

[2023 IEHC 26]

THE HIGH COURT

JUDICIAL REVIEW

[2021 No. 1123 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

FIONUALA SHERWIN

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

AND

CWTC MULTI FAMILY ICAV

NOTICE PARTY

**JUDGMENT of Humphreys J. delivered on the 27<sup>th</sup> day of January, 2023**

1. While ostensibly about technical issues under the Planning and Development Act 2000, the present case, concerning the fate of the former Dublin Diocesan Seminary at Clonliffe, is something of a sociological window onto the rise and fall of the Catholic Church in Ireland.
2. The association between the Clonliffe area and ecclesiastical institutions is very ancient. Going back to before the conquest, the area was linked to St. Mary's Abbey, legendarily said to have been founded by Clonliffe residents in the reign of Maelseachlainn (980-1022) (see H.J. Lawlor, 'The Foundation of St. Mary's Abbey, Dublin' (1926) 16 *J.R.S.A.I.* 22).
3. The Grange of Clonliffe appears in ecclesiastical taxation records by 1304 (see F. Erlington Ball, *A History of the County Dublin: The People Parishes Antiquities from the Earliest Times to the Eighteenth Century*, Vol. 6 (Dublin, University Press, 1920)). The St. Mary's Abbey lands at Clonliffe passed to secular ownership in 1539 with the dissolution of the monasteries, and ultimately into the possession of Viscount Moore. In 1710 Tristram Fortick, the founder of Fortick's Alms House, obtained a lease of the great house of the Grange of Clonliffe from Viscount Moore. In 1728-9 the Clonliffe lands were sold by the Moore family to Sir Edward Lovett Pearce (a familiar figure from

*Hellfire Massy Residents Association v. An Bord Pleanála* [2021] IEHC 424, [2021] 7 JIC 0201 (Unreported, High Court, 2<sup>nd</sup> July, 2021) (noted Áine Ryall (2021) (3) *I.P.E.L.J.* 107) para. 1) in trust for Brabazon Ponsonby (Viscount Duncannon) and Luke Gardiner (see Melanie Hayes, *Anglo Irish Architectural Exchange: Patrons, Practitioners and Pieds-à-terre* (2015, PhD thesis, Dublin University)). Gardiner acquired the full interest the following year.

**4.** While the National Inventory of Architectural Heritage shows the house as dating from 1750 to 1770, Roque's map of 1756 shows the house (known as "the Red House") as being in place at that time, possibly in its present construction, as well as the lands around it, which are marked as Fortick's Grove. Around 1790, the house and lands were leased from Luke Gardiner II (later Viscount Mountjoy) by the impresario Frederick ("Buck") Jones. Jones ran the Crow Street Theatre (in Temple Bar possibly on a site later occupied by Apothecaries' Hall, now Urban Outfitters), but died penniless in 1834. The house was later leased to Professor Gregor von Feinaigle of Baden as a preparatory school. Crucially for present purposes, it was acquired by Archbishop Paul Cullen, Catholic Archbishop of Dublin, in 1858.

**5.** Cullen immediately founded a seminary on the site, and the lands with which we are now concerned were originally focused around the Red House building in which the seminary began in 1859. A foundation stone for a new main college building was laid in 1860. The building was designed by the Irish architect John Bourke (who also designed the Mater Hospital) and the main block was constructed in 1861 (a date of 1863 is also referred to in the papers).

**6.** The applicant in oral submissions described the college as of "enormous historical significance" and says that its establishment was "part of the transformation of the emerging people". Following on from Catholic Emancipation in 1829, the establishment of this seminary was part of a series of changes whereby, as put by the applicant, the adherence of the majority religion would now have "religious leaders authentically educated in institutions of the church". The applicant describes the site in question as "a place of enormous significance in the transformation of the people in their rights, in the acknowledgment of their religion". The applicant submitted that Cullen went to enormous trouble to ensure that the church later to be built on the site was "of a type that would acknowledge that great transformation", and that is reflected in its design.

**7.** The site of the adjoining Archbishop's Palace was acquired also in 1861 and, as part of the International Exhibition of Arts and Manufactures held in Iveagh Gardens in 1865, a statue of Pius IX was brought to Dublin and later acquired by Cullen for display in the seminary. In 1866, Cullen was raised to the cardinalate, the first Irish person ever to be so honoured.

**8.** Cullen laid the foundation stone for the church on the Clonliffe campus in 1873. The church was designed by the Irish architect J.J. McCarthy who was referred to as "Ireland's Pugin" (see the report on the removal of ecclesiastical objects from the site). Indeed, McCarthy finished cathedrals in Enniscorthy and Killarney from designs by Pugin, and also completed St. Patrick's Cathedral in Armagh. McCarthy was professor of architecture at the Catholic University of Ireland (subsequently incorporated into University College Dublin), and designed the Maynooth College chapel, and the college and church at All Hallows, Drumcondra. The desire for a grand design for the church was realised by modelling the exterior on the Santa Francesca Romana in the Roman Forum, and the interior on that of the Sant'Agata dei Goti church, which is attached to the Irish College in Rome and was the location of the interment of Daniel O'Connell's heart (though unfortunately that was lost during later renovations).

**9.** A south link building was designed on the site in 1876. On Cullen's death in 1878, he was interred in a vault underneath the chancel of the church. The Archbishop's Palace adjoining the site was built around 1889, and has its own gardens and a boundary between it and the college. The church was renovated in 1943 with a new chancel floor in Irish white and Connemara green marble. A baldacchino of four Connemara green marble columns was erected in the church in 1944. The foundation stone for the new wing was laid in 1950 and a new assembly hall constructed in 1958, as well as an ambulatory in 1959. The assembly hall in the new wing was converted into an oratory in 1960.

**10.** In 1965, the Mater Dei Institute of Education for Religion Teachers was founded on an adjoining site by Archbishop McQuaid of Dublin (its building on the campus was closed in or about 2016 and the institute been incorporated into DCU). A library wing was built in 1966, as well a north link building.

**11.** This burst of development up to about 1966 was an apex point for the life of the seminary complex. By the 1990s, vocations in Dublin were dwindling. The complex closed as a seminary in 2000 with any new intake being transferred to St. Patrick's College Maynooth in County Kildare. Thereafter, the buildings were then used for a variety of diocesan purposes; for example the diocesan charity Crosscare was based in the library wing and adult religious education courses took place in the main block.

**12.** On 4<sup>th</sup> November, 2002, members of Dublin City Council voted on foot of a manager's report to amend the record of protected structures to add the seminary complex. The wording of the motion passed is summary in form and thus not altogether explicit as to what is meant by the

reference to Clonliffe College and Archbishop's house complex. But the intention is clear when one considers the underlying manager's report of 22<sup>nd</sup> October, 2002. That report envisaged the removal of the new wing north link and library wing from the proposal to extend the record of protected structures, although at the same time it recognised the importance of the buildings as creating a sense of enclosure to the quadrangle behind the main block, in the case of a new wing and as an edge building in front of the main building in the case of the library wing. There was also a recognition that the interior of the oratory in the new wing was "of special importance" and that any future decision should, as well as providing for continuance of the sense of enclosure to the garden, also include the "relocation and reinstatement of the internal fit-out of the oratory in appropriate location".

**13.** The Dublin City Development Plan 2016-2022 came into effect on 21<sup>st</sup> October, 2016. It contains a number of relevant provisions, particularly in relation to protected structures, and we will return to those later.

**14.** In 2018 the diocesan trust sold the lands to the GAA. The sale included the Red House which is now owned by a GAA subsidiary company. Thereafter various transfers of lands in tranches were made to Hines Real Estate Ireland, through the medium of the notice party. They proposed to repurpose the lands as a build-to-rent residential development.

**15.** The church continued to be used by the Ukrainian Orthodox community up to around 2020.

**16.** A pre-application consultation in relation to the present development took place, by Microsoft Teams rather than in person due to the Covid-19 emergency, on 18<sup>th</sup> January, 2021.

**17.** On 25<sup>th</sup> June, 2021, the remains of Cardinal Cullen were disinterred from the vault, and then reinterred under the high altar of the Pro-Cathedral. That process was not the subject of any planning permission as apparently it was not considered by the diocese to be development. Some of the tomb remains in the vault underneath the church. The photograph of Cardinal Cullen's tomb on p. 283 of the EIAR shows a sarcophagus-type structure placed on top of a stone base. On the date of the site visit, the sarcophagus structure was gone and the stone base was covered rather indecorously by a dislocated door. Fortunately, the planning implications if any of this exercise don't arise in the present proceedings.

**18.** The present application for permission was lodged on 16<sup>th</sup> July, 2021 directly to the board under the strategic housing development procedure.

**19.** Shortly after the present application, a separate application was lodged on 5<sup>th</sup> August, 2021 by the Dublin diocese through the St. Laurence O'Toole Diocesan Trust to Dublin City Council for

permission to remove a number of objects from the church. The application (reference 3270/21) was described as follows:

“PROTECTED STRUCTURE: planning permission is sought for the removal of artefacts of a Liturgical and Religious nature from Holy Cross Church (a protected structure RPS no 1901) to facilitate their reinstatement [*sic*] in appropriate locations (subject to separate statutory consents where required).

The artefacts consist of the following:

1. Altar of the Holy Cross - south aisle - bas-relief c.1870,
2. Our Ladys [*sic*] Altar - north isle - bas-relief 1870,
3. Statue of Pope Pius IX - 1865 by Filippo Matteini,
4. Statue of Cardinal Cullen - 1881 by Thomas Farrell,
5. Stone Plaque built into wall (coat of arms of Cardinal Cullen) 19th c,
6. Main altar (late 20th c),
7. Tabernacle (late 20thc),
8. Stations of the cross (19th c),
9. Confessional box (19th c),
10. Crucifix above main altar (late 20th c),
11. Pews to central aisle and side aisles (late 20th c)“.

**20.** A report of Fitzgerald Kavanagh partners supporting this proposal indicated that various ecclesiastical works would be reinstated in specific destinations, for example the statute of Cardinal Cullen would go to Carlow Cathedral, that of Pius XI would go to Ballyhea, County Cork, the altar would go to Bellewstown, County Meath, and the tabernacle to Burnfort, County Cork. Some items such as the coat of arms of Cardinal Cullen were not given a specific destination.

**21.** As regards the present application, the Conservation Officer of Dublin City Council prepared a submission dated 31<sup>st</sup> August, 2021 which recommended a refusal of the application on the basis of two objections, essentially the impact on protected structures and the undesirability of a large subterranean structure. We will return to those points in more detail later.

**22.** On 1<sup>st</sup> October, 2021, the city council decided to grant permission for removal of the ecclesiastical objects from the church. Conditions included para. 2(b), that all works would be in accordance with the Architectural Heritage protection guidelines for planning authorities (October 2011) issued by the Department of Arts Heritage and Gaeltacht, and that works would maintain the maximum amount of surviving historical fabric *in situ*.

**23.** In relation to the present application, the board's inspector prepared a report dated 19<sup>th</sup> October, 2021 which recommended a grant of permission and also a refusal of the eight requests made for an oral hearing. There seems to have been a procedural question at this point because no board direction refusing the oral hearing appears to have ever been drawn up. The board hasn't evidentially clarified exactly what happened in this regard. Since the applicant has not made an issue of that or sought to amend the pleadings, I do not think the procedural difficulty here could be a basis for *certiorari*, although one has to leave open the possibility that it might not be completely irrelevant to later procedural issues depending on what arises.

**24.** On 22<sup>nd</sup> October, 2021, the applicant appealed to An Bord Pleanála (ref. 311748) in relation to the grant of permission for removal of ecclesiastical objects from the church by the city council. The Diocesan Trust also appealed, why exactly was not totally made clear to me, but either way the appeals are still currently under consideration.

**25.** By direction of the board on 2<sup>nd</sup> November, 2021 and an order dated 4<sup>th</sup> November, 2021 signed by Mr. Paul Hyde, deputy chairperson, the board granted permission for the development subject to conditions.

**26.** In mid-2022, there was an auction of religious artefacts, mostly of a moveable nature, drawn from aspects of the complex other than the Church. A farewell service was held on 8<sup>th</sup> September, 2022 to mark the end of the religious use of the seminary, and on 28<sup>th</sup> October, 2022, the legal interest in the lands was finally transferred to the notice party. I am informed that the church has not as yet been formally deconsecrated. This requires a decision of the local ordinary (see *Codex Iuris Canonici*, cc. 1222 and 1224(2)) although I am informed that in practice such a step requires the approval of Rome, which has yet to occur and possibly has yet to be sought. Pending the finalisation of planning issues, the Dublin Diocesan Archive is in occupation of part of the site on a temporary rolling licence.

### **Procedural history**

**27.** The statement of grounds was filed on 21<sup>st</sup> December, 2021, and an amended statement of grounds on 11<sup>th</sup> February, 2022. I granted leave on the basis of the amended statement on 14<sup>th</sup> February, 2022.

**28.** Statements of opposition were filed on 17<sup>th</sup> and 24<sup>th</sup> June, 2022. On 29<sup>th</sup> July, 2022 a hearing date was fixed provisionally, later confirmed, for 15<sup>th</sup> November, 2022. The matter was heard on 15<sup>th</sup> to 17<sup>th</sup> November, 2022. Following discussion and agreement (or at least acquiescence) by the parties, I carried out a site visit on 18<sup>th</sup> November, 2022.

## **Reliefs**

**29.** The reliefs sought in the amended statement of grounds are as follows:

- “1. An Order of *certiorari* by way of application for judicial review quashing the decision of the Respondent dated the 4th November, 2021, granting permission to the Notice Party for the construction of 1,614 built-to-rent apartments and associated works on the site of Holy Cross College, Clonliffe Road, Drumcondra, Dublin 3 (ABP-310860-21).
2. Such Declaration(s) of the legal rights and / or legal position of the Applicant and / or persons similarly situated and / or the legal duties and / or legal position of the Respondent as the Court considers appropriate.
3. A Declaration that special costs rules apply to the proceedings under Section 50B of the Planning and Development Act 2000 (as amended) and / or by way of Section 3 and 4 of the Environmental (Miscellaneous) Provisions Act, 2011;
4. An Order pursuant to Order 84 rule 20(8)(b) of the Superior Court Rules staying the development by the Notice Party, its affiliates, assigns, servants and / or agents of the lands at Holy Cross College, Clonliffe Road, Drumcondra, Dublin 3 pending conclusion of the present proceedings.
5. Costs.”

## **Materials before the court**

**30.** Materials placed before the court by being uploaded to the ShareFile platform for this case included pleadings and exhibits, authorities, a checklist, correspondence, a core book and submissions, running to a total of 3,608 pages.

## **Preliminary issues**

**31.** An embarrassment of preliminary issues emerged from the opposing parties. In some cases, there can be a phenomenon whereby an over-proliferation of technical objections gives the impression, rightly or wrongly, of a degree of defensiveness by opposing parties that might pique the interest of the court in the merits (what the English barrister Keith Evans in his books on advocacy refers to as the legal equivalent of Newton’s Third Law of Motion). In fairness to the opposing parties, that may not apply here, and indeed it does not seem necessary to decide all of these issues. However, it is probably worthwhile identifying the preliminary objections specifically.

