

THE HIGH COURT

JUDICIAL REVIEW

[2018 No. 593 J.R.]

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

BETWEEN

CORK HARBOUR ALLIANCE FOR A SAFE ENVIRONMENT

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

AND

INDAVER IRELAND LIMITED,

FIRST NAMED NOTICE PARTY

AND

INDAVER NV T/A INDAVER IRELAND

SECOND NAMED NOTICE PARTY

JUDGMENT of Mr. Justice David Barniville delivered on the 19th day of March, 2021

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1. Introduction

1. These proceedings involve a challenge on several grounds by a Cork based community environmental group to a decision of An Bord Pleanála dated 29th May, 2018 to grant planning permission for the development of a waste to energy facility (a waste

incinerator with energy recovery) for the treatment of non-hazardous and hazardous waste at Ringaskiddy, County Cork to Indaver Ireland Limited, the first named notice party.

2. This is the latest in a series of challenges brought or supported by various persons or organisations, including the applicant, and Indaver NV, the second named notice party, to decisions of An Bord Pleanála and of the Environmental Protection Agency granting or refusing permission for earlier versions of a waste incinerator development at Ringaskiddy and granting an integrated pollution control licence to Indaver for incineration activities at Ringaskiddy. Planning permission was first granted by the Board to Indaver NV for an incinerator at Ringaskiddy in January, 2004. That decision was the subject of judicial review proceedings and no development was ever carried out on foot of it. The Board refused a second application for permission for an incinerator at Ringaskiddy in June, 2011. Indaver NV challenged that decision. That challenge was ultimately withdrawn in October, 2012. The applicant supported the first challenge and was joined as a notice party to the second challenge. In these proceedings, the applicant has challenged the decision made by the Board under the Strategic Infrastructure Development provisions (the “SID provisions”) in the Planning and Development Act, 2000 (as amended) (the “2000 Act”) to grant permission to Indaver Ireland Limited for a further version of an incinerator development at Ringaskiddy.

3. The breadth of the challenge brought by the applicant to the Board’s decision of 29th May, 2018 was formidable and the grounds of challenge advanced in the proceedings have required the court to consider and to determine a number of significant issues of administrative law as well as several significant specific issues of Irish and European Union planning and environmental law.

4. The case was extremely well run and argued by all sides. I had the benefit of extremely detailed and helpful written submissions and was expertly brought through the submissions by counsel over the course of a hearing which lasted nine days. In reaching the

conclusions which I have reached on the issues raised, I have considered and taken into account all of the submissions advanced by the parties in writing and at the hearing. While I have attempted to capture the most significant points raised by the parties in the course of this judgment, I have not specifically referred to or addressed every individual point raised or argument advanced by the parties. I have, however, taken all of them into account in forming my views and in reaching the conclusions expressed in this judgment.

2. Overview of Decision

5. As I explain in detail in this judgment, I have found for the applicant on two of the grounds of challenge which it advanced, including on what appeared to me to be the most significant issue raised in the proceedings, namely, that the Board's decision was tainted by objective bias by reason of the prior involvement of the then deputy chairperson of the Board, who was also the presenting member of the Board in respect of the Board's consideration of the planning application at issue, as a consultant in work done for Indaver which did, in my view, have a clear, rational and cogent connection with the planning application considered by the Board. I have also found for the applicant on an issue concerning the jurisdiction of the Board to consider and determine an application for permission for a Strategic Infrastructure Development where the application was not made by the person who engaged in the pre-planning consultation procedures with the Board. This issue required a consideration of the particular statutory provisions in the 2000 Act applicable to Strategic Infrastructure Developments. While finding for the applicant on the correct interpretation of those statutory provisions, I have, as requested by the applicant during the hearing, left over for future consideration, if necessary, the consideration of what, if any relief, should be granted to the applicant arising from my decision on the correct interpretation of those provisions.

6. I have found against the applicant on all of the other grounds of challenge advanced by it. It will be necessary, in due course, to consider with counsel the precise reliefs which

should be granted in light of the conclusions which I have reached on the two grounds on which the applicant has succeeded.

3. Structure of Judgment

7. It is necessary at the outset to outline some general background to the parties and to the planning application which led to the Board's decision in May 2018. This will require some reference to the previous applications for permission for an incinerator at Ringaskiddy. It will then be necessary to set out in some detail the procedural background to the decision, commencing with the pre-application consultation procedure and including the decisions made in the course of that procedure, the oral hearing conducted by the inspector appointed by the Board, the inspector's report, the further steps taken by the Board following receipt of that report, the further submissions and observations made on foot of a request for further information made by the Board following receipt of the inspector's report, the inspector's supplemental report and the procedural and other decisions made by the Board prior to the making of the impugned decision. It will then be necessary to describe the decision-making process which immediately preceded the decision and then to outline what the Board decided and the reasons for its decision. Following that, I will refer to the grounds of challenge raised by the applicant and the response of the Board and of the Indaver notice parties to those grounds and will provide a brief overview of the relevant evidence. I will then consider each of the grounds of challenge maintained by the applicant outlining in greater detail, where appropriate, in respect of each ground, the relevant evidence referable to that ground, the arguments advanced by the parties, the legal principles applicable and my conclusions and decision in respect of each ground. Having done so, at the end, I will summarise my conclusions.

4. The Parties

8. The applicant, Cork Harbour Alliance for a Safe Environment (“CHASE”), is an unincorporated body based in Cobh, County Cork. It has been in existence since 2001 and is an alliance of a number of community groups from in and around the area of Cork Harbour. It was established in 2001 for the purpose of protecting the health of the communities in Cork Harbour and of safeguarding the Cork Harbour environment. It has pursued those aims and objectives by participating in and making submissions to local and national authorities on various matters including county and local area development plans and regional and national waste management plans. The applicant is a voluntary non-profit community organisation, the aims and objectives of which relate to the promotion of environmental protection.

9. The respondent, An Bord Pleanála (the “Board”), is the statutory body responsible for considering and determining applications for permission for Strategic Infrastructure Developments under Part III of the 2000 Act (as inserted by the Planning and Development (Strategic Infrastructure) Act, 2006). The development at issue in these proceedings is a Strategic Infrastructure Development (“SID”). In the case of an application for permission for a SID, the application must be made directly to the Board and not to a planning authority and certain statutory procedures must be complied with. Those procedures are considered in greater detail later in this judgment.

10. The first notice party, Indaver Ireland Limited (the “Irish Company”), is an Irish registered company and is a wholly owned subsidiary of Indaver NV. Indaver NV (the “Belgian Company”) is a Belgian company registered in Ireland on the external register. It has an Irish branch with the name Indaver Ireland. It is the second notice party. It is necessary for one of the grounds of challenge advanced by the applicant (ground 1) to distinguish between the Irish Company and the Belgian Company. However, it is otherwise unnecessary to distinguish as between the two companies and, in particular, as between Indaver Ireland

Limited and Indaver NV trading as Indaver Ireland. In an attempt to avoid confusion, where it is unnecessary to distinguish between these two companies, I will use the term “Indaver” to cover both.

11. As we shall see, Indaver has been attempting to obtain permission for various versions of a waste incinerator at Ringaskiddy, County Cork since 2001. In its decision of 29th May, 2018, the Board granted permission for the development of an incinerator on the application of the Irish Company. Indaver maintained that it was intended that the application would be made not by the Irish Company, but by the Belgian Company through its Irish branch, Indaver Ireland. The Belgian Company engaged in the required pre-application consultation process with the Board under Part III of the 2000 Act. All of this is relevant to ground 1 in the grounds of challenge advanced by the applicant.

5. General Background

12. Prior to the application for the incinerator development the subject of these proceedings, Indaver made two previous applications for permission for earlier versions of an incinerator development at Ringaskiddy. The first such application was made in 2001 and sought permission for a development consisting of a waste management facility, comprising a waste to energy facility, a waste transfer station and a community recycling park. The incinerator was for both hazardous and non-hazardous industrial waste with 100,000 tonnes capacity. The development the subject of that application was described in the Environmental Impact Statement (EIS) in respect of the application and by the parties in these proceedings as “*phase 1*”. The buildings were also designed to accommodate an additional incinerator and process stream for a further 100,000 tonnes of municipal waste. That latter incinerator was intended to be the subject of a future planning application and was described as “*phase 2*”. The application was made to the planning authority, Cork County Council (the “Council”). The Council refused the application. Indaver and others, including the applicant, appealed to

the Board. In his report dated 5th January, 2004, Philip Jones, the inspector appointed by the Board, recommended refusal. However, in a decision dated 15th January, 2004, the Board granted permission. A number of local residents (including Mary O’Leary, the chairperson of the applicant) brought judicial review proceedings challenging the decision. The applicant supported that application. The 2004 permission ultimately lapsed without any development taking place.

13. In the meantime, Indaver applied to the EPA for a waste licence for the operation of a community recycling park, a waste transfer station and an incineration plant consisting of two incinerators. The EPA granted the licence on 24th November, 2005. The licence allowed up to 100,000 tonnes of waste per year to be incinerated in each of the incinerators. That decision was challenged by judicial review proceedings brought by the Ringaskiddy and District Residents’ Association Limited. The applicant objected to the grant of the licence and supported the challenge to the decision of the EPA. The licence was ultimately surrendered and ceased to have effect from 14th January, 2016.

14. In November, 2008, Indaver made an application to the Board for another incinerator development at Ringaskiddy. The application was for a ten-year planning permission for a waste energy facility for hazardous and non-hazardous waste and for a transfer station facility. This application was made under the SID provisions contained in the 2000 Act (as amended by the 2006 Act). Permission was sought for two incinerators, one for the treatment of solid and non-hazardous industrial waste and the other for residual municipal waste with a maximum combined capacity of 240,000 tonnes per annum. The applicant objected to that application and participated in the oral hearing (as it had done in the oral hearings for the 2001 application and for the EPA application). The Board’s inspector, Oznur Yucel-Finn, recommended that permission be refused. In a decision dated 9th June, 2011, the Board

refused permission under s. 37G of the 2000 Act. The first reason given by the Board for refusing permission was as follows:-

“The Board is not satisfied that the provision of incineration capacity to deal with residual municipal waste, in addition to hazardous waste, at this site is appropriate, having regard to both the layout and limited size of the site and to the current strategy of the Cork local authorities in respect of waste management, as set out in the submissions of the planning authority in connection with the application, including to the oral hearing. Accordingly, the Board is not satisfied that the proposed development would be compatible with the waste management strategy for the region or the waste management plan for County Cork, 2004, and, therefore, considers that the proposed development would not be in accordance with the proper planning and sustainable development of the area.”

15. In its second reason, it was stated that:-

“The Board considers that the provision of an incinerator to treat hazardous and industrial waste (100,000 tonnes per annum) is in accordance with national policy, as set out in the National Hazardous Waste Management Plan, 2008-2012, and therefore invited revised proposals to provide such incinerator, whilst omitting facilities to treat municipal waste and reducing the scale of the development accordingly.”

16. Indaver brought judicial review proceedings to challenge the Board’s refusal of the 2008 application in July, 2011. The applicant was joined as a notice party to those proceedings in October, 2011. The proceedings were ultimately withdrawn by Indaver in October, 2012. In a judgment delivered on 21st January, 2013, the High Court (Kearns P.) awarded costs to the Board and to the applicant as against Indaver (*Indaver NV t/a Indaver Ireland v. An Bord Pleanála & anor* [2013] 1 IR 357).

6. Indaver's 2016 Planning Application: Pre-Application Consultation Procedure

17. In this section, I outline the relevant events leading up to the submission of the application for permission for the development the subject of these proceedings by the Irish Company in January, 2016.

18. On 30th August, 2012, the Belgian Company commenced the pre-application consultation process in respect of a further application for permission for an incinerator development at Ringaskiddy under s. 37B of the 2000 Act. In a letter of that date, the Belgian Company requested a pre-application consultation meeting with the Board. It was indicated that Indaver proposed to develop a waste management facility in Ringaskiddy comprising a waste to energy plant (with a typical total capacity of 200,000 tonnes per annum) for hazardous and non-hazardous waste and for the recovery of energy and for a waste transfer station. The letter noted that the nature and extent of the proposed development would be familiar to the Board as the application would be "*similar to that previously submitted*" in 2008.

19. Representatives of the Board met with Indaver on six occasions as part of the pre-application consultation procedure on 12th November, 2012, 12th June, 2013, 3rd March, 2015, 16th July, 2015, 11th September, 2015 and 23rd November, 2015. It is common case that the Indaver entity which engaged in the pre-consultation procedure with the Board was the Belgian Company and that it was, therefore, the "*prospective applicant*" under the SID provisions in the 2000 Act (as amended).

20. It was indicated in the course of the consultation procedure that two possible options for the development were being proposed. The first was similar to that proposed in the 2008 application (with some changes) and involved one incinerator for industrial hazardous and non-hazardous waste with a maximum annual capacity of 100,000 tonnes per annum and a second incinerator for municipal waste with a maximum annual capacity of 140,000 tonnes.

The second option involved combining both incineration lines into one larger line for hazardous and non-hazardous industrial waste and for municipal waste with a maximum annual capacity of 220,000 tonnes per annum. It was also proposed to include a waste transfer station as part of the proposed development (see, for example, Indaver's letter to the Board dated 19th September, 2012). During the course of the pre-application consultation process, the preferred option became the second option just described. It was also decided during the consultation process to remove the waste transfer station from the proposed application. The circumstances in which this was done, and the potential relevance of the removal of the waste transfer station from the application, will require further consideration in the context of ground 3 of the grounds of challenge advanced by the applicant. The decision to remove the waste transfer station from the proposed application was communicated to the Board on 16th July, 2015. The Board appointed an inspector (Breda Gannon) to prepare a report on the issue as to whether the Board should serve a notice on the "*prospective applicant*" pursuant to s. 37B(4) of the 2000 Act stating that it was of the opinion that proposed development constituted SID. The inspector prepared a report on that issue which was dated 10th December, 2015. In her report, the inspector considered the relevant planning history and the planning policy context, including the applicable national and regional waste management plans as well as the Cork County Development Plan and the Carrigaline Local Area Plan. She also summarised the key issues and advice arising in the course of the pre-application consultation process. Having done so, the inspector recommended that the Board serve the required notice pursuant to s. 37B(4), to the effect that the Board considered that the proposed development constituted SID.

21. On 23rd December, 2015, the Board determined that the proposed development would comprise SID. The members of the Board who made that decision included the then chairperson (Dr. Mary Kelly) and the then deputy chairperson (Conall Boland). Mr. Boland

was at that stage a long-standing Board member, its deputy chairperson and a member of the Board's Strategic Infrastructure Division. Dr. Kelly had delegated the coordination and day to day management of the Strategic Infrastructure Division of the Board to Mr. Boland. Mr. Boland's involvement in the ultimate decision of the Board in May, 2018 is at the heart of one of the grounds of challenge maintained by the applicant (ground 4: objective bias). It will be necessary to consider in more greater detail the precise involvement of Mr. Boland in the process when considering that ground of challenge. The Board informed Indaver (and specifically the Irish branch of the Belgian Company) of its decision by letter dated 23rd December, 2015.

7. Indaver's 2016 Planning Application: Decision-Making Process

22. On 13th January, 2016, the Irish Company (Indaver Ireland Limited) made an application to the Board for permission for the development at issue pursuant to s.37E of the 2000 Act. Indaver has maintained that the application was made in the name of the Irish Company in error and that it was intended that the application be made in the name of the Belgian Company, which had been the "*prospective applicant*" in the pre-application consultation procedure. I consider that issue further below in the context of ground 1 of the grounds of challenge maintained by the applicant. The application was for permission for a "resource recovery centre development", comprising a waste to energy facility for the treatment of non-hazardous and hazardous waste. The application was for a ten-year planning permission with the waste to energy facility or incinerator having an operational lifetime of 30 years. It was proposed that the facility would be used for the treatment of up to 240,000 tonnes per annum of residual household, commercial and industrial non-hazardous and suitable hazardous waste. Of the 240,000 tonnes of waste capacity, it was proposed that up to 24,000 tonnes per annum of suitable hazardous waste would be treated at the facility. An

Environmental Impact Statement (EIS) and a Natura Impact Statement (NIS) in respect of the proposed development were submitted with the application.

23. The Board appointed an inspector (Derek Daly) to prepare a report and to make a recommendation in respect of the application. An oral hearing was convened. The oral hearing was held over seventeen days between 19th April, 2016 and 17th May, 2016. More than 90 witnesses (including experts in various fields) gave oral evidence at the hearing. The applicant participated in the process and made submissions and observations through (amongst others) its chairperson, Ms. O’Leary, and also through its solicitors, Noonan Linehan Carroll Coffey. The applicant fully participated in the oral hearing. It will be necessary to refer further to what occurred at the oral hearing when considering some of the grounds of challenge maintained by the applicant.

24. Prior to the oral hearing, Indaver wrote to the Board on 3rd February, 2016 informing it that the application form had contained a clerical error in referring to the applicant as the Irish Company rather than to Indaver Ireland, the Irish branch of the Belgian Company. The letter stated that *“as discussed, this letter is sufficient to confirm that the clerical error, which does not prejudice any third parties, has been both acknowledged and corrected”*. The Board replied on 19th February, 2016 noting the content of the letter and stating that *“the issue should be addressed by Indaver Ireland, with any other errata, at the commencement of the oral hearing”*.

25. The issue was raised by Indaver at the outset of the hearing and various additional documents were handed out at the hearing on 19th April, 2016. These documents included the correspondence referring to the clerical error concerning the name of the Indaver company referred to in the application for permission. The applicant, through its solicitors, had also raised an issue concerning the correct identity of the Indaver company which had applied for permission, in a letter dated 8th March, 2016. The issue was also raised in closing

submissions on behalf of the applicant and on behalf of Indaver. In his closing submissions, Mr. Noonan, the applicant's solicitor, adverted to the discrepancy between the identity of the Indaver company which engaged in the pre-application consultation procedure with the Board and the Indaver company which had submitted the planning application following that consultation process. This now forms ground 1 of the applicant's grounds of challenge and will be considered further in that context.

26. Another issue which arose in the course of the hearing concerned errors in the data and evidence submitted by Indaver, through one of its experts, Dr. Fergal Callaghan of AWN Consulting Ltd ("AWN"), which was relevant to the potential impact of dioxins produced from the operation of the incinerator on humans. The manner in which that issue was addressed by the inspector, and ultimately by the Board, is at the heart of ground 9 of the applicant's grounds of challenge and will be considered further in that context.

27. The inspector provided his main report to the Board on 27th January, 2017. I consider parts of the report in greater detail later in this judgment. For present purposes, I should note that the report contained a description of the proposed development and of the planning history of the site. It contained a detailed discussion of the policy context referable to the proposed development which included a detailed consideration of waste management policy and of planning policy at EU, national and local levels. The report considered the many submissions received from the Council, from prescribed and public bodies and from observers, including the applicant, groups, individuals and groups of individuals. The report then provided an overview of the oral hearing. It then provided a detailed assessment of the proposed development including the need for the development, site selection and issues of policy specific to the site and area of the proposed development. Included within this section of the report was a discussion of air quality, and the impact of the proposed development on human beings including on human health (which included a discussion on the potential health

impacts of emissions containing dioxins and furans from the operation of the proposed incinerator) and several other issues.

28. The report then contained a section on Environmental Impact Assessment (“EIA”) (s. 10.0) and Appropriate Assessment (“AA”) (s. 11.0). With regard to AA, the inspector screened out three potentially relevant European sites and proceeded to conduct a stage 2 AA in respect of one European site, the Cork Harbour SPA. Having considered the NIS submitted by Indaver, the inspector was satisfied that the proposed development, individually or in combination with other plans or projects, would not adversely affect the integrity of that European site, or any European site, in view of the relevant conservation objectives of the site.

29. The inspector’s conclusions were set out in s. 12.0. He concluded that while the EIS was legally adequate in relation to the matters required to be contained in an EIS, it was deficient in a number of respects and, in particular, with respect to the consideration of alternative sites for the proposed development and with regard to the documentation submitted concerning the assessment of dioxins (which he concluded was based on baseline data which referred to another site and was not, therefore, relevant to the findings outlined in the EIS). The inspector concluded that the proposal to cater for 240,000 tonnes per annum of waste, including 24,000 tonnes of hazardous waste, was consistent with the requirements identified in national and regional policy. However, owing to what he regarded as a “*tight and constrained site*”, the inspector considered the development proposal constituted overdevelopment. The inspector was also not satisfied with the site selection process and the assessment and evaluation of alternative locations. He did not consider that the proposed development was compatible with recent development in the area. In light of his assessment and conclusions, the inspector recommended that the permission be refused. The reasons and considerations recommended by the inspector included reasons which were directed to the

perceived deficiencies in the EIS submitted with reference to the suitability of the site, the site selection process and the information presented relevant to the evaluation of potential dioxin intake.

30. After the inspector's report was submitted to the Board, Dr. Kelly, the chairperson of the Board, decided on 1st February, 2017 to invoke s. 112A(8) of the 2000 Act to transfer consideration of the application from the Strategic Infrastructure Division to the full Board.

31. At that stage, there were nine members of the Board. Dr. Kelly considered that none of those members had a conflict of interest. However, she concluded that five members ought not to be involved in the determination of the application "*because of the risk of a perception of bias*" (para. 16 of Dr. Kelly's affidavit of 23rd November, 2018). Dr. Kelly explained in her affidavit the reasons why she concluded that those members ought not to be involved. Dr. Kelly did not consider that Mr. Boland had any conflict of interest or that there was any "*perception or apprehension of bias*" in his involvement in the determination of the application. Dr. Kelly did not consider that Mr. Boland's previous work for Indaver in 2004 precluded his involvement. Having excluded five members of the Board, that left four members of the Board who could participate in the determination of the application, namely, Dr. Kelly, Mr. Boland and two other members, Paddy Keogh and Michael Leahy. Dr. Kelly appointed Mr. Keogh to be the presenting Board member in respect of the application. Those four members met to consider the application on 21st, 23rd and 28th February and on 2nd March and 10th March, 2017. At the meeting on 10th March, 2017, the Board decided to defer the case for consideration to a further Board meeting and to issue a request for further information from Indaver on two matters pursuant to s. 37F(1)(a) of the 2000 Act. Those two matters were, first, the discrepancies in the information provided in the EIS concerning the dioxins issue and, in particular, the discrepancies in appendix 6.3 and appendix 6.4 of the EIS and, second, an issue concerning helicopter navigation safety.

32. The Board requested the further information and clarification from the Irish Company on those two issues by letter dated 20th March, 2017. Indaver responded on 15th May, 2017 with a cover letter of that date from the Belgian Company which enclosed additional material directed to the two issues the subject of the request for further information. It will be necessary to consider the further information provided in some detail when dealing with ground 9 of the applicant's grounds of challenge. I will just note here that included in the material provided by Indaver were a revised and corrected report by Dr. Callaghan of AWN, an addendum to that report which attempted to explain the errors in the material provided with the EIS on the dioxins issue, revised attachments and a report by Prof. Paul Johnston on "*Data Consistency in Modelling of Risk Assessment*" dated September, 2016. Observations were made by several interested parties in response to the further information submitted by Indaver. The applicant's solicitors made observations on behalf of the applicant in a letter dated 20th July, 2017. Included with that letter was a further submission from Ms. O'Leary, the chairperson of the applicant, and a report of Dr. Gordon Reid dated 19th July, 2017 as well as a further note from the applicant's solicitors on Prof. Johnston's report.

33. The further submissions received were forwarded to Indaver by the Board on 5th September, 2017. Indaver was invited to respond within four weeks. It did respond on 2nd October, 2017. Included with its response were a main response document and various attachments including a response by Dr. Callaghan to Dr. Reid's report.

34. By this stage, Mr. Keogh and Mr. Leahy had ceased to be Board members. Dr. Kelly decided that Mr. Boland should take carriage of the file and become the presenting member in respect of the application. Mr. Boland considered the further information and additional submissions received and discussed the case with Dr. Kelly. As appears from a memorandum dated 23rd October, 2017, Mr. Boland did not consider that further cross circulation of the documents received from Indaver was necessary at that stage. In other words, he concluded

that it was not necessary to afford the applicant and others the opportunity of responding to the further information and submissions received from Indaver in early October, 2017. Mr. Boland felt that it would be useful for the Board to obtain a summary of the responses received since the further information was requested by the Board in March, 2017. Therefore, he requested the file to be forwarded to the inspector to prepare a supplemental report (a) providing a “*recap*” on the issues raised by the Board in its request for further information; (b) summarising the response by Indaver to that request; (c) summarising the responses received from the observers (including the applicant) in July, 2017; and (d) summarising the responding submission from Indaver received on 2nd October, 2017. Initially, Mr. Boland did not consider it necessary to obtain a further assessment and recommendation from the inspector. However, after further consultation with Dr. Kelly and with the Board’s assistant director of planning, Mr. Boland considered that it was appropriate for the inspector to provide a further assessment and recommendation in the case (as appears from a memorandum dated 8th November, 2017).

35. The inspector furnished an addendum or supplemental report dated 7th March, 2018 to the Board. In that report, the inspector provided a summary of the issues raised by the Board in its request for further information dated 20th March, 2017, a summary and assessment of the responses received from Indaver and from other parties and observers (including the applicant) and a recommendation in light of his assessment of the further responses and submissions received. The inspector was satisfied that the further information submitted addressed the deficiencies in the content of the EIS and, in particular, in the baseline information provided in appendix 6.3 and appendix 6.4 of the EIS which was one of the reasons for which the inspector had originally recommended refusal (reason 3). He was also satisfied that the additional information provided addressed the concerns he initially had in relation to air navigation and safety (the subject of reason 5).

36. As of 3rd May, 2018, there were ten members of the Board, including Dr. Kelly and Mr. Boland. Dr. Kelly considered that no members had a conflict of interest but that two members ought not to be involved in the application because of “*the risk of a perception of bias*” (para. 28 of Dr. Kelly’s affidavit of 23rd November, 2018). Those two members were Philip Jones and Paul Hyde. Mr. Jones had been the inspector in respect of the 2001 planning application and had recommended refusal of permission for that application. Mr. Hyde was excluded for a different reason. That left eight members available to determine the application, including Dr. Kelly and Mr. Boland. A further member (John Connolly) declared a potential conflict of interest as a result of his employment prior to his appointment to the Board in which he had been involved in commercial discussions with Indaver and was also a member of an IBEC committee of which Indaver was also a member. On that basis, Dr. Kelly was satisfied that Mr. Connolly should not participate in the determination of the application. That left seven members available to do so.

37. Those seven members proceeded to consider the application at the meetings on 3rd May, 9th May, 15th May, 17th May and 23rd May, 2018. It appears from the minutes of those meetings that at a meeting on 17th May, 2018, the members of the Board voted 5:2 to grant permission in respect of the proposed development. There is a dispute between the parties as to what was actually agreed at that meeting and the legal status and effect of the decision reached at the meeting. This issue is directly relevant to ground 5 of the applicant’s grounds of challenge and I will address the respective contentions of the parties when dealing with that ground of challenge. The minutes disclose that at a further meeting on 23rd May, 2018, the members agreed the terms of the Board Direction and the payment of cost to certain parties, including the applicant. The Board Direction is dated 24th May, 2018. The Board Order under which permission was granted to the Irish Company for the proposed development under s. 37G of the 2000 Act (as amended), subject to the conditions set out in

the order, is dated 29th May, 2018. The decision of the Board in respect of which an order of *certiorari* was sought by the applicant is the decision dated 29th May, 2018, being the date of the Board Order.

8. The Board's Decision

38. Leaving aside for the moment the dispute between the parties as to when the decision to grant permission was made and, specifically, the issue as to whether the decision was made before the EIA and AA were completed, it is appropriate at this stage to refer to the two principal documents which record the decision and set out the Board's reasoning. The first is the Board Direction dated 24th May, 2018. The second is the Board Order dated 29th May, 2018.

(a) The Board Direction

39. It was noted in the preamble to the Board Direction that certain changes had taken place to the composition of the Board in the period following the Board meeting of 10th March, 2017 at which a decision was made to seek further information from Indaver. The preamble noted that the original presenting Board member (Mr. Keogh) left the Board in May, 2017 and that Mr. Boland, the deputy chairperson, took carriage of the case in relation to the procedural matters concerning the further information sought. Having referred to the inspector's supplemental report, the preamble then referred to the Board meetings on 3rd May, 9th May and 15th May, 2018 at which the case was considered by all of the available Board members. The preamble noted that the case was "*presented in full*" by Mr. Boland and referred to some of the material considered. It then noted that the Board was satisfied that no further cross circulation of submissions was necessary, that there was no need to reopen the oral hearing and that there was no need to seek any further clarification or to appoint any specialist advisors. The preamble then stated that at a meeting of the available Board members on 17th May, 2018 "*the Board decided, by a 5:2 majority, to grant permission for*

the proposed development” and that “*at a further meeting of all available Board members held on May 23rd, the Board agreed the following reasons and considerations and conditions*”.

40. The Board Direction then set out the reasons and considerations. Reference was made in that context to the European policy framework for waste management as well as national and regional waste policy and referred to various documents and plans including the Waste Framework Directive 2008/98/EC, the National Hazardous Waste Management Plan, 2014-2020 and the Southern Region Waste Management Plan, 2015-2021. Reference was also made to the provisions of the Cork County Development Plan, 2014-2020, including the objectives which referred to the location of large-scale waste treatment facilities in strategic employment areas, such as Ringaskiddy. The Direction referred to the pattern of existing and permitted development in the area and the planning history of the site, as well as to the fact that an industrial emissions licence (formerly an IPC licence) from the EPA would be required for the operation of the facility and that the operator would be required to comply with any conditions imposed. Reference was made to the mitigation measures proposed to prevent and to minimise environmental impacts likely to arise from the proposed development. Reference was also made to the written submissions made in respect of the planning permission and the submissions made at the oral hearing, as well as to the reports and recommendations of the inspector.

41. The Board Direction then recorded the EIA carried out by the Board. It expressly stated that the Board “*completed an Environmental Impact Assessment of the proposed development...*”, taking certain matters into account. Reference will be made in more detail to the EIA section of the Board Direction when considering ground 5 of the applicant’s grounds of challenge and some of the other grounds. Having referred to the inspector’s report and to the supplemental report, as well as the further information provided and the

submissions received in relation to that information, the Direction noted that the Board agreed with certain aspects of the inspector's assessment and diverged from the inspector in a number of areas, including the consideration in the EIS of alternatives. The Board agreed with the inspector's conclusions in the supplemental report concerning the dioxins issue and, in particular, was satisfied that the further information provided supported the conclusions contained in the EIS. The Board Direction stated, under the heading "*EIA Conclusion*", the following:-

"The Board completed an environmental impact assessment in relation to the proposed development and concluded that, by itself and cumulatively with other development in the vicinity, and subject to the implementation of the mitigation measures proposed, the proposed development would not have unacceptable impacts on the environment."

42. The Board Direction then dealt with AA. The Board agreed with the screening assessment carried out by the inspector and with his conclusion that the only European site requiring stage 2 AA was the Cork Harbour SPA. The Board then carried out the stage 2 AA with respect to that European site and accepted and adopted the AA carried out by the inspector in his main report. The Board was satisfied that the proposed development would not adversely affect the integrity of the Cork Harbour SPA in view of its conservation objectives. The Board further agreed with the inspector that the further submissions and information provided following the request for further information did not alter the position.

43. The Board Direction then set out the Board's conclusions on proper planning and sustainable development. The Direction noted that the proposed development would be consistent with European, national and regional waste management policy including, in particular, the Southern Regional Waste Management Plan, 2015-2021 and the National Hazardous Waste Management Plan, 2014-2020. The Board Direction recorded the Board's

conclusion that the proposed development would be in accordance with the proper planning and sustainable development of the area.

44. The Board Direction then explained why the Board had decided not to accept the inspector's recommendation to refuse permission. It addressed each of the five reasons set out by the inspector in his report for recommending the refusal of permission including the reasons referable to the evaluation of alternatives, the adequacy of the EIS in terms of the information provided on the dioxins issue and the alleged overdevelopment of the site. Finally, the Board Direction set out the Board's determination in relation to the costs to be paid in accordance with the provisions of s. 37H(2)(c) of the 2000 Act. The Board Direction was dated 24th May, 2018 and signed by Mr. Boland.

(b) The Board Order

45. The Board Order dated 29th May, 2018 was in similar (but not identical) terms to the Board Direction. However, the relevant parts of the Board Order are substantially the same. They include the sections setting out the reasons and considerations for the Board's decision, the EIA completed by the Board in respect of the proposed development, the AA carried out by the Board and the Board's conclusions on proper planning and sustainable development and the reasons why the Board decided not to accept the inspector's recommendation to refuse permission. The Board's decision to grant permission in respect of the proposed development was subject to 24 conditions which were set out in the Board Direction and in the Board Order.

9. The Proceedings

46. On 24th July, 2018, I gave leave to the applicant to apply for judicial review in respect of the Board's decision of 29th May, 2018. In the amended statement of grounds filed by the applicant, the applicant sought orders of *certiorari* quashing the Board's decision on various grounds as well as quashing the EIA and AA purportedly carried out by the Board on 23rd

May, 2018. The applicant also sought several declarations to give effect to the grounds on which the applicant sought relief in the proceedings.

47. The grounds on which the applicant sought relief in respect of the Board's decision and in respect of procedures adopted by the Board in reaching that decision were as follows:-

- (1) The Board had no jurisdiction to grant planning permission to the Irish Company pursuant to s. 37E of the 2000 Act or, in the alternative, the Board erred in failing to have any or any proper regard to the issue of jurisdiction and/or the applicant's submissions and observations relating thereto.
- (2) The Board erred in law in making the impugned decision given the absence of required landowner consents to the application. Further or in the alternative, the Board erred in failing to have any or any proper regard to the issue of ownership of the lands on which the incinerator development was to take place and/or landowner consent for the planning application.
- (3) The Board unlawfully and in breach of its duties under the 2000 Act permitted Indaver to split the incinerator project into two planning applications for the purposes of avoiding the provisions of the Seveso III Directive and/or the domestic Seveso Regulations with a consequent failure to carry out an EIA of the entire project at the earliest opportunity and/or a consequent prospect of incremental development. Further or in the alternative (and without prejudice to the foregoing), the Board failed to have any or any proper regard to the issue of project splitting.
- (4) The Board's decision was vitiated by objective bias and/or breach of natural and constitutional justice and/or fair procedures.
- (5) The Board failed to carry out an EIA or AA prior to deciding to grant development consent in respect of the proposed development.

- (6) The Board failed to carry out an EIA of the impact on health and/or failed to comply with its obligations to carry out an EIA by relying upon the role of the EPA in granting an IPPC licence (now an industrial emissions).
- (7) The EIS did not outline what alternative sites were considered by Indaver and/or the reasons for choosing the development lands as the site for the incinerator development and the EIA purportedly carried out by the Board was inadequate in that regard.
- (8) The Board's conclusions regarding the suitability of the site from a planning perspective were unreasonable and unsustainable.
- (9) The Board failed to respond appropriately to "*the revelation of false evidence*" presented on the part of Indaver.
- (10) The Board failed to carry out a proper EIA and/or failed to assess the impact of the incinerator development on human health.
- (11) The inspector failed to provide the Board with a fair and/or complete and/or sufficient report.

48. The applicant's application was grounded on an affidavit sworn by its chairperson, Mary O'Leary on 17th July, 2018. The application was also supported by an affidavit sworn by Dr. Gordon Reid on 15th July, 2018 and on an affidavit sworn by the applicant's solicitor, Joe Noonan, on the same date.

49. The Board delivered a statement of opposition resisting all of the grounds of challenge advanced by the applicant on 23rd November, 2018. The Board's statement of opposition was supported and verified by affidavits sworn by Chris Clarke, the secretary of the Board, on 23rd November, 2018, by Dr. Mary Kelly, the Board's chairperson, on 23rd November, 2018 and by Conall Boland, the Board's deputy chairperson, on the same date.

50. Indaver filed a statement of opposition also resisting all of the grounds of challenge advanced by the applicant on 30th November, 2018. Indaver's statement of opposition was supported by an affidavit sworn by Jackie Keaney, an employee and former director of the Irish Company and an Irish representative of the Belgian Company, on 30th November, 2018. Indaver also relied on an affidavit sworn by Prof. Paul Johnston on 3rd December, 2018.

51. In response, further affidavits were sworn on behalf of the applicant, namely, a second affidavit of Mary O'Leary, which was sworn on 5th January, 2019, a second affidavit of Gordon Reid, which was sworn on 4th January, 2019, and a second affidavit of Joe Noonan, which was sworn on 7th January, 2019.

52. In addition, further affidavits were sworn on behalf of the Board and on behalf of Indaver in the context of an application by the applicant for discovery and for other reliefs as against the Board and Indaver. That application led to a judgment delivered by me on 15th February, 2019: *Cork Harbour Alliance for a Safe Environment v. An Bord Pleanála & ors* [2019] IEHC 85. In the context of that application, Ms. Keaney swore a second affidavit on 7th February, 2019. Mr. Boland swore a second affidavit on 25th February, 2019 and a third affidavit on 1st March, 2019. Mr. Clarke swore his second affidavit on 26th February, 2019 and his third affidavit on 6th March, 2019. In addition, Chris McGarry, a member of the Board since February, 2019, swore another affidavit on behalf of the Board on 6th March, 2019.

53. It will be necessary to refer to aspects of the evidence set out in some of those affidavits when considering the individual grounds of challenge maintained by the applicant.

10. Ground of Challenge Not Pursued by Applicant

54. Although the applicant had raised a ground of challenge concerning the issue of the ownership of the lands on which the incinerator development was to take place (ground 2), and although the applicant made written submissions on that issue to which the Board and

Indaver responded, the applicant's counsel informed the court on Day 2 of his opening of the case that the applicant was not pursuing this ground of challenge and that the applicant accepted that the statutory provision relied upon, namely, Regulation 22 of the Planning and Development Regulations, 2001 (as amended), did not apply to an application for permission for a development falling within the SID provisions of the 2000 Act. It is unnecessary, therefore, to consider this ground of challenge any further.

11. Grounds of Challenge Maintained by Applicant

55. The applicant did maintain the other ten grounds of challenge set out in the amended statement of grounds. I now consider those grounds of challenge and address the relevant facts and legal principles applicable to them. I have found it helpful to consider some of those grounds of challenge together with others. I consider the grounds of challenge in the following order:-

- (1) Ground 4: objective bias.
- (2) Ground 1: prospective applicant/applicant: jurisdiction issue.
- (3) Ground 3: project splitting.
- (4) Ground 5: timing of EIA/AA.
- (5) Ground 6: EIA/EPA issue.
- (6) Grounds 7 and 8: EIA: alternatives and site suitability.
- (7) Ground 9: EIA: dioxin issue.
- (8) Ground 10: EIA: human health.
- (9) Ground 11: complaints re inspector's report.

56. I will now deal with each of these grounds in turn.

12. Ground 4: Objective Bias

(a) Brief Summary of Parties' Positions

(1) The Applicant

57. I summarise first in brief and relatively high-level terms, the applicant's position on this ground. The applicant made clear that it was not alleging actual bias on the part of the Board or its deputy chairperson, Mr. Boland. The applicant's case was that the Board's decision was vitiated and should be set aside on the grounds of objective bias. It contended that a reasonable person would have a reasonable apprehension of bias by reason of the work done by Mr. Boland, in his capacity as an employee of RPS MCOS Consulting Engineers ("RPS"), in the preparation of three submissions on behalf of Indaver in 2004 which were furnished to Cork County Council and Cork City Council in relation to a new waste management plan for those respective Councils and in relation to a proposed waste management plan for Cork County. The applicant relied on Mr. Boland's involvement in the preparation of those submissions which, the applicant contended, amounted to "*determined advocacy*" on behalf of Indaver for an incinerator development at Ringaskiddy. The applicant alleged that a reasonable person would have a reasonable apprehension that the Board had prejudged or was lacking in impartiality in its assessment of the application made by Indaver in 2016. The applicant pointed to what it contended were clear links between the work done by Mr. Boland for Indaver in 2004, as an employee of RPS, and the application made by Indaver in 2016 for the incinerator development at Ringaskiddy.

58. In support of its claim of objective bias, the applicant relied on various matters including: the nature of the work done by Mr. Boland in 2004 as evidenced by the content of the 2004 submissions; the reliance by Indaver on parts of those submissions at an oral hearing conducted by the EPA in 2005; the failure to disclose Mr. Boland's prior involvement with Indaver in the course of the Board's consideration of the 2016 planning application; the absence of any specific disclosure of Mr. Boland's prior work for Indaver in 2004 to the chairperson of the Board or of any express consideration given by the chairperson to his involvement in the context of the Board's consideration of the 2016 planning application, in

contrast to the disclosure and record of consideration of that issue made in the context of earlier applications by Indaver concerning an incinerator development in County Meath in 2012 and 2014; and an alleged breach of the applicable code of conduct for Board members, employees and certain other persons adopted by the Board in June, 2011 (the “Code”). It should be noted that the applicant did not pursue the contention, which had been made in the amended statement of grounds, that objective bias also arose by virtue of other work done by Mr. Boland in 2006, when he was still an employee of RPS, and which was not specifically referable to Indaver or to an incinerator development in Ringaskiddy.

