

THE HIGH COURT  
JUDICIAL REVIEW

2014 No. 518 J.R.

IN THE MATTER OF SECTION 50 AND 50A OF THE PLANNING AND DEVELOPMENT ACT  
2000

BETWEEN

ARDRAGH WIND FARM LIMITED

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

**JUDGMENT of Mr Justice Garrett Simons delivered on 22 November 2019**

**INTRODUCTION**

1. These judicial review proceedings seek to challenge a decision by An Bord Pleanála to refuse planning permission for a proposed wind farm. The proceedings are taken at the instance of the applicant for planning permission, Ardragh Wind Farm Ltd. (*“the Developer”*). The Developer had applied for planning permission for a development project consisting of the erection of five wind turbines and associated works at Ardragh at the western end of the Mealagh Valley in Cork (*“the proposed development”*). The proposed development would have had a total potential output of approximately 11.5 megawatts. As such, the proposed development exceeded the relevant threshold prescribed for wind farm projects under Schedule 5 of the Planning and Development Regulations 2001, and, consequently, was subject to environmental impact assessment (*“EIA”*) under Part X of the Planning and Development Act 2000 (*“the PDA 2000”*). Part X of the PDA 2000 gives effect to the Environmental Impact Assessment Directive (2011/92/EU) (*“the EIA Directive”*).
2. The principal ground of challenge advanced on behalf of the Developer is that An Bord Pleanála failed to carry out the requisite EIA. In the alternative, it is contended that if An Bord Pleanála did carry out an EIA, then the Board failed to give reasons for its decision and/or failed to properly record its assessment.
3. Before turning to consider the substance of the challenge, it should be observed that these proceedings have a number of unusual features. First, the decision under challenge is a decision to *refuse* development consent. Most challenges are taken against decisions to grant planning permission. The benefit to litigant who seeks to challenge a decision to grant planning permission is obvious, if the proceedings are successful then the development project cannot be carried out. It is far less obvious what benefit might be gained from a challenge to a refusal of planning permission.
4. Secondly, there has been inordinate delay in the prosecution of these proceedings. An Bord Pleanála’s decision was made on 8 July 2014, and these proceedings were initiated on 1 September 2014, i.e. within the eight-week time-limit prescribed under Section 50 of the PDA 2000. Thereafter, the proceedings were becalmed for a number of years. An application to have a hearing date fixed for the proceedings was not made until the end of February 2019, that is, some four and a half years after the proceedings had first been

instituted. On 26 February 2019, the parties applied, on consent, to have the matter listed for hearing in November 2019. The parties estimated that the hearing would take four days. A four-day hearing slot commencing on 5 November 2019 was duly allocated. In the event, however, the hearing only took a single day.

5. *I will return to consider the implications of this inordinate delay towards the end of this judgment as part of the discussion of the discretionary nature of judicial review.*
6. Thirdly, the legal context has changed since the proceedings were initiated more than five years ago. The Supreme Court delivered a landmark judgment on 17 July 2018 which clarified the legal requirements in respect of the carrying out of an EIA, *Connelly v. An Bord Pleanála* [2018] IESC 31; [2018] 2 I.L.R.M. 453. One consequence of the Supreme Court judgment is that the arguments which the Developer seeks to rely upon are no longer tenable.

#### **LEGISLATIVE REGIME AS OF JULY 2014**

7. An Bord Pleanála's decision was made on 8 July 2014. It is necessary, therefore, to consider the legislative regime as it stood at that date. (The PDA 2000 has been amended more recently to give effect to the revised EIA Directive (Directive 2014/52/EU). It is agreed that the Board's decision fell to be determined by reference to the previous version of the Directive).
8. The Developer's challenge is predicated largely on the effect of amendments introduced in October 2012. These amendments were necessary as a consequence of the judgment of the Court of Justice in Case C-50/09, *Commission v. Ireland*. The Court of Justice ("the CJEU") held that Article 3 is a fundamental provision of the EIA Directive, and that transposition of Articles 4 to 11 alone cannot be regarded as automatically transposing Article 3. The obligations created by Article 3 were summarised as follows in the judgment.  
  
*"36. Article 3 of Directive 85/337 makes the competent environmental authority responsible for carrying out an environmental impact assessment which must include a description of a project's direct and indirect effects on the factors set out in the first three indents of that article and the interaction between those factors (judgment of 16 March 2006 in Case C-332/04 Commission v Spain, paragraph 33). As stated in Article 2(1) of the directive, that assessment is to be carried out before the consent applied for to proceed with a project is given.*  
  
*37. In order to satisfy the obligation imposed on it by Article 3, the competent environmental authority may not confine itself to identifying and describing a project's direct and indirect effects on certain factors, but must also assess them in an appropriate manner, in the light of each individual case.*  
  
*38. That assessment obligation is distinct from the obligations laid down in Articles 4 to 7, 10 and 11 of Directive 85/337, which are, essentially, obligations to collect and exchange information, consult, publicise and guarantee the possibility of challenge*

*before the courts. They are procedural provisions which do not concern the implementation of the substantial obligation laid down in Article 3 of that directive."*

9. Case C-50/09 concerned the planning legislation as it stood prior to the Planning and Development (Amendment) Act 2010. The CJEU held that the pre-2010 Act version of the planning legislation did not properly transpose Article 3 of the pre-2014 version of the EIA Directive.
10. In response to the judgment in Case C-50/09, a series of amendments were made to Part X of the PDA 2000. These amendments were introduced by *inter alia* the European Union (Environmental Impact Assessment) (Planning and Development Act, 2000) Regulations 2012 (S.I. No. 419 of 2012) ("*the 2012 Regulations*").
11. The Developer places emphasis on the amended definition of "environmental impact assessment" under Section 171A(1) of the PDA 2000, which read as follows.

