THE HIGH COURT

JUDICIAL REVIEW

[2020 No. 44 JR]

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

AND IN THE MATTER OF THE PLANNING AND DEVELOPMENT (HOUSING) AND RESIDENTIAL TENANCIES ACT, 2016

BETWEEN

PROTECT EAST MEATH LIMITED

APPLICANT

AND

AN BORD PLEANÁLA, THE MINISTER FOR HOUSING, PLANNING & LOCAL GOVERNMENT, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

RAVALA LIMITED AND LOUTH COUNTY COUNCIL

NOTICE PARTIES

JUDGMENT of Mr. Justice Denis McDonald delivered on 19th June, 2020

The issue before the court

1. The issue which I am required to determine at this stage of the proceedings is whether the first named notice party (*"Ravala")* should be entitled to continue to defend these proceedings notwithstanding that the first named respondent *("the Board")* is prepared to consent to an order of *certiorari* quashing its decision of 27th November, 2019 by which planning permission was granted for the construction of 450 dwelling units and associated office space, crèche and associated site works on lands south of Marsh Road, Drogheda, County Louth. The development in question constitutes a strategic housing development under the Planning and Development

(Housing) and Residential Tenancies Act, 2016 *("the 2016 Act"*). Under the 2016 Act, applications for permission in respect of strategic housing developments are made directly to the Board.

Relevant facts

2. By an order made by Simons J. on 23rd January, 2020, the applicant was given leave pursuant to O.84 r.20 of the Rules of the Superior Courts and s. 50 of the Planning and Development Act, 2000 (*"the 2000 Act"*) to apply, by way of an application for judicial review, for an order of *certiorari* of the Board's decision of 27th November, 2019 granting permission for the development described in para. 1 above together with the balance of the relief claimed in Part D of the applicant's statement of grounds.

3. The proceedings were subsequently served on the respondents and the notice parties. By letter dated 18th February, 2020 the solicitors acting on behalf of the Board wrote to all parties to confirm that the Board would consent to an order of *certiorari* on the following grounds:-

> *"The Board accepts that in light of the recent decision of the Board dated 11th February, 2020 in case ABP-305703-19, and in particular the treatment of the impact of that proposed development on Boyne Estuary SPA, the Board erred in law in this case by screening out significant effects on the Boyne Estuary SPA and that there was not sufficient evidence before the Board to reach such a conclusion".*

4. This concession on the part of the Board must be read against the backdrop of the case made in the statement of grounds with regard to the Boyne Estuary SPA *("the SPA"*). The qualifying interests of the SPA include Lapwing. Because of the proximity of the development site to the SPA (and to a number of other Natura sites)

Ravala had submitted a screening report for appropriate assessment to the Board in July 2019. The report referred to a site visit conducted on 24th May, 2018. In its statement of grounds, the applicant complained that the report did not contain any consideration of *ex-situ* impacts on birds and the applicant also complained that no survey effort of any sort was undertaken to establish if the qualifying interests in the SPA utilised the development site for foraging purposes. This was raised by the applicant in its submission to the Board in response to the application for development consent. The submission also noted that potential impacts from increased anthropogenic disturbance had not been assessed. As I understand it, the reference to anthropogenic disturbance relates to disturbance of the environment resulting from human activity. In its submission, the applicant also referred to the fact that the Board had refused permission (ref 302948) for a nearby proposal for the change of use of a golf driving range to a tourist campsite in Mornington, County Meath on 23rd April, 2019 on the basis, *inter alia*, that the developer had failed to assess the *ex-situ* impacts on the SPA. It should be noted that the Board's decision to refuse permission in respect of that development (namely decision ref. 302948) relates to a different development to that described in the Board's solicitor's letter of 18th February, 2020 (quoted in para. 3 above) namely the decision of 11th February, 2020 in case ABP-305703-19. The latter decision post-dates the commencement of these proceedings and it does not, therefore, feature in the applicant's case.

5. In its statement of grounds, the applicant made the case that the Board was not entitled to screen out the possibility of significant effects on the SPA in circumstances where (on the case made by the applicant) no survey work had been undertaken to establish whether, when and to what intensity the development site is utilised by the qualifying interests of the SPA, in particular Lapwing. The applicant also referred to

surveys carried out by the National Parks and Wildlife Service ("*NPWS")* which the applicant claimed showed significant concentrations of Lapwing foraging in the area of the SPA closest to the development site. In its statement of grounds, the applicant referred to the note prepared by the in-house ecologist which referenced the possibility of anthropogenic disturbance and e*x-situ* impacts. In relation to that issue, the ecologist had noted that the introduction of 450 units could result in increased numbers of people seeking safe areas for recreational walking including dog walking but that the area of the SPA in closest proximity to the proposed development had not been identified as subject to disturbance pressures. The ecologist noted that the area was therefore *"unlikely to be used by numbers of recreational walkers or new residents walking dogs that could have any measurable effect on the adjacent SPA".* In paras. 25 and 26 of the statement of grounds, the applicant criticised the approach taken by the ecologist (and subsequently by the inspector and the Board itself). The applicant contended that the Board was not entitled to screen out the possibility of significant effects via anthropogenic disturbance or e*x-situ* effects in circumstances where *(inter alia)* there was no assessment as to whether and to what extent the proposed development will lead to increased disturbance from walkers, dogs and cyclists. The applicant complained that the ecologist had no survey information and therefore no scientific evidence upon which she could possibly have determined the magnitude of any such disturbance. It was claimed that this was all the more significant in circumstances when this type of disturbance and loss of *ex-situ* feeding sites had been specifically identified by the NPWS. In addition, it was contended that the ecologist had conducted no qualitative analysis of the alternative alleged available sites to assess their suitability in terms of size, level of anthropogenic disturbance, fragmentation, food resource and ecological resource. The applicant contended that

the conclusions were no more than expressions of hope on the part of the ecologist and that they could provide no basis upon which the Board could have been satisfied, at the screening stage, that any displaced avifauna would have equivalent foraging capacity available to them and would not be subject to anthropogenic interference and would suffer no significant adverse effect from disturbance response relocation.

6. Subsequent to the letter of 19th February, 2020, the matter was listed before me in the Strategic Infrastructure Development Infrastructure list on 20th February, 2020 when Ravala requested time to consider the concession made by the Board. On 26th February, 2020, Arthur Cox, the solicitors then acting on behalf of Ravala wrote to the Board in the following terms:-

> *"We confirm that we are instructed to apply to the Court for an order remitting the matter to the Board. We note that the basis of concession relates to issues arising under the Habitats Directive and, in particular, to an insufficiency of information to allow the Board to screen out the likelihood of significant effects on … the Boyne Estuary SPA. You will be aware that under sections 177U and 177V of the Planning and Development Act, 2000 … your client has a power to request … such further information as it considers necessary to carry out screening for appropriate assessment and appropriate assessment respectively, and there is no statutory preclusion on the exercise of such power in the context of applications for planning permission for Strategic Housing Development. Accordingly, our client is seeking remittal with a view to allowing the Board an opportunity to make such request for further information as it considers appropriate and/or necessary for the purposes of carrying out its functions pursuant to Article 6 (3) of the Habitats Directive".*

7. On 27th February, 2020, the matter was listed before me again in the Strategic Infrastructure Development list when the matter was adjourned, again at Ravala's behest, to 12th March, 2020. In the meantime, on 6th March, 2020, the Board responded to Arthur Cox stating that if the matter were remitted, it would not exercise its discretion to seek additional information. The Board noted that the 2016 Act did not contain a provision similar to ss. 131 to 133 of the Planning and Development Act, 2000 (*"the 2000 Act"*) thus giving rise to concern about the ability of the Board to fairly and effectively manage the submission of additional information and its consequences. On 10th March, 2020 the applicant wrote to the Board and to Ravala indicating its view that remittal was not an appropriate option. Thereafter on 11th March, 2020, Arthur Cox wrote to the parties indicating that it was seeking to adjourn the matter for three additional weeks to allow Ravala to consider its position. The applicant's solicitors responded on 12th March, 2020 to suggest that it was inappropriate that the matter should be adjourned for such a lengthy period given that proceedings in the Strategic Infrastructure Development list were intended to be fast-tracked.