59. The applicant attached particular significance to the fact that Mr. Boland was asked to perform the role of “presenting member” in respect of the Board’s consideration of Indaver’s application in May, 2018 and that he had been directly involved in making significant decisions in connection with the application, including the Board Direction of 23rd December, 2015 determining that the proposed development would comprise SID and the decision in October, 2017 that it was not necessary to circulate to the observers Indaver’s response to the observers’ responses to the further information provided by Indaver. It is important to stress again, however, that the applicant did not rely on these facts in order to make a case of actual bias and, at all times, the applicant made clear that its case was one of objective bias.

60. The applicant contended that, notwithstanding that the work done by Mr. Boland in 2004 was not work done in respect of a planning application for an incinerator development at Ringaskiddy, and notwithstanding that the work was done in 2004, some eleven years before the decision of the Board that the development proposed by Indaver was SID and could avail of the fast-track provisions for SID in the 2000 Act and notwithstanding that the Board’s decision to grant permission in respect of the proposed development was some fourteen years after the work done by Mr. Boland in 2004, nonetheless a reasonable person, armed with all of the relevant facts, as they are known today, would reasonably apprehend

that his or her right to a fair and impartial hearing had been compromised by virtue of Mr. Boland's prior involvement. The applicant did not accept that the professionalism of the Board's members, their obligation to act independently and the existence of a code of conduct would disabuse such a reasonable person of that reasonable apprehension of bias. The applicant contended that Mr. Boland's involvement amounted to a breach of the Code (clause 15.4), although it must be said that this was not a standalone pleaded ground advanced by the applicant but rather was said to form part of the overall picture which a reasonable person would consider and which the court had to consider in determining the objective bias ground. Finally, the applicant placed some significance on the fact that Mr. Boland did not disclose his involvement in or the content of the February, 2004 submission in his first replying affidavit and that the chairperson, Dr. Kelly, did not appear to have been aware of the fact that Mr. Boland had been involved in two submissions prior to the May, 2004 submission, namely, the submissions in February and March, 2004 and was not aware of the content of those submissions.

(2) The Board

61. In response, the Board rejected the contention that the work done by Mr. Boland in 2004 could give rise to a reasonable apprehension of bias on the part of a reasonable person. The Board emphasised that the 2004 submissions all concerned a review and subsequent proposal for a new waste management plan for Cork County and a review of a waste management plan for Cork City. The Board emphasised that the submissions were not in respect of any planning application for an incinerator at Ringaskiddy. It further noted that the submissions were made at a time when Indaver had obtained planning permission for an incinerator development at Ringaskiddy on foot of the 2001 application. Permission for that development was granted in January, 2004 (although that decision was subject to a judicial review). The Board relied on the content of the 2004 submissions, stressing that they were

directed to policy and did not advocate the planning merits of an incinerator development at Ringaskiddy. The Board argued that Mr. Boland had not advocated the grant of planning permission for any such development and that the submissions could not be said to amount to “*determined advocacy*” by the Board for an incinerator in Ringaskiddy. It further stressed that the submissions were not expert reports but rather submissions that could just as easily have been made by Indaver itself. While the 2004 submissions advocated a change in waste policy away from overdependence on landfill which would be consistent with incineration or waste recovery through thermal treatment, they could not reasonably be construed as advocating the planning merits of an incinerator development at Ringaskiddy and that that issue had already been determined by the Board in January, 2004 where it granted permission for an incinerator development on the site.

62. The Board disputed the relevance of the exclusion of other members of the Board from consideration of Indaver’s 2016 planning application, including Mr. Jones. The Board explained the basis on which each of the members excluded (on the basis of a risk of perception of bias). The Board rejected the suggestion that the involvement of Mr. Boland was in breach of the Board’s code of conduct.

63. The Board relied on the passage of time (between the 2004 submissions and the date on which the impugned decision of the Board was made in May, 2018), the professionalism of the members of the Board (and the statutory provisions governing their appointment) and the fact that the pool of experts in the area of waste management in Ireland was a small one. It submitted that it was, therefore, inevitable, having regard to Mr. Boland’s lengthy employment with RPS, that he would have had professional contacts with many of the stakeholders involved in the area, including Indaver.

64. The Board strenuously rejected any alleged lack of candour on the part of the Board and on Mr. Boland’s part, as well as any alleged breach of a duty of disclosure. The Board

relied on the explanation given by Mr. Boland in his affidavits as to why he had not mentioned the February 2004 submission in his initial replying affidavit and had not brought it to the attention of the Board's lawyers prior to swearing that affidavit. The Board further relied on the evidence of the chairperson, Dr. Kelly, that she was satisfied that Mr. Boland had no conflict of interest in dealing with Indaver's application and that there was no other reason to prevent him from considering the application. Finally, while the affidavits sworn on behalf of the Board and the Board's submissions did refer to the practical constraints to which the Board was subject when considering Indaver's application following the inspector's supplemental report, having regard to the changes in the membership of the Board, the Board made clear that it was not relying on the doctrine of necessity and it was not suggested that it would not have been possible to form a quorum to determine the application without Mr. Boland. The Board did, however, emphasise Mr. Boland's involvement throughout the process (including the pre-application consultation process) and the fact that two of the other members involved had ceased to be members of the Board by the time the Board came to consider the application in May, 2018.

65. In summary, the Board contended that, having regard to the absence of any cogent or rational link between the work done by Mr. Boland in 2004 and the planning application determined by the Board in 2018, the passage of time between the work done and the Board's consideration of Indaver's 2016 application, the professionalism of the Board members, the small pool available in Ireland from which Board members with relevant expertise could be selected and the various other reasons summarised above, a reasonable person, having knowledge of all of the relevant facts, would not reasonably apprehend that the Board had prejudged Indaver's 2016 planning application or that the application would not be determined by the Board in a fair and impartial manner.

(3) *Indaver*

66. Indaver supported the position adopted by the Board and made submissions to similar effect. Indaver relied on the alleged absence of any cogent or rational link between the work done by Mr. Boland for RPS in 2004 and Indaver's 2016 planning application. It too stressed that the 2004 submissions were directed to waste management policy which Indaver was contending ought to be adopted by Cork County Council and Cork City Council and did not concern the planning merits of an incinerator in Ringaskiddy, still less the particular incinerator development the subject of Indaver's 2016 application. Indaver contended that, to sustain a case of objective bias, the applicant would have to point to some prejudgment or predetermination by the Board of Indaver's application and that the applicant had failed to do so. It too disputed the contention that the 2004 submissions amounted to "*determined advocacy*" by Mr. Boland of an incinerator development in respect of which permission was sought by Indaver in its 2016 application. Rather, it said, the submissions supported the adoption of Cork County Council (and Cork City Council) of a particular waste policy which was reflective of Indaver's business model. In contrast to Indaver's 2016 planning application, those preparing the 2004 submissions (including Mr. Boland) were not required to engage in the planning merits of any particular proposed development and did not prejudge the planning merits of any proposed development at the time, still less the development for which permission was ultimately granted in May 2018. Indaver contended, therefore, that a reasonable person possessed of all of the relevant facts would not reasonably apprehend that the Board had prejudged its application or would determine the application otherwise than in a fair and impartial manner.

(b) Facts Relevant to this Ground

67. While the facts relevant to this ground are not in dispute, the parties strongly disagreed as to the conclusions which the court should draw having applied the relevant legal principles to those facts.

68. The facts relevant to this ground concern Mr. Boland, the former deputy chairperson of the Board, and the work which he did for Indaver as an employee of RPS in 2004 and his involvement in the Board's determination of Indaver's 2016 planning application. Prior to his appointment to the Board in January, 2007, Mr. Boland, a civil engineer, was employed by RPS between 1998 and 2006. He worked a lot on waste management planning issues and was involved in waste management plans for several regions in the country in which he represented local authorities. He was also involved in national level projects on behalf of various bodies, including the EPA. RPS was engaged by Indaver to make submissions to Cork County Council and Cork City Council in 2004 in relation to waste management plans which were being reviewed at the time by both Councils. RPS was engaged to prepare submissions to both Councils for the purposes of those reviews.

69. RPS prepared and provided a submission on behalf of Indaver to Cork County Council in February, 2004. According to the document control sheet for the February, 2004 submission, Mr. Boland was the co-author of the first draft of that submission and was the reviewer of the final version of the submission. RPS prepared and furnished a submission on behalf of Indaver to Cork City Council in March, 2004. This was in virtually identical terms to the February, 2004 submission to Cork County Council. Again, according to the document control sheet, Mr. Boland was the co-author of the draft of the submission and was the reviewer of the final version. Both those submissions encouraged the two Councils to move towards incineration (waste to energy) as a preferred method for the treatment of residual non-hazardous material above landfill. Both submissions referred to the planning permission

granted to Indaver in respect of the incinerator development at Ringaskiddy in January, 2004 (which they described as phase 1) and referred to the capacity for further development (referred to as phase 2).

70. The submissions set out Indaver's proposals for a new waste management plan for both Councils. They contained a detailed discussion on EU legislation and policy, national policy and regional policy on waste management. Both submissions contained a description of Indaver's company profile, the waste management services offered by Indaver and its ongoing projects, including its waste management facility at Carranstown in Meath and the Ringaskiddy development for which permission had been granted in January, 2004. Both submissions contained a more detailed description of the Ringaskiddy waste management facility, phase 1 of which Indaver planned to develop on foot of the permission granted by the Board in January, 2004.

71. Both submissions contained a separate section (s. 4.2.2) headed "Benefits of Ringaskiddy Facility for MSW Management in the Cork Region" which made express reference to phase 1 (for which permission was granted by the Board in 2004) and phase 2 (which the submissions said did not require any additional building to be established as the required infrastructure was already included in phase 1). The submissions described Ringaskiddy as being a "*suitable location*" for a regional waste facility and that the location would be "*further enhanced*" by the construction of the Ringaskiddy by-pass. The submissions then set out a list of "*potential benefits*" which made express reference to the potential advantages of incineration (waste to energy) and the competitiveness of disposal of non-hazardous residual waste at the waste to energy facility.

72. RPS also prepared and submitted to Cork County Council a further submission in May, 2004 on the proposed waste management plan for Cork County. By that stage, Cork County Council had published a proposed waste management plan for Cork County (in

March, 2004) which was out for public consultation. The May 2004 submission made reference to the February 2004 submission which had been furnished prior to the publication of the proposed plan. No document control sheet exists in respect of the May 2004 submission. Mr. Boland attempted to obtain a copy of the document control sheet for this submission from Indaver in November, 2004, but none could be found. The applicant had the May 2004 submission when it applied for leave to bring these proceedings in July, 2018. The applicant was also aware of the existence of the February 2004 submission as it was referred to in the May 2004 submission but did not have a copy of that submission. I believe that I am entitled to infer from Mr. Boland's affidavits that he was likely to have been equally involved in the preparation of the May 2004 submission as he was in the February and March 2004 submissions. Mr. Boland stated on affidavit that when he prepared his first replying affidavit on behalf of the Board in November, 2018, he did not recall the March 2004 submission. In the absence of any cross-examination, I accept that that was the case. He had the May 2004 submission (but I accept his evidence that he would not have remembered the date of the submission had it not been exhibited by the applicant). I accept Mr. Boland's evidence that he only remembered or became aware of the existence of the March 2004 submission when it was exhibited by Ms. Keaney of Indaver to her affidavit of 20th November, 2018. By the time Mr. Boland swore his first affidavit on behalf of the Board on 23rd November, 2018, he had a copy of the May 2004 submission and the February 2004 submission. However, he made no reference to the February 2004 submission in his affidavit. His explanation for that was that, having obtained a copy of the February 2004 submission from Warren Phelan of RPS, on 20th November, 2018, he glanced at that submission and concluded that it was "*simply an earlier iteration of the May 2004 submission*" which had been made at an earlier stage in the public consultation process and that he did not see any need to amend the draft of his affidavit which had been largely finalised at that stage to refer to and exhibit the February 2004 submission

(paras. 20 and 21 of Mr. Boland's second affidavit of 25th February, 2019). He explained that as a planner and engineer rather than as a lawyer, he did not regard the existence or contents of the February 2004 submission as adding anything material to the case which the applicant was making.

73. Mr. Boland stated that he had disclosed to the Board that he had done work for Indaver in 2004 in the context of the public consultation exercise on the preparation of a new waste management plant for Cork and that he did not see that it made any difference to the question as to whether there was any difficulty with him participating in the Board's decision on Indaver's 2016 planning application whether RPS had prepared a single submission or a number of submissions in 2004 (para. 22 of Mr. Boland's second affidavit of 25th February, 2019). Mr. Boland's recollection was that the work which he had done for RPS for Indaver in 2004 was always treated as a single assignment rather than as a series of assignments. Mr. Boland did not seek advice from the Board's legal advisors as to whether he ought to refer to the February 2004 submission in his replying affidavit on behalf of the Board in November, 2018.

74. While I believe that Mr. Boland ought to have raised the issue with the Board's legal advisors and ought to have sought advice on it, ultimately, I do not regard this as having any material bearing on my consideration of the objective bias issue. I accept Mr. Boland's explanation as to his recollection of the work done by him in RPS on behalf of Indaver in 2004. In my view, Mr. Boland satisfactorily explained what his recollection was and how it was that he referred only to the May 2004 submission in his first replying affidavit on behalf of the Board in November, 2018.

75. Mr. Boland acknowledged (at para. 25(v) of his second affidavit of 25th February, 2019) that the "*tenor of the [May 2004] submission was to advocate for a waste management approach that would include waste-to-energy (incineration)*" in the waste management plans

for Cork County and Cork City and that *“the various reports, especially the earlier ones, speak positively about the client, Indaver, on whose behalf the submissions were made”*. I agree with those statements and accept that the tenor of the three submissions was to advocate for a waste management approach, including incineration in the relevant waste management plans and that the submissions did speak positively about Indaver. However, in my view, the February 2004 and May 2004 submissions went further than that in referring to the then proposed development in Ringaskiddy and to the benefits of that development for waste management in the Cork region, including the suitability of the location of Ringaskiddy for a regional waste facility incorporating incineration and the potential benefits of that facility. The May 2004 submission did not include the section contained in the February and March, 2004 submissions on the Ringaskiddy facility (s. 4.2). It did, however, strongly advocate the development of thermal treatment (incinerator) capacity as a more sustainable alternative to landfill and spoke positively about incineration in the context of the proposed plan. For example, in commenting on the proposed plan, which the May 2004 submission stated, *“veers away from thermal treatment”*, the submission made a number of points which it suggested had not been taken into consideration in the proposed plan (s. 4.1, pp. 11-12). Further, in referring to the regional planning guidelines for the south west region (which included Cork City and County and Kerry), which were by then available in draft form, it was stated in the May 2004 submission that those draft guidelines *“specifically acknowledged the potential benefits of including thermal treatment capacity as part of the Cork region’s waste management infrastructure, including capacity to treat non-hazardous municipal waste”* (para. 4.3, pp. 12-13).

76. Indaver subsequently relied on the 2004 submissions in its evidence at the oral hearing conducted by the EPA in 2005 and included a graph outlining a proposed waste policy, bearing the RPS logo, which was taken from the May 2004 submission.

77. Mr. Boland was appointed as a member of the Board with effect from 1st January, 2007. Following his appointment, he discussed the question of conflict of interests with the then chairperson of the Board. Two potential areas of conflict were considered: conflicts with waste management cases, given Mr. Boland's background in waste management, and conflicts with the work of RPS generally (as RPS is a major consultancy firm involved in a wide range of projects). It was agreed that for a period of two years following his appointment, Mr. Boland would not participate in applications for planning permission for waste related developments. While the Board's code of conduct at the time referred to a one-year period, the then chairperson was more comfortable with a period of two years. From early 2009 onwards, thereafter, Mr. Boland was available to participate in new applications for planning permission for waste related developments and did so.

78. The code of conduct in place at the time of Mr. Boland's appointment dated back to January, 2003. A new code of conduct was adopted by the Board in June, 2011 (the "Code"). That is the code which applied at the time of the Board's consideration of Indaver's 2016 planning application. The most relevant provisions of the Code for present purposes: at paras. 15.2, 15.4 and 15.7.

79. Para. 15.2 provides:-

"A member... shall not deal with any case in any capacity on behalf of the Board where he/she previously had any involvement at any time in the matter, either on a personal basis or on behalf of a previous employer or as a member of any other organisation or voluntary body."

80. Para. 15.4 provides:-

"A member... shall not knowingly deal with a file relating to a planning authority or private practice where he/she was previously employed during the previous two-year

period or any voluntary or professional organisation at which the person is or was a member during the previous two-year period.”

81. Para. 15.7 provides:-

“A Board member or employee shall not deal with or participate in the decision-making process in any case where he/she considers such involvement could give rise to an appearance of objective bias i.e. that such involvement could give rise to a reasonable apprehension that the decision maker or the process leading to the decision might have been biased or that a reasonable observer would apprehend that there had not been an impartial decision-making process. In the case of doubt on this issue, a member should seek a ruling from the chairperson...”

82. In December, 2012 and July, 2014, Mr. Boland participated as a member of the Board in two applications by Indaver to amend existing planning permissions for a waste to energy facility in Duleek, County Meath. At a meeting of the Board on 12th December, 2012, Mr. Boland made a declaration in relation to a number of matters. The minutes of that meeting record the following:-

“C Boland declared that he had in 2004 carried out a consultancy report prepared by RPS – MCOS Consulting Engineers on behalf of Indaver Ireland, submitted to Cork County Council during the consultation stage of review of the Cork Waste Management Plan. Prior to leaving RPS Consulting Engineers at the end of 2006, he had been involved in the preparation of the current Regional Waste Management Plan for the North East Region, and had also been involved in the Strategy Study commissioned by the EPA in reviewing the National Hazardous Waste Management Plan (this study was completed and the Plan subsequently made by the EPA). He has not had any involvement in any form in the Indaver facility at Duleek. The

Chairperson determined that his continued involvement in the case would not create any conflict with the Board's code of conduct."

83. Having made that declaration, the chairperson, Dr. Kelly, determined that Mr. Boland's continued involvement in the application would not breach the Board's code of conduct. The chairperson explained in her affidavit that she had already been aware that Mr. Boland had particular experience and expertise in the area of waste policy. She stated that as he had not had any involvement in the Indaver facility at Duleek, she did not consider that Mr. Boland's continued involvement in the case would be in breach of the Board's code of conduct.

84. An almost identical declaration was made by Mr. Boland at a meeting of the Board on 31st July, 2014 to consider a further request by Indaver to alter one of the conditions to the permission granted in respect of the Duleek facility. The chairperson reached the same conclusion in relation to Mr. Boland's involvement as she had reached in December, 2012. Dr. Kelly explained in her affidavit that she was satisfied that his continued involvement in that case would not create any conflict of interest. I note that in each case, the minutes expressly confirmed that Mr. Boland had not had "*any involvement in any form in the Indaver facility at Duleek*". At the time Mr. Boland made these declarations in relation to the work done with RPS for Indaver in 2004, Mr. Boland did not have a copy of any of the submissions made by RPS in 2004 in which he was involved. He did not bring documents with him when he left RPS. He received a copy of the May 2004 submission when it was exhibited in the applicant's application for judicial review in July, 2018. He received the February 2004 submission when it was sent to him by RPS on 20th November, 2018. He only saw a copy of the March 2004 submission when it was exhibited by Ms. Keaney in her affidavit of 30th November, 2018. It is clear from the evidence that Mr. Boland did not recall the detail of the 2004 submissions when making his declaration in 2012 and 2014 in

connection with Indaver's application concerning the Duleek facility. Nor obviously could Dr. Kelly have been aware of that detail.

85. Mr. Boland was appointed deputy chairperson of the Board on 30th May, 2012. He ceased to be deputy chairperson and a member of the Board on 31st December, 2018.

86. Indaver initiated the pre-application consultation procedure which ultimately led to the 2016 planning application in August, 2012. At a meeting on 23rd December, 2015, the Board determined that the proposed development constituted SID. Mr. Boland signed the Board Direction of that date. By that stage, Mr. Boland had been a member of the Board for eight years, was its deputy chairperson and was a member of the Board's Strategic Infrastructure Division. The chairperson had delegated the coordination and day to day management of that division to Mr. Boland. Dr. Kelly and Mr. Boland both swore affidavits explaining that consideration was given to Mr. Boland's involvement in Indaver's proposed application in December, 2015 and in Indaver's subsequent 2016 planning application. Mr. Boland stated that the chairperson had to consider whether his involvement "*in the 2004 RPS report*" and in the preparation of certain waste management policy documents in 2006 (not involving Indaver) gave rise to a conflict of interest or a reasonable apprehension of bias and that the chairperson determined that it did not (para. 17 of Mr. Boland's first affidavit of 23rd November, 2018).

87. In her affidavit, Dr. Kelly stated that more than a decade had passed since Mr. Boland's involvement in the "*May 2004 submission*" and that she did not consider that there was any conflict of interest or that a reasonable person would "*reasonably apprehend a danger of bias in Indaver's favour on Mr. Boland's behalf*" (para. 11 of Dr. Kelly's affidavit of 23rd November, 2018). Dr. Kelly further stated that normal Board practice was followed and that at each meeting in connection with Indaver's proposed application and its subsequent 2016 application, Mr. Boland confirmed that he had no conflict and that Dr. Kelly

agreed with him. I note, however, that in contrast to the minutes of the meetings in December, 2012 and July, 2014 when Mr. Boland's disclosures were made with respect to Indaver's Duleek applications, the minutes of the meeting of the Board of 23rd December, 2015 do not make any express reference to any such disclosure. However, neither Dr. Kelly nor Mr. Boland were cross-examined in relation to their affidavits and I accept that Mr. Boland's position was considered by Dr. Kelly at the meeting of 23rd December, 2015 as Dr. Kelly and Mr. Boland stated. I would again note, however, that Mr. Boland's recollection of the work in which he had been involved for Indaver in 2004 was not very detailed and he did not have copies of the three submissions made in 2004. Nor obviously did Dr. Kelly. She too was not aware of the detail of the work done in 2004.

88. After the Board decided that Indaver's proposed development in Ringaskiddy was SID, Indaver lodged its application for permission on 13th January, 2016. On 1st February, 2017, the chairperson decided to invoke s. 112A(8) of the 2000 Act (as amended) to transfer consideration of the application from the Board's Strategic Infrastructure Division to all available members of the Board. The chairperson then had to decide which members were available to participate in the consideration of the application in the context of any potential conflict of interest or reasonable apprehension of bias issues. As noted earlier, the chairperson adopted a precautionary approach and, although she concluded that no members had a conflict of interest, she did conclude that five members ought not to be involved in the consideration of the application because of the risk of a perception of bias. Those members included Philip Jones who had been the Board inspector who prepared the report (and who recommended refusal of permission) in connection with Indaver's 2001 planning application. The exclusion of those five members left four members, Dr. Kelly, Mr. Boland, Mr. Keogh and Mr. Leahy. Mr. Keogh was appointed as the presenting member by the chairperson. Dr. Kelly stated that she was "*still aware*" in February, 2017 of Mr. Boland's involvement in the

“2004 RPS report” but did not consider that that could create a conflict of interest or a perception or apprehension of bias, some thirteen years later. There is a record of Dr. Kelly’s consideration of the issue in February, 2017: chairperson’s appendix to case minutes 21st February, 2017. While there was no equivalent express declaration of Mr. Boland’s work for RPS in the 2004 submissions on behalf of Indaver in those minutes or in the minutes of any subsequent meetings of the Board at which Indaver’s 2016 planning application was considered equivalent to the more detailed declarations made in the 2012 and 2014 minutes, I accept that Dr. Kelly did consider the question of Mr. Boland’s participation in the consideration of the application when she was deciding on the availability of Board members in February, 2017. However, I conclude that she did so without full knowledge of the content of the 2004 submissions and the actual work done by Mr. Boland on those submissions, as neither she nor Mr. Boland had copies of the submissions at the time and Mr. Boland did not have a full recollection of the extent of the work performed by him back in 2004.

89. I also accept that the fact that, during the course of his employment with RPS, Mr. Boland carried out work for Indaver in 2004 did not necessarily and of itself mean that he should not participate in the consideration of the application. As we shall see from the consideration of the relevant legal principles, that issue very much turns on the detail of the work actually carried out by Mr. Boland and the extent to which it could reasonably be said that there was a rational and cogent connection between the work done and the issues which arose in the Board’s consideration of Indaver’s 2016 planning application.

90. By the time Dr. Kelly considered the availability of members to participate in the Board’s consideration of Indaver’s 2016 planning application, the oral hearing had already taken place (in April, 2016) and the inspector’s report had been provided to the Board (on 27th January, 2017). There were meetings of the Board to consider the application on 21st, 23rd, 28th February, 2nd March and 10th March, 2017. On 10th March, 2017, the Board issued

the request for further information referred to earlier. The Board's Direction of 10th March, 2017 was signed by Mr. Keogh. Further information was in due course furnished by Indaver and responded to by the applicant and others and was, in turn, responded to by Indaver. Mr. Keogh and Mr. Leahy had by that stage ceased to be members of the Board. On 23rd October, 2017, having discussed the matter with the chairperson, Mr. Boland decided that it was not necessary to circulate Indaver's response of 2nd October, 2017 for further observations. He directed that a further report be provided by the inspector although, initially, he indicated that a further assessment and recommendation from the inspector was not required. That position changed on 8th November, 2017. In a memorandum of that date, Mr. Boland noted that having discussed the matter with the Board's assistant director of planning and subsequently with the chairperson, it was considered appropriate for the inspector to complete a further assessment and recommendation in the case. That was done by the inspector and his supplemental report dated 7th March, 2018 was provided to the Board.

91. By that stage, there were only two members of the Board left who had familiarity with Indaver's application, Dr. Kelly and Mr. Boland. Dr. Kelly decided to appoint Mr. Boland to take over carriage of the file and to present it *de novo* to the Board. Dr. Kelly stated on affidavit (at para. 27 of her affidavit of 23rd November, 2018) that when she made that decision, she was aware of Mr. Boland's involvement in the "2004 RPS report" and had "*no qualms about his continued involvement in the case*".

92. In May, 2018, Dr. Kelly considered the availability of the members of the Board to participate in the consideration of Indaver's application. A memorandum dated 3rd May, 2018 signed by Dr. Kelly records the fact that she considered, amongst other things, the Board's code of conduct and, in particular, paras. 3.13 and 5.7 of the code and decided that, although no members of the Board had a conflict of interest, in order to ensure that there could be no perception of a conflict or of any form of bias, there were eight members available for

participation in the consideration of the application (including the chairperson herself and Mr. Boland). Dr. Kelly considered that two other members of the Board ought not to participate because of the risk of a perception of bias. They were Mr. Jones and Mr. Hyde. One of the eight members referred to by Dr. Kelly (Mr. Connolly) declared a potential conflict of interest later that day and was recused. That left seven members who would be considering the application. Dr. Kelly's memorandum of 3rd May, 2018 also recorded the fact that she had asked Mr. Boland to take carriage of the file and to present it *de novo* to the Board for examination and decision. I again accept that, notwithstanding that there was no equivalent declaration by Mr. Boland as there was in connection with Indaver's Duleek applications in 2012 and 2014, Dr. Kelly was aware of and did consider whether the work done by Mr. Boland in 2004 should preclude him from participating and decided that it did not. However, Dr. Kelly's decision was made on the basis of the information which she had at the time which clearly did not include knowledge of the detail of the 2004 submissions which Mr. Boland himself did not recall until much more recently and of which Dr. Kelly was unaware.

93. The seven Board members proceeded to consider the application at meetings on 3rd May, 9th May, 15th May, 17th May and 23rd May, 2018. The minutes of each of those meetings contained a confirmation by way of a tick in a box that the members present confirmed that to the best of their knowledge, they did not have a conflict of interest in the case. None of the minutes contained a declaration of the type made by Mr. Boland in 2012 and 2014. The minutes noted that the Board decided 5:2 on 17th May, 2018 to grant the permission sought by Indaver. The minutes of the meeting on 23rd May, 2018 recorded that the members present agreed the Board Direction and various costs. As noted earlier, the Board Direction dated 24th May, 2018 recorded the fact that the case was presented in full at the meetings on 3rd May, 9th May and 15th May, 2018 by Mr. Boland. Mr. Boland signed the Board Direction of 24th May, 2018.

94. I am satisfied on the basis of the evidence contained in the affidavits before the court and the documentation exhibited to those affidavits, that as a matter of fact, both Dr. Kelly and Mr. Boland considered whether Mr. Boland's participation in the Board's consideration of Indaver's 2016 planning application could give rise to a perception of bias and believed that it could not and that Dr. Kelly decided that it was in order for Mr. Boland to participate. The fact that both Dr. Kelly and Mr. Boland had reached that subjective view is, however, irrelevant in determining whether the Board's decision was affected by objective bias, as that question must be decided objectively and not on the basis of the subjective beliefs of the decision maker or of the participants in that decision. Equally irrelevant are the subjective views of others, such as the applicant.

(c) Legal Principles Applicable to Objective Bias

95. There was no real disagreement between the parties on the legal principles applicable to objective bias and the law is well settled in the area, having been considered on several occasions in the relatively recent past by the Supreme Court. I start with a few preliminary points. First, the authorities all make clear that each case must turn on its own facts and that all of the surrounding factual context and circumstances must be considered when assessing an allegation of objective bias.

96. Second, it must be stressed that although the applicant was critical of aspects of the Board's evidence and of the explanation provided by Mr. Boland and by Dr. Kelly of the consideration given to whether Mr. Boland should be involved in Indaver's 2016 planning application and of the absence of any disclosure of Mr. Boland's involvement and of his prior work for Indaver to the applicant and other interested parties, the applicant made clear that the case it was making was one of objective bias and not actual bias.

97. Third, the authorities make clear that the legal principles on objective bias apply to planning bodies including the Board. In *Usk and District Residents Association Ltd v. An*

Bord Pleanála [2010] 4 IR 113 (“*Usk*”), the High Court (MacMenamin J.) referred to the Board as a “*statutory body entrusted with decision-making of some national importance...*” which has “*an additional onus to ensure that what it does is fair, in order to avoid the perception of prejudgment in appearance and reality and in accordance with law*” (at para. 43). The High Court applied the well-established principles on objective bias in that case and quashed the decision of the Board at issue. In *Reid v. Industrial Development Agency* [2015] 4 IR 494 (“*Reid*”), the Supreme Court (in a judgment delivered by McKechnie J.) applied the objective bias principles in quashing a decision of the IDA to compulsorily acquire the applicant’s land. The Court stated that the test (for objective bias) “*remains the same right throughout the ambit of public administration: given that the underlying purpose of the test is confidence in the objectivity of all such persons and bodies, it would be invidious if the standard should differ as between one entity and another*” (para. 78).

98. Fourth, although only one member of a multi-member panel or tribunal may be objectively biased, the decision of the entire panel will nonetheless be invalid: *Reid* (per McKechnie J. at para. 78); *O’Driscoll v. Law Society of Ireland* [2007] IEHC 352 (per McKechnie J. at para. 56); *O’Neill v. Irish Hereford Breed Society Ltd* [1992] 1 IR 431 (“*O’Neill*”); and *Kenny v. Trinity College Dublin* [2008] 2 IR 40 (“*Kenny*”). In *Kemper v. An Bord Pleanála & ors* [2020] IEHC 601 (“*Kemper*”), Allen J. described as trite law that “*a collective decision is tainted by objective bias on the part of any one member of the panel or committee or court*” (para. 69). The fact, therefore, that the allegation of objective bias was made by the applicant only against Mr. Boland is irrelevant. If sustained, the decision of the Board will be found to be invalid.

99. What then are the legal principles applicable to determining objective bias? The overriding principle is that stated by Lord Hewart C.J. in *Rex v. Sussex Justices, Ex Parte McCarthy* [1924] 1 KB 256 (“*Sussex Justices*”):-

“...it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.”

(at 259)

100. Almost all of the leading Irish cases cite this *dictum* which has been described as *“probably a concept as old as the common law itself and... in perfect harmony with our constitutional situation”* (per O’Flaherty J. in *O’Reilly v. Cassidy* [1995] 1 ILRM 306 at 31).

101. In *Dublin Wellwoman Centre Ltd v. Ireland* [1995] 1 ILRM 408 (“*Wellwoman*”), the Supreme Court allowed an appeal from the refusal of Carroll J. in the High Court to grant an application by one of the defendants to recuse herself from hearing the case on the ground that her activities as chairwoman of the Commission on the Status of Women created a reasonable apprehension of bias. Carroll J. refused to recuse herself as she was satisfied that she was not biased. The Supreme Court allowed the appeal and held that the High Court judge ought to have discharged herself on the grounds that the appellant had made out a case of objective bias in the circumstances. The Supreme Court held that the test was an objective one, namely, *“whether a person in the position of the appellant in this case, a reasonable person, should apprehend that his chance of a fair and independent hearing by reason of the actions of the learned High Court judge in her capacity as Chairwoman of the Commission on the Status of Women...”* would be adversely affected (per Denham J. at 421). Having concluded that the facts of the case, which involved issues of abortion and the related constitutional amendments regarding travel and information were extremely emotive and divisive topics, the Court then stated:-

“It is a fundamental and age old concept in common law that justice must manifestly and visibly be seen to be done. It is expressed now as constitutional justice. In cases such as this where many reasonable people in our community hold strong opinions, it is of particular importance that neither party should have any reasonable reason to

apprehend bias in the courts of justice. Further, once the question of a possible perception of bias has been raised reasonably on the grounds of pre-existing non-judicial position and actions, it would be contrary to constitutional justice to proceed with a trial.” (per Denham J. at 423)

102. The leading authority in this jurisdiction now on objective bias on the part of a decision maker is *Bula Ltd v. Tara Mines Ltd (No. 6)* [2000] 4 IR 412 (“*Bula*”). The Supreme Court dismissed an application to set aside its decision on an appeal from the High Court on the grounds of objective bias by reason of work done by two members of the Court who had sat on the appeal while they were barristers for Tara Mines and the Minister for Energy. Denham J. and McGuinness J. delivered judgments on the application.

103. In her judgment, Denham J. stated that it was well-settled Irish law that the test for objective bias is an objective one, namely, “*whether a reasonable person in the circumstances would have a reasonable apprehension that the applicants would not receive a fair trial of the issues*” (at 439). Denham J. stressed the unique nature of the work done by a barrister, referring in that context to the “*cab rank*” principle and to the independence of the bar. In reiterating that the test is an objective one, Denham J. stated that the test takes account of “*the view of the reasonable person who would have a reasonable knowledge of a barrister’s work*” and that to sustain a case of objective bias against a judge, it would be necessary to show more than simply that the judge as barrister had acted for one of the parties in the case (at 445). Denham J. continued:-

“The mere fact that a judge when a practising barrister acted for a party is not a bar to him or her acting as a judge in a subsequent case where that party is a party to the litigation. The test for the court is more than a prior relationship of legal adviser and client...” (at 445)

104. Denham J. quoted with approval from the judgment of the High Court of Australia in *Re Polites: Ex Parte Hoyts Corporation Pty Ltd* (1991) 173 C.L.R. 78 and noted that the links between the judge's previous work as a barrister and the issues in the case had to be "cogent and rational". Denham J. further agreed with the analysis of Merkel J. in *Aussie Airlines Pty Ltd v. Australian Airlines Pty Ltd* (1996) 135 ALR 753 where the judge stated that:-

"Although the test is one of appearance, it is an appearance that requires a cogent and rational link between the association and its capacity to influence the decision to be made in the particular case..." (at para. 55)

105. Denham J. continued:-

"If a judge has acted for or against a person previously as a legal adviser or advocate that alone is insufficient to disqualify him or her from acting as a judge in a case in which that person is a party, there must be an additional factor or factors. The circumstances must be considered to see if they establish a cogent and rational link so as to give rise to the reasonable apprehension test. The link must be relevant." (at 446)

106. Denham J. referred to the declaration required to be given by a judge under Article 34.5.1 (now Article 34.6.1) of Constitution of Ireland and stated:-

"On occasion it is inappropriate for a judge to adjudicate in a case. This will depend on the circumstances. A judge is not disqualified from adjudicating in a case merely because one of the parties was in receipt of his or her professional legal services at an earlier time. In the context of the independent bar which operates in Ireland such a link is not a connection sufficient to disqualify. It requires special additional circumstances to disqualify a judge from adjudicating on a case. Thus, a long, recent

and varied connection may disqualify a judge. The circumstances must be cogent and rational so as to give rise to a reasonable apprehension that the judge might not bring an impartial mind to the resolution of the issues in the case. Special circumstances precluding a judge from presiding include a situation where the judge as counsel had previously given legal services to a party on issues alive in the case to be heard by the court.” (at 446)

107. Denham J. and McGuinness J. closely examined the work which the two judges (Keane J. and Barrington J.) had done while at the bar (more than twenty years prior to the decision of the court on which they sat). They also identified the issues which had arisen on the appeal which had been dismissed in the decision challenged on objective bias grounds. Both concluded that neither of the judges had acted for or advised for the relevant defendants in relation to the issues which arose in the appeal determined by the Supreme Court. That analysis led Denham J. to refer to a “*misunderstanding of the role of the independent bar*” on the part of the applicants. She continued:-

“For the reasons stated, the fact that a judge previously acted for a party does not bar him or her from acting as a judge in a case in which that person is a party. However, if the litigation is between the same parties on an issue or issues upon which as counsel he or she has previously advised or advocated in the cause between the parties then it would not be appropriate for a judge to hear the case.” (at 458)

108. Later, Denham J. observed:-

“In order for a judge to be disqualified from hearing a case, in addition to the relationship of client/counsel, there must exist a factor which would give rise to a reasonable apprehension of bias in the mind of a reasonable person. Such a link must be cogent and rational. Such a link could be if the counsel had advised on the issues

to be determined. However, in this case the advice and advocacy given was not in relation to the issues on the appeal.” (at 461)

109. In her judgment, McGuinness J. also cited the Australian case of *Aussie Airlines* from which the requirement to establish a “*cogent and rational link*” was derived. She commented:-

“This requirement of a ‘cogent and rational link’ between the judge’s past associations and the capacity of those associations ‘to influence the decision to be made’ seems to me to fulfil the requirement that the Applicants’ apprehension should be both reasonable and realistic...” (at 510)

110. In considering whether a person would have a reasonable apprehension of bias based on the work done by the judges while in practice as barristers, McGuinness J. concluded that among the factors to be taken into account were the importance of the judicial oath, the independence of the bar and the time factor involved (where the work done was between 20 and 30 years prior to the challenged decision). McGuinness J. continued:-

“As has been set out in the Australian cases, a reasonable person must be expected to have a general understanding of the weight of the judicial oath and of the general role of barristers. Given that all of the events in question took place at least twenty, and in some cases nearly thirty years ago, it does not appear to me that in the circumstances there is sufficient basis for a reasonable and realistic apprehension of bias on the part of a reasonable person. In my view the time factor is of great importance... To use the phrase of Merkel J., a reasonable bystander would not perceive a cogent and rational link between the association of the two judges with the respondents and its capacity to influence the decision to be made.” (p. 518)

111. There is no doubt, in my view, that the facts of *Bula* can readily be distinguished from the present case. Both Denham J. and McGuinness J. in their judgments emphasised the

importance of the judicial oath and the independence of the bar, an essential and fundamental component of which is the “*cab rank*” rule. Neither of those factors applies in the present case. To the extent that the Board relied on *Bula* and argued that these distinguishing factors were not particularly relevant, I reject that argument. Nonetheless, many of the principles identified and discussed in *Bula* are highly relevant to the issues which arise in this case.

112. The Supreme Court’s confirmation of the test is an objective one in the sense of whether a reasonable person would reasonably apprehend that he or she would not receive an impartial decision by virtue of a prior association between the decision maker, or a member of the decision-making body, and one of the parties to the dispute or issue before the deciding body is directly relevant to the present case. While the issue of objective bias in a case is very much fact specific, *Bula* requires that where objective bias is based on prior association, (a) there must be a “*cogent and rational link*” between the association of the decision maker or member of the decision-making body and the party involved and its capacity to influence the decision to be made and (b) the apprehension of bias must be both reasonable and realistic.

