THE HIGH COURT

JUDICIAL REVIEW

[2021] IEHC 312

[2020 No. 813 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

WALTHAM ABBEY RESIDENTS ASSOCIATION

APPLICANT

AND

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

RESPONDENTS

AND

O'FLYNN CONSTRUCTION COMPANY UNLIMITED

NOTICE PARTY

JUDGMENT of Humphreys J. delivered on Monday the 10th day of May, 2021

1. On 23rd January, 2020, the notice party developer engaged in a pre-application consultation process for a proposed strategic housing development consisting of the construction of 123 apartments and associated works at Old Fort Road, Ballincollig, County Cork.

2. In February 2020, the board issued an opinion pursuant to s. 6(9) of the Planning and Development (Housing) and Residential Tenancies Act 2016 that the application provided a reasonable basis for a Strategic Housing Development (SHD) application.

3. There is a procedure under s. 7 of the 2016 Act for a subsequent opinion as to the scope of environmental impact assessment (EIA), but this was not activated here, so any EIA issues were integrated into the usual development consent process.

4. The formal SHD application was made on 11th June, 2020. A tree survey was conducted for that purpose and screening reports were produced for the purposes of EIA and appropriate assessment (AA). The EIA screening report at para. 3.1.3 asserts that the site is of "low value ecological habitat". It does not include any particular analysis of the flora and fauna on the site. The only reference to "biodiversity" is to the AA screening report which in turn only relates to Natura 2000 sites rather than the ecology of the site itself.

5. The EIA screening report conclusion includes a proposal that the retention of existing vegetation on site "where possible" and its enhancement through new landscaping will result in a positive biodiversity impact. The "Statement of Consistency" states that "[t]he existing hedgerows and trees along the site boundary are to be retained and protected where appropriate. All trees to be maintained will be protected appropriately during construction and operation. As above, the existing trees on site are to be retained and protected …". That wording suggests that no trees are being removed, but that is not the case. A number of cypress trees are being cut down as well as two oak trees out of six

on the site. One of the oak trees being removed has a cavity which suggests that it could be suitable for use by fauna.

6. On 7th July, 2020, the applicant company which represents the residents of a nearby estate made a lengthy submission raising a vast number of issues. The main thrust of the submission related to the impact of a large new housing development on the existing established residential community, for example in terms of parking and traffic. Given the comprehensive nature of the submission, it was a pleasant surprise that the grounds in the present judicial review were tightly focused.

7. On 11th September, 2020, the inspector reported favourably on the application.

8. On 16th September, 2020, the board decided to grant permission for the development. For the purposes of AA the board adopted the screening exercise of the inspector. In relation to EIA, that is not stated because the inspector did not conduct a screening exercise in the sense of the Planning and Development Regulations 2001. Rather the board says that *it* completed an EIA screening. The primary relief sought in the present proceedings is an order of *certiorari* quashing the board's decision.

Scope of the challenge

9. The relief sought in core ground 1 is a challenge to the validity of the pre-application consultation legislation. That has been left over to a potential later module, pending the determination of the other issues, on the principle of reaching constitutional issues last.

10. Core grounds 2 regarding AA screening, 3 regarding the water framework directive, 6 regarding the site notice and 7 regarding parking provision were not in fact pursued at the hearing. Thus, the only matters falling for determination in this module are core grounds 4 and 5 regarding the EIA screening process.

Non-compliance with regulation 299B of the Planning and Development Regulations 2001

11. Regulation 299B of the Planning and Development Regulations 2001 (S.I. No. 600 of 2001), inserted by the European Union (Planning and Development) (Environmental Impact Assessment) Regulations 2018 (S.I. No. 296 of 2018), envisages three levels of engagement with the EIA process. Firstly, there is "preliminary examination" which is required in every case by reg. 299B(1)(b). Following that the board may decide that "screening" is required and this is undertaken under reg. 299B(2)(b)(ii). The third and highest level of engagement following that process would be full EIA.

12. Where an application comes through preliminary examination and the board goes on to conduct a screening exercise, a document required to be produced by reg. 299B(1)(b)(ii)(II)(C) is "a statement indicating how the available results of other relevant assessments of the effects on the environment carried out pursuant to European Union legislation other than the Environmental Impact Assessment Directive have been taken into account."

