

**THE HIGH COURT
JUDICIAL REVIEW**

[2021] IEHC 322
[2020 No. 712 JR]

BETWEEN

ATLANTIC DIAMOND LIMITED

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

AND

EWR INNOVATION PARK LIMITED

NOTICE PARTY

JUDGMENT of Humphreys J. delivered on Friday the 14th day of May, 2021

1. The notice party developer's proposal here under the Strategic Housing Development (SHD) procedure is to replace most of the existing commercial units at Docklands Innovation Park, East Wall Road in Dublin with six residential blocks, leaving three of the existing operating industrial units in place. The applicant refers to the resultant outcome as a "factory-cum-apartment complex".
2. The applicant is a commercial tenant of one of the units to be retained in the Innovation Park, and had made a submission to the board claiming there would be a necessity for heavy goods vehicles to come into the development for the indefinite future, at somewhat unsocial hours and for the operation of noisy industrial equipment outdoors, again during unsocial hours.
3. The board's inspector prepared a report on 23rd July, 2020 recommending that permission be granted subject to 30 conditions and on 17th August, 2020 the board decided to grant the permission generally in accordance with the inspector's report. The development would involve 366 dwellings, childcare facilities and associated site works.
4. The board's decision includes the "defensive and circular" (*per* O'Donnell J. in *Balz v. An Bord Pleanála* [2019] IESC 90, [2020] 1 I.L.R.M. 637) phrase that they had considered all matters that they were obliged to consider under the legislation. I don't see this sort of terminology as really assisting the board either in terms of law or judicial psychology. As a matter of law it is an empty phrase that adds nothing to the decision; and as a matter of psychology it suggests a certain insecurity in the robustness of the decision, because a confident decision-maker wouldn't have recourse to such a self-consciously defensive formulation.
5. The board's decision states that regard was had to government policies including the Sustainable Urban Housing: Design Standards for New Apartments Guidelines for Planning Authorities (2018) and the Urban Development and Building Heights: Guidelines for Planning Authorities (December 2018).
6. The board concluded that full Appropriate Assessment (AA) and Environmental Impact Assessment (EIA) was not required. The decision found that the grant of permission would materially contravene the development plan in respect of building heights, but that

this was permissible under s. 37(2)(b)(i) and (iii) of the Planning and Development Act 2000 having regard to various matters, particularly s. 3.2 of the building heights guidelines, and specific planning policy requirement (SPPR 3). In the decision, 26 conditions were imposed. The applicant now seeks *certiorari* of the board's decision pursuant to an amended statement of grounds that sets out 49 listed grounds of challenge.

Summary of domestic law grounds

7. A number of interesting domestic law grounds were raised in submissions, but were not in fact pursued due to inadequacies in the pleadings: firstly, the argument that the council's report was not issued by the Chief Executive contrary to s. 8(5)(a) of the Planning and Development (Housing) and Residential Tenancies Act 2016, but rather was issued by one of the departments of the council; and secondly, an argument that the board erred in referring to reg. 109(3) of the Planning and Development Regulations 2001 (S.I. No. 600 of 2001) which had been revoked by reg. 69(c) of the European Union (Planning and Development) (Environmental Impact Assessment) Regulations 2018 (S.I. No. 296 of 2018). With those points out of the way, there were essentially three grounds of challenge:
 - (i). lack of reasons for rejecting the submissions made;
 - (ii). an erroneous approach in relation to the issue of daylight and sunlight; and
 - (iii). an incomplete application contrary to the prescribed form.