113. *Bula* is also of assistance in referring to the relevance of the time factor involved, both in terms of the length of the association complained of and the lapse of time between that association and the date of the challenged decision. Both of these aspects of the time factor are obviously relevant in the present case.

114. The Supreme Court delivered two significant judgments on the principles applicable to objective bias in 2007: *O’Callaghan v. Mahon* [2008] 2 IR 514 and *Kenny v. Trinity College Dublin* [2008] 2 IR 40.

115. In her judgment in *O’Callaghan*, having referred to the *dictum* of Lord Hewart C.J. in the *Sussex Justices* case, Denham J. stated:-

“The appearance of what is being done is critical. It is essential that justice be seen to be done. Therefore, the test refers to a reasonable apprehension by a reasonable

person, who has knowledge of all the facts, who sees what is being done. It is this reasonable person's objective view which is the test. This is the criterion which is required to be applied. It is not the apprehension of a party." (para. 77)

116. In his judgment, in a paragraph recently cited with approval and applied by Allen J. in *Kemper*, Fennelly J. observed that the principles to be applied were well-established. He summarised them as follows:-

- "(a) Objective bias is established, if a reasonable and fair-minded objective observer, who is not unduly sensitive, but who is in possession of all the relevant facts, reasonably apprehends that there is a risk that the decision-maker will not be fair and impartial;*
- (b) The apprehensions of the actual affected party are not relevant;*
- (c) Objective bias may not be inferred from legal or other errors made within the decision-making process; it is necessary to show the existence of something external to that process;*
- (d) Objective bias may be established by showing that the decision-maker has made statements which, if applied to the case at issue, would effectively decide it or which show prejudice, hostility or dislike towards one party or his witnesses.*" (para. 551)

117. Having referred to a number of the earlier cases, including *Bula*, Fennelly J was at pains to describe the test as being "*strictly objective*" and that "*otherwise, it would be susceptible to variation dependent on the attitude of the individual party*" (para. 529). He observed that in considering an allegation of objective bias:-

"It is the hypothetical objective observer that matters. He or she is always deemed to be reasonable." (para. 529)

118. He referred to the *dictum* of Finlay C.J. in *O'Neill v. Beaumont Hospital Board* [1995] ILRM 419 that the “*hypothetical reasonable person*” is someone who is not “*either over-sensitive or careless of his own position*”. Fennelly J commented that Finlay C.J. in *O'Neill*, considered that in applying the test to the particular facts, a judge “*should take the interpretation more favourable [to the plaintiff] where there is ambiguity*”. However, he noted that the standard “*as consistently enunciated, is one of reasonable apprehension*” (para. 532).

119. *O'Callaghan* makes clear, therefore, that the reasonable fair-minded objective person is someone who is not “*unduly sensitive*” and who is in possession of “*all the relevant facts*”. It is the reasonable apprehension of that reasonable and fair-minded objective observer that is relevant. The reasonable apprehension must be that there is a “*risk that the decision-maker will not be fair and impartial*” (para. 551). In my view, these observations are of particular relevance in the present case.

120. To sustain a claim of objective bias on the part of Mr. Boland, the applicant must establish that a reasonable and fair-minded objective observer, who is not unduly sensitive, and who is in possession of all of the relevant facts, would reasonably apprehend that there is a risk that, by virtue of Mr. Boland’s work in 2004, the board would not approach the determination of Indaver’s 2016 planning application in a fair and impartial manner.

121. In *Kenny*, Fennelly J. returned to a consideration of the hypothetical reasonable person and what that person must be deemed to know. He stated:-

“The hypothetical reasonable person is an independent observer, who is not over-sensitive, and who has knowledge of the facts. He would know both those which tended in favour and against the possible apprehension of a risk of bias.” (para. 20)

122. Fennelly J. referred again to the view expressed by Finlay C.J. in *O'Neill* that, where the allegation was one of pre-judgment bias, the court should “*take the interpretation more*

favourable where there is ambiguity to the plaintiff than to the defendant". However, while not necessarily holding that such was a principle of general application, Fennelly J. found that it applied "*in a special way*" to that case where the Supreme Court was being asked to adjudicate on whether one of its own judgments was tainted by objective bias. He continued:-

"That fact obliges it, in order to ensure respect for the principle that justice must not only to be done but to be seen to be done, to act with great care and circumspection. It should err on the side of caution." (para. 21)

123. Fennelly J. summarised both the issue and the conclusion at para. 24 as follows:-

"The question is whether a reasonable observer might have a reasonable apprehension that a judge, hearing such allegations being made against the firm of architects in which his brother was a member, although that brother was not in any way directly involved in the subject-matter of the litigation, might find it difficult to maintain complete objectivity and impartiality. Could such an observer be concerned that the allegations were of a nature to cast doubt on the integrity of at least one member of the firm and that a judge should not adjudicate on such a dispute? Applying the most favourable interpretation to the facts from the plaintiff's point of view and bearing in mind that the Court should be especially careful where it is considering one of its own judgments, I believe that the test of objective bias should be held, in all the circumstances, to be satisfied." (para. 24)

124. While I believe that passage must be viewed (as all of these cases on objective bias must) by reference to the particular facts, and the facts of that case were very unusual and particularly sensitive, nonetheless, it does seem to me that most of the principles stated are of general application. It is, I believe, appropriate to ask whether a hypothetical independent reasonable observer (with all of the attributes of such a person) would have a reasonable apprehension that Mr. Boland "*might find it difficult to maintain complete objectivity and*

impartiality” in participating in the Board’s decision on Indaver’s 2016 planning application. While I also agree that there is scope for the court to follow the principle that it should apply the most favourable interpretation of the facts from the applicant’s point of view, it seems to me that that approach is only likely to arise where there is some ambiguity or doubt about the position. I do not understand Fennelly J. to have laid down a general principle that in all cases the court should apply an interpretation most favourable to the party alleging objective bias. As I read para. 21 of his judgment in *Kenny*, Fennelly J. was leaving that question open but did feel that on the facts of that case, the most favourable interpretation of the facts from the party alleging objective bias should be applied. He was not, however, saying that that is the approach that should apply in all cases.

125. I should note that the principles discussed in *Bula* and *O’Callaghan* were again considered and applied by the Supreme Court in *Goode Concrete v. CRH Plc* [2015] 3 IR 493. At para. 54 of her judgment, Denham C.J. said the following about the “*reasonable person*” test relating to the issue of bias:-

“The test to be applied when considering the issue of perceived bias is objective. It is whether a reasonable person, in all the circumstances of the case, would have a reasonable apprehension that there would not be a fair trial from an impartial judge. As it is an objective test, it does not invoke the apprehension of a judge, or any party; it invokes the reasonable apprehension of a reasonable person, who is in possession of all the relevant facts.” (para. 54)

126. The test as so described was considered and applied by the Court of Appeal in *Commissioner of An Garda Síochána v. Penfield Enterprises Ltd* [2016] IECA 141. Irvine J., who delivered the judgment of the Court of Appeal, stressed that it was “*very clear from the leading decisions... that each case must turn upon its own particular facts and circumstances*” and that, therefore, it was important to establish precisely what was said or

done by the decision maker whose decision was challenged on the grounds of objective bias (in that case the judge of a court below) and the circumstances in which that occurred (para. 41). Commenting on the attributes of the hypothetical objective reasonable person, Irvine J. stated that:-

“I am, of course, conscious of the fact that a judge faced with a recusal application does not treat the ‘reasonable person’ as somebody who is over-sensitive or over-scrupulous. The apprehension relied upon by the applicant must be reasonable and realistic rather than fanciful or vague...” (para. 66)

127. In addition to relying on all of the leading Irish authorities on objective bias, the parties also referred to and relied on several English and Scottish cases. As the legal principles on objective bias are well established in Irish law, I have not found it necessary to discuss these other cases in any great detail. There are, however, some helpful observations in a number of the cases.

128. In *Locabail (UK) Ltd v. Bayfield Properties Ltd* [2000] 1 All ER 65, the English Court of Appeal, when considering the circumstances on which a judge ought to recuse himself from hearing a case in light of prior adverse comments made in relation to a party or a witness, made the point that:-

“In most cases, we think, the answer, one way or the other, will be obvious. But if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal.” (at 78)

The court went on to make the following point, made in a number of the leading Irish cases discussed earlier:-

“We repeat: every application must be decided on the facts and circumstances of the individual case. The greater the passage of time between the event relied on as

showing a danger of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be.” (at 78)

129. In *Davidson v. Scottish Ministers* [2004] UKHL 34 (“*Davidson*”), the UK House of Lords, in the context of whether a Scottish judge should have recused himself from a panel of judges hearing a case where, while Lord Advocate in Scotland, the judge had piloted and promoted a piece of legislation in the House of Lords, stated that it was necessary to take a broad approach in considering the connection between the legislation in which the judge had previously been involved and the case before the court. Lord Bingham stated:-

“The fair-minded and informed observer who has considered the facts is not to be credited with mastery of the minutiae of drafting. Such an observer will pay attention to the wood, not the trees.” (para. 8)

130. Later, Lord Bingham stated:-

“The question is not, however, whether Lord Hardie’s statements were reasonable and proper but whether the fair-minded and informed observer, having considered them and the circumstances in which they were made, would conclude that there was a real possibility that he was biased in the sense that, having made these statements, he would be unable to bring an objective and undistorted judgment to bear on the issue raised [in the case]...” (para. 9)

131. Lord Bingham also stressed that it was very important that proper disclosure be made by a judge in a case where a previous activity or association might provide the basis for a reasonable apprehension of a lack of impartiality and that it was very important that proper disclosure be made in such cases to give the parties an opportunity to object and to show that the judge has nothing to hide and is conscious of the factors which might be apprehended to influence his or her judgment in the case (para. 19).

132. In his judgment, Lord Hope stated that while it might be possible to say that the issues which the judge had dealt with as Lord Advocate and the issues in the case were not the same, the *“fair-minded and informed observer is unlikely to conduct such a precise analysis”* and would *“prefer to look at the matter more broadly”* (para. 56).

133. The final English case which the party referred to and which I believe is worth mentioning is the decision of the English Court of Appeal in *R (Secretary of State for Communities and Local Government) v. Ortona Ltd* [2009] EWCA Civ 863 (*“Ortona”*) That was a planning case. One of the issues was whether the decision of an inspector who had dismissed an appeal by a developer from a refusal to grant planning permission for a development should be set aside under the applicable legislation on the grounds of apparent bias. The inspector had previously worked for the relevant local authority and had responsibility for planning policy, including transport planning, during the course of his employment. An objection was made on behalf of the developer to the inspector dealing with the appeal. That objection was unsuccessful. One of the grounds on which the inspector’s decision was challenged on appeal was apparent or objective bias by reason of the inspector’s prior employment and his involvement in matters relevant to the planning application at issue. In his judgment (with which the two other members of the court agreed), Sullivan L.J. made the obvious point that *“each ‘bias’ case must turn upon its own particular facts and the whole of the surrounding factual context must be considered”* (para. 33). He continued:-

“The inspector in the present case had worked for Norfolk County Council for very many years from 1975 to 2003. In my view that would not in itself have been sufficient to give rise to any real fear of apparent bias. Nor would the fact that the inspector had been involved at some unspecified level with structure plan policies generally, which would necessarily have included transport policies. What is of critical importance in the present case is the inspector’s responsibility within the county

council for transport planning, including the local transport plan, in which capacity he would have been responsible for the formulation of the transport policies in issue in the appeal, although of course I acknowledge that the policies were those of the county council rather than any individual planning officer. This responsibility for transport policy formulation was coupled with his responsibility for the practical application of those policies at local level as the officer responsible for development control matters relating to highways. This was not a planning officer who had been peripherally involved with the policies in issue in this appeal. He had been directly responsible for the formulation and implementation of those policies.” (para. 33)

134. Later in his judgment, Sullivan L.J. stated:-

“In these circumstances, the fair-minded observer would have concluded that there was a real possibility that this particular inspector, by reason of his particular professional experience within the county council, would, albeit unconsciously, attach undue weight to those policies. I would emphasise that, for my part, the decision in this case turns very much upon these particular facts...” (para. 35)

135. Sullivan L.J. continued:-

“The question is not a mechanistic one to be answered simply by asking: How many years ago did the inspector leave the authority? A number of factors may well be relevant. The seniority, for example, of the inspector within the authority. Was he the county planning officer? Was he a lowly planning assistant? How long was he involved with policy formulation? To what extent was he involved? Was it merely part and parcel of a much broader role within the authority concerned or was he directly responsible for that area of policy? These and other factors will all be relevant...”

(para. 36)

136. In his judgment, Patten L.J. made the following additional observation:-

“Cases on bias are necessarily highly fact-specific. Although a period of four years since leaving the employment of the county council might in some cases have been sufficient in itself to exclude any real possibility of bias on the part of the inspector from the mind of the fair minded and impartial observer, I agree that the close involvement of the inspector with the formulation and implementation of the county council's transport strategy puts this case into a special category.” (para. 40)

137. In his judgment, Mummery L.J., stressed that *“the context forms an important part of the material that has to be considered in deciding whether there is a real possibility of bias”* (para. 42) and that *“the context in this case is the most important part of the material that has to be considered in approaching the question of the real possibility of bias”*. All of the members of the Court of Appeal were agreed that the test for apparent or objective bias was satisfied in that case.

138. In the period since judgment was reserved in this case, the High Court (Allen J.) gave judgment in *Kemper*. One of the grounds of challenge to the decision of the Board in that case was that the decision was vitiated by objective bias. Two of the grounds on which objective bias was alleged are potentially relevant to this case. The first was that the Board member who led the process had, prior to his appointment, been the head of planning for a public limited company, a developer, which had an interest in the solution to the lack of capacity to deal with wastewater in the Greater Dublin area which was sought to be addressed by the development at issue, the Greater Dublin Drainage Project (the “GDD Project”). The other ground was that another Board member had, prior to his appointment to the Board, worked in the Department of Housing, Planning and Local Government which was responsible for the National Planning Framework from which ultimately provision for a new waste water treatment plant in North County Dublin which formed part of the relevant development arose.

139. Allen J. found that the applicant had failed to establish substantial grounds for challenging the Board's decision on the basis of those claims of alleged objective bias. He cited a number of the Irish authorities discussed earlier as well as the decision of the English Court of Appeal in *Ortona*. Allen J. stressed the necessarily highly fact specific enquiry which had to be undertaken when considering an allegation of objective bias.

140. As regards the first Board member the subject of the allegation, Allen J. could not see how that member's previous employment with a developer (which was not involved in the development at issue and whose land valuation would not be enhanced or diminished one way or another by the location of the development) could give rise to a reasonable apprehension of bias on the part of a reasonable observer. Allen J. agreed with the Board that "*the logic of such a proposition would disqualify anyone and everyone who might previously have worked for a developer, whether as an employee or as a construction professional*" (para. 81). He also rejected the claim that the member's involvement in the decision was a breach of para. 15.4 of the Board's code of conduct.

141. As regards the second member, Allen J. was satisfied that the member's employment in the Department and his role as Assistant Secretary in the Housing and Planning Division of the Department did not give rise to a reasonable apprehension of bias on his part. The Court looked at the precise role which the member had within the Department, his previous association with the GDD Project and the relevance of that to the particular development the subject of the impugned Board decision. Allen J. concluded that there was no "*rational or cogent link*" between the member's previous "*limited involvement as a civil servant*" with the GDD Project and the role which he had as a member of the Board in relation to the proposed development the subject of the application at issue.

142. Allen J. noted that the applicant had focused on the closeness in time of the previous professional associations of the two Board members concerned and their assignment as Board members to deal with the planning application at issue. In that regard, Allen J. observed:-

“Proximity in time may be a factor but it cannot be determinative. Each case is to be decided on its own facts. If there is no link between a previous engagement and the administrative decision, the proximity in time may count for little. If there is a substantial link, a long lapse of time may count for very little.” (para. 95)

143. Allen J. referred to *Ortona* and noted that the argument made in that case (and in the case before him) that *“planning is a small world and that it was inevitable that you come across people you have known before”* did not carry much, if any, weight. Having noted that the issue of objective bias is *“necessarily highly fact specific”*, Allen J. commented:-

“In the mix are the duration of the previous professional relationship, the time that has elapsed since it ended, the nature and extent of the previous relationship, the nature and extent of the previous work, and, most of all, I think, the connection between the previous work and the assignment under consideration.” (para. 92)

These observations are precisely what the Supreme Court in *Bula* said had to be examined when assessing an allegation of objective bias and I completely agree with them. They are all relevant issues to the objective bias case made by the applicant in these proceedings.

(d) Application of Principles to Facts of this Case: Decision on Ground 4

144. The principles and *dicta* discussed above are the principles which I must apply to the facts which I have set out in assessing the applicant’s claim of objective bias in respect of the impugned decision of the Board in this case.

145. The test I must apply is whether a reasonable objective observer, who is not unduly sensitive and who is possessed of all of the relevant facts, would reasonably apprehend that, by virtue of the work done by Mr. Boland for Indaver in 2004 while employed by RPS, there

was a risk that Mr. Boland, and, as a consequence, the Board, would not be fair and impartial in determining Indaver's 2016 planning application. The test is strictly objective and requires the court to consider the position from the perspective of the reasonable observer and not from the perspective of the applicant or from the perspective of Mr. Boland or Dr. Kelly or the Board itself.

146. As the cases make clear, the hypothetical reasonable objective observer is a person who is not unduly sensitive and would not come to a view on the risk of objective bias with the scars of past planning battles over an incinerator development at Ringaskiddy. He or she would, however, be aware of the fact that such battles did occur and would, for example, be aware of the fact that previous applications for permission for incinerator developments at Ringaskiddy were invariably the subject of significant opposition from, amongst others, organised local community groups. He or she would be aware of the fact that Mr. Boland was involved in a small team of people within RPS in working on the three sets of submissions furnished to Cork County Council and Cork City Council on behalf of Indaver in 2004 and would be aware of the contents of those submissions. He or she would be aware of the fact that the submissions were not made in the context of a planning application but in the context of a review of the waste management plans for Cork County and Cork City (in the case of the February and March 2004 submissions) and in the context of the published proposed waste management plan for Cork County (in the case of the May 2004 submission). He or she would be aware of the fact that Mr. Boland was an expert in the area of waste management and that he was appointed as a member of the Board by virtue of his expertise in that area and in accordance with the statutory provisions applicable to the appointment of members to An Bord Pleanála (as amended). He or she would be aware of the significance of Mr. Boland's appointment as deputy chairperson of the Board and of his reappointment to that position for a second term. He or she would be aware of the fact that, as presenting member, Mr. Boland

had an important role in presenting the application to the Board and had an involvement in procedural decisions taken in the course of the Board's consideration of the application. He or she would be aware of the relatively small pool from which waste management experts can be drawn for appointment to the Board and of the fact that such persons would generally have worked for or with one or more of the leading consultancies in the field, such as RPS, and would have dealt in the course of their employment with local authorities and the Board itself. He or she would have been aware of the fact that the Board had in place a code of conduct designed to address the risk of members involved in Board decisions having a potential conflict of interest or being in a position where the risk of a perception of bias might arise. Possessed of all of this information and of the quality of objectivity, the reasonable objective person would seek to make an objective assessment as to whether there was a reasonable apprehension that Indaver's 2016 planning application would not be dealt with in a fair or impartial manner.

147. Mr. Boland did, undoubtedly, have a past professional relationship with Indaver when he was involved in a small team within RPS and worked on the three sets of submissions made on behalf of Indaver in that capacity in 2004. I agree with the Board that the law is clear that a mere past professional relationship would not be sufficient of itself to give rise to a reasonable apprehension of bias on the part of a reasonable objective person. The two judgments of the Supreme Court in *Bula* make clear that there must be a "*cogent and rational link*" between the past professional association and its capacity to influence, or to be seen reasonably as being capable of influencing, the particular decision at issue. The existence of the previous professional association must be such as to give rise to a "*reasonable and realistic*" apprehension of bias on the part of a reasonable person. The Supreme Court in *Bula* made clear that, in the case of a judge, the fact that the judge, when in practice as a barrister, may have acted for or advised one of the parties in the case would not in and of itself provide

the required cogent and rational link and would not generally be sufficient to disqualify the judge from hearing a case involving one of those parties. Something more would be required. In my view, while *Bula* sets out the applicable legal principles to be applied, the application of those principles and the decision was very much influenced by the unique position of members of the independent bar, whose members are bound by the “cab rank” rule, as well as the judicial oath taken by judges on their appointment. In the case of counsel who become judges, the Supreme Court made clear in *Bula* that where the judge as counsel had acted for or advised a party on issues which were live in the case to be heard by the judge, or by a court of which the judge was a member, the judge would be precluded from hearing the case by reason of objective bias. That is why the Supreme Court looked so closely at the work done by the two judges concerned while at the bar for the two defendant parties. The Court was satisfied that the advice given and the advocacy provided by the two judges as counsel was not in relation to any of the issues which arose on the appeal considered by the court on which the two judges sat.

148. The factors which, in my view, played an important role in the application of the legal principles to the facts in *Bula* do not apply in this case. It is not suggested that anything similar to the “cab rank” rule applied to Mr. Boland’s profession as an engineer, planner or waste management professional. Nor was Mr. Boland required to take an oath or to make a declaration similar to that under Article 34.6 of the Constitution. Consequently, the bar for establishing reasonable apprehension of bias on the basis of a past professional association could not be higher in the case of someone in Mr. Boland’s position than it would be in the case of judges and it may well be somewhat lower by reason of those distinguishing factors.

149. In considering whether there is a “*cogent and rational*” link between the work done by Mr. Boland/RPS for Indaver in 2004 and Indaver’s 2016 planning application such as to give rise to a reasonable apprehension of bias, the following are relevant and must all be

considered. First, the work was done over the course of no more than five months in the first half of that year. Indaver's 2016 planning application was preceded by the pre-application planning procedure which commenced in 2012, the application itself was made in January, 2016 and was determined by the Board in May, 2018. Second, the 2004 submissions were not made for the purposes of any planning application made by Indaver for an incinerator development at Ringaskiddy but were made in response to a review of the waste management plans for Cork County and for Cork City (in the case of the February and March 2004 submissions) and in the context of the public consultation phase on a proposed waste management plan for Cork County (in the case of the May 2004 submission). Third, persons, such as Mr. Boland, are appointed to the Board by virtue of their professionalism and expertise, are drawn from a small pool of persons with such expertise, are subject to statutory provisions concerning their appointment and removal and to a code of conduct. Fourth, Mr. Boland's prior work for Indaver in 2004 was disclosed to Dr. Kelly, the Board's chairperson, who determined that there was no reason why Mr. Boland could not participate in the determination of Indaver's application where other Board members were excluded for various reasons.

150. The authorities make clear that the period of time between the past professional association alleged to give rise to objective bias, and the period of time over which the professional association lasted, are relevant factors but cannot be assessed in a mechanical or mechanistic manner. Much will depend on the nature and extent of the past professional association itself: See, for example, *Bula*, *Kemper* and *Ortona*. Where the past association is a substantial one and/or where the work done involves the same or very similar issues to those which fall to be considered by the decision maker in question, a large gap in time between the past association and the decision will be insufficient to dispel the risk of objective bias. In some cases, a decision maker could, by virtue of prior association, be

forever precluded from being involved in a decision. Whether that is so or not will depend on the precise nature and extent of the prior association and its link or connection to the issues arising in the decision. The relevant periods of time involved in the case of Mr. Boland are: eight years between the date of the 2004 submissions and the date on which Indaver commenced the pre-application process in 2012, eleven and a half years between the date of the 2004 submissions and the date on which the Board decided that the proposed development was SID, and between thirteen and fourteen years between the date of the 2004 submissions and the dates on which Mr. Boland actively participated in the Board's decision making process on Indaver's 2016 planning application (including in the decisions to seek further information from Indaver in March, 2017 and not to circulate Indaver's responses to the observers' responses to the further information provided by Indaver in October, 2017 as well as in the process which ultimately led to the Board's decisions in May, 2018). It might be said that there was a very substantial lapse of time between the date of the work done by Mr. Boland and the date on which he first became involved in Indaver's 2016 planning application. However, that is not determinative of the position. That lapse (or those lapses) in time must be considered in the context of the 2004 submissions themselves and the issues which arose on Indaver's 2016 planning application.

151. Both the Board and Indaver argued that there was no "*cogent or rational*" link between the 2004 submissions and the issues which arose on Indaver's 2006 planning application. They stressed that the 2004 submissions were directed to a review of the then waste management plan for Cork County and Cork City (the February and March 2004 submissions) and the proposed waste management plan for Cork County which was put out for consultation in March, 2004 (in the case of the May 2004 submissions). They noted that waste management policy at European, national and regional level had significantly changed since the 2004 submissions were made and that the current policy was reflected in the

inspector's report and in the Board Direction and Board Order. The Board and Indaver were undoubtedly correct in all of that.

152. The 2004 submissions did not form part of any planning application by Indaver for an incinerator development at Ringaskiddy. Planning permission had been granted for an incinerator development in January, 2004. However, the Board's decision to grant that permission was subject to challenge in judicial review proceedings and no development ever occurred on foot of it. Nonetheless, it is correct to say that the 2004 submissions were not made in the context of any planning application and were made in the context of reviews of the waste management plans for Cork County and Cork City.

153. It is also true to say that waste management policy at European, national and regional level had significantly moved on and evolved in the period since 2004 and was significantly different in terms of how incineration was viewed by the time Indaver came to make its application for permission in 2016. While there was much debate between the parties as to the extent to which waste management policy had changed during that period and whether the change was a radical one, I do not find it necessary to resolve that issue as it is undoubtedly the case that the policy had changed by the time the Board came to consider Indaver's 2016 planning application. By that stage, as appears from the inspector's main report, waste management policy was determined, at a European Union level, by the Waste Framework Directive (2008/98/EC), at national level, by various different published strategies and the National Hazardous Waste Management Plan, 2014-2020 and, at a regional level, by the Southern Region Waste Management Plan, 2015-2021, the Southwest Regional Planning Guidelines, 2010-2022 and, at a local level, by the Cork County Development Plan, 2014-2020. The Southern Region Waste Management Plan, 2015-2021 set out the policy framework for the prevention and management of waste within the Southern Region and replaced previous regional and county waste plans, including the Waste Management Plan

(2004) for Cork County (see the inspector's report, para. 4.1.3.1). However, the fact that waste management policy had changed in the period since the 2004 submissions, in a manner which was more favourable towards incineration, including incineration of hazardous waste, is only part of the picture.

154. More relevant, in my view, is the fact that in the February and March 2004 submissions, in which Mr. Boland was heavily involved either as author or as reviewer, not only did Indaver urge for the inclusion of incineration as an acceptable and necessary option for the treatment of residual non-hazardous waste and as a preferred method over landfill, but in doing so it expressly relied on the planning permission granted by the Board in 2004 for the then version of the incinerator at Ringaskiddy. Those submissions extolled the virtues of the Ringaskiddy facility (in passages which I have quoted earlier in this judgment) as well as the track record of Indaver as a waste management company, making specific reference to its ongoing projects in Ireland as well as future projects. Particularly significant, in my view, is s. 4.2 of the February and March 2004 submissions which described and then discussed the benefits of the Ringaskiddy facility (comprising the incinerator development for which permission had just been granted by the Board) to MSU (municipal solid waste) management in the Cork region.

155. I have referred earlier to the relevant passages in s. 4.2 but would stress again the reference to the location of Ringaskiddy being a "*suitable location*" for a regional waste facility and that it would be "*further enhanced*" by the construction of the Ringaskiddy bypass. The submissions itemised the potential benefits of the Ringaskiddy facility, including its compliance with waste hierarchy principles, with the then Cork Waste Management Plan and the competitiveness of the disposal of non-hazardous residual waste by incineration at the Ringaskiddy facility. Site suitability was a very significant issue in the three planning applications made by Indaver for an incinerator development at Ringaskiddy and the issue

featured prominently in the inspector's report on Indaver's 2016 planning application and in the Board's decision on the application, as evidenced by the Board Direction and the Board Order.

156. While the observations in the submissions concerning the suitability of Ringaskiddy for an incinerator development were not made in the context of a planning application, RPS was lending its support and its name to a submission on behalf of Indaver which argued for and endorsed the suitability of the Ringaskiddy location for an incinerator development. By virtue of his significant involvement in the preparation of those submissions, Mr. Boland was doing likewise and would, in my view, be associated in the mind of a reasonable objective observer with the support and endorsement of the suitability of the location for an incinerator set out in the February and March 2004 submissions. Whether the submissions could be described as "*determined advocacy*" for an incinerator development at Ringaskiddy or not, they certainly amounted to advocacy and support for changes to the waste management policies for Cork County and Cork City and did so by expressly extolling the benefits of the incinerator development in Ringaskiddy for which Indaver had obtained planning permission.

157. The May 2004 submission, while omitting direct reference to the Ringaskiddy incinerator development in arguing for a change to the proposed waste management plan for Cork County and a move to thermal treatment, or incineration capacity, as a more sustainable alternative to landfill, did make reference in general terms to the benefits of the Ringaskiddy facility which had been identified in the two earlier submissions, such as the availability of private capital for incinerator development. By reason of the omission of the express references to the Ringaskiddy development and its benefits, the May 2004 submission on its own might not be sufficient to provide the required "*cogent and rational*" link between Mr. Boland's prior association with Indaver and the Board's determination of Indaver's 2016 planning application. However, read with the two earlier submissions, I am satisfied that the

requisite link has been established to satisfy the test for objective bias and that a reasonable apprehension of bias in the circumstances would be “*reasonable and realistic*”.

158. In my view, a reasonable objective observer would be aware of the fact that Mr. Boland was involved in the preparation of the 2004 submissions for Indaver. He or she would be aware of the fact that in those submissions the local authorities were urged to adopt a waste management plan which was more favourable to incineration and that, in support of that argument, reliance was placed on the benefits and potential benefits of Ringaskiddy and the development for which Indaver had obtained permission in 2004. While those submissions were not made in the context of a planning application and, in particular, were not made in the context of a planning application for the precise development the subject of Indaver’s 2016 planning application, I do not believe that a reasonable objective observer would concern himself or herself with the minutiae or detail of the submissions and the difference between the issues dealt with in the submissions and in the 2016 planning application. The reasonable observer possessing all of the required attributes would look at the position in a more broad sense and would pay attention to the “*wood, not the trees*” (per Lord Bingham in *Davidson*). The reasonable objective observer would, in my view, reasonably be concerned at the fact that Mr. Boland was involved in submissions for Indaver in 2004 which relied on the permission granted to Indaver for an incinerator at Ringaskiddy in 2004 and on the benefits and potential benefits of the development to be carried out from that location, in circumstances where, between eleven and fourteen years later, Mr. Boland was involved in the Board’s determination of an application by Indaver for planning permission for a further version of an incinerator development at the very same site in Ringaskiddy.

159. Notwithstanding that the planning application was quite different to the submissions made in 2004, the nature and extent of Mr. Boland’s involvement with Indaver and the

content of the 2004 submissions made on its behalf would, in my view, cause a reasonable objective observer, possessing all of the required attributes for such a person, to have a reasonable apprehension that Mr. Boland would unconsciously be unable to consider Indaver's 2016 planning application in an impartial manner. What is critical, in my view, is the fact that the application was made by the same party, Indaver (the difference between the Irish Company and the Belgian Company not, in my view, being relevant to this ground of challenge), as the party on whose behalf the submissions were made in 2004 and that those submissions described the benefits and potential benefits of an incinerator development at the very same site in Ringaskiddy as was the subject of the subsequent planning application.

While it may have been necessary for the Supreme Court in *Bula* carefully to examine the work done by the two judges while in practice at the bar in order to determine whether the issues they advised on were the same issues as those which were live in the appeal before the Supreme Court, I do not believe that the Supreme Court was saying that in all cases it would be necessary to establish that the issues addressed in the prior association were precisely the same issues as would have to be addressed in the decision, subsequently challenged on the grounds of objective bias. It was important in *Bula* to establish that the issues were the same, having regard to the particular features of the independent bar and the existence of the judicial oath discussed in the two judgments in that case. The fact that the issues addressed in the 2004 submissions were not the same as the issues which arose in Indaver's 2016 planning application does not, in my view, mean that a reasonable objective observer would not have a reasonable apprehension of bias in light of the significant other connecting factors or links between Mr. Boland's prior professional association and Indaver's 2016 planning application. In my view, the links are significantly closer on the facts of this case than they were in *Bula*.

160. In reaching that conclusion, I accept the submission of the applicant that there is no clear demarcation between issues of waste management policy and waste management issues

which may arise in a planning application and which did arise in Indaver's 2016 planning application. Issues concerning the applicable waste management policies were considered in the course of the pre-application procedure which preceded Indaver's 2016 planning application. Waste management policy issues arose for consideration during the course of the oral hearing, having been raised by Indaver and addressed by observers in the course of the hearing. Waste management policy issues were addressed in the EIS (volume 2, chapter 2) and formed an important part of the assessment of the environmental effects of the development which were considered by the inspector and by the Board as part of the EIA carried out in respect of the proposed development. As noted earlier, the inspector's report contained a section on waste policy at EU, national, regional and local levels. The Board's decision expressly referred to the applicable waste policy at European, national, regional and local levels in the "*reasons and considerations*" set out in the Board Direction and in the Board Order. I agree with the applicant that there is no bright line or clear demarcation between waste management policies and planning in general and in the EIA, in particular, which the Board was required to carry out in respect of the proposed development.

161. The Board argued that the 2004 submissions could just as easily have been made by Indaver itself rather than in the joint names of Indaver and RPS and that they were not expert reports containing expert testimony by RPS. That may well be so, but I cannot see how that assists the Board or Indaver. On the contrary, it might well be said that the fact that Mr. Boland was as involved as he was in the preparation of submissions which did not contain expert views or opinions but rather purely reflected the views of the client (Indaver) would, in the eyes of the reasonable objective person, have associated Mr. Boland even more closely with Indaver than might have been the case if the output of the work done was an expert report or reports reflecting the expert views of Mr. Boland and his colleagues in RPS and not merely the views of the client.

162. Among the other factors relied upon by the Board to refute the applicant's contention that a reasonable observer would reasonably apprehend that Mr. Boland might not approach the determination of Indaver's 2016 planning application in an impartial manner were that members of the Board (including Mr. Boland) are appointed by virtue of their particular expertise in an area relevant to the functions and areas of responsibility of the Board, that those persons are drawn from a small pool of available experts having regard to the size of the State and the nature of the expertise involved, that there are detailed statutory provisions governing their appointment and duties as Board members and that they are subject to a code of conduct which is intended to avoid or at least reduce the risk of conflicts of interest and the risk of objective bias arising.

163. The Board was right to raise these features and they are quite correct in what they say. There is no doubt that Mr. Boland was eminently qualified for appointment and re-appointment as a Board member and for appointment as deputy chairperson of the Board. There is no doubt that the evidence before the court discloses that he was extremely professional in the way in which he performed his duties as a member and as deputy chairperson of the Board. I also accept that because of the size of the State and the limited number of experts in relevant fields, such as waste management, it is highly likely that persons appointed will have had professional associations in the past with developers, local authorities and other persons or bodies who they would be likely to encounter in the exercise of their functions as members of the Board. However, that does not obviate the requirement to assess, by reference to the required objective standard, whether the involvement of a Board member in a particular decision might, by virtue of the prior professional association of that member with a party interested in a planning application, such as the applicant for that permission, give rise to a reasonable apprehension of bias on the part of a reasonable objective observer. Nor does it remove the requirement to assess whether such a case might

be made in the context of a particular planning application. That is why it was agreed between the then chairperson of the Board and Mr. Boland that, following his appointment to the Board in 2007, Mr. Boland would not be involved in any application in the waste management area for a period of two years from his appointment. It is also why specific consideration was given to whether Mr. Boland could be involved in the Board's consideration of Indaver's two applications to amend and extend their planning permissions in respect of the facility at Duleek. It was decided that Mr. Boland could participate in those decisions. From the record of the decisions in 2012 and 2014 that he could participate, it can be seen that it was considered relevant that, while Mr. Boland had done work for Indaver in 2004, he had not had "*any involvement in any form in the Indaver facility at Duleek*" (minutes of Board meetings of 12th December, 2012 and 31st July, 2014). The same, however, cannot be said about Mr. Boland's involvement insofar as the Ringaskiddy facility is concerned. The February and March 2004 submissions expressly dealt with the incinerator development for which Indaver had obtained permission in January, 2004. While the incinerator development the subject of Indaver's 2016 planning application was different to that for which it had obtained permission in 2004, it could not be said that Mr. Boland had not had "*any involvement in any form in the Indaver facility*" at Ringaskiddy.

164. In my view, the fact that members of the Board with expertise in a particular area, such as waste management, may be drawn from a small pool of persons and that those persons would, in all likelihood, have had some involvement with developers, local authorities and other entities or persons is an inevitable fact of life but does not, in my view, remove or even dilute the requirement to take all reasonable steps to avoid the risk of a reasonable apprehension of bias arising on the part of a reasonable objective observer. I note that the "*small world*" argument made little impression on Allen J. in *Kemper* (or on the

English Court of Appeal in *Ortona*). It has not made much impression on me either on the particular facts of this case.

165. I observe here that I have reached a different conclusion on the issue of objective bias to that reached by Allen J. in *Kemper* by reason of the highly fact specific exercise in which the court has been required to engage. The facts of *Kemper* clearly fell on one side of the line and the facts of this case have, in my judgement, clearly fallen on the other side of the line.

166. I must also address the submissions made by the parties concerning the Code. The Board is required by s. 150 of the 2000 Act to adopt a code of conduct “*for dealing with conflicts of interest and promoting public confidence in the integrity of the conduct of its business which must be followed by...*” members and employees of the Board as well as by certain other persons (s. 150(1)(a)). The relevant code of conduct for present purposes is the Code adopted by the Board on 8th June, 2011 which was in force when the Board determined Indaver’s 2016 planning application. I set out earlier the relevant provisions of the Code. The adoption of a code to address potential conflicts of interest and to set out other circumstances in which it would not be appropriate for a member to participate in any decision-making process does not, of course, insulate the Board from a claim that a decision made by the Board should be set aside on the grounds of objective bias. It is, however, relevant that the Board does have such a code, as it is required to have under the 2000 Act. While the applicant sought to argue (in reply) that the participation by Mr. Boland in the decision-making process in respect of Indaver’s 2016 planning application amounted to a breach of clause 15.2 of the code, I do not agree. As noted earlier, the applicant did not plead a breach of the Code in its amended statement of grounds. However, if such a claim were pleaded, I would reject it.

167. Clause 15.2. precludes a member from dealing with a case where the member previously had “*any involvement at any time in the matter*” being considered by the Board.

Mr. Boland had not had any involvement “*in the matter*” prior to the Board’s 2016 planning application. The “*matter*” which the Board had to decide on Indaver’s 2016 planning application was not the same “*matter*” in which Mr. Boland had been involved in 2004. The 2004 submissions on waste management policy were not directed to the same “*matter*” as Indaver’s 2016 planning application. In my view, therefore, there was no breach of clause 15.2 of the Code.

168. That does not, however, mean that Mr. Boland’s prior association with Indaver in 2004 could not give rise to a reasonable apprehension of bias on the part of a reasonable objective observer by virtue of Mr. Boland’s subsequent participation in the Board’s consideration of Indaver’s 2016 planning application. I have concluded that a reasonable apprehension of bias does arise in the particular circumstances of this case. However, that reasonable apprehension of bias does not arise by virtue of any breach of clause 15.2 of the Code. Nor, in my view, was there any breach of clause 15.4 which precludes a member from knowingly dealing with a file relating to a planning authority or a private practice where the member was previously employed in the previous two years. The most relevant, and potentially applicable, provision of the Code is clause 15.7. Under that provision, a board member is precluded from participating in the decision-making process in a case where the member considers that his or her involvement “*could give rise to an appearance of objective bias*” in that “*such involvement could give rise to a reasonable apprehension that the decision maker or the process leading to the decision might have been biased or that a reasonable observer would apprehend that there had not been an impartial decision-making process*”. In the case of doubt on that issue, the member is required to seek a ruling from the chairperson. I do not believe that Mr. Boland was in breach of clause 15.7 of the Code. I accept that he did not consider that his involvement could give rise to a reasonable apprehension of bias on the part of a reasonable observer. Clause 15.7 is concerned with the

subjective consideration by the member. However, the fact that the member does not consider that his or her involvement could give rise to a reasonable apprehension of bias is not relevant to the court's assessment as to whether as a matter of law there is a reasonable apprehension of bias on the part of a reasonable objective observer. Clause 15.7 is directed to the Board member's subjective consideration, whereas the law on objective bias regards that subjective consideration as irrelevant and requires the court to assess the position in a strictly objective manner. Finally, in the context of clause 15.7. I am satisfied on the evidence that the chairperson did consider whether Mr. Boland could be involved in the Board's consideration of Indaver's 2016 planning application and decided that he could. The chairperson's consideration of the issue would be very relevant as to whether there was a breach of clause 15.7 of the Code (and I do not believe that there was), but it has no relevance to the objective test which the court has to apply as a matter of law.