8. Subsequently, the matter was listed before me in the Strategic Infrastructure Development list on 12th March, 2020 when a new firm of solicitors acting on behalf of Ravala, McCann Fitzgerald, sought time to make submissions in support of an application to continue to defend the proceedings notwithstanding the approach proposed by the Board. I directed that written submissions should be exchanged.

The case made by Ravala

9. Short written submissions were delivered on behalf of the applicant on 17th March, 2020. In those submissions, Ravala drew attention to the significant body of case law which has recognised the right of the holder of a planning permission to be

heard in opposition to a judicial review challenge to that permission. Among the authorities cited by Ravala is the decision of the Supreme Court in *O'Keeffe v. An Bord Pleanala* [1993] 1 I.R. 39 where the Supreme Court joined the beneficiary of the planning permission as a party to the judicial review proceedings in that case. Ravala also referred to the long line of authority (which includes *McIlwraith v. Judge Fawsitt* [1990] 1 I.R. 343) where the courts have accepted that, in certain circumstances, the *legitimus contradictor* in judicial review proceedings may be someone other than the respondent decision-maker.

10. Ravala also referred to a number of decisions where a notice party has been allowed to defend a decision notwithstanding that the decision-making body had either conceded the case or had not defended the case. These include *Pearce v. Westmeath County Council* [2016] IEHC 477 where the owner of a quarry was allowed to defend a decision notwithstanding that the respondent County Council did not file any statement of opposition; *Hunter v. Environmental Protection Agency* [2013] IEHC 591 where, according to Ravala, a holder of a waste licence was permitted to defend a decision of the EPA notwithstanding that the EPA had conceded the case at an early stage; and *Boland v. Valuation Tribunal* [2017] IEHC 660 where, according to Ravala, the Commissioner of Valuation was allowed, as a notice party, to defend a decision that the respondent tribunal did not seek *"to stand over".* Ravala made the case that it would suffer an injustice if it was not allowed to defend the proceedings. In the first place, it argued that the concession made by the Board relates to the sufficiency of the evidence (in particular the bird survey work) put before the Board by Ravala. It was submitted that the concession therefore comprises "*an indirect criticism of the Developer and the work done by ecologists and other professionals that contributed to the application made. Those professionals have not*

been heard". In addition, Ravala argued that the burden of proof is on the applicant and that Ravala should be entitled to an opportunity to persuade the court to form a different view of the applicant's case to that formed by the Board.

The response of the other parties

11. The solicitors acting on behalf of the Board and on behalf of the applicant responded to the effect that the court could not properly reach a conclusion in relation to the application of Ravala without sight of Ravala's intended opposition papers. In addition, very helpful written submissions of counsel were made available to the court by the solicitors acting on behalf of Louth County Council *("the Council")* which identified a number of relevant authorities and also took issue with the way in which Ravala had characterised the decisions cited in para. 10 above.

12. In light of the observations made on behalf of the Board and the applicant, by order made by me on 19th March, 2020 I directed Ravala to serve a draft notice of opposition and supporting affidavits and I gave liberty to all parties to thereafter file written submissions by email. In giving those directions, I explained that, in order to resolve the issue as to whether Ravala should be allowed to continue to defend these proceedings notwithstanding the concession by the Board that its decision should be quashed, it was essential that Ravala should set out the factual basis on which it contends that the claim made by the applicant can be defended. For reasons which it is unnecessary to record here, there was some delay on the part of the solicitors for Ravala in preparing the draft statement of opposition and affidavits but ultimately those documents were circulated to all parties by email of 21st April, 2020. It should also be noted, for completeness, that, in light of the restrictions arising as a result of the ongoing Covid-19 pandemic, each of the parties agreed that this issue could be

determined by the court solely on the basis of the written observations submitted by the parties.

The grounds on which Ravala seeks to defend the screening decision of the Board

13. In the draft statement of opposition circulated in April 2020, Ravala confined itself to the issue which arises in relation to the screening assessment in the context of the SPA. For completeness, it should be noted that Ravala opposes the balance of the grounds on which the applicant seeks relief in these proceedings but, for the purposes of the present application, it confines itself to the screening issue. In its statement of opposition (and in the supporting affidavits) Ravala took issue with the characterisation of the survey completed on 24th May, 2018. Ravala contended that the survey was carried out in accordance with best practice methodology and was undertaken during the optimal season for such surveys. In addition, Ravala contended that the SPA is not adjacent to the development site and that any possible ecological connection between the SPA and the site is interrupted by *"highly modified land use, comprising industrial development (namely … the Drogheda Port Company Murflo jetty and the FloGas Drogheda Marine Terminal), a wastewater treatment plant, roads … and tall trees that interrupt any direct line to the estuary".*

14. Ravala also made the case that the site survey found nothing of value or interest to the bird species which are listed as qualifying interests for the purposes of the SPA. Furthermore, Ravala contended that no evidence has been provided by the applicant to suggest that any bird species of special conservation interest has been observed at the development site. In para. 16 of the statement of opposition, Ravala denied that there is any prospect of indirect disturbance. In the same paragraph, attention is drawn to the Screening Report for appropriate assessment prepared by

Openfield Ecological services which was submitted by Ravala to the Board. Paragraph 16 of the statement of opposition records that the report stated that indirect disturbance is unlikely to occur and the point is made in the same paragraph that the language used in the report is consistent with a determination that the proposed development is not likely to have a significant effect on any European site. This is reiterated in para. 31 of the statement of opposition (which addresses the complaint made by the applicant in respect of anthropogenic disturbance). In para. 32 of the statement of opposition, it is accepted that, in other material before the Board, it was stated that areas of the SPA are exposed to moderate or high disturbance from human activity including dog walking and horse riding. However, it is contended that the locations of such activity are remote from the development site. It is also contended that relevant areas of the SPA are not easily accessed from the development site.

15. With regard to the decision of the Board in respect of the campsite (ref 302948) to which specific reference was made in para. 20 of Part E of the applicant's statement of grounds, Ravala made the case that this is materially different from the development site, being located within 30 metres and 120 metres of the SPA and separated from it only by a 1.5 metres to 3.0 metres high berm of soil dominated by grassland. Ravala also highlights that the decision mentioned in the Board's solicitor's letter of February, 2020 does not relate to the campsite but to a development by Shannon Homes Ltd which post-dates the commencement of these proceedings and therefore does not form part of the grounds on which relief has been sought in these proceedings. In addition, without prejudice to that contention, Ravala maintains that there are significant differences between the Shannon Homes site and the development site the subject matter of these proceedings. In particular, Ravala contends that the Shannon Homes site is located further from Drogheda town centre,

is separated from the SPA only by agricultural lands and is designed within link roads that would facilitate user access to the SPA. Ravala also highlighted that, in the Shannon Homes case, the planning authority, the inspector appointed by the Board and the Board itself all agreed that there was insufficient information available to conclude that appropriate assessment of the site was not required. In contrast, Ravala suggested that, in the present case, the planning authority, the in-house ecologist assisting the Board, the inspector appointed by the Board and the Board itself all agreed that there was sufficient information available to conclude that appropriate assessment was not required.

16. In circumstances where the decision of the Board in the Shannon Homes case postdates the decision under challenge and also postdates the order granting leave to commence these proceedings, the case is made in the statement of opposition that, if the applicant had wished to rely on the Shannon Homes decision as a ground to question the validity of the permission granted in respect of the Ravala development, leave of the court would be required under s. 50(8) of the 2000 Act. In addition, it is argued that, if the Board had wished to rely on a matter as a basis to refuse permission (other than an issue raised by one of the parties in the proceedings before it), the applicant for permission would be entitled, whether as a matter of natural justice or in accordance with s. 137 of the 2000 Act, to advance notice and to an appropriate opportunity to make submissions or observations. It is, therefore, argued that Ravala should not be prejudiced or put at a disadvantage by reason of an event which arose after the planning process in this case has concluded.