## **Objections to the use of documents created by Dublin City Council**

**32.** While the notice party’s statement of opposition objected to the deployment of material from Dublin City Council, this was ultimately withdrawn. That was a sensible move because I do not think

such an objection has much merit, particularly where, in the judicial review context, there is an obligation of transparency on opposing parties (see in particular *R. v. Lancashire County Council ex parte Huddleston* [1986] 2 All E.R. 941). That must also apply to notice parties who choose to file opposition to an application. That doctrine has the consequence that where relevant material is not otherwise before the court, an applicant can step into the breach; and opposing parties that even for defensible reasons may not have mobilised themselves to inform the court of all relevant information must logically be precluded by the obligation of transparency from raising any objection such as hearsay to an applicant bringing forward such matters.

### **Objection to amendments on time grounds**

**33.** Objection was raised to some of the amended grounds, particularly core grounds 2, 5 and 7, on the basis that the grounds had not been advanced within the eight weeks statutory period. Unfortunately, that is a fundamental and sadly persistent confusion on the part of opposing parties which no amount of clarification seems to be capable of dispelling. I endeavoured to summarise the principles applying to amendments in *Habte v. Minister for Justice and Equality* [2019] IEHC 47, [2019] 2 JIC 0405 (Unreported, High Court, 4<sup>th</sup> February, 2019) (noted Estelle Feldman (2020) 1(1) A.R.I.L. 192) in sixteen numbered propositions as follows:

“(i). the jurisdiction to amend is intended to be liberal ([*Croke v. Waterford Crystal Ltd.* [2004] IESC 97 [2005] 2 I.R. 383 [2005] 1 I.L.R.M. 321], [*Moorehouse v. Governor of Wheatfield Prison* [2015] IESC 21 (Unreported, Supreme Court, 5th March, 2015)]);

(ii). in considering the amendment of pleadings in any proceedings, the overriding consideration is the interests of justice, including the right of access to the courts and ensuring that the real issues in the proceedings are addressed ([*Keegan v. Garda Síochána Ombudsman Commission* [2012] 2 I.R. 580 [2012] IESC 29], [*O’Neill v. Appelbe* [2014] IESC 31 (Unreported, Supreme Court, 10th April, 2014)], *Croke*, [*D.P.P. v Corbett* [1992] I.L.R.M. 674]);

(iii). it is not the function of the court in considering an amendment to punish parties for mistakes (*Moorehouse*);

(iv). there are three tests for allowing an amendment: arguability, explanation and lack of irremediable prejudice (*Keegan*, [*B.W. v. Refugee Appeals Tribunal* [2017] IECA 296 [2018] 2 I.L.R.M. 56]);

(v). if the point is not arguable then the amendment should not be allowed (follows from *B.W.*);



- (vi). explanation of the failure to include the point in the original pleadings is to be distinguished from good and sufficient reason to extend time; an application to amend is not an application for extension of time as such and requires a lower level of explanation rather than good reason as such (*[Krops v. Irish Forestry Board [1995] 2 I.R. 113]*, *[Smyth v. Tunney [2009] 3 I.R. 322]*, *[O'Leary v. Minister for Transport, Energy and Communications [2001] 1 I.L.R.M. 132]*, *Keegan*);
- (vii). simple inadvertence by lawyers acting for the party concerned may be accepted as such an explanation (*Keegan*);
- (viii). the fact that the application is based on facts that were there originally rather than new facts is not a bar to the amendment being made (*Keegan*);
- (ix). while the other party will virtually always claim prejudice, this is normally not irreparable if it can be remedied by adjournment or in costs terms (*Corbett, Moorehouse*);
- (x). having to deal with a potentially winning point that was not originally included does not constitute irreparable prejudice (follows from *Keegan*);
- (xi). irreparable prejudice to third parties who are affected by an impugned decision may be a factor against allowing an amendment;
- (xii). the fact that the proposed amendment introduces an entirely new cause of action or new ground, or even fundamentally alters the nature of the proceedings, or requires the addition of new parties, is not a bar to allowing the amendment (*[Rubotham v. M. & B. Bakeries Ltd. [1993] I.L.R.M. 219]*, *[Shell E. & P. Ireland Ltd. v. McGrath [2006] IEHC 99 [2006] 2 I.L.R.M. 299]*);
- (xiii). the fact that the amendment involves a new relief, or challenges a different decision including one made after the institution of the original proceedings, is not a bar to allowing an amendment (*[Y.Y. v. Minister for Justice and Equality [2017] IESC 61 [2018] 1 I.L.R.M. 109]*);
- (xiv). if the proposed new claim is one that could otherwise be pursued by separate proceedings, the potential saving in costs and likelihood of a more just and convenient disposition of the issues by dealing with all related matters in the one set of proceedings is a factor in favour of allowing the amendment (*[Clifford v. Minister for Education and Science [2005] IEHC 288 (Unreported, Budd J., 10th June, 2005)]*);
- (xv). while amendments that do not substantially enlarge the proceedings, or merely particularise what is implicit, may be readily granted, the fact that the amendment

substantially enlarges the proceedings is not a bar to allowing an amendment (Y.Y., and see the result in *Keegan*); and

(xvi). if an amendment introduces a new evidential contest, that may be a factor against allowing it, especially if made at a late stage such as to derail a hearing and cause significant delay in finalising the proceedings. In such a case the court's assessment of the balance of justice must factor in any harm to the interests of justice by reason of such delay but nonetheless, delay is not a bar to an amendment, and the power to amend can be exercised during the trial, after judgment is reserved, or at any time up to perfection of the final order ([*Wildgust v. Bank of Ireland* [2001] 1 I.L.R.M. 24], [*J.K. (Uganda) v. Minister for Justice and Equality* [2011] IEHC 473 (Unreported, High Court, Hogan J., 13th December, 2011)]."

**34.** I also made the point at para. 24 that unfortunately, as far as many opposing parties are concerned, the message that the central question is that of justice seems to have fallen on stony ground. This very point was emphasised recently by Collins J. for the Court of Appeal in *North Westmeath Turbine Action Group v. An Bord Pleanála* [2022] IECA 126 (Unreported, Court of Appeal, 1<sup>st</sup> June, 2022).

**35.** Collins J. said at para. 44: "While it is, of course, entirely appropriate that applications to amend judicial review proceedings – and particularly proceedings governed by a special statutory regime such as that provided for in sections 50 and 50A PDA – should be carefully scrutinised, such proceedings are, in principle, open to amendment pursuant to Order 84, Rule 23(2) RSC. While Rule 23(2) makes no express reference to amending the relief claimed (as opposed to the grounds on which relief is sought) the State Respondents accept – correctly, in my view – that the court has power in an appropriate case to permit the amendment of the relief, including by the addition of further relief. Ultimately, the touchstone for determining whether to permit an amendment under Rule 23(2) RSC – as it is under Order 28 RSC – is the interests of justice: *Keegan v. Garda Síochána Ombudsman Commission* [2012] 2 IR 570, per Fennelly J. (O' Donnell and McKechnie J.J. agreeing), at para 21. Protecting the constitutional right of access to the court is an important consideration in this context: *Keegan*, at para 29. The assessment of whether the interests of justice weigh in favour of amendment or not will depend on the particular facts and circumstances: *Keegan* at para 23. Ultimately, the Court in *Keegan* allowed the amendment, even though the additional grounds "raised an entirely new ground in law" and, to that extent, substantially enlarged the original grounds

(para 38). A factor favouring the amendment was that, if not permitted, the appellant would be “deprived of a serious argument.””

**36.** Collins J. went on to say at para. 54: “In light of the above discussion, I am not persuaded that it was appropriate to approach the amendment application here as though it involved a late application for leave to seek judicial review and thus was subject to the extension of time provisions in section 50(8) PDA. Section 50 does not purport to impose any such general requirement. It does not in fact address the issue of amendment at all. Order 84, Rule 23(2) RSC continues to govern the amendment of judicial proceedings brought pursuant to section 50. Order 84, Rule 23(2) does not require that every amendment application must be approached as if it involved a late application for leave. That is the appropriate approach where a substantially new case is sought to [be] made. The amendment here did not involve the making of a substantially new case or, indeed, any new case at all.”

**37.** The basic principle is that any given set of proceedings challenging a decision should be brought within the statutory period, and any failure to do so must be supported by good and sufficient reason. However, once such proceedings are brought, any further amendment does not require that same level of “good and sufficient reason” but rather arguability, explanation and lack of irremediable prejudice, the overall test being the interest of justice. After all, the main purposes of the statutory period has been achieved by a prompt bringing of proceedings, even if elements of the case are refined later. In short, what counts as good and sufficient reason for an amendment is less demanding than what would count as good and sufficient reason for not bringing the action within time at all.

**38.** This makes sense in a context where, as in *North Westmeath Turbine* and *Keegan*, the normal explanation for an amendment is oversight by an applicant’s legal advisers. The law must look comprehendingly on such inevitable human oversights insofar as they occur in the course of the process, but the system would be hopelessly unworkable if one were to offer equal latitude to oversights regarding the initiation of the process in the first place. Consequently, it makes complete sense to have a very high bar for the initiation of the proceedings, thus requiring good and sufficient reason for proceedings to be brought out of time, with a less extreme test of explanation (along with arguability and lack of a remedial prejudice) as regards amendments that are brought to proceedings that have been properly instituted within time in the first place. The reality – much denied or (depending on your point of view) concealed by opposing parties – is that the vast bulk if not normally all of the public policy objectives sought to be achieved by limitation-type periods for

initiating proceedings are achieved by the bringing of the proceedings within that time. A bit of refinement to the grounds or even reliefs is neither here nor there in that context and does very little injury to the public interest in expedition. Nor does it injure the need for certainty as to the status of a decision – the status is by definition known at that point, being a decision already under challenge.

**39.** A possible grey area is where the amendments make what is sometimes called an “entirely new case”. This is not a technical term but rather a rhetorical move. A party or court that wants to see an amendment refused will simply label it an “entirely new case” and act accordingly. The very imprecision and flexibility of the term “entirely new case”, together with its superficially impressive bombastic energy, is part of its oratorical appeal for this purpose. So perhaps unsurprisingly the authorities are not entirely easy to reconcile. Part of this problem has been caused by a repeated pattern of a very selective opening of the authorities to any given court, resulting in judgments that do not necessarily reflect the range of points that have been already decided – this is a problem that is absolutely chronic and that has continued in some of the decisions after the caselaw referred to in *Habte*. Even in *North Westmeath Turbine*, a number of important authorities regarding amendment were not specifically opened to the court. It seems to me that the authorities can best be reconciled by taking the view that in the situation where an amendment creates an “entirely new case”, then if the interests of justice would permit the amendment to be brought on the basis of mere explanation (for example oversight), then that can be done – this is what happened in *Keegan*. On the other hand, if the interests of justice would not so permit, then a higher level of justification would be required.

**40.** In a probably doomed attempt to encourage some small increase in consistency on the issue of whether amendments should be allowed, I set out below in a table the different situations that may arise and what would appear to be the appropriate responses:

Situation	Appropriate approach where amendment sought after expiry of time for instituting proceedings
Amendment challenges a totally separate decision from that challenged in the original (or previous) statement of grounds.	Requires good and sufficient reason for an extension of time.

<p>Amendment challenges an interim decision in the same process, in circumstances where for some reason it is thought necessary to add express reference to such an interim decision to a challenge that has already been brought to the final decision.</p>	<p>Such an amendment is normally not necessary because a challenge to the final decision inherently allows the court to review the interim steps in the process as well. Where such an amendment is sought for the avoidance of doubt or otherwise, it does not require the level of good and sufficient reason that would be necessary for an extension of time; the amendment is to be assessed on a balance of justice basis, having regard to arguability, explanation (which will normally be simply the avoidance of doubt) and lack of irremediable prejudice (which is inherent in the fact that a challenge to the final decision encompasses an interim decision anyway). In such circumstances a court can lean towards allowing such an essentially clarificatory amendment.</p>
<p>Amendment challenges the same decision in substance, but reliefs are re-worded or added to, e.g. declaratory relief rather than just <i>certiorari</i> or <i>vice versa</i>.</p>	<p>Does not require the level of good and sufficient reason that would be necessary for an extension of time; amendment is to be assessed on a balance of justice basis having regard to arguability, explanation and lack of irremediable prejudice.</p>
<p>Reliefs the same, but grounds amended to re-word or elaborate a point that was there already in some form or to correct technical or other errors.</p>	<p>Does not require the level of good and sufficient reason that would be necessary for an extension of time; amendment is to be assessed on a balance of justice basis having regard to arguability, explanation and lack of irremediable prejudice.</p>
<p>Reliefs the same, but grounds amended to add a new ground but one that is</p>	<p>Does not require the level of good and sufficient reason that would be necessary for an extension of time; amendment is to be assessed on a balance of justice</p>

reasonably related to pre-existing grounds.	basis having regard to arguability, explanation and lack of irremediable prejudice.
Reliefs the same, but grounds amended to add an entirely new case, completely separate from any pre-existing grounds.	<p>If the interests of justice are such as to permit the amendment on the basis of mere explanation (together with arguability and lack of irremediable prejudice) then this may be done.</p> <p>If the interests of justice do not so permit, then a higher level of "good and sufficient reason" would be required.</p>

**41.** In relation to the applicant's specific amendments here, it seems to me that they were arguable to the level of substantial grounds. (Insofar as some of the points as so amended are now being dismissed one has to guard against hindsight bias – no point looks that great after it has failed but I don't think it was wrong to consider the grounds substantial as of the time of the amendment.) There is no irremediable prejudice to the opposing parties within the sense of the caselaw. Merely having to answer a potentially winning point is not prejudice for the purposes of the interests of justice. And it seems to me that the explanation is broadly acceptable especially in the context where the applicant was receiving further information about the site after the commencement of the proceedings. Any failure to anticipate some of these points originally would have to be attributed to oversight, amplified albeit in relation to some ultimately less crucial grounds by the fact that the applicant was not in possession of all materials at the outset and had to make detailed inquiries. In any event, the points are closely related to points already made from the beginning. The reason for the amendments is adequately good and sufficient for the purposes of such an application, although I stress that mere oversight would not constitute good and sufficient reason for failure to bring the proceedings at all within the 8 week period.