169. I must also address the complaint made by the applicant in relation to the non-disclosure to it (and other interested parties) of Mr. Boland's previous work for Indaver in 2004. In my findings of fact earlier in this judgment, I accepted that in 2012 and 2014, Mr. Boland disclosed to the chairperson that while employed by RPS, he had prepared "a report" (in fact, they were submissions and not a report or reports) on behalf of Indaver to Cork County Council in the context of a review of the waste management plan for Cork County (as well as two other pieces of work in which he was involved which were not for Indaver). I accepted that Mr. Boland disclosed what he recalled, but that his recollection was not complete and the chairperson decided on Mr. Boland's involvement in respect of the two Duleek amendment applications without full knowledge of the extent of the work done by Mr. Boland on the 2004 submissions for Indaver. I also accepted that while there were no equivalent minutes in the context of Mr. Boland's involvement in the Board's consideration of Indaver's 2016 planning application to the minutes which existed in respect of his

involvement in considering the Duleek amendment applications, the chairperson continued to be aware of what she had been informed in connection with Duleek and decided that Mr. Boland could participate in the Board's decision-making process with respect to Indaver's application in 2016. While the applicant was aware of Mr. Boland's appointment to the Board in 2007 (and it seems made some critical comments about his appointment at the time) and of the fact that Mr. Boland had been involved in the Board's decision in December, 2015 that the proposed development was SID, it was not aware of the fact of the work done by Mr. Boland for Indaver in the 2004 submissions, still less the detail of that work. Nor was the applicant aware that Mr. Boland would be, and ultimately was, involved in the Board's consideration and determination of Indaver's 2016 planning application. The Board submitted that it does not disclose the identity of Board members who are to be involved in considering particular planning applications or appeals as otherwise there would be objections to the involvement of certain Board members and there would be a risk that interested parties would seek to dictate the composition of the Board in any particular case. The approach taken by the Board is that possible conflicts or the risk of objective bias are to be dealt with by the Board members and ultimately by the chairperson.

170. I can understand why this approach is taken, notwithstanding that there are merits to disclosing at the outset of a decision-making process any potential issue concerning the involvement of a member of the decision-making body so that any reasonable objection can be considered at the earliest possible stage. The merit of disclosure in such circumstances was commented upon by Lord Bingham and by Lord Hope in *Davidson*. However, there may well be good reasons why it is not done by the Board. There is, however, a risk that if disclosure of possible issues is not made at an early stage, allegations of objective bias may be upheld at a much later stage after the decision is taken. That unfortunately is what has happened here. I should make clear, in the context of the arguments advanced by the applicant on disclosure,

that I do not accept the applicant's claim that the Board was in breach of its duty of candour. I accept that shortcomings or lack of detail in certain respects in Mr. Boland's first replying affidavit on behalf of the Board were addressed and explained in his second affidavit. It is unnecessary, in my judgment, to consider the allegation of lack of candour in any detail here as, while the allegation was made, it was quite rightly not strenuously pressed by the applicant at the hearing. I am satisfied that Mr. Boland fully and properly explained his position in the two affidavits which he swore on behalf of the Board and that there is no basis for a finding of a lack of candour on his part or otherwise on the part of the Board.

171. As part of its case on objective bias, the applicant pointed to alleged discrepancies in the way in which the chairperson considered and excluded certain other members from participation in the Board's consideration and determination of Indaver's 2016 planning application in early 2017 and again in May, 2018. I am satisfied that the Board put sufficient information before the court to explain why the chairperson concluded that the particular members concerned ought not be involved in the determination of the application because of the risk of an allegation of objective bias. As each case of objective bias is fact specific, it is not particularly useful to compare the reasons given for excluding certain members and for not excluding others. The fact that the chairperson did exclude certain members, but not Mr. Boland, is not in itself a reason for calling into question Mr. Boland's involvement. However, I have concluded that he ought not to have been involved for the various other reasons outlined above.

172. I should finally make clear that the Board did not make the case that Mr. Boland's involvement in the Board's consideration and determination of Indaver's 2016 planning application was required as a matter of necessity in order to ensure a quorum or anything like that. The doctrine of necessity does not, therefore, fall for consideration in this case. That is not to say that the Board did not face considerable practical and administrative difficulties

when assembling Board members who were available to consider Indaver's application in May, 2018, having regard to the expiry of the terms of office of two of the members involved at an earlier stage in the Board's consideration of the application and the appointment of a number of new members. The chairperson, Dr. Kelly, and the deputy chairperson, Mr. Boland, were the only two members of the Board with familiarity with the file by May, 2018. Appropriately, however, the Board did not make the case that Mr. Boland's involvement was justified on the grounds of necessity.

173. Nor did the Board or Indaver make the case that the applicant waived any entitlement to object to Mr. Boland's involvement, although that point was dangled before the court by Ms. Keaney in her first affidavit on behalf of Indaver (at para. 24). I am quite satisfied that there would be no basis for a finding that the applicant waived any objection to Mr. Boland being involved in the decision. The applicant was unaware of the work done by Mr. Boland for Indaver in 2004 and, in fact, only became aware of the extent of that work after these proceedings were commenced and when copies of the February and March 2004 submissions were exhibited by Ms. Keaney to her first affidavit and when Mr. Boland's second affidavit was obtained.

174. Finally, I have not found it necessary to consider the arguments advanced by the applicant on the basis of Article 6 of the European Convention on Human Rights (ECHR) and the judgment of the European Court of Human Rights in *Findlay v. UK* (1997) 24 EHRR 221, as it was accepted by the applicant that the legal principles on objective bias are fully dealt with in Irish law and that the EHCR jurisprudence on which the applicant intended to rely was to the same substantive effect as the Irish cases. I have not found it necessary, therefore, to consider the ECHR case law on this issue.

175. In conclusion, therefore, for the various reasons set out in this section of my judgment, I am satisfied that the applicant has established that a reasonable objective

observer would have a reasonable apprehension that the Board might not be capable of considering and determining Indaver's 2016 planning application in an unbiased and impartial manner, by virtue of the prior professional association of Mr. Boland in the preparation of the 2004 submissions for Indaver. The ultimate touchstone is that justice must not only be done but must manifestly be seen to be done. It is essential that public confidence in the integrity of the Board's procedures is maintained. A refusal to grant relief to the applicant on this ground would, in my view, undermine that critical public confidence. The applicant must, therefore, succeed on this ground.

13. Other Grounds of Challenge

176. As I have found that the applicant is entitled to succeed on one of its grounds of challenge, namely, ground 4 on objective bias, it may be strictly unnecessary for me to deal with the other nine outstanding grounds of challenge (some of which can be grouped together). However, for completeness, I propose to deal now with those other grounds of challenge.

14. Ground 1: Prospective Applicant/Applicant: Jurisdiction Issue

(a) Brief Summary of Parties' Positions

(1) Applicant

177. The applicant maintained that the Board did not have jurisdiction to determine Indaver's 2016 planning application on the basis that the Belgian Company was the "*prospective applicant*" which participated in the pre-application consultation process with the Board and was the entity to which the Board's notice under s. 37B(4) of the 2000 Act was addressed, whereas the planning application was made to the Board by the Irish Company. The applicant contended that, properly construed, the SID provisions of the 2000 Act require that the applicant for permission under s. 37E must be the same entity as the "*prospective applicant*" under ss. 37A, 37B, 37C and 37D. The applicant pointed out that Indaver

informed the Board prior to the oral hearing that the application had been submitted in the name of the Irish Company due to a “*clerical error*” and that it ought to have been submitted in the name of Indaver Ireland, the Irish branch of the Belgian Company. Indaver was told by the Board to raise the issue at the oral hearing. It did so.

178. The applicant raised the issue in its opening submissions at the oral hearing and in its closing submissions and specifically adverted to the discrepancy between the Indaver entity which was the “*prospective applicant*” and the Indaver entity which made the planning application. The applicant contended that the issue was not addressed by the inspector or by the Board. It contended that the Board had no jurisdiction to consider and determine Indaver’s 2016 planning application on the basis that the application was submitted by the Irish Company and not by the Belgian Company as it maintained was required under the 2000 Act. In the alternative, the applicant contended that the Board failed to consider the issue at all and that its failure to do so amounted to a jurisdictional error.

(2) *The Board*

179. The Board’s case was that s. 37E does not require an application for permission for a development which is SID to be made by the same entity which had been the “*prospective applicant*” and which had engaged in the pre-application consultation procedure with the Board. The Board contended that there is no express statutory requirement that the applicant for permission be the same as the “*prospective applicant*” and that such a requirement should not be implied into the section. It argued that there was no requirement to read the relevant SID provisions in the 2000 Act together so as to imply such a requirement into s. 37E. The Board maintained that the key issue in terms of whether an application can be made for permission under the SID provisions of the 2000 Act is the nature of the development. It is the development which must satisfy the statutory requirements in order for a notice to be

issued by the Board under s. 37B(4). The identity of the entity making the application for permission is not a key factor.

180. The Board argued that neither the objective nor the purpose of the procedure set out in the SID provisions of the 2000 Act requires that the entity which applies for permission under s. 37E be the same entity which engaged in the pre-application consultation process with the Board.

181. In support of its contention that the identity of the applicant for the permission is not a key factor, the Board relied on s. 39 of the 2000 Act which provides that a planning permission enures for the benefit of the lands to which it relates and travels with the lands and not with the entity to which the permission was granted. The Board sought to contrast the SID provisions of the 2000 Act with the provisions of the Waste Management Act, 1996 (as amended), in which the identity of the licensee to which a waste licence is granted is a relevant factor to be considered by the EPA and the EPA's consent must be sought for any transfer of a waste licence.

182. It was contended, therefore, that the Board did have jurisdiction to determine Indaver's 2016 planning application and that no jurisdictional issue arose by reason of the fact that the applicant was a different entity to that which had engaged in the pre-application consultation process. It was further argued that merely because the issue was raised in advance of and at the hearing did not mean that the Board had to determine the issue.

(3) Indaver

183. Indaver supported the Board's submissions on this issue. It too stressed the absence of any express requirement in s. 37E that the applicant for the permission had to be the same entity as the "*prospective applicant*". Nor, it said, was it necessary for such a requirement to be implied in the Act, whether by reference to the other SID provisions in the 2000 Act or by

reference to the long title of the Planning and Development (Strategic Infrastructure) Act, 2006 (the “2006 Act”) which inserted those provisions into the 2000 Act.

184. Indaver also submitted that the Board’s jurisdiction to consider and determine a planning application for a SID is referable to the development itself and not to the person on whom the notice under s. 37B(4) is served. It observed that the Oireachtas could easily have included an express requirement that the applicant for permission had to be the same entity as the “*prospective applicant*”, but had not done so and that there was no reason why such a requirement should be implied where that might create an additional burden or obstacle to development which would run counter to the objective of the SID provisions.

185. Indaver also submitted that the interpretation which it and the Board were urging on the court was consistent with the principle in s. 39 of the 2000 Act.

186. It argued, therefore, that there was no jurisdictional bar to the Board considering and determining Indaver’s 2016 planning application. Indaver further maintained that by determining the application, the Board had, in effect, found that it had jurisdiction, that it was correct to so decide and that, since no issue as to jurisdiction arose, the alternative complaint advanced by the applicant that the Board had failed to consider the issue of jurisdiction fell away.

(b) Facts relevant to this Ground

187. The facts relevant to this ground are not in dispute and can be briefly stated. Indaver Ireland, the Irish branch of the Belgian Company, applied to the Board on 30th August, 2012 to engage in consultations with the Board in relation to the proposed incinerator development at Ringaskiddy. The Irish branch of the Belgian Company engaged in those consultations with the Board. The Board’s notice under s. 37B(4)(a) of the 2000 Act dated 23rd December, 2015 that the proposed development would be SID was addressed to and served on Indaver Ireland, the Irish branch of the Belgian Company.

188. The planning application made under s. 37E of the 2000 Act on foot of the Board's notice under s. 37B(4)(a) was submitted on 13th January, 2016 by the Irish Company. The applicant was described in the application form as the Irish Company although, confusingly, the company registration number given in the application form was that of the Irish branch of the Belgian Company.

189. The public notices required under s. 37E were issued in the name of Indaver Ireland, the Irish branch of the Belgian Company.

190. On 3rd February, 2016, Indaver Ireland, the Irish branch of the Belgian Company, wrote to the Board stating that the application form contained a "*clerical error*" in referring to the name of the applicant company as the Irish Company instead of "*Indaver Ireland*", the Irish branch of the Belgian Company. That letter appears to have been written following a discussion with the Board. It concluded by stating:-

"As discussed, this letter is sufficient to confirm that the clerical error, which does not prejudice any third parties, has been both acknowledged and corrected. We await instruction from the Board with regard to uploading this information to the standalone planning website."

The letter then apologised for the "*clerical error*". The Board wrote back in a letter addressed to the Irish Company dated 19th February, 2016 stating that the Board had noted the letter concerning the "*clerical error*" and that "*the issue should be addressed by Indaver Ireland, with any other errata, at the commencement of the oral hearing*".

191. Prior to the oral hearing, the applicant's solicitors, Noonan Linehan Carroll Coffey, wrote to the Board on 8th March, 2016. They queried the identity of the Indaver company which had applied for permission in respect of the proposed development and noted various discrepancies in the application form concerning the name, company registration number and directors of the company named in the form. Those issues were raised by the applicant's

solicitors in the context of the ownership of the lands on which the proposed development was to take place. That letter did not make the jurisdictional point now made in ground 1 of the applicant's grounds of challenge.

192. At the outset of the oral hearing on 19th April, 2016, certain additional documentation was handed out by Indaver including the letters of 3rd February, 2016 and 19th February, 2016. A written opening statement was provided by counsel for Indaver Ireland. In that statement it was noted that *“as appears from the public notice, the applicant for permission is Indaver Ireland which the owner of the lands”*. It was explained that Indaver Ireland is a registered business name of the Belgian Company registered in Ireland on the external register and the various registration details were provided. The statement then said:-

“Unfortunately, the name of the company on the application form was given as Indaver Ireland Limited. Though there is such a company, and it is wholly owned by Indaver NV Plc, by way of clarification, it is Indaver Ireland which should be regarded as the applicant for permission.”

The submission went on to dispute the contention which had been made by the applicant (in its solicitors' letter) that the application was invalid by reason of the incorrect details contained in the application form. It was noted that Indaver had written to the Board when the error came to light and had been asked to clarify the position at the oral hearing. Counsel stated that, in the circumstances, there could be no question of anyone being misled.

193. Mr. Noonan, the applicant's solicitor, made a written opening submission on behalf of the applicant on 21st April, 2016. He referred again to the discrepancies in the application form concerning the identity of the Indaver entity which was seeking the permission and reiterated the point which had been made in the letter of 8th March, 2016 that the application on its face was invalid and should be rejected. Mr. Noonan then commented on Indaver's counsel's opening statement and on his reference to the fact that the applicant for the

permission was “*Indaver Ireland which the owner of the lands*” and that that was the business name of the Belgian Company. Mr. Noonan contended that Indaver Ireland was not a legal person and could not, therefore, make an application for permission under s. 37E of the 2000 Act. He contended, therefore, that there was no valid planning application before the Board and the Board had no jurisdiction to continue with any consideration of the application. He then made a point about the ownership of the lands and said that Indaver Ireland was not a legal person and had no legal capacity to own land.

194. The issue was also addressed in closing submissions at the oral hearing. In his closing statement on behalf of Indaver Ireland, counsel said:-

“One or two legal issues have arisen in the course of the hearing which have already been addressed, in particular the issue regarding the identity of the applicant. I won’t repeat what has been said before here. I will say, however, that the evidence having been heard and with the Board now in a position to examine, analyse and evaluate the application, it is difficult to see how it is [in] anyone’s interest to argue that all that has gone to date should be set at nought on the basis of a wholly technical argument. Surely, it is in everyone’s interest that this application is now assessed and determined on its merits by you inspector and the Board.”

195. Mr. Noonan made a closing statement to the oral hearing on behalf of the applicant. He dealt with the issue concerning the identity of the applicant for the permission. In that statement, he reiterated the point that a business name could not be an applicant for permission and that it would have to be the company itself. He also made, for the first time, the point that under the SID provisions in the 2000 Act the applicant for the permission had to be the same entity as the “*prospective applicant*” who had engaged in the pre-application procedure with the Board and that this went to the jurisdiction of the Board to consider the application.

196. The inspector did not address the issue of jurisdiction arising from the fact that the application had been submitted in the name of the Irish Company, that that was a “*clerical error*” and that the intended applicant was the Belgian Company, through its Irish branch. The inspector did refer to an issue concerning the identity of the Indaver company in s. 9.11.2 of his report (paras. 9.11.2.1 to 9.11.2.3). He did so in the context of an issue which had arisen concerning the ownership of the lands on which the proposed development was to take place. He observed:-

“The points raised largely revolved around matters relating to the ownership of the site; issues relating to registered business name as distinct from the applicant’s name; clarifications in relation to who is the applicant Indaver Ireland/Indaver Ireland Limited as Indaver Ireland Limited was referred to in the initial documentation to the Board in addition to Indaver Ireland...”

He also noted that the ownership of the relevant Indaver company of the lands had been questioned. However, he did make the point that the issue of the identity of the Indaver entity which was applying for permission was also relevant to the validity of the application (although he did not specifically mention the SID provisions in the 2000 Act) and the question of enforcement, in the event that permission was granted. The inspector referred to counsel’s submission on behalf of Indaver Ireland to the effect that the identity of the Indaver company seeking the permission had been clarified in advance of the hearing and that the lands in question were registered by the Land Registry in the name of Indaver Ireland.

197. In his comment and conclusion on this issue (at para. 9.11.2.3, pp. 108-109), the inspector rejected any suggestion that the Indaver entity seeking the permission did not have sufficient legal interest to make the application and consent from the owner of the lands to do so. As regards enforcement, the inspector expressed the view that enforcement would take place against the entity which operated the facility permitted by the development. The

inspector also referred to s. 39 of the 2000 Act. It should be said, however, that the inspector did not expressly, at least, address the issue raised in Mr. Noonan's closing submission concerning the jurisdictional issue which the applicant had contended arose from the fact that the Indaver entity which had applied for the permission, the Irish Company, was different to the Indaver entity which had engaged in the pre-application consultations with the Board and that this meant that the Board did not have jurisdiction to deal with the application. Although, it could be argued that the words used by the inspector were wide enough to encompass this point.

198. The Board did not expressly address this issue in the Board Direction or in the Board Order. It did, however, record under the "*Reasons and Considerations*" heading that it had considered the written submissions made in respect of the planning application, the submissions made at the oral hearing and the reports and recommendations of the inspector. The Board proceeded to determine the application and to grant permission for the proposed development to the Irish Company which was the Indaver entity which had submitted the application, implicitly, at least, accepting that it had jurisdiction to do so.

199. The factual position, therefore, is that the pre-application consultations were held between the Board and Irish branch of the Belgian Company. The s. 37B(4)(a) notice was directed to the Irish branch of the Belgian Company. The application for permission under s. 37E was made in the name of a different Indaver entity, the Irish Company. Indaver informed the Board in advance of the oral hearing that this was a "*clerical error*" and that the application should have been in the name of Indaver Ireland, the Irish branch of the Belgian Company. Indaver was told by the Board to raise this at the oral hearing. It did so. The applicant, as one of the objectors at the hearing, raised discrepancies in the details contained in the application concerning the Indaver entity which was seeking the permission and asserted that the application was invalid by reason of the discrepancies in the information

provided. It also made points concerning the absence of consent from the owner of the lands on which the proposed development was to take place. Counsel instructed for Indaver Ireland disputed those points and maintained that it was at all times intended that the Indaver entity applying for the permission was the Belgian Company as evidenced by the fact that the public notices were issued in the name of Indaver Ireland, the Irish branch of the Belgian Company. Among the points raised by the objectors at the hearing was a potential difficulty in enforcing compliance with any permission which might be granted by reason of the discrepancies in the information concerning the identity of the Indaver entity seeking the permission. The point was made by the applicant that the application was invalid as there was a discrepancy between the “*prospective applicant*” and the “*applicant*” for the permission. The inspector did not expressly address that point in his report. The Board did not expressly address that point in its decision. The Board proceeded to grant permission to the Irish Company. The evidence establishes that it was not the intention of Indaver to seek permission for the Irish Company and its intention was to seek such permission for the Belgian Company, through its Irish branch.

200. These are the facts by reference to which I must decide the two pleaded points advanced by the applicant, namely, that the Board had no jurisdiction to grant permission to the Irish Company under s. 37E of the 2000 Act as it was not the “*prospective applicant*” under the relevant provisions of the 2000 Act, including ss. 37A and 37B; and that, in the alternative, the Board did not consider the jurisdiction issue and the applicant’s submissions made on that issue.

(c) Decision on Ground 1

201. The resolution of the legal issue raised under ground 1 requires the court to engage in a process of statutory interpretation in respect of the SID provisions which were inserted in the 2000 Act by the 2006 Act. The question of what relief or remedy may be available in the

event that the applicant is successful on this issue raises some further issues which I touch on below. Counsel for the applicant asked that the question of the appropriate relief (if any) to be granted in respect of this ground be left over for further argument in the event that it arose.

202. The SID provisions, ss. 37A to 37J, were inserted in the 2000 Act by the 2006 Act and have been further amended from time to time since then. The relevant part of the long title of the 2006 Act (on which all sides relied in support of their respective interpretations of the statutory provisions at issue) provides:-

“An act to provide, in the interests of the common good, for the making directly to An Bord Pleanála of applications for planning permission in respect of certain proposed developments of strategic importance to the State; to make provision for the expeditious determination of such applications...; for those purposes and for the purpose of effecting certain other changes to the law of planning and development to amend and extend the Planning and Development Acts, 2000 to 2004; ...”

203. Section 37A bears the marginal note which refers to the Board’s *“jurisdiction in relation to certain planning applications”*. While a helpful guide to what the section is concerned with, the marginal note does not form part of the 2000 Act: s. 18(g) of the Interpretation Act, 2005 and *Crilly v. T&J Farrington Ltd* [2001] 3 IR 251.

204. Section 37A(1) provides that an application for permission for a development falling within the types of SID in the Seventh Schedule must, provided that a particular condition is satisfied, be made to the Board under s. 37E and not to a planning authority. The condition is set out in s. 37A(2) and it is that, following consultations under s. 37B, the Board must serve on the *“prospective applicant”* a notice in writing under s. 37B stating that, in the opinion of the Board, the proposed development would, if carried out, fall within one of three paragraphs then set out including, at para. (a), that the development *“would be of strategic economic or social importance to the State or the region in which it would be situate”*.

Section 37A(3) provides that the term “*prospective applicant*” in s. 37A(2) means the person referred to in s. 37B(1).

205. Section 37B deals with the discussions and consultations between the “*prospective applicant*” and the Board before a direct application can be made to the Board in respect of a SID. Section 37B(1) provides that “*a person who proposes to apply for permission*” for a SID shall “*before making the application*” enter into consultations with the Board in relation to the proposed development. Section 37B(2) provides that “*such a person*” i.e. the person referred to in s. 37B(1) “*who proposes to apply for permission*” for the SID, “*is referred to subsequently in this section and in sections 37C and 37D as a ‘prospective applicant’*”. The “*prospective applicant*”, therefore, is the person who “*proposes to apply for permission*” for the SID and who must enter into the consultations with the Board in relation to the proposed development. As we shall see, ss. 37C and 37D deal with supplemental matters in relation to the consultations and the giving of an opinion by the Board on information to be contained in the EIS which must accompany an application to the Board under s. 37E. Section 37B(3) provides that the Board may give advice to the “*prospective applicant*” regarding the “*proposed application*” on certain matters in the consultations which must be carried out under s. 37B(1). Those consultations must be between the Board and the “*prospective applicant*” and the advice, if given by the Board, is given to the “*prospective applicant*”.

206. Section 37B(4) makes provision for the serving of a notice by the Board on the “*prospective applicant*”. The terms of that notice will depend on the Board’s opinion as to whether the proposed development would fall within one of the paragraphs in s. 37A(2), in other words, for present purposes, whether the development is a SID or not. Section 37B(4) states:-

“Where, following consultations under this section, the Board is of the opinion that the proposed development would, if carried out —

- (a) *fall within one or more of paragraphs (a) to (c) of section 37A(2), it shall serve a notice in writing on the prospective applicant stating that it is of that opinion, or*
- (b) *not fall within any of those paragraphs, it shall serve a notice in writing on the prospective applicant stating that it is of that opinion.”*

207. In other words, if the Board forms the opinion that the proposed development would be a SID then it must serve a notice in writing to that effect on the “*prospective applicant*”. If it is of the opinion that the proposed development would not be a SID, it must serve a notice in writing to that effect on the “*prospective applicant*”. In the latter case, the notice must include a statement that the “*prospective applicant’s application for permission*”, if it is proceeded with, must be made to the appropriate planning authority and not to the Board.

208. Section 37B contains a number of indications, at least, that the Oireachtas envisaged that the person engaging in the consultations with the Board in relation to a proposed application would be the person subsequently making that application. One such indication is found in s. 37B(1) and (2) which refer to the person “*who proposes to apply for permission*” for the relevant development and provide that such a person is the “*prospective applicant*”. Another is the reference (albeit in the case of an application which must be made to the planning authority rather than to the Board following the Board’s notice under s. 37B(4)(b)) in s. 37B(5) which talks of the “*prospective applicant’s application for permission*” and appears to envisage, at least by reference to that type of development in respect of which permission must be made to the planning authority, that the application will be made by the person who was the “*prospective applicant*”. Why else would the term “*prospective applicant’s application for permission*” be used? It might also be asked why the Oireachtas would use the term “*prospective applicant*” in ss. 37A, 37B, 37C and 37D unless it was intended that the person being referred to as the “*prospective applicant*” would be the person

who actually makes the application to the Board under s. 37E following the pre-application consultation procedure. The term “*prospective*” encompasses something which is expected or likely to happen: see the definitions of “*prospective*” from the Oxford and Cambridge Dictionaries provided by the applicant.

209. Section 37C contains supplemental provisions concerning the consultations between the “*prospective applicant*” and the Board. Section 37D applies where the Board serves a notice under s. 37B(4)(a) in relation to a proposed development on the “*prospective applicant*”. Section 37D(1) provides that in such a situation a “*prospective applicant*” may request the Board to provide an opinion in writing on what information will be required to be contained in an EIS in relation to the development (and which must accompany any application for permission under s. 37E). Section s. 37D(3) requires a “*prospective applicant*” to supply the Board with sufficient information in relation to the proposed development so as to enable the Board to assess it.

210. Sections 37C and 37D refer to the person who is a “*prospective applicant*” in the context of the consultations which must take place before an application for permission can be made and in the context of the opinion which can be requested from the Board as to what should go into the EIS which must accompany any application for permission which may be made. It seems clear that the purpose of the consultations and the opinion which may be requested and which must be provided by the Board if requested is to assist the person who ultimately makes the application for permission for the SID under s. 37E in framing that application and ensuring that the EIS, which must accompany the application for permission for the SID under s. 37E, contains the required information in order to enable the Board to consider and determine the application as expeditiously as possible, which is a fundamental objective of these provisions, as appears from the long title to the 2006 Act.

211. Section 37E is the section which provides for the making of the application for permission in respect of a SID to the Board. Section 37E(1) provides that an application for permission for development in respect of which a notice has been served under s. 37B(4)(a) must be made to the Board and must be accompanied by an EIS in respect of the proposed development. There are, therefore, two express preconditions to the making of an application for permission to the Board under this section. The first is that a notice must have been served by the Board in respect of the development under s. 37B(4)(a). It will be recalled that, under s. 37B(4)(a), having carried out consultations with the “*prospective applicant*” and if the Board is of the opinion that the proposed development would, if carried out, fall within one or more of paras. (a) to (c) of s. 37A(2), the Board must serve a notice in writing stating that it is of that opinion. The notice must be served on the “*prospective applicant*”. While the notice sets out the Board’s opinion in relation to the proposed development, it is served on the “*prospective applicant*” and after consultations with that person. The second precondition is that the application must be accompanied by an EIS in respect of the proposed development. I mentioned earlier that a “*prospective applicant*” can request the Board for an opinion in writing as to what information will be required to be contained in an EIS in relation to the development and, if requested, the Board must give that opinion to the requesting “*prospective applicant*”. While the nature of the development is obviously very important and perhaps even the most important factor in whether an application can be made for permission to carry out that development, I do not believe that the Board and Indaver are correct in contending that the identity of the person making the application is not relevant, having regard to the SID provisions in the 2000 Act. For the reason I have just mentioned, the involvement of the “*prospective applicant*” is undoubtedly very relevant.

212. Under s. 37E(2), the Board may refuse to deal with an application under s. 37E where it considers that the application for permission or the EIS is “*inadequate or incomplete*”,

having regard to certain regulations made “*or to any consultations held under section 37B*”. The Board’s entitlement to refuse to deal with an application on the basis that the application itself or the EIS is deficient in some respect having regard to (among other things) any consultations held under s. 37B is also, in my view, relevant to the issue of the identity of the person making the application. The consultations under s. 37B must be held with the “*prospective applicant*”.

213. In their submissions, the Board and Indaver drew attention to the fact that there is no provision in s. 37E to the effect that the Board may refuse to deal with an application which is not made by the person who was the “*prospective applicant*”. That submission is correct but does not resolve the issue. The applicant’s case was that the requirement that the person who applies for the permission be the person who was the “*prospective applicant*” must necessarily arise by implication by reason of the prior provisions in ss. 37A, 37B, 37C and 37D which provide for the important role of the “*prospective applicant*” in the procedure. In my view, the fact that there is no express provision in s. 37E giving the Board power to refuse, or requiring the Board to refuse, to deal with an application where it is not made by the person who was the “*prospective applicant*” is not determinative of the issue. A proper reading of s. 37E with the earlier provisions may well require s. 37E to be read as requiring that the person who applies for permission under the section must be the person who was the “*prospective applicant*” who was involved in the earlier stages of the process. That is the conclusion I have ultimately reached on this issue.

214. Section 37E(3) provides that “*before a person applies for permission to the Board under this section*”, he or she must take certain steps, including publishing a notice in the newspapers with certain information in relation to the proposed development, and sending a prescribed number of copies of the application and the EIS to the relevant planning authority and to other prescribed authorities. The notice which must be published under s. 37E(3)(a)

must state (among other things) that *“the person proposes to make an application to the Board for permission for the proposed development”*. The Board and Indaver submitted that if the Oireachtas had intended that an application for permission under s. 37E could only be made by a person who was a *“prospective applicant”*, it would have said so in s. 37E(3) and would not simply have referred to a *“person”*. They submitted that if the applicant were correct, s. 37E(3) would have referred to a *“prospective applicant”* rather than a *“person”*. The applicant disagreed and made the point that it would not be correct to refer to the person at that stage as a *“prospective applicant”* as the person would at that stage no longer be a *“prospective applicant”* as the notice would have been served by the Board under s. 37B(4)(a) permitting the application to be made to the Board. That is not necessarily correct. I do not see why the person could still not be the *“prospective applicant”* in the period between the date of the notice under s. 37B(4)(a) and the date on which the application for permission is made. When the application for permission is made, the person becomes a person applying for permission or an applicant for that permission and ceases to be a *“prospective applicant”*. The Oireachtas could, therefore, have used the term *“prospective applicant”* instead of *“person”* in s. 37E(3). However, the fact that it did not does not, in my view, undermine the applicant’s argument that the person who applies for permission must be the person who was a *“prospective applicant”*.

215. The applicant’s case on this issue is, in my view, supported by s. 37E(3)(a)(i)(I) which provides that one of the matters which must be stated in the notice that must be published is that *“the person proposes to make an application to the Board for permission for the proposed development”*. It is difficult to understand why the Oireachtas would have set out the elaborate procedure for consultations with the Board and for the obtaining of opinions and advice from the Board, both of which involve the *“prospective applicant”*, and for the service of a notice by the Board on the *“prospective applicant”* authorising the application to

be made but then, when specifying to the requirement to publish a notice before the application for permission is made, and referring to “*the person who proposes to make the application*” intending that that person could be someone different to the person who was involved in all of the earlier steps in that elaborate statutory procedure.

216. In my view, it is much more consistent with the earlier SID provisions that when s. 37E(3) talks of a “*person*” who applies for permission and the “*person*” who “*proposes to make an application to the Board for permission*”, the Oireachtas intended that such a person was one and the same as the “*prospective applicant*” who was involved in the earlier extensive procedure. I observe here that the terminology used in s. 37E(3)(a)(i)(I) i.e. “*the person proposes to make an application to the Board...*” is very similar to the words used in ss. 37B(1) and (2) where reference is made to a “*person who proposes to apply for permission...*” and that person is referred to in ss. 37B, 37C and 37D as a “*prospective applicant*”.

217. The remaining SID provisions, s. 37F to s. 37J make no further mention of the “*prospective applicant*”. Section 37F refers throughout to the “*applicant for permission*”. However, that is understandable as that section is addressing the position after the application for permission has been made and before the Board has determined the application. By that stage, the person who has applied is clearly no longer a “*prospective applicant*” but is the “*applicant for permission*”. The term “*applicant*” is also used in s. 37H. That section is concerned with what happens after the Board has made its decision on the application under s. 37G. By that stage, the person who has applied for permission is no longer the “*prospective applicant*” and is the applicant who has now obtained a decision on the application. It is, in my view, therefore, perfectly understandable that, by the time the application for permission comes to be made to the Board and in respect of events that take place after the application has been made and the decision has been made by the Board the

sections would refer to the “*applicant*” or the “*applicant for permission*” and not to a “*prospective applicant*”.

218. Although not expressly relied on by the applicant, s. 37J also supports the applicant’s case on this issue. That section seeks to give effect to the objective of the Oireachtas that SID applications are dealt with expeditiously at the various stages of the process. Section 37J(1) refers to the duty on the Board to ensure that consultations held under s. 37B are completed and that a decision under s. 37G on an application under s. 37E is made, as expeditiously as is consistent with proper planning and sustainable development. The Board is required to take all such steps as are open to it to ensure that, so far as practicable, there are no avoidable delays at any stage in the holding of the consultations or the making of the decision. Section 37J(1), therefore, stresses the importance of the consultations under s. 37B and the need to ensure that there are no avoidable delays in the holding of those consultations. Those consultations take place between the Board and a “*prospective applicant*” and not with anyone else. Section 37J, in my view, provides some support for, and is in any event consistent with, the applicant’s case that the Oireachtas envisaged that the person making the application under s. 37E is the same as the person who engaged in the consultations and in the earlier procedure, namely, the “*prospective applicant*”.

219. I prefer the interpretation of the SID provisions contained in ss. 37A onwards proposed by the applicant rather than the interpretation for which the Board and Indaver contended. It is well established that the court’s role in interpreting a statutory provision or provisions is to seek to give effect to the intention of the legislature, with such intention being ascertained primarily from the words used in the legislation, if they are clear and unambiguous. In order to understand the words used, it is appropriate to consider the subject matter with respect to which they are used and the object of the legislation: *Howard v. Commissioners of Public Works* [1994] 1 IR 101 (per Blayney J. at 151); *Grealis v. Director*

of Public Prosecutions [2001] 3 IR 144 (per Denham J. at 176-177); and *O'Rourke v. Governor of Cloverhill Prison* [2004] 2 IR 456 (per Denham J. at 465). In the case of a disputed interpretation of a particular statutory provision, it may be necessary to consider that provision in the context of other provisions in the legislation or in the context of the legislation as a whole.

220. In my view, the interpretation put forward by the Board and by Indaver was excessively narrowly focused on the words used in s. 37E and did not fully consider where s. 37E fell within the legislative scheme provided for in the SID provisions inserted into the 2000 Act by the 2006 Act. The interpretation for which the applicant contended did, in my view, better reflect the intention of the Oireachtas in s. 37E when read with the earlier provisions of ss. 37A, 37B, 37C and 37D. It is wrong, in principle, to simply look at the words used in s. 37E, to note that there is no express requirement in that section for the application for permission to be made by the same entity as engaged in the pre-application procedures provided for in ss. 37A to 37D and to conclude from this that there is no requirement for the person applying for permission to be the same as the "*prospective applicant*".

221. Section 37E forms part of a scheme which provides for a two-stage procedure in respect of applications for permission for developments which are SID. Section 37E which provides for the application for permission must, in my view, be read in the context of the earlier sections which provide for the procedure leading up to the making of the application. It is incorrect, therefore, in my view merely to focus on s. 37E and to say that if the Oireachtas had intended that the applicant be the same as the "*prospective applicant*", it would have said so and that since it did not, no such requirement is contained in s. 37E. Section 37E must be read in the context of the earlier provisions in the scheme for SID introduced into the 2000 Act by the 2006 Act. I have concluded that s. 37E, when read with

those other provisions, requires that the application for permission be made by the entity which was a “*prospective applicant*” under the earlier stage of the statutory procedure. That this is the correct interpretation of the provision is, in my view, strongly supported by the analysis of the SID provisions set out earlier in this part of my judgment and, in particular, by the following matters which I now wish to emphasise.

222. First, the condition referred to in s. 37A(1) and (2) which must be satisfied before an application can be made to the Board under s. 37E concerning the required notice from the Board under s. 37B has two elements to it. The first is that the notice must be served on the “*prospective applicant*”. The second is that the notice must state that in the Board’s opinion the proposed development would fall within one or more of paras. (a), (b) and (c) of s. 37A(2). Both are important elements of the condition. The interpretation suggested by the Board and by Indaver stressed the nature of the development (the subject of the Board’s opinion referred to in the notice) only and failed to attach sufficient weight to the other element, namely, that the notice must be served on the “*prospective applicant*”.

223. Second, the reference in s. 37B(1) and (2) to the person “*who proposes to apply for permission*” for a SID being the “*prospective applicant*” (as referred to in ss. 37B, 37C and 37D) strongly suggests that the person who actually makes the application under s. 37E is the person who proposed to apply for such permission at the earlier stage of the process under s. 37B(1). That person is the “*prospective applicant*”.

224. Third, s. 37B(3) refers to the Board giving advice to the “*prospective applicant*” regarding the “*proposed application*” in the consultations under s. 37B(1) and sets out the areas on which such advice may be given. The purpose of that advice must be to facilitate the making of an application for permission under s. 37E and to ensure that the person making the application is aware of the procedures involved and the considerations which may have a bearing on the decision in respect of the application, as well as ensuring that the “*proposed*

application” is in order and addresses the necessary considerations. It is difficult to reconcile that provision, which is designed to assist the “*prospective applicant*” in navigating the procedures and in making an application for permission, with the suggestion that a different entity can come along and make the application under s. 37E. That would not, in my view, be consistent with the objective sought to be achieved by the consultation and advice provisions in s. 37B(3). In my view, ss. 37B(1), (2) and (3) strongly supports the interpretation for which the applicant contends and undermines that contended for by the Board and Indaver.

225. Fourth, the significance to the SID statutory process of the “*prospective applicant*” is also underlined by the requirement in s. 37B(4) that the notice setting out the Board’s opinion as to whether the proposed development would, if carried out, constitute SID be served on the “*prospective applicant*”. This is a mandatory application and strongly suggests that the intention of the Oireachtas is not only directed to the nature of the proposed development but also to the identity of the “*prospective applicant*”.

226. Fifth, further support is provided for the applicant’s interpretation by s. 37B(5) where, in a case where the Board is of the opinion that the proposed development is not SID, the Board’s notice must include a statement that the “*prospective applicant’s application for permission*”, if proceeded with, must be made to the appropriate planning authority. The words “*prospective applicant’s application for permission*” closely ties the “*prospective applicant*” with the subsequent application for permission, albeit in the case of a non-SID application. There would not seem to be any reason in principle why the position in relation to a SID application should be any different. Section 37B(5) combined with ss. 37B(1) and (2), in my view, strongly suggests that the “*prospective applicant*” must ultimately be the entity which makes the application for permission in the case of a SID.

227. Sixth, the provisions of ss. 37C and 37D which further concern the consultations between the Board and a “*prospective applicant*” and the opinion which the Board is

required to provide, if requested, to the “*prospective applicant*” as to the information required to be contained in an EIS in respect of the proposed development, both support the applicant’s contention that the “*prospective applicant*” must be the person that ultimately applies for the permission under s. 37E after the consultation and the provision of such an opinion by the Board. The consultations and the opinion as to the information required for the EIS, which are all expressed to involve the “*prospective applicant*”, are designed to assist in the making of the application and in ensuring that the documentation which must accompany the application (such as the EIS) contains the required information and deals with the relevant considerations. These provisions would make little, if any, sense if a person other than the “*prospective applicant*” could subsequently come along and make the application. In my view, they provide strong support for the applicant’s interpretation.