17. Complaint is also made in the statement of opposition that the explanation given in the letter of 18th February, 2020 sent by the solicitors for the Board (quoted in para. 3 above) does not identify the *"frailty"* in the decision of the Board made in

this case on 27th November, 2019. In addition, it is argued that no attempt has been made to describe the relevant similarities or differences between the Shannon Homes matter and the present matter.

18. With regard to the use of the subject site by bird species, Ravala draws attention to the report of the Board's inspector in this case which recorded that:-

> *"No evidence of wintering birds using the proposed development site has been presented, however, it's unclear if this was considered at all in the screening or biodiversity assessment. The majority of the special conservation interest species listed for this SPA favour intertidal muds and sand flats for feeding with species such as Golden Plover and Lapwing using alternative habitats adjacent to the site such as grasslands occasionally. An examination of the wider area shows that there are extensive agricultural grasslands available to wintering birds east of the proposed development and it is unlikely that the loss of this area of… land could affect the ex-situ movements and feeding areas for bird species associated with the SPA."*

19. In the statement of opposition, it is admitted that the low tide count for 1st February, 2012 records Lapwing observed within the SPA but it is contended that no inference can be drawn that, upon high tide, those Lapwing would be displaced to the site of the proposed development. In this context, the statement of opposition refers to the analysis carried out by the in-house ecologist employed by the Board and by the inspector who recorded that there are extensive agricultural grasslands available to wintering birds east of the proposed development and that it is unlikely that the loss of this area of land could affect the *ex-situ* movements and feeding areas for bird species associated with the SPA.

20. The statement of opposition also contains what is described as a *"general objection"* in which Ravala objects to weight being given to any of the opinions expressed in the affidavit sworn by Mr. Fred Logue on 20th January, 2020 grounding the application for leave to bring judicial review proceedings. The statement of opposition contends that Mr. Logue was, at the time leave was granted, one of two shareholders and one of two directors of the applicant but that he was also the solicitor for the applicant. At para. 64 of the statement of opposition, the following contention is made:-

> *"More generally, the parties and the Court must remain vigilant to the risk, even if entirely inadvertent, of conflict between the respective interests and duties of client, expert and solicitor on record, where the same person inhabits all three roles."*

21. The intended statement of opposition is supported by an affidavit of Michael Murphy, a director of Ravala, and also an affidavit of Pádraic Fogarty, ecologist, who prepared the screening report, the Natura Impact Statement and other documents in support of the application made by Ravala for permission for the proposed strategic housing development. I do not propose, however, to rehearse everything stated in those affidavits. The case which Ravala intends to make is outlined in sufficient detail in the intended statement of opposition (which I have attempted to summarise above). It is sufficient to note that Mr. Murphy, in his affidavit, reiterates the points made in the statement of opposition. In addition, he seeks to call into question the weight to be given to averments made by Mr. Logue on behalf of the applicant in the affidavit verifying the applicant's statement of grounds. I am not, however, persuaded that the material on which Mr. Murphy relies provides any sufficient basis to take that course. Insofar as Mr. Fogarty's affidavit is concerned, he provides evidence consistent with

the points made in the statement of opposition. With regard to the potential for anthropogenic disturbance, Mr. Fogarty, in his affidavit, quoted from the inspector's report as follows:-

> *"...Human activities can cause disturbance to birds and thereby affect their distribution and use of the area. The potential for anthropogenic disturbance to wintering birds for which the SPA is designated is examined in this screening for AA as follows and as referred to in the internal support note from the An Bord Pleanála Ecologist:*
>
> - *The development of 450 housing units could result in increased numbers of people seeking safe areas for recreational walking including dog walking. In an examination of disturbance (MPWS, 2013) the most common activity recorded was walking, including with dogs with greatest levels of disturbance from these activities recorded in Baltray and at Lady's Finger, which are not located in proximity to the proposed housing development.*
> - *The sub areas of the SPA in closest proximity to the proposed development and which may be vulnerable to disturbance include areas known as The Arp and Port Beaulieu are located to the north of the R150 and along the mouth/Estuary area of the River Boyne. These areas were not characterised with such disturbance issues including walking with dogs in the 2011/2012 assessments. This may be due in part to the fact that the road does not have a pedestrian footpath and there is no direct access to the wetlands area. Due to road safety issues, the area is unlikely to be used by numbers of recreational*

walkers or new residents walking dogs that could have any measurable effect on the adjacent SPA".

The position taken by the Board

22. In the written submissions delivered on behalf of the Board, counsel for the Board very properly accept that, as a matter of law, a notice party may be allowed to continue to defend proceedings. In those circumstances, the submissions do not address the points raised by Ravala or by the applicant in response. This is subject to the concern of the Board (as expressed in the submissions), in relation to any potential costs liability in circumstances where the Board has, at an early stage in the proceedings, conceded the issue in relation to screening for appropriate assessment. It is also explained in the Board's submissions that the Board is conscious of the need for scientific certainty in the context of appropriate assessment both as a matter of national law and EU law. The submission explains that the Board considered the proceedings and the decision to grant permission in light of the report of the Board's inspector and the Board's own decision in the Shannon Homes case. The stated reason for refusal in the Shannon Homes case was:-

"Having regard to the proximity of the subject site to the Boyne Estuary SPA…, the factors that can adversely affect the achievement of the conservation objective to maintain favourable conservation conditions of the non-breeding waterbird special conservation interest species listed for the designated site, namely anthropogenic disturbance and ex-situ factors, and the absence of a Stage 2 assessment on the potential for likely significant effects in relation to these factors, on the basis of the information provided with the application and appeal, including the Natura Impact Statement, and in light of the assessment carried out, the Board, cannot be satisfied, beyond reasonable

scientific doubt, that the proposed development, either individually or in combination with other plans and projects, would not adversely affect the integrity of Boyne Estuary SPA, in view of the site's conservation objectives and qualifying interests. The Board is, therefore, precluded from granting planning permission for the proposed development".

23. At para. 2.5 of the submissions, it is explained that the Board considered that, on reflection and in light of the decision of 11th February, 2020 to refuse permission for the Shannon Homes Development, it could not continue to defend these proceedings. Importantly, the submissions continue in the following terms in para. 2.6:-

"Insofar as [Ravala] *... states at para. .45 of its intended Statement of Opposition that it relies on the entire of the note prepared by the Board's in-house ecologist ... as well as the entire of the Inspector's Report, including in particular s. '11.0 Appropriate Assessment' (at pages 0629-43), the position of the Board is that it is not standing over the ecologist's note, the Inspector's Report (insofar as it addressed the ex-situ impacts on the Boyne Estuary SPA only) and its own decision of 27th November, 2019 (again insofar as it addressed the ex-situ impacts on the Boyne Estuary SPA) for the ... reasons* [stated in paras. 2.7 to 2.9]…"

24. At paras. 2.7 to 2.9 of the submissions, the following reasons are given in support of the passage quoted in para. 23 above:-

(a) In the first place, it is explained that the Board was conscious of the location of the Boyne Valley SPA in relation to both development sites as well as the proximity of the proposed development sites both to the SPA and to each other;

(b) Secondly, the Board was conscious that the same ecologist, Openfield Ecological Services, had prepared the appropriate assessment screening documentation and Natura Impact Statement (*"NIS"*) for the application for the proposed development in issue in these proceedings and also for the purposes of the Shannon Homes case;

(c) Attention is also drawn to the fact that the inspector's report in the Shannon Homes case was completed on 23rd January, 2020 which is the same date as the applicant instituted these proceedings. In those circumstances, the inspector made her recommendation on that application for permission independently of the fact that the applicant had instituted these proceedings and in circumstances where the Board did not yet have knowledge of the case made by the applicant in these proceedings.

(d) At para. 2.9 it is stated that the Board is now satisfied that the correct approach to the issue of the anthropogenic disturbance and ex-situ factors in relation to sites proximate to the Boyne SPA is as set out in the Shannon Homes decision and not the decision which is challenged in these proceedings.