Inadequate reasons

8. The reasons argument is, in practice, frequently overcooked by applicants. The question of reasons normally comes down to the main reasons for the main issues: see *Balscadden Road SAA Residents Association Ltd. v. An Bord Pleanála (No. 1)* [2020] IEHC 586, [2020] 11 JIC 2501 (Unreported, High Court, 25th November, 2020), *Connelly v. An Bord Pleanála* [2018] IESC 31, [2018] 2 I.L.R.M. 453. It is also important that, whether under the heading of reasons or otherwise, the court does not get drawn into the merits of a planning application: *Kemper v. An Bord Pleanála* [2020] IEHC 601 (Unreported, High Court, Allen J., 24th November, 2020).
9. There was much interesting discussion at the hearing as to the lack of a procedure in the SHD mechanism for resolving conflicts of fact, given that there is no procedure to require further information from a developer. The applicant submits that because the developer chooses the SHD mechanism rather than normal planning, the developer must then take the burden of any adverse consequences flowing from the lack of a mechanism to resolve factual conflict. The inference, although the discussion didn't perhaps fully spell it out, is that in the SHD context the board does not have jurisdiction to resolve any conflict of fact in favour of the developer as to do so would create an unfairness of procedure, especially given that the court is not in the business of reviewing substantive findings. That would not prevent the board from preferring one set of expert opinions over another in the exercise of planning judgement, but it would preclude rejection of an objector's version of the facts on the ground by reference to which the planning application should be judged.

10. The developer and board put up the argument that many of the applicant's points were matters for other forms of civil litigation, such as whether it had a right of way that precluded the carrying out of the development. Of course that is superficially a legitimate proposition. But the applicant points out that one could collapse any objection by arguing, in response to a submission that the development interferes with X, that "they shouldn't be doing X", and that if the objector disagrees with that, it is a matter for other civil litigation. It seems to me that there is a distinct logic to that analysis. Without in any way taking from the point that the grant of permission does not of itself constitute a right to carry out the development, nonetheless there is a principle here which is that the factual matrix by reference to which the question of whether the permission represents proper planning and sustainable development and whether it should be granted or not has to be assessed must be the reality on the ground at the time of the application. That is a question of fact.
11. While, on one view, within the applicant's argument here there is the germ of a fairly fundamental attack on the whole SHD procedure, in fact the proposition as pleaded and argued is somewhat more modest for the purposes of the present case. That proposition is that if and insofar as the board was not accepting the applicant's view of the facts (given that it is implicitly being assumed for the sake of this argument that the board has jurisdiction to reject that version), then clear reasons need to be given.

Lack of reasons for rejecting submission insofar as it alleged that the development was unprecedented

12. There are a number of striking elements of the applicant's submission that it is hard to see as having been dealt with in the decision, whether clearly or otherwise. The most striking point is the argument that the development would be unprecedented. According to the applicant's submission to the board "building 336 apartments in an industrial estate is without precedent and would be a grave planning error." The applicant goes on to say that "parents will not let their children play unattended for fear of being run over by a lorry or truck." The apartments guidelines 2018 (para. 4.13) is cited stating that: "[e]xperience in Ireland and elsewhere has shown that children will play everywhere." The complaint is made that the developers CGI photomontages do not show children being attracted to a reversing forklift, a reduced mobility driver getting out of a car as a lorry rounds the corner, a couple being woken up at 5 am by lorries coming from Dublin Port or children in the crèche or open areas inhaling diesel fumes.
13. It is worth noting, by way of background, that the developer has since clarified that in its opinion such a development is not unprecedented, and cites three developments in Dublin in particular, at Sandyford Industrial Estate, Carriglea on the Naas Road and developments in Tallaght/ Cookstown. The applicant responds by distinguishing these developments on various grounds including by contending that the housing and industrial areas are physically separate. It also points to a permission refusal in Greenmount Industrial Estate in Harold's Cross that it says has some read-across to this development. Obviously, I am not going to resolve that here, but it does show that there is a debate to be had about whether this proposal really is unprecedented. I should also make clear that just because something is unprecedented doesn't mean it can't be done – otherwise

nothing would ever be done for the first time. The possible argument that this particular development might on one view seem unusual doesn't imply that it shouldn't be accepted. But the question of precedent or otherwise was a major issue raised by the applicant.