*"'environmental impact assessment' means an assessment, which includes an examination, analysis and evaluation,\* carried out by a planning authority or the Board, as the case may be, in accordance with this Part and regulations made thereunder, that shall identify, describe and assess in an appropriate manner, in light of each individual case and in accordance with Articles 4 to 11 of the Environmental Impact Assessment Directive, the direct and indirect effects of a proposed development on the following:*

- (a) human beings, flora and fauna,
- (b) soil, water, air, climate and the landscape,
- (c) material assets and the cultural heritage, and
- (d) the interaction between the factors mentioned in paragraphs (a), (b) and (c)."

\* Words in italics added by the 2012 Regulations.

12. Counsel on behalf of the Developer, Mr Michael O'Donnell, BL, submits that this section imposes an express obligation on An Bord Pleanála itself to carry out an EIA. The examination, analysis and evaluation must be evident from the Board's decision.
13. Counsel on behalf of An Bord Pleanála, Ms Nuala Butler, SC, has drawn attention to *other* aspects of the amendments introduced under the 2012 Regulations. In particular, counsel opened the following provisions which address, first, the Board's obligation to consider the adequacy of the environmental impact statement submitted with the planning application, and, secondly, the nature of the information to be made publicly available following the making of a decision to grant or to refuse planning permission.

"(1D) The planning authority or the Board, as the case may be, shall consider whether an environmental impact statement submitted under this section identifies and describes adequately the direct and indirect effects on the environment of the proposed development and, where it considers that the environmental impact

statement does not identify or adequately describe such effects, the planning authority or the Board shall require the applicant for consent to furnish, within a specified period, such further information as the planning authority or the Board considers necessary to remedy such defect.

- (1E) In addition to any requirement arising under subsection (1D), the planning authority or the Board, as the case may be, shall require an applicant for consent to furnish, within a specified period, any further information that the planning authority or the Board considers necessary to enable it to carry out an environmental impact assessment under this section.
- (1F) Where information required by the planning authority or the Board under subsection (1D) or subsection (1E) is not furnished by the applicant for consent within the period specified, or any further period as may be specified by the planning authority or the Board, the application for consent for the proposed development shall be deemed to be withdrawn.
- (1G) In carrying out an environmental impact assessment under this section the planning authority or the Board, as the case may be, shall consider—
- (a) the environmental impact statement;
  - (b) any further information furnished to the planning authority or the Board pursuant to subsections (1D) or (1E);
  - (c) any submissions or observations validly made in relation to the environmental effects of the proposed development;
  - (d) the views, if any, provided by any other Member State under section 174 or Regulations made under that section.
- (1H) In carrying out an environmental impact assessment under this section the planning authority or the Board, as the case may be, may have regard to and adopt in whole or in part any reports prepared by its officials or by consultants, experts or other advisers.
- (1I) Where the planning authority or the Board, as the case may be, decides to grant consent for the proposed development, it may attach such conditions to the grant as it considers necessary, to avoid, reduce and, if possible, offset the major adverse effects on the environment (if any) of the proposed development.
- (1J) When the planning authority or the Board, as the case may be, has decided whether to grant or to refuse consent for the proposed development, it shall inform the applicant for consent and the public of the decision and shall make the following information available to the applicant for consent and the public:
- (a) the content of the decision and any conditions attached thereto;
  - (b) an evaluation of the direct and indirect effects of the proposed development on the matters set out in section 171A;
  - (c) having examined any submission or observation validly made,

- (i) the main reasons and considerations on which the decision is based, and
  - (ii) the main reasons and considerations for the attachment of any conditions, including reasons and considerations arising from or related to submissions or observations made by a member of the public;
- (d) where relevant, a description of the main measures to avoid, reduce and, if possible, offset the major adverse effects;
  - (e) any report referred to in subsection (1H);
  - (f) information for the public on the procedures available to review the substantive and procedural legality of the decision, and
  - (g) the views, if any, furnished by other Member States of the European Union pursuant to section 174."
14. As appears, these legislative provisions chart a series of procedural steps which An Bord Pleanála must follow. Relevantly, these include an obligation to consider the adequacy of an environmental impact statement submitted with the planning application, and, if necessary, to request the applicant to submit such *further information* as the Board considers necessary to remedy any defect. The provisions then set out the relevant considerations to which regard must be had. Finally, the provisions set out the information which must be made available following the making of a decision to grant or refuse planning permission.
15. *Counsel for An Bord Pleanála submits that it is implicit from the statutory provisions which stipulate the information to be provided to the public at the time of the decision that the EIA does not necessarily have to be set out in full in the decision but rather can be provided separately, i.e. in the inspector's report. Sub-section 172(1J)(b) identifies an "evaluation of the direct and indirect effects of the proposed development" as part of the information to be provided. That this is enumerated separately from the planning decision is said to support an inference that this information can be provided in a different document, i.e. the inspector's report.*