25. The Board suggests that, if the court is prepared to permit Ravala to defend the proceedings, Ravala should be made liable for costs or, in the alternative, Ravala should indemnify the Board for any costs exposure over and above the costs which the Board accepts flow from its acknowledgement that it would concede an order in *certiorari* on 18th February, 2020. The Board submits that, if the case is to proceed, it should be dealt with in a modular way with the screening issue being dealt with as a preliminary issue and where the transcripts of the hearing are circulated to all parties (including the Board). The submissions make clear that the Board does not propose to participate in the trial of such a preliminary issue nor to attend the trial unless directed

to do so by the trial judge. The submissions also made clear that the Board reserves its position in relation to the balance of the case pleaded in the applicant's statement of grounds.

The position taken by the applicant

26. In the submissions of counsel for the applicant, attention is drawn to the change of position adopted by Ravala in these proceedings. In the immediate aftermath of the letter of 18th February, 2020 from the solicitors for the Board, Ravala made no suggestion that it proposed to seek leave to defend the proceedings notwithstanding the concession made by the Board. On the contrary, as noted in para. 6 above, its then solicitors wrote to the Board confirming that they were instructed to apply to the court for an order remitting the matter to the Board on the basis that further information could then be sought by the Board. The submissions highlight that it was not until the morning of 12th March, 2020 (when the matter appeared in the list) that the first intimation was given that Ravala might seek to defend the proceedings.

27. While the submissions make clear that the applicant does not propose to engage on the merits of the draft statement of opposition submitted by Ravala, the submissions identify the considerations which the applicant suggests should inform the decision of the court as to how to proceed. In summary, these are:-

(a) In the first place, the applicant submits that the concession of the Board is of *"the utmost significance in a case of this sort"*. The reason advanced by the Board for its concession corresponds to the grounds raised by the applicant (in particular at para. 27 of its statement of grounds where it is contended by the applicant that screening out the possibility of significant impacts on water-birds using the SPA were not conclusions that could be reached beyond

reasonable scientific doubt as required by the decision of the CJEU in Case C-127/02 *Waddenzee*). Counsel stress that the Board is an expert body and its concession is of particular importance in the context of the *Waddenzee* test.

(b) The applicant also submits that the attempt by Ravala to rely on the *McIlwraith* line of jurisprudence is misplaced. The essence of those cases is that there are certain types of decision makers (such as judges) for whom it would be inappropriate to participate in judicial review proceedings. In such circumstances, another party to the proceedings or process before the relevant decision-maker will act as *legitimus contradictor*.

(c) The applicant also suggests that it is particularly relevant that the Board is a disinterested party. That said the applicant submits that the significance of the concession made by the Board goes beyond any concept of disinterested party. The applicant refers, in this context, to the observations of Barrett J. in *Murtagh v. Judge Kilrane* [2017] IEHC 384 and Barniville J. in *CHASE v. An Bord Pleanala* [2019] IEHC 85 both of whom stressed that, in the context of discussion about the duty of candour owed by a public authority in judicial review proceedings, the object of the public body should be not to win the litigation at all costs but to assist the court in reaching the correct result.

(d) The applicant also submits that the Board's concession must be considered in the context of the decision of the CJEU in Case C-378/17 *Minister for Justice and Equality v. Workplace Relations Commission* ECLI:EU:C:2018:979. In that case, the CJEU, at para. 39, made clear that the principle of primacy of EU law requires not only the courts but all bodies of the Member States to give effect to EU law. The applicant submits that the effect of that principle operates both at the level of the Board concession and at the level of the

court's own obligations in these proceedings to give full effect to EU law. Insofar as the Board's concession is concerned, the applicant draws attention to fact that the Board is not a body which ordinarily stands aside from the judicial review arena. The Board actively defends its decisions. By its concession in this case, it has recognised that the screening decision here should not be defended. Insofar as the court is concerned, the question is asked rhetorically as to how a court could uphold a decision notwithstanding the acknowledgement of the decision-maker that it is in breach of the requirements of EU law in a manner which deprives it of jurisdiction. The applicant submits that, if the court were to uphold the decision in the face of the Board's concession, this would raise significant issues of European law which would require a reference to the CJEU.

28. Insofar as the issue in relation to EU law is concerned, the applicant submits that Article 6 (3) of the Habitats Directive (as interpreted by the CJEU) requires the competent authority to exclude the possibility of significant effects on the relevant qualifying interest. In circumstances where the Board, as the competent authority, has accepted that there was not sufficient evidence for its original screening decision, the applicant submits that it is not clear how the court could come to an alternative decision. In this context, the applicant draws attention to s. 177 S (2) of the 2000 Act which makes the Board a competent authority for the purposes of Article 6 of the Habitats Directive. Section 177 S (2) provides:-

"The competent authority in the State for the purposes of this Part and Articles 6 and 7 of the Habitats Directive, shall be …

(f) in relation to a proposed development (other than development referred to in paragraph (g) or (h)), the planning authority to whom an application for permission is made or … the Board, as the case may be,

… ".

29. While the applicant accepts that a notice party may often have valid points to make in opposition to judicial review proceedings against a decision-maker (who has made a decision in that party's favour), the present case raises very different considerations in circumstances where the designated competent authority has explicitly accepted that the decision-making process was not valid.

30. As a separate point, the applicant submits that any presumption of validity which ordinarily would attach to a decision of the Board cannot apply where the Board has conceded that its own decision is not valid.

31. With regard to the authorities cited by Ravala (namely those mentioned in para. 10 above) the applicant submits that these cases do not address a situation where a notice party is seeking to uphold a decision where the decision-maker in question has decided that it did not have jurisdiction to make the decision. In this context, it is important to bear in mind that it is now well established that a decision made in breach of Article 6 (3) of the Habitats Directive is a decision made in excess of jurisdiction.

32. The applicant also suggests that Ravala is essentially seeking to attack the decision of the Board to make the concession outlined in the letter of 18th February, 2020 such as to attract the application of s. 50 (2) (a) of the 2000 Act. Under s.50 (2) (a), the validity of any decision made by the Board in performance of a function under the 2000 Act cannot be challenged otherwise than by way of an application for

judicial review under O.84. It is also suggested that Ravala is out of time to initiate any judicial review proceedings in relation to the concession.

The position taken by the State Respondents

33. In para. 14 of the written submissions of counsel on behalf of the State respondents, it is acknowledged that the screening issue does not directly affect those respondents. Nonetheless, the State respondents, on principle, oppose the application by Ravala to defend these proceedings. They submit that the matter has effectively been determined by the Board's concession of *certiorari.* They suggest that, in these circumstances, the doctrine of judicial restraint should apply. In this context, they refer to the observations of Kelly J. (as he then was) in *Usk v. An Bord Pleanala* [2007] IEHC 86 where he said at para. 23:-

> *"I will grant certiorari solely on the ground conceded by the Board. Whilst the applicant raises other questions which might arguably provide additional grounds for granting certiorari, it is not in anybody's interest that the public time of the court or the expensive time of the litigants and their advisers be expended on such an exercise. Judicial restraint dictates that the court should confine itself to facts and findings necessary to support the order of certiorari. It should not go beyond them".*

34. Although *Usk* concerned an attempt by an applicant to pursue further relief against the Board notwithstanding the concession made by the Board in that case in respect of a single ground, the State Respondents submit that the logic underlying the decision applies *mutatis mutandis* to the present case. As with the applicant in *Usk*, the State Respondents suggest that Ravala here is seeking to vindicate its rights through engaging in costly litigation in circumstances where the validity of the underlying decision has already been conceded.

35. In their submissions, counsel for the State Respondents also suggest that the only proper *legitimus contradictor* in relation to the screening issue is the Board itself. They argue that the present case can be distinguished from a situation where a notice party may be entitled to defend a decision of a public body in circumstances where the decision-maker has elected to remain neutral and does not oppose the relief sought and where the interests of the notice party are likely to be significantly affected by the outcome of the proceedings. In such cases, the decision-maker has elected not to participate in the proceedings and thus not to exercise its role as *legitimus contradictor*. By expressly consenting to an order of *certiorari*, the State Respondents argue that the Board has exercised its function as the primary respondent to the proceedings such that the court is effectively *functus officio* save as to the making of final orders.

