THE HIGH COURT
JUDICIAL REVIEW

[2021] IEHC 230
[2020 No. 54 JR]
[2020 No. 82 COM]

BETWEEN

THOMAS REID

APPLICANT

AND
AN BORD PLEANÁLA

RESPONDENT

AND
INTEL IRELAND LIMITED

NOTICE PARTY

Judgment of Humphreys J. delivered on Monday the 12th day of April, 2021

1. At one level, what is before the court is a simple enough motion to exclude some of the applicant's evidence. But this modest procedural application raises questions that go to the heart of what judicial review actually is. The complaint essentially regarding the applicant's evidence has three dimensions:

   (i). that the evidence goes beyond the pleadings;

   (ii). that the points, legal or otherwise, should have been made to the decision-maker; and

   (iii). that new evidence is introduced which should have been put to the decision-maker.

Facts

2. On 5th October, 2017, the board granted permission for a manufacturing facility at Leixlip, County Kildare.

3. On 1st February, 2019, a further planning application was lodged.

4. On 17th May, 2019, Kildare County Council decided to grant that permission subject to 34 conditions. There was a limited appeal by the developer, and a third-party appeal by the applicant.

5. On 8th October, 2019, the inspector recommended a grant of permission on 17 conditions and on 21st November, 2019 the board granted permission.

Procedural history

6. The applicant's statement of grounds was dated 23rd January, 2020 and seeks *certiorari* of the board's decision, and various declarations. On 10th February, 2020, Meenan J. directed that leave should be applied for on notice.

7. On 29th June, 2020, Barniville J. admitted the case to the Commercial List for telescoped hearing.

8. The notice party has brought a motion filed on 21st December, 2020 seeking:

(i). to exclude the affidavits of Maria Cullen, a research scientist and an expert in the science of lichens and bryophytes, on behalf of the applicant, as inadmissible in their entirety;

(ii). to have the court refuse permission for her to file a third supplemental affidavit; and

(iii). to exclude various identified matters from the applicant's affidavits.

The nature of judicial review

9. In the sixth edition of his masterwork, *Judicial Review Handbook* (Oxford, Hart, 2012), Michael Fordham Q.C., identifies the traditional three-fold classification of the grounds of judicial review: illegality, irrationality and procedural impropriety (para. 45.1). These headings can be broken down further as follows:

(i). As to illegality, this includes lack of jurisdiction, which may depend on a particular objective precedent fact situation (see Fordham, section 16.2). It also includes breach of a substantive legal provision, including error of law or of legal interpretation, breach of legitimate expectations, breach of a rule of law or statutory provision, or a provision of EU law or of the ECHR (as incorporated into domestic law) or of the Constitution. It also includes defective decision-making procedures in administrative law terms, such as consideration of an irrelevant matter.

(ii). The heading of irrationality covers quasi-merits-based challenges such as unreasonableness or disproportionality.

(iii). Procedural impropriety deals with fairness of the procedure before the decision-maker and is generally regarded as including questions of *audi alteram partem, nemo iudex* and lack of reasons.

Requirement that complaints be pleaded

10. The nature of the leave procedure in judicial review means that an applicant is confined to what the court allows, either at the leave stage or later by way of amendment. Although it does not arise here, it is worth noting that where the court allows a post-leave amendment, it does not have to go through the meaningless ritual of also granting "leave" for the amendment. Leave is permission for the initiation of the proceedings, and an amendment later on doesn't require "leave to seek judicial review", but "leave to amend the statement of grounds" which implies an entitlement to pursue the point in the proceedings.

11. The basic rule as regards pleadings can be summarised as follows:

(i). a party can only pursue grounds set out in his or her pleadings;

(ii). a party cannot introduce new grounds of claim or opposition by affidavit; and

(iii). any new grounds or reliefs have to be sought by amendment of the statement of grounds; and

(iv). likewise for any new points of opposition.

Requirement to generally raise points first with the decision-maker

12. In *Lancefort Ltd. v. An Bord Pleanála (No. 2*) [1998] IESC 14, [1999] 2 I.R. 270 the Supreme Court held, as a general proposition, that it would be an injustice to a party to ask it to defend proceedings on the grounds of an alleged irregularity which could have been brought to the attention of relevant parties prior to the granting of a permission, but which was not relied on until after the judicial review was brought.