#### **THE DEVELOPER'S CASE**

16. The grounds of challenge were narrowed at the hearing on 5 November 2019. Counsel on behalf of the Developer indicated that his client was not now pursuing the grounds in relation to the interpretation of the statutory development plan. In particular, grounds (e) (13) to (18) were withdrawn.
17. The Developer's case is striking in its simplicity. An Bord Pleanála is a "competent authority" for the purposes of the EIA Directive. An Bord Pleanála is under an express obligation to carry out an EIA in accordance with Sections 171A and 172 of the PDA 2000. This assessment must include an "examination, analysis and evaluation" of the direct and indirect effects of a proposed development on the environment. It is submitted that the carrying out of the requisite "examination, analysis and evaluation" must be evident from the Board's decision itself.

18. An Bord Pleanála's decision of 8 July 2014 does not, it is submitted, fulfil these statutory obligations. There is no reference in the curial or operative part of the Board's decision to its having carried out an EIA in respect of the proposed wind farm. Even if one considers the earlier Board Direction, there is, again, no reference to the carrying out of an EIA.
19. It is not sufficient, on the Developer's argument, that the Board Direction states that the Board decided to refuse permission "generally in accordance with" the inspector's recommendation. The court should not impute the assessment set out in the inspector's report to the members of An Bord Pleanála. To do so, it is said, would be to engage in "speculation". Rather, the only inference which could be drawn from the absence of an express reference, in either the Decision or the Direction, to the Board itself having carried out an EIA, is that the Board did not, in fact, carry out an EIA.
20. (A "Board Direction" is the initial document which records the determination on an appeal as taken at a meeting of the board members. That determination is subsequently embodied in a formal order or decision which is signed and sealed by a member of the Board. Both the Board Direction and the Decision are then made publicly available).
21. Counsel for the Developer, very properly, concedes that the legal position would have been different had either the Decision or Direction expressly stated that the Board had "carried out" or "completed" an EIA, and that it had "adopted" the inspector's assessment as set out in his report. This concession is well made given the established case law discussed at page 14, paragraphs 38 *et seq.* below. Counsel maintains the position, however, that in the absence of such an express statement, it would be "improper" and "impermissible" to speculate as to whether and on what basis an EIA might have been carried out by An Bord Pleanála.
22. In order to determine whether these arguments on behalf of the Developer are correct, it is necessary to rehearse the manner in which the appeal was processed by An Bord Pleanála. This is done under the next heading below.

#### **AN BORD PLEANÁLA'S PROCESSING OF THE APPEAL**

23. The appeal came before An Bord Pleanála by way of two third-party appeals. The first-instance decision of the local planning authority (Cork County Council) had been to grant planning permission.
24. As is normal practice, an employee of the board ("*the inspector*") had been assigned the role of reporting upon the appeal and preparing a recommendation. The board members are required to consider the report and recommendation. (Section 146 of the PDA 2000).
25. In the event, the inspector prepared two reports. The first report is dated 13 July 2012 ("*the first report*"). In this report, the inspector made, in effect, two alternative recommendations. This arose in circumstances where the inspector had identified what he considered to be a "number of deficiencies" in the environmental impact statement ("*EIS*") submitted on behalf of the Developer. The inspector also identified other areas where he considered further information would be required in order to adequately assess

the impacts of the proposed development. The inspector recommended that the Board could either (i) make a decision to refuse planning permission, by reference to what the inspector considered to be the significant negative impacts which the proposed development would have on the landscape and visual amenities of the area, or (ii) issue a request for further information. The inspector indicated a preference for the first option, and provided a draft form of wording for a decision to refuse planning permission. The inspector went on, however, to set out in detail the nature of the further information to be sought in the event of the Board deciding not to refuse planning permission at that stage. (See pages 45 and 46 of the inspector's first report).

26. The Board made a decision at a meeting on 13 December 2012 to serve a request for further information. Relevantly, the following information was sought in respect of the cumulative landscape and visual impacts of the proposed development.

“The submitted EIS and supporting documentation fails to adequately assess the cumulative landscape and visual impacts of the proposed development with other permitted and proposed wind energy developments, particularly those within the Mealagh Valley, at Barrboy to the east and seven turbines in respect of which planning permission has been granted at Derreenacrinnig West to the southeast of the site. A revised Landscape and Visual Impact Assessment should therefore be submitted taking into consideration these cumulative impacts.”

27. The response to the request for further information on behalf of the Developer was received by the Board on 14 October 2013. Crucially, this response was circulated to parties to the appeal and submissions were received from the third-party appellants.
28. The inspector then prepared a supplementary report dated 12 May 2014 (*“the second report”*). The second report sets out a revised environmental impact assessment of the impact of the proposed development, having regard to the response to the request for further information and the submissions received from the third party appellants. The inspector explained (at page 11 of the second report) that he continued to have concerns in respect of the landscape and visual impacts of the proposed development.