228. Seventh, while s. 37E(1) does not expressly require that the application for permission be made by the “*prospective applicant*”, when read with the earlier SID provisions, including ss. 37A(1), (2) and (3), it can and, in my view, should be interpreted as requiring the application to be made by the entity which was the “*prospective applicant*”. That was the entity on which the notice was served under s. 37B(4)(a) and that was the entity which was entitled to consult with and to obtain advice from the Board as to the information required to be contained in the EIS, which is a document required to accompany the application under s. 37E(1). Read with the earlier SID provisions, I agree with the applicant, and disagree with the Board and Indaver, that the nature of the development is not the only factor to be taken into account. The identity of the applicant is also relevant having regard to the terms of s. 37E(1) itself and particularly when read with the earlier SID provisions. In my view, s. 37E(1) when read with the other SID provisions requires that the application must be made by the entity which was the “*prospective applicant*”.

229. Eighth, while s. 37E(2) does not contain an express entitlement on the Board to refuse to deal with an application which is not made by the entity which was the “*prospective applicant*”, it is by no means inconsistent with the requirement that the application be made by that entity, as it entitles the Board to refuse to deal with the application where the application or the EIS is inadequate or incomplete having regard, amongst other things, to any consultations held under s. 37B (noting also the opportunity on a “*prospective applicant*” to obtain an opinion from the Board under s. 37D on the information required to be contained in the EIS). This subsection is broadly supportive of the applicant’s interpretation notwithstanding that there is no express reference to the entitlement of the Board to refuse to deal with the application where it is not made by the entity which was the “*prospective applicant*”.

230. Ninth, s. 37E(3) is strongly supportive of the applicant’s interpretation in referring (in s. 37E(3)(a)(i)(I)) to the requirement that the public notices must state that the “*person proposes to make an application to the Board for permission for the proposed development*” before the application for permission is made. Similar words are used in ss. 37B(1) and (2) to refer to the “*prospective applicant*”. It is difficult to see why they would have a different meaning in this subsection. While the Oireachtas could have used the term “*prospective applicant*” in s. 37E(3) instead of “*a person [who] applies for permission*” or a “*person [who] proposes to make an application to the Board...*”, the fact that it did not do so does not, in my view, significantly undermine the applicant’s case. That subsection and, in particular, the words in s. 37E(3)(a)(i)(I) should be read with the earlier SID provisions including ss. 37B(1) and (2). If they are read together, as I believe they must be in order to give a coherent interpretation to the SID provisions, s. 37E must, in my view, be interpreted as requiring the person who applies for permission to the Board to be the person who was the “*prospective applicant*” at the earlier stage in the procedure.

231. Tenth, to the extent that it is necessary to refer to the long title to the 2000 Act, I believe the applicant is correct in suggesting that the purpose of the SID provisions introduced by the 2006 Act into the 2000 Act supports the case made by the applicant and undermines that made by the Board and Indaver. I set out the terms of the long title to the 2006 Act earlier in this part of my judgment. The purpose of the 2006 Act, so far as SID developments are concerned, is to enable applications for permission in respect of such developments to be made directly to the Board because of the strategic importance of those developments to the State and to make provision for the expeditious determination of those applications. That purpose is promoted by an interpretation that the person making the application for permission under s. 37E is the person who was the “*prospective applicant*” as it is the “*prospective applicant*” who is required to engage in the consultations as to the procedures involved and as to the considerations which may be taken into account by the Board in deciding the application and it is that person who is entitled to obtain the opinion of the Board as to what information will be required to be contained in the EIS. That objective would not be promoted if the provisions were to be interpreted as permitting some other entity to come along and make the application where that entity was not involved in the earlier consultation procedure. That is particularly so where the person who makes the application has no connection with the “*prospective applicant*”. In my view, the purpose of the SID provision supports the applicant’s case on this ground.

232. Apart from advancing arguments on the interpretation of the SID provisions, the Board and Indaver also relied on s. 39(1) of the 2000 Act. They argued that the case made by the applicant on this ground was inconsistent with the scheme of the 2000 Act as a whole and, in particular, with the provisions of s. 39(1). That section provides that, except as may otherwise be provided for in the permission itself, the grant of permission “*shall enure for the benefit of the land and of all persons for the time being interested therein*”. They argued,

therefore, that the identity of the applicant for the permission and of the grantee of that permission is irrelevant. The Board and Indaver are obviously correct in that, as a general principle, s. 39 of the 2000 Act makes clear that a planning permission enures for the benefit of the land to which it relates and of all persons for the time being interested in those lands. However, the SID provisions cover a particular situation specifically designed by the Oireachtas to deal with applications for permission for SIDs. Those provisions must be carefully considered both as to their terms and as to the objective sought to be achieved by the Oireachtas in the 2006 Act when inserting the SID provisions into the 2000 Act. Section 39 of the 2000 Act must be read subject to the SID provisions and to the correct interpretation of those provisions. I do not believe, therefore, that s. 39 qualifies or conditions in any way what I believe to be the correct interpretation of the SID provisions, namely, the interpretation advanced by the applicant.

233. The issue raised in ground 1 of the applicant's grounds of challenge has not previously been directly considered by the courts. However, the parties referred to the judgment of the Supreme Court in *Callaghan v. An Bord Pleanála* [2018] IESC 39 ("*Callaghan*"). The essential issue in the appeal in *Callaghan* was whether participation should be permitted in the pre-application procedure under the SID provisions in the 2000 Act. The High Court, the Court of Appeal and, ultimately, the Supreme Court decided that such participation was not required. However, both sides sought to rely on aspects of the judgment of the Supreme Court (delivered by Clarke C.J.) in support of the positions they were urging on the court in respect of ground 1. The parties were agreed, however, that the Supreme Court did not address or decide the issue which I have to decide under ground 1. The Supreme Court was not considering the issue as to whether the applicant for permission for a SID had to be the same entity as the "*prospective applicant*" which had engaged in the pre-application consultation procedure. As a matter of fact, in *Callaghan*, the entity which

initiated the pre-application consultation procedure was different to the entity which applied for the permission. The applicant for the permission in that case was a subsidiary of the “*prospective applicant*”. That was not an issue in the case and the Supreme Court was not asked to, and did not, give a view as to whether that gave rise to any difficulty with regard to the application for permission. The Supreme Court was solely concerned with the third-party participation issue.

234. In paras. 2.1 to 7.6 of his judgment, Clarke C.J. gave an overview of structure of the scheme provided for in the SID provisions introduced by the 2006 Act. The applicant in the present case relied on paras. 7.2 and 7.3 of the judgment of Clarke C.J. and contended that those paragraphs suggest an understanding on the part of the Supreme Court that there would be no difference between the person who engaged in the pre-application consultation procedure and the applicant for the permission. The Board (and Indaver) relied on the same paragraphs, as well as paras. 7.4, 7.5 and 7.6 which they contended demonstrated that the Supreme Court made clear that the focus of the scheme provided for by the SID provisions was on the development and not on the person applying for permission for the development. Both the applicant and the Board (and Indaver) acknowledged that while the person who engaged in the pre-application consultation procedure in that case was different to the person who applied for the permission, the Supreme Court did not consider whether any difficulty arose as a consequence of that, since that was not the issue under consideration in the appeal.

235. At para. 7.2 of his judgment, Clarke C.J. stated:-

“In substance, where the Board is of the opinion that the development falls within those categories [in s. 37A(2)], it becomes mandatory on the applicant for permission to make that application directly to the Board (see s. 37E(1)). Where the Board is not of the opinion that the development comes within any of the categories specified in s. 37A(2) then the applicant is required, if a permission for development consent is to go

ahead, to go down the route of an ordinary application to the relevant local planning authority in accordance with s. 37B(5). The Board's notice setting out its opinion that the development does not come within s. 37A(2) must include a statement to the effect that such application must be made to the planning authority."

236. In my view, there is nothing in this paragraph which assists either side in the present case. The issue which arises here did not arise before the Supreme Court and, understandably, was not adverted to.

237. At para. 7.3, the Chief Justice stated:-

"While somewhat complicated, the overall structure of the scheme is relatively straightforward. If a proposed development comes within the Seventh Schedule then any applicant for permission must first enter into the consultations contemplated by the various provisions in the legislation leading to the Board forming an opinion as to whether the development qualifies for the purposes of s. 37A(2). It is that opinion which determines the subsequent course of the planning application, for if the opinion is to the effect that the development does so qualify then the provisions concerning SID applications directly to the Board apply, whereas if the opinion is to the opposite effect the applicant is authorised to go down the route of an ordinary planning application to the relevant local planning authority."

238. While this passage might be said to support the position of the applicant in the present case in that Clarke C.J. commented that an applicant for permission for a SID "*must first enter into the consultations*" provided for in the legislation, that would, in my view, be reading too much into the words used by the Chief Justice. He was not adverting to the issue which has been raised by the applicant in the present case and had no reason to believe that any issue could arise in the event that the applicant for permission was a different person to the person who was the "*prospective applicant*" who had engaged in the consultations

provided for under the legislation. I would not, therefore, read too much into this passage from the judgment of the Chief Justice one way or the other.

239. Similarly, with regard to para. 7.4 where the Chief Justice stated:-

“For present purposes the key provision is, therefore, the opinion which the Board must form under s. 37A(2) as a result of the process specified in the legislation. It is clear that the conclusion of the Board must be that it is of the opinion that the proposed development, if carried out, would fall into one or more of the three categories specified in ss. 37A(2)(a) to (c). It is that conclusion which directs the substantive planning application into either the SID or the ordinary route.”

240. The Chief Justice made clear that his reference to the “*key provision*” was “*for present purposes*” i.e. for the purposes of the issues arising in the appeal before the Supreme Court in *Callaghan* and not for all purposes. It is true that, in that passage, the Chief Justice was focusing on the opinion of the Board with regard to the nature of the proposed development and as to whether it fell within the categories of SID in s. 37A(2). However, I do not believe that he was thereby ruling out the potential relevance of any difference between the applicant for permission and the “*prospective applicant*”. The same, in my view, applies with regard to paras. 7.5 and 7.6 of the judgment of Clarke C.J.

241. I am satisfied that the Supreme Court in *Callaghan* was not dealing with the issue which arises under ground 1 in this case and it is reading too much into the *dicta* of the Chief Justice, referred to above, to regard them as supporting the position adopted by either side on this issue in the present case. Nor do I read too much into the fact that there was a difference between the applicant for the permission and the “*prospective applicant*” on the facts of that case. Since it was not an issue in the case, it was unnecessary for the Supreme Court to consider what consequences (if any) flowed from that difference. I do not believe, therefore,

that *Callaghan* provides support for the position adopted by either side in this case in respect of ground 1.

242. Finally, in terms of the interpretation issue, I should briefly address the point made by the Board that the position under the SID provisions inserted in the 2000 Act by the 2006 Act can be contrasted with the provisions of the Waste Management Act, 1996 (as amended) where consideration must be given by the EPA before granting a waste licence to the proposed licensee. The Board argued that while the identity of the identity of the proposed licensee under that legislation was relevant, the identity of the applicant or of the grantee for permission is of only very limited relevance in the case of a planning permission generally and of no particular relevance in the case of an application for permission for SID. I do not believe that any significance can be attached to the difference between the scheme introduced by the 1996 Act and the scheme introduced by the 2006 Act into the 2000 Act in respect of SID applications. In the case of each scheme, it is necessary carefully to consider the statutory provisions applicable to the scheme and to interpret them in a way which best reflects the intention of the legislature as expressed in the words used in their proper legal context. That is what I have sought to do in respect of the relevant SID provisions considered above. The answer to the interpretation issue raised in ground 1 must be determined by reference to the interpretation of the SID provisions and not by reference to any other statutory scheme.

243. In conclusion, therefore, I agree with the applicant that, properly interpreted, the SID provisions require that the applicant for permission under s. 37E should be the same person as the “*prospective applicant*” who engaged in the pre-application consultation procedure provided for under those provisions. The applicant for permission in respect of the proposed incinerator development at Ringaskiddy was not the same entity as the person who applied to and engaged in the pre-application consultation procedure with the Board. While it may have

been the intention of Indaver that the application was to be made by the same entity, that did not happen. Contrary to the submission advanced by the applicant, however, I accept that this occurred as a result of a clerical error which was pointed out by Indaver prior to and at the oral hearing.

244. While I have agreed with the interpretation of the SID provisions contended for by the applicant, and while the consequence of that interpretation might normally lead to an order of *certiorari* quashing the Board's decision on the basis that it did not have jurisdiction to consider and determine the application, that is not necessarily always the case.

245. The applicant has requested that I defer dealing with the question of the remedy or relief to be granted in respect of this ground and I will do so until I hear further argument (if necessary) from the parties on that issue. I feel it necessary, however, to express some reservation as to whether, on the particular facts of this case, I should grant an order of *certiorari* of the decision on this ground. My reservations arise from the fact that the applicant for permission, the Irish Company, is, on the uncontested evidence before the court, a subsidiary of the "*prospective applicant*", the Belgian Company. The objective and rationale of the scheme provided by the SID provisions is, consistent with the interpretation of those provisions which I have found, to ensure that the person who ultimately applies for permission in respect of the development has had the benefit of the consultations and advice given by the Board during the course of the pre-application procedure in terms of the procedures themselves, the application for permission and the documentation which must accompany that application (such as the EIS). One can see how those objectives would be undermined where a person engaged in the pre-application consultation procedure as the "*prospective applicant*" and then an entirely different person, unconnected to the "*prospective applicant*", came along and prepared and made the application under s. 37E without the benefit of being involved in or a party to the consultations and advices under the

prior statutory procedure. In that situation, the objective of the scheme provided for under the SID provisions would be undermined. The same, however, could not necessarily be said where the person that makes the application for permission is closely related to the person who was the “*prospective applicant*”, as is the case here. It can reasonably be inferred that having regard to the very close relationship between the two companies (one being a subsidiary of the other) that the applicant for the permission did in fact have the benefit of the consultations which took place during the pre-application procedure. On the facts of this case, it is difficult to see how the objective sought to be achieved by the SID provisions would be undermined by the applicant being the Irish Company when the “*prospective applicant*” was the Belgian Company, through its Irish branch. As well as that, I agree with the Board and Indaver that no issues of enforcement should arise by virtue of any issue concerning the identity of the applicant and the “*prospective applicant*”. Compliance with the terms of a planning permission can be enforced against the party who carries out the development or operates the facility in a manner which is alleged to constitute a breach of the terms of the permission. If the Belgian Company were to carry out the development then in the event that the terms of the permission were not complied with, enforcement could issue against that company. Therefore, enforcement is not affected by the fact that the permission was sought by and granted to the Irish Company rather than the Belgian Company, in circumstances where the development may be carried out by the Belgian Company, through its Irish branch.

246. While the applicant correctly made the point that the Board proceeded to deal with an application and to grant permission to an entity which was not intended to be the applicant, where that was pointed out shortly after the application was made and before the oral hearing commenced, that is not an issue that directly arises from the case pleaded by the applicant which centred on the difference between the “*prospective applicant*” and “*the applicant for permission*” and the jurisdictional issue which arose as a result.

247. This may be one of the exceptional cases in which the court might, while accepting that the interpretation for which the applicant contended was correct, and that, in a different factual situation, the consequences of that interpretation might lead to the court quashing the decision on jurisdictional grounds, in the exercise of its discretion, decide not do so in the present case. I accept that normally relief would follow *ex debito justitiae*. However, there are exceptional circumstances in which that may not be so. This may be one of those situations having regard to the close connection between the two entities concerned and the objectives sought to be achieved under the SID provisions.

248. Apart from making the point in respect of the interpretation of the SID provisions, on which the applicant has succeeded, the applicant has not shown how its position has been in any way prejudiced as a result of the fact that a the Indaver entity which applied for permission was different to the Indaver entity which engaged in the pre-application consultation procedure. As already observed, the applicant would not be prejudiced in terms of enforcement of the terms of the permission granted.

249. It may also be relevant to the reliefs that might be granted, that it may be open to the Board to correct the error in the name of the applicant for permission by amending its order so as to show the name of the company which was intended to be the applicant, namely, the Belgian Company. The decision of the High Court in *Schwestermann v. An Bord Pleanála* [1994] 3 IR 437 (“*Schwestermann*”) is relevant. This case was very appropriately brought to my attention in the course of his reply by counsel for the applicant. While the facts of that case are quite different to the facts of the present case, it is of some relevance to the issue now under consideration. The application for permission in *Schwestermann* was incorrectly made in the name of one company. It was intended that the application be made in the name of another company, where the two companies were managed and controlled by the same person. The High Court (O’Hanlon J.) held that the error in the application did not invalidate

the ensuing grant of permission where, having regard to the business, management and shareholding relationships between the two companies, the application had to be viewed as having been made on behalf of the true applicant or with its knowledge and approval. O'Hanlon J. referred with approval to the decision of Costello J. in *The State (Toft) v. Corporation of Galway* [1981] ILRM 439 ("*Toft*") where the court held that the planning authority had power to correct that error by amending its order so as to show the correct name of the relevant company. O'Hanlon J. held that the same power could be used in *Schwestermann*, in the event that the other challenges made to the validity of the Board's decision were not successful. It seems to me that if the Board's decision were otherwise valid (leaving aside my decision on the objective bias issue), it might well be possible for the Board, in applying the principles set out in *Toft* and *Schwestermann*, to correct the error in the name of the applicant and to correct the Board Order and register to reflect the name of the intended applicant, namely, the Belgian Company. It would, in my view, be possible to uphold the applicant's case on the interpretation of the statutory provisions at issue but to decline to quash the Board's decision in this case in the exercise of the court's discretion in the particular circumstances of this case. However, I refrain from expressing a concluded view on whether I would exercise my discretion to refuse to grant an order quashing the decision on the grounds set out in ground 1 as I agreed to leave that issue over, as requested by the applicant. The issue may well be relevant in terms of the consequences of an order quashing the Board's decision on the objective bias grounds and, if remitted, the point in time in the process and the terms on which the application might be remitted, if that is the appropriate course to take.

250. In conclusion, therefore, I find for the applicant on the interpretation issue arising under ground 1 and leave over the precise relief or remedy to be granted for further discussion, in light of the various considerations which I have just discussed.

15. Ground 3: Project Splitting

(a) Brief Summary of Parties' Positions

(1) The Applicant

251. The applicant contends that the Board permitted Indaver to split the incinerator development into two planning applications for the purposes of avoiding the provisions of the Seveso III Directive (Directive 2012/18/EU of the European Parliament and of the Council of 4th July, 2012) and the Domestic Seveso Regulations (Chemicals Act (Control of Major Accident Hazards involving Dangerous Substances) Regulations, 2015) (S.I. no. 209/2015) with the consequent failure by the Board to carry out an EIA of the entire project at the earliest opportunity or to prevent the prospect of incremental development. Alternatively, the applicant contends that the Board failed to have any regard to the issue of “project splitting”. The applicant relies on the fact that both Indaver’s 2001 planning application and its 2008 planning application sought permission for a hazardous waste transfer station. Provision was originally made for the inclusion of such a station in an area of the site known as the “Western Fields” and was considered by Indaver and the Board during the pre-application consultation procedure which proceeded Indaver’s 2016 planning application. The waste transfer station was removed from the proposed development during the course of that procedure (as noted in a record of a meeting between the applicant and the Board on 16th July, 2015 and in a subsequent meeting on 11th September, 2015). The waste transfer station was not included in Indaver’s 2016 planning application.

252. The applicant contended that the construction of a raised plateau on the Western Fields was “*manifestly for the sole purpose of facilitating the development of the waste transfer station in the future*” (para. 42 of the amended statement of grounds). The applicant raised the issue of the waste transfer station and the implications of such under the Seveso III Directive and made submissions on the issue at the oral hearing. However, “project splitting”

was not considered by the inspector or by the Board. The applicant submitted that the inspector and the Board also failed to consider the implications and consequences of the removal of the waste transfer station in terms of the Seveso III Directive and the Domestic Seveso Regulations and in terms of the scope and adequacy of the EIA. On that basis, it was contended that the EIA carried out by the Board was manifestly inadequate.

253. The applicant relied on a number of the leading Irish cases on “project splitting” in support of its claim under this ground (including *O Grianna v. An Bord Pleanála* [2015] IEHC 248 (“*O Grianna*”). It asked the court to infer that, notwithstanding what was said on behalf of Indaver at the oral hearing before the inspector and on affidavit in the course of these proceedings, it was the intention of Indaver to develop a waste transfer station on the site. It contended that the exclusion of the waste transfer station from the application and its non-consideration in the EIA amounted to “project splitting” as understood in the cases.

While accepting that the incinerator the subject of the application was not either factually or legally functionally interdependent upon the waste transfer station, the applicant submitted that neither was a necessary prerequisite to establish “project splitting” and that there was a sufficient form of connection between the incinerator development the subject of the application and the waste transfer station which had initially been included as part of the proposed development. In its reply, the applicant relied on the recently delivered judgment of the Supreme Court in *Fitzpatrick v. An Bord Pleanála* [2019] IESC 23 (“*Fitzpatrick*”).

254. The applicant argued that, as a consequence of the failure to take account of the future development of the waste transfer station in the EIA, consideration was not given to the provisions of the Seveso III Directive and the Domestic Seveso Regulations. The applicant submitted, therefore, that the Board unlawfully permitted Indaver to split the incinerator project for the purpose of avoiding an EIA which would take into account the intended development of a waste transfer station and of avoiding the application to the development of

the Seveso III Directive and the Domestic Seveso Regulations. The applicant's case was that the project to be assessed as part of the EIA included the waste transfer station and that it had not been assessed, as required. It claimed that the Board did not even consider the issue, notwithstanding that it had been raised by the applicant at the oral hearing.

(2) The Board

255. In response, the Board and Indaver contended that on the evidence and on the law, there was no question of any “project splitting” in connection with Indaver’s 2016 planning application. The Board maintained that the incinerator development the subject of Indaver’s application was subjected to an EIA carried out by the inspector and by the Board. Insofar as it was the applicant’s case that, even though a waste transfer station was not included in the application actually made by Indaver, the Board was nonetheless obliged to take it into account as part of the EIA, the Board, in reliance on cases such as *O’Grianna*, contended that it was under no such obligation. It maintained that the evidence established that there was no functional interdependence between the incinerator development and the waste transfer station and that the evidence disclosed that the incinerator could operate without a waste transfer station. The Board submitted that the project before it was the incinerator development without a waste transfer station and that that was what was assessed in the EIA carried out by the Board. The Board submitted that, following the removal of the waste transfer station from the proposed development before Indaver’s 2016 planning application was made, the Board was under no obligation to assess the effects of a hypothetical waste transfer station as part of the EIA. In that regard, the Board relied on the opinion of Advocate General Gulmann in Case C-396/92 *Bund Naturschutz in Bayern v. Freistaat Bayern* [1994] ECR I-03717 (“*Bund Naturschutz*”), *Friends of the Curragh Environment Ltd v. An Bord Pleanála* [2006] IEHC 390 and *Fitzpatrick v. An Bord Pleanála* [2017] IEHC 585 (McDermott J.). The Board strongly relied on the decision of the Supreme Court in

Fitzpatrick when responding to the points made by the applicant in its reply in reliance on that decision.

256. The Board submitted that it was under no obligation to assess the effects of a hypothetical waste transfer station as part of its cumulative assessment of the effects of the proposed development and referred in this regard to annex IV of the EIA Directive and to the amendments introduced to that Directive in 2014 (by Directive 2014/52/EU). While accepting that the amendments introduced in 2014 did not apply to the development the subject of these proceedings, nonetheless, the Board submitted that the express reference to the obligation to consider the cumulative effects of a proposed development with “*existing and/or approved projects*” was a clarification of the pre-2014 Directive position. The Board also relied on cases such as *Ratheniska v. An Bord Pleanála* [2015] IEHC 18 (“*Ratheniska*”) (a case to which the 2011 Directive applied) in which the High Court (Haughton J.) made clear that cumulative assessment required that the development be assessed in light of “*existing and permitted development in the relevant area*” (para. 95). While the court in that case had accepted that there might be “*exceptional cases*” in which a development which had not yet been permitted was required to be considered, the Board submitted that this was not such a case.

257. The Board submitted that it would be an entirely speculative exercise if the Board were required as part of its consideration of the cumulative effects of the proposed development to consider the possibility that in the future permission might be sought for a waste transfer station on the site. The Board rejected the suggestion that it was required to engage in such speculation under Article 2 or Article 3 of the EIA Directive or by the decision of the Court of Justice in Case C-50/09 *Commission v. Ireland* [2011] ECR I-00873.

258. In its oral submissions, the Board stated that there was a “*high probability*” that an EIA would be required in the event that Indaver subsequently sought to develop a waste

transfer station on the site and that an EIA of any such proposed development would “*almost certainly*” be required. Further, it submitted that if a waste transfer station were regarded as an extension of the existing project, an EIA would be required in respect of that extension under para. 13(a) of annex II of the EIA Directive (as amended by the 2014 Directive).

259. Finally, the Board submitted that, in circumstances where the waste transfer station was omitted from the proposed development, it was under no obligation to consider the provisions of the Seveso III Directive or the domestic Seveso Regulations in assessing the proposed development.

(3) Indaver

260. Indaver supported the submissions of the Board on this issue. In its written and oral submissions, Indaver relied on the factual position set out in Ms. Keaney’s affidavit which referred to Indaver’s intentions with respect to the development of a waste transfer station on the site as well as the evidence given at the oral hearing. Indaver also relied on cases such as *O’Grianna* in support of its position, noting that it had been accepted by the applicant that there was no interdependence between the incinerator and the waste transfer station. It submitted that the undisputed evidence of Ms. Keaney created an insuperable obstacle to the case which the applicant sought to make under this ground and that, in any event, the legal position, as applied in cases such as *O Grianna*, was clear that there was no obligation on the Board to take account in its EIA of a waste transfer station in the absence of any functional interdependence between the incinerator and the waste transfer station and on the basis of the undisputed factual evidence before the court. Indaver further submitted that there was no obligation on the Board under EU law to assess the effects of a waste transfer station which Indaver had no intention of developing and which was not required for the operation of the incinerator. It too argued that this was not one of the exceptional types of cases referred to by

the High Court in *Ratheniska*. Finally, Indaver also relied on the dicta of the Supreme Court in *Fitzpatrick*.

(b) Facts relevant to this Ground

261. The facts relevant to this ground are as follows. In its 2001 application for permission for an incinerator development at Ringaskiddy, Indaver included as part of the application provision for a waste transfer station on the site. It also included provision for a waste transfer station in its 2008 application. It was envisaged that a waste transfer station would be included in the application which Indaver was going to make following the pre-application consultation process commenced in 2012, which ultimately led to Indaver's 2016 planning application. However, a decision was taken by Indaver during the course of that consultation process to remove provision for a waste transfer station in its proposed application. Indaver's 2016 planning application did not include provision for a waste transfer station.

262. The record of a meeting on 16th July, 2015 between representatives of the Board and representatives of Indaver, as part of the pre-application consultation, noted as follows:-

“The prospective applicant informed the Board that the pre-treatment facility (transfer station) has now been removed from the intended planning application. This has been done in order to simplify the planning application, though it hopes to make a separate application for this element at some time in the future. The prospective applicant said that the overall size of the subject site will remain the same. Noting this, the Board said that it would be important to be clear on this point so as to avoid any possible accusations of project-splitting and an incremental approach to the development of the site.

Arising from this, the prospective applicant said that the site should no longer fall under the Seveso Regulations. This would be due to the removal of storage of certain

volumes of solvents. Notwithstanding this, a risk assessment will be included as part of the formal planning application...”

263. The record of that meeting was subsequently corrected at a later meeting as part of the consultation process, on 11th September, 2015. With reference to the issue of the removal of the transfer station, the record of the meeting of 11th September, 2015 noted:-

“The transfer station is not needed at this time. It may revisit it as a separate application in the future.”

There was a further clarification at that meeting with respect to the Seveso III Directive/Domestic Seveso Regulations. In that respect, the record of the meeting on 11th September, 2015 noted:-

“The proposed development will not fall under the Seveso Regulations; therefore reference to the Major Accidents Directive in the public notices is not required.”

264. Indaver’s 2016 planning application did not seek permission for a waste transfer station as part of the proposed development. Paragraph 3.3.3 of the EIS, under the heading “Waste Transfer Station Option”, stated as follows:-

“The provision of a waste transfer station, as a separate piece of infrastructure, was contemplated as a possible aspect of this project, but ultimately not included. A transfer station is not required for the operation of the proposed development, as is evidenced by the Meath waste-to-energy facility, which accepts the same waste streams as the proposed development in Ringaskiddy, but does not have a transfer station. There are already transfer stations, Shannon, Cork and Portlaoise.

...

The applicant reiterates that a waste transfer station is not envisaged for the Ringaskiddy site at this time and that no permission is sought for such a waste transfer station on this application for consent.”

265. In his opening statement at the oral hearing on 21st April, 2016, Mr. Noonan, the applicant's solicitor, made reference to the 2008 application and to the inclusion of a waste transfer station as part of that application. He noted that it might be "*coincidental*" that the location for the waste transfer station in the 2008 application, which was described in the application before the inspector as the "*Western Fields*", was to be raised to a level of 4.5 metres OD and otherwise undeveloped. Mr. Noonan observed that that was an "*expensive exercise*" and noted that Indaver denied that it had any intention "*to come back for a waste transfer station in the future*". Mr. Noonan further noted that "*apart from any other planning significance, removal of the waste transfer station may have taken this development out of the strict requirements of the Major Accidents Directive*".

266. The applicant's evidence to the inspector on this issue was given by Conor Jones of Indaver. In response to a submission by the applicant that Indaver had to develop a hazardous waste transfer station at the incinerator in order to facilitate "*a full service offering to the pharmachem waste producers*", Mr. Jones stated in his witness statement as follows:-

"The facility does not require a transfer station facility. The waste to energy facility in Carranstown accepts the same waste streams as is proposed for the Ringaskiddy facility and no transfer station is located on the site."

267. So far as I can see from the evidence provided to the court on this application, it was not actually suggested to the inspector on behalf of the applicant that Indaver had removed from its intended application provision for a waste transfer station in order to avoid consideration and assessment of the transfer station as part of the EIA required to be carried out in respect of the proposed development and that this amounted to unlawful "project splitting". That was certainly the case made in its application before the court but, so far as I can see, the applicant did not make the case before the inspector that Indaver was engaged in unlawful "project splitting".

268. In his report of 27th January, 2017, the inspector noted that *“no waste transfer station is proposed in relation to the current proposal”*. He did not address any submission on “project splitting” as none appears to have been made to him. Similarly, there is no reference to any suggestion of “project splitting” in the Board Direction or in the Board Order.

269. In her first affidavit in support of the applicant’s application, Ms. O’Leary exhibited certain documents and made the point (which had been made by Mr. Noonan in his opening statement to the inspector) that the 2008 application included provision for a waste transfer station to be constructed on a portion of the site described as the *“Western Fields”*, that no station was included in Indaver’s 2016 planning application and that instead provision was made for the construction of a substantial raised plateau with separate entrance in the *“Western Fields”*. Among the documents exhibited by Ms. O’Leary was a report dated 13th July, 2018 from Ms. Trisha O’Sullivan of TPlan Planning Consultants in which the following was stated:-

“We would suggest that the level of works at the Western Fields is over complex, over engineered and over specified and therefore unnecessary simply for a temporary compound for the use of construction related heavy vehicles during the construction period.

Given the planning history of the site, it is difficult to interpret this ‘raised plateau’ as anything other than the earthworks and groundworks necessary for the establishment of a hazardous waste transfer station in the Western Fields.

Therefore we remain concerned that the approach by the applicants represented a strong possibility of project splitting.”

270. While Ms. O’Sullivan had furnished a report to the oral hearing dated 26th April, 2016, that report did not contain any allegation of “project splitting”.

271. Ms. Keaney addressed this allegation on behalf of Indaver at paras. 17 to 21 of her first affidavit of 30th November, 2018. At para. 18 of that affidavit, Ms. Keaney stated that, while a proposal to develop a waste transfer station at the site was included in previous applications for permission, *“it is no longer intended to develop a waste transfer station at the waste to energy facility at Ringaskiddy”*. She further confirmed and stated that it was explained at the oral hearing that no waste transfer station is required for the operation of the facility at Ringaskiddy. At para. 19 of her affidavit, Ms. Keaney stated that:-

“It was decided not to proceed with the waste transfer station as part of the application for the current planning permission and there are currently no plans to develop a waste transfer station on the Ringaskiddy site. I can also confirm that a waste transfer station is not required for the waste to energy facility to operate.”

Ms Keaney referred to the evidence given by Mr. Jones at the oral hearing to the effect that the facility operated by Indaver at Carranstown, County Meath, which accepts the same waste streams as is proposed for the facility at Ringaskiddy, does not have a waste transfer station.

272. Ms. Keaney further disputed the applicant’s contention that the construction of a raised plateau at the western part of the site was for the purpose of facilitating the development of a waste transfer station. She referred to the flood risk assessment at appendix 13.4 of the EIS in which reference was made to a proposal to have a general flood defence level of 4.55 OD for the site which would offer a high standard of flood protection. She noted that that required raising the foot print of the entire site to at least the proposed minimum site flood defence level of 4.55 OD and that the ground level in the area of the raised plateau had to be raised to the same minimum flood defence level established for the entire site of 4.55 OD. She referred in that regard to s. 7.7.7 of the EIS. She concluded by stating that *“the raising of the level of the western part of the proposed development is not related to any proposal to construct a waste transfer station”*.

273. In her second affidavit sworn on behalf of the applicant on 5th January, 2019, Ms. O’Leary referred again to the views of Ms. O’Sullivan, the planning consultant, who apparently remained of the view that *“the only realistic purpose for the raised plateau on the Western Fields is the accommodation of a waste transfer station, in the future...”*. Reference was made (at para. 32 of that affidavit) to the possibility that it might become necessary for Ms. O’Sullivan to swear an affidavit setting out her views once discovery was made in the case. However, no affidavit from Ms. O’Sullivan was ultimately provided.

274. In opening the applicant’s case, counsel for the applicant acknowledged that the applicant faced some difficulties in advancing its case under this ground in light of the evidence given by Ms. Keaney. However, the applicant did persist in its case under this ground and, if anything, pressed the ground even more forcefully in the reply.

275. In light of the evidence which I have summarised, I conclude, as a matter of fact, that Indaver does not intend to develop a waste transfer station at the site in Ringaskiddy, that it currently has no plans to develop a waste transfer station on the site and that such a station is not required for the incinerator facility to operate at Ringaskiddy. I also conclude, as a matter of fact, that while the applicant now seeks to make the case that the non-inclusion by Indaver of a waste transfer station as part of its 2016 application amounted to unlawful “project splitting” by Indaver, that case was not made, explicitly at least, in the submissions made on behalf of the applicant to the inspector or the Board.

(c) Decision on Ground 3

276. I conclude that the applicant cannot succeed on this ground having regard to the factual evidence before the court and the applicable legal provisions.

277. Under Article 2 of the EIA Directive, Member States are required to adopt all measures necessary to ensure that *“before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made*

subject to a requirement for development consent and an assessment with regard to their effects". Article 1(2)(a) defines what is meant by a "project" in this context. Article 1(2)(c) provides that "development consent" means "the decision of the competent authority or authorities which entitles the developer to proceed with the project". Article 3 requires that the EIA "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 of a project on" a number of factors including human beings, fauna and flora and so on. In Case C-50/09 *Commission v. Ireland*, the CJEU observed (at para. 40) that, in carrying out such an assessment, the "competent environmental authority must thus undertake both investigation and an analysis to reach as complete an assessment as possible of the direct and indirect effects of the project concerned on the factors set out in the first three indents of Article 3 and the interaction between those factors" (para. 40; see also *Balz v. An Bord Pleanála* [2016] IEHC 134 (Barton J.) at paras. 24 to 28). The provisions of Articles 2 and 3 of the EIA Directive were transposed into Irish law by ss. 171A and 172 of the 2000 Act. The 2000 Act does not refer to "projects" but rather to "developments". However, that difference is not significant for the purpose of this case.

278. In my view, the Board did assess the project before it which was the incinerator development the subject of Indaver's 2016 planning application. That application did not include a waste transfer station. The Board could not assess the effects of the waste transfer station on the environment or the likely cumulative effects of the proposed development with the likely effects of a waste transfer station on the environment in circumstances where it had no information before it concerning the waste transfer station. What would the Board have taken into account in carrying out any assessment of the effects of a waste transfer station on the environment when it had no information about the waste transfer station? It could not simply have gone back to the earlier applications in 2001 and 2008 and read across into the

2016 application the information derived from those earlier applications. Indaver's 2016 planning application differed in a number of significant respects from the earlier applications. It would, therefore, have been an entirely speculative operation for the Board to have undertaken. I do not accept that that was something the Board was required to do under Article 2 or Article 3 of the EIA Directive or under the provisions of ss. 171A or 172 in part X of the 2000 Act. In particular, I do not accept that the Board was required to undertake that exercise by reference to what the Court of Justice said at para. 40 of its judgment in Case C-50/09 *Commission v. Ireland*.

279. I do not accept, therefore, that the Board was required to assess, as part of the EIA which it was required to carry out in respect of the development the subject of Indaver's 2016 planning application, the effects of a waste transfer station which did not form part of the application, which was not required for the operation of the incinerator development and which Indaver stated it did not have an intention to develop.

280. Nor do I accept that the removal of the waste transfer station from its proposed development and the non-inclusion of that station in Indaver's 2016 application amounted to unlawful "project splitting" by Indaver. The parties were agreed on the applicable case law and they all relied on more or less the same cases in support of their respective positions.

281. There are various different descriptions of "project splitting" and it is unnecessary to define the precise boundaries of that term for the purpose of resolving the issue in this case.

282. As recently explained by the Supreme Court in *Fitzpatrick*, "project splitting" is generally understood to refer to the avoidance of assessment under the EIA Directive "*by the splitting of projects which, if taken together, are likely to have significant effects on the environment and meet the thresholds for assessments in accordance with Article 4 of the EIA Directive and Annexes referred to therein...*" (per Finlay Geoghegan J. in the Supreme Court at para. 37). The Supreme Court referred in that regard to the well-known judgment of the

CJEU in case C-142/07 *Ecologistas en Acción-CODA v. Ayuntamiento de Madrid* [2008]

ECR I-06097 at para. 44. There, the CJEU stated:-

“Lastly, as the Court has already noted with regard to Directive 85/337, the purpose of the amended directive cannot be circumvented by the splitting of projects and the failure to take account of the cumulative effect of several projects must not mean in practice that they all escape the obligation to carry out an assessment when, taken together, they are likely to have significant effects on the environment within the meaning of Article 2(1) of the amended directive...”

283. I agree with the Board and Indaver that no such “project splitting” has occurred in this case. The Board did carry out an EIA in respect of the incinerator development the subject of Indaver’s 2016 planning application.

284. However, there is another form of “project splitting” on which the applicant seeks to rely and that is the making of an application for permission which excludes certain elements which are required to be taken into account in the EIA as those elements are an integral part of the same “*project*”. However, this case is completely different to cases such as *O’Grianna* in which this type of “project splitting” was considered.

285. In *O’Grianna*, the High Court (Peart J.) concluded that the development was not a standalone project and that the connection to the national grid was an integral part of the overall development of which the construction of the turbines was the first part and that the wind turbine development on its own “*serves no function if it cannot be connected to the national grid*” (per Peart J. at para. 27). The court concluded, therefore, that the connection to the national grid was “*fundamental to the entire project*” and that “*in principle at least the cumulative effect of both must be assessed in order to comply with the Directive*” (per Peart J. at para. 27). That is not the case here. The undisputed evidence is that there is no functional interdependence between the incinerator and the waste transfer station. The evidence is all

one way on that issue. The incinerator can operate without a waste transfer station. The wind farm at issue in *O’Grianna* could not operate without the connection to the national grid. The two were functionally interdependent upon each other. That is not so in respect of the development at issue in this case and the waste transfer station. That was accepted by the applicant. This is not a case, therefore, as was the position in *O’Grianna*, that “*in reality the wind farm and its connection in due course to the national grid is one project*”.

286. Nor is this a case where there is any legal interdependence between the incinerator development and the waste transfer station as there was in the English case of *Brown v. Carlisle City Council* [2010] EWCA Civ 523 (“*Brown*”).