13. Such a general proposition now needs a little qualification, particularly with regard to subsequent developments in European law, although in fairness the qualifications are not entirely confined to that. Whether an applicant can plead new grounds in a judicial review that were not raised before the decision-maker depends on two main dimensions - the relationship of the applicant to the original process, and the nature of the ground of challenge concerned.

14. Under the first heading, there is a substantive difference between an applicant and an objector or similar third party. An applicant who seeks a decision for her own benefit must put forward the grounds being relied on to the decision-maker. If the decision is adverse, the applicant can't be allowed to challenge the decision for failure to consider something that was never put forward.

15. As long as we are talking about an alleged substantive illegality with the decision, an applicant generally must have raised the alleged illegality with the decision-maker in order to allow that body and any other interested party, if applicable, to address the point. To raise a complaint of substantive illegality for the first time in court is a form of gaslighting of the decision-maker by seeking to condemn a decision on a point that was never put: see *J.W. v. Minister for Justice and Equality* [2020] IEHC 500, [2020] 10 JIC 1501 (Unreported, High Court, 15th October, 2020), *De Souza v. Minister for Justice and Equalit*y [2019] IEHC 440, [2019] 6 JIC 0407 (Unreported, High Court, 4th June, 2019), *Ratushnyak v. Minister for Justice and Equality* [2019] IEHC 619 (Unreported, High Court, 16th August, 2019) *per* Keane J. at paras. 35 to 36, *B.D. (Bhutan and Nepal) v. Minister for Justice and Equality* [2018] IEHC 461, [2018] 7 JIC 1709 (Unreported, High Court, 17th July, 2018*), A.J.A. (Nigeria) v. International Protection Appeals Tribunal* [2018] IEHC 671, [2018] 11 JIC 1403 (Unreported, High Court, 14th November, 2018), *O.A. (Nigeria) v. International Protection Appeals Tribunal* [2018] IEHC 661, [2018] 11 JIC 2003 (Unreported, High Court, 20th November, 2018), *M.H. (Bangladesh) v. Refugee Appeals Tribunal* [2018] IEHC 496, [2018] 6 JIC 2607 (Unreported, High Court, 26th June, 2018), *Jahangir v. Minister for Justice and Equality* [2018] IEHC 37, [2018] 2 JIC 0102 (Unreported, High Court, 1st February, 2018), *I.S.O.F. v. Minister for Justice, Equality and Law Reform* [2010] IEHC 457 (Unreported, High Court, Cooke J., 17th December, 2010).

16. The logic of doing otherwise (taking it to the extreme) is that an applicant can fire in any old submission to the decision-maker, and can only get around to looking at the matter properly and calling in experts and lawyers if an adverse decision is made. That would be a complete distortion of the process and certainly does not promote good decision-making.

17. Of course there are a range of situations where this approach does not apply. For example, where the illegality is jurisdictional there is less absolute need to raise the point expressly – a body can't go beyond its jurisdiction merely due to the silence of an applicant.

18. Where the party who becomes the judicial review applicant is not the applicant in the administrative process but is, say, an objector, it is not the function of the objector to correct the other party's homework or to point out omissions the correction of which during the process would enable the application (which is being opposed) to be corrected and improved. An objector is entitled to rely on the decision-maker to identify such gaps or omissions and retains an entitlement to complain to the court (for the first time) if that is not done.

19. On the other hand, if the objector wants the decision-maker to take into account something positive that is additional to anything the other party is obliged to put forward (whether or not that party actually puts it forward), then the objector must positively raise that additional matter in order to have a case later. For example, if the issue is whether scientific doubt as to effect on a European site precluded the grant of permission, an objector has to bring something into the process that raises such a doubt, if doubt wouldn't otherwise arise. Failure to do so maybe doesn't preclude being allowed to go through the motions of a challenge later but it renders the challenge empty, and devoid of any prospect of success, because the issue in that challenge would be whether there was doubt by reference to the material before the decision-maker, not by reference to new matters the applicant thought of after the event.