36. Like the applicant, the State Respondents also submit that, if Ravala were permitted to defend the decision which the Board has already conceded, this would be tantamount to permitting a judicial review of the Board's decision to concede that the relevant evidence was not sufficient. The State Respondents also make a similar argument to the applicant to the effect that the Board is the competent authority in the State for the purposes of Article 6 of the Habitats Directive.

The position taken by the Council

37. On behalf of the Council, very helpful written submissions were made available to the court at an early stage by its counsel. In those submissions, counsel drew attention to the decision of Barniville J. in *Fitzgerald v. Dun Laoghaire Rathdown County Council* [2019] IEHC 890 in which the court strongly reiterated and adopted the approach taken by Kelly J. in *Usk*. In that case, the applicant had sought to argue additional grounds of challenge to a decision of the respondent Council not

withstanding that the Council had conceded the case on a single ground. At para. 76 of his judgment, having previously referred to *Usk*, Barniville J. said:-

> *"... I am satisfied that while the applicant in the present case has advanced grounds of challenge which might arguably provide additional grounds for an order of certiorari in respect of the Council's decision, it is not in the interests of the applicant or of the notice party or of the Council that the resources of the court or of the parties themselves or others should be expended on hearing and determining those other grounds of challenge. This is a case in which, in my view, it is appropriate to exercise judicial restraint. Court time is valuable and precious and should not be taken up in the hearing of issues which it is unnecessary to determine in light of a concession made by one or more of the parties to proceedings".*

38. In paras. 11 and 12 of the written submissions, counsel highlighted an issue which, in my view, is particularly significant for present purposes. He said:-

> *"11.... the ground that the Board has conceded is one that is based on there not being sufficient evidence before the Board to reach its conclusion that significant effects on the Boyne Estuary SPA should be screened out. Thus, the Developer will have to show that ..., contrary to the Board's view, the evidence that was before the Board established that the Development was not 'likely to have a significant effect [on the Boyne Estuary SPA] either individually or in combination with other plans or projects' (see Article 6 (3) of the Habitats Directive).*
>
> *12. In this regard, the Developer cannot truly be described as a legitimus contradictor, it is not competent to tell this Honourable Court how the Board*

arrived at its decision, only the Board can do that; and, the Board has conceded that it was a legal error in how it made its decision".

39. In the same submissions, counsel also distinguished each of the authorities on which Ravala had relied in its submission (namely the authorities mentioned in para. 10 above). With regard to *Pearce v. Westmeath County Council* [2016] IEHC 477, counsel highlighted that, in that case, the decision-maker did not oppose the application for judicial review but did not consent to it either. With regard to *Hunter v. Environmental Protection Agency* [2013] IEHC 591, counsel identified that the judgment of Hedigan J. in that case was concerned solely with the costs of the proceedings. In that case, an application for costs by the applicant was made as against a notice party that delayed (for more than one year) before conceding the case notwithstanding that the decision-maker itself had conceded the case at an earlier stage. Counsel stressed that the judgment does not deal with whether or not the notice party ought to have been permitted, in the first place, to defend the decision-maker's decision notwithstanding the concession made by the decision-maker itself.

40. With regard to *Boland v. Valuation Tribunal* [2017] IEHC 660, counsel suggested that, there, Murphy J. did no more than note that the task of standing over the respondent tribunal's decision had been left to the notice party but that she neither endorsed nor condemned that approach. The task of acting as *legitimus contradictor* in that case was left to the Commissioner of Valuation. In my experience, that is not unusual. It must be kept in mind that the Valuation Tribunal is an adjudicative body and it would not ordinarily get involved in defending judicial review proceedings taken against it. When a decision of that tribunal is challenged in judicial review proceedings by one of the parties appearing before it, the opposing party to the dispute will act as *legitimus contradictor*. In *Boland*, it was the rate payer who challenged the

decision of the Tribunal. Thus, it was the Commissioner who acted as *legitimus contradictor*. However, there have also been cases where the Commissioner has taken judicial review proceedings against the Tribunal. In such cases the relevant rate payer will be the relevant *legitimus contradictor* (albeit named as a notice party). An example is to be found in the recent decision of Simons J. in *Commissioner of Valuation v. The Valuation Tribunal* [2019] IEHC 23.

41. In his submissions, counsel very properly accepted that there may well be circumstances where it would be appropriate to grant leave to a notice party to defend proceedings notwithstanding a concession made by the decision-maker concerned but he submitted that this is not such a case. At para. 23 of the written submissions, counsel said:-

> *"23. It is … submitted, the issue of whether a notice may defend a decision when the decision-maker does not, is a matter that this Honourable Court ought to decide on a case by case basis in light of the concession given by the decision-maker and the circumstances of the case. For example, if the decision-maker is conceding the case as a matter of convenience or for an improper reason without having a legally sound reason to concede; or, if the decision-maker is relying on an interpretation of the law and/or facts and the notice party wishes to posit a bona fide alternative interpretation".*

Final observations of Ravala

42. In the written observations dated 15th May, 2020 submitted by the solicitors for Ravala, it is noted that no party has yet engaged with the substance of the intended defence of Ravala. It is accordingly suggested that the court should determine the application on the basis that the intended defence is not contradicted. In my view, that is not an approach which I can properly take. In this context, it must be borne in mind

that, as noted in para. 11 above, the reason why Ravala's intended opposition papers in relation to the screening issue were directed to be furnished was simply that the court could not properly reach a conclusion in relation to Ravala's application without knowing the case which Ravala would intend to make in relation to this issue in the event that it was given leave to defend the proceedings notwithstanding the concession made by the Board. It was never suggested or intended that any of the other parties would respond by way of evidence to the intended opposition papers. The purpose of the direction given by me on 19th March, 2020 was simply to enable everyone to understand the nature of the case which Ravala proposes to make so that each of the parties could address the issue as to whether Ravala should be given leave to defend in an informed and targeted way. It is true that Mr. Logue, the solicitor acting on behalf of the applicant swore an additional affidavit. However, that was merely for the purposes of exhibiting the correspondence which was discussed in certain of the submissions delivered by the parties. In the same affidavit, Mr. Logue, for understandable reasons, also addressed the issue raised in para. 64 of the statement of opposition (quoted in para. 20 above) and in the affidavit of Mr. Murphy sworn on behalf of the applicant. In para. 2 of his affidavit Mr. Logue stated:-

> *"2. I say that the Developer … makes a number of allegations and innuendos as to my role in these proceedings. These allegations have not grounded any application by the Developer and the legal purpose of including them is entirely unclear. There is therefore no need for me to address them further at this juncture except to record that I have conducted myself in this (and, insofar as relevant, any other proceedings) entirely in accordance with my professional obligations and my obligations as an Officer of this Honourable*

Court. If the Developer's application is granted and any legal issue arises from those allegations I will respond in full as required".

43. In their final observations, the solicitors for Ravala submit that the weight to be given to the concession by the Board is a matter for the substantive hearing of the application for judicial review. They raise a significant number of other questions but, having done so, they then suggest that it is neither necessary nor appropriate for the court to resolve them at this interlocutory stage. These questions are set out in para. 3 of the final observations and they include the following:-

(a) In the first place, Ravala raises a question as to how the concession made by the Board in this case affects the ordinary burden of proof on the applicant. They question the applicant's suggestion that the burden of proof is reversed in such circumstances. Even if the burden of proof is reversed (which Ravala does not accept) the question is asked whether it is sufficiently clear that he grounds for intended opposition by Ravala are doomed to fail? The solicitors submit that it would be inappropriate to form any view that those grounds are doomed to fail where no one has contradicted the only expert evidence on affidavit before the court namely the affidavit of Mr. Fogarty sworn on behalf of Ravala;

(b) The next question raised is whether the concession by the Board affects the normal presumption of validity. Is the presumption entirely lost? Can it be said that the concession carries greater weight than the original decision?