***Alleged lack of locus standi***

**42.** It was argued that the applicant did not have *locus standi* to raise the issue of alleged demolition of protected structures where this was not an issue raised in her submission to the board. In that regard, it is important to distinguish between points that a decision-maker must consider if raised during the process, and points that a decision-maker is obliged to consider autonomously

whether they are raised by anybody or not (see *Reid v. An Bord Pleanála (No. 1)* [2021] IEHC 230, [2021] 4 JIC 1204 (Unreported, High Court, 12<sup>th</sup> April, 2021) (noted Kieran Lynch BL (2022) (1) I.P.E.L.J. 30)). Unfortunately for the opposing parties here, while there are some aspects of the applicant's argument that fall into the first category (for example, the board cannot be condemned for failing to consider Dublin City Council paperwork regarding the site when that paperwork was not put before the board by anybody, or was not otherwise something to which it should have had regard), the prohibition on demolition of protected structures does not come into this category. That is a statutory requirement, and any decision-maker has an autonomous obligation to ensure that its decisions comply with any relevant statutory provisions. So either this prohibition applies on the facts of the application or it does not, and if it does apply then either it was complied with or not. The applicant is not required to remind the board of its autonomous statutory obligations during the process. That is consistent with the principle that an applicant is not required to correct a developer's homework: see *Reid v. An Bord Pleanála (No. 1)*, *Clonres v. An Bord Pleanála (No. 2)* [2021] IEHC 303, [2021] 5 JIC 0706 (Unreported, High Court, 7<sup>th</sup> May, 2021) (noted Douglas Hyde BL, (2021) (1) I.P.E.L.J. 3), *Atlantic Diamond v. An Bord Pleanála* [2021] IEHC 322, [2021] 5 JIC 1403 (Unreported, High Court, 14<sup>th</sup> May, 2021), *Heather Hill Management Company CLG v. An Bord Pleanála* [2022] IEHC 146 (Unreported, High Court, Holland J., 16<sup>th</sup> March, 2022), *Kelly v. An Bord Pleanála* [2022] IEHC 238 (Unreported, High Court, Holland J., 28<sup>th</sup> April, 2022), *Environmental Trust Ireland Ltd v. An Bord Pleanála* [2022] IEHC 540 (Unreported, High Court, Holland J., 3<sup>rd</sup> October 2022).

**Allegation that the applicant should not be entitled to raise objections regarding protected structures as reformulated in connection with the exercise of the court's discretion**

**43.** The misconceived complaint that the applicant lacked *locus standi* to raise the issue of protected structures is also re-worded as a claim that the applicant ought not, in the exercise of the court's discretion, be entitled to pursue or succeed on such issues. Unfortunately, for similar reasons, that is equally misconceived.

**Allegation that applicant is not entitled to raise arguments based on caveats in Dublin City Council material**

**44.** It is contended that any argument that Dublin City Council placed caveats on the demolition of a new wing or library wing is not open to the applicant because she did not furnish that material to the board. It seems to me that that argument has substance, in that the board cannot be criticised

for failure to have regard to something of which it was not made aware and of which it was not autonomously under a duty to be aware.

#### **Complaint that written and oral submissions go beyond pleadings**

**45.** A range of complaints were made by the opposing parties that a number of arguments advanced on behalf of the applicant, in both written and oral submissions, were not properly founded in the pleadings. While I would not accept all of those complaints, I would not dismiss all of them either and I think the best way to deal with that objection is to consider the applicant's case on a ground-by-ground basis, which is the manner in which I intend to approach it later in this judgment. Such a treatment will have the effect that points not properly based in specific pleaded grounds will not be considered. In any case the complexity of the pleadings makes a ground-by-ground approach all but inevitable independently of that.

**46.** Two matters in particular are worth noting at this stage.

**47.** Firstly, the applicant's basic concern (or one of her basic concerns) seems to be about the Holy Cross Church ceasing to be used as a church. That is a perfectly legitimate point of view, but as a specific ground for relief it is not pleaded in the statement of grounds. That said, there doesn't seem to be any dispute about the architectural quality of the church, and while my views on the merits are irrelevant, having seen it I wouldn't dispute that either. The exterior is certainly magnificent, and the interior is impressive and has many features of considerable interest. That much seems to be common case.

**48.** That said however, and independently of whether internal features are removed or not, even if the applicant had specifically pleaded that the board should have required the church to be subject to a requirement to continue as a church, I am not persuaded that such a claim would have been made out. Even the most attentive approach to protected structures can only look at retaining the original use where that is reasonably possible. If one lawfully forms the judgment that continuation of such use is not reasonably possible, one then has to turn to uses similar to the original use (the departmental guidelines refer to, for example, churches being used as community centres or museums (with helpful photographic illustrations), an approach which I note thereby preserves the public-facility focus of the original use), and if that is not possible one could look at new uses. The use proposed for the church by the developer is as a communal space for residents, with for example a movable cinema screen at the back of the church.

**49.** The second element of the ecclesiastical impact is the demolition of the oratory in the new wing. In relation to that, the applicant majored on the new wing being a protected structure because



it lay in the curtilage of the main block, which itself was a protected structure. While that would normally be sufficient to establish the new wing as the protected structure, that argument cannot succeed in this case because of the very deliberate decision of the city council to word the entry in the register in such a way as to exclude the new wing and specifically remove it from the list of proposed additions (which I explain further below). The applicant's fall-back argument in relation to the oratory was that the 2002 material should have been considered, or that such material imposed some sort of legally enforceable requirement, but since this material was not before the board the first aspect does not arise, and as regards the second limb of that argument, the city council's intentions and analysis as of 2002 are not self-executing in legal terms (again I deal with this further below). There was no further fall-back argument pleaded as to the absence of a condition to reinstate the oratory as a whole somewhere else or preserve it on site.

**Alleged lack of particulars contrary to O. 84 r. 20(3) RSC**

**50.** Some complaints were made about a lack of particularity in pleading, for example that the applicant has specified which policies in the development plan were contravened but not "particulars of the manner in which it is alleged that the development plan is contravened". But I think that objection falls into the never-ending respondent's cry of "particularise that". An applicant can always be faulted for not giving more detail. The question is whether the point is acceptably clear, and I think that by specifying which policies of the development plan have been contravened, the point has been made acceptably clear here.

**51.** With the preliminary objections thus addressed, I can now turn in more detail to the site itself.

**The site**

**52.** It is important for an understanding of the case to describe the buildings on site and their status. For the purposes of this case, two levels of protection were relied on:

(i) national protection as recorded or national monuments in the record of monuments and places (RMP); or

(ii) local protection under the Dublin City development plan record of protected structures (RPS).

**53.** The buildings are given different numbers in different plans of the site, but for the purposes of this section I will work off section 4.7 of the developer's masterplan vol. 1.

**54.** Many of the existing buildings are grouped around a central quadrangle, and by this arrangement contribute something visually to the appearance of the site. The quadrangle in the

present state of the site appears slightly underwhelming, but would be a striking and important feature of any redevelopment. In general terms the fronts of the buildings are on the sides away from the quadrangle, so that the backs of the buildings are the sides facing into the quadrangle. Not all of these back ends are particularly visually attractive as matters stand at present.

### **Buildings for demolition**

**55.** The first building for demolition is the new wing (no. 5 in the master plan). The EIA report at p. 288 states that this is not on the Dublin City Council record of protected structures. A red asterisk on the relevant map is understood as referring to the ambulatory on the ground floor which will be retained. This is a form of cloister-like walkway around the central quadrangle. While the new wing does not seem itself to be of any massive architectural merit, it does contribute to the overall site in a number of ways. Firstly, there is the ambulatory on the ground floor which, as noted, will be preserved. Secondly, by boxing off one side of the quadrangle it contributes to the sense of enclosure which is part of the atmosphere of the space. That to an extent is recognised in the permission by the intention to erect a new residential block fronting on to the quadrangle in place of the new wing.

**56.** The third aspect is the oratory contained within the new wing. For those who associate 1960s architecture with demolition of Georgian buildings, crude concrete brutalism and uPVC windows, the oratory is a salutary reminder that some good architectural work was done during this period. Dublin City Council said in 2002 that this is "a marvellous piece of ecclesiastical design from the period".

**57.** For better or worse, the oratory is not what it was and appears to have suffered at least three depredations already. Before-and-after pictures in the EIAR show that, presumably due to the decline in numbers, the original layout of the oratory was radically changed.

**58.** The first layout is set out in an original photograph of the oratory on p. 292 of the EIAR which shows a range of pews, an altar, tabernacle, a crucifix and a statute.

**59.** A second layout appears in a more recent photograph on p. 293 of the EIAR showing church furniture of a more modern type, a greatly reduced number of pews, a fully wooden altar and lectern, a tabernacle which may have been attached to the back wall, a crucifix on a stand and a statue which may be the one in the original picture. The more impermanent pieces of furniture are set out in a more demotic central formation that may or may not be convincing to all critics.

**60.** There was then a third stage of removal of objects and fittings prior to the sale to the notice party. I was informed (not strictly evidence, but nobody came back to dispute this so I can

legitimately record it) that the fittings in the more recent photograph were removed before the present developer came on site.

**61.** The fourth stage is the current one following the recent auction of items by the Diocese. In that regard I can record that it was apparent during the site visit that there was an auction sticker (No. 119) on a fixed wall-box in the sacristy area of the oratory which at least suggests the possibility that the oratory or its attendant rooms may have been denuded of further items at that point, whether moveable or otherwise.

**62.** A comparison between the current situation and the most recent photograph in the EIAR shows that all of the movable items have been removed. Presumably the tabernacle was one of the most recent items to be unscrewed or detached from the back wall – all that is left now are a few holes in that wall. But despite all the punishment the oratory has suffered, the fine wooden panelled walls and their alignment with the oratory windows still give this space an intimate and (in the most secular and non-denominational sense) spiritual feel.

**63.** The council as of 2002 in effect wanted the oratory to be transferred and reconstructed somewhere else in the event of the demolition of the new wing. I do not know whether it is still possible to achieve that, but if so I would certainly encourage it (that is, retaining it as a unit rather than the vague references to “salvage” in the materials which could mean almost anything). Relatedly, it may be that the legislation on protected structures does have a lacuna regarding situations such as that applying to the oratory, where a local authority does not wish to give a building full protected status in such a way as would prevent its demolition (except in exceptional circumstances), but does want to protect specific features in such a way that they would be retained and reinstated elsewhere. It is not altogether clear to me how this can be achieved at the moment otherwise than by planning condition (or more expansive entry on the RPS), but the council’s mere hopes and intentions as expressed in 2002 are not in and of themselves self-executing.

**64.** The other building listed for demolition is the library wing (building no. 8). This is alleged to have significance as an “edge building”. My views on planning matters are irrelevant of course. So where in any case any given judge could be construed as suggesting a view on merits issues, apart from legitimate quasi-merits situations like unreasonableness or proportionality, that should be taken as being either context or an attempt at transparency, or sometimes an attempt to merely encourage reasonable outcomes (for example, the Supreme Court has been known to suggest sympathetic treatment to some candidates for deportation whose cases lack legal merit (e.g., *P.O. v. Minister for Justice & Equality* [2015] IESC 64, [2015] 3 I.R. 164, para. 47)). Either way, such a

view doesn't affect the legal conclusion. But as it happens, having seen the building, I would agree with the developer that demolition of this so-called "edge building" would not injure the main building and indeed it doesn't strike one as making a meaningful contribution to the appearance of the site overall. At the back of the complex, the buildings that form the edge of the quadrangle certainly all mutually reinforce a sense of enclosure, so there is a need for buildings at each edge there; but there is no obvious benefit to the main block in having a newer building sticking out at right angles asymmetrically on one side of it. On the face of things, the proposed demolition without replacement of this asymmetric "edge building" would seem to be an improvement to the site rather than the reverse.

**65.** A small building joining the library wing with the main seminary block, called the north link, is also proposed for demolition. Separately from these two main buildings, there are some very small parts of the protected structures that are intended for demolition. All later additions to the original structures, these would appear to be toilet blocks on either side of the main stairwell of the main seminary building, a storeroom at the back of Holy Cross Church, and a small room or corridor at the back of the south link building.

#### **Buildings that will be reworked and repurposed**

**66.** The five main buildings that are expressly recorded on the city council's RPS will all be reworked and repurposed to some extent. These are as follows:

- (i). Building no. 2, the seminary main block. The rear wall of the main block will be partly altered by creating new openings which will then lead to a large residential extension. Some internal demolition is also indicated including apparently the demolition of fine corridor brick work (see in particular comments in the city council's report).
- (ii). Building no. 4, the south link building.
- (iii). Building no. 3, Holy Cross Church.
- (iv). Building no. 6, the assembly hall.
- (v). Building no. 7, the ambulatory.

#### **New buildings**

**67.** Once complete, the envisaged development involves a total of twelve apartment blocks. Two will be in the central quadrangle (as noted above, one replacing the new wing and one as an extension to the main seminary building). The other ten are at a further remove, ranging up to

thirteen and eighteen storeys at a maximum. There is also a large subterranean structure envisaged under the parkland between the main seminary building and the Red House, to which we now turn.

### **Buildings not being physically altered**

**68.** There are a number of important buildings outside of the red line area which are not being physically altered, but which are either a part of the physical context for development or where there are allegedly visual and other impacts, or where curtilage is or may be affected, in particular:

- (i) Building no. 1, the "Red House", which as noted above dates from approximately 1750 and is the oldest part of the site. This is a recorded monument.
- (ii) The site is also adjacent to building no. 9, the Archbishop's house.
- (iii) Stone walls and a milestone near the Archbishop's house are also protected structures.

### **The grounds of challenge**

**69.** There are eight core grounds in the amended statement of grounds and 48 sub-grounds, making 56 grounds in total. These are more than usually independent of each other, because a significant number of points in the sub-grounds are not expressly signposted in the core grounds.

**70.** As noted above, there are so many points in the case that it is not possible to make sense of it other than by going through the grounds point-by-point. I will start by addressing the core grounds in general terms, but disposing of such grounds at the general level is without prejudice to the sub-grounds and doesn't imply disposing of a more specific sub-ground. In some instances, while the general plea may not have a compelling validity, a more telling sub-point is pleaded later in the amended statement of grounds.

### **Core ground 1 – lack of consideration of section 57(10) of the 2000 Act**

**71.** Core ground 1 states as follows: "The impugned decision is invalid as the Respondent erred in law in granting planning permission for the demolition of a protected structure without consideration of the provisions of Section 57(10) of the Planning and Development Act, 2000, more particularly, that such permission is impermissible save in exceptional circumstances;"

**72.** The issue of s. 57(10) is best dealt with as related to the city council's first objection to the scheme, and I will return to it further below.

### **Core ground 1(i) – reasons regarding exceptional circumstances**

**73.** Core ground 1(i) reads as follows: "If Section 57(10) of the Planning and Development Act, 2000, was considered, the Respondent failed to give sufficient reasons or any reasons to enable the

Applicant to understand how exceptional circumstances applied to the demolition of the protected structure in issue;”.

**74.** This ground as pleaded doesn't arise because s. 57(10) of the 2000 Act was not considered by the board.

**Core ground 1(ii) – irrationality regarding exceptional circumstances**

**75.** Core ground 1(ii) reads as follows: “Having regard to the considerations that are incumbent upon the Respondent to take into account when considering the demolition, alteration or extension of protected structures and their curtilages the decision reached by the Respondent is irrational.”