14. Sticking with the formulation of the board being required to provide the main reasons on the main issues, I do consider that, in the context here, the alleged unprecedented nature of the scheme was a main issue and there is no clear reason provided as to why that was not a countervailing consideration to the grant of permission.

Reasons regarding rejection of submission on impact of industrial operations

15. The submission was made in particular that the noise and fumes of an industrial estate are not compatible with residential development and it is asserted that engineering equipment is located outdoors in the yard in front of the unit, and that grinding machines, air compressors and water treatment pumps run intermittently in the dead of night. Lorries must reverse into spaces and forklifts are invariably operated by operators unfamiliar with the estate. These vehicles have limited visibility especially when reversing and would be an attraction to children. The inspector's report in essence, and particularly at para. 12.5.10, states that given the reports carried out on behalf of the developer including the transportation assessment travel plan and stage 1 road safety audit, the proposed development would not represent an unacceptable traffic safety risk.
16. Insofar as concerns questions of planning judgement, the decision-maker is entitled to prefer one set of expert opinion over another, all things being equal. However, that approach has its limits, particularly where the facts are contested. It is hard to see in the decision a basis for saying that clear reasons are provided in respect of all of the applicant's main points, particularly the movements of heavy vehicles and the use of outdoor equipment.
17. Any affidavits providing additional evidence subsequent to the board decision do not resolve the legal issue for the board or the notice party and are best regarded as either contextual or as simply inadmissible.
18. It's true that the board has jurisdiction to add conditions (*Boland v. An Bord Pleanála* [1996] 3 I.R. 435) and that condition 12(e) provides for a mobility management strategy. But it is hard to see how that could address the issue of commercial vehicles arriving at unsocial hours, and nor does it deal with noisy outdoor equipment. Even assuming for the sake of argument that some of the applicant's points, such as the swept path analysis, are too tied into the disputed question of the right of way to be a basis for quashing the decision, and even assuming that one stretched to its limits the approach of implying reasons from acceptance of the developer's expert material, I do not think that it can be said that the applicant has been provided with the main reasons for all of the main issues (particularly the rejection of the applicant's submissions regarding movements of heavy vehicles and the use of outdoor equipment) having regard to the perhaps atypical circumstances here, so accordingly I would quash the decision on that basis also.

Daylight and sunlight analysis

19. A standing issue is raised against the applicant in terms of the point sought to be made on the daylight and sunlight analysis; firstly, because the applicant did not raise this point before the board, and secondly, because the applicant is not personally affected. I don't think that either objection has merit. Notwithstanding that this is a domestic law issue, it comes under the heading of there being no obligation to correct the developer's homework: see *Reid v. An Bord Pleanála* [2021] IEHC 230 (Unreported, High Court, 12th April, 2021). An objector is not obliged to point out omissions and defects in the paperwork of an applicant before the administrative body in order to enable that application to be more successfully pursued. The objector is entitled to rely on the administrative body to see to all of that, and if that is not done, the point can be raised for the first time in the court.
20. On the second leg of the standing objection, it is correct that the applicant is not personally affected, but nobody particularly is, given that the people affected will be the owners and occupiers of future apartments. There is no rule that you can only make points in a planning context that you are personally affected by. I do not accept any analogy with the point made in *Dunnes Stores v. An Bord Pleanála* [2016] IEHC 226 (Unreported, High Court, Hedigan J., 4th May, 2016), to the extent that it holds that one cannot argue for the constitutional rights of others. That is as may be, but I certainly would not extend that principle any further and it most certainly does not have the consequence that you cannot make a planning objection on a point unless it personally affects you. On the contrary, anybody can make a planning objection on any legally cognisable ground. On the facts here, as noted above, if matters were otherwise this point could not be raised by anybody because the people most affected, the potential purchasers, are a class that is yet to crystallise.
21. More broadly, the enforcement of planning law is crowdsourced to some extent by allowing challenges with looser standing rules than normal public law proceedings. For example, any person can make an application under s. 160 of the Planning and Development Act 2000. More generally environmental litigation is different to normal litigation in a number of ways, including special rules on costs. If and insofar as there was a relevant legal obligation to comply with guidelines under s. 28 of the 2000 Act in respect of daylight and sunlight, the objector was entitled to look to the decision-maker to ensure that that obligation was satisfied. There is a fundamentally different dynamic here from a case where the judicial review applicant is also the applicant in the administrative process. In the latter type of case, if the applicant wants the decision-maker to consider something, generally she has to raise that something herself.
22. In addition to the misconceived standing objection, there is also a misconceived pleading objection.
23. It is true that, as the board and the notice party point out, an applicant is confined to matters pleaded (treating that as a domestic law proposition for now): *Harrington v. Minister for Communications, Energy and Natural Resources* [2018] IEHC 821 (Unreported, High Court, MacGrath J., 8th June, 2018), *A.P. v. D.P.P.* [2011] IESC 2,