20. As regards a complaint of irrationality or disproportionality, generally such a complaint can only be articulated after the event in the sense that an applicant can only compare the extent to which the precise decision and the stated reasons can be deemed to be open on the evidence once that decision and reasons are actually available, so there is no obligation to submit in advance to a decision-maker that the decision would be disproportionate or irrational unless a particular outcome was arrived at. But at the same time, the material by reference to which the decision is said to be irrational is that before the decision-maker, not new material.

21. As regards fairness of procedure, in general an applicant can proceed on the presumption that the decision-maker will act fairly. To assume otherwise would be not only inappropriate, but counterproductive - many decision-makers would resent any contrary implication. If the unfairness alleged in the proceedings is one that the applicant could reasonably have expected the decision-maker not to engage in, the issue does not have to be raised with the decision-maker in advance because that would be to anticipate

possible error by the decision-maker. A requirement to articulate such a concern would be unfair on both. Such problems can simply be challenged after the event.

22. If, however, an applicant seeks a specific procedure that would not normally be granted in the absence of a request, she should positively ask for it from the decision-maker (for example, depending on the procedures of the body concerned, an adjournment, an oral hearing, cross-examination or an unusual opportunity to comment on some aspect of proceedings not envisaged by the body's procedures).

23. Bias, however, is something that certainly should be raised with a decision-maker in advance. It is totally unfair to the entity making the decision if an applicant is aware of some fact giving rise to a possible claim of bias, sits on it, does not make a recusal application, and then raises it for the first time on judicial review after an adverse decision. Of course the matter is different if the problem was not reasonably ascertainable at the time.

24. As regards reasons, ideally where the reasons are inadequate one would apply to the body concerned for more reasons if its procedure so permits, but that is a counsel of perfection rather than an absolute bar to relief (see Fordham, para. 62.2.12).

European law perspective

25. There is also a significant European law qualification to the *Lancefort* approach arising from Case C-137/14, *Commission v. Germany* (Court of Justice of the European Union, 15th October, 2015), which dealt with the access to justice provisions of art. 11 of directive 2011/92/EU on EIA and art. 25 of directive 2010/75/EU on industrial emissions. In particular, at paras. 75 to 77, the CJEU identifies that a domestic requirement that "pleas in law" (para. 75) to be made to the court must first be made in the administrative process is not provided for in the directives which have the objective "of ensuring broad access to justice in the area of environmental protection" (para. 77). The logic of that decision would seem to apply to any similar access to justice provision in EU environmental law, meaning that an applicant is not confined to legal grounds that were raised before the decision-maker. There is no similar express clause in the habitats directive (92/43/EEC), but the objectives of that directive are so closely linked to the EIA directive that I should assume at this interlocutory stage (subject to any further argument at the trial) that the same approach probably applies. However, such a principle does not take away from the need for a complaint to be properly pleaded and nor does it create an entitlement to introduce new evidence that would not otherwise be permitted.

Requirement to put the relevant evidence before the decision-maker

26. Much reliance was placed by the notice party here on the decision in He*nnessy v. An Bord Pleanála* [2018] IEHC 678 (Unreported, High Court, 27th November, 2018), where Murphy J. relied on a quotation from Lewis, *Judicial Remedies in Public Law*, 5th ed. (London, Sweet & Maxwell, 2015) at p. 368 and underlined in the quotation the following: "The courts do not consider fresh evidence, that is evidence which, if it had been put before the decision maker, might have influenced his decision."

27. Unfortunately, the extract from Lewis which was opened to Murphy J. and which is quoted with approval in her judgment as "a succinct statement of law which this court accepts and endorses" (para. 38), terminates at the description of what the court *cannot* do. Consulting the textbook as to what comes next, and assuming that the 6th edition (2021, at para. 9-134 (pp. 388 - 389)) opened to me is similar terms to the 5th edition cited in *Hennessy*, the analysis in Lewis runs on in the next paragraph to set out what the court *can* do, specifically to receive evidence showing what material was before a decision-maker, to "receive evidence where the issue is one of jurisdictional fact for the court to decide or where the evidence is intended to support an allegation of bad faith or of procedural error by the public body in reaching its decision", and to assess a breach of the ECHR. So Lewis in fact acknowledges that there is an array of situations where a court in judicial review can receive new evidence. A further range of situations are outlined in Fordham at section 17.2.