287. Both *O’Grianna* and *Brown* were considered by the Supreme Court in *Fitzpatrick*. At para. 45 of her judgment in that case, Finlay Geoghegan J. stated that the approach in *O’Grianna* and *Brown* is “*dependent upon a finding of fact made that the specific project for which planning permission was granted was functionally or legally interdependent on a further development not included in the application for planning permission which might have environmental effects and in respect of which no EIA had been carried out...*”. On the facts of this case, the incinerator the subject of Indaver’s 2016 planning application is not functionally or legally interdependent on the waste transfer station. That was also the conclusion reached by the High Court (McDermott J.) in *Fitzpatrick* in relation to the development at issue in that case.

288. In *Fitzpatrick*, Apple applied for and obtained planning permission for a proposed data centre near Athenry, County Galway. Apple also submitted a masterplan which envisaged that eight data halls would potentially be built on the site in the future. The permission granted by the Board involved two elements, a data centre and a substation with grid connection. In the High Court, the applicants primary contention was that the Board was obliged to carry out an EIA of the masterplan and that it had failed to do so in breach of the

EIA Directive. They submitted that the masterplan was the “*project*” for the purposes of the EIA Directive rather than the single data centre which was the subject of the application at issue. The High Court rejected that contention. The Supreme Court agreed with the High Court’s finding that there was no functional interdependence between the development of the first data centre and the development of further data halls in accordance with the masterplan. The Supreme Court held that once built, the data centre could be operated as a single data hall and that it was a standalone project which was capable of being the subject of a planning application for which an EIA could properly be carried out (para. 46). The Court held that the Board was correct in considering the development of the first data centre and ancillary works to be a standalone development which could properly be the subject of a planning application and EIA assessment. The Court noted that while the Board took into account the fact that the data centre was the first of eight data centres proposed in the masterplan when considering the justification for the site selected, it did not follow that impermissible project splitting or slicing had taken place (para. 47). The Court held that the first data centre was “*standalone*” in the sense of not being functionally dependent on future phases of the masterplan (para. 47). The Court further held that the fact that it was the first phase in the masterplan was a matter to be taken into account as part of the relevant circumstances to be considered when conducting the EIA and making the planning decision. However, there was no obligation on the Board to conduct an EIA of the masterplan in the course of an application for planning permission for phase one of that plan (para. 48).

289. The Supreme Court went on to consider the scope of an EIA in respect of the first phase of the masterplan. Referring to the opinion of Advocate General Gulmann in *Bund Naturschutz*, and Article 3 of the EIA Directive, the Court noted that “*the obligation is to carry out an assessment in an appropriate manner in the light of each individual case*” (para. 56). Therefore, the Court held that the assessment is “*fact specific to the individual case*”. It

held that in light of the obligation under the EIA Directive to assess potential effects on the environment at the earliest possible stage, it was necessary to take account, when carrying out an EIA of the development at issue of the future potential phases of the masterplan, as far as practically possible (para. 56). The Court was satisfied that the inspector and the Board, when carrying out the EIA of the proposed development, did take account as far as was practically possible of the proposed buildout of further data halls under the masterplan and that the Board had, therefore, conducted a valid EIA in accordance with the requirements of the EIA Directive.

290. While the decision of the Supreme Court in *Fitzpatrick* is extremely helpful in understanding the approach to be taken, the facts at issue in that case were very different from present case. As in *Fitzpatrick*, in my view, the incinerator development in this case is a separate standalone “*project*” and the omission of a waste transfer station from the application was not the omission of an integral element of the project. There is nothing in this case equivalent to the masterplan which was at issue in *Fitzpatrick*. On the evidence, there is no plan to construct a waste transfer station at Ringaskiddy. The construction of such a transfer station is not part of any wider plan or masterplan. While the Supreme Court made clear that it was necessary for the Board to assess the potential effects on the environment of the future potential phases of the masterplan when carrying out an EIA in respect of the particular development at issue, there was no obligation on the Board to assess the potential effects on the environment of a waste transfer station when there were no details before the Board concerning any waste transfer station and the evidence before the Board was that no such station was required. The evidence before the court in these proceedings is that it is no longer intended to develop a waste transfer station at Ringaskiddy and that there are currently no plans to do so. There is, therefore, no equivalent in this case to the masterplan which was considered in *Fitzpatrick* which was required to be taken into account, and which was taken

into account, by the Board in carrying out the EIA in respect of the particular data centre development. It seems to me, therefore, that while the decision of the Supreme Court in *Fitzpatrick* is extremely helpful in understanding the extent of the obligation on the Board to consider matters beyond the immediate development itself, it provides no support for the applicant's contention that as part of the EIA in respect of the proposed development in this case, the Board was required to take into account the potential effects of a waste transfer station which might, in the future, be sought to be developed on the site at Ringaskiddy.

291. It seems to me, therefore, that on the facts and on the law, there was no unlawful "project splitting" by Indaver in submitting its application without including a waste transfer station and no breach by the Board of its obligations under the EIA Directive and Part X of the 2000 Act in assessing the proposed development without reference to the possibility that in the future a waste transfer station might be sought to be developed on the site.

292. While counsel for the Board may be correct in her view that there is a "*high probability*" that any attempt to develop a waste transfer station on the site in the future would require an EIA and that an EIA would "*almost certainly*" be required, either as an extension to the existing development (if permitted) under para. 13 of annex II of the EIA Directive (as amended by the 2014 Directive) or otherwise, that is not an issue I have to determine on this application. It might also be noted that in the event that permission is sought in the future for a waste transfer station on the site, any such application may well engage the provisions of ss. 37E and 37G of the SID provisions in the 2000 Act requiring the submission of an Environmental Impact Statement by the applicant for permission and the carrying out of an EIA by the Board in considering that application.

293. The applicant's complaint that the Board did not consider the question of "project splitting", can be easily dealt with. First, the issue does not appear to have been expressly raised by the applicant in its submissions to the Board or to the inspector. Second, the issue of

“project splitting” was not engaged at all on the facts. For the reasons set out earlier in this section of my judgment, I have concluded that both on the facts and on the law, the applicant’s complaints in relation to “project splitting” are not well founded and I am compelled to reject them.

294. Finally, under this ground, it is clear that as the proposed development does not include a waste transfer station, the provisions of the Seveso Directive and the Domestic Seveso Regulations do not apply to it. No criticism can be made of the inspector or of the Board, therefore, for not expressly addressing these provisions in his report or in its decision.

16. Ground 5: Alleged grant of Development Consent before EIA and AA

(a) Brief Summary of Parties’ Positions

(1) The Applicant

295. The applicant contended that the Board decided to grant permission to Indaver in respect of the proposed development before it carried out an EIA and an AA in respect of the proposed development, in breach of the provisions of the EIA Directive and the Habitats Directive and the provisions of the 2000 Act which transposed those directives into Irish law. The applicant relied on the minutes of the various meetings of the Board in May, 2018 and argued, by reference to those minutes, that the Board decided to grant permission to the applicant in respect of the proposed development in a vote taken by the Board at its meeting on 17th May, 2018. The applicant contended that the decision taken at that meeting pre-dated the carrying out of an EIA and an AA by the Board. It alleged that the Board carried out an EIA and an AA in respect of the proposed development at its subsequent meeting on 23rd May, 2018, with the outcome of those assessments being referred to in the Board Direction dated 24th May, 2018. Consequently, the applicant argued that the EIA and the AA were carried out after the decision was made to grant permission in respect of the proposed development.

296. The applicant relied on Article 2(1) of the EIA Directive and the judgment of the CJEU in Case C-50/09 *Commission v. Ireland* to demonstrate that the Board was obliged to carry out an EIA before granting permission for the proposed development. It relied on Article 6(3) of the Habitats Directive and s. 177V of the 2000 Act to demonstrate the requirement to carry out an AA before granting permission for a development and on the decision of the Supreme Court in *Connelly v. An Bord Pleanála* [2018] IESC 31 (“*Connelly*”) to demonstrate the necessity for a valid AA to be carried out by the Board in order that the Board had jurisdiction to grant permission.

297. The applicant also relied on a number of sections of the 2000 Act referable to the decision-making process of the Board, including s. 111(4) and disputed the contention of the Board and Indaver that the decision of the Supreme Court in *Ecological Data Centres Ltd v. An Bord Pleanála* and *Urinnbridge Ltd v. An Bord Pleanála* [2013] IESC 61 (“*Urinnbridge*”) was sufficient to dispose of this ground of challenge advanced by the applicant. The applicant submitted that it was necessary substantively to comply with the requirements for an EIA and an AA under EU law, that mere formal compliance with those requirements would not be sufficient as a matter of EU law and that, if the court were in any doubt on the correct interpretation of the provisions of EU law relevant to this ground, the court should make a preliminary reference to the CJEU under Article 267 TFEU.

(2) The Board

298. In response, the Board (supported by Indaver in many of the arguments which it advanced in respect of this ground) accepted that, where they are required, the EIA and the AA must be carried out before the Board makes its decision to grant permission in respect of a proposed development. The Board referred to the record of its decision in this case, noting that the application was considered by the Board at a number of meetings in May, 2018 before the meeting on 17th May, 2018. In its statement of opposition, the Board asserted that

it did not make its decision on Indaver's application until its order had been drafted and signed on 29th May, 2018. The Board referred to the decision at the meeting on 17th May, 2018 as a decision to grant permission "*in principle*" and noted that the Board reconvened on 23rd May, 2018 to agree and finalise the reasons and considerations for its decision, including the terms of the record of the EIA and the AA carried out by it and the terms of the conditions to which its decision was subject, having regard to the EIA and AA which it had carried out. It contended that the decision to grant permission in respect of the proposed development was not made until 29th May, 2018 and that it had carried out an EIA and an AA prior to the grant of permission. The Board stressed the fact that, at its meeting on 23rd May, 2018, it decided to grant permission subject to 24 conditions which were decided upon at that meeting and that those conditions were crucial and formed an integral part of the decision itself, as well as being critical to the EIA which it was required to carry out. The Board relied, in particular, on the provisions of s. 37G(3) and s. 172(1H) and (1I) of the 2000 Act. The Board also relied upon certain provisions of the EIA Directive and of the Habitats Directive in support of its position. The Board contended that this case is quite different to *Connelly*. It relied on the decision of the Supreme Court in *Urinbridge* in support of its contention that the decision to grant permission in respect of the proposed development was only made as a matter of law when the Board Order was made on 29th May, 2018.

(3) *Indaver*

299. As noted above, Indaver supported the submissions advanced by the Board under this ground. It contended that it was clear from the Board Direction of 24th May, 2018 that the decision to grant permission was made on 23rd May, 2018 at which time the record of the Board decision, including the record of the assessments undertaken for the purposes of the EIA Directive and the Habitats Directive, was finalised. Indaver further relied on the decision of the High Court (Noonan J.) in *Aherne v. An Bord Pleanála* [2015] IEHC 606 ("*Aherne*") to

the effect that the onus of proof that an EIA had not been carried out by the Board rested with the applicant and that the applicant had not put forward any evidence to support its allegation that an EIA and an AA had not been carried out until after the decision to grant permission was made. Indaver also relied on the decision of the Supreme Court in *Urinnbridge*. It agreed with the Board that the conditions were a necessary part of the decision and that until the conditions were decided upon, the decision was not and could not have been made by the Board. Finally, Indaver also relied on *Urinnbridge*.

(b) Facts relevant to this Ground

300. There is no dispute between the parties as to the facts relevant to this ground. Having received the report and the supplemental report from the inspector, and the chairperson having determined the Board members who were available to participate in the consideration of the application, the members of the Board who were available to do so had a number of meetings to consider the application during the course of May, 2018. The minutes of those meetings were exhibited by Ms. O’Leary. In respect of some of the meetings, there are two versions of the minutes available, one which contains relevant information added in handwriting and another in which that information has been typed up.

301. The Board met on 3rd May, 9th May and 15th May, 2018 to consider the application. At each of those meetings, a decision on the application was deferred. The minutes of those meetings (and of the subsequent meetings of the Board referred to below) all contain the introductory words:-

“The Board, having considered the files and all other matters related to the cases and after due consideration of all the issues involved, decided to act in the manner indicated below...”

The minutes record that in each of those three meetings, the decision was to defer.

302. The Board met again on 17th May, 2018. The minutes of that meeting contain the same introductory words. The handwritten version of the minutes contains the words “*grant 5: 2*” and an “X” to indicate that the inspector’s recommendation was “*not generally accepted*”. The typed-up version of those minutes state after the entry “*decision*”, the word “*grant*” and, an indication that the inspector’s recommendation was being reversed. Beside the entry “*vote*”, the minutes state “5/2”. The applicant maintained that it was at that meeting that the Board decided to grant permission for the proposed development and that an EIA and an AA had not been carried out by that stage. As noted earlier, in its statement of opposition, the Board described the decision made at the meeting on 17th May, 2018 as being a decision to grant permission “*in principle*”, for the reasons summarised earlier.

303. The Board met again on 23rd May, 2018. The minutes of that meeting contain the same introductory words as before. Both the handwritten and typed up version of the minutes of that meeting contain, after the entry “*decision*”, the words “*Agreed Board Direction and determined costs...*” and set out the costs to be paid to a number of parties, including the applicant. Neither of the two versions of the minutes of that meeting disclose a vote having been taken at that meeting.

304. The Board Direction is dated the following day, 24th May, 2018. I have referred earlier to some of the contents of the Board Direction. For present purposes, I note that the Board Direction refers to the Board meetings on 3rd May, 9th May and 15th May, 2018 and states that the case was “*considered by all available Board members*” (noting that one Board member was not available for the meeting on 9th May, 2018 but was briefed by the deputy chairperson in advance of the meeting on 15th May, 2018). The Board Direction further notes that “*the case was presented in full*” by the deputy chairperson and reference is made to the application and the other information on the file up until the inspector’s report, the details of the further information request issued by the Board in March, 2017 the inspector’s

supplemental report dated March, 2018 dealing with the matters raised in the further information request, and the subsequent written submissions from the parties. The Direction then sets out various matters of which the Board was satisfied and states that the Board *“proceeded to complete its consideration of the case based on the submissions already on file”*. This is clearly a record of what the Board considered and was satisfied with at the meetings on 3rd May, 9th May and 15th May, 2018. The Board minutes then refer to a further meeting of the Board on 17th May, 2018 at which *“the Board decided, by a 5:2 majority, to grant permission for the proposed development”*. The Board Direction does not state that that decision was a decision *“in principle”*. However, no reference is made to any conditions having been decided at the meeting of 19th May, 2018. The Board Direction then refers to the further meeting of the Board on 23rd May, 2018 at which *“the Board agreed the following reasons and consideration (sic) and conditions”*. The *“reasons and considerations”* are then set out, followed by the sections of the Board Direction dealing with the EIA and AA which it carried out. Under the heading EIA, the Board Direction states that the Board *“completed an environmental impact assessment of the proposed development, taking into account”* various matters which are then set out. Under the heading AA, the Board Direction notes that, with reference to the screening stage, the Board completed a screening for AA and sets out the result of that process. It then considers the stage 2 assessment stage and sets out the record of the AA carried out by the Board. The Board Direction then sets out the conclusions reached by the Board in relation to proper planning and sustainable development and outlines the reasons why the Board decided not to accept the inspector’s recommendation before listing the conditions to the grant of permission which the Board agreed at the meeting on 23rd May, 2018. There are 24 conditions.

305. The next relevant event is the Board Order which is dated 29th May, 2018. For present purposes, it is to be noted that the Board Order records the decision of the Board to grant

permission under s. 37G of the 2000 Act for the proposed development “*based on the reasons and considerations under and subject to the conditions set out below*”. The matters considered and the reasons and considerations are identified in the Board Order. The Order then records the EIA and AA carried out by the Board and its conclusions in respect of each assessment before setting out the Board’s conclusions on proper planning and sustainable development. As with the Board Direction, the Board Order sets out the reasons why the Board decided not to accept the inspector’s recommendation to refuse permission and then lists the 24 conditions subject to which permission was being granted and the reasons for each of those conditions. Finally, the Board Order deals with the question of costs (in the manner addressed in the earlier Board Direction).

306. These facts are not in dispute. What is in dispute, however, is the legal consequences of the manner in which the Board approached the decision-making process in respect of this application and the decision itself to grant permission in respect of the proposed development. That is at the heart of this ground of challenge advanced by the applicant and I consider my conclusions on this ground in my decision below.

(c) Decision on Ground 5

307. There is no dispute between the parties as to the EU and statutory provisions applicable to this ground. As regards EIA, the relevant provisions are to be found in Recital (7) and Articles 1, 2 and 3 of the EIA Directive and ss. 171A and 172 of the 2000 Act. As regards AA, the relevant provisions are to be found in Article 6(3) of the Habitats Directive and s. 177V(1) of the 2000 Act.

308. The relevant part of Recital (7) of the EIA Directive is as follows:-

“Development consent for public and private projects which are likely to have significant effects on the environment should be granted only after an assessment of the likely significant environmental effects of those projects has been carried out.”

(emphasis added)

309. Article 1(2)(c) defines the term “*development consent*” as meaning:-

“...*the decision of the competent authority or authorities which entitles the developer to proceed with the project;*”

310. Article 2(1) provides that:-

“*Member States shall adopt all measures necessary to ensure that, before development consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects...*” (emphasis added)

311. Article 3 provides that the EIA “*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 various factors set out, including human beings, fauna and flora, soil, water, air, climate and the landscape and so on.

312. These provisions are largely mirrored in Part X of the 2000 Act and, in particular, in ss. 171A and 172. There are two subsections of s. 172 to which I should refer. Section 172(1I) provides that:-

“*Where the planning authority or the Board, as the case may be, decides to grant consent for a proposed development, it may attach such conditions to the grant as it considers necessary, to avoid, reduce and, if possible, offset the major adverse effects on the environment (if any) of the proposed development.*”

The previous subsection, s. 172(1H), provides that:-

“*In carrying out an Environmental Impact Assessment under this section the planning authority or the Board, as the case may be, may have regard to and adopt in whole or*

in part any reports prepared by its officials or by consultants, experts or other advisers.”

313. I should also refer to s. 37G of the 2000 Act, which is to be found in the SID provisions inserted in the 2000 Act, and which deals with the decision to be made by the Board on an application for permission for a SID development. That section makes clear that the Board must consider the EIS submitted with an application for permission for a SID. Section 37G(3) provides that the Board, in deciding on such an application, may decide to grant the permission (with or without modifications) or to refuse to grant the permission sought and that a decision to grant permission “*may be subject to or without conditions*”.

314. Finally, with reference to EIA, the CJEU stated in Case C-50/09 *Commission v. Ireland*, with reference to Article 2(1) of the EIA Directive as follows (at paras. 76 and 77 of its judgment):-

“76. *Article 2(1) of Directive 85/337 thus states that the environmental impact assessment must take place ‘before the giving of consent’. That entails that the examination of a project’s direct and indirect effects on the factors referred to in Article 3 of that directive and on the interaction between those factors be fully carried out before consent is given.*

77. *In those circumstances, while nothing precludes Ireland’s choice to entrust the attainment of that directive’s aims to two different authorities, namely planning authorities on the one hand and the [EPA] on the other, that is subject to those authorities’ respective powers and the rules governing their implementation ensuring that an environmental impact assessment is carried out fully and in good time, that is to say before the giving of consent, within the meaning of that directive.”*

315. It is clear, therefore, and there is no dispute on this, that the Board must carry out an EIA in respect of a proposed development (where such an EIA is required, as in the case of an application for permission for a SID) before consent is given to the developer which would entitle the developer to proceed with the particular project or development.

316. A similar requirement arises in the case of an AA. Under Article 6(3) of the Habitats Directive, the competent national authorities can permit a particular plan or project which is likely to have a significant effect on the management of a European site in the particular circumstances envisaged in Article 6(3) “*only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public*”. The requirement to ensure that an AA is carried out in respect of the relevant plan or project (or development) before permission is given in respect of that project or development is mirrored in s. 177U (with reference to screening for AA) and s. 177V (with reference to stage 2 AA) of the 2000 Act. Section 177U(2) requires screening for AA to be carried out by the competent authority before consent for a proposed development is given. Section 177V(1) requires that, where stage 2 AA is required, the AA must be carried out by the competent authority before consent is given for the proposed development.

317. It is, therefore, equally clear, and was not in dispute between the parties, that where an AA is required (as in the present case), the AA (and its various stages) must be carried out before permission is given for the proposed development.

318. There is an added dimension to the requirement to carry out an AA before permission is granted in respect of a proposed development having regard to the requirement for a valid AA decision in order to confer jurisdiction on the Board to grant permission for the proposed development. This jurisdictional requirement was discussed by the High Court (Finlay Geoghegan J.) in *Eamon (Ted) Kelly v. An Bord Pleanála* [2014] IEHC 400 (“*Kelly*”) and by

the Supreme Court in *Connelly* (and has been considered in many other cases including, for example, in the following judgments which I have given: *Eoin Kelly v. An Bord Pleanála and ALDI Stores (Ireland) Ltd* [2019] IEHC 84 (“*Kelly/ALDI*”) at para. 97, *Rushe v. An Bord Pleanála & ors* [2020] IEHC 122 at para. 129 and *Crekav Trading GP Ltd v. An Bord Pleanála* [2020] IEHC [400] (“*Crekav*”) at paras. 121 to 123). This renders it all the more important that the AA is carried out before the decision to grant permission is made as it is necessary to confer jurisdiction on the Board to grant the permission and is a necessary precondition for the grant.

319. These appear to me to be the relevant EU and statutory provisions applicable to this ground of challenge advanced by the applicant.

320. Having considered the arguments advanced by the parties on this ground in light of the facts set out above and in light of these EU and statutory provisions, I do not believe that the applicant has made out its case under this ground. I will explain now why I have reached that conclusion.

321. It seems to me that the applicant has focused unduly on one point in time in the overall decision process, namely, the Board’s meeting on 17th May, 2018 and has effectively ignored what happened both prior to and subsequent to that meeting and, in particular, the meeting on 23rd May, 2018, the Board Direction of 24th May, 2018 and the Board Order of 29th May, 2018. While the applicant is correct in stating that the Board did not really address this ground in its affidavit evidence, notwithstanding that a number of affidavits were sworn on behalf of the Board, including affidavits sworn by the chairperson and by the deputy chairperson, it seems to me that the record is sufficient to enable conclusions to be made in respect of the decision-making process adopted by the Board in respect of this planning application. The applicant rightly pointed to the judgment of the High Court (Barton J.) in *Balz v. An Bord Pleanála* [2016] IEHC 134 (“*Balz*”) as stressing the importance of the record

of the Board's decision and of what the Board was required to do (per Barton J. at paras. 58 and 59). While it might have been more helpful if the Board had explained the position in greater detail in its affidavits, I am satisfied that the record is adequate to enable the court properly to consider and determine this ground of challenge.

322. It is clear from the minutes of the meetings of 3rd May, 9th May and 15th May, 2018 and from the terms of the Board Direction of 24th May, 2018 that Indaver's application was considered by the available Board members at those meetings, that the case was presented in full by the deputy chairperson and that the Board was satisfied of various matters, including that no further cross circulation of submissions was necessary, that there was no need to reopen the oral hearing and that there was no need to seek any further clarification of technical matters and that the Board proceeded to complete its consideration of the case based on the submissions already on the file (as appears from pp. 1 and 2 of the Board Direction). Among the materials considered by the Board at those meetings were the application and material included with it (including the EIS and NIS), the two reports of the inspectors and the various written submissions from the parties. It is clear from the Board Direction and from the minutes of those meetings (which contain the introductory wording to which I referred earlier) that this material was considered at those three meetings. The Board then decided, at the meeting on 17th May, 2018 by a 5:2 majority, to grant permission for the proposed development. However, it did so as part of the decision-making process which included the three earlier meetings referred to. While the Board did vote 5:2 at that meeting to decide to grant permission for the proposed development, it seems to me that viewed in its proper factual context, that decision was not a final decision to grant permission and whether it may properly be called a decision "*in principle*", it was certainly an inchoate or incomplete decision.

323. I say this for a number of reasons. First, the Board had not decided on any conditions at that stage. Second, the Board Direction makes clear that there was further detailed consideration of the application at the subsequent meeting on 23rd May, 2018 at which the EIA and AA were completed and at which the conditions were decided upon. Those conditions were an essential part of the decision to grant permission in respect of the development. Third, it could not, in my view, be said that the decision taken at the meeting on 17th May, 2018 was a final and complete decision to grant permission in respect of the proposed development, as Indaver could not have commenced the development for which permission was sought immediately following that decision. Apart from the fact that no conditions were decided upon at that meeting, the Board Order containing the grant of permission was not issued until 29th May, 2018 and it was in that order that the Board set out its decision to grant permission under s. 37G of the 2000 Act, subject to the conditions set out in the Board Order. Before then, Indaver could not have commenced carrying out the development for which permission was sought. That was implicitly acknowledged by the applicant since the order of *certiorari* which it sought in the proceedings was directed to the decision of the Board dated 29th May, 2018 (being the date of the Board Order) (s. D(1) of the amended statement of grounds) or, alternatively, to the EIA and/or the AA carried out by the Board on 23rd May, 2018 (s. D(2) of the amended statement of grounds) and not to the decision made by the Board on 17th May, 2018. Fundamentally, however, it seems to me to accept the applicant's contention that a final and complete decision to grant permission in respect of the development was made at the meeting on 17th May, 2018 would involve a wholesale disregard in what occurred at the subsequent meeting on 23rd May, 2018 which was set out in the Board Direction of the following day, 24th May, 2018.

324. The conditions subject to which the Board decided to grant permission were, in my view, an integral and critical part of the Board's decision to grant permission. I referred

earlier to s. 37G(3) which sets out the range of decisions which were open to the Board when making a decision on an application for permission for a SID. Among the decisions which the Board could make was a decision to grant permission subject to conditions. If that was the option which the Board was deciding to take, the conditions would be an essential part of the decision to grant permission. Without the conditions, the decision to grant permission would be inchoate or incomplete. That was the option which the Board decided to adopt in this case, as is clear from the terms of the Board Direction. In a similar vein, the attachment of conditions to the grant of permission is an option open to the Board where it considers that such conditions are necessary *“to avoid, reduce and, if possible, offset the major adverse effects on the environment (if any) of the proposed development”* under s. 172(1I) of the 2000 Act. It is apparent from a review of the conditions set out in the Board Direction (and subsequently in the Board Order) that several of the conditions were directed to addressing the potential adverse effects on the environment of the proposed development. They include condition 3 (the requirement for an industrial emissions licence), condition 5 (which limits the quantity of waste and of hazardous waste permitted to be accepted at the facility), condition 6 (which requires implementation in full of all of the environmental mitigation measures outlined in the EIS and in the NIS, as amended by the additional information submitted at the oral hearing), condition 7 (directed to the management of the construction of the development), condition 12 (directed to coastal erosion protection measures), condition 16 (concerning water supply and drainage arrangements), condition 17 (directed to the preservation of archaeological materials) and so on. Without a decision on the appropriate conditions, the decision to grant permission was inchoate or incomplete and the conditions were necessary to address issues which arose as part of the EIA and AA carried out by the Board.

325. I do not accept the applicant’s contention that the fundamental requirement under EU law that an EIA and an AA be carried out before development consent was granted in respect of the proposed development (for the purposes of the EIA provisions) or before the Board agreed to the project or development (for the purposes of the AA provisions) was breached in this case. Nor do I accept that the Board’s arguments on this ground were formalistic and did not recognise the substantive requirements of EU law. I am satisfied that, on the evidence, the Board did not make a decision under s. 37G to grant permission in respect of the proposed development until it had decided on the appropriate conditions to attach to the permission. The record establishes that the Board did not reach a decision on those conditions until the meeting on 23rd May, 2018. The Board Direction demonstrates that it was at that meeting that the Board completed the EIA of the proposed development and completed the two AA stages required under the Habitats Directive. The formal decision of the Board, including the relevant conditions, was then recorded in the Board Order dated 29th May, 2018. It was the Board Order which recorded the decision in including the conditions which constituted the “*development consent*” under the EIA Directive which entitled the applicant to proceed with the development. In those circumstances, I reject the applicant’s contention that the decision was taken before completion of the EIA and the AA in breach of the EIA Directive and the Habitats Directive and the national implementing provisions. I am satisfied that the Board did not act in breach of those provisions in the manner alleged by the applicant under this ground.

326. For completeness, I should add that I agree with Indaver that the onus of proving that the Board did not carry out an EIA and an AA rested with the applicant: *Aherne v. An Bord Pleanála* [2015] IEHC 606. For the reasons which I have just set out, I do not accept that the applicant has discharged that onus. On the contrary, I am satisfied on the evidence that the Board did carry out an EIA and an AA before it made its decision under s. 36G to grant

permission for the proposed development subject to the conditions set out in the Board Direction and in the Board Order.

327. In light of these conclusions, it seems to me that it is not necessary for me to address in any detail the submissions advanced by the parties arising from the decision of the Supreme Court in *Urinnbridge*. It is sufficient for me to note that there is nothing in that decision which undermines the conclusions which I have drawn as to the legal consequences of the various stages of the decision-making process undertaken by the Board in reaching its decision ultimately to grant permission to Indaver in respect of the proposed development in the terms set out in the Board Order. On the contrary, while the Supreme Court was dealing with a different issue in *Urinnbridge*, it seems to me that the conclusion I have reached on the facts of this case is entirely consistent with the conclusion reached by the Supreme Court in that case, to the effect that the determination by the Board of the appeal under s. 37 of the 2000 Act is made when the Board formulates and issues its written decision. In this case, that was when the Board Order was issued on 29th May, 2018.

328. In conclusion on this issue, I am satisfied that I can decide the issue myself and do not require the assistance of the CJEU in doing so. I do not, therefore, believe that it is appropriate for me to make a reference to the CJEU under Article 267 TFEU as requested by the applicant.

329. Accordingly, for the reasons set out above, the applicant's claim under this ground must fail.

17. Ground 6: Alleged Failure by Board to carry out Assessment of Impact on Health and/or Failure by Board to comply with Obligation to carry out EIA by relying on Role of EPA

330. It was not entirely clear at the hearing whether the applicant was actually pursuing this ground of challenge. The parties addressed this ground in their respective written

submissions. At the hearing, the applicant indicated that it would rest on its written submissions in respect of this ground and sought to paraphrase the case made under this ground as being “*over reliance by the Board on the role of the EPA and what the EPA would consider before granting a [IPPC] licence...*”. The applicant stated that the principal authority on which it relied under this ground was the decision of the CJEU in Case C-50/09 *Commission v. Ireland*. The Board responded to this ground of challenge as part of an overall response to a number of the other grounds of challenge which raised public health issues. Indaver responded specifically to this ground in its oral submissions. The applicant did not deal with this ground in its reply. However, since the applicant did not expressly withdraw this ground of challenge or indicate that it was not pursuing it, it is necessary briefly to deal with it.

(a) Brief Summary of Parties’ Positions

(1) The Applicant

331. The applicant contended that the Board failed to identify, describe and assess the impact of the proposed development on health and, instead, relied on the role of the EPA which would have to consider whether to grant an industrial emissions licence (previously known as an integrated pollution control licence) (an “IEL”) in respect of the operation of the incinerator on the site. The applicant referred to correspondence between the Board and the EPA in February, 2016 and submitted that both the inspector and the Board, in reliance on the correspondence from the EPA and on the fact that the EPA would have to consider whether to grant an IEL in respect of the incinerator activity, failed to assess the impact of the proposed development on health. The applicant contended that that was a breach of the Board’s obligations under the EIA Directive and a breach of its duty under s. 37G(5) of the 2000 Act to consider whether to refuse permission for the development on environmental grounds.

332. In its amended statement of grounds and in its written submissions, the case essentially made by the applicant was that the Board had abdicated its role as the competent authority carrying out an EIA in respect of the proposed development, with respect to its effects on human beings and human health, on the basis that the EPA would be carrying out its own EIA as part of the consideration by that agency as to whether to grant an IEL in respect of the activities carried out on the site. The applicant stepped back somewhat from that position in its oral submissions, describing its case under this heading as “*over reliance*” by the Board on the role of the EPA and on what the EPA would consider before granting an IEL, while at the same time resting on what was said in its written submissions.

(2) *The Board*

333. In response, the Board referred to the legislative amendments effected to the Environmental Protection Agency Act, 1992 and the Waste Management Act, 1996 following the judgment of the CJEU in Case C-50/09 *Commission v. Ireland* (on which the applicant relied) as well as to the provisions of s. 37G(4), under which the Board is precluded from attaching conditions to a grant of permission for the purposes of controlling emissions from the activity to be carried out as part of a proposed development for which permission is granted, and s. 37G(5), under which the Board is entitled to refuse to grant permission for a proposed development where the Board considers that the development, notwithstanding the licensing of the activity concerned, is “*unacceptable on environmental grounds, having regard to the proper planning and sustainable development at the area in which the development will be situated*”.

334. The Board submitted that it had acted in a manner which was consistent with the judgment of the CJEU in Case C-50/09 *Commission v. Ireland* and with the provisions of s. 37G(4) and s. 37G(5). It submitted that the Board had properly consulted with the EPA and had had regard to its submission and that the potential licensing of the relevant activity by the

EPA, the statutory body with responsibility for controlling environmental emissions, was a relevant matter to which the Board was entitled to have regard, and did have regard, in carrying out the EIA in respect of the proposed development.

335. The Board rejected the contention that it had delegated its assessment of the effects of the proposed development on human beings and human health as part of its EIA to the EPA. It relied on relevant extracts from the Board's decision which it maintained demonstrated that the applicant's claims were incorrect. The Board submitted that it had properly and appropriately applied the legislative regime which had been enacted specifically to address the type of concerns expressed by the applicant in relation to the interaction between the Board and the EPA.

(3) Indaver

336. In its submissions on this ground, Indaver expressed its agreement with the submissions of the Board. It contended that the Board was required to have regard to the fact that an application would have to be made to the EPA for an IEL in respect of the activities to be carried out on the site and that, as a matter of fact, the Board did carry out an assessment of the impact of the proposed development on human health and did not refrain from doing so on the basis that the activities would be the subject of a licence application to the EPA.

337. Indaver submitted that a proper consideration of the Board's decision and the reports of the inspector demonstrates that the applicant's claim is unfounded. It submitted that the Board and the inspector did reach conclusions in relation to the impact on human health of the proposed development and did not conclude that the fact that the activity would be subject to an IEL excused the Board from its obligation to conduct an appropriate EIA. It referred to parts of the inspector's report and his supplemental report, which conclusions on that issue were accepted by the Board. It also referred to the Board's conclusions on this issue which, Indaver maintained, the Board was entitled to reach having regard to the obligations

placed upon it by the 2000 Act. Indaver submitted that the Board was required to carry out an EIA in respect of the application, separate to the EIA which the EPA would have to carry out when considering an application for an IEL under the 1992 Act (as amended) and under the 1996 Act (as amended) and that in carrying out its EIA, the Board was entitled to consider submissions from the EPA and the fact that emissions from the activity carried out at the site would be subject to the licensing regime provided for under the 1992 Act (as amended).

Indaver also rejected the contention that the minimal involvement of the EPA undermined the decision reached by the Board. It submitted that the Board complied with its obligations under s. 37G(4) and s. 37G(5) of the 2000 Act. Without prejudice to those submissions, Indaver relied by way of analogy on the decision of the Court of Appeal in *People Over Wind v. An Bord Pleanála* [2015] IECA 272 in further support of its contention that the Board was entitled to have regard to the fact that the activity proposed to be carried out as part of the development would be regulated by the EPA, including by the imposition of emissions limits designed to avoid significant effects on the environment.

(b) Facts relevant to this Ground

338. These can be briefly stated. On 1st February, 2016, the Board wrote to the EPA referring to Indaver's 2016 planning application. In that letter, the Board sought confirmation from the EPA that the proposed development was a development comprising, or for the purposes of, an activity which would require a licence under the 1992 Act (as amended) and under the 1996 Act (as amended). In the event that a licence was required, the EPA was requested to submit any observations to the Board which it might have in relation to the application. The EPA replied on 3rd February, 2016. The EPA noted that the previous licence granted to Indaver had ceased to have effect and that it would be required to make a new IEL application to the EPA if it wished to operate the activity the subject of the application before the Board. The EPA had received a copy of the EIS submitted by Indaver to the Board and

noted that it appeared to address the key points in relation to the environmental aspects of the proposed activity which related to matters coming within the EPA's area of responsibility.

The letter further stated that, as part of its consideration of any licence application which might be received by it, the EPA would ensure that before the licence was granted, the application would be subject to an EIA with respect to the matters coming within the functions of the EPA and that the appropriate consultation on any such licence application and EIS would be carried out by the EPA.

339. As a matter of fact, the inspector did consider the potential effects of the proposed development on human beings and human health in both of his reports. In his main report, the inspector did so in s. 9.7, (pp. 87 to 98) and in s. 10.4.4.1.1 (pp. 117 to 120) on likely significant direct and indirect effects. Those passages contain a detailed consideration of the dioxins issue which is central to ground 9 of the grounds of challenge advanced by the applicant and is addressed separately by reference to that ground. It is sufficient to state, however, that the inspector's main report does clearly address the impact of the proposed development on human health and does not do so solely by reference to the fact that the activity to be carried out on the site would require to be licensed by the EPA. In expressing his conclusions on the likely effects of the proposed development on the health of human beings, the inspector stated (at pp. 119 and 120):-

“Impacts in relation to impacts on human health in the absence of mitigation, in particular, during the operational phase of the development are likely to arise given the nature of the development and emissions arising. Any effects to health in the construction phase are short term in duration and are not likely to give rise to a significant impact.

The development will be subject to ongoing monitoring and will be licenced in relation to emissions. The development is not located, however, immediately adjoining any residential properties and the impact from emissions will reduce and dissipate with distance. It cannot be stated with certainty that impacts direct and/or indirect will not arise in particular in relation [to] increases of bioaccumulation over time of certain substances but based on anticipated levels and distance and the monitoring which will be in situ from the licencing process, I do not consider that there (sic) any significant risk is posed to human health as a consequence of the proposed development or that significant impacts in conjunction with existing, planned or proposed development are not (sic) likely to arise.”

340. The inspector’s supplemental report also dealt with the impact of the proposed development on human health and specifically addressed the dioxins issue. The inspector did note at paras. 3.2.19 (p. 6) of his supplemental report that *“there are current limits in relation to emissions and exposure which are required to be addressed by other statutory requirements and licencing”*. At para. 3.2.20 (also p. 6), the inspector stated:-

“In this regard I would note that limits on emissions including many identified and associated with the proposed development are defined and regulated by the EU Directive on Industrial Emissions... and will require an IE licence from the EPA.”

341. In the Board Direction and in the Board Order, the Board expressly noted that among the matters considered by it was:-

“...the fact that an Industrial Emissions licence from the Environmental Protection Agency, which will be subject to ongoing review, will be required for the activity and the operator will be required to comply with any conditions imposed in such a licence;” (p. 3 of Board Direction; p. 4 of Board Order)

342. In the Board Direction and Board Order, the Board also stated:-

“The Inspector did not consider that any significant risk is posed to human health by the proposed development. The Board shared this view. In reaching this conclusion, the Board drew in particular on the following aspects:

- *the use of modern technology in the design and operation of the facility, including in relation to cleaning of flue gases, and*
- *the Industrial Emissions regulatory regime under which waste-to-energy plants must operate, whereby the Environmental Protection Agency will require compliance with relevant EU and national emission standards.”*

(p. 6 of the Board Direction; p. 7 of the Board Order)

(c) Decision on Ground 6

343. Having considered the parties’ respective submissions, the factual position as summarised above and the applicable EU and statutory provisions, I am satisfied that the Board did not abdicate or delegate its responsibility for carrying out an EIA in respect of the proposed development and for assessing its effects on human health to the EPA. Nor did the Board rely to an excessive or impermissible extent on the fact that the activity intended to be carried out on the site as part of the proposed development would be the subject of an application to the EPA for an IEL. As a matter of fact, it is clear that the Board did carry out an EIA of the proposed development and, in that regard, did assess the effects of the proposed development on human beings, including on human health. It is clear from a review of the relevant materials, including the two reports of the inspector, the Board Direction and the Board Order that, contrary to the submission advanced on behalf of the applicant, the Board did assess the impact of the proposed development on human health and did not regard itself as being excused from that obligation on the basis that the activity would be considered by the EPA as part of an application for an IEL which would have to be made to that agency by Indaver. I should make clear that I am not addressing in this section of my judgment the

claim advanced by the applicant under ground 9 which is directed to the dioxin issue. I consider that ground separately.

