complete assessment of all aspects of the proposed project'. For the avoidance of any doubt it is well settled that it is the duty of the decision maker, ~~whether the Planning Authority or the Board,~~ to fully inform itself using the best scientific information available in carrying out Appropriate Assessment without lacunae and not to simply depend ~~of~~ <u>on</u> information submitted by the Applicant in a Natura Impact Statement. The ~~Planning Authority's and the~~ Board's attention was drawn to this issue but neither had regard to the submissions and both failed to inform themselves of the readily available information. The Planning Authority ~~in particular failed in this regard as it was the body which~~ was aware of issues with capacity as far back as at least 2006 in relation to a planning application for an adjacent temporary wastewater plant 06/1754 (see discharge licence application in exhibit MD3) and a refusal of permission for another connection to the plant in 07/798 (exhibit MD2). It also more recently granted permission to Irish Water 18/1004 (exhibit MD2) for upgrade works to the inlet apparatus and a stormwater tank in which it clearly stated that there was no increase in the Population Equivalent or treatment capacity of the plant. I beg to refer to the Clare County Council discharge licence application to the EPA, Annual Environment Reports (AER's), a Site Visit Report (SVR), EPA Licence and amendment for the Clareabbey WWTP which pinned together and marked with the letters and number 'MD4' I have signed my name prior to the swearing hereof.

10. In section 3.1 of the Inspector's Report reference is made to 'conditions of note' in the Planning Authority's decision. Notwithstanding the illusionary concept of a statutory de novo assessment one of those conditions relates to details of the wastewater connection to the sewer. There is no reference to any wastewater connection in the decision of the Board and no reference linking the Board's decision with that of the Planning Authority or the conditions attached to it. Most importantly there is no reference in either decision to the connection conditioning specified by Irish Water in its prescribed body response. Given that it is a prescribed body it is intuitive that its response is of relevance and that regard, or even particular regard, should be had to it. Irish Water will require separate planning permission, including appropriate assessment of that application, for the conditioned discharge man-hole and gravity sewer because of its connectivity to European Sites. Therefore this subject proposal is classic project splitting as it cannot proceed without Irish Water having an extant planning permission for the connecting link and that prospect has not had Appropriate Assessment or proper Appropriate Assessment. There is no guarantee that Irish Water will receive such planning permission. I beg to refer to the Irish Water prescribed body response in the subject application which pinned together and marked with the letters and number 'MD5' I have signed my name prior to the swearing hereof.

11. In what is supposed to be a de novo assessment the Inspector commences with a recital of most of the conditions in the decision of the PA, including prescribed body submissions and 3rd party submissions. However in reference to planning history the

Inspector notably ignores a reference by the Planner to permission 07/798 (exhibit MD2) as discussed in paragraph 7 herein. That crucially contained a decision by the Planning Authority that it was not satisfied that the Clareabbey WWTP had adequate capacity. The Inspector either erred, or otherwise chose to ignore, the Planner's reference to this refused permission and the reasons for refusal. This inter alia created a lacuna in the Inspector's AA and precluded a decision.

12. In section 7.5.4 of the Inspector's report reference is made 'based on the information on the file' that Irish Water has 'no objection' to the proposal and that there is 'sufficient capacity' in the WWTP. Despite submissions to the contrary questioning this capacity and a paucity of regard to those submissions, a lack of acknowledgement of one of the reasons for refusal in 07/798, and lacunae in Appropriate Assessment to consider all impacts and/or in-combination impacts, the Inspector states that the development is connecting to a municipal wastewater treatment plant designed to cater for the urban settlement of Ennis and therefore is a reasonable arrangement. Clearly the infrastructural requirements of the urban settlement of Ennis have altered since this WWTP was designed in or about 1981. I have to date been unsuccessful in accessing design drawings and details for this plant which was initially built by the Local Authority as exempt development. However in its licence application (exhibit MD 4) in 2008, to the EPA, Clare County Council conceded that the plant was operating above the design capacity of 6,000 PE. In implicit mitigation it referred to a temporary private WWTP which had been granted permission with conditioning that a large proportion of the Clareabbey wastewater would be immediately diverted to the temporary plant upon commissioning. That temporary plant was never constructed yet Clare County Council continued to permit development in the catchment area to the present day without any extension of capacity in the plant.