28. Thus one has to respectfully conclude that *Hennessy* (despite being relied on in other jurisprudence) only addresses a fragmentary view of the position rather than being a comprehensive statement of the law in this area. There is no one-size-fits-all answer, but rather competing approaches depending on the precise context (see also *Sliabh Luachra Against Ballydesmond Windfarm Committee v. Bord Pleanála* [2019] IEHC 888 (Unreported, High Court, McDonald J., 20th December, 2019), *M28 Steering Group v. An Bord Pleanála* [2019] IEHC 929 (Unreported, High Court, MacGrath J., 20th December, 2019), *People Over Wind v. An Bord Pleanála* [2015] IEHC 271 (Unreported, High Court, Haughton J., 1st May, 2015), *Sweetman v. An Bord Pleanála* [2021] IEHC 16 (Unreported, High Court, 15th January, 2021) *per* Hyland J.).

29. Indeed, returning to Fordham, his discussion of this matter at para. 17.2.1 opens with the comments of Schiemann *L.J. in R. v. Secretary of State for the Home Department, ex parte Turgut* [2001] 1 All ER 729 at 735 that "[t]he court will not shut out evidence which is relevant to the issues … [t]he evidence is not strictly limited to evidence which was or should have been before the Secretary of State at the time of the decision. This was the unanimous view of the House of Lords in *R. v. Secretary of State for the Home Department, ex parte Launder* [1997] 1 WLR 839 [at 860H to 861B]".

New evidence in the context of a complaint of illegality

30. The court does have jurisdiction to receive new evidence in the case of a complaint of a fact going to jurisdiction or going to breach of an essential procedural requirement: see *R. v. Secretary of State for the Environment, ex parte Powis* [1981] 1 WLR 584. A decision-maker does not acquire jurisdiction simply because of a mistake of fact or because the absence of jurisdiction was not brought to its attention.

31. As regards substantive illegality, whether new evidence is permissible depends on whether the substantive illegality is one that the applicant could reasonably be expected to have addressed. If not, the court has jurisdiction to allow the applicant to put in further evidence. In *Baile Éamoinn Teoranta v. An Bord Pleanála* [2020] IEHC 642 (Unreported, High Court, 4th December, 2020), Barr J. (at para. 82) noted that where the

decision-maker had made an error of fact, that was a different situation to bringing in fresh evidence as to the merits. New evidence of such a mistake can be admitted.

32. Fresh evidence has also been allowed to show what material was before the decision-maker (see *R. v. Secretary of State for the Environment, ex parte Powis*). Also, where jurisdiction depends on a question of fact, additional evidence has been allowed (*Sweetman v. An Bord Pleanála* [2021] IEHC 16 at paras. 25 and 26). In addition, new evidence necessary to explain technical terms or processes can be admitted (*R. (Lynch) v. General Dental Council* [2004] 1 All ER 1159 *per* Collins J.), and likewise where a process of reasoning involved serious technical error (*R. (Law Society) v. Lord Chancellor* [2018] EWHC 2094 (Admin), [2019] 1 WLR 1649).

33. In limited cases, fresh evidence has even been allowed where a decision-maker had an independent duty to inquire and relevant information could reasonably have been available: *see R. (J.A.) v. London Borough of Bexley* [2019] EWHC 130 (Admin) para. 48 *per* David Casement Q.C. However, one needs to approach this heading with a little reserve because there has to be some basis on the evidence actually presented in the process for the conclusion that the decision-maker should have held that there was a gap in the available information. An applicant can argue for there being a gap based on what was before the decision-maker and does not necessarily need to put in new information for that purpose. Separately, new information is allowable to explain the context in which the issue arises (*R. (Al-Sweady) v. Secretary of State for Defence* [2009] EWHC 2387 (Admin) at para. 23), or if produced for background information *(R. (Pelling) v. Bow County Court* [2001] UKHRR 165 at para. 13).