[2011] 1 I.R. 729, *Reid v. An Bord Pleanála* [2021] IEHC 230 (Unreported, High Court, 12th April, 2021). Complaint is made that the applicant did not plead an error in relation to material contravention. It is true that the phrase "material contravention" is not used in the statement of grounds. However, everything (and "everything" includes pleadings) has to be read in context. The game of "particularise that" can be played forever. That process has to stop when it is acceptably clear what point the applicant is making. Here the point is clear beyond doubt. Ground 29 expressly relies on para. 3.2 of the building height guidelines 2018, as do grounds 32 and 38. Paragraph 3.2 of the guidelines relates directly to material contravention and is quoted in that context in the board decision itself. So the fact that the applicant has not used the words "material contravention" is irrelevant. The point is that the applicant has clearly specified reliance on para. 3.2 at grounds 29, 32 and 38 which manifestly must be read in the context of reliance on para. 3.2 in the contested decision, which in turn is in the context of material contravention. So it seems to me absolutely clear that the applicant's argument is situated firmly in the context of the material contravention aspect of the decision and that the applicant is entitled to go on to argue that any non-compliance with para. 3.2 has a consequence in terms of that aspect.

24. With those preliminaries out of the way, I can now turn to the merits of the point. However, that point is somewhat more complex than the norm because an understanding of it depends on the interrelationship between seven different documents as follows.

- (i). the building height guidelines;
- (ii). the apartment guidelines;
- (iii). the BRE guidelines;
- (iv). the British Standard;
- (v). the board decision;
- (vi). the inspector's report; and
- (vii). the developer's daylight study.

I will address each of these in turn starting with the guidelines and working backwards from there through the board decision to the documents it relied on.

Building Height Guidelines

25. The Urban Development and Building Heights: Guidelines for Planning Authorities were published in December 2018 under s. 28 of the 2000 Act. I discussed these guidelines in *Higgins v. An Bord Pleanála* [2020] IEHC 564, [2020] 11 JIC 1301 (Unreported, High Court, 13th November, 2020). Paragraph 3.2 begins as follows:

"Development Management Criteria

3.2 In the event of making a planning application, the applicant shall demonstrate to the satisfaction of the Planning Authority/ An Bord Pleanála, that the proposed development satisfies the following criteria: ...”

26. There are then criteria at different scales. The criteria of the scale of the site/building are as follows:

“At the scale of the site/building

- The form, massing and height of proposed developments should be carefully modulated so as to maximise access to natural daylight, ventilation and views and minimise overshadowing and loss of light.
- Appropriate and reasonable regard should be taken of quantitative performance approaches to daylight provision outlined in guides like the Building Research Establishment’s ‘Site Layout Planning for Daylight and Sunlight’ (2nd edition) or BS 8206-2: 2008 – ‘Lighting for Buildings – Part 2: Code of Practice for Daylighting’.
- Where a proposal may not be able to fully meet all the requirements of the daylight provisions above, this must be clearly identified and a rationale for any alternative, compensatory design solutions must be set out, in respect of which the planning authority or An Bord Pleanála should apply their discretion, having regard to local factors including specific site constraints and the balancing of that assessment against the desirability of achieving wider planning objectives. Such objectives might include securing comprehensive urban regeneration and or an effective urban design and streetscape solution.”