13. There is a difference in language between the regulations and the directive in that art. 4(4) of the EIA directive 2011/92/EU as amended, in particular by directive 2014/52/EU, does not require a "statement" of the assessments under other European Union legislation, only "information" (see generally on the amended directive, Agustìn Garcìa-Ureta, "Directive 2014/52 on the Assessment of Environmental Effects of Projects: New Words or More Stringent Obligations?*", Environmental Liability, Law Practice and Policy*, (2014) 22(6) Env. Liability: 239). Similarly, the EC EIA *Guidance on Screening*, 2017, p. 44 refers to information rather than a statement.

14. That said, any member state can normally implement a directive in a way that adds additional protections, not inconsistent with EU law, to those expressly spelled out in the directive.

15. One of those additional procedures here is the clear and unambiguous requirement of a "statement" of the analysis of the effects of the project under other EU law. As the CJEU pointed out in Case C-75/08 *R. (Mellor) v. Secretary of State for Communities and Local Government* (Court of Justice of the European Union, 30th April, 2009, ECLI:EU:C:2009:279) at para. 57: "third parties, as well as the administrative authorities concerned, must be able to satisfy themselves that the competent authority has actually determined, *in accordance with the rules laid down by national law*, that an EIA was or was not necessary" (emphasis added).

16. The situation is unfortunately inadequately reflected in the ministerial guidelines on EIA, 2018, issued under s. 28 of the Planning and Development Act 2000, which state at para. 3.10 that the developer "must take into account relevant available results of other assessments". The guidelines are to that extent lacking in specifics because the regulations require, not that these assessments be merely "taken into account", but that a "statement" is required; and, moreover, a statement with a particular specified content.

17. Here the inspector proposed disposing of the matter on the basis of a preliminary examination. The board did not do that; in contrast with the approach taken in relation to AA, as noted above, where the inspector carried out screening and the board adopted that exercise.

18. However, the board simply did not engage with the statutory framework for this process and made no reference to regulation 299B, good, bad or indifferent. Certainly there is nothing in the decision that states that the material set out in reg. 299B(1)(b)(ii)(II)(C) was provided, which it clearly was not, or indeed that the board considered the terms of that provision at all, although that is not a specific ground of challenge.

19. The board decision phrased itself as having made involved a single decision on screening, but it is absolutely clear in the regulations that two decisions are involved:

    (i). a first decision under reg. 299B(1)(b)(ii)(II) on preliminary examination that "there is significant and realistic doubt in regard to the likelihood of significant effects on the environment arising from the proposed development"; and

(ii). a subsequent decision under reg. 299B(2)(b)(i) on screening.

20. The board's submission that everything was done correctly turned out to be just an assertion based on the words used. That doesn't get the board very far because the words used are not adequate to show proper consideration of the relevant matters or even of the relevant legislation, and suggest a quite different and more truncated single decision. More fundamentally of course, the necessary statement wasn't before the board.

21. There is a very clear distinction in the regulations between a statement and information. Section 12 of form No. 14 in the 2001 regulations as added by the 2018 regulations sets out six necessary statements at A to F. "Statement" is clearly a term of art in the environmental context. Counsel for the applicant calls it "an identifiable document", and I agree with that. There are 494 references to "statement" in the 2018 regulations which inserted reg. 299B, and 356 references to "information". Examining a range of these references indicates that the drafter clearly had in mind a definite distinction between the two concepts.

22. The kind of assessments that should be brought together in the statement under reg. 299B(1)(b)(ii)(II)(C) include those under the following directives:

(i). directive 92/43/EEC, the habitats directive: see EC EIA, *Guidance on Screenin*g, 2017, p. 44;

(ii). directive 2000/60/EC, the water framework directive, including as it applies in this case to the Lee-Cork Harbour catchment area: see EC EIA, *Guidance on Screening*, 2017, p. 44;

(iii). directive 2001/42/EC, the SEA directive: see EC EIA, *Guidance on Screening*, 2017, p. 44;

(iv). directive 2002/49/EC, regarding environmental noise;

(v). directive 2008/50/EC, the clean air for Europe directive;

(vi). directive 2007/60/EC, regarding the assessment and management of flood risks; as well of course as

(vii). any other relevant provision of EU law.