New evidence in a complaint of irrationality

34. As noted above, irrationality is generally to be judged by reference to the evidence before the decision-maker. It does not make sense to say a decision is irrational based on something that was never put up. On the other hand, the court's ultimate role to protect constitutional rights must leave open the possibility that a disproportionate impact on such rights might be assessed by reference to the overall fact-situation rather than just what was before the decision-maker (Lewis raises a similar concept in the context of the ECHR in the passage that was not cited in Hennessy). The decision in *R. v. Secretary of State for the Home Department, ex parte Launder,* referred to by Fordham, can also be thought of in terms of admitting new evidence where appropriate to protect human rights considerations (see for example the section headed "The Position in Future").

New evidence in the context of procedural unfairness

35. Whether new evidence is permitted depends on the nature of the unfairness alleged. For example, if the complaint is one of misconduct by the decision-maker, new evidence is generally permitted to show this: see *R. v. Secretary of State for the Environment, ex parte Powis*. Generally, evidence regarding procedural unfairness must be allowed if the conduct complained of is such that the applicant could not reasonably have been expected to anticipate and deal with the issue before the decision-maker, for example, as in *Halpin v. An Bord Pleanála* [2019] IEHC 352 (Unreported, High Court, Simons J., 24th May, 2019), if it turns out that relevant material was not disclosed at the material time. Where

an applicant points to new evidence in the context of something not having been put to him or her, it is not so much for the purpose of asking the court to re-adjudicate on the merits, but rather to show that the applicant would have had something to say in response if he or she had been given the opportunity to comment.

Summary of obligation to raise the point with the decision-maker

36. In summary, an applicant should normally raise her point with the decision-maker first, before doing so by way of judicial review.

37. This applies in particular if:

    (i). the complaint is that the decision-maker didn't consider something that she was not otherwise obliged to consider;

    (ii). the applicant complains about the lack of a specific procedure, not normally provided by the body's procedures without being requested, in which case she should positively ask for it from the decision-maker (for example adjournment, an oral hearing, cross-examination or an unusual opportunity to comment on some aspect of proceedings not envisaged by the body's procedures).

    (iii). the applicant is aware of some fact giving rise to a possible claim of bias;

    (iv). the complaint is one of irrationality, that is whether the decision was open on the material actually produced to the decision-maker, in which case it is not that the actual complaint of irrationality has to be made to the decision-maker (which it doesn't), but that the material by reference to which the decision would be irrational has to be put forward during the process under review.

38. An applicant can however present a new argument or a new piece of evidence to the court that was not put before the decision-maker if:

    (i). the complaint of illegality is jurisdictional, or the applicant seeks to introduce new evidence regarding a fact going to jurisdiction or going to breach of an essential procedural requirement;

    (ii). the applicant in judicial review is not the applicant before the decision-maker and the point amounts to correcting the other party's homework or pointing out omissions which would have enabled the application which is being opposed to be corrected and improved; such omissions can be left to the decision-maker to address and if not so addressed can be presented by the objector to the court without having first been raised before the decision-maker;

    (iii). the complaint is one of irrationality or disproportionality, so can only be assessed after the event in the sense that an applicant can only compare the extent to which the precise decision and the articulated reasons were open to the decision-maker on the evidence once that decision and reasons are actually available, although noting as stated above that while the articulation of the complaint of irrationality or

disproportionality can be new, the evidence by reference to which the argument is made generally should have been that before the decision-maker (apart from, in limited respects, where constitutional or ECHR rights are at issue (see below));

(iv). the complaint is of a procedural unfairness that the applicant could not reasonably have been expected to deal with in the process under review or is in respect of a requirement that the applicant could reasonably have expected the decision-maker to comply with, noting that this does not apply where some special procedure was not volunteered by the decision-maker, because as noted above an applicant should ask for any such special procedure if desired rather than making a generalised complaint in proceedings without prior notice;

(v). the complaint is one of lack of reasons (although asking the body for reasons, if such are lacking, and where its procedures so provide, is to be encouraged);