(c) Ravala also raises a question as to whether the concession comprises a decision to which s. 50 of the 2000 Act applies. The solicitors for Ravala expressly reserve all rights in relation to questioning the validity of the concession and they suggest that any application for leave to apply for judicial

review of (or any other remedy in connection with) the concession would be premature pending the outcome of the present application.

(d) With regard to the usual approach of the court to treat the Board as a disinterested party, Ravala raises a question as to whether this approach should be taken in the present case. In this context, the observations state:-

> *"There must be many factors relevant to whether a party is interested to defend legal proceedings? It is clear from the submissions made (by all parties) that there is sensitivity in relation to legal costs, particularly for authorities whose expenditure is scrutinised in the public domain. There is a particular sensitivity regarding an entirely separate decision to refuse permission to a third party: certainly, that third party, if disgruntled, might be encouraged to question the validity of that refusal if the Board was to defend the developer's permission. More generally, the Board might choose to prioritise its scarce resources and seek respite from the volume of legal proceedings and eliminate any prospect of an unfavourable outcome. It would be inappropriate to assume too much, of course, in circumstances where the position of the Board is recorded only in correspondence and submissions, not in any formal order or attested on affidavit";*

(e) The next question raised by Ravala relates to the extent of the evidence and/or record of the concession which should be available to the court, before deciding on the weight to allocate to that concession. While the solicitors for Ravala make no criticism of the Board for the fact that the Board's position is noted only in correspondence from its solicitor and submissions from its counsel, Ravala submits that greater formality should be required. Ravala

submits that it is relevant to know whether the members of the Board who made the original decision to grant permission have made the concession after a change of mind on their part or whether a differently constituted Board (which disagreed with the original decision to grant permission) has decided to make the concession.

44. The submissions also highlight that the planning permission in issue is for a strategic housing development comprising 450 homes adjacent to Drogheda train station and that the State has identified the lands as a key development site in an urban area of high demand for housing and for accelerated delivery of that housing. This is evidenced by the commitment of funding to provide public infrastructure under the Local Infrastructure Housing Activation Fund in accordance with Pillar 3 of *"Rebuilding Ireland: An Action Plan for Housing & Homelessness".* The solicitors for Ravala submit that *"this public interest should slow the Court from denying the Developer an opportunity to defend that permission".*

The final observations on behalf of the applicant

45. In their final observations, counsel for the applicant note that Ravala has not provided any substantive response to the points made in their previous submissions regarding the significance of the concession made by the Board and in particular in relation to the position of the Board as the competent authority for the purposes of the Habitats Directive.

46. Counsel for the applicant also submit that, in effect, the court is being invited by Ravala to embark on its own screening assessment (in lieu of the screening assessment which the Board has conceded was incorrect) on the basis of material not before the Board and on which the public will have no opportunity to comment. It is submitted that such an approach would involve the court assuming the role of

competent authority conferred by statute on the Board and breaching the requirements of public participation.

47. With regard to the questions raised by the solicitors for Ravala, counsel for the applicant submit that the notice party cannot properly obtain a substantive hearing by saying that it will address some or all of these issues at such a hearing.

48. With regard to the suggestion made by Ravala about the importance of the proposed development, counsel for the applicant submit that this is not a relevant consideration and that it *"cannot excuse the … continued failure to properly address the significance of the Board's concession despite being afforded numerous opportunities to do so. The fact that the fast-track procedure available is not fast enough for the Notice Party's liking is no reason to prolong these proceedings once the decision-maker has conceded that its decision was unlawful on a ground which deprived it of jurisdiction".*

Discussion and analysis

49. There can be no doubt but that, as a general rule, a party in the position of Ravala has a legitimate interest in upholding a decision of a planning authority in its favour where that decision is challenged in judicial review proceedings. That right is now firmly established in the law as evidenced by the authorities on which Ravala relies namely *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39, *TDI Metro v. District Judge Sean Delap* [2000] 4 I.R. 337, *Spin Communications v. Independent Radio and Television Commission* [2000] IESC 56, *O'Connor v. Nenagh Urban District Council* [2002] IESC 42 and *BUPA Ireland Ltd v. Health Insurance Authority* [2006] 1 I.R. 201. While some of those authorities were not decided in a planning context, the underlying principle is nonetheless applicable.

50. Equally, there can be doubt that, where, in judicial review proceedings, a decision-maker chooses not to defend the proceedings, the relevant notice party with a direct interest in upholding the decision under challenge, will ordinarily be entitled to act as the principal *legitimus contradictor* in order to defend the decision under challenge. It is therefore unsurprising that, in both *Pearce v. Westmeath County Council* [2016] IEHC 477 and *Boland v. Valuation Tribunal* [2017] IEHC 660, the notice party in question defended the proceedings in place of the respondent decision-maker.

51. However, neither Ravala nor any other party has identified any authority where a notice party has defended a decision of a decision-maker under challenge in judicial review proceedings in circumstances where the decision-maker in question has gone further than simply choosing not to defend the proceedings and, instead, has positively consented to an order of *certiorari* quashing the decision in question. The cases on which Ravala purports to rely (as recorded in para. 10 above) plainly do not constitute authority for this proposition. The observations made by counsel for the Council (summarised in paras. 39-40 above) are clearly correct and, understandably, Ravala has not made any attempt to respond to those observations.

52. Quite apart from authority, I cannot recall any instance, in the course of my experience as a judge or in my previous practice at the Bar, where a notice party has defended proceedings to trial in circumstances where the respondent decision-maker has consented to an order of *certiorari* quashing the decision in question. Thus, for example, very recently, in proceedings 2020 No. 309 JR *O'Toole v. Minister of State, Department of Housing Planning and Local Government*, the applicant challenged a decision of the respondent minister to grant a foreshore licence to the relevant notice party to install a subsea fibre optic cable on the foreshore off Old Head, Louisburgh,

County Mayo. This related to an Irish spur of a trans-Atlantic fibre optic cable extending from the United States to Denmark with branches to Ireland and Norway. In the course of an application by the applicant for a stay on the licence pending the determination of the proceedings, the respondent minister conceded that an order of certiorari should be made in circumstances where, it appeared, the respondent minister may have taken into account mitigation measures in a decision to screen out the potential impact of the laying of the cable on a number of protected species including cetaceans. As a consequence of the decision of the CJEU in Case C-323/17 *People over Wind v. Coillte* ECLI:EU:C:2018:244, it is impermissible under Article 6 (3) of the Habitats Directive to take mitigation measures into account at the screening stage. In that case, the notice party, at approximately the same time the proceedings were commenced, had already retained specialised vessels (which, on the evidence, were extremely difficult to procure) for the purposes of laying the cable. Against that backdrop, the notice party was intent on vigorously contesting the application for a stay on the licence. The notice party had filed affidavits which suggested that, if a stay were granted, costs of approximately $[redacted] would be incurred in respect of the aborted cable laying process and that if, after conclusion of the proceedings, the project were to resume, it would require 52 days of ship hire at $[redacted] per day amounting in total to $[redacted] approximately. Nonetheless, when the Minister, on the eve of the date scheduled for the hearing of the application for a stay, indicated that he would consent to an order of *certiorari* quashing the decision to grant the licence, the notice party, notwithstanding the very significant losses to which it claimed to be exposed, accepted that the concession brought the proceedings to an end.