27. The board suggested that the second and third bullet points may be difficult to reconcile. Unfortunately, I don’t agree. If, having regard to the relevant guidelines, the developer is not able to fully meet all the requirements regarding daylight provisions, then there are three very specific consequences.

- (i). this must be clearly identified;
- (ii). a rationale for any alternative compensatory design solutions must be set out; and
- (iii). a discretion and balancing exercise is to be applied.

28. Thus, the second and third bullet points are entirely consistent logically.

29. Furthermore, taking the provisions together, it is clear that the board is not at large in terms of what guidelines it has to have regard to. In my view, despite the fact that for reasons that will become apparent this is probably *obiter*, the reference to guidelines like the two identified certainly includes having regard to both of the two guides identified, as well as any similar and broadly compatible guides (for example an updated version of one or other of those documents). The concept of documents “such as” the identified guidelines inherently involves something similar and broadly compatible, and you can’t

judge that unless you have had regard to the documents to which the new document is meant to be similar.

Apartment Guidelines

30. Similar requirements are set out in para. 6.7 of the apartment guidelines 2018 “[w]here an applicant cannot fully meet all of the requirements of the daylight provisions above, this must be clearly identified and a rationale for any alternative, compensatory design solutions must be set out, which planning authorities should apply their discretion in accepting taking account of its assessment of specific. This may arise due to a design constraints associated with the site or location and the balancing of that assessment against the desirability of achieving wider planning objectives. Such objectives might include securing comprehensive urban regeneration and or an effective urban design and streetscape solution.”

BRE Guidelines

31. A private group of British planning consultants, the BRE Group, published a document entitled *Site Layout Planning for Daylight and Sunlight: A Guide to Good Practice* (BR 209) 2nd ed., (2011, edited by P.J. Littlefair). A note C1 in this document says that the British Standard BS 8602-2 and CIBSE lighting guide LG10 provide advice and guidance and that the BRE guide is intended to be used with those documents. Thus, the two documents (that is, the BRE guide and the British Standard) are to be read together in any event. That means we don’t need to get to the point of saying that the British Standard has to be considered anyway, but if that had been necessary, as mentioned above, I would have so held.

32. Paragraph 2.1.8 of the BRE guide specifically refers to an average daylight factor (ADF) of 2% for kitchens as set out in the British Standard. While certain specific sunlight issues are dealt with in the BRE document and not the BS document, that does not take from the specific provision regarding the ADF for kitchens. In appendix C, point C4, the BRE document states that “if a predominantly daylit appearance is required, then the ADF should be 5% or more if there is no supplementary electric lighting, or 2% or more if supplementary electric lighting is provided. There are additional recommendations for dwellings of 2% for kitchens, 1.5% for living rooms and 1% for bedrooms. These additional recommendations are minimum values of ADF which should be attained even if a predominantly daylit appearance is not achievable.”

33. The developer’s study states explicitly that the BRE guidelines are not mandatory. That is something of a downplaying of the situation. The mandatory s. 28 guidelines require appropriate and reasonable regard to be had to the BRE guidelines. That takes them well out of the “not mandatory” *simpliciter* category.

British Standard

34. British Standard BS 8206-2 *Code of Practice for Daylighting*, 2008 is the other standard referred to in the Building Height Guidelines. I am informed that that has since been revoked and replaced by BS EN 17037:2018, but that these two documents appear to be in similar terms for present purposes. The British Standard expressly provides that where rooms are used for combined purposes, the appropriate standard is the ADF that is

highest for any of the uses. Thus, insofar as kitchens are combined with living rooms in the proposed development, the appropriate ADF would be the higher of the 1.5% standard for living rooms and the 2% standard for kitchens. Unfortunately, the developer applied a 1.5% standard to these combined rooms as we shall see below.