(vi). the complaint engages the principle of access to justice in EU law, such as the provisions of art. 11 of directive 2011/92/EU on EIA and art. 25 of directive 2010/75/EU on industrial emissions, or related fields;

(vii). the complaint is that the decision-maker made an error of fact;

(viii). the applicant wishes to show what material was before the decision-maker;

(ix). new evidence is necessary to explain technical terms or processes;

(x). new evidence is to show that a process of reasoning involved serious technical error;

(xi). a decision-maker had an independent duty to inquire, and relevant information could reasonably have been available:

(xii). new evidence explains the context in which the issue arises or is produced for background information;

(xiii). the complaint relates to a disproportionate impact on constitutional or ECHR rights which might be assessed by reference to the overall fact-situation rather than just what was before the decision-maker (though this does not allow an applicant to complain that some identified constitutional or ECHR right wasn't considered at all when that right was never alluded to by the applicant before the decision-maker);

(xiv). the complaint is one of misconduct by the decision-maker;

(xv). generally, the illegality is one that the applicant could not reasonably be expected to have addressed before the decision-maker;

(xvi). failure to raise the point during the process is otherwise explained satisfactorily.

Application of these principles to the facts here

39. Seven affidavits on behalf of the applicant are challenged in whole or in part and I will endeavour to apply the foregoing principles to these affidavits sequentially.

Applicant's grounding affidavit

40. Paragraph 11 exhibits an interpretation manual regarding habitats. That is a quasi-legislative document that is referenced in the habitats directive itself, so putting it before the court is perfectly permissible.

41. Paragraph 19 outlines the applicant's contentions in the first three sentences, which is essentially informative rather than evidential, but the remainder of the paragraph is impermissible new evidence going to the merits and needs to be struck out.

42. Paragraph 22 refers to another planning development which is of no real relevance to these proceedings and should also be struck out.

43. Paragraph 26 refers to a decibel comparison chart. That simply explains technical information so is permissible.

44. Paragraphs 31, 32 and 64 are really just statements of the applicant's point. They do not add much to the statement of grounds and are not of evidential value and I do not particularly see the need to strike them out as it would really makes no difference to do so.

45. Paragraphs 33, 35 and 36, however, do constitute new scientific evidence on the merits and I would strike those out.

46. At para. 34 the applicant exhibits UNECE documentation which is referred to in the developer's Natura Impact Statement. As this material is referred to in the notice party's own material which was before the decision-maker, exhibiting it in the proceedings is permissible and is a form of clarification as to what the materials before the decision-maker in fact meant.

Applicant's supplemental affidavit

47. Paragraphs 59 to 61 and 63 essentially repeat points made in Maria Cullen's affidavits and do not seem to add much to them and I would strike them out, particularly having regard to how I am dealing with her affidavit below.

48. Paragraph 62 amounts to new evidence on the merits and I would strike that out.

49. Paragraph 67 seems to be an attempt to highlight an allegation of shortcomings in the decision. As it is not of evidential value there is no particular need to strike it out.

50. Paragraph 70 complains that chilling effect on the applicant's own lands caused by the development. The first sentence is a complaint about omissions in the decision which seems to me to be essentially a submission rather than evidential, so striking it out would make no difference. The remainder is new evidence, but it is permissible as long as it is taken to be evidence showing that the applicant is prejudiced. But it is not to be taken as

going to the question of whether the board should have or failed to consider something that was not put to it.

51. Paragraph 71 deals with engagement with Kildare County Council and a comparison with Meath County Council. Again, I am taking that as going to the proposition that the applicant is prejudiced by the decision and it is admissible as long as it is not to be taken as new evidence on the basis of which the applicant can challenge the decision itself.

52. Paragraphs 91 to 95 refer to a separate planning application on adjoining lands owned by the developer. The applicant's replying affidavit to the present motion at paras. 59 to 60 does not make any convincing case as to why these specific points are relevant or could not have been anticipated during the planning process so on balance these paragraphs should be struck out.