#### “4.2 Landscape and Visual Impacts:

The concerns expressed in my previous report in relation to the landscape and visual impacts of the proposed development related primarily to the cumulative impacts on the character of the Mealagh Valley. In this regard, the revised visual impact assessment notes that the proposal will be visible in conjunction with the permitted developments of Goulacullin (Barrboy) and Derreenacrinnig, “at widely disparate viewing angles within complex terrain”. It is stated that the “steep and meandering nature of the Mealagh River Valley aids the visual absorption of the modest scale wind farms that are located on the ridges above the valley.”

The submission is not accompanied by additional imagery. It is clear from documentation submitted with the planning application and at further

information stages, that the development will be visible in conjunction with other existing and permitted wind energy developments along almost the entire southern side of the Mealagh Valley. While I note the analysis submitted, I consider that the cumulative impact with other permitted development within the area would be significant adverse rather than medium as suggested. I do not consider that the succession or sequential nature of such views, as opposed to a combined view, significantly mitigates the landscape character impacts of the development. The concentration of three wind energy developments around this valley, notwithstanding their modest scale, would significantly alter and erode its character. In this regard, I remain of the opinion that the permission for the development should be refused for the reason previously recommended."

29. The inspector then set out his overall conclusion and recommendation as follows (at pages 12 and 13 of the second report).

"5.0 CONCLUSION AND RECOMMENDATION:

*I consider, based on the information submitted with the planning application and associated further information responses, and the information subsequently submitted to the Board in October 2013, that there is sufficient information before the Board on which to make a determination in this instance.*

I have previously raised concerns with regard to the overall landscape and visual impacts of the proposed development, particularly on the character of the Mealagh Valley, when taken in conjunction with other permitted developments in the area. I do not consider that the submissions received have addressed these concerns and remain of the opinion that permission should be refused on these grounds, as follows:

1. The Cork County Development Plan 2009 sets out policies and objectives in relation to wind energy development and identifies areas in broad strategic terms for the location and siting of such development, identifying "Strategic Search Areas" and "Strategically Unsuitable Areas". The overall strategic approach as set out in the said Development Plan is considered to be reasonable. The proposed development, which is not located within a "Strategic Search Area", is located immediately adjacent to areas designated as "Strategically Unsuitable Areas", considered generally to be unsuitable for wind energy projects and where such projects would normally be discouraged. The proposed development, which would itself be visible over a wide area, would in conjunction with permitted and proposed development in the area, give rise to an undue concentration of wind energy development with significant negative impacts on the landscape character and visual amenities of the area, and in particular the



Mealagh Valley, and its amenity, tourism and recreational potential. The proposed development would therefore be contrary to the proper planning and sustainable development of the area."

30. The Board, at a meeting held on 30 June 2014, made a decision to refuse planning permission. The decision is recorded in a Board Direction dated 2 July 2014 as follows.

"The submissions on this file and the Inspector's report were considered at a further Board meeting held on 30th, June 2014.

The Board, by majority of 2 1, decided to refuse permission generally in accordance with the Inspector's recommendation, for the reasons and considerations as set out below.

#### *REASONS AND CONSIDERATIONS*

The Cork County Development Plan 2009 sets out policies and objectives in relation to wind energy development and identifies areas in broad strategic terms for the location and siting of such development, identifying "Strategic Search Areas" and "Strategically Unsuitable Areas". The overall strategic approach as set out in the said Development Plan is considered to be reasonable. The proposed development, which is not located within a "Strategic Search Area", is located immediately adjacent to areas designated as "Strategically Unsuitable Areas", considered generally to be unsuitable for wind energy projects and where such projects would normally be discouraged.

The proposed development, which would itself be visible over a wide area, would in conjunction with permitted and proposed development in the area, give rise to an undue concentration of wind energy development with significant negative impacts on the landscape character and visual amenities of the area, and in particular the Mealagh Valley, and its amenity, tourism and recreational potential. The proposed development would, therefore, seriously injure the visual amenities of the area and be contrary to the proper planning and sustainable development of the area."

31. A formal order of the board was then prepared; and this order was signed and sealed on 8 July 2014 (*"the Decision"*).

#### **DETAILED DISCUSSION**

32. The single issue which falls for adjudication in these judicial review proceedings could hardly be narrower. It is whether the absence of an express reference, in either the Decision or Board Direction, to the carrying out of an environmental impact assessment renders the decision to refuse planning permission invalid. It is common case that the inspector carried out an EIA which, had it been expressly adopted by An Bord Pleanála, would meet the requirements under national law and under the EIA Directive.
33. The Developer makes no criticism of the EIA which had been carried out by the inspector and recorded in his two reports. Nor has there been any suggestion that the procedural

requirements under Part X of the PDA 2000 were not complied with. This is scarcely surprising: the Developer could have no grounds for criticising the procedure adopted in circumstances where the Board had given the Developer an opportunity—by way of the request for further information—to address its concerns in respect of the impact of the proposed development on the landscape and visual amenity of the area.