**76.** However, given that the board didn't make a decision on exceptional circumstances at all, it doesn't really make sense to criticise such a decision for irrationality. If there isn't such a decision at all, there isn't a decision to assess by reference to rationality.

**Core ground 2 – demolition of library wing and north link building**

**77.** Core ground 2 provides as follows: “The impugned decision is invalid and the Respondent erred in law in granting planning permission for the demolition and / or alteration of the Library Wing and the North Link Building without having any consideration for the Record of Protected Structures of the Dublin City Development Plan 2016 – 2022 and the Decision of Dublin City Council dated the 22nd October, 2002, as to the extent of protection for this structure, in particular the importance of these structures as an edge building protecting the front of the Main College Building.”

**78.** Insofar as the allegation of a lack of regard to the RPS in relation to demolition of the library wing/north link building is concerned, unfortunately for the applicant it is very clear from *travaux préparatoires* that, as with the new wing, Dublin City Council specifically intended to exclude these buildings from the RPS in 2002. Admittedly there was language used in the decision-making process about these buildings being in the curtilage of the protected structures, but that can't displace the clear intention to exclude them from the register.

**79.** A protected structure generally includes structures within the curtilage, although an individual planning authority may vary that general position within the record in relation to an individual site (see generally *Begley and Clarke v. An Bord Pleanála (No. 1)* [2003] WJSC-HC 1075 (Unreported, High Court, Ó Caoimh J., 14<sup>th</sup> January, 2003), *Begley and Clarke v. An Bord Pleanála (No. 2)* [2003] 5 JIC 2301 (Unreported, High Court, Ó Caoimh J., 23<sup>rd</sup> May, 2003)). The discretion of a planning authority to determine exactly what is or is not protected is also reinforced by s. 54 of the Act.

**80.** Therefore, while normally any building within the curtilage of a protected structure is also part of the definition of a protected structure, a local authority has jurisdiction to define what exactly is to be protected. So in circumstances such as those that arise here where a conscious decision was made to limit the scope of what was protected, the overwhelming inference is that the new wing, north link building and library wing were intended to be excluded from the RPS, and that must include exclusion from the concept of what would otherwise be protected in the curtilage. I would emphasise that this is a relatively unusual situation and does not detract from the general position which is that structures within the curtilage are also protected.

**81.** Insofar as complaint is made that the 2002 materials of Dublin City Council were not adequately considered, unfortunately, the applicant didn't bring those to the attention of the board prior to the decision complained of, so she can't condemn the board for failure to have regard to these matters.

**82.** Insofar as the point is made that there was failure to have regard to the library wing as a so-called edge building protecting the front of the main college building, I don't think one can plausibly say that the board didn't have regard to the actual layout of the buildings on the ground. The relationship between the library wing at right angles to the front of the seminary block is inherent in the site layout.

### **Core ground 3 – failure to consider the record of monuments and places**

**83.** Core ground 3 provides as follows: "The impugned decision is invalid as the Respondent erred in failing to consider adequately or at all the status of the subject lands within the Record of Monuments and Places protected pursuant to Section 12 of the National Monuments (Amendment) Act, 1994;".

**84.** The problem for the applicant here is really one of the onus of proof. The applicant hasn't established that the main college building or associated buildings are national or recorded monuments. I agree that the record is unsatisfactory in that, while it appears to show a "buildings site" on the map additional to but close to the Red House, there is no further narrative. Which buildings? We are not told. Inquiries with the Department indicate that this is a redundant record, albeit that that information is not officially part of the register. It seems to me that in a case of doubt as to whether something is a monument or not, the onus of proof must lie on the applicant (as the party normally alleging monument status).

**85.** It is a fundamental principle of judicial review that the onus of proof remains on the applicant at all times (per Denham J. in *Meadows v. Minister for Justice, Equality and Law Reform* [2010] IESC

3, [2010] 2 I.R. 701, [2011] 2 I.L.R.M. 157 at 743). Another way of making the same point is that a decision has a presumption of validity, and it is up to the applicant to prove otherwise. If anything has been a fixed feature of judicial review it is this principle (see for example *Monkstown Road Residents Association v. An Bord Pleanála* [2022] IEHC 318 (Unreported, High Court, 31<sup>st</sup> May, 2022) at para. 96 per Holland J.). When Hogan J. in *An Taisce v. An Bord Pleanála* [2022] IESC 8, [2022] 1 I.L.R.M. 281 said at para. 121 that the legal burden of demonstrating the invalidity of any grant of planning permission in cases arising under the habitats directive “will always rest with the applicant ... the evidential burden rests with the board to demonstrate that it has conducted an [appropriate assessment] which meets the requirements of Article 6(3)” of the directive, this was simply using a technical term in a non-technical sense. What he clearly meant by “evidential burden” in this passage was an obligation in the decision-making process itself and not in judicial review. The technical meaning of an “evidential burden” is a burden in the context of proceedings; in that context it “is not a burden of proof. It is a burden of raising, on the evidence in the case, an issue as to the matter in question fit for consideration by the tribunal of fact” *per* Lord Bingham in *Sheldrake v. D.P.P.* [2004] UKHL 43 at para. 1. For example, to over-simplify, in a criminal trial, the prosecution doesn’t have to disprove all possible defences; the accused must meet an evidential burden first to show that a particular defence would arise on the facts. If that is overcome, the point is then in issue and the prosecution has to negative that. Thus, it makes no sense to talk of an evidential burden on a respondent *in proceedings* to prove anything or to disprove the invalidity of its decision, because it is not up to respondents to raise issues as to the validity of their decisions in such proceedings. Respondents can put points of defence in issue, such as an applicant’s disqualifying conduct for example, but they don’t have to prove that their decision is valid. Since an evidential burden in the context of proceedings is one entitling a party, if it is overcome, to raise an issue, the concept would make no sense whatsoever if applied to the defence of judicial review litigation on its merits, such as on whether an appropriate assessment was validly conducted. Hence Hogan J. in *An Taisce* can only have been using the term in the non-technical sense of referring to an obligation in the administrative process. It is implausible to suggest that he could have been seeking to reverse *Meadows* and demolish a fundamental pillar of judicial review, by an *obiter* side-wind.

**86.** Unfortunately for the applicant here, I think that where a doubt exists, it is up to her to prove that the main college building is a recorded monument, and I don’t think that she has managed to do that on the material before the court.



**87.** That leaves the Red House, which *is* a recorded monument. The impact on the Red House is best dealt with as part of the discussion of the first main objection of the city council, which I will deal with in more detail below.

**Core ground 3(i) – lack of reasons**

**88.** Core ground 3(i) reads as follows: “If the designation of the subject lands within the Record of Monuments and Places protected pursuant to Section 12 of the National Monuments (Amendment) Act, 1994 was considered, the Respondent failed to give sufficient reasons or any reasons to enable the Applicant to understand how such status was dismissed or overcome by the Respondent.”

**89.** Similar points arise to those in relation to the previous paragraph. Insofar as the main building or associated buildings are concerned, it has not been shown that these are monuments, so reasons don’t really come into it. In relation to a lack of reasons for impact on the Red House as a recorded monument, that is best dealt with below under the general heading of the city council’s concerns in relation to the application.

**Core ground 3(ii) - irrationality**

**90.** Core ground 3(ii) provides as follows: “Having regard to the considerations that are incumbent upon the Respondent to take into account when considering the National Monuments, their curtilages and setting the decision reached by the Respondent is irrational.”

**91.** Again the same points apply. Insofar as the applicant’s complaint relates to the main building, that hasn’t been shown to be a recorded monument. Insofar as her concerns under this paragraph relate to the impact on the Red House, I deal with that more generally below in relation to the city council’s submission.

**Core ground 4 – level of protection of protected structures**

**92.** Core ground 4 provides as follows: “The Respondent erred in law and in fundamental reason and common sense when considering the *protection* to be afforded to the seven protected structures on the site and in permitting the use by the Notice Party its predecessor and / or assigns of multiple planning applications for consideration of permission for works of demolition, alteration and extension the same protected structure.”

**93.** Insofar as this ground complains that there are seven protected structures on the central campus associated with the main block, I cannot accept that argument for reasons identified above. Insofar as the ground embodies a complaint that there was an error in considering the protection to be afforded to such structures as are so protected, I think that can be adequately addressed below under the general heading of dealing with Dublin City Council’s concerns. Insofar as concerns the

allegation of project-splitting by way of multiple planning applications, the applicant didn't advance any written or oral submissions in support of the project-splitting point, and, when pressed to clarify the matter, indicated that the position was that there was a lack of information to enable that point to be brought home. Under those circumstances I don't think I need to consider it any further.

**Core ground 5 – material contravention of the development plan**

**94.** Core ground 5 provides as follows: "The impugned decision is invalid as the Respondent erred in law in materially contravening the Dublin City Development Plan 2016 – 2022, Built Heritage and Culture policies and objections in breach of section 9(6)(c) of the Planning and Development (Housing) Act 2016."

**95.** This issue is best dealt with under the heading of the city council's first objection to the scheme which I deal with in more detail below.

**Core ground 6 – breach of section 37 of the 2000 Act**

**96.** Core ground 6 provides as follows: "The Respondent was not entitled to grant development consent and acted ultra vires in so granting development consent in reliance on the provisions of Section 37(2)(b) of the Planning and Development Act, 2000, in light of the material contravention of density, unit mix, height and Built Heritage and Culture for the development."

**97.** Logically it seems to me that this point, insofar as it relates to the built heritage and culture part of the development plan, is dependent on the establishment of there being a material contravention, and I deal with that further below under the heading of the city council's first concern.

**98.** Insofar as it relates to the density, unit mix and height provisions of the development plan, these matters *were* covered in the material contravention statement and are expressly referred to by the inspector and the board. One can imagine different views being reasonably held about these matters, but ultimately, the applicant's complaint under these headings, it seems to me, is basically merits-based. That doesn't take from the possibility that issues regarding height for example could be specifically relevant to the treatment of and protection for the protected structures and the recorded monument on site by virtue of the heritage provisions of the development plan, but I deal with that further below.

**Core ground 7 – inadequate assessment**

**99.** Core ground 7 reads as follows: "The impugned decision is invalid and the Respondent erred in law in granting planning permission for the development of the site without any or any adequate assessment of the material assets and cultural heritage of the site pursuant to *inter alia* Article 3, 5, 6 and 9 of the EIA Directive 2011/92EU and / or Part X of the Planning and Development Act, 2000."

**100.** However, nothing specific was pointed to which would create an additional obligation under European law to assess the project, above and beyond that which would arise in relation to the specific points pleaded, mainly related to treatment of the protected structures. Accordingly, I think nothing identifiable arises for decision under this heading that is not addressed below under the heading of the city council's concerns.

**Core ground 8 – costs**

**101.** Core ground 8 provides as follows: "Section 3 of the Environmental (Miscellaneous Provisions) Act, 2011, applies to the present proceedings which seek to challenge *inter alia* the failure of the Respondent to adequately address the domestic environment issues including the material assets and cultural heritage of the Holy Cross College site in assessing the project and its direct and indirect effect on the architectural and archaeological heritage of the site."

**102.** That is not a ground for substantive relief but in any event seems to have been largely overtaken by the Supreme Court judgment in *Heather Hill v. An Bord Pleanála* [2022] IESC 43 (Unreported, Supreme Court, Murray J., 10<sup>th</sup> November, 2022).

**Sub-ground 1**

**103.** Sub-ground 1 reads as follows: "The Respondent's decision of the 4th November, 2021, adopted the Inspector's Report dated the 19th October, 2021, which report at paragraph 11.8.30 stated that:-

I am of the opinion that the proposed demolitions are not detrimental to the character of the wider college setting. Many of the elements to be demolished are modern interventions of limited significance. In terms of the Conservation Officer in relation to the demolition of the New Wing and the Library Wing, I note their unprotected status. While they are included in the NIAH Ministerial Recommendation, I question why they were not included in the Record of Protected Structures in the first instance."

**104.** That is a statement of factual context not a legal ground as such.

**Sub-ground 2**

**105.** Sub-ground 2 reads as follows: "At paragraph 11.8.16 the Report stated that:-

The extent of the proposed demolition of existing buildings (the New and the Library Wing) is significant. Notwithstanding their unprotected status, these buildings are included in the NIAH Ministerial Recommendations as part of the seminary complex, which was given a Regional Rating and of Architectural, Cultural, Historic and Social categories of special

interest and are considered by the Conservation Section of the planning authority to be buildings of architectural significance.”

**106.** Again, that is merely factual context.

**Sub-ground 3**

**107.** Sub-ground 3 reads as follows: “The Respondent’s Order of the 4th November, 2021, confirms the demolition of the New Wing and the Library Buildings of the College / Seminary main building.”

**108.** Again, that is factual material not a legal ground.

**Sub-ground 4 – lack of regard to the definition of a protected structure**

**109.** Sub-ground 4 reads as follows: “The Respondent’s decision is flawed in law in failing to have regard for the definition of a “protected structure” under the Planning and Development Act, 2000, and in particular the inclusion within such definition of a) lands lying within the curtilages of the structure, and b) any other structures lying with that curtilage and their interiors.”

**110.** Insofar as this point is a re-run of the argument that the new wing, the north link and the library wing are protected structures, I have dealt with that above. Insofar as it makes the further point that there are other structures proposed for demolition lying within the curtilage of the protected structures, or in their interiors, that issue warrants separate consideration and I deal with that further below. As noted above in the site description, there is some interior demolition proposed and there are some small structures within the curtilages or attached to relevant buildings that are condemned by the scheme.

**Sub-ground 5 – new wing and library wing**

**111.** Sub-ground 5 provides as follows: “Both the New Wing and the Library Wing of the Main College Building lie within the curtilages of a protected structure, namely the main college building and as such are defined as “protected structures” pursuant to the provisions of the Planning and Development Act, 2000.”

**112.** Again, I don’t accept that characterisation, and have dealt with that point above.

**Sub-ground 6**

**113.** Sub-ground 6 states as follows: “Section 57(10)(b) of the Planning and Development Act, 2000, confirms:-

A planning authority or the board on appeal shall not grant permission for the demolition of a protected structure or proposed protected structure save in exceptional circumstances.”

**114.** That is a statement of legal context not a legal ground as such.

**Sub-ground 7 – non-compliance with section 57(10) in respect of the new wing and library wing**

**115.** Sub-ground 7 provides as follows: “This test was not used by the Respondent in its decision on whether or not to demolish the New Wing and the Library Wing of the Seminary Buildings; instead the Respondent erroneously placed a vague balancing test between the need to develop the lands to an appropriate scale and protecting the character and setting of the historic structures (para. 11.8.32).”

**116.** This ground is predicated on the assertion that the new wing and library wing are protected structures. As I don’t accept that premise, that the ground does not arise.