53. A similar logic applies regarding para. 96 which I will also strike out.

54. Paragraph 102 exhibits the relevant folio in response to an averment as to the date of purchase of the lands concerned. The question of who owned what lands when is to do with the issue of what alternatives should have been considered for EIA purposes. The objection made in the grounding affidavit for the present motion at para. 37 is that no complaint about alternatives to be considered in the EIA process was made at the time. However, based on *Commission v. Germany*, the applicant is entitled to raise that legal point now. The new "evidence" is merely a statutory public record.

55. Paragraph 127 exhibits a decibel chart which is just technical explanation rather than impermissible new evidence.

56. Paragraph 129 exhibits ministerial guidelines - those are a public document of the kind a court might consider taking judicial knowledge of anyway. That is permissible. The relevance may be disputed, but a final decision on that can be left to the hearing.

57. Paragraph 131 refers to a modelling exercise in another planning application. That seems to be of limited relevance and also to amount to new evidence, so I would strike that out.

Applicant's second supplemental affidavit

58. Paragraph 7 exhibits documents already exhibited, so apart from anything else it is repetitive and I would strike it out.

59. Paragraphs 14 to 19 refer to subsequent parking developments and traffic management plans. That does not go to the issue the court has to decide and indeed arose subsequently so I would strike those paragraphs out.

First affidavit of Ms. Maria Cullen

60. Ms Cullen's first affidavit is relatively modest and discusses a UNECE document which is referenced in the notice party's Natura Impact Statement. Given that context, it is open to her as an expert to say that the terms of the UNECE document are inaccurately represented in the NIS. I will allow her affidavit to the extent that it is read in the sense of expert explanation and comment on the materials that were before the board, or the

further materials referred to in those materials, and not to be read as an expression of her own opinion as a stand-alone fact independent of such materials.

Supplemental affidavit of Maria Cullen

61. Paragraph 5 refers to new site visits and is impermissible new evidence, so should be struck out.

62. Paragraph 6 refers in the first sentence to new surveys and I would strike out that sentence. The second sentence is permissible scientific explanation.

63. Paragraphs 7 to 11 refer to alleged differences between the zone of influence as defined in the NIS and in the EIAR. That amounts to legitimate expert explanation or comment.

64. Paragraphs 12 to 36 seemed fairly saturated with new evidence and I would strike those out save to the extent that they merely point out omissions in the material before the board which is legitimate expert comment.

Second supplemental affidavit of Maria Cullen

65. Paragraph 3 exhibits *inter partes* correspondence. Such correspondence is, as a rule, something a court may find helpful to have in any case, so I won't strike it out although its precise relevance and value if any can be left to the trial.

66. Paragraphs 6 to 34 are again full of new evidence as to the merits so I would strike those out except insofar as they point out omissions in the material before the board.

Maria Cullen's proposed third supplemental affidavit

67. I would refuse permission to file the third supplemental affidavit on the grounds that it largely consists of new scientific information going to the merits. While there may be the isolated fragment of it that might in principle be permissible, it's not really the court's function in the context of a proposed affidavit in circumstances such as these (especially where the applicant has already had quite a degree of opportunity to contribute evidentially) to sift through such a proposed affidavit to indicate how it might be rewritten or edited in order to preserve any potentially admissible fragments.

Order

68. Accordingly, the order will be:

(i). to strike out the following:

(a). paragraphs 19 (apart from the first three sentences), 22, 33, 35 and 36 of the applicant's affidavit;
(b). paragraphs 59 to 63, 91 to 96 and 131 of the applicant's supplemental affidavit;
(c). paragraphs 7 and 14 to 19 of the applicant's second supplemental affidavit;
(d). paragraphs 5, 6 (first sentence) and (save insofar as they highlight omissions in the material before the board) 12 to 36 of Maria Cullen's supplemental affidavit;

(e). paragraphs 6 to 34 of Maria Cullen's second supplemental affidavit save insofar as they highlight omissions in material before the board;

(ii). to refuse permission to file Maria Cullen's third supplemental affidavit;

(iii). insofar as averments are not struck out on the basis that they are to be read in a particular sense, to direct that such averments are to be construed in the sense referred to in the judgment; and

(iv). to direct the parties to contact the List Registrar to have the matter listed in the next convenient Monday List.