53. Like the present case, the ground on which the Minister conceded *certiorari* in the *O'Toole* case, related to Article 6 (3) of the Habitats Directive and in particular to a decision reached, at the screening stage, that it was unnecessary to carry out a full appropriate assessment. As the decision of the CJEU in Case C-127/02 *Waddenzee* [2004] ECR I-07405 demonstrates, it is now well-established that appropriate assessment must be carried out by a competent authority unless it is possible, on the basis of objective information, to conclude, at the screening stage, that no risk exists that the proposed development will have a significant effect on a protected site. This is clear from paras. 43-44 of the judgment of the CJEU in that case:-

> *"43. It follows that the first sentence of Article 6(3) of the Habitats Directive subordinates the requirement for an appropriate assessment of the implications of a plan or project to the condition that there be a probability or a risk that the latter will have significant effects on the site concerned.*
>
> *44. In the light, in particular, of the precautionary principle, which is one of the foundations of the high level of protection pursued by Community policy on the environment, … and by reference to which the Habitats Directive must be interpreted, such a risk exists if it cannot be excluded on the basis of objective information that the plan or project will have significant effects on the site concerned …. Such an interpretation of the condition to which the assessment of the implications of a plan or project for a specific site is subject, which implies that in case of doubt as to the absence of significant effects such an assessment must be carried out, makes it possible to ensure effectively that plans or projects which adversely affect the integrity of the site concerned are not authorised, and thereby contributes to achieving, in accordance with the third recital in the preamble to the Habitats Directive and Article 2(1) thereof,*

its main aim, namely, ensuring biodiversity through the conservation of natural habitats and of wild fauna and flora".

54. It is clear from that extract that, in carrying out a screening test, the precautionary principle applies such that, in any case of doubt as to the absence of significant effects, a full appropriate assessment must be carried out. This is so notwithstanding that the words *"likely to have a significant effect"* are found in Article 6 (3) of the Habitats Directive.

55. As Barniville J. highlighted in *Kelly v. An Bord Pleanála* [2019] IEHC 84, despite the use of the word *"likely",* the threshold requiring full appropriate assessment is a very low one. In that case, at paras. 53-57, Barniville J referred to the very useful guidance given by Advocate General Sharpston in Case C-258/11 *Sweetman v. An Bord Pleanála* ECLI:EU:C:2012:743. As Barniville J. noted in *Kelly*, the Advocate General referred, in para. 46 of her opinion, to the different language versions of the words *"likely to have a significant effect"* in Article 6 (3) which suggest that the test is *"simply whether the plan or project concerned is capable of having an effect"* and that it is in that sense that the words "*likely to*" in the English language version of Article 6 (3) should be understood. At para. 47 of her opinion in *Sweetman,* the Advocate General continued:-

"47. It follows that the possibility of there being a significant effect on the site will generate the need for an appropriate assessment for the purposes of Article 6(3). The requirement at this stage that the plan or project be likely to have a significant effect is thus a trigger for the obligation to carry out an appropriate assessment. There is no need to establish such an effect; it is, as Ireland observes, merely necessary to determine that there ***may*** *be such an effect".* (emphasis added)

56. Later, as Barniville J. noted at para. 57 of *Kelly,* the Advocate General suggested, at para. 49 of her opinion, that the threshold at the stage 1 screening stage is a *"very low one"* which operates "*merely as a trigger, in order to determine whether an appropriate assessment must be undertaken of the implications of the plan or project for the conservation objectives of the site".*

57. The fact that the threshold is such a low one must be borne in mind in considering the present case. It follows from *Waddenzee,* at para. 44, that once a doubt exists, at the screening stage, as to the absence of significant effects, a full appropriate assessment must be carried out. That is the test which the court would have to apply if these proceedings were to go to trial.

58. It is equally important to keep in mind that, as noted in para. 28 above, the Board is the competent authority under the 2000 Act for the purposes of carrying out both screening for appropriate assessment and, in the case of doubt, carrying out a full appropriate assessment.

59. In my view the concession made by the Board in its solicitors' letter of 18 February is highly significant in the context of the *Waddenzee* test. Subject to what I say below, it seems to me that the effect of that concession made by the Board is to raise a *prima facie* doubt as to the absence of risk of significant effects on the SPA. In this context, it must be borne in mind that the Board is an expert body well accustomed to carrying out both screening exercises and also full appropriate assessments. While Ravala has sought to make the case that the only scientific evidence before the court is the affidavit of Mr. Fogarty, the fact remains that the Board itself is a body with vast experience of the appropriate assessment process and a long history of involvement in cases before both the Irish courts and the CJEU in relation to Article 6 (3). For a body of that kind to make a concession of that nature is

not something that a court can lightly ignore. If such an expert body is expressing itself in that way in the context of Article 6 (3), it would be difficult for a court, in the absence of strong countervailing factors, to reach a conclusion that no doubt exists as to the absence of significant effects.

60. I do not suggest that a concession made by the Board will always be determinative. Each case would have to be considered in its own context. Nor do I suggest that a notice party should never be entitled to defend proceedings where a competent planning authority has, subsequent to the commencement of the proceedings, conceded that its decision is infirm on grounds relating to the adequacy of a screening test. However, in my view, in cases which turn on the adequacy of screening, a court will be slow to look behind a concession made by a competent planning authority unless the notice party is in a position to place sufficient objective evidence before the court to demonstrate very clearly that, notwithstanding the concession made by the competent authority, there is a sound basis to suggest that, at trial, the *Waddenzee* test can be met (i.e. that there is no risk that the proposed development may have a significant effect on the protected site or its conservation objectives).

61. Likewise, there may be circumstances where, as counsel for the Council has suggested, a decision-maker concedes a case as a matter of convenience or without putting forward a proper reason for doing so. In such cases, the court would, very likely, be prepared to allow the notice party concerned to defend the proceedings. However, the present case is plainly not in that category. Notwithstanding the suggestion made by Ravala in its final observations in relation to costs concerns, there is nothing in this case to suggest that the Board, in making the concession set out in the letter of 18th February, is motivated solely by a desire to avoid the costs of

defending the proceedings. As noted previously, the Board has a long and well-established tradition of actively defending its decisions. That is not to say that the Board does not, from time to time concede that its decisions must be quashed. It is entirely correct that such concessions should be made in cases where a public authority such as the Board concludes that the decision under challenge is legally infirm. There is an obvious public interest in public authorities acting in that way. In some respects, this public interest is a facet of the duty of candour discussed by Barrett J and Barniville J in *Murtagh v. Judge Kilrane* [2017] IEHC 384 and *CHASE v. An Bord Pleanala* [2019] IEHC 85 respectively. As noted in the submissions made by counsel for the applicant, it was emphasised in both of those cases, that the object of the public body in judicial review proceedings should be not to win the litigation at all costs but to assist the court in reaching the correct result.

62. Furthermore, by taking a decision at an early stage to concede the challenge to the validity of its decision, the public authority will not only save the very significant costs that would otherwise arise, but it will also ensure that valuable court time is not spent on litigating an issue which should properly have been conceded in the first place. Thus, the approach taken, for example, in *O'Toole v. Minister for State for Housing, Planning and Local Government,* is to be encouraged. The legal advisors and the decision-maker in such cases are to be commended for taking that approach.

63. In the present case, the Board, in the legal submissions prepared by counsel on its behalf, has explained the basis for the decision taken by it to consent to an order of *certiorari.* While Ravala has suggested that any such explanation should be put on affidavit, I do not believe that it is necessary to do so in the present case given that the Board's decision is based on the approach taken by it in the *Shannon Homes* case and given that the documents in that case are publicly available on the Board's website.

There is accordingly a perfectly logical basis for the Board's decision and therefore it cannot be suggested, in my view, that the decision was motivated by considerations of cost. Nor could it be said that it was motivated by any of the other considerations outlined in para. 41 above.

64. As noted in para. 60 above, I believe that the correct approach to take is to consider whether there is sufficient objective evidence available to demonstrate very clearly that, notwithstanding the concession proposed by the Board, there is a sound basis to suggest that, at trial the *Waddenzee* test can be met. In this context, I do not suggest that it is necessary that the court needs to be persuaded that Ravala will definitely succeed at trial on this issue. It would be sufficient, in my view, that Ravala could point to some objective material that could be relied upon at trial to make a strong case to the effect that no doubt exists as to the absence of significant effects on the SPA or the bird species for which the SPA has been designated.