Board decision

35. As noted above the board decision found that grant of permission would contravene the development plan materially in respect of building heights. Relying on s. 37(2)(b)(iii), the board held that this was permissible by reference *inter alia* to para. 3.2 of the building height guidelines and SPPR 3. The decision in effect accepted the inspector's report generally as is set out explicitly in the board direction.

Inspector's report

36. The inspector impliedly accepted the developer's documentation and in particular the developer's statement of consistency, which is in some respects reiterated word for word by the inspector. Paragraph 12.4.9 of the report states that an average daylight factor analysis indicated that of a 135 rooms tested, 125 exceeded the BRE guidelines. That is a positive assertion of fact. That assertion is impliedly based on the developer's interpretation of the guidelines. Thus, we are well outside the realm of planning judgement or *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39 unreasonableness. This is a question of interpretation of a document with some legal relevance. That is ultimately a matter for the courts. Deference to the decision-maker's interpretation does not arise any more than it arises in the interpretation of any other legally relevant instrument.

37. The inspector accepted again pretty much word for word the developer's analysis as to why the departure from the BRE guidelines (in the sense of the ten rooms tested that in the developer's view did not meet the standard) was reasonable. The inspector stated that a balance must be struck between overall regeneration of the site and a minor reduction in VSC (Vertical Sky Component) of some of the proposed units at ground floor.

Developer's daylight study

38. The document that the inspector was endorsing in this passage is a Daylight Sunlight and Overshadowing Study dated 22nd January, 2020 prepared by Integrated Environmental Solutions. Section 7 of that study deals with ADF and identifies the appropriate guidelines for kitchens at 2% and living rooms at 1.5%. Crucially, however, that document does not articulate (and neither does the board) that we are dealing here with combined kitchens and living rooms. They are simply treated as living rooms with no acknowledgment of the problem. That methodological gap in the reasoning would in my view be fatal in itself.

39. The second fatal aspect arises when combined with the fact that the British Standard requires that the highest standard of a combined room be applied. That has a direct read-across to the BRE guidelines with which the developer claimed compliance, wrongly on this analysis. The board acted erroneously in endorsing that without properly stress-testing it against the guidelines. If they had done so, the incompatibility would have come to light. Thus the case illustrates a certain laxity in scrutiny, involving in effect the cutting-and-pasting of the developer's materials by the board without adequate critical interrogation.

Conclusion under this heading

40. The board's defence is essentially that the 2018 guidelines are permissive and that there is some sort of absolute choice between the BRE guidelines and the British Standard or indeed some other document. I don't accept that argument. The obligation is to have "appropriate and reasonable regard" to guides of this nature, and regard would not be appropriate or reasonable unless one considered all of the material and acted in conformity with it or, if not, explained why.
41. The board predictably says that there is an element of discretion and planning judgement and endeavours to characterise this as an unreasonableness challenge. As noted above, that misses the point that the 2018 ministerial documents are binding mandatory statutory guidelines which require as a matter of legal obligation that the decision-maker have appropriate and reasonable regard to identified standards.
42. Nor does such an interpretation elevate a British code of practice to equate to a statutory requirement in Irish law, or something similar, as contended for by the board at para. 95 of its submissions (a mildly provocative submission that some might even interpret as a subliminal tricolour-waving exercise). Even if it did, in principle there would not be anything particularly wrong about that because the legislature can give legal effect to recognised international standards. Nor is there anything impermissible in principle about giving statutory effect to a guideline produced by the national authority of another jurisdiction – even if that jurisdiction is the UK, I might superfluously add for the benefit of the board. But of course the guidelines do not go that far. What is required is appropriate and reasonable regard, and if the standards identified are not being complied with, it must be clear why.
43. The developer argues that the applicant's consequential argument that if the standards are not met there needs to be "a rationale for any alternative" is a new separate and unpleaded argument. But it is not. It is just a consequence of the breach of the requirement to have due and adequate regard to the standards.
44. An interesting alternative argument was raised by the developer that a departure from 2% to 1.5% would have been appropriate to give effect to the design standards in the apartment guidelines of 2018 which favour balconies as private amenities basis to be accessed from living rooms (para. 3.35 to 3.36). That may well be an argument that the notice party could have made; but we are reviewing a decision here, not writing a new one, and no such analysis was spelled out by the decision-maker.
45. For these reasons, I would uphold in full the point pleaded under this heading at ground 35 that "the report fails to identify the fact that, in this application, the living room in every apartment within the proposed development has a shared use with a kitchen, and the assessment fails to apply the British Standard recommendation that *"the higher minimum ADF value should apply"*. The correct minimum value against which to assess ADF for the sample locations should have been 2.0%, not 1.5%."