**Sub-ground 8**

**117.** Sub-ground 8 provides as follows: “The Dublin City Development Plan 2016 - 2022 confirms that at 11.1.5.8 that there exists a presumption against demolition of protected structures:-

The loss of any protected structure should be wholly exceptional; therefore, in most instances, the City Council will resist the demolition or substantial demolition thereof. Where a structure is considered to make a positive contribution to an Architectural Conservation Area (ACA) and is identified through the development management process or an ACA appraisal, there will be a presumption against demolition.”

**118.** This is a statement of factual context and not a legal ground.

**Sub-ground 9**

**119.** Sub-ground 9 provides as follows: “The Dublin City Council decision of the 22nd October, 2002, confirm that the Library Wing and the North Link building which link the Library Wing to the Main College Building have an importance as an edge building to the space in front of the main college building and this should be recognised in any future planning decision on any proposed alteration or demolition of these buildings.”

**120.** Again, this is just a statement of fact and not a legal ground.

**Sub-ground 10 – lack of consideration of Dublin City Council material from 2002**

**121.** Sub-ground 10 provides as follows: “No consideration was made by the Respondent as to this requirement when determining that the Library Wing and North Link building were “unprotected” and thus could be demolished at will.”

**122.** The problem with this ground is that it is predicated on the argument that the board was obliged to have regard to the detailed narrative behind Dublin City Council’s 2002 decision. The applicant didn’t put that before the board and hasn’t shown that it was or should have been otherwise

before the board. Consequently, the board's decision can't be faulted for failing to give "consideration" to that decision. In any event, the decision can't be characterised as a "requirement"; it was simply the view of the city council at the time.

### **Sub-grounds 11 and 12**

**123.** Sub-grounds 11 and 12 read as follows:

"11. The Statutory Record of Monuments and Places for County of Dun Laoghaire-Rathdown, County of Fingal, County of South Dublin and Dublin County Borough lists as a Record of Monuments and Places two entries for Clonliffe Road, at national grid reference 31652/23631, which comprise 1) DU018-01901- Clonliffe Road, Dwelling Possible, and 2) DU018-01902- Clonliffe Road, Buildings Site.

12. The Respondent Inspector's Report references the "Red House" at para. 11.8.7 as within the Zone of Archaeological Interest and as being included in the Record of Monuments and Places, Ref. No. 018-019."

**124.** These are simply statements of fact rather than legal grounds as such.

### **Sub-ground 13 – inadequacy of para. 13.4.9 of the inspector's report**

**125.** Sub-ground 13 reads as follows: "However, the Respondent when addressing the "Cultural Heritage – Archaeology" of the site at para. 13.4.9 does not appear to address the Red House again or correlate the significance of the property or the reference number. The Respondent states that there are six recorded monuments within 500 meters of the proposed site. Whilst the Respondent references a monument site located to the immediate east of the site, site number "DU18-019001", it goes on to state that testing of the site did not reveal areas of archaeological significance."

**126.** The problem under this heading is that it is not up to an applicant to dictate the form of a decision. It is true that para. 13.4.9 of the inspector's report could not be said to be exactly a comprehensive statement of all issues of archaeological interest. But that in itself isn't a ground for *certiorari*; one must look at the material as a whole. There is further discussion of the Red House in particular in other parts of the inspector's report. As far as the alleged second monument is concerned, I have dealt with that above.

### **Sub-grounds 14 to 17**

**127.** Sub-grounds 14 to 17 provide as follows:

"14. The Red House is a Record Statutory National Monument ref. DU18-01901-.

15. The Investigators Report confirms that The Red House is outside the red line boundary and does not form part of this current application. Notwithstanding this, any impacts on its character and setting require assessment (para. 11.8.11).

16. In the Planning Authority submissions at paragraph 8.1 the Conservation Officer notes inter alia that the proposed height, scale and massing of the Block D[1] building at 17 +1 storeys is excessive in this context and will entirely dominate and seriously injure the architectural setting of the protected structures – the former Seminary and the Red House in particular.

17. The Respondent states (para. 13.4.9) that there will be no negative impacts on any specific site of archaeological or cultural heritage significance as a result of the proposed project.”

**128.** These are factual grounds rather than legal grounds as such.

**Sub-ground 18 – impact on Red House**

**129.** Sub-ground 18 provides as follows: “This finding is irrational and / or fails to consider the Red House as a Recorded Monument limiting its assessment of the Red House to that of a protected structure. Further and in addition such finding ignores the principles of protection and conservation of National Monuments and fails to engage with the extent of the National Monuments on site, their curtilage, setting and their social, cultural and historical significance. In the absence of an Archaeological impact assessment or Protected Structure impact assessment the investigation by the Respondent on this issue lacks any diligence.”

**130.** Insofar as this ground demands an archaeological impact assessment or protected structure impact assessment, those are not statutory requirements. The EIAR endeavours to deal with such issues (whether adequately or not we can discuss further below). Insofar as the general point is made that there is an impact on the Red House or alternatively that a finding of no impact is flawed, I will deal with that below as part of the city council’s objection.

**Sub-ground 19 – impact on Red House and construction of basement**

**131.** Sub-ground 19 provides as follows: “If the Respondent did consider the Red House as a Recorded Monument it failed to set out any reasons or any sufficient reasons so as to understand why it was permissible to grant permission for an 18 story apartment block in the immediately vicinity of the Red House or permit the construction of basement networks on the Holy Cross College site. Further and in addition no consideration was given to the Archaeology in the Planning Process guidelines, Office of the Planning Regulator, issued January, 2021.”

**132.** This sub-ground essentially raises three points.

**133.** Firstly, the alleged lack of reasons for the decision having regard to the impact on the Red House, which engages the city council's first objection to the scheme and which I address below.

**134.** Secondly a lack of reasons regarding the construction of the basement structure, which engages the city council's second objection to the scheme, again which I address below.

**135.** The final point made in sub-ground 19 is a lack of consideration to the leaflet issued by the planning regulator, *Archaeology in the planning process*, in 2001. However, that is not a statutory document and there is no legal obligation to have regard to it, unless somebody in the process requests that that be done. Since neither the applicant nor anybody else appears to have done that, the decision is not invalid by reason of any alleged failure by the board to have regard to this document.

#### **Sub-ground 20 – alleged second monument**

**136.** Sub-ground 20 provides as follows: "There is no consideration by the Respondent of the second Statutory Record of Monuments and Places "DU018-01902- Clonliffe Road, Buildings Site" which appears in the Duchas publication for Dublin. This entry is referenced as the same grid reference as the Red House but is described as "Buildings site".

**137.** This is a re-run of the allegation of a second monument on the site and I have dealt with this point already.

#### **Sub-grounds 21 and 22**

**138.** Sub-grounds 21 and 22 provide as follows:

"21. Duchas, The Heritage Service, National Monuments and Historic Properties publication 1998, which lists the Statutory Monuments and Places for Dublin outlines the basis for the reference numbers stating:-

County Dublin has been given a two letter identifying code (DU) and this forms the first element in the identifying number. The rest of the code is the number of the monument or place within County Dublin. The first two of the three dashes at the end allow monuments or places situated in close proximity to each other or closely associated with each other to be given one overall monument number but at the same time be individually identified through the use of sub-numbering in the form (for example) 00101-, 00102-, 00103-,. etc., as appropriate.

22. The publication confirms that maps on which the recorded monuments and places are shown are composite maps produced by the Ordnance Survey. The publication continues:-



The recorded monuments and places are shown on the maps by being circled or boxed in as appropriate by a black line. In some cases several monuments or places are circled or boxed in together because of their close proximity to, or association with, each other. The circles and boxes around the recorded monuments and places are intended to show them but not to define their exact extend [sic].”

**139.** These are factual matters and not legal grounds as such.

**Sub-ground 23 - alleged second monument**

**140.** Sub-grounds 23 provides as follows: “The Respondent does not address adequately or at all the second Statutory Recorded National Monument(s) which is situated on the site in question.”

**141.** Again, that is a reformulation of a point already rejected above.

**Sub-ground 24**

**142.** Sub-grounds 24 reads as follows: “The Dublin City Development Plan 2016 - 2022 to which the Respondent confirmed it had regard to in reaching its decision confirms it is a policy of Dublin City Council to protect and preserve National Monuments (CHC9)”.

**143.** That is simply factual context and not a legal ground.

**Sub-ground 25**

**144.** Sub-ground 25 reads as follows: “The requirement for architectural and archaeological assessment pursuant to the provisions of the EIA Directive 2011/92EU and the direct and indirect impact on the material assets and cultural heritage were not adequately carried out by the Respondent. Where such assessment was carried out the decision reached in respect of the project works and the impact of such works on the material assets and cultural heritage of the site was irrational.”

**145.** The applicant hasn’t identified anything specific in the European law requirement for assessment that goes beyond the assessment that would otherwise be required in national law. However, insofar as the complaint is made that the impact on heritage assets was not properly assessed, that crosses into the city council’s first point about the effect on protected structures, and can be subsumed into the discussion under that heading set out below.

**Sub-grounds 26 to 29**

**146.** Sub-grounds 26 to 29 provide as follows:

“26. “Protection” is defined by the Planning and Development Act, 2000, as:-

... in relation to a structure or part of a structure, includes conservation, preservation and improvement compatible with maintaining the character and interest of the structure or part.

27. Section 57(10)(a) of the Planning and Development Act, 2000, states that:-

... in considering any application for permission in relation to a protected structure, [the board] shall have regard to the protected status of the structure.

28. The Dublin City Development Plan 2016 - 2022 confirms at inter alia "CHC2":-

To ensure that the special interest of protected structures is protected. Development will conserve and enhance protected structures and their curtilages and will:

- a) Protect or, where appropriate, restore form, features and fabric which contribute to the special interest
- b) Incorporate high standards of craftsmanship and relate sensitively to the scale, proportions, design, period and architectural detail of the original building, using traditional materials in most circumstances
- c) Be highly sensitive to the historic fabric and special interest of the interior, including its plan form, hierarchy of spaces, structure and architectural detail, fixtures and fittings and materials
- d) Not cause harm to the curtilage of the structure; therefore, the design, form, scale, height, proportions, siting and materials of new development should relate to and complement the special character of the protected structure
- e) ...

Changes of use of protected structures, which will have no detrimental impact on the special interest and are compatible with their future long-term conservation, will be promoted.

29. The Development Plan confirms at 11.1.5.2 that the protection of protected structures in Dublin is a key objective of the City Council and this will assist in the delivery of the Core Strategy. Para. 11.1.5.3 confirms that:-

In order to protect the city's protected structures the City Council will manage and control internal and external works that materially affect the character of the structure. ... Prior to undertaking works to a Protected Structure, it is essential to make an assessment of the special interest of the structure and to identify all elements, both internal and external, which contribute to this. An assessment of the special interest of the structure is required

as part of a Protected Structure Impact Assessment to accompany the planning application. The complexity of the assessment should be proportionate to the overall special interest of the site and the scale and complexity of the proposed works. Proposals for works to Protected Structures should be supported by detailed drawings, photographic survey and schedules of works and materials. The assessment should outline the impact clearly on all elements of special interest and confirm their retention.

Interventions to Protected Structures should be to the minimum necessary and all new works will be expected to relate sensitively to the architectural detail, scale, proportions and design of the original structure. This should take into account the evolution of the structure and later phases of work, which may also contribute to its special interest.

**147.** These are points of legal and factual context and not legal grounds as such.

#### **Sub-ground 30 – lack of protection**

**148.** Sub-grounds 30 provides as follows: “The Report of the Inspector and the ultimate Order of the Respondent whilst using words such as protection and conservation of the protected structures uses such words without any regard for the actual meaning under the Planning Acts or pursuant to the Dublin City Development Plan. One of the principal objections to the issue of architectural heritage (page 29 of Investigator’s Report) was the absence of an Architectural Impact Assessment. This was not addressed by the Respondent; nor was the absence of a Protected Structure Impact Assessment addressed. This is particularly relevant when the Conservation Officer for the Planning Authority recommended a refusal of the planning application (page 31 Inspector Report).”

**149.** This appears to make two separate claims.

**150.** The first is that while terms such as “protection” are used, they are not used in the sense required by the legislation and the development plan. That essentially blends into the city council’s first point regarding the effect of the development on protected structures and can be dealt with below under that heading.

**151.** The second point is the lack of an architectural impact assessment or protected structure impact assessment but again, that is not a statutory requirement and the EIAR did endeavour to deal with these issues. The adequacy of the assessment of impact in the light of the legislation and development plan will be considered further below.

#### **Sub-ground 31 – lack of regard to definition of protected structure**

**152.** Sub-ground 31 provides as follows: “The Respondent had no regard for the definition of protected structure under the Planning and Development Acts, 2000, which so defines a protected

structure as including the 1) interior of the structure, 2) all fixtures and fittings which form part of the interior and exterior of the structure, 3) lands lying within the curtilages of the structure and 4) any specified feature within the attendant grounds of the protected structure.”

**153.** It seems to me that this is largely repetitious of an earlier ground regarding misconstruction of the definition of protected structures. While some elements of the applicant’s claims regarding the wide scope of protected structures have been rejected above, other elements warrant further consideration and can be best addressed below under the heading of the city council’s first objection to the scheme.

#### **Sub-ground 32 – project-splitting**

**154.** Core ground 32 provides as follows: “In failing to have regard to the definition of a structure the Respondent permitted the assessment of planning permission of a protected structure to be split between separate planning applications. In particular the Holy Cross Chapel was the subject to two separate planning applications, one in relation to the interior fixtures and fittings and a second in relation to its external features and apparent change of use. This form of assessment precluded any meaningful review of the planning application as envisaged under the Dublin City Development Plan and resulted in development splitting facilitating an incremental test of the effects of the proposed works on the protected structure. This is a wholly erroneous manner in which to assess the material effect of proposed development on a protected structure.”

**155.** As noted above, the applicant, while formally making the point, didn’t address any submissions to it and appeared to be accepting that she wasn’t possessed of sufficient information to bring the point home at this stage. So I don’t need to deal with it.

#### **Sub-ground 33 – failure to outline the basis for rejecting the council’s submission**

**156.** Sub-ground 33 provides as follows: “The failure to appreciate the definition of “protected structure” as defining more than simply the protected buildings is evident in the Respondent’s complete disregard for the curtilage and attendant grounds of the site. In particular the proposal for a basement constructed beneath the eastern end of the Formal Green was expressly opposed by the planning authority as same would give rise to potentially serious and injurious impact on the wider setting and the curtilage of the protected structures (pg 32 Investigator’s Report). In response to this issue and the effect of the changes on the curtilage of a protected structure the Respondent Inspector state at page 167 “I have no information before me to believe that the proposed basement would negatively impact on the Formal Green”. This proposition appears irrational and / or the

Respondent has failed to outline the rational basis for rejecting the planning authorities concerns as to the Formal Green proposals.”

**157.** This relates to the council’s second objection to the scheme, and I deal with that further below under that heading.