23. It is clear that no such statement was submitted. There is no reference to such a statement in either the inspector's report or the board's decision. It is true that for example there are some references to some of the relevant directives in the EIA screening report and other documents, but they do not individually or collectively comply with reg. 299B(1)(b)(ii)(II)(C) by indicating "how the available results of other relevant assessments of the effects on the environment carried out pursuant to European Union legislation other than the Environmental Impact Assessment Directive have been taken into account." That would have required four clear elements:

(i). a distinct identifiable document constituting a statement of all the relevant matters for the purposes of reg. 299B(1)(b)(ii)(II)(C);

(ii). identification of the relevant assessments that are available;

(iii). identification of the results of those assessments; and

(iv). identification of how those results have been taken into account.

24. This is not just a matter of form. But even if it was just a matter of form, the regulations were not complied with. There is a mandatory requirement to refuse an application if the information referred to in sub-article (1)(b)(ii)(II) was not provided by the applicant, by virtue of reg. 299B(2)(a). Admittedly, this provision uses the word "information", but in that specific instance, that must logically include the "statement" as there would be no reason why only that element of the mandatory information would not be necessary. Indeed, that would undermine the whole scheme of the regulation.

25. The notice party suggested that the regulations should be construed in a permissive manner because if not, a *vires* issue would arise on the basis that it might not be open to the Minister by way of regulations to determine how the discretion in s. 8(3)(a) of the 2016 Act would be achieved (or in other words, that it was not open to provide in reg. 299B(2)(a) that in the absence of the information the board had to refuse to deal with the application under s. 8 of the 2016 Act).

26. Unfortunately that doesn't hold water. The first problem is that reg. 299B(2)(a) would work perfectly well even if the reference to s. 8 of the 2016 Act was excised as invalid (which it isn't).

27. More fundamentally, reg. 299B was itself inserted by the 2018 regulations which were made under s. 3 of the European Communities Act 1972, and which may, and in this case did, amend primary law for the purposes of implementation of the EIA directive. Hence it was perfectly lawful for reg. 299B to have impliedly or otherwise amended or modified primary law in the form of s. 8 of the 2016 Act.

28. The board and notice party suggested that even if a "statement" is required (which it obviously is because that's what the regulations say), the board is not obliged to reject the application if it has the information that would otherwise be in the statement. I do not accept that for two reasons.

29. First of all, the requirement of a statement is absolutely clear and mandatory, and the consequences of not providing it are spelled out.

30. Secondly, I do not think that all of the information provided in the statement is adequately contained in other documents in the present case, even if one was to be entitled to attempt to jigsaw them together, given the four required elements for the statement as set out above and the myriad of possible directives which might fall for consideration in the process, as also alluded to above.

31. Particularly because the consequences of non-compliance are set out in the regulations themselves, this is not a case where one needs to get into the case law of mandatory versus discretionary provisions such as *Monaghan U.D.C. v. Alf-a-Bet Promotions Ltd.* [1980] I.L.R.M. 64, *M.P. v. Teaching Council of Ireland* [2019] IECA 204 (Unreported, Court of Appeal, McGovern J. (Peart and Kennedy JJ. concurring), 23rd July, 2019), *Gillen v. Commissioner of An Garda Síochána* [2012] IESC 3, [2012] 1 I.R. 574, *The State (Elm Developments Ltd.) v. An Bord Pleanála* [1981] I.L.R.M. 108, *R. v. Soneji* [2005] UKHL 49, [2006] 1 AC 340. Rather, what is at issue here is the non-compliance with an express statutory requirement: *McAnenley v. an Bord Pleanála* [2002] IEHC 60, [2002] 2 I.R. 763, and moreover one where the statute sets out the consequence - the board shall refuse to deal with the application.

32. Nor is this a case about the purpose of interpretation of the EIA directive: see *e.g. Ó Gríanna v. An Bord Pleanála* [2017] IEHC 7 (Unreported, High Court, McGovern J., 18th January, 2017), *M28 Steering Group v. An Bord Pleanála* [2019] IEHC 929 (Unreported, High Court, MacGrath J., 20th December, 2019). The particular procedure here is one imposed by the terms of national law. The fact that the requirement of a "statement" is not in the directive, or in schedule 7A of the 2001 regulations inserted by the 2018 regulations, is irrelevant. Those matters do not take from the clear statutory language of a requirement for a statement in the relevant domestic law, reg. 299B(1)(b)(ii)(II)(C).