34. The Developer has not sought to challenge the finding that the cumulative effect of the proposed development with other wind energy development projects would have “significant negative impacts” on the landscape character and visual amenities of the area.
35. Rather, the Developer’s entire case turns on the highly formalistic argument that a planning decision must, at a bare minimum, expressly state that An Bord Pleanála “carried out” or “completed” an environmental impact assessment. Nothing less will do. If the board is relying upon its inspector’s report as evidencing the EIA, then the decision must state that the board “adopted” the inspector’s report.
36. Arguments along these lines have been rejected by the High Court in a series of cases dating from 2015. In each of these cases, the applicant for judicial review had sought to seize upon the literal wording of Section 172(1H) of the PDA 2000 to make an argument that An Bord Pleanála was required to state expressly that it had “adopted” its inspector’s report. The sub-section reads as follows.

“(1H) In carrying out an environmental impact assessment under this section the planning authority or the Board, as the case may be, may have regard to and adopt in whole or in part any reports prepared by its officials or by consultants, experts or other advisers.”
37. It will be recalled that Section 172(1H) had been introduced in October 2012 under the 2012 Regulations (S.I. No. 419 of 2012). At the time the within proceedings were instituted on 1 September 2014, the argument that an inspector’s report had to be formally “adopted” was still a novel one, and had not yet been the subject of a reserved judgment of the High Court. Unfortunately for the Developer, however, one consequence of the leisurely pace at which these proceedings have been pursued is that, by the time the case eventually came on for hearing on 5 November 2019, the argument had no life left in it.
38. The relevant case law includes the following: *Buckley v. An Bord Pleanála* [2015] IEHC 572; *Ahearne v. An Bord Pleanála* [2015] IEHC 606; *Dunnes Stores v. An Bord Pleanála (Square Tallaght)* [2016] IEHC 226; and, most recently, *Redrock Developments Ltd. v. An Bord Pleanála*, unreported, High Court, Faherty J., 21 October 2019. In each of these cases, a formula of words which fell short of An Bord Pleanála formally “adopting” the inspector’s report was held to be sufficient.
39. The approach taken in these judgments can be illustrated by the following passages from *Buckley v. An Bord Pleanála*.

"117. On the facts of the present case, it is clear that the inspector carried out an Environmental Impact Assessment. Indeed the Applicant accepts that were this 'adopted' by the Board then its argument would fall away. In circumstances however, where the Board in its decision, at the very outset, stated that it decided to grant permission 'generally in accordance with the inspector's recommendations for the following reasons and considerations and subject to the following conditions' and that it had regard to 'the report of the inspector' and that it adopted all 25 conditions in the Inspector's Report, I am of the view that it is clear that the Board did 'adopt' the Inspector's Report and carry out an appropriate EIA in accordance with its statutory obligations.

118. I would therefore conclude that the Applicants' submission in this regard is not well founded."

40. The language employed by An Bord Pleanála in the decision under review in *Buckley* resonates with that of the decision the subject matter of these proceedings. In each instance, the decision was made "generally in accordance with" the inspector's recommendation. Moreover, again as in *Buckley*, it is accepted by the applicant for judicial review that had An Bord Pleanála formally "adopted" the two inspector's reports, this would have represented proper compliance with the requirements of Part X of the PDA 2000.
41. Counsel on behalf of the Developer has sought to distinguish this line of case law on the basis that in those cases the planning decision under review had included a statement to the effect that the Board had "completed" an environmental impact assessment.
42. With respect, this argument is incorrect in point of fact and of law. In at least one of the judgments, *Redrock Development Ltd v. An Bord Pleanála*, the planning decision did not include any such formula. See, in particular, paragraphs [120] to [124] of the judgment. Notwithstanding this, the High Court (Faherty J.) held at [137] that An Bord Pleanála had discharged its statutory function in conducting an EIA.

"The first thing to be noted is that the rEIS submitted with the substitute consent application was comprehensively addressed in the Report of the Inspector. Secondly, the Board specifically states in its Decision that it decided to refuse the substitute consent application generally in accordance with the Inspector's recommendation and for the reasons and considerations set out in the Decision. Thirdly, the Board's Direction clearly refers to the rEIS. Fourthly, both the Board's Direction and Decision reference matters which were canvassed in the rEIS. By and large, the Board's reason for refusal of substitute consent replicates the Inspector's first recommended reason for refusal. The Inspector's first recommended reason for refusal clearly followed upon his appraisal of the rEIS which accompanied the substitute consent application. To my mind, all of those factors lead to the undoubted conclusion that the Board conducted the requisite EIA."

43. A similar commonsense analysis is to be found in each of the cases. The courts apply a pragmatic approach to the interpretation of planning decisions. The absence of a particular form of words such as, for example, “the board adopted the inspector’s report” or “the board completed an environmental impact assessment” is not necessarily fatal to the validity of a planning decision. Rather, the decision, as with any planning document, must be read as a whole. If it is evident that the members of the Board accepted the approach in the inspector’s report, then it is legitimate to regard the assessment set out in the inspector’s report as representing the EIA as adopted by the Board. It is not necessary for An Bord Pleanála to replicate the content of same in the formal decision.
44. The case law of the High Court discussed above has, to an extent, been eclipsed by the landmark judgment of the Supreme Court in *Connelly v. An Bord Pleanála* [2018] IESC 31; [2018] 2 I.L.R.M. 453. The judgment in *Connelly* is now the leading authority on the duty to give reasons. I turn to consider this judgment under the next heading below.