344. I am also satisfied that the Board was entitled to have regard to the fact that the activity would be the subject of an application to the EPA for an IEL. Section 37G(4) of the 2000 Act provides that in such a situation, the Board, where it decides to grant permission, is not permitted to attach conditions to that grant for the purpose of controlling emissions from the operation of the activity or following the cessation of the operation or the activity. It did not do so. Section 37G(5) provides that in a case where the activity requires an IEL, the Board may decide to refuse to grant permission for the proposed development where it considers that the development “*notwithstanding the licensing of the activity, is unacceptable on development grounds, having regard to the proper planning and sustainable development of the area in which the development will be situated*”. The Board did not refuse to grant permission under this provision.

345. These two provisions read together do clearly indicate that the fact that the relevant activity may require that an application for an IEL be made to the EPA is a relevant factor in the Board’s consideration of an application for permission, that the Board may refuse permission notwithstanding the licensing of the activity where it considers that the development is unacceptable for the reasons set out in s. 37G(5) and that the Board may not impose a condition to any grant of permission controlling emissions from the particular activity or its cessation. These sections are intended to reflect the proper division of responsibility as between the Board and the EPA in light of the decision of the CJEU in Case-50/09 *Commission v. Ireland*. There is nothing in that decision or in the statutory provisions to which I have referred (and those in the 1992 Act (as amended) and in the 1996 Act (as amended)) which precludes the Board from considering the fact that the activity would require a licence from the EPA provided that the Board carries out a EIA itself. It is to be

noted that one of the conditions attached to the grant of permission is the fact that construction of the proposed development is not permitted to commence until an IEL for the operation of the facility has been granted by the EPA (condition 3).

346. In conclusion, I am satisfied that the Board did not abdicate or improperly delegate its functions in carrying out an EIA in respect of the proposed development, with particular reference to the effects on human health, to the EPA, in breach of the EIA Directive or any of the applicable statutory provisions. The fact that an application would have to be made to the EPA for the licence in respect of the activity proposed to be carried out was a relevant factor. However, it is clear from a review of the inspector's reports and from the Board Direction and Board Order that the Board was not delegating to or excessively relying on the EPA in carrying out this aspect of the EIA which it was required to carry out.

347. In light of those conclusions, I do not consider it necessary to address whether the Board's entitlement to have regard to the EPA licencing issue was permitted by analogy with the decision of the Court of Appeal in *People Over Wind*.

348. For these reasons, the applicant's claim under this ground must fail.

18. Grounds 7 and 8 – Ground 7: EIA Site Selection and Alternatives; Ground 8: Site Suitability

349. Although these two grounds were separately pleaded by the applicant in the amended statement of grounds, they were addressed together in the written and oral submissions of the parties. At the hearing, the applicant described these grounds as being substantively connected but formally separate. Ground 7 which concerned site selection and the consideration of alternatives is primarily an EIA ground. Ground 8, which concerned site suitability, is a planning ground.

(a) **Brief Summary of Parties' Positions**

(1) *The Applicant*

350. The applicant's case under ground 7 was that the EIS submitted by Indaver failed to comply with the requirements of Article 5(3)(d) of the EIA Directive and Article 94 and para. 1 of Schedule 6 of the Planning and Development Regulations, 2001 (as amended) with respect to the information provided concerning the "*main alternatives studied by*" Indaver and the "*main reasons*" for its choice, taking account the "*environmental effects*". The applicant relied on the criticism contained in the inspector's main report of those parts of the EIS concerning the justification for Indaver's selection of the site for the proposed development and the account of the alternatives (including alternative sites) considered by Indaver for the proposed development. The applicant relied not only on the inspector's report for the purposes of Indaver's 2016 planning application but also on the reports prepared by the inspectors for the 2001 and 2008 applications, both of which were critical of the site selection process followed by Indaver and of the suitability of the chosen site.

351. The applicant relied on the conclusions reached by the inspector in his main report on site selection, including his conclusions that a *de novo* site selection process had not been conducted in respect of the present application; that the initial site selection process carried out in 1999/2000 was updated and re-evaluated in 2015; that it was questionable whether the other sites considered warranted consideration as alternative sites; that the site selection assessment did not provide a "*robust evaluation or assessment of changes in the immediate area*" in the period since 2000 which were of importance; and that there was a "*significant information deficit*" in relation to site selection and the consideration of alternative sites and, therefore, "*an absence of a more up to date robust evaluation in this regard*" (quoting from para. 9.2.3.7 on p. 62 of the inspector's report). The applicant also relied on the further

conclusions stated by the inspector in relation to site selection and the consideration of alternatives at para. 12.3.5 on p. 141 of the inspector's report and in the second of the reasons on which the inspector recommended that the Board should refuse permission in respect of the proposed application. In support of this ground of challenge, the applicant relied on the opinion of the Advocate General on the judgment of the CJEU in case C-461/17 *Holohan v. An Bord Pleanála* (opinion delivered on 7th August, 2018 (ECLI: EU: C: 2018: 649); judgment delivered on 7th November, 2018 (ECLI: EU: C: 2018: 883)) ("*Holohan*").

352. The applicant contended that, notwithstanding the inspector's findings and conclusions as regards a lack of robustness and a deficiency in relation to site selection, the Board nonetheless concluded that it could complete the AA and make an informed decision in relation to site suitability. The applicant intended that in doing so, the Board acted in breach of Article 5(3)(d) of the EIA Directive and the equivalent provisions in the 2001 Regulations in carrying out the assessment in circumstances where the site selection process followed by Indaver was not a *de novo* process for the purposes of Indaver's 2016 planning application and that, in breach of those provisions, the Board failed to require the kind of studies of alternative sites required by those provisions. In those circumstances, it was contended that the Board failed to carry out an adequate EIA in respect of the fundamental issue of site selection.

353. With respect to ground 8, which concerns site suitability, the applicant pointed to the findings and conclusions of the inspectors appointed in respect of the 2001 and 2008 applications and to the findings and conclusions expressed by the inspector in respect of this application in his main report. The applicant relied, in particular, on the other developments which had taken place close to the site in the period since 1999/2000, including the Maritime College, the Irish Maritime Energy Resource Cluster (IMERC) and the Beaufort Research Laboratories which the inspector considered had altered the character of the area and which

he said had grown in significance since 1999/2000. The applicant noted that, while the inspector acknowledged that in principle the proposed development was not precluded by the applicable planning and zoning objectives, the proposed development should not be incompatible with other nearby developments. The applicant noted that the inspector had “*major reservations*” in relation to the site of the proposed development and considered that the proposal would not be compatible with recent development and public investment in the area and might potentially militate against further similar developments (para. 3.3.8 on pp. 69-70 of the inspector’s report). The applicant also pointed to the conclusions on the issue of site suitability set out at para. 12.3.6 on p. 141 of the report and the first reason for which the inspector recommended that the Board should refuse to grant permission in respect of the proposed development. The applicant contended that in reaching the opposite conclusion, the Board’s decision lacked any evidential basis and was unreasonable and unsustainable. Alternatively, the applicant contended that the Board had failed to properly explain the basis on which it disagreed with the inspector in relation to the suitability of the site. The applicant relied in that regard on the judgment of the High Court (Barton J.) in *Balz* and, to a greater extent, on the judgment of the Supreme Court in *Connelly*. The applicant was very critical of what it alleged was the Board’s failure to explain why it had reached a different view to the inspector on this issue.

(2) *The Board*

354. In response to the case made under ground 7, the Board contended that it explained in its decision why it had concluded that the information provided by Indaver in the EIS on alternatives and on site selection was adequate to allow the Board to complete its EIA and to make an informed decision in relation to site selection and site suitability. The Board submitted that it was not necessary for the EIS to carry out a *de novo* site selection process and that it was permissible to work from the process carried out in 1999/2000, as updated in

2015 to reflect developments and changes since then. The Board rejected the contention that the information provided by Indaver in relation to alternatives failed to comply with the provisions of Article 5(3)(d) of the EIA Directive and the equivalent provisions of the 2001 Regulations. The Board pointed to the inspector's conclusion that the EIS was legally adequate in relation to the composition and matters required to be contained in the EIS (para. 12.2.1 at p. 140 of the inspector's report). The Board submitted that it had explained in the decision why it disagreed with the inspector's conclusion that the consideration of alternatives in the EIS was not robust. The Board maintained that the area of difference between it and the inspector was relatively narrow and that it had explained why it had differed from the inspector on this issue. The Board relied on a series of cases to the effect that once the EIS was found to be legally compliant with the requirements of the EIA Directive (as was the case here), the adequacy of the information contained in the EIS for the purposes of the Board carrying out an EIA is a matter for the Board subject to limited review on *O'Keeffe v. An Bord Pleanála* grounds. The Board relied (*inter alia*) on *Kenny v. An Bord Pleanála (No. 1)* [2001] 1 IR 704 (McKechnie J.) ("*Kenny*"), *Klohn v. An Bord Pleanála* [2009] 1 IR 59 (McMahon J.) ("*Klohn*"), *Ratheniska v. An Bord Pleanála* [2015] IEHC 18 (Haughton J.) ("*Ratheniska*"), *People Over Wind v. An Bord Pleanála* [2015] IEHC 271 (Haughton J.) ("*People Over Wind*"), *Holohan v. An Bord Pleanála* [2017] IEHC 268 (Humphreys J.), *O'Brien v. An Bord Pleanála* [2017] IEHC 773 (Costello J.) ("*O'Brien*") and *Kelly/ALDI* (Barniville J.). The Board submitted that there was material before it to support its decision and that the applicant could not succeed in challenging the decision in accordance with the principles set out in those cases. The Board submitted that neither the opinion of the Advocate general nor the judgment of the CJEU in *Holohan* provides any support for the applicant's claims in respect of this ground.

355. With regard to ground 8 and the question of site suitability, the Board relied on the terms of its decision which it contended explained clearly the reason why it differed from the inspector's conclusions in relation to the compatibility of the proposed development with existing and future developments. The Board submitted that its assessment as to the compatibility of the proposed development with such other developments was a matter of planning judgement, which again was only open to review by the court on limited *O'Keeffe v. An Bord Pleanála* [1993] 1 IR 38 ("*O'Keeffe*") grounds and referred, in particular, to the judgment of the High Court (McGovern J.) in *Navan Co-Ownership v. An Bord Pleanála* [2016] IEHC 181 ("*Navan Co-Ownership*") and the cases referred to in that judgment. The Board submitted that, ultimately, it came down to a question of planning judgement as to whether the proposed development would or would not be appropriate in circumstances where there are competing land uses and potentially conflicting objectives in the relevant statutory plans. It submitted that the applicant could not succeed in challenging the Board's decision in light of the test to be applied.

(3) *Indaver*

356. In its written and oral submissions, Indaver supported the position taken by the Board in respect of both of these grounds. It disputed the relevance and weight which the applicant sought to attach to the reports of the inspectors prepared in respect of the 2001 and 2008 applications and pointed out that what was relevant was the decision of the Board on those applications. In its decision on the 2001 application, the Board did not accept the inspector's criticism and granted permission in respect of the proposed development. While the Board did not grant permission in respect of the 2008 application, it did not refuse that application on the basis that it was accepting the inspector's criticisms of the site selection process. The Board, in fact, considered that the provision of an incinerator to treat hazardous and industrial waste was in accordance with national policy and invited revised proposals to provide such

an incinerator which omitted facilities to treat municipal waste and reduced the scale of the development.

357. Indaver agreed that neither the opinion of the Advocate General nor the judgment of the CJEU in *Holohan* provided any support for the applicant's case under ground 7. On the contrary, it submitted that, if anything, *Holohan* meant that information on the alternatives considered in 2000 had to be included in the EIS, even though they had been ruled out by Indaver a long time ago.

358. Finally, Indaver contended that the reasons given by the Board for disagreeing with the inspector in relation to both site selection/alternatives and site suitability clearly met the test for reasons set out by the Supreme Court in *Connelly*.

(b) Facts relevant to this Ground

359. The inspector (Philip Jones) who was appointed by the Board in connection with Indaver's 2001 application was critical of the site selection process undertaken by Indaver in choosing the site for the proposed development. He concluded that Indaver had not provided sufficient evidence to justify the choice of the site for the proposed development. He was also critical of the suitability of the site for various reasons including its location at the end of a peninsula with only one road access and its proximity to sensitive land uses and users, including its proximity to the National Maritime College. Inspector Jones concluded that the proposed site was objectively unsuitable to accommodate the proposed development and recommended refusal of the application. However, despite this, the Board granted permission in respect of the proposed development in 2004.

360. The inspector (Oznur Yucel-Finn) appointed by the Board in respect of Indaver's 2008 application was also critical of the site selection process undertaken by the applicant for the purposes of that application and concluded that there was a significant information deficit in relation to site selection and the consideration of alternative sites for the purpose of that

development. In June, 2011, the Board refused permission for that proposed development but not on the basis of any inadequacy in the site selection process or in the consideration of alternatives.

361. The EIS submitted with Indaver's 2016 planning application contained, in chapter 3, an explanation of the process by which the site was identified and selected. As explained by Ms. Keaney in her first affidavit on behalf of Indaver, the site selection process commenced in 1999. Five areas around Cork Harbour were identified as the potential site for the proposed waste to energy facility. Ringaskiddy was identified as offering the best option. Other sites around Ringaskiddy were subsequently identified and considered. Indaver ultimately purchased the site at Ringaskiddy in November, 2000. That was the site which was the subject of the 2001 and 2008 applications also. Prior to Indaver's 2016 planning application, Indaver retained Arup to undertake a technical review of the site and its surroundings. Coakley O'Neill were commissioned to evaluate the site in the context of applicable planning policies. Section 3.2.8 of the EIS explained the implications for the site from changes in the area. A site suitability review undertaken in 2015 concluded that developments which had occurred since 2000 did not render the site unsuitable for the development of a waste to energy facility and that the site was of a sufficient scale to accommodate the development. An assessment was undertaken as to whether the development could be located at a site in Bottlehill, County Cork. However, it was concluded that that was not a suitable alternative for the proposed development but could play a supporting role in the context of an integrated waste management service for County Cork. Assessments were also undertaken in respect of sites at Gortadroma, County Limerick and Kilbarry, County Cork. However, it was concluded in chapter 3 of the EIS that neither of these sites was suitable for various reasons. An assessment of the use of other technologies was also undertaken. However, it was concluded in the EIS that the development of the waste to energy facility together with the technology to

be used in that facility represented the best approach. A *de novo* site selection process was not undertaken but rather developments since the original site selection process in 1999/2000 were considered and reviewed in 2015.

362. At the oral hearing, Fiona Patterson, senior executive scientist with Arup, gave evidence in relation to the site suitability assessment carried out in 2015. Mr. Coakley of Coakley O'Neill also gave evidence dealing with alternative sites in a policy context. Ms. Patterson explained in her evidence that, in 2015 the suitability of the sites at Kilbarry, Bottlehill and Gortadroma were considered as further alternative sites which had not formed part of the original site selection process. The assessment of the suitability of those sites was contained in s. 3.2.10 of chapter 3 of the EIS. Ms. Patterson explained that in undertaking the site selection process, the approach contained in the World Health Organisation (WHO) guidelines entitled "*Site Selection for New Hazardous Waste Management Facilities*" (Sloane, 1993) was adopted as a "*conservative benchmarking tool*" for the Ringaskiddy site (p. 4 of Ms. Patterson's witness statement at the oral hearing). Ms. Patterson stated that the suitability of the Ringaskiddy site satisfied the WHO guidelines in 2016, that the site enjoyed a favourable rating based on the WHO selection criteria and that the fourteen exclusionary factors contained in the WHO guidelines had been considered and did not apply to the site (pp. 4 and 5 of Ms. Patterson's witness statement).

363. The inspector appointed by the Board in respect of Indaver's 2016 planning application dealt with the issues of site selection/alternatives and site suitability in his main report dated 27th January, 2017. The inspector concluded (at s. 10.2, pp. 116-117) that the content and scope of the EIS was considered to be acceptable and in compliance with the requirements of Articles 94 and 111 of the 2001 Regulations (as amended). The inspector considered that as regards the adequacy of the EIS, it contained the information specified in schedule 6 of the 2001 Regulations (as amended) and that the information provided was

“sufficiently detailed and comprehensive” and would assist the Board *“to carry out a robust and accurate assessment of the development for the purposes of Environmental Impact Assessment”* (s. 10.2, p. 117). He repeated his conclusion that the EIS was legally adequate at para. 12.2.1 on p. 140 of the report. However, the inspector dealt with the issue of site selection and the consideration of alternatives in an earlier section of his report (s. 9.0 Assessment). He dealt with site selection at s. 9.3.2 and, having referred to Article 94 and para. 1(d) of Schedule 6 of the 2001 Regulations (as amended) (being the provisions implementing Article 5(3)(d) of the EIA Directive), and having referred to the WHO guidelines, the inspector set out his conclusions (at p. 62 of his report) as follows:-

“In relation to the site selection and consideration of alternatives my initial observation is that the current proposal was not, I consider, assessed from a de novo situation.

The initial site selection process as carried out in 1999/2000 remains the empirical assessment in relation to the current assessment of alternatives. The site selection as identified in 2000 has in the current proposal, in effect, been proofed against an updated re-evaluation carried out in 2015.

It is questionable the sites selected in the most recent assessment in particular Bottlehill and Gortadroma warranted consideration as alternative sites in site selection given an initial standpoint that location in the Metropolitan Cork and the harbour area was considered to be the optimum location.

The site selection assessment does not provide a robust evaluation or assessment of changes in the immediate area of the Ringaskiddy peninsula in the period since 2000, which are of importance and which were referred to in many submissions.

I conclude that there is [a] significant information deficit in relation to site selection and consideration of alternative sites and there is therefore an absence of a more up to date robust evaluation in this regard.”

Among the changes in the immediate area of the site since 2000 to which the inspector referred included the Maritime College and the IMERC.

364. The inspector then considered the suitability of the site in the context of the relevant planning policies specific to the site and the area (s. 9.3.3) and, setting out his conclusion on this issue (in para. 9.3.3.8 on pp. 69-70), the inspector noted that:-

“In principle the current site, therefore, in terms of the use proposed is not precluded by the provisions as stated in the CCDP [Cork County Development Plan] and LAPs [Local Area Plans] or indeed also in the context of policy and guidance as set out at national and regional level.”

365. However, the inspector continued:-

“I would however indicate that a zoning objective in itself is not the sole criterion to assess the development and its compatibility with other policy provisions and the suitability of the site must be further considered in the context of EIA and other provisions of policy stated in the CCDP and LAPs including most importantly facilitating other forms of permitted development and therefore should not be incompatible with other nearby development.

In such a context I would have major reservations in relation to the location of the development at the proposed site. I consider that the proposal is and would not be compatible with recent development and public investment located in the immediate area and would be at variance with recent investment and development in this area of Cork harbour and in particular the eastern end of the Ringaskiddy peninsula and potentially militate against future similar related investment.” (para. 9.3.3.8 at p. 70)

366. These are the relevant conclusions expressed by the inspector in the body of his report which are referable to grounds 7 and 8 of the applicant’s grounds of challenge. They were summarised by the inspector at paras. 12.3.5 (site selection) and 12.3.6 (site suitability) of the report (p. 141). Site suitability constituted the first reason for which the inspector recommended that the Board should refuse permission. Having noted that the relevant zoning permitted consideration of an industrial use on the site, the inspector stated that *“such consideration is also subject to an appraisal in the overall context and provisions of the statutory plans and development in the immediate area”* (p. 143). He continued:-

“It is considered that the proposed development would not be compatible with recent development in the area, including the Maritime College, IMERC and Beaufort campuses, which are supported by objective C-01 of the Local Area Plan and major public investment on Haulbowline and Spike Islands. It is, therefore, considered that that proposed development would be contrary to the proper planning and sustainable development of the area.” (Reason 1, p. 143)

367. The second reason for refusing permission for the proposed development which was recommended by the inspector to the Board was concerned with site selection. With respect to that reason, the inspector stated:-

“Central to any consideration of a site, for the nature of the development proposed, is the necessity in the Environmental Impact Statement for a robust assessment in the

context of a site selection process and a robust assessment and evaluation of alternatives. In relation to the site selection process consideration of alternatives, a de novo assessment or evaluation was not carried out and the assessment is majorly reliant on the initial process of 1999/2000. The overall appraisal and identification of alternative sites was seriously deficient and did not give sufficient consideration and weighting to recent development in the Ringaskiddy peninsula area which include major public and private investment initiatives and which have transformed the character of the area in the intervening period since 2000.” (Reason 2, p. 143)

368. The Board disagreed with the inspector on both of these issues. The references below are to the Board Order (the relevant provisions of which are in identical terms to the Board Direction on these two issues). With respect to the site selection/alternatives issue, the Board considered this issue as part of its EIA. It made clear that, in completing its EIA, it took into account, amongst other things, *“the nature, scale and location of the proposed development (including existing and permitted development and future land-use planning objectives for the area)”* (p. 5 of the Board Order). The Board noted that its assessment of environmental impacts *“diverged from those of the Inspector in a number of areas”*, including on the issue of *“alternatives”*. Under that heading in its decision, the Board noted that chapter 3 of the EIS documented the site selection processes followed in 1999/2000 and then went on to update the site selection to take into account changes which occurred in the intervening period including:-

- “• changes to the development plan,*
- the guidance in relation to site selection included in the Southern Region Waste Management Plan 2015-2021 (the subject site is tested against the relevant criteria), and*

- *changes in physical and planning circumstances in the area.*” (p. 6 of the Board Order)

369. The Board then explained why it disagreed with the inspector’s conclusions in relation to the robustness of the EIS on the issue of site selection, in the following terms:-

“The Board did not agree with the Inspector that the environmental impact statement analysis lacked robustness or is deficient in relation to site selection. The changes in the vicinity of the site (such as the education/research campuses, the investment in heritage/ tourism assets, and increase in cruise tourism) are considered in the environmental impact statement. Other changes in the area (such as the erection of tall wind turbines, the expansion of Port of Cork facilities, and proposed improvements to the N28 road) are also considered.

The Board was satisfied that the consideration of alternatives as set out in the environmental impact statement complied with the legal requirements of the EIA Directive (2011/92/EU) and the Planning and Development Regulations 2001 (as amended), had regard to relevant guidance, took into account environmental factors, and was robust. Therefore, notwithstanding that a ‘de-novo’ site selection exercise was not carried out for the purpose of this planning application, the Board was satisfied that it could complete its environmental impact assessment and make an informed decision in relation to the site suitability.” (pp. 6 and 7 of the Board Order)

370. The Board was, therefore, in a position to complete an EIA in respect of the proposed development and did so (p. 9 of the Board Order).

371. In setting out its conclusions on proper planning and sustainable development in the Board Order, the Board stated, with respect to the issue of site suitability, that it considered that the proposed development:-

- “• *would be compatible with the pattern of existing development in this area of Cork Harbour, which includes large-scale industrial plants and utilities and other strategic facilities including the nearby Port of Cork container terminal facility,*
- *would be compatible with the continued development of the marine-related research and development/employment campuses in the vicinity of the site,*
- *would be compatible with the continued development of heritage and tourism assets in the harbour, ...”* (p. 11 of the Board Order)

372. The Board then set out the reasons why it had decided not to accept the inspector’s recommendation to refuse permission and, for present purposes, dealt with the first and second recommended reasons for refusal which concerned site suitability and the evaluation of alternatives. With respect to the first reason, the Board Order recited the following:-

“The Board noted the existing education/research facilities that have been developed adjacent to the site and the further proposals to expand such employment uses. The recent revisions to the Ballincollig Carrigaline Local Area Plan (August 2017) – whereby part of the subject site was identified as suitable for extension of such land uses – was also noted. There has also been public investment in public amenities and heritage/tourism assets on Spike Island and Haulbowline, and further initiatives are proposed. Nevertheless, the Cork County Development Plan 2014-2020 enables the location of large scale waste treatment facilities, including waste to energy facilities in industrial areas designated as ‘Strategic Employment Areas’, which is the overarching land use objective applying to Ringaskiddy in the Development Plan. The site is also close to the expanding Port of Cork facilities and to various industrial (pharmaceutical/chemical) plants and large scale utilities. The Board was, therefore, cognisant of competing objectives in relation to the future development of the area.

Waste to energy plants operate successfully in a range of urban environments and such facilities, when well designed, operated and regulated, do not unduly constrain neighbouring land uses. The Board considered that the development of a modern waste-to-energy facility would be compatible with continued development of the educational campus facilities in the area and with the ongoing improvement of tourism and amenities in the lower harbour. The Board concluded that the proposed facility would integrate successfully with the multi-faceted nature of existing and proposed development in the area, and would not be contrary to the development plan policies for the area or undermine the achievement of any of its objectives.” (p. 12 of the Board Order)

With respect to the second recommended reason for refusal, namely, the evaluation of alternatives, the Board Order referred back to the earlier EIA section of the decision and to the consideration of “*alternatives*” set out there.

(c) Decision on Grounds 7 and 8

373. I am not satisfied that the applicant has established good grounds for challenging the Board’s decision on either ground 7 or ground 8.

(1) Ground 7

374. With regard to ground 7, the EU and statutory requirements relevant to the contents of an EIS at the time of Indaver’s 2016 planning application were contained in Article 5(3)(d) of the EIA Directive. That provision was amended by Directive 2014/52/EU but it was accepted those amendments were not applicable to Indaver 2016’s application).

375. Under Article 5(3)(d) of the EIA Directive, the information which Indaver was required provide as part of its EIS to enable the Board to carry out an EIA had to include “*at least*” the following:-

“an outline of the main alternatives studied by the developer and an indication of the main reasons for his choice, taking into account the environmental effects;”

An identical requirement was contained in Article 94 and para. 1(d) of Schedule 6 to the 2001 Regulations (as amended).

376. The inspector found that the EIS was legally adequate in that it contained the information required in Schedule 6 of the 2001 Regulations (as amended) (s. 10.2 and para. 12.2.1 of the inspector’s report). He was, however, of the view that there were certain deficiencies in the EIS (including the manner in which the dioxins issue was addressed). However, the inspector’s conclusion that the EIS was legally adequate in terms of what the applicable EU and statutory provisions required is very significant.

377. The Board was satisfied that it could complete an EIA on the basis of the information available to it. While the inspector was critical of the site selection process undertaken by the applicant for the reasons outlined earlier and concluded that the site selection assessment did not provide a robust evaluation or assessment of changes in the immediate area of the site since 2000 for the various reasons outlined earlier, the Board disagreed with that conclusion and explained why that was so (pp. 6 and 7 of the Board Order). The Board disagreed that the EIS was not robust or was deficient in relation to site selection. It considered that the relevant changes in the vicinity of the site were considered in the EIS as were other relevant changes. The Board was satisfied that the consideration of alternatives set out in the EIS did comply with the requirements of the EIA Directive (i.e. Article 5(3)(d)) and the 2001 Regulations (as amended) (Article 94 and para. 1(d) of Schedule 6), did have regard to relevant guidance (the WHO guidelines), did take into account environmental factors and was robust. It was satisfied that, notwithstanding that there was no *de novo* site selection exercise undertaken (but rather the original site selection was updated and re-evaluated in 2015 to take account of

changes since 1999/2000), it could complete an EIA and make an informed decision in relation to the suitability of the site.

378. I agree with the Board and Indaver that once the EU and statutory requirements for an EIS are complied with (as was the case here), the adequacy and the qualitative nature of the information contained in the EIS is primarily a matter for the Board and not for the court, subject only to the court's entitlement to review the exercise of that discretion in accordance with the *O'Keefe* standards of reasonableness and rationality. That is the approach which the courts have consistently taken when considering attempts to challenge decisions of planning authorities and the Board based on the alleged inadequacy of the information contained in an EIS. The Board provided the court with a lengthy list of authorities in support of the proposition that the adequacy of the information contained in an EIS is a matter for the planning authority or the Board, as the case may be, subject only to review on the *O'Keefe* principles. It is unnecessary to refer to all of the authorities mentioned by the Board. The principle is so well established in Irish law. It can be seen, for example, in *Kenny v. An Bord Pleanála (No. 1)* [2001] 1 IR 565 (McKechnie J.). At para. 19 of the judgment, McKechnie J. stated, when dealing with a challenge to an EIS submitted in connection with an application, as follows:-

“Once the statutory requirements had been satisfied I should not concern myself with the qualitative nature of the Environmental Impact Statement or the debate on it had before the Inspector. These are not matters of concern to this Court...” (at 578)

(see also *Kenny v. An Bord Pleanála (No. 2)* [2001] 1 IR 704 at 712)

379. A similar point was made by the High Court (McMahon J.) in *Klohn v. An Bord Pleanála* [2009] 1 IR 59 where, at para. 37, McMahon J. stated:-

“It is recognised in cases such as this that the court in reviewing the Board's decision will not interfere with the bona fide exercise of its discretion in these matters. It is not

the court's function to second-guess the Board and substitute its own decision for that of the Board. The legislature, in its wisdom, vested the power to make such a decision in a body which has expertise and experience in these matters. Such a body is much better qualified and in a much better position to make such technical decisions in this specialised area than the court, which has to rely on expert evidence to inform it in these cases. The courts will only interfere in such decisions where they appear so irrational that no reasonable authority or decision maker in this position would have made such a determination..." (at 73)

380. McMahon J. observed that such an approach is "*now well-established in our jurisprudence*" and the question as to whether it might have to be reassessed in future as a result of developments in EU law remained to be seen but did not arise in that case.

381. The approach adopted in *Klohn* was expressly referred with approval and applied by the High Court (Haughton J.) in *Ratheniska* (at paras. 72 to 76). Haughton J. expressly confirmed that the standard of review contained in *O'Keeffe* is "*both well established and remains appropriate, and continues to bind the High Court at least in its review of decisions of the Board, including EIAs forming part of such decisions*" (per Haughton J. at para. 76). A similar approach was taken by Barton J. in *Balz*, where at para. 55, the court stated:-

"Whereas the EIS must comply with the relevant planning regulations, the adequacy of the information supplied in it is primarily a matter for the decision maker. Once the statutory requirements have been satisfied the court is not concerned, in planning terms, with the qualitative nature of the EIS or with any discourse upon it by the Inspector."

Barton J. then applied the passage quoted above from the judgment of McMahon J. in *Klohn* as to the very limited circumstances in which the court would interfere with the exercise by the Board of its discretion in assessing the adequacy of an EIS provided for the purposes of

the EIA required to be carried out by the Board. Similar conclusions are reached in many other cases including *Holohan v. An Bord Pleanála* [2017] IEHC 268 (Humphreys J.), *Fitzpatrick v. An Bord Pleanála* [2017] IEHC 585 (McDermott J.), *O'Brien v. An Bord Pleanála* [2017] IEHC 773 (Costello J.) and *Kelly/ALDI* (Barniville J.) (concerning the adequacy of the information available to the Board for the purposes of carrying out a screening determination for AA).

382. In light of the test to be applied, namely, review on the basis of the *O'Keefe* principles, I am satisfied that the applicant's challenge to the Board's decision that the EIS was sufficiently robust in its consideration of alternatives and in relation to site selection cannot succeed. There was ample evidence available to the Board to reach the conclusion which it did, notwithstanding that it disagreed with the inspector's conclusion on this issue. The Board explained why it disagreed with the inspector. The applicant has challenged the reasoning provided by the Board for disagreeing with the inspector on this issue and on the related issue of site suitability. I will deal with the adequacy of the reasons given by the Board for disagreeing with the inspector at the end of this section of my judgment. However, I am quite satisfied that the applicant has failed to demonstrate that the Board's conclusion that the EIS was adequate to enable it to complete an EIA in respect of the proposed development, including its view that the EIS dealt sufficiently with issues of site selection and alternatives was supported by relevant material and was not unreasonable or irrational.

(2) *Ground 8*

383. With regard to ground 8, and the Board's decision to disagree with the inspector that the site of the proposed development was not suitable, as being incompatible with recent developments in the area and, therefore, that the proposed development would be contrary to the proper planning and sustainable development of the area, I do not believe that the applicant has made out its case on this ground either.

384. I agree with the submissions advanced by the Board and by Indaver that, with particular reference to the suitability of the site, the Board's conclusion that the proposed development would be in accordance with the proper planning and sustainable development of the area should not be interfered with by the court. The Board's view that the development would be compatible with the pattern of existing developments in the area, including the continued development of marine related research and heritage and tourism assets in Cork Harbour, was, in my view, quintessentially a matter for the planning judgement of the Board and could only be interfered with by the court on the *O'Keefe* principles.

385. Both the Board and the inspector agreed that the proposed development would be consistent with the policies and objectives of the Cork County Development Plan, 2014-2020 and with the industrial land use zoning for the area in the Ballincollig Carrigaline Local Area Plan, 2017. The extent of the disagreement between the Board and its inspector on this issue was confined to the compatibility of the proposed development with other recent developments in the area which were also supported by the applicable planning objectives. The inspector took the view that the proposed development would be incompatible with those recent developments and, therefore, contrary to the proper planning and sustainable development of the area. The Board disagreed and concluded that it would not be incompatible with the developments in question. The Board was entitled to take that view unless it could be said that the decision was unreasonable or irrational on *O'Keefe* grounds.

386. The burden of establishing such irrationality rested on the applicant. I am not satisfied that the applicant has discharged that burden. There was material before the Board to enable the Board to exercise its judgement on the planning issues as to whether the proposed development would be incompatible with other developments. The exercise of that judgement was a matter for the Board, subject to review on *O'Keefe* grounds.

387. The task of attempting to reconcile potentially competed planning policies and objectives in terms of assessing the compatibility of development which falls within the relevant objectives with other existing and potential developments which also fall within the relevant planning objectives is a matter for the Board in the exercise of its planning expertise. While not dealing with an identical situation, the judgment of McGovern J. in the High Court in *Navan Co-Ownership v. An Bord Pleanála* [2016] IEHC 181 (“*Navan Co-Ownership*”) is of some assistance. In that case, the court was considering a challenge to a decision of the Board which refused permission for the development of a cinema. The focus of the challenge concerned the decision of the Board as to how to reconcile competing planning objectives. The court concluded that the Board had correctly construed the relevant development plan. In the course of his judgment, McGovern J. made reference to the decision of the UK Supreme Court in *Tesco Stores Ltd v. Dundee City Council* [2012] UKSC 13. In that case, Lord Reid noted that development plans are “*full of broad statements of policy, many of which may be mutually irreconcilable...*” (para. 19). Lord Reid continued:-

“In addition, many of the provisions of development plans are framed in language whose application to a given set of facts requires the exercise of judgment. Such matters fall within the jurisdiction of planning authorities, and their exercise of their judgment can only be challenged on the ground that it is irrational or perverse (Tesco Stores Ltd v. Secretary of State for the Environment [1995] 1 WLR 759, 780 per Lord Hoffmann)” (para. 19)

388. McGovern J. also referred to the judgment of Lang J. in *William Davis Limited v. Secretary of State for Communities and Local Governments* [2013] EWHC 3058 (Admin) where the court stated (at para. 46):-

“The task of reconciling different strands of planning policy on the facts of a particular case has been entrusted to the planning decision-maker. Such planning judgements will only be subject to review by this court on very limited grounds.”

389. In addition to finding that the Board had correctly construed the development plan in that case, McGovern J. also found that the Board’s decision was not unreasonable or irrational in accordance with *O’Keeffe* or *Meadows v. Minister for Justice and Equality* [2010] IESC 3 (para. 28). I referred to and applied the approach taken by McGovern J. in *Navan Co-Ownership in Kelly/ALDI* and held that the Board in that case had correctly interpreted the relevant guidelines and had then applied that interpretation to the facts in the exercise of planning expertise and judgement which had not been shown to be unreasonable or irrational in the *O’Keeffe* sense (para. 192). The same approach was taken by Haughton J. in the High Court in *Alen-Buckley v. An Bord Pleanála (No.2)* [2017] IEHC 541 (see paras. 58 and 59).

390. While not entirely on fours with the present case, it is clear that the Board’s decision that the proposed development would be compatible with the pattern of existing development in the area and with the continued development of the type mentioned, including marine-related research and development, is a planning judgement which could only be interfered with on the grounds of unreasonableness or irrationality in the *O’Keeffe* sense. I am not satisfied that the applicant has discharged the onus of demonstrating such unreasonableness or irrationality.

(3) Reasons for Disagreeing with the Inspector

391. I move now to consider the applicant’s claim that the Board failed properly to explain the basis for its disagreement with the inspector. The applicant’s case as pleaded made this point specifically with reference to ground 8, the applicant’s argument on this issue at the oral hearing did not specifically distinguish between ground 7 and ground 8. While I am inclined

to agree with the suggestion by Indaver's counsel at the hearing that the applicant's case in respect of these two grounds shifted somewhat from a case based on the reasonableness or rationality of the Board's decision concerning the suitability of the site to a reasons argument based primarily on the decision of the Supreme Court in *Connelly*, it does seem to me that the applicant was entitled to make the case it made based on *Connelly* and it did form part of the applicant's pleaded case. In any event, neither the Board nor Indaver objected to meeting a case based on the alleged inadequacy of the reasons given by the Board for disagreeing with the inspector, based on *Connelly*. It is, therefore, appropriate to deal with the arguments advanced by the applicant on this issue and I do so by reference to both ground 7 and ground 8.

392. The version of s. 37H(2) of the 2000 Act which applied to Indaver's 2016 planning application was the version which pre-dated the amendments introduced with effect from September, 2018. The relevant version of s. 37H(2) provided that the Board was required to state, amongst other things, the "*main reasons and considerations on which the decision [was] based*" (s. 37H(2)(a)) and, where conditions were imposed, the "*main reason for the imposition of any such conditions*" (s. 37H(2)(b)). Section 37H(2) does not expressly require the Board to provide the main reasons for not accepting the recommendation made by its inspector. An express requirement to that effect was inserted by way of a new subparagraph in s. 37H(2), namely, s. 37H(2)(ba), in September, 2018 by the European Union (Planning and Development) (Environmental Impact Assessment) Regulations, 2018 (SI No. 296 of 2018) (Regulation 10(b)(iii)). However, that provision did not apply to Indaver's 2016 planning application. Notwithstanding the absence of any express statutory requirement, there was no dispute between the parties that where the Board was disagreeing with the inspector, including with recommendations made by the inspector, the Board had to give reasons for its disagreement.

393. With respect to the issues arising under ground 7 and 8, the Board did give reasons for disagreeing with the inspector in relation to site selection and the consideration of alternatives and in relation to site suitability. The dispute between the parties was the extent to which the reasons given by the Board for disagreeing with the inspector on those issues satisfied the Board's obligation to give reasons set out by the Supreme Court in *Connelly*. The applicant contended that the reasons given by the Board for disagreeing with the inspector on these two related issues fell short of the requirements for reasons set out by the Supreme Court in *Connelly*. The Board and Indaver disputed that and argued that the reasons given were sufficient and complied with the requirements set out in that case.

394. The judgment of the Supreme Court in *Connelly* has been considered in several recent cases. I had cause to consider it in some detail in *Crekav Trading GP Ltd v. An Bord Pleanála* [2020] IEHC 400 ("*Crekav*"). While the judgment in *Crekav* was delivered after judgment was reserved in this case, the discussion of the general legal principles applicable to the Board's obligation to give reasons, derived from the judgment in *Connelly*, is directly on point and is a convenient way of summarising the relevant legal principles.

395. At paras. 156 to 165 of the judgment in *Crekav*, I considered some of the judgments on the Board's obligation to give reasons prior to the judgment of the Supreme Court in *Connelly*. Those cases included *The State (Sweeney) v. Minister for the Environment* [1979] ILRM 35, *O'Donoghue v. An Bord Pleanála* [1991] ILRM 750 and *Mulholland v. An Bord Pleanála* [2006] 1 IR 453. At paras. 167 to 194 of the judgment in *Crekav*, I discussed *Connelly*. The Supreme Court considered, in great detail, the extent of the Board's obligation to give reasons for its decision to grant permission for a wind farm in circumstances where the inspector had recommended that permission be refused. The central issue on the appeal, for present purposes, was whether adequate reasons were given by the Board for its decision. The Supreme Court considered the Irish legal principles on reasons as applied to decisions of

the Board and also considered the extent, if any, to which additional obligations are placed on the Board in terms of reasons for decisions which involve the carrying out of either or both an EIA or an AA. As is well known, the Supreme Court set out very specific obligations on the Board in terms of its decisions on AA. That part of the judgment is not relevant for present purposes as no specific issue has been raised by the applicant concerning that part of the Board's decision which concerns the AA carried out by it in respect of the proposed development. However, those parts of the judgment in *Connelly* which dealt with the obligation on a decision maker to give reasons for its decision and the particular obligations on the Board to give reasons for its EIA decisions are directly relevant. I did not have to deal with the separate considerations arising in respect of EIA decisions in *Crekav*.