Lack of disclosure of details of enforcement notices as part of the application

46. The application form for a strategic housing development is set out in art. 297(1) of the Planning and Development Regulations 2001 as amended. The terms of the form are set out in schedule 3, form 14 of the regulations. That form begins as follows:

“BEFORE FILLING OUT THIS FORM PLEASE NOTE THE FOLLOWING

Failure to complete this form or attach the necessary documentation, or the submission of incorrect information or omission of required information, will lead to the Board refusing to deal with your application. Therefore, ensure that each section of this application form is fully completed and signed, entering n/a (not applicable) where appropriate, and that all necessary documentation is attached to the application form.”

47. Section 16(L) of the form goes on to say:

(i). “Do any statutory notices (e.g. Fire Safety, Enforcement, Dangerous Buildings, Derelict Sites, Building Control, etc.) apply to the site and/or any building thereon?

Yes [] No [] [Place X in appropriate box]

(ii). If the answer to Question 16(L)(i) is “Yes”, give details:”

48. In this instance the developer ticked yes to the question of statutory enforcement notices, but failed to give details as required. The fact that the board did not seem too bothered by the omission is irrelevant. The Minister has prescribed the form of the application; it requires specified details without which the Minister states that it “will lead to the Board refusing to deal with your application.” The clear and express terms of the statutory instrument indicate an intention that the details required are mandatory. Even if *arguendo* the problems with the way reasons were omitted and daylight issues were dealt with could be cured on hypothetical remittal, because the notice party’s application was invalid, *certiorari* must issue and the question of remittal does not arise.

49. The notice party calls such a result formalism, but formalism is not always to be condemned where it might contribute to making a better decision or could make a difference. I don’t think one could say that no reasonable board could have taken account of the enforcement information had it been provided. So one can’t say that it couldn’t have made any difference. Baker J. (Irvine and Costello JJ. concurring) speaking for the Court of Appeal in *V.K. v. Minister for Justice and Equality* [2019] IECA 232 (Unreported, Court of Appeal, 30th July, 2019), at para. 109, said that “[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*”.

EU law issues

50. As the applicant succeeds on domestic law issues, the European law issues do not arise, although it is probably fair to say that the submission made to the board was a bit light

on material relevant to these issues. Perhaps it could also be argued that the statement of grounds was suboptimal in terms of the particulars of the EU law points, but as I say, it is not necessary for me to get into these questions having regard to the foregoing.

Order

51. Accordingly, the order will be:

- (i). an order of *certiorari* removing for the purpose of being quashed the decision of the board to grant permission to the notice party for the impugned development;
- (ii). an order that remittal would not be appropriate having regard to the foregoing findings; and
- (iii). a direction that the parties liaise with the List Registrar to arrange for the matter to be mentioned at the next convenient Monday list for any consequential matters.