65. It is clear from the statement of opposition and the affidavit of Mr. Fogarty that Ravala places significant reliance on the note by the Board's in-house ecologist and the report of the Inspector appointed by the Board. However, unusually, in the present case, the Board has indicated that it will not stand over the ecologist's note, the inspector's report (insofar as it addressed the *ex-situ* impacts on the SPA only) and its own decision of 27th November, 2019 (again insofar as it addressed the *ex-situ* impacts on the SPA). As outlined in para. 59 above, where the competent authority is not prepared to stand over its own material in the specific context of the screening exercise, it seems to me to follow that this, in itself, is sufficient to raise, at least on a *prima facie* basis, a doubt as to the adequacy of the exercise. In these circumstances, if Ravala is to successfully persuade the court that, notwithstanding this stance on the part of the Board, it should be permitted to defend the proceedings, it would need to

place some other evidence before the court sufficient to demonstrate that, by reference to objective material, there is a sustainable case to make that there is no doubt that the proposed development will have no significant effects on the SPA or the bird species in issue.

66. For this purpose, I have considered the statement of opposition and the affidavits of Mr. Murphy and Mr. Fogarty. I have come to the conclusion that they fail to demonstrate that the necessary objective material is available. While there are undoubtedly arguments to be made that the development will not have any significant adverse effect on the SPA, I do not believe that these arguments (as flagged in the statement of opposition and affidavits) are sufficient to demonstrate that a strong case can be made as to the absence of doubt. In this context, I note that the Board's ecologist (on whose views Ravala seeks to rely) noted that the development of 450 housing units could result in increased numbers of people seeking safe areas for recreational walking, including dog walking. This identifies a potential risk arising from anthropogenic disturbance. The ecologist referred, in this context, to evidence within NPWS documents published in 2013 which showed that, at that time, the greatest levels of disturbance from such activities were recorded in Baltray and at Lady's Finger which are not located in proximity to the proposed housing developments. The ecologist also noted that the sub areas of the SPA in closest proximity to the proposed development which might be vulnerable to disturbance include areas north of the R150 and along the mouth/estuary area of the River Boyne. The ecologist noted that those areas were not characterised with such disturbance issues (including walking with dogs) in an assessment carried out in 2011/2012. The ecologist then continued:-

*"This **may** be due in part to the fact that the road does not have a pedestrian footpath and there is no direct access to the wetlands area. Due to road safety issues, the area is unlikely to be used by numbers of recreational walkers or new residents walking dogs that could have any measurable effect on the adjacent SPA".* (emphasis added).

67. It is clear from the note of the ecologist that a significant housing development comprising 450 units could result in increased numbers of people seeking safe areas for walking (including dog walking). That accordingly has the potential (or risk to use the language in *Waddenzee*) that, through human activities carried on in the vicinity of the SPA, there could be *ex-situ* disturbance of bird species for which the SPA has been designated. Having regard to the *Waddenzee* test, if that risk is to be discounted at the screening stage, there should be some objective material available to support a conclusion that such a risk can be safely excluded. There is, in fact, very little evidence available within the statement of grounds and the affidavit of Mr. Fogarty which addresses the risk created by human activity in the context of *ex-situ* foraging (or other activities) of the bird species in question. Reliance has been placed on the NPWS Conservation Objectives Supporting Document (*"the Supporting Document"*) which suggests that *ex-situ* activity by the relevant bird species will usually be in the immediate hinterland of the SPA or in lands which are ecologically connected to the SPA. Ravala has also made a persuasive argument that the development site is not ecologically connected to the SPA. However, that does not address the issue as to the potential impact of increased anthropogenic effects outside the development site arising from the activities of the occupants of 450 new homes. The Supporting Document identifies that there are areas of the SPA itself - and also areas adjacent to the SPA - which were subject to such amenity pressure at the time of

preparation of the Supporting Document in December 2012. There was no suggestion in that document that the area of the SPA closest to the development site was subject to such pressures and the Board's ecologist took the view (as set out in para. 21 above) that, due to road safety issues the area was unlikely to be used by numbers of recreational walkers or new residents walking dogs that *"could have any measurable effect on the adjacent SPA".*

68. However, I cannot see any objective material in the papers before the court which supports the conclusion reached by the ecologist in 2019 in relation to the potential risk arising from anthropogenic pressures created by the activities of the occupants of the 450 units in the proposed development . The ecologist does not identify any objective material that supports her view. More importantly, Ravala has not pointed to the existence of any material that could arguably be said to remove any doubt as to whether the view expressed by the ecologist is correct. Nor has Ravala pointed to any more proximate material (in terms of time) than the information contained in the studies referenced by the Board's ecologist which address the position as of 2012. In the absence of such material, I do not believe that Ravala can be said, at this point, to have established a sufficient case to persuade the court that it should be allowed to defend the proceedings notwithstanding that the Board proposes to consent to an order of *certiorari.* Bearing in mind, *mutatis mutandis,* the principle of judicial restraint discussed in *Usk* and in *Fitzgerald v. Dun Laoghaire Rathdown County Council,* it seems to that there is no sufficient basis established to justify why the order of *certiorari* signalled in the Board's solicitors' letter of 18 February, should not be made.

69. In taking this approach, I wish to make very clear that I do not rule out the possibility that Ravala, in any future application, may be able to produce the

necessary information to exclude the existence of risk. Likewise, it may well be the case that, even if a full appropriate assessment has to be carried out, that it will show that there is no risk of significant effects on the SPA or the relevant bird species.

70. I should also make clear that I have not lost sight of the fact that, as Ravala has highlighted, the view reached by the Board in the *Shannon Homes* case post-dates the decision made in this case. I equally appreciate that the decision in the *Shannon Homes* case was not relied upon by the applicant in its statement of grounds. Nor could it have been relied upon by the applicant since it post-dates the commencement of these proceedings. However, given the very important duty cast on the Board as a competent authority for the purposes of Article 6 (3) of the Habitats Directive, it seems to me that, in any proceedings in which an issue arises under Article 6 (3), it is entirely permissible that, following receipt of a judicial review challenge to its decision, the Board may carry out an assessment as to the validity of its own decision. Such an assessment is particularly appropriate in the context of Article 6 (3) of the Habitats Directive given that a decision reached in breach of the requirements of Article 6 (3) will be treated by the courts as a decision made without jurisdiction; (see the judgment of Finlay Geoghegan J. in *Kelly v. An Bord Pleanála* [2014] IEHC 400 and the subsequent decision of the Supreme Court in *Connelly v. An Bord Pleanála* [2018] IESC 31). As noted by counsel for the applicant in their submissions (as summarised in para. 27 (c) above), there is a duty of candour owed by a public authority in judicial review proceedings. Both Barrett J. in *Murtagh v. Judge Kilrane* and Barniville J. in *CHASE v. An Bord Pleanála* have stressed that the object of the public body in such proceedings should be not to win the litigation at all costs but to assist the court in reaching the correct result. In light of that principle, it seems to me that the Board cannot be criticised for taking the approach which it has.

71. In light of the view which I have formed (as set out above) I do not believe that it is necessary to consider whether the decision of the Board to consent to an order of *certiorari* attracts the application of s. 50 of the 2000 Act or any of the other issues discussed in the written observations of the parties.

Conclusion

72. There will, accordingly, be an order of *certiorari* made on the grounds set out in the letter of 18 February, 2020 (quoted in para. 3 above).

73. In so far as costs are concerned, the Board has accepted that it has some liability for costs up to the date of the letter of 18 February but the precise extent of that liability does not appear to me to have been worked out as yet. I will therefore give the parties a period of 14 days from the date of delivery of this judgment in which to attempt to agree the terms of an order to be made in respect of the costs of the proceedings up to an including 18 February, 2020.

74. With regard to the costs which have been incurred since that time, I will give the parties a period of 14 days from today in which to attempt to agree the form of an order with respect to such costs. If agreement is reached in relation to costs, the parties are to notify the registrar to that effect by email.

75. If any element of costs has not been agreed within 14 days as aforesaid, the parties will have a further period of 7 days thereafter in which to make observations by email (addressed to the registrar) in relation to costs following which I will issue a written ruling.