13. The Inspector has fallen into the presumptive trap that municipalities carry out duties in accordance with rules and regulations. The first duty of the Inspector was to ensure, on the basis of the best scientific knowledge available, that this proposal, on its own or in-combination with other projects, is not likely to have significant impacts on European Sites. The Inspector and the Board manifestly failed to do so. ~~Without prejudice to the validity of the appeal in the first instance,~~ an appropriate assessment with lacunae precluded the making of an appeal decision.

14. Any reasonable consideration, and not necessarily a scientific assessment, of the Irish Water submission would recognise that there is absolutely no guarantee of capacity or indeed a connection to the municipal system. The coyness expressed subliminally in the Irish Water submission is tacit acknowledgement that there are capacity issues if highlighted and challenged. Therefore it is not correct to make a planning decision, or more importantly, provide an Appropriate Assessment determination, based on what was in that submission without at the very least further scientific enquiry. I again make the point that there was no consultation or reference to the EPA discharge licence portal or indeed the EPA itself regarding this application. The Planning Authority is on record of being aware of the Irish Water proposal to pipe all the wastewater arising in the Clarecastle agglomeration to the Clareabbey WWTP notwithstanding that it was not satisfied about the available capacity in 07/798 and has no evidence of such capacity since. In fact this Planning Authority recognised that this plant was operating above design capacity as far back as 2006 in planning application 06/1754 (exhibit MD4).

15. The Clareabbey plant is currently operating in breach of its discharge licence. An amendment to the licence in December 2021 required certain actions to be taken in respect of the Stormwater Overflow (SWO) associated with this plant at the Westfields pump station. There is no monitoring or measurement of volumes or frequency of discharges from this SWO. The EPA amendment to the licence was caused by a decision of the ECJ against Ireland for not managing such SWO's. In effect this SWO has operated as a pressure release valve when this plant was not capable of dealing with the flows. This is balanced by accelerating the volume of wastewater through the plant, reducing the residence time and reducing or eliminating appropriate treatment. Once sampling avoids such events they will never be discovered or highlighted. The physics are undeniable in that the volume of wastewater arriving at the Westfields pump station either passes through the plant, at whatever rate, or the excess is disposed through the unmonitored SWO. As can be seen from the ECJ Judgement this is not in accordance with the relevant European Directive. There was no appropriate assessment, or no proper appropriate assessment, of likely significant effects, either individually or in-combination with other projects, on adjacent European Sites with respect to the additional wastewater loading and/or cumulative or in-combination wastewater loadings, via the unmonitored stormwater overflow to the SAC or, via the discharge from the Clareabbey WWTP to the SAC. I beg to refer to the Judgement

of the ECJ in case C-427/17 which pinned together and marked with the letters and number 'MD6' I have signed my name prior to the swearing hereof.

16. I intend to file this statement and associated affidavit on Thursday 15th December 2022 and thereafter have the matter opened to comply with the 8 week rule in s. 50 of the Planning and Development Act as amended which falls on the 15th December. As a result of the decision on the 6th December in proceedings 2021/85 JR I had to compile this application since then. As a litigant in person I must travel to Dublin to stamp, file and open the application. It was impossible to do so within the current timelines associated with the Judicial Review Ex-Parte Monday list. Therefore if necessary I will make the case that this is good and sufficient reason and the circumstances that resulted in the failure to make the application for leave within the period mentioned were outside my control. (exhibit MD6)

~~17. In the premise I pray this Honourable Court for the reliefs sought herein.~~ [Unnecessary]"

33. An amended statement of grounds should be filed in accordance with the foregoing. It can be noted that insofar as factual references to the council are not being struck out, those are to be construed as informational and contextual and not as a basis for any complaint against the council.

34. It can also be noted that the orders being made on the leave applications mean that there is in fact no need to make any specific order on foot of the council's notice of motion.

Order

35. For the foregoing reasons, it is ordered that:

(i) leave be refused in the 2021 proceedings;

(ii) the council be struck out as a respondent from the 2022 proceedings and made a notice party;

(iii) leave be granted in part and refused in part in the 2022 proceedings as set out in the judgment, without prejudice to any point the opposing parties could have made at the leave stage, on the basis of an amended statement of grounds to be filed in accordance with the judgment within 2 weeks;

(iv) the amendments directed to be made arising from partial refusal of leave are without prejudice to any rights of the applicant to contend in any other forum that such refusal or amendment ought not to have been ordered;

(v) no order be made on foot of the council's notice of motion;

(vi) the originating notice of motion be issued within a further 2 weeks returnable for 9th October, 2022; and

(vii) unless any party applies otherwise by written legal submission within 7 days, the foregoing order be perfected forthwith on the expiry of that period on the basis of no order as to costs.