#### **CONNELLY V. AN BORD PLEANÁLA**

45. The unanimous judgment of the Supreme Court in *Connelly v. An Bord Pleanála* [2018] IESC 31; [2018] 2 I.L.R.M. 453 (“*Connelly*”) was delivered by Clarke C.J. The Chief Justice identified two purposes which a duty to state reasons serves, as follows. First, to enable a person affected by the decision to understand why a particular decision was reached. Secondly, to enable a person to ascertain whether or not they have grounds upon which to appeal the decision (where an appeal lies) or to seek judicial review.
46. Having identified the purpose of the duty to give reasons, the court was then able to formulate the legal requirements against which the adequacy of reasons may be tested. First, any person affected by a decision is entitled to know in general terms why the decision was made. This requirement derives from the obligation to be fair to individuals affected by binding decisions, and also contributes to transparency. Second, a person is entitled to have enough information to consider whether they can or should seek to avail of any appeal or to apply for judicial review of a decision. The reasons provided must also be such as to allow a court hearing an appeal or reviewing a decision to engage properly in such an appeal or review.
47. The aspect of the judgment in *Connelly* of most immediate relevance to the present case is, of course, the discussion of what surrounding documentation can be relied upon in identifying the reasons for an administrative decision. The Supreme Court indicated that, in principle, the reasons for a decision may be derived in a variety of ways, either from a range of documents or from the context of the decision, or in some other fashion. This is subject always to the requirement that the reasons must actually be ascertainable and capable of being determined.
48. As with the present case, the proceedings in *Connelly* also involved a challenge to a decision of An Bord Pleanála to grant planning permission in respect of an EIA project. The Supreme Court accepted, in principle, that in assessing the adequacy of reasons, it was appropriate to have regard not only to An Bord Pleanála’s formal decision, but also the report prepared in respect of the planning appeal by an inspector employed by An

Bord Pleanála. The inspector's report is made available to the public at the same time as the Board's decision is notified. The Supreme Court further accepted that it might also be appropriate to have regard to the documentation accompanying the planning appeal, including documentation submitted by the applicant for planning permission, i.e. the proposed developer.

49. The judgment indicates that it would be preferable in all cases if An Bord Pleanála made expressly clear whether it accepts all of the findings of its inspector or, if not so doing, where and in what respect it differs. Failure to do so is not, however, necessarily fatal if in the circumstances it is possible to reach a significantly clear inference as to what the board thought in that regard.

"9.6 In that context it does seem to me to be worth saying that it would be preferable in all cases if the Board made expressly clear whether it accepts all of the findings of an inspector or, if not so doing, where and in what respect it differs. It may be possible, in certain circumstances, to reach a significantly clear inference as to what the Board thought in that regard but it would be better if the matter were put beyond inference and were expressly stated.

9.7 Where the Board differs from its inspector then there is clearly an obligation for the Board to set out the reasons for coming to that conclusion in sufficient detail to enable a person to know why the Board differed from the inspector and also to assess whether there was any basis for suggesting that the Board's decision is thereby not sustainable. But where, as here, a further process intervenes between an inspector's report and the final decision of the Board then it is obvious that that further process was designed to ascertain whether the concerns set out in the inspector's report and accepted by the Board could be met by further information. In essence, the general reasons issue in this case comes down to one of assessing whether the Board has given adequate reasons for being satisfied that the initial concerns expressed in the inspector's report, and which would appear to have found favour with the Board at least on a prima facie basis, had been adequately dealt with by the additional information, including the NIS supplied.

9.8 It seems to me, therefore, that the reasons for the Board's development consent decision in this case can, at a minimum, be found in the inspector's report and the documents either expressly or by necessary implication referred to in it, the s.132 notice and the further information and NIS subsequently supplied, as well as the final decision of the Board to grant permission including the conditions attached to that decision and the reasons given for the inclusion of the conditions concerned.

9.9 Any interested party will have had access to all of that documentation. If the reasons for the Board's decision can be reasonably ascertained from that documentation, then, at least so far as national law is concerned, the requirement to give reasons will be met because any interested party (including a person who has standing but who was not involved in the planning process before the Board) will be able to assess whether adequate reasons have been given or whether there

might be grounds for challenging the decision of the Board. Insofar as the High Court judgment suggests that the reasons for the Board's decision cannot be sufficiently identified, I would reverse the judgment."

50. The Supreme Court addressed the specific requirements in relation to the reasons for an environmental impact assessment at page 481/482 of the report.

"11.4 It follows that, while the general principle remains the same, there is an additional requirement in a case to which the EIA regime applies to the effect that the decision must be sufficiently clear to enable any interested party to consider whether they may have grounds to challenge the decision on the basis that it might be contended that an adequate EIA had not been conducted.

11.5 In that context, it is important to note that the EIA regime does not require any particular result to the relevant process but rather is concerned with the process itself. It requires a particular assessment to be carried out and, by necessary inference, that a sustainable permission only be granted where that assessment is favourable to the grant of the permission concerned. It follows that, amongst the reasons which need to be given, there must be included the basis on which the assessment required under the EIA regime leads to the conclusion that a permission can be granted. That in turn requires that the decision, or other relevant and connected materials available to any interested party, must demonstrate that an EIA was carried out and that the decision maker properly had regard to the results of the EIA in coming to its conclusion.