**Sub-grounds 34 – lack of consideration of development plan**

**158.** Sub-ground 34 provides as follows:

“Of the protected structures overall the Inspector states at page 167:- There will be some loss of historic fabric of the site by virtue of the proposed demolition. This is somewhat inevitable in such a large scale development. There will be a change in the setting of the protected structures. There will also be a change to the character of the site as it moves from its current state to that of accommodating a development of the scale proposed. I consider that the site can accommodate the development of the scale proposed without detriment to the protected structures.

In considering the decision-makers reasoning above it appears clear that no consideration was had to the Development Plan policy and guidelines for assessing changes to protected structures; no consideration was given to the statutory obligation to assess permission of protected structures in the context of the status of the structure; no consideration was given to the Architectural Heritage guidelines on ether protected structures, conservation principles, liturgical buildings or curtilages of protected structures. If such considerations were given by the decision-maker then there was a complete failure to provide sufficient reasons so as to understand how the Respondent dismissed or overcame these requirements.”

**159.** The applicant clarified that the “guidelines” referred to were not the development plan guidelines of 2007 but the architectural heritage guidelines of 2011. Those are subject to a “have regard to” obligation and indeed are referred to in the board’s order. It seems to me that this ground is best assessed under the general heading of the council’s first objection to the scheme, and I deal with that further below.

**Sub-grounds 35 and 36**

**160.** Sub-grounds 35 and 36 read as follows:

“35. Chapter 13 of the Dublin City Development Plan 2016 – 2022 confirms that it is the policy of the City Council to ensure the special interest of protected structures is protected. Development will conserve and enhance protected structures and their curtilage and will

not harm the curtilage of the structure; therefore the design, form, scale, height, proportions, siting and material of new development should relate to and complement the special character of the protected structure.

36. Paragraph 11.1.5.3 confirms that any development which affects the interior of a protected structure must be highly sensitive to the historic fabric and special interest of the interior, including its plan form, hierarchy of spaces, structure and architectural detail, fixtures and fittings and materials. Interventions to Protected Structures should be to the minimum necessary and all new works will be expected to relate sensitively to the architectural detail, scale, proportions and design of the original structure.”

**161.** These are statements of factual context and not legal grounds as such.

**Sub-ground 37 – contravention of Development Plan**

**162.** Sub-ground 37 provides as follows: “The interventions to the protected structures on site are odious and in complete contravention of multiple policies, objectives and principles of Chapter 13 of the Development Plan including 11.1.4.5, CHC2, 11.1.5.3, 11.1.5.8, CHC5, 11.1.5.14 and CHC9.”

**163.** Whether the interventions to protected structures should be characterised as odious, as alleged, seems to me to be a matter of merits-based judgment rather than a legal allegation for determination by the court. However, the claim of contravention of the development plan does raise judiciable legal issues, and is best dealt with below under the heading below of the council’s first objection to the scheme.

**Sub-ground 38 – statement of material contravention**

**164.** Sub-ground 38 provides as follows: “The Notice Party has not submitted a Statement of Material Contravention of such issues in breach of Regulation 36 of the PDR 2001 and Section 34(6) of the PDA 2000.”

**165.** That sub-ground seems to me to be inextricably related to the allegation of material contravention of the development plan in respect of heritage policies, and is best dealt with below under the heading of the council’s first objection.

**Sub-ground 39 – breach of section 9 of the Planning and Development (Housing) Act 2016**

**166.** Sub-ground 39 provides as follows: “The Respondent has not complied with the provisions of Section 9(6)(c) of the Planning and Development (Housing) Act 2016 and as such the planning permission granted which material contravenes the Dublin City Development Plan as hereinabove stated is invalid.”

**167.** Again, that seems to me to be a reformulation of the material contravention argument and is best addressed under the heading of the council's first objection below.

**Sub-ground 40 – lack of reasons for contravention of provisions of development plan regarding unit mix**

**168.** Sub-ground 40 provides as follows: "The proposed development consisted of over 70% of the units being either one bed units or studio units. The Dublin City Development Plan allowed for a maximum of 25% to 30% of such units. This it was submitted was a very significant breach of the Development Plan and would only lead to substandard housing in the long term. The excessive use of single occupancy units was also flagged as a negative factor in the preservation of the Seminary Building, a protected structure. No justification or reasons were provided save that the development was of strategic national importance. In light of the protected nature of the site and the National Monuments situated there on it was incumbent onto the Respondent to provide adequate reasons for the significant breach of the Development Plan on this issue."

**169.** It is important to note that this is pleaded as a reasons issue, and I don't think it succeeds as such an issue given the wording of the decision. It is not pleaded as a substantive unlawfulness, for example that the alleged strategic national importance of the development was not a lawful justification in and of itself.

**Sub-ground 41 – contravention of development plan regarding heights**

**170.** Sub-ground 41 provides as follows: "The proposed development exceeded the height restrictions for the area for 7 of the 12 blocks of apartments. The Dublin City Development Plan allowed for a maximum of 16m to 24m. 7 blocks exceeded 24 meters, Block A4 exceeded its limit by 19m (182%) while block D1 exceeded its limit by 38m (261%) This it was submitted was a very significant breach of the Development Plan and would beach the skyline in an incongruous fashion. The D1 block being situated closest to the Red House a National Monument. No justification or reasons were provided save that the development was of strategic national importance. In light of the protected nature of the site and the National Monuments situated there on it was incumbent onto the Respondent to provide adequate reasons for the significant breach of the Development Plan on this issue."

**171.** Insofar as this is also pleaded as a reasons issue, I don't think it succeeds in those terms either given the wording of the board's decision. Insofar as there is a complaint about lack of reasoning of the decision in respect of the height of the D1 block having regard to the impact on the

Red House, that is addressed further below under the heading of the council's first objection to the scheme.

### **Sub-grounds 42 to 44**

**172.** Sub-grounds 42 to 44 provide as follows:

"42. Section 171A Planning and Development Act, 2000 as amended:-

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

- (a) Human beings, flora and fauna;
- (b) Soil, water, air, climate and the landscape;
- (c) Material assets and the cultural heritage, and
- (d) The interaction between the factors mentioned in paragraphs (a), (b) and (c).

43. Section 172 Planning and Development Act, 2000 as amended:-

(1) An environmental impact assessment shall be carried out by the planning authority or the board, as the case may be, in respect of an application for consent for a proposed development where either-

a. The proposed development would be of a class specified in-

- i. Part 1 of Schedule 5 of the Planning and Development Regulations, 2001, ... and such development would exceed any relevant quantities, area or other limit in that Part, or
- ii. Part 2 of Schedule 5 of the Planning and Development Regulations, 2001, ... and such development would exceed any relevant quantities, area or other limit in that Part;

44. Article 3 of the EIA Directive confirms that the environmental impact assessment shall identify, describe and assess in an appropriate manner, in the light of each individual case and in accordance with Articles 4 to 12, the direct and indirect effects of a project on the following factors."

**173.** These sub-grounds are statements of legal context and not legal grounds as such.

### **Sub-ground 45 – alleged lack of assessment**



**174.** Sub-ground 45 provides as follows: "The EIAR of the Notice Party fails to adequately address the direct and indirect effects of the project on the material assets and the cultural heritage of the Holy Cross College site. Section 15 of the EIAR fails to correctly list the inclusion of the second Statutory Monument on the site or address the direct or indirect effect of the works on this site."

**175.** As regards the alleged second recorded monument on the site, I don't accept that the applicant has made out that point for reasons set out above. As regards the lack of addressing of the impact of the works and cultural heritage, that can be subsumed into the discussion of the council's objections to the scheme as set out below.

**Sub-ground 46 – EIA directive**

**176.** Sub-ground 46 provides as follows: "The Respondent fails to comply with the provisions of inter alia Article 3 or 9 of the EIA Directive in examining the concerns and opinions expressed by the public in respect of the cultural, architectural and archaeological aspects of the project and setting out the reasons and considerations as to why the decisions to grant permission should be made in the face of such concerns."

**177.** The applicant did not point to anything specifically in European law that went beyond what would otherwise be required by domestic law, and the applicant confirmed in submissions that this did not add to what was raised under the other grounds.

**Sub-ground 47 - costs**

**178.** Sub-ground 47 provides as follows: "Section 3 of the Environmental (Miscellaneous Provisions) Act 2011, and / or Section 50B of the Planning and Development Act, 2000, is applicable to proceedings, such provision applies to all costs of the proceedings. Section 3(1) of the 2011 Act confirms that notwithstanding anything contained in any other enactment or in Order 99 of the Superior Court Rules, in proceedings to which this section applies, each party shall bear its own costs."

**179.** As discussed above this is not a ground for a substantive relief.

**Sub-ground 48**

**180.** Sub-ground 48 provides as follows:

"The decision of Simons J in *Heather Hill Management Company CLG v An Bord Pleanala* [2019] IEHC 186, concerning Section 50B costs in environmental matters confirmed, in respect of the costs protection in environmental matters in furtherance of the European Directive at para. 40, that:-

... the special costs rules apply to all of the costs of proceedings which seek to question the validity of a decision made pursuant to a statutory provision—such as section 9 of the PD(H)A 2016—which gives effect to article 6(3) of the Habitats Directive.”

**181.** That is a statement of legal context and not a ground for relief.

#### **The net issues**

**182.** Having regard to the foregoing, it seems to me that the case essentially boils down into two net headings which can be summarised as follows:

- (i) the city council’s first objection to the application, principally regarding impact on protected structures, and related issues regarding material contravention of the development plan and contravention of the legislation regarding such structures; and
- (ii) the city council’s second objection to the application, principally regarding the impact of the subterranean structure, and the related question of material contravention of the development plan in respect of that structure.

#### **The city council’s first objection and the general issue of protected structures**

**183.** The first ground on which the city council conservation officer recommended refusal of the application is summarised as follows: “The proposed height, scale and massing of the Block D2 building at 17+1 storeys is excessive in this context and will entirely dominate and seriously injure the architectural setting of the Protected Structures – the former Seminary and the Red House in particular, as well as the surrounding environs of Clonliffe Road and Drumcondra, including adjacent and adjoining Z2 Residential Conservation Areas. It would also be clearly visible in long-range views from other parts of the historic city. Accordingly, Block D2 should be omitted from the proposed development.”

**184.** The conservation officer’s report quoted extensively from the Dublin City Development Plan 2016 - 2022, including chapter 11 on Built Heritage and Culture, s. 11.1.1, policy CHC1, and policy CHC2 regarding the protection of protected structures. Sub- para. (d) of that policy says specifically that “the design, form, scale, height, proportions, siting and materials of new development should relate to and complement the special character of the protected structure”. This is specifically quoted by the conservation officer. Reference is then made to para. 11.1.5.3 to the effect that “[i]nterventions to Protected Structures should be to the minimum necessary and all new works will be expected to relate sensitively to the architectural detail, scale, proportions and design of the original structure”. Height is relevant specifically to the protection of architectural heritage, and the

conservation officer notes statements to that effect in the Architectural Heritage Protection Guidelines at para. 6.8.2 and 6.8.5.

**185.** The section ‘works to individual buildings’ at pp. 12 to 13 of the report does not address the new wing and the loss of the oratory. I note that the EIAR says that anything of architectural interest will be ‘‘carefully salvaged’’, whatever that means, but one can note in passing that that is far short of preserving the room as a whole by re-erecting it elsewhere.

**186.** The submission comments that placing a tower at the end of the entrance avenue facing the seminary will have the result of ‘‘obscuring the present legibility and special sense of space and place’’.

**187.** Reservations were expressed regarding demolition of the new wing and library building by reference to their location within the curtilage of protected structures and the regional rating in the NIAH (National Inventory of Architectural Heritage). The oratory is mentioned at this point in the submission and reference is made to its design by architect Stanislaus Nevin as being ‘‘of the highest quality of design, materiality and workmanship, using materials which included raised-and-fielded wall panels in Japanese oak and a hand carved altar by Mr. T. Doody, joiner craftsman. This panelling is excellent condition. It is understood that this panelling, altar and other loose fittings from the oratory are to be carefully removed and salvaged for reuse for use in a church specified by Archbishop’s House’’. I am not at all clear what the basis for this understanding is, but in any event it doesn’t seem to have a legal footing. It may not even have a factual footing. The hand-carved altar and the loose fittings are already gone. I have no idea whether these have been disposed of or even auctioned off.

**188.** The loss of other features in the new wing and library wing was also noted and regretted.

**189.** Section 2(1) of the 2000 Act defines a number of important terms. ‘‘Protected structure’’ is defined as follows: ‘‘‘‘protected structure’’ means—

- (a) a structure, or
- (b) a specified part of a structure,

which is included in a record of protected structures, and, where that record so indicates, includes any specified feature which is within the attendant grounds of the structure and which would not otherwise be included in this definition’’.

**190.** The term ‘‘structure’’ is defined as follows:

‘‘‘‘structure’’ means any building, structure, excavation, or other thing constructed or made on, in or under any land, or any part of a structure so defined, and—

- (a) where the context so admits, includes the land on, in or under which the structure is situated, and
- (b) in relation to a protected structure or proposed protected structure, includes—
- (i) the interior of the structure,
  - (ii) the land lying within the curtilage of the structure,
  - (iii) any other structures lying within that curtilage and their interiors, and
  - (iv) all fixtures and features which form part of the interior or exterior of any structure or structures referred to in *subparagraph (i) or (iii)*”.

**191.** Section 57(10) is relevant:

“(10) (a) For the avoidance of doubt, it is hereby declared that a planning authority or the Board on appeal—

- (i) in considering any application for permission in relation to a protected structure, shall have regard to the protected status of the structure, or
- (ii) in considering any application for permission in relation to a proposed protected structure, shall have regard to the fact that it is proposed to add the structure to a record of protected structures.

(b) A planning authority, or the Board on appeal, shall not grant permission for the demolition of a protected structure or proposed protected structure, save in exceptional circumstances.”

**192.** The term “for the avoidance of doubt” implies that this is illustrative and consequential, and is not necessarily intended to exhaust the totality of obligations to safeguard a protected structure. But even on its own terms, there is a clear prohibition on “demolition” save in exceptional circumstances.

**193.** The term “structure” is defined by the 2000 Act to mean any part of a structure, which has the consequence that “demolition” means demolition of any part of a protected structure and not merely demolition of the whole. Apart from being the clearly defined and normal and logical meaning, this is totally consistent with the statutory policy, which is to protect such structures. That policy would be utterly defeated if anything short of complete bulldozing of a protected structure was to be in principle permitted, with exceptional circumstances only applying to complete demolition. That would make a mockery of the statutory intention.

**194.** Thus when one is dealing with any element of a protected structure, including structures in the curtilage of protected structures, or structures otherwise falling within the definition such as by

reason of being in attendant grounds, any proposals for full or partial demolition need to be carefully scrutinised for compliance with s. 57(10) (see also *per* Holland J. in *Monkstown Road Residents' Association v. An Bord Pleanála* [2022] IEHC 318 (Unreported, High Court, 31<sup>st</sup> May, 2022) at para 85).