33. The board in its written submission implied that it could be taken to have "adopted" the report of the inspector even though that specific language is not used. The board also suggested that the applicant's argument was defeated by cases on substance rather than form such as *Buckley v. An Bord Pleanála* [2015] IEHC 572 (Unreported, High Court, Cregan J., 29th July, 2015), *Alen-Buckley v. An Bord Pleanála* [2017] IEHC 541 (Unreported, High Court, Haughton J., 26th September, 2017), *Kelly v. An Bord Pleanála* [2019] IEHC 84 (Unreported, High Court, Barniville J., 8th February, 2019).

34. That submission involves a fundamental misconception. There are three entirely distinct levels of analysis that EIA in the 2001 regulations and no conceivable way here that the board can be taken to have adopted the inspector's conclusion. The inspector said the EIA could be ruled out at the preliminary examination stage, whereas the board carried out a screening. Those are totally distinct legal processes under the regulations and the matter cannot be dismissed as one of form only. Nor can it be answered by saying that the board considered relevant information and had jurisdiction to decide whether full EIA is required relying on *O'Sullivan v. An Bord Pleanála* [2017] IEHC 716 (Unreported, High Court, Costello J., 30th November, 2017). Again, that is a sort of a self-proving circular argument along the lines that the decision-maker has jurisdiction to make a valid decision, the decision-maker has exercised that jurisdiction, therefore, the decision-maker made a valid decision. Unfortunately for the board, judicial review is a mechanism for ensuring that the decision is made in accordance with mandatory legal requirements including procedural requirements which certainly was not done here, and a *fortiori* was not shown to be done. The regulations set out how the jurisdiction is to be exercised.

35. A lingering unsatisfactory feature of the decision is the board's complete failure to make any reference whatsoever to reg. 299B or any specific sub-provision of it. The board initially submitted there was no need to do so because the position was totally clear, but that somewhat defensive, even blustering, posture disintegrates under examination. The two necessary legal decisions which are entirely distinct under the regulations are collapsed into a single decision here that makes no reference whatsoever to the necessary documents required following preliminary examination and no reference to reg. 299B.

36. Nor was the position made clear evidentially, because there is nothing in the affidavit of Mr. Pierce Dillon on behalf of the board as to what actually happened. That affidavit says that factual matters are dealt with in the statement of opposition, but that's a misunderstanding – as far as reg. 299B(1)(b)(ii)(II)(C) is concerned, they aren't.

37. There are only three references to reg. 299B in the board's statement of opposition, and none of them constitute dealing with the factual matters relevant to this issue:

    (i). At para. 32 it is pleaded that the board was satisfied that it had sufficient information to make a decision on the screening exercise. That is not an answer. Of course the board was satisfied that it had enough information to make a decision – that's why we're here. That doesn't address the question as to whether it was right to be so satisfied, or in particular whether it had the specific materials required by the regulations which include a statement under reg. 299B(1)(b)(ii)(II)(C), or even whether it gave any consideration at all to reg. 299B, although lack of reference to the regulation is not a specific pleaded ground here.

    (ii). At para. 33 of the statement of opposition, the board states (rather than pleads anything specifically arising out of it) that the applicant did not take an issue with non-compliance with reg. 299B(1)(b)(ii)(II)(C) in its submission to the board. That is correct, but not decisive as I will discuss shortly.

    (iii). At para. 34 the board says that the applicant has not established how the assessments referred to in the statement of grounds were relevant assessments for the purposes of reg. 299B(1)(b)(ii)(II)(C). That is irrelevant because the requirement for a statement is a mandatory requirement of the regulations.

38. The whole situation just goes to show how desirable it is that a decision under an enactment should, in the terms and language of the decision, engage with the steps required in the enactment. Since I have not been asked to quash the decision on the ground that the statutory scheme was ignored in the wording of the decision, I am certainly not going to do that, but I can be allowed to say that engagement with the terms of the enactment is at a minimum highly desirable, and may arguably be a legal requirement (a point I can leave for discussion in some other case); and also that the absence of any reference whatsoever to reg. 299B may be of some relevance to the issue of the court's discretion to which I now turn.