11.6 Against that background it is necessary to look at the decision. It is clear that the inspector's report sets out the analysis of the matters which the inspector considered necessary in the context of an EIA. But it is also clear that an additional assessment was carried out both by the Board in considering the inspector's report, again by the Board in requiring additional information including an NIS and finally by the assessment of the Board of the overall situation in the light, amongst other things, of that additional information.

11.7 In those circumstances it does not seem to me that it can be said that there is inadequate information to allow a party to assess whether a proper EIA has been carried out. Any interested party can identify the issues which were addressed in the inspector's report, in the additional information and in the Board's final assessment. If there is a case to be made that material issues were not assessed then an interested party has access to adequate information to enable them to mount such a case. In my view it follows that the information and reasons given are adequate to permit any interested party to mount a challenge based on a contention that a proper EIA was not carried out. Such a party knows the matters that were assessed and, for the reasons already analysed, knows why the result of that assessment was as set out in the decision. So far as information and reasons are concerned that is sufficient to meet the legal requirement. Insofar as the High Court judgment found otherwise I would reverse the judgment."

## **FINDINGS OF THE COURT**

51. The legal test as per *Connelly* is that the planning decision, *or other relevant and connected materials available to any interested party*, must demonstrate (i) that an EIA was carried out, and (ii) that the decision-maker properly had regard to the results of the EIA in coming to its conclusion.
52. Applying these principles to the facts of the present case, I am satisfied, first, that it is appropriate to read the formal board decision in conjunction with the inspector's report; and, secondly, that the recording of the EIA and the reasons for the decision to refuse planning permission by reference to the significant negative impacts of the proposed development are to be found in these materials. I elaborate upon these points below.
53. Under Section 172(1D) of the PDA 2000 (set out earlier), An Bord Pleanála is obliged to consider whether an environmental impact statement ("*EIS*") submitted by a developer identifies and describes adequately the direct and indirect effects on the environment of the proposed development, i.e. the Board is obliged to appraise the adequacy of the EIS. It will be recalled that the inspector, in his first report, had put forward an option of making a request for further information. The purpose was to address inadequacies in the EIS. The Board chose this option at their meeting in December 2012, and duly issued a request pursuant to Section 132 of the PDA 2000. The request for further information was in almost identical terms to that recommended by its inspector.
54. It is evident from this sequence of events that both the inspector and the members of An Bord Pleanála were not only cognisant of the fact that the proposed development was subject to mandatory EIA, but also were taking active steps in order to ensure that the assessment was properly carried out.
55. The further information was then subject to a second report by the inspector, and the inspector recommended that planning permission be refused because of the cumulative impact on landscape and visual amenity.
56. The Board Direction expressly states that the Board decided to refuse permission "generally in accordance with" the inspector's recommendation for the reasons and considerations set out. There then followed a formal statement of the "reasons and considerations". The content of this formal statement of "reasons and considerations" is precisely the same as that recommended by the inspector in his second report.
57. There can be no doubt, therefore, but that the Board was adopting the same approach as its inspector. Section 172(1H) of the PDA 2000 expressly envisages that the Board may adopt the EIA carried out in an inspector's report. The High Court case law discussed earlier indicates that it is not necessary to use the term "adopt" in order to achieve this. Rather, the court will take a common sense approach to the interpretation of the planning decision.
58. The Board's Decision to refuse planning permission is framed in language which can only be understood as referable to the carrying out of an EIA. More specifically, planning

permission was refused by reference to the cumulative impact of the proposed development and its significant adverse effect on the landscape and visual amenity. The requirement to take into account the *cumulative effect* of a proposed development project, i.e. the environmental impact of that project when considered with other existing and proposed development projects, is a concept directly referable to the EIA Directive.

59. An informed participant—which is the relevant test as per *Connelly*—would have immediately understood from reading the inspector’s two reports; the Board Direction; and the Board Decision that the Board agreed with and accepted the inspector’s recommendation to refuse planning permission precisely because of the significant negative impact it would have on the environment. The requirements of the EIA Directive were fulfilled. The Board made a decision, informed by the EIS and further information submitted by the Developer, and following public consultation, to refuse planning permission because the proposed development would have had a significant negative impact.
60. Counsel on behalf of the Developer submitted that it would be improper and impermissible to impute the inspector’s assessment to the members of An Bord Pleanála. To do so, it was suggested, would require the court to engage in “speculation”. With respect, this submission is untenable. The only rational and logical inference to draw from the materials, and the history of the processing of the appeal, is that An Bord Pleanála had been cognisant of its obligation to carry out an EIA and had done so. It would be *perverse* for this court to draw the opposite conclusion and to decide, in effect, that having taken the time and trouble of serving a request for further information and obtaining a second inspector’s report, the members of An Bord Pleanála thereafter entirely overlooked the requirement to carry out an EIA.