**195.** The problem for the board is that the question of s. 57(10) was never considered at any point by the inspector. There is a clear analogy with *O'Brien v. Dun Laoghaire Rathdown County Council* [2006] IEHC 177 (Unreported, High Court, 1<sup>st</sup> June, 2006) *per* O'Neill J. He noted at para. 26 that in the planning report in that case "[n]owhere in this detailed report is there any reference whatsoever to a consideration of exceptional circumstances in the context of the prohibition of demolition contained in s. 57(10)(b) of the Act of 2000. There is simply no evidence at all of any consideration of that topic". While *O'Brien* was not a final substantive decision, the point still holds here.

**196.** While I would accept the point that the new wing and the library wing were expressly excluded from the protection intended to be granted by the city council, there is more to the demolition than just those two structures. While the board referred repeatedly and dismissively to the "toilet blocks" being demolished, that is not by any means the totality of it. Parts of the fabric of the main building are due for demolition including the toilets on either side of the main stairwell, as well as part of the back wall, in order to create a series of regular openings into the extension. In addition, small buildings (specifically a storeroom and a corridor) adjacent to the church in the south link building are also due for demolition. If these lie within the curtilages of protected structures, then they themselves fall within the protected structures. There are also interior demolitions proposed, including striking features of the main block interior.

**197.** To comply with s. 57(10) in the context of a development affecting a protected structure, the board is obliged to proceed as follows:

- (i) to identify exactly what internal or external demolition is involved in the application;
- (ii) to identify whether each individual piece of demolition technically involves the demolition of any part of a protected structure (if not, then s. 57(10) does not apply);
- (iii) to assess in each case whether any particular piece of demolition, external or internal, would in itself (that is, separate from any benefit achieved by the works overall) adversely affect the interest of the protected structure (for example

whether the interest would be enhanced by removing an unsympathetic later adjustment) - if the result is such an enhancement, then by necessary implication from the purpose of the Act, s. 57(10) does not apply either;

- (iv) if the net result of this analysis is that some individual piece of demolition is subject to s. 57(10), then the decision-maker must determine whether exceptional circumstances have been demonstrated (the benefit of the works overall can be considered at this point in a way that gives appropriate recognition to the fact that normally the best way to protect a structure is to keep it in use); and
- (v) in considering any impacts on a protected structure, whether demolition or otherwise, the decision-maker must have regard to the need to protect the structure, which normally means that any detriments to the structure are the minimum necessary to achieve the benefit to the structure of its continued or re-fashioned use.

**198.** Unfortunately the board failed to apply such an approach here.

**199.** Step (ii) requires a little explanation. If the demolition of something which technically forms part of the definition of a protected structure would in fact increase the interest of the protected structure as a whole, then it cannot have been the intention of the legislature to require any test of exceptionality for such demolition to be permitted. That would be entirely self-defeating in terms of the overall objective of the legislation, which is the furtherance of protection. A typical example would be some much later and unsympathetic adjustment to an original structure of interest.

**200.** There are a number of instances of this within the Holy Cross site. The proposed demolition of the mezzanine level in the assembly hall is a good example. It seems to me that any rational planning decision-maker would have to take the view that this mezzanine level diminishes the interest of the structure. On that basis, the demolition of those features must be permissible notwithstanding what might be thought to be the literal wording of s. 57(10), without a need to show exceptionality.

**201.** This possibly highlights the need to define what we mean by the "interest" of a structure. At one level, everything is interesting. "Everything" includes subsequent architectural vandalism of important structures. On this almost anarchically wide definition of "interest", demolition of anything could be viewed as removal of a feature of "interest". But that is not the sense in which that term is used in the 2000 Act. Protection of the "interest" of a structure means that the net result of any

development would be that the structure retains at least as much interest as, if not more than, it had prior to the development. In other words, one can ask, would demolition of a particular feature enhance or reduce the level of interest of the structure?

**202.** In the case of the mezzanine level there could only be one answer to that. The developer's oral submissions suggested that this was a "hideous" feature in architectural terms, and with no disrespect to the needs of the Diocese which prompted the addition of this internal floor, I agree with the developer on that. Not only does it not look any better when one sees it at first hand, it looks even worse than the photographs, if that can be believed. That is perhaps an illustration of the point at which merits-based assessment can cross over into a permissible view on the quasi-merits-related issue of rationality, not least because there isn't anything going the other way (apart from the legalistic argument that demolition of this part of the interior is a demolition of a protected structure).

**203.** Another example, though not strictly the demolition of a protected structure, relates to the demolition of the library wing. The developer's view (with which I happen to agree, not that it matters) is that this asymmetrical feature detracts from the interest of the main building. On that logic, demolition of the library wing would enhance the interest of the mezzanine structure.

**204.** But matters are different where the internal demolition *does* reduce the interest of the structure, such as in relation to the brick corridors of the main seminary block.

**205.** Step (iv) also requires a little explanation. If the net result of this analysis is that some individual piece of demolition is subject to s. 57(10), then the decision-maker must consider the question of exceptional circumstances, although this has to be done in a way that gives appropriate recognition to the fact that normally the best way to protect a structure is to keep it in use; preferably the original use or if not a closely related one, or failing that some appropriate new use. Thus there will be a category of instances where the exceptionality test can be satisfied by reason of any relatively modest partial demolitions being the minimum necessary to achieve the overall protection of the structure by retaining it in use. That is not a bulldozer's charter, because it involves starting from a premise of protection and looking for the minimum deviation from that, rather than what seems to me to be the inspector and board's essential *de facto* approach here of starting from the developer's scheme and proposing only minimal changes to that to mitigate the worst impacts.

**206.** Step (v) also requires comment. Section 57(10) is as noted elsewhere expressed to be "for the avoidance of doubt". It doesn't take from the overall purpose of the provisions of the 2000 Act on protected structures which is to achieve actual protection. Yes there can be adverse impacts if

necessary (whether demolition or otherwise, such as by affecting its setting), but the intention of the legislation is clearly to minimise such impacts. The approach must be that the benefit to the structure of any given development (for example by retaining continued use) must outweigh such detriments, which should be the minimum necessary to achieve the benefit concerned. The concept of impact minimisation is for good measure expressly articulated in those terms in the Development Plan.

**207.** This interpretation of s. 57(10) is, as it happens, consistent with the basic approach of the Architectural Heritage Guidelines 2011. These state at para. 6.8.13: "Where partial demolition of a protected structure is proposed, the onus should be on the applicant [for permission] to make a case that the part – whether or not it is original to the structure – does not contribute to the special interest of the whole, or that the demolition is essential to the proposed development and will allow for the proper conservation of the whole structure."

**208.** Turning from the statutory requirements to the development plan specifically, section 11.1.5.1 of the Development Plan sets out an objective CHC2 as follows:

"To ensure that the special interest of protected structures is protected. Development will conserve and enhance Protected Structures and their curtilage and will:

- (a) Protect or, where appropriate, restore form, features and fabric which contribute to the special interest
- (b) Incorporate high standards of craftsmanship and relate sensitively to the scale, proportions, design, period and architectural detail of the original building, using traditional materials in most circumstances
- (c) Be highly sensitive to the historic fabric and special interest of the interior, including its plan form, hierarchy of spaces, structure and architectural detail, fixtures and fittings and materials
- (d) Not cause harm to the curtilage of the structure; therefore, the design, form, scale, height, proportions, siting and materials of new development should relate to and complement the special character of the protected structure
- (e) Protect architectural items of interest from damage or theft while buildings are empty or during course of works
- (f) Have regard to ecological considerations for example, protection of species such as bats.

Changes of use of protected structures, which will have no detrimental impact on the special interest and are compatible with their future long-term conservation, will be promoted."



**209.** Paragraph 11.1.5.2 provides as follows: "Protected Structures – Policy Rationale

The conservation and protection of the 8,500 (approx) protected structures in Dublin is a key objective of the City Council and this will assist in the delivery of the Core Strategy."

**210.** Paragraph 11.1.5.3 provides as follows:

"Protected Structures – Policy Application

In order to protect the city's Protected Structures, the City Council will manage and control external and internal works that materially affect the character of the structure. Planning permission is required for any works, including some repairs, which would materially affect the character of the structure or its special interest. Prior to undertaking works to a Protected Structure, it is essential to make an assessment of the special interest of the structure and to identify all elements, both internal and external, which contribute to this. An assessment of the special interest of the structure is required as part of a Protected Structure Impact Assessment to accompany the planning application. The complexity of the assessment should be proportionate to the overall special interest of the site and the scale and complexity of the proposed works. Proposals for works to Protected Structures should be supported by detailed drawings, photographic survey and schedules of works and materials. The assessment should outline the impact clearly on all elements of special interest and confirm their retention. Interventions to Protected Structures should be to the minimum necessary and all new works will be expected to relate sensitively to the architectural detail, scale, proportions and design of the original structure. This should take into account the evolution of the structure and later phases of work, which may also contribute to its special interest. Where possible, existing detailing, fabric and features of the structure should be preserved, repaired or, if missing or obscured, should be re-instated or revealed. In almost all cases, the materials used for alterations, extensions or repairs should match the original and the use of non-traditional materials will not normally be acceptable. Original and historic fabric should be retained and protected, wherever possible. Any development which affects the interior of a protected structure must be highly sensitive to the historic fabric and special interest of the interior, including its plan form, hierarchy of spaces, structure and architectural detail, fixtures and fittings and materials. The original plan form of protected structures should be protected or re-instated and not compromised by unsympathetic alteration or extension. Proposals for amalgamation between protected structures which compromise the original plan form will

be considered unacceptable where they adversely affect the historic integrity and special interest of the structure. Breaches between party walls will not be acceptable in sensitive parts of protected structures. The City Council will require all works, whether they are repair or alteration, to be undertaken in a sensitive manner, under proper supervision and by a specialist with appropriate expertise. The curtilage of a Protected Structure is often an essential part of the structure's special interest. In certain circumstances, the curtilage may comprise a clearly defined garden or grounds, which may have been laid out to complement the design or function. However, the curtilage of a structure can also be expansive and can be affected by development at some distance away. The protected structure impact assessment should also include an appraisal of the wider context of the site or structure and the visual impact. The design, form, scale, height, proportions, siting and materials of new development should relate to and complement the special character of the protected structure. The traditional proportionate relationship in scale between buildings, returns, gardens and mews structures should be retained, the retention of landscaping and trees (in good condition) which contribute to the special interest of the structure shall also be required. Any development which has an adverse impact on the setting of a protected structure will be refused planning permission. The removal of rear gardens to permit underground accommodation is permitted only in limited circumstances. A garden size appropriate to that of the structure should be retained. The total removal of historic boundary features or subdivision of rear gardens or original communal front gardens will generally not be permitted. Car parking will be permitted within the curtilage in accordance with policy CHC8 and standards as set out in the development plan, Section 16.10.18. The historic use of the structure is part of its special interest and in general the best use for a building will be that for which it was built. However, on occasion the change of use will be the best way to secure the longterm conservation of a structure. Where a change of use is proposed, the building should be capable of being converted into the new use without harmful extensions or modifications, especially if the change of use would require new openings, staircases and substantial subdivisions to the historic floor plan or loss of historic fabric. Issues such as fire protection, sound proofing, servicing and access will also require detailed consideration. In finding the optimum viable use for protected structures, other land-use policies and site development standards may need to be relaxed to achieve long-term conservation. In some circumstances, short-term uses may provide

a way to help keep a building weather-tight and in use pending long-term solutions. Historic fixtures and fittings are at risk of damage or theft when buildings are vacant, undergoing building work or on the market. The protected structure impact assessment should outline how proposals will manage this risk. If architectural features are damaged or stolen they must be re-instated; this is likely to require a new planning application. The planning authority will encourage the sensitive upgrading of protected structures to improve environmental performance and create inclusive access, further advice is set out in the retrofitting and design principles and policies section. Given the high concentration of protected structures in Dublin city, it is important to refer to the further detailed guidance on protection, repair and alteration of protected structures as set out in the Guidelines for Planning Authorities on Architectural Heritage Protection published by the Department of Arts, Heritage, Regional, Rural and Gaeltacht Affairs (2011)."

**211.** The development plan goes on to provide as follows in s. 11.1.5.7:

"Demolition of Protected Structures and Buildings in Architectural Conservation Areas

It is the Policy of Dublin City Council:

CHC5: To protect Protected Structures and preserve the character and the setting of Architectural Conservation Areas. The City Council will resist the total or substantial loss of:

- Protected structures in all but exceptional circumstances (and will require the strongest justification, including professional input with specialist knowledge so that all options receive serious consideration).
- Non-protected structures which are considered to make a positive contribution to the character and appearance of an Architectural Conservation Area, unless it can be demonstrated that the public benefits of the proposals outweigh the case for retention of the building.

Demolition behind retained facades may be considered on non-protected structures, depending on the significance of the structures, where it will secure the retention of façades which make a significant contribution to local townscape, where it will maintain the scale of original rooms behind principal façades and where the demolition is considered otherwise acceptable having regard to the above policy considerations. Where an existing structure is considered to make a neutral or negative contribution to an Architectural Conservation Area, the City Council will encourage:

1. Its demolition and replacement with a high-quality building with enhanced environmental performance, or
2. Where appropriate, its improvement, recladding or refurbishment to improve both its appearance and environmental performance.

In all cases, demolition will only be permitted where:

1. Any replacement building will be of exceptional design quality and deliver an enhancement to the area and improvement in environmental performance on-site, taking into account whole life-cycle energy costs.
2. Firm and appropriately detailed proposals for the future re-development of the site have been approved and their implementation assured by planning condition or agreement."

**212.** Returning to the city council's objections here, the council noted that the toilet blocks to the rear of the main building will be removed but considered that this demolition would be acceptable. The striking brick arches within the main seminary building are also earmarked for removal and the conservation officer regards this as "regrettable as this element is considered to be of character and high architectural quality and demonstrates the development of the building over time".

**213.** Complaint is made that the substantial and largely blank gable elevations of new blocks around the quadrangle create a somewhat oppressive impact on adjoining buildings, which requires further consideration to reduce the impact on the architectural setting of the adjoining and adjacent protected structures. The loss of floor plans, floors and internal features in the main building is also regretted and certain recommendations are made.

**214.** Turning to the church, the conservation officer considers that "the stripping out of ... Liturgical and Religious features which form an intrinsic part of Holy Cross Church is most regrettable in terms of architectural conservation and heritage, but is considered to be [an] inevitable consequence of the closure of the Seminary". The concept of removing religious items for re-use rather than leaving them *in situ* is supported. A number of clarifications are sought including the fate of the pulpit. The baldacchino is also referred to, although it's not clear to me what the fate of that structure will be. It is not included in the diocesan planning application for removal and relocation.