Discretion

39. While I am urged, particularly by the notice party, to refuse relief on the grounds of discretion, a key contextual point here is that there is nothing particularly special about this case as to why the requirement for a statement should be excused under the discretionary heading. If I were to refuse relief on a discretionary basis here, I would be more or less compelled to refuse it in every case, which would amount to a usurpation of the legislative function and a rewriting of the regulations by in effect deleting the obligation for a statement altogether.

40. The applicant's point under this heading was condemned as formalism of the kind that Advocate General Sharpston disagreed with in para. 79 of her opinion in Joined Cases C-128/09 to C-131/09, C-134/04 and C-135/09 *Boxus v. Région Wallonne*, (Court of Justice of the European Union, 19th May, 2011, ECLI:EU:C:2011:319), where she said that "[t]he EIA Directive is not about formalism. It is concerned with providing effective EIAs for all major projects; and, in its amended form, with ensuring adequate public participation in the decision-making process." Counsel for the applicant replied to that charge by referring to Scalia J.'s comment in "Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws" *in A Matter of Interpretation: Federal Courts and the Law* (Princeton: Princeton University Press, 1998), "Long live formalism. It is what makes a government a government of laws and not of men" (p. 25). One doesn't have to buy into the flawed theories of textualism (ignore the law's purpose) or originalism (only the meaning when enacted counts) to appreciate that Scalia J. has some kind of point there, albeit perhaps slightly over-stated in the sense that if all that is standing between us and anarchy is formalism then the rule of law is in more trouble than we think. As in many things, there is a balance to be arrived at. Law most certainly should not be interpreted in a blindly literal and formalistic manner. On the other hand, any regard to context and purpose can only take one so far from the actual text of the law concerned. But as Baker J. (Irvine and Costello JJ. concurring) said in *V.K. v. Minister for Justice and Equality* [2019] IECA 232 (Unreported, Court of Appeal, 30th July, 2019) at para. 109: "[w]ords do matter, and if the language of the Minister departed in its emphasis, tone, and possible import from that in the case law, in seems to me that [the judge] was correct to grant *certiorari*".

41. Anyway on the facts this isn't just a question of departing from the statutory language but also its substantive content. The necessary matters required for the statement have not been demonstrated to be present here in all of their aspects, even if elements could be unearthed in scattered parts of the documentation. But more fundamentally, the regulations clearly envisage a benefit in that being brought together in a single identifiable document. That makes a lot of sense. For example, the AA screening process would be extremely difficult if there was no requirement for a statement of the developer's screening exercise and if the particular issues that are contained in that document were scattered among various different items of correspondence or reports in a very voluminous application.

42. The board's failure to make any reference to reg. 299B at all is also relevant here. I don't think I would be upholding the statutory scheme if I exercised discretion (even if was

otherwise appropriate, which it isn't), or regarded the non-compliance as *de minimis*, or considered that the substance was complied with such that *certiorari* should be refused, or refused relief on the grounds that the applicant did not raise the point with the board. That would dilute, and in effect all but rewrite, the statutory scheme. But such a conclusion is reinforced by the board's failure itself to expressly engage with the terms of the regulation. While I amn't basing my decision on it, the judgment in *Southwood Park Residents Association v. An Bord Pleanála* [2019] IEHC 504 (Unreported, High Court, 10th July, 2019), where, at para. 42, Simons J. said, relying on *McAnenley*, that a breach could be "fatal" even if "the content of the one of the missing documents … was available in an almost identical form", doesn't particularly help the respondent here.

43. The notice party did make the argument that government policy, and the importance of provision of housing in general, and strategic housing in particular, is such that *certiorari* should be refused on a discretionary basis. It is not clear to me that any specific basis for the general plea of discretionary refusal is articulated at para. 44 of the notice party's statement of opposition, but even if I could nonetheless make such an order (which I do not think I should in the absence of any express adverse matter being pleaded, by reference to which such an exercise of discretion would be appropriate), I do not think that this is a case for discretion. The statute envisages a particular procedure to be followed. It was not followed, and it really is as simple as that. To refuse *certiorari* would be to say that the enactment, which for good measure was introduced by regulations having statutory effect under s. 3 of the 1972 Act, frustrates some kind of higher purpose - which I don't accept and which would be illogical.

44. As regards the applicant's failure to address reg. 299B in the submissions to the board, it should be noted that the board did not make a standing argument. While the notice party did plead standing or disentitlement to make the point in oral submissions, that was not pursued in that form, but rather recast as a point that the failure to raise the issue was said to be something the court should take into account in terms of discretion.