#### **DISCRETIONARY FACTORS**

61. For the reasons set out above, I have concluded that the challenge to the decision of An Bord Pleanála cannot succeed on the merits. For the sake of completeness, I should state that even if I had found for the Developer on the merits, I would have refused to set aside the Board’s Decision in the exercise of the court’s discretion.
62. It is well established that judicial review is a discretionary remedy. A court, in the exercise of its discretion, may decide to withhold relief from an otherwise entitled applicant. The court is not, of course, at large in this regard. There must be a reasoned basis for the exercise of discretion. The type of factors which might be considered include *inter alia* the conduct of an applicant, delay, the existence of an adequate alternative remedy or that the grant of relief would serve no useful purpose.
63. I would have refused to grant relief in this case on the basis of the last of these factors, namely that to do so would serve no useful purpose. As observed at the outset of this judgment, these proceedings are unusual in that they seek to challenge a decision to *refuse* development consent. Such proceedings are normally only ever brought in order to clarify *an issue of principle* which might affect the reconsideration of the planning application. A recent example of proceedings with this purpose is provided by *Element*



*Power Ireland Ltd v. An Bord Pleanála* [2017] IEHC 550. Those proceedings presented an issue of principle as to whether An Bord Pleanála is entitled to refuse planning permission on the basis that it would be premature to grant permission in the absence of a national wind energy strategy with a spatial dimension. The resolution of this issue of principle would be of obvious benefit to the developer who had been refused planning permission. If, as ultimately transpired, the court were to hold that An Bord Pleanála was not entitled to refuse planning permission on this basis, then the matter could be remitted to the Board to be reconsidered by reference to the legal position as clarified by the judgment.

64. By contrast, the within judicial review proceedings do not present any issue of principle. The proceedings simply allege a procedural error on the part of the Board in recording an EIA. The Developer never sought to suggest that the substance of the decision was incorrect nor that the inspector's assessment was erroneous. It is not at all obvious as to what benefit even a favourable ruling would have had for the Developer. An order of this court setting aside An Bord Pleanála's decision as invalid would not, for example, have the legal effect of reviving the planning authority's first-instance decision to grant planning permission. See *McCallig v. An Bord Pleanála (No. 1)* [2013] IEHC 60, [86]. Nor would the judgment have provided guidance for future decision-making.
65. Moreover, as a direct consequence of the delay in prosecuting these proceedings, this is not a case where it would have been appropriate for the court to have made an order, pursuant to Order 84, rule 27(4) of the Rules of the Superior Courts, remitting the planning appeal to An Bord Pleanála for further consideration. Rather, any order would have been confined to one setting aside the decision to refuse planning permission *simpliciter*. If the Developer wished to obtain planning permission, it would have to make a *fresh* application to the local planning authority. This is something that could have been done in any event, without recourse to the courts.
66. The reason that remittal would have been inappropriate is that it would be contrary to the spirit of the EIA Directive, with its requirement for timely decision-making and effective public participation, to revive a planning appeal which had been determined more than five years ago. This is especially so where the legal provisions governing the carrying out of EIA have been amended in the interim. The amendments made to the EIA Directive by Directive 2014/52/EU came into effect on 16 May 2017. The transitional provisions indicate that, in certain circumstances, consent applications which were pending before that date fall to be determined by reference to the old legislative regime. It would have been contrary to the spirit of those transitional provisions to have remitted the planning application the subject-matter of these proceedings to An Bord Pleanála. To do so would have had the effect that the Developer would have the benefit of the old rules in respect of a consent application which, in effect, would be made some two and a half years *after* the implementation date for Directive 2014/52/EU.
67. It would also be contrary to the general approach adopted under the PDA 2000. The legislation indicates that a planning appeal should ideally be determined within a period of eighteen weeks. The legislation also provides that a planning permission must normally

be implemented within five years of the date of grant. It would be entirely inconsistent with these timeframes to revive a planning appeal which had first been made to An Bord Pleanála on 10 April 2012.

68. Finally, relief by way of judicial review would also have been refused on the basis that the Developer has failed to put forward even an arguable case for saying that the outcome of the decision-making before An Bord Pleanála might have been different had the (allegedly omitted) EIA been carried out. Whereas an applicant for judicial review is not, of course, required to establish that a breach of procedure has affected the substantive outcome of the decision-making (Case C 72/12, *Altrip*), there is nevertheless a minimum standard which must be met. In many objector-led cases, the argument will be that had the competent authority carried out a proper EIA, then this would have disclosed some environmental impact which might have led to the refusal of development consent.
69. On the facts of the present case, conversely, the Developer has not sought to challenge the finding that the proposed development would have a “significant negative” impact on the landscape character and visual amenity. Nor is this a case where a party argues that they were not given an opportunity to make submissions on a point. As the procedural history outlined earlier indicates, An Bord Pleanála afforded the Developer an express opportunity to address its concerns in relation to the impact on landscape character and visual amenity, by way of a request for further information.
70. The height of the Developer’s case is that the Board determined the planning appeal by reference solely to the national law test of “proper planning and sustainable development”, and failed to assess the significant impacts of the proposed development in accordance with the EIA Directive. Even if this analysis were correct—and I have concluded it is not—there is simply nothing before the court which suggests that a different outcome would have followed for the planning appeal. The Board’s finding that the development would have a significant negative impact on landscape character and visual amenities of the area is self-evidently one which would have informed the conclusion of any EIA process.

#### **CONCLUSION AND FORM OF ORDER**

71. The application for judicial review is dismissed. I will hear counsel on the question of costs, and, in particular, on whether the proceedings are subject to the special costs rules applicable to certain types of environmental litigation under Section 50B of the PDA 2000.