**215.** The conservation officer then turns at p. 22 to the impact on the Red House, stating that its architectural setting "will be significantly and adversely affected by the proposed development". It is noted that despite the adjustment of its curtilage and setting "it still enjoyed a very respectful

buffer zone in front of its principal façade, and retained the mature trees along the entrance avenue from Clonliffe Road, and the avenue of trees that extend in a broadly east-west direction to the northwest corner of the Red House". The conservation officer states that "its architectural setting is considerably diminished by the proposed development overall" (p. 24). It is noted that the principal vehicular access route to the development site is located very close to the front of the protected structure: "this will have an adverse impact on the presentation, legibility, special architectural character and architectural setting of the Protected Structure" (p. 25 of conservation officer's submission). The potential adverse and injurious impacts of heavy traffic on days of large GAA events "would be unacceptable in architectural conservation terms". The submission states that the "somewhat crude demarcation of the new ownership boundary and reduction of what little remains of the historic curtilage and buffer zone to the south of the Red House gives rise to serious concerns. Through property sales/ownership negotiations, the curtilage and setting of the Red House has been even further compromised by an insensitive and inappropriate boundary line striking horizontally across the site, instead of being considered in a manner that responds to the natural demarcations, tree line and undulations of the site".

**216.** The report notes that the existing distance approximately 40 metres between the south elevation of the Red House and the field boundary to the south and its consistent location on historical maps from 1837 to the present is being approximately halved by the position of the proposed site boundary. A children's play area would be created within the area taken from the curtilage of the Red House. Existing trees within the effective 40 metre buffer zone between block D2 and the Red House "should be retained and maintained and should not be removed in the future" without permission. "Such subdivision of historic curtilage in property transfers can give rise to detrimental impacts on protected and un-protected structures". A proposed rectangular plaza in front of the Red House is "entirely unconvincing and at odds with the principle [*sic*] elevation of the protected structure". The report goes on to say: "We entirely disagree with the conclusion on p. 364 of the Environmental Impact Assessment Report (EIAR) Volume 2 Table 14-24 that 'the proposed new high quality blocks will have a positive impact on the setting of the Red House'. The architectural setting of the Red House would be significantly, adversely and injuriously impacted by the height, scale and massing of the 18-storey block D1, which is located in relatively close proximity to the Red House".

**217.** Adverse impacts on the Archbishop's house were also identified (p. 26), including erosion of the buffer zone between the site and the Archbishop's house. Other concerns were raised regarding

the "overall scale and massing of the proposed development" and its impacts on both the protected structures within and adjacent to the site, and the environs on the site. The step-up in height of block C1 to eight storeys was considered "not acceptable ... as it will disrupt the balance of buildings enclosing the Formal Green in front of the former Seminary". Block D1, the 18-storey tower, came in for a particular criticism; its "proposed height, scale and massing" was "excessive in this context and will entirely dominate and injure the architectural setting of the Protected Structures".

**218.** A recommendation was also made that key historical information should be provided on signage at key locations within the complex (p. 30). Unfortunately it is not clear that this was taken up by the board by way of condition, nor indeed does this seem to have been raised by the applicant as a specific ground in the present judicial review.

**219.** It is also worth noting that considerable concerns were also expressed by the Department of Housing, Local Government and Heritage, overlapping with some of the concerns of Dublin City Council.

**220.** Turning to the inspector's report, architectural heritage is dealt with in s. 11.8 (p. 87 onwards). The report notes the views of the city council and also summarises the submission of the Department of Housing, Local Government and Heritage at para. 11.8.17, noting the impacts on the Red House as "one of the most serious concerns of the Department – the greatly diminished setting of Red House, the removal of historic avenues and the close proximity of the primary route through the site" as well as its recommendation to omit block D1. The inspector's response to the concerns in relation to impact on the Red House ultimately boils down to a proposal to reduce the footprint of block B3 by approximately 18 metres, thus losing 22 units (para. 11.8.19), with some additional landscaping creating a larger buffer area. The removal of block D1 was considered unnecessary (para. 11.8.21) and the inspector was of the view that it can sit side by side with existing protected structures without detriment. No discernible reference was made to the concerns regarding the radically diminished curtilage of the Red House, or to the construction of the major vehicle route through the site, virtually up to its doorstep. In terms of removal of liturgical features and objects, para. 11.8.23 notes the separate planning application for the removal of items within the church. The inspector states that "It is understood that panelling, altar and other loose fittings from the oratory are to be removed and salvaged for reuse for use in a church specified by Archbishop's house. While this is noted, it does not have any bearing on this current assessment." The view was expressed in effect that removal of religious objects was inevitable, and that relocation within

alternative churches in which they will retain their religious purpose and significance was more appropriate than leaving them *in situ* in this instance.

**221.** Impacts on the Archbishop's house were said to be not unduly concerning and could be dealt with by way of additional planting (para. 11.8.27).

**222.** In the conclusions, the inspector was of the opinion that the proposed blocks would not unduly impact on the lands or surrounding areas to such an extent as to warrant refusal of permission (para. 11.8.31). The critical thought-process appears to be at para. 11.8.32: "I am of the opinion that a balance needs to be achieved in such instances between developing lands to an appropriate scale in compliance with national policy guidance whilst at the same time protecting the character and setting of the site and the historic structures located thereon. I am satisfied that this balance has been achieved in this instance. I do not recommend the omission of block D1." Any impacts on protected structures at the site were not such as to warrant a refusal of permission (para. 11.8.33), and positive features of the development were noted such as the appreciation and awareness by the developer of the collection of historical buildings, the hierarchy of spaces and inter-relationships informing the original layout of the site, and the retention of the main buildings (the main block of the seminary and the church) as having central roles as the core or focal point of the lands post-development (11.8.35).

**223.** While admittedly the conservation officer did not expressly allege a material contravention of Dublin City Development Plan, she did quote from a number of specific provisions of the plan, particularly the need for developments affecting protected structures to respect the existing scale of the structures. This application certainly does not do that.

**224.** The main defence to this point is in effect that the extension to the main seminary block *does* respect the scale of that building, and that the larger scale buildings (which clearly don't respect that scale) are situated at a remove. That is all well and good, but the remove is not on some entirely separate premises; all works are within the curtilages or attendant grounds of the protected structures. On that basis it is clear that the development plan provisions regarding height, scale and massing are being materially contravened. Indeed, the scale of the buildings proposed adjacent to protected structures is vastly out of line with the scale of the protected structures themselves. While one can see an argument for some planning judgement when one gets into the question of what structures would appear as dominating and what would appear as complementary, the question of whether the scale of the new structures within the curtilages and attendant grounds of the protected structures respects the existing scale is not a matter of planning judgement, but a matter

of fact. Admittedly the conservation officer did not legalistically phrase this as a material contravention, but the point does not cease to have legal relevance merely because it is not phrased in a legalistic way.

**225.** The board accepts that in the event of a departure from a development plan, such a departure requires to be assessed as a material contravention in some express way within the board's decision (see *Redmond v. An Bord Pleanála* [2020] IEHC 151 (Unreported, High Court, Simons J., 10<sup>th</sup> March, 2020)), so its defence hinges on the development not being such a contravention. Unfortunately I don't agree. There is simply no way that such massively larger and bulkier buildings within the curtilages and attendant grounds could be said to respect the mass and scale of the protected structures.

**226.** The consequence is that on these particular facts, the decision must be held to be infirm on this ground, because the board's analysis of material contravention does not address the heritage aspects of the Dublin City Development Plan.

**227.** As regards the Red House specifically, it seems to me that the pleaded complaints regarding lack of reasons or defects in consideration have also been made out. While some of the impacts are addressed in the inspector's report, other major impacts are not engaged with at all. While a decision-maker does not need to give micro-sub-reasons for every possible aspect of a submission made, it does have to give the main reasons on the main issues. Where the relevant local authority identifies its concerns in any formal submission, such issues are virtually by definition major issues. Thus if the board disagrees, reasons are required. These are lacking in respect of the Red House, particularly the dramatic loss of curtilage (the loss of the "respectful buffer zone") and the insertion of an immediately adjacent major thoroughfare almost up to the front door of the structure. In addition, the impacts should normally be the minimum necessary in order to provide the required statutory protection for the structure, in this case both as a protected structure and a national monument. Was it really necessary that the main access road would run right up to the front of the monument? Maybe, maybe not, but that question isn't even properly asked.

**228.** A directly related infirmity in the decision is the fact that the absolutely crucial piece of analysis by the inspector reduces the whole question to one of "a balance" between development and compliance with national policy on the one hand, and preserving the character and setting of the site and historic structures on the other. This attempts the familiar respondent's move of seeking to collapse all legal issues into a mere question of planning judgement locked within the black box of irrationality. Unfortunately it seems to me that the applicant's complaints regarding this



extremely vague concept of a balance are well-founded. The nebulous concept of “balance” simply does not adequately reflect the statutory preference for protection that is explicit and implicit in the relevant provisions of the 2000 Act, the specific requirements of s. 57(10), or the requirements of the development plan.

**229.** That is not to say that a development affecting a protected structure might not be permitted following a careful assessment of material contravention and exceptional circumstances where applicable, but one would have to identify the benefits to the protected structure (for example, its continued use) as against the detriments, and be satisfied that any detriments were the minimum necessary to achieve protection of the structure. It is very difficult to discern in the inspector’s report any meaningful engagement with the need to minimise impacts on the protected structures as a result of this relatively ambitious development. While some fairly modest mitigation measures are proposed (as noted above, setting back one block slightly and additional planting and landscaping), it seems that the concept of protection and therefore of impact minimisation has almost been reversed. The inspector seemed to approach the matter on the basis of preserving the maximum amount of the developer’s proposals, making only such minimum change to them as was necessary to avoid, in her view, the worst impacts on the protected structure. This reverses the correct statutory analysis. The decision-maker should first identify all potential impacts on the protected structures, and then critically examine each of them to see whether they are the minimum necessary in order to achieve any overall benefit to the protected structure by reason of retaining it in use.

**230.** In one sense I agree with the inspector that speaking loosely and non-legalistically, there is a balance to be achieved between various factors when it comes to developments affecting protected structures. But we only get to that point having first surmounted any legal hurdles. Before any planning judgements, one must first comply with all legal requirements. Those include not just compliance with the development plan (save where material contravention can be expressly justified), but also compliance with the statutory system of protection of “protected structures”, particularly section 57(10) of the 2000 Act. Here the board didn’t validly surmount either requirement – it didn’t engage with the heritage material contraventions in this respect at all, or with s. 57(10) at all.

#### **City Council’s second objection – basement structure**

**231.** The second proposed reason for refusal set out by the city council conservation officer is summarised as follows: “The proposed basement beneath the eastern end of the Formal Green gives

rise to serious concerns in relation to the potential serious and injurious impact this would have on the wider setting and curtilages of the protected structures comprising mature trees, the health of the grounds adjacent to this area that are indicated to be retained, and on the long-term performance of this 'new' green area above the basement. This proposed basement should be omitted from the proposed development."

**232.** The report notes that there are 296 trees within the red-line area, of which only 179 are to be retained and 117 removed. (I pause to note that that makes a nearly 40% removal rate). Of the 117 trees to be removed, 92 would otherwise have been suitable for retention. This level of tree loss "is indefensible and is not supported from a conservation standpoint". In fairness to the developers, it was noted that the avenue of trees to the west of the Red House would be almost fully retained. This is probably the most distinctive feature of the treescape on the site, and the conservation officer regarded this retention as "very important" (p. 29).

**233.** As regards the subterranean structures, the conservation officer notes at p. 13 that "the masterplan document refers to the significance of the historic landscaping, particularly to the front of the seminary building, but the proposed construction of a new basement beneath a large part of this garden will fundamentally and permanently destroy and disrupt this fine landscape and setting to the front of the seminary building and the rest of the historic seminary complex".

**234.** The detailed rationale for the objection is set out at p. 30 of the conservation officer's submission. She states as follows: "The proposed basement to be constructed between the eastern end of the Formal Green gives rise to serious concerns, in relation to the potential adverse and injurious impact this will have on the mature trees and health of the grounds adjacent to this area that are indicated to be retained, and on the long-term performance of this 'new' green area above the basement. As noted in DCC Development Plan 2016 - 2022 16.10.15, 'it is the policy of Dublin City Council to discourage any significant underground or basement development or excavations below ground level of, or adjacent to, residential properties in Conservation Areas or properties which are listed on the Record of Protected Structures ... In considering applications for basement developments, the planning authority will have regard to the following: ... Impact of proposal on future planting and mature development of vegetation and trees on the site'. There will already be so much disruption to the ground conditions arising from the construction of all of the new buildings, I question the potential destruction of what is one of the most important aspects of this site - its green areas and landscaping. It would be preferable that all basements are only located beneath building footprints where the ground will inevitably be disturbed, and not beneath the most important

green area within the site to the east of the former Seminary – the central basement should be omitted”.

**235.** The inspector’s response to this is set out at para. 11.8.28 which concludes as follows: “I query if the removal of the proposed basement is necessary, provided the proposed works are undertaken in an appropriate manner. I have no information to believe they would not be undertaken in such an appropriate manner and I am satisfied that if the board is disposed towards a grant of permission, that the submission of a comprehensive method statement relating to same could be dealt with by means of condition.” She noted the landscape proposals but did not draw any specific conclusion in that regard.

**236.** The critical piece of reasoning is that she queries if the removal of the basement is necessary provided that the proposed works are undertaken in an appropriate manner. On no view could that possibly be said to actually engage with the points made by the city council, still less to answer those points clearly. There is no reference in this context to the impact on mature trees. That there is an impact seems to be clear in that I understand that all trees lying above the basement area are going to be felled. There is no engagement with the concerns regarding the health of the grounds adjacent to the area indicated to be retained. There is no engagement with the concerns about the long-term performance of the new green area above the basement. There is no engagement with the terms of the development plan, and again it seems to me, although it was not phrased in this way by the conservation officer, that the grant of permission for an underground structure within the curtilage of protected structures is also a material contravention of the terms of the development plan referred to by the council.

**237.** So it seems to me that on these facts, the applicant also succeeds in relation to the city council’s second objection, both on the basis of lack of reasoning for disagreeing with the views of the city council (being virtually by definition a major issue for which main reasons are required) and also by reason of a further unacknowledged material contravention of para. 16.10.15 of the development plan on this aspect.

**238.** Overall, the inspector and board’s attitude seems to have been fairly dismissive, if not depending on your point of view disrespectful, of the planning authority’s views and concerns; concerns which for good measure were in this instance firmly grounded in the development plan. Judging from a range of recent decisions, that is not a particularly isolated phenomenon. Viewing that empirically rather than normatively, it is arguably within the realm of possibility that such an approach, rather than merely issues around the name on the signature line of the board’s order,

may have an impact on “public ... confidence in An Board Pleanála” (see OPR Report under s. 31AS of the 2000 Act, 16<sup>th</sup> December, 2022, p. 2).

**Order**

**239.** For the reasons set out above, the order will be one of *certiorari* removing for the purpose of being quashed the decision of the respondent of 4<sup>th</sup> November, 2021, granting permission for the construction of 1,614 built-to-rent apartments and associated works on the site of Holy Cross College, Clonliffe Road, Drumcondra, Dublin 3 (ABP-310860-21).