45. But even if a full-blown standing challenge had been mounted, there is no requirement for an objector to point out gaps in the paperwork of an adversary in an administrative process. It is not the obligation of an objector to say to the decision-maker how the application being objected to could be improved such that it could be allowed. Ensuring compliance with any relevant requirements can be left to the decision-maker. A judicial review applicant who was the objector or third party in the administrative process is not required to address such an issue in advance, and nor is she precluded from bringing a challenge the decision because of a failure to do so: see on this point *Reid v. An Bord Pleanála* [2021] IEHC 230 (Unreported, High Court, 12th April, 2021).

46. Regulation 299B provides that if the information specified (which must include the statement as to assessments under non-EIA EU law) is not provided, then the board must decline to deal with the application. Especially in such a context, it would not make sense for the court to exercise its discretion to render valid the board's having dealt with the application.

47. For all of these reasons, it seems to me that there is no basis for refusing relief on grounds of discretion. Doing so would only weaken the rule of law and undermine the enactment in this respect, probably fatally.

Adequacy of the EIA in relation to bats

48. Turning to the second issue which is the adequacy of EIA in relation to bats, we are now into pure EU law to which different procedural requirements apply: see *Balscadden Road Residents Association SAA Ltd. v. An Bord Pleanála (No. 2)* [2021] IEHC 143 (Unreported, High Court, 12th March, 2021). The impact of the development on bats was raised in the applicant's submission to the board, but not dealt with in any great detail, albeit that the inspector (at para. 11.7.2) did refer somewhat in passing to the view that "[t]he site does not generally provide suitable habitats for wildlife or species of conservation interest." The applicant complained in particular about the lack of a full bat survey and of consideration of the system of strict protection for bats under the habitats directive.

49. The EC EIA guidance at p. 60 includes, in its checklist of criteria for evaluation of the significance of environmental impacts for screening purposes, the question "[w]ill many receptors of other types (fauna and flora, businesses, facilities) be affected?" Here there is little in the EIA screening report as to the impact on bats. The applicant relies in particular on the judgment of the CJEU in Case C-435/97 *World Wildlife Fund v. Autonome Provinz Bozen* (Court of Justice of the European Union, 16th September, 1999, ECLI:EU:C:1999:418), at para. 45 that: "the objective of the Directive … is that no project likely to have significant effects on the environment, within the meaning of the Directive, should be exempt from assessment, unless the specific project excluded could, *on the basis of a comprehensive assessment*, be regarded as not being likely to have such effects" (emphasis added).

50. Had it been necessary to come to a decision under this heading I would have given consideration to whether to seek the assistance of the CJEU on the questions arising, which seem to be as follows:

    (i). whether para. 3(b) of annex IIA of the EIA directive, insofar as it refers to provision of information on by diversity as relating to "any likely significant effects, to the extent of the information available on such effects", imposes a requirement on the developer to obtain such information by conducting adequate scientific surveys of relevant species; and

    (ii). whether art. 4 of the EIA directive alone and/or in combination with art. 11 and/or art. 3(b) of annex IIA have the effect that a decision that public participation is not required should be informed by adequate scientific surveys of relevant species and/or by a consideration of whether the development if carried out would engage the provisions of art. 12 of the habitats directive, either in general or where the competent authority receives information from third parties as to such impacts where those impacts are not addressed in the information provided by the developer.

51. However, as the matter can be disposed of under domestic law, these questions are not "necessary" for the determination of the proceedings within the meaning of art. 267 TFEU, so, for the purposes of this case, we don't need to get into EU law either in general or as to the possibility of a reference in particular.

Order

52. Accordingly, the order will be as follows:

(i). There will be an order of *certiorari* removing for the purposes of being quashed the board's decision to grant permission.

(ii). On that basis, the case against the State is moot, so I provisionally propose to strike out the case against the State with no order, without prejudice to the applicant's entitlement to pursue any such point in any future litigation if that becomes necessary and with liberty to re-enter the proceedings against the State in this case if some future development in the present proceedings makes such re-entry legally appropriate. For clarification if there is no such development, then any future case against the State would be ventilated through new proceedings in a hypothetical new factual context if such arises.

(iii). I will direct the parties to the present module to liaise with the State and with List Registrar to list the matter on the next convenient Monday for any consequential directions.