396. The Supreme Court in *Connelly* addressed in some detail the purpose behind the obligation to give reasons. It did so by reference to a number of previous decisions including *Mallak v. Minister for Justice* [2012] 3 IR 297. Having referred to those cases, the Supreme Court in *Connelly* noted (at para. 6.15) that there were “*two separate but closely related requirements regarding the adequacy of any reasons given by a decision maker*”. They were described by Clarke C.J. as follows:-

“First, any person affected by a decision is at least entitled to know in general terms why the decision was made. This requirement derives from the obligation to be fair to individuals affected by binding decisions and also contributes to transparency.

Second, a person is entitled to have enough information to consider whether they can or should seek to avail of any appeal or to bring judicial review of a decision. Closely related to this latter requirement, it also appears from the case law that the reasons provided must be such as to allow a court hearing an appeal from or reviewing a decision to actually engage properly in such an appeal or review.”

397. Clarke CJ. observed that the application of that general approach “*will vary greatly from case to case as a result of the various criteria identified earlier which might distinguish one decision, or decision making process, from another*”.

398. The Supreme Court was also concerned the materials which might have to be considered in terms of ascertaining the reasons for a decision. And having considered various authorities on the point, Clarke CJ. summarised the position as follows:-

“Any materials can be relied on as being a source for relevant reasons subject to the important caveat that it must be reasonably clear to any interested party that the materials sought to be relied on actually provide the reasons which led to the decision concerned... However, it is not necessary that all of the reasons must be found in the decision itself or in other documents expressly referred to in the decision. The reasons may be found anywhere, provided that it is sufficiently clear to a reasonable observer earning out a reasonable enquiry that the matters contended actually formed part of the reasoning. If the search required were to be excessive then the reasons could not be said to be reasonably clear.” (para. 9.2)

399. As noted at para. 179 of *Crekav*, it is clear from *Connelly* that the reasons for the Board’s decision can be found in a range of different documents, including the inspector’s report and other materials, as well as in the decision itself. The Supreme Court in *Connelly* stated that it would be preferable if the Board made expressly clear whether it accepted all of the findings (or recommendations) of an inspector or, if it did not, “*where and in what respects it differs*” from the inspector’s findings (and recommendations) (para. 9.6). In the decision at issue in this case, the Board did make clear where it was disagreeing with the inspector in relation to the issue of site selection and the consideration of alternatives and in relation to the inspector’s recommendations concerning site suitability and alternatives. The

issue is whether the Board did so in a manner which complied with the requirements set out in *Connelly*.

400. At para. 9.7 of the judgment in *Connelly*, Clarke CJ. stated that where the Board differed from its inspector, there is “*clearly an obligation for the Board to set out the reasons for coming to that conclusion in sufficient detail to enable a person to know why the Board differed from the Inspector and also to assess whether there was any basis for suggesting that the Board's decision is thereby not sustainable*”.

401. The Supreme Court in *Connelly* made clear that in considering the adequacy of the reasons given by the Board for its decision, the court can have regard not only to the decision itself but also to the documents expressly referred to in the decision and those referred to by necessary implication as well as potentially to further documentation. In the present case, the adequacy of the reasons given by the Board for disagreeing with the inspector can be considered by reference to the terms of the decision itself and also by reference to other material including the relevant parts of the EIS and supporting documentation, the evidence given at the oral hearing and the relevant parts of the inspector’s main report.

402. At para. 10.1 of its judgment in *Connelly*, Clarke CJ. stated:-

“As noted earlier, the general duty to give reasons does not involve a box ticking exercise. It will rarely be sufficient to set out, in almost standard form, a generic description of the legal test or principles by reference to which the decision is to be made, to state that that test has been applied, and simply to go on to say that a particular decision has been made. While it has often been said that a decision maker is not required to give a discursive determination along the lines of what might be expected in a superior court judgment, it is equally true that the reasoning cannot be so anodyne that it is impossible to determine why the decision went one way or the other.” (para. 10.1)

403. At para. 10.3 of his judgment in *Connelly*, Clarke CJ. stated that there is a “*middle ground*” between the type of “*broad discursive consideration*” which might be found in the judgment of a court and “*an entirely perfunctory statement that, having regard to a series of factors taken into account, the decision goes one way or the other*”. He stated that there was “*at least an obligation on the part of decision makers to move into that middle ground, although precisely how far will depend on the nature of the questions which the decision maker had to answer before coming to a conclusion*”.

404. The applicant submitted that the reasons given by the Board for disagreeing with the inspector, both in relation to his conclusions on site selection and the consideration of alternatives and in relation to his recommendations concerning site suitability and the evaluation of alternatives, were “*anodyne*”, as that term was used by the Supreme Court in *Connelly*. However, as I explain below, I do not agree.

405. The Supreme Court in *Connelly* made clear that it was not concerned with whether the findings made by the Board were open to it on the basis of the materials before it and that it was not seeking to second guess the judgment of the Board. That is somewhat different to the present case in that, particularly with regard to ground 8, the applicant’s case was that the Board’s conclusions in relation to site suitability were irrational and unreasonable. The Supreme Court in *Connelly* was concerned only with the reasons given for the decision (under Irish administrative law and as regards EIA and AA decisions). The Supreme Court was satisfied on the facts of *Connelly* that the Board had given adequate reasons for disagreeing with the inspector on the relevant issues. The Supreme Court concluded that an interested party would, as a result of reading the decision in conjunction with the inspector’s report together with other documents, have sufficient information (a) to inform itself as to why the Board ultimately came to the conclusions which it did and (b) to consider whether there was any basis for challenging the conclusions reached by the Board (see para. 10.15).

Clarke CJ. stated that the law does not require *“a level of reasoning which goes beyond that required to afford an interested party reasonable information as to why the decision was made and whether it can be challenged”* (para. 10.15).

406. The Supreme Court went on to consider the position in relation to the Board’s decisions as part of the EIA carried out by it. The Court concluded that *“same rules apply, at the level of principle, to the reasons which must be given in a case involving an EIA”* as apply in the case of decisions on applications for permission dealt with solely under national law (para. 11.1). The Court held that requiring compliance with national rules concerning reasons did not *“fall short of the obligation to provide an effective remedy”* (para. 11.3).

Clarke CJ. continued:-

“If a person knows the reasons why a particular decision was taken to the standard identified earlier in this judgment, then they will be able to assess whether there might be an arguable case that the EIA was not properly carried out to the standards required by Union law. The overriding principle is that a person needs to know why the decision was made and be able to assess whether it can be challenged. Where the decision was made after an EIA then it follows that, as part of the application of the general principle to the circumstances of such a case, the person must know enough about the decision to be able to assess whether it can be challenged on, amongst other grounds, the basis of an alleged failure to carry out a proper EIA.” (para. 11.3)

407. At para. 11.4, the Chief Justice stated:-

“It follows that, while the general principle remains the same, there is an additional requirement in a case to which the EIA regime applies to the effect that the decision must be sufficiently clear to enable any interested party to consider whether they may have grounds to challenge the decision on the basis that it might be contended that an adequate EIA had not been conducted.” (para. 11.4)

The Supreme Court concluded that the reasoning given by the Board in that case as part of its decision in carrying out the EIA was sufficient.

408. In summary, therefore, as I stated at para. 190 of my judgment in *Crekav*, there are three separate, but closely related, requirements to be considered in determining the adequacy of reasons given for a decision of the Board on an application for permission which is dealt with solely under national law and in a case where the Board has to carry out an EIA. First, any person affected by the decision must know, at least in general terms, why the decision was made. Second, an affected person must be given enough information to consider whether he or she can or should seek to appeal or judicially review the decision or to consider whether there may be grounds to challenge the decision on the basis that it might be contended that an adequate EIA had not been carried out by the Board. Third, the reasons provided for the decision must enable the court to be in a position properly to hear the appeal or conduct the judicial review of the decision and to determine, where the issue is raised, whether an adequate EIA has been carried out. As the Supreme Court in *Connelly* made clear, a more stringent test applies with respect to reasons in the case of AA decisions taken by the Board. However, the particular test to be satisfied in such cases does not arise here as the applicant has not advanced any AA specific grounds and, in particular, has not contended that the stricter test outlined by the Supreme Court in *Connelly* in respect of such cases was not met by the Board in the AA which it carried out in the present case.

409. Having considered the relevant parts of the EIS concerning site selection and the consideration of alternatives, the record of the evidence on these issues at the oral hearing, the parts of the inspector's report which dealt with these issues and with the issues of site suitability (as set out earlier) and the terms of the decision of the Board itself as recorded in the Board Direction and in the Board Order, I am satisfied that the Board did provide adequate reasons for its disagreement with the inspector in relation to site selection and the

consideration of alternatives and in relation to site suitability and that those reasons complied with the principles as set out by the Supreme Court in *Connelly*, both as regards planning decisions of the Board and as regards EIA decisions. I do not accept that the reasoning given by the Board for disagreeing with the inspector, either in relation to site selection and the consideration of alternatives or in relation to site suitability, and the recommendations made by the inspector in that regard, were “*anodyne*” as submitted by the applicant.

410. I am satisfied that reading the relevant parts of the Board’s decision with the relevant parts of the inspector’s report and the other material to which I have referred (i) would enable an interested party, such as the applicant, to know why the Board had reached a different conclusion to the inspector on these issues, (ii) would enable such a person (including the applicant) to consider whether he or she could seek to challenge the decision (including that part of the decision concerning the EIA carried out by the Board) and (iii) would provide sufficient information to the court to review the Board’s conclusions on these issues, including its EIA conclusions. I am satisfied, therefore, that the Board has provided adequate reasons for its decision in compliance with the requirements set out by the Supreme Court in *Connelly* and I reject the applicant’s claims to the contrary.

(4) *Holohan*

411. Finally, in respect of these grounds, while the applicant relied on the opinion of Advocate General Kokott and the judgment of the CJEU in *Holohan* in its written submissions in support of ground 7, it did not advance any oral submissions at the hearing based on the opinion or the judgment in *Holohan*. Consequently, it was not addressed by the Board in its oral submissions at the hearing (although, in its written submissions, the Board disputed the relevance of *Holohan* to the issues arising in respect of ground 7). The case was briefly addressed by Indaver at the hearing. Its counsel took the court through the relevant parts of the opinion of Advocate General Kokott and of the judgment of the CJEU and

submitted, with justification, in my view, that it did not provide any support for the case made by the applicant in respect of either of these two grounds. If anything, as counsel submitted, the opinion and the judgment in *Holohan* supported the approach taken by Indaver in including alternatives considered in 1999/2000 in its consideration of alternatives, notwithstanding that those alternatives had long been rejected by that the time. The applicant did not address the relevance of *Holohan* in its reply.

412. Having reviewed again the opinion and judgment in *Holohan*, I agree with the submissions advanced by the Board and by Indaver in their written submissions, and with the oral submission advanced by Indaver at the hearing, that neither the opinion of Advocate General Kokott nor the judgment of the CJEU in *Holohan* provides any support for the applicant's case under either ground 7 or ground 8 and I do not believe that it requires any further consideration in this judgment.

413. For the reasons which I have set out above, I reject the claims made by the applicant under grounds 7 and 8.

19. Ground 9: EIA – Alleged Failure of Board to deal with Alleged False Evidence and Credibility Issues

414. This ground concerns an issue of considerable controversy which arose in the course of the oral hearing. While I will summarise the respective positions of the parties on the issue shortly and outline in more detail the relevant factual context in which this issue arises, I should briefly explain how this issue arose so as best to understand the applicant's case and the response of the Board and of Indaver in respect of this ground.

415. A major issue arose at the oral hearing concerning the possible impact on human health as a result of certain chemicals, namely, dioxins and furans, in emissions from the operation of the incinerator proposed by Indaver on the Ringaskiddy site. For convenience, the parties have used the term dioxins to include both dioxins and furans and I will do the

same in this judgment. There was a great deal of controversy between the parties at the hearing on the dioxins issue. It was an issue on which not only the applicant and its advisors but also several other observers engaged. Indaver had addressed this issue as part of the EIS (in chapter 6 and in various appendices). It relied on evidence from AWN Consulting (“AWN”), a firm of environmental consultants, on this issue. That firm provided a series of reports with attachments which were appended to the EIS and which it was said supported the conclusion at s. 6.5.3.6 of the EIS that the incinerator the subject of the proposed development would have no significant impact on dioxin intake for the theoretical maximum at risk individual (known as the “MARI”) and that the proposed development, therefore, would have no adverse impact on human health. That conclusion was contested by the applicant and by others including by Dr. Gordon Reid, a retired senior lecturer in physiology at UCC, who participated at the oral hearing and who swore affidavits on behalf of the applicant in the proceedings. They strongly disagreed with the conclusion expressed in the EIS and in the AWN reports and attachments.

416. On the last day of the oral hearing before the inspector, Dr. Fergal Callaghan of AWN was being cross-examined by Mr. Noonan, the applicant’s solicitor. With the assistance and input of Dr. Reid, Mr. Noonan established from Dr. Callaghan that certain attachments to a document which comprised appendix 6.4 to the EIS, which was an AWN modelling report, namely attachments D and J, contained a number of serious errors and discrepancies which Dr. Callaghan was unable to explain at the oral hearing.

417. The inspector addressed this issue in his main report when considering the impact of the proposed development on human health. He was critical of the data submitted by Indaver in relation to the dioxins issue and the deficiencies in the material provided by Indaver on this issue formed one of the reasons for which the inspector recommended that the Board refuse to grant permission. The Board sought further information from Indaver on this issue which

was provided and received further submissions from several of the observers, including the applicant and Dr. Reid. The Board sought and received Indaver's observations on those further submissions and then concluded that it was not necessary to seek further observations from the observers. It sought a further report from the inspector on the matters raised in the further information request and in the further submissions received. The Board then considered all of that material as part of its decision and as part of the EIA which it carried out and was satisfied that the information obtained supported the conclusion set out in the EIS on this issue.

418. The applicant was dissatisfied with the approach taken by the Board and was very critical, in particular, with the Board's failure, as it saw it, to pursue the issues as to the credibility and competence of Dr. Callaghan of Awn, in terms of the explanations provided for the errors and discrepancies in the data and the errors and discrepancies themselves, and, as a consequence, the reliability of the data and conclusions on the dioxins issue provided to the Board on behalf of Indaver. The applicant was further critical of the Board's failure to circulate the response received by the Board from Indaver in October, 2017 in response to the observations of the applicant and others provided in July, 2017 in response to the further information provided by Indaver in May, 2017.

(a) Brief Summary of Parties' Positions

(1) The Applicant

419. The applicant stated that the dispute on the dioxins issue was extremely complex and maintained that it was not asking the court to resolve the competing scientific views on the dioxins issue or as to the credibility or competence of Dr. Callaghan/Awn. The applicant's case was that the inspector and the Board should have, but did not, address the credibility and competence of Dr. Callaghan/Awn and the reliability of the material provided to the Board on this issue, as they were highly relevant to a vitally important issue concerning the potential

impacts and effects of the proposed development on human health. The applicant contended that as it had raised serious issues concerning the reliability of the information relied upon by the Board on the dioxins issue and serious doubts about the credibility of the explanations given for the errors and discrepancies in the data and documentation relied upon by Indaver, the inspector and the Board ought to have addressed these issues and that, in failing to do so, the Board was in breach of its obligations under Article 3 of the EIA Directive (as considered by the CJEU in Case C-50/09 *Commission v. Ireland*) and under the equivalent provisions of the 2000 Act.

420. The applicant's case under ground 9 was essentially twofold:-

- (1) The applicant contended that the Board had a jurisdiction and a duty to resolve the issues of credibility and competence raised in respect of Indaver's experts and of the reliability of the documentation and data provided by them. In its written submissions on this limb, the applicant relied on a passage from the judgment of the High Court (Clarke J.) in *Ashford Castle v. SIPTU* [2007] 4 IR 70 ("*Ashford Castle*");
- (2) The applicant also contended that the Board was obliged under s. 37F(2) of the 2000 Act to make the additional material and information provided by Indaver to the Board in October, 2007 available for inspection and to permit the applicant and others, including Dr. Reid, the opportunity to consider and comment upon it but failed to do so.

(2) The Board

421. In response to the first limb of the applicant's complaint under this ground, the Board, while acknowledging the deficiencies in the manner in which the matter was dealt with by Indaver's expert at the hearing, maintained that it was not the role or duty of the Board to resolve issues of credibility or the competence and reliability of experts. The Board

maintained that its role and function, and its duty, was as set out in Article 3 of the EIA Directive and in the national implementation measures, to consider the matters set out in s. 37G(2) and to carry out the assessment required under ss. 171A and 172 of the 2000 Act and that it had done so. The Board relied on the various stages in the process, including the hearing before the inspector, the inspector's main report, the request for further information made of Indaver, the provision of that further information by Indaver, the observations made by the applicant and others (including Dr. Reid) in relation to that further information, the further information provided by Indaver, the supplemental report of the inspector and the Board's ultimate consideration of and conclusions on the potential impacts on public health as recorded in the Board Direction and in the Board Order.

422. The Board submitted that it acted in accordance with its statutory functions and complied with its statutory duties in addressing the dioxins issue and that it was not required to engage in a determination on credibility or competence issues. The Board submitted that it considered the robustness of the material provided to it on the dioxins issue and was satisfied that the material before it supported the conclusions contained in the EIS and that its conclusions that there would be no adverse effect on human health from the operation of the incinerator were well based.

423. The Board further noted that it had approached the issue on the most conservative basis as required and that the EPA would determine the actual permitted limits of the emissions from the incinerator.

424. The Board submitted that it was obliged to consider the submissions which it received on this issue and did so. However, it was not required to address and report individually on all of the submissions which it had received. In that regard, it relied on the judgment of the High Court (Costello J.) in *O'Brien v. An Bord Pleanála* [2017] IEHC 773 ("*O'Brien*"). The Board submitted that it was entitled to form the views and conclusions which it did on the

dioxins issue in carrying out the EIA which it was required to carry out in respect of the proposed development and that its decision in that regard was reviewable only on the *O'Keeffe* grounds.

425. As regards the second limb of the applicant's claims under this ground, the Board submitted that it was not obliged, whether under s. 37F(2) or otherwise, to circulate the further information received from Indaver in October, 2017 and to invite comment from the observers, including the applicant. The Board maintained that it was entitled to take that view in circumstances where the observers had already been afforded the opportunity of making submissions in relation to the further information received from Indaver and that the Board was entitled to take the view that the observers (including the applicant and Dr. Reid) had had an adequate opportunity of dealing with all of these issues on a number of occasions and had done so. The Board submitted that the process could not continue endlessly and had to come to an end at some point.

(3) Indaver

426. Indaver supported the submissions made by the Board in respect of this ground. As regards the first limb, Indaver relied on the totality of the material put before the inspector and the Board including the further information provided by Indaver to the Board in 2017, which included a report of Prof. Paul Johnston and revised documents to address the errors made in the documentation presented at the oral hearing. Indaver submitted that, notwithstanding its protestations to the contrary, the applicant was essentially asking the court to engage in a merits-based challenge to the Board's decision on the dioxins issue. Indaver submitted that the Board was not obliged to follow up and decide on issues of credibility or competence. It submitted that the Board was entitled to form the view which it had formed on the evidence that there were no significant adverse impacts on human beings or human health as a result of the proposed development, as the EIS had concluded. Indaver

submitted that that was the task of the Board which it had performed. It rejected the contention that there were further errors in the inspector's supplemental report and stated that, even if there were, those errors did not undermine the ultimate conclusions reached by the Board. Indaver submitted that the inspector and the Board comprehensively engaged on the dioxins issue and approached the task of assessing the potential impacts on human beings and human health as part of the EIA as they were required to do.

427. As regards the second limb of the applicant's claim under this ground, Indaver agreed with the Board that it was a matter for the Board to decide whether to circulate the further information received from Indaver in October, 2017 and to invite further observations and that it was not obliged, whether under s. 37F(2) of the 2000 Act or otherwise, to do so. It noted that the issue as to whether the information received in October, 2017 should be circulated to the observers was considered by the Board in October, 2017 and was again considered by the Board in May, 2018, as appears from the Board's Direction. Indaver submitted that the Board's decision not to circulate this further information could only be reviewed on *O'Keeffe* grounds and that the applicant had not advanced its case on that basis.

(b) Facts Relevant to this Ground

428. In this section, I set out the factual context in which this ground arises. I have touched on that above. I have not been asked to resolve disputed issues of fact or to resolve the issues of controversy as between the scientific experts concerning the level and impact of the dioxins predicted in the emissions from the proposed incinerator, and it would not be appropriate for me to do so. Nor am I asked to resolve disputed issues as to the credibility and competence of Dr. Callaghan/AWN. Again, it would not be appropriate for me to do so in these judicial review proceedings. What I intend to do in this section is to flesh out in a bit more detail the factual context in which the relatively net issues which arise in this ground must be viewed.

429. In the EIS submitted with Indaver’s 2016 planning application, the conclusion was stated that the proposed development would have no significant impact on dioxin intake for even the theoretical maximum at risk individual (MARI) and that the incinerator the subject of the proposed development would have no impact on human health with respect to the issue of dioxin intake. The conclusions in the EIS on that issue were supported by various reports prepared by AWN which formed appendices to the EIS. They included, at appendix 6.3, a sampling and analysis of soil and sediment samples for PCDDs, PCDFs and PCBs (dioxins, furans and other chemicals known as polychlorinated biphenyls) taken at various locations around Cork Harbour. Also included, at appendix 6.4, was a report by AWN entitled “*Modelling of PCDD/F Intake for Ringaskiddy Resource Recovery Centre 2015*” (the “appendix 6.4 modelling report”). That report sought to assess the potential risk to human health of dioxins from the proposed incinerator. The stated method adopted in that report was to analyse soil samples taken from the site for background dioxin levels and to model the extent to which dioxins from the incinerator would increase those dioxin levels in the soil and, in turn, affect a theoretical human (the MARI) living near the incinerator (see para. 6 of Dr. Reid’s affidavit of 7th July, 2018). AWN purported to base its modelling on existing dioxin levels found in soil samples taken in 2015 from the Ringaskiddy site. That data was contained in appendix 6.3. As explained by Dr. Reid, attachment D to the appendix 6.4 report purported to contain a printout of results of part of the modelling exercise based, in part, on the soil samples taken in 2015 and ought to have reflected the dioxin concentrations found in those soil samples and to report on the uptake of dioxins by the MARI resulting from the baseline soil concentrations. The next step in the method described in the EIS involved the calculation of the likely additional uptake of dioxins from emissions from the incinerator. Attachment J to the appendix 6.4 modelling report purported to contain a printout of that modelling exercise.

430. However, it emerged at the oral hearing that there were errors and discrepancies in the data contained in attachments D and J and in the documents themselves. Dr. Reid found that the data for existing soil concentrations in attachment D did not appear to relate to the soil sample test results from 2015 found in appendix 6.3. He discovered that attachment D was identical to the equivalent attachment D to Indaver's 2008 planning application, save that the name of the client at the start of the first page was different. If the 2016 attachment D was based on soil samples taken in 2015, then it could not have been identical to the 2008 attachment D. Dr. Reid discovered further discrepancies with regard to attachment J. The 2016 attachment J was identical to the 2008 attachment J apart from two differences in the title page and in the name of the client. Dr. Reid discovered that the 2008 attachment J was identical to an equivalent attachment which was attached to an equivalent appendix of an EIS prepared by AWN for a planning application made in 2008 by a different developer, College Proteins, in respect of a site in Nobber, County Meath. Dr. Reid concluded that the 2016 attachment J was identical to the 2008 attachment J and with the equivalent attachment for the Nobber development in 2008 (with only the two differences just referred to). He also established that these attachments were identical to the equivalent attachment D for the Nobber development.

431. These discrepancies were raised by Mr. Noonan in his cross-examination of Dr. Callaghan of AWN on the last day of the oral hearing before the inspector. Dr. Callaghan initially felt that there was "*an error in the printing*" which he would have to check. Indaver's counsel at the hearing informed the inspector that "*the raw data contained in the appendices is not the raw data which was used and incorrect data has been used in the appendices to the EIS and that is obviously regrettable*". He informed the inspector that it would take a period of time to obtain the correct raw data and that it was his understanding that it was to be found in either Dr. Callaghan's home or his office. Indaver sought an

opportunity to provide the correct information. Mr. Noonan made a submission to the effect that the documentation was not reliable and was very critical of that.

432. The inspector dealt with this issue in his main report at s. 9.5 (air quality) and at s. 9.7 (human beings). In s. 9.7.2, the inspector dealt with impacts on human health. He dealt specifically with the dioxins issue at para. 9.7.4 of the report (pp. 92 to 96). The inspector noted (p. 94) that the question of the “*veracity*” of the data presented in the EIS arose during the course of the oral hearing. The inspector referred to the fact that issues had arisen in relation to the “*veracity of the modelling*” and that it emerged, and was admitted by Indaver, that:-

“The baseline data... which was used in the EIS did not relate to the Ringaskiddy site, but was base line data from another site. This was acknowledged to be an error by [Indaver]. On this basis the observer contended that the assessment was flawed and could not be relied upon to reach a conclusion of no effect.” (pp. 94-95)

433. The inspector further commented as follows:-

“It is however fundamental to an assessment of impacts that the EIS presented should provide the relevant data on which to make an assessment of impact in relation to dioxins, furans and other substances. In relation to the matter of the incorrect data it is my view that the correct data should be submitted and subject to robust evaluation to enable a considered view to emerge that the impact was identified correctly and be open to evaluation to a satisfactory level. This fact has not occurred in relation to the current proposal.” (p. 96)

434. The inspector summarised his conclusion on that issue in s. 12.0 of the report, at para. 12.2.1, where he referred to deficiencies in the documentation submitted by Indaver on the assessment of dioxins and furans which was based on baseline data which referred to another site.

435. In the third reason for which the inspector recommended the Board should refuse to grant permission, the inspector stated:-

“The EIS relating to the proposed development is, however, deficient in content, in particular in relation to the baseline information in appendices 6.3 and 6.4. The baseline information presented in appendices 6.3 and 6.4 is to assist in the modelling and subsequent evaluation of potential dioxin intake. The baseline data as presented, however, does not and cannot support the results, outcomes and stated likely impacts as presented in the Environment Impact Statement. The information as submitted to the Board is, therefore, insufficient to enable the Board to carry out an environmental impact assessment in an appropriate manner, and to form a basis for an informed decision on the application.” (pp. 143-144)

436. The Board requested further information from Indaver pursuant to s. 37F(1)(a) of the 2000 Act on 20th March, 2017. One of the two areas on which further information was sought concerned the errors and discrepancies in the material provided by Indaver in respect of the dioxins issue. In its letter of 20th March, 2017, the Board explained the basis for seeking further information on this issue as follows:-

“It is noted that on the final day of the oral hearing that was held in relation to the proposed development possible discrepancies in the content of appendix 6.3 and appendix 6.4 of the Environmental Impact Statement accompanying the application were brought to the attention of the hearing. In these circumstances it is considered necessary in the interests of justice, and prior to An Bord Pleanála concluding an Environmental Impact Assessment, to request that the applicant comment on and clarify any such discrepancies and, if necessary, correct any errors.”

437. Indaver provided its response to the Board’s request on 15th May, 2017. In its response, Indaver confirmed that appendix 6.3 remained in the form as submitted with the

EIS. With regard to the appendix 6.4 modelling report, Indaver stated that two attachments to appendix 6.4, attachments D and J, were *“the wrong printouts and were included in error”*. Indaver enclosed what it said were the *“correct printouts”* of those attachments and an *“addendum explaining how the two appendices were attached in error”*. Indaver enclosed an amended version of the Article 6.4 modelling report which was dated 17th January, 2017 (prior to the date of the Board’s request for further information). The amended report showed areas where figures had been changed from the earlier version of the report. The addendum (prepared by Dr. Callaghan) sought to explain how the errors and discrepancies arose. The original Article 6.4 modelling report sought to establish that the predicted dioxin and furan dose was estimated to increase by 0.224 pg WHO-TEQ/kg body weight per week, representing an increase of 1.7% of the EU tolerable weekly intake (TWI) limit value of 14 pg WHO-TEQ/kg body weight and that the predicted dose was *“well below applicable limit values”* for dioxin and furan intake. It concluded that the predicted impact of emissions from the incinerator *“even assuming both municipal solid waste and hazardous waste facilities operating at maximum capacity, maximum permitted exhaust flow rates and maximum permitted dioxin and furan concentrations”*, in terms of dioxin and furan dose to a theoretical MARI, would not be significant and that the dioxin and furan dose to the MARI was predicted to increase by 1.7% of the limit value. In the amended report, the 1.7% was replaced by 1.5%. Both the original and the amended report concluded that *“based on a worst case scenario, the predicted dioxin and furan intake for the MARI was predicted to be well within the EU 14 pg WHO-TEQ/kg bw/wk value, a limit set for the protection of human health”*. Both versions of the report went on to conclude:-

“It can therefore be concluded that proposed municipal solid waste and hazardous waste to energy facilities will have no significant impact on dioxin and furan intake

for even the theoretical MARI and that, with respect to dioxin and furan intake, the facility will have no impact on human health.” (para. 8.0, p. 17)

438. It should be said that the applicant and Dr. Reid were extremely critical of the errors which had been made and at what, they perceived, was the failure by Indaver and its experts properly to explain the errors and discrepancies which occurred and to correct all of those errors. They challenged the credibility of the explanations given and maintained (as appears to be the case) that Indaver failed to explain how data referable to a different development, by a different developer in a different part of the country, several years prior to the proposed development at issue, were the same as data supplied to the Board in connection with Indaver’s 2016 planning application.

439. With its response to the request for further information, Indaver also provided a report from Prof. Paul Johnston, an engineering hydrologist and adjunct professor at Trinity College Dublin, entitled “*Report on Data Consistency in Modelling of Risk Assessment*” (dated September, 2016). That report explained that Prof. Johnston’s task was to check data consistency and to confirm that the data chain used in the modelling exercise contained in the appendix 6.4 modelling report was complete and consistent. Indaver asserted in its letter of 15th May, 2017 that Prof. Johnston had considered and reconfirmed the “*robustness of the model, methodology, inputs and outputs*” and agreed with the conclusion of the appendix 6.4 modelling report. It noted that Prof. Johnston had identified some minor transcription errors which did not change the conclusions, but which had been corrected by AWN (and for that reason, a new and marked up version of the Article 6.4 modelling report correcting those errors was provided by Indaver to the Board). Indaver asserted that the documents demonstrated that the conclusions in the Article 6.4 modelling report remained unchanged as did the conclusions in s. 6.5.3.6 in the EIS, namely, that the proposed development would have “*no significant impact on dioxin and furan intake for even the theoretical maximum at*

risk individual, and that, with respect to dioxin and furan intake, the facility will have no impact on human health”.

440. The Board received submissions from several observers in response to the further information provided by Indaver, including from the applicant’s solicitors and from Dr. Reid. The applicant’s solicitors and Dr. Reid were extremely critical of the further information provided and with the explanation given for the original errors and discrepancies. Dr. Reid was of the view that Prof. Johnston appeared to have been provided with different documents to those submitted with EIS. Dr. Reid accepted that his criticisms were “*highly technical and detailed*” and, while the Board was not obliged to accept them, he asserted that the inspector and the Board were required to consider the issues of competence, reliability and credibility which the applicant and he had raised (para. 32 of Dr. Reid’s affidavit of 17th July, 2018). Dr. Reid set out in his report and in his affidavit an extensive critique of the original information and the further information provided by Indaver.

441. The Board invited Indaver to respond to the submissions made to the Board in July, 2017 in response to the further information provided by Indaver in May, 2017. Indaver did so in a letter dated 2nd October, 2017. That letter contained a document entitled “*Response to Submissions*”, which included a response from Dr. Callaghan of Awn dated 2nd October, 2017 in response to Dr. Reid’s submission of 19th July, 2017. At s. 13.0 of his response, Dr. Callaghan stated:-

“It is concluded that the determination arrived at in the EIS, that the proposed resource recovery facility will have no significant impact with regard to PCDD/F impact on human receptors, remains valid. The theoretical MARI (an individual who does not in fact exist) may experience a slight increase in PCDD/F intake but this is still below the relevant EU intake guidance. For actual people living in the area, the PCDD/F exposure which may occur is insignificant when compared with the

PCDD/F exposure of the general population from food stuffs available on the Irish market.”

442. The deputy chairperson of the Board (Mr. Boland), having discussed the matter with the chairperson, considered that further cross-circulation of the documents was not necessary but that it would be useful for the inspector to provide a report recapping on the issues and summarising the various responses. At that stage, he did not consider it necessary for the inspector to provide a further assessment and recommendation. Mr. Boland wrote to the Board’s SID section in those terms on 23rd October, 2017. However, the position had changed by 8th November, 2017 as, on that date, Mr. Boland wrote to the SID section again stating that having discussed the matter with the assistant director of planning and with the chairperson, it was considered appropriate for the inspector to provide a further assessment and recommendation on the case, as well as the summary of responses previously requested.

443. The inspector provided his supplemental report on 7th March, 2018. In that report, the inspector provided a recap of the issues raised by the Board in its request for further information and summarised the responses received (which were set out at appendix A to the inspector’s supplemental report). The inspector then assessed the responses at s. 3.0 of his supplemental report. It was suggested by the applicant that the inspector’s supplemental report contained a number of errors (including at para. 3.2.5). However, having regard to what I believe to be the correct role of the Board, I do not regard the alleged errors to be significant. In the course of his assessment of the responses and in his summary of the responses, the inspector referred on numerous occasions to the fact that the applicant was challenging the credibility, integrity and reliability of the material provided by Indaver and its experts, AWN, on the dioxins issue and of the explanations given for the errors and discrepancies which the applicant and Dr. Reid had identified (see, for example, paras. 3.2.14 and 3.2.15 of the inspector’s supplemental report and paras. 2.22.2, 2.22.3 and 2.22.4 of

appendix A to his report). Having analysed the responses, the inspector noted (at para. 3.2.22) that, based on Prof. Johnston's review, *"there is nothing to suggest the level of emissions exceed unacceptable levels or pose an unacceptable risk to human health"*. The inspector then commented (at para. 3.2.23) on the modelling and noted that, taking into account the revised information provided by Indaver, the overall conclusion indicated *"levels of tolerable intake at a very low level of the current permissible standard"*. He also expressed the view that there was nothing to suggest that the modelling was not robust (para. 3.2.23). He commented on the application of the MARI and concluded that, although it presented limitations in assessing potential impacts, its use was reasonable. He noted that even applying the MARI, the level of tolerable intake of dioxins and furans was within *"very low spectrum of 1.5%/1.7% of permitted limit values"*. He concluded (at para. 3.2.30):-

"Having regard to the above, I am of the view that the information submitted has addressed the discrepancies as identified at the oral hearing, and would not indicate that the main findings and robustness of the modelling as presented would be altered, or that the conclusions reached are unsupported."

444. In s. 4.0, at para. 4.1 of the supplemental report, the inspector recorded that he was satisfied that the information submitted addressed the deficiencies in content, in particular in relation to the baseline information contained in appendix 6.3 and appendix 6.4 of the EIS which was an issue he had raised in his first report and was the third reason for which he recommended that the Board should refuse permission. The inspector was, therefore, satisfied that having considered the additional information and the responses received, his initial concerns had been addressed.

445. The Board's consideration of this issue was recorded in the Board Direction and, subsequently, its decision was set out in the Board Order. The Board Direction records that the case was presented by the deputy chairperson at the meetings on 3rd, 9th and 15th May,

2018 and that the presentation included the information up to and including the date of the inspector's main report, the further information requested by the Board and the supplemental report of the inspector dealing with the matters raised in the further information request and in the subsequent submissions received from the parties. It also records that, having considered the position, the Board was satisfied that no further cross-circulation of submissions was necessary, that there was no need to reopen the oral hearing, that there was no need to seek any further clarification of technical matters or to appoint any specialist advisors and that the Board could proceed to complete its consideration of the case based on the submissions already on the file. The Board Order notes that the Board completed an EIA of the development, taking into account the various matters referred to earlier which included the submissions of the parties, the inspector's reports and Indaver's response to the Board's request for further information and the subsequent submissions from the parties. The Board Order then notes that the Board considered that the EIS, supported by the further documentation submitted by Indaver, "*identifies and describes adequately the direct, indirect, secondary and cumulative effects of the proposed development on the environment*" (p. 5 of the Board Order). It then notes that, while the inspector's main report identified concerns relating to baseline information with regard to the modelling of dioxin uptake in humans, the inspector's supplemental report expressed satisfaction the information available on that issue.

446. In assessing the impacts on health, the Board referred to the fact that the inspector did not consider that any significant risk was posed to human health by the proposed development and that the Board shared that view. With regard to the dioxins issue, the Board stated as follows:-

"The environmental impact statement contains a modelling exercise to predict the theoretical maximum level of dioxin intake for a resident of the area, which relies on

detailed baseline information on the level of dioxins in air and soil, as well as on air dispersion modelling. The applicant accepted that the environmental impact statement appendices (submitted with the planning application in January 2016) contained incorrect information, and submitted corrected information in response to the An Bord Pleanála further information request of March 2017. A peer review of the revised information was submitted. The revised information was subject to further detailed submissions from the observers and the applicant. In his Addendum Report (March 2018) the Inspector is satisfied that the further information submitted by the applicant addressed his original concerns regarding the baseline information submitted and the modelling exercise carried out. The Board, having considered all of the available information, reached the same conclusion, and was satisfied that the further information supports the conclusions set out in the environmental impact statement document.” (pp. 7 and 8 of the Board Order)

447. The Board further stated:-

“The environmental impact statement also contains a specialist report on Human Health that concludes there will be no deleterious effects on human health in the immediate vicinity or in the wider context. Taking into account all of the information available on this topic, the Board considered that this conclusion was well based.”

(p. 8 of the Board Order)

448. The Board was in a position, therefore, to complete an EIA in respect of the proposed development and concluded that the proposed development would not have unacceptable impacts on the environment (p. 9 of the Board Order).

449. In its conclusions on proper planning and development, the Board Order noted that the Board considered that, subject to compliance with the conditions attached to its decision,

the proposed development “*would not be prejudicial to public health*” (p. 11 of the Board Order).

450. It is in this factual context that I must consider the two limbs of the applicant’s claim under this ground.

(c) Decision on Ground 9

451. Clearly, the court cannot resolve the conflicting scientific evidence as to the correct predicted levels of dioxin and furan intake by the MARI from emissions from the proposed incinerator. Nor can the court decide on the credibility, reliability and competence of the experts retained by Indaver to deal with this issue in the course of the planning application. In advancing this ground, the applicant did not ask the court to do either of those two things. Rather, it advanced its case under this ground under two limbs. First, it contended that the Board was obliged to address the issues of credibility, reliability and competence and failed to do so. Second, it contended that the Board was obliged under s. 37F(2) of the 2000 Act to make available for further submissions by the applicant and others the further information provided by Indaver to the Board in October, 2017 in response to the various responses received from the applicant and others in July, 2017.

452. Despite the highly controversial and complex circumstances in which the issue emerged and developed during the course of the planning process, these two limbs raise very net issues and can be dealt with relatively briefly.

(1) The first limb: credibility, reliability and competence

453. In considering this limb of the applicant’s claim under this ground, it is necessary first to identify the nature of the exercise which the Board was engaged in when considering the complex and controversial issue concerning the potential effects on human health from chemicals (dioxins and furans) in the emissions which would be likely to emanate from the incinerator proposed by the applicant on the Ringaskiddy site. This issue arose primarily as

part of the EIA which the Board had to carry out in respect of the proposed development, but also as part of its assessment of the likely consequences of the proposed development for proper planning and sustainable development in the area.

454. It is first necessary to consider the relevant SID provisions in the 2000 Act. Under s. 37E, the application for permission for a SID development had to be accompanied by an EIS (s. 37E(1)). The person applying had to publish a notice and send copies of the application effectively inviting submissions from interested persons and bodies on the implications of the proposed development for proper planning and sustainable development and on the likely effects on the environment if the proposed development was carried out (s. 37E(3)). Under s. 37F(1), the Board was entitled to request further information from Indaver and to request further submissions or observations from it or from any person who made submissions or observations or, indeed, any other person who might have information relevant to the determination of the application (s. 37F(1)(a) and (c)).

455. Under s. 37G(2), the Board was required, when making its decision on Indaver's 2016 planning application, to "*consider*" several matters including the EIS submitted under s. 37E(1), any submissions or observations made within time in response to the invitation referred to in s. 37E(3), the report of the planning authority in accordance with s. 37E(4), any information furnished to the Board under s. 37F(1), which would include the further information provided by Indaver in response to the Board's request and the subsequent submissions and observations furnished by the applicant and others and "*any other relevant information before it*" relating to two things, namely:-

“(i) *the likely consequences of the proposed development for proper planning and sustainable development in the area in which it is proposed to situate the development, and*

(ii) *the likely effects on the environment of the proposed development,*”

(s. 37G(2)(a))

It was also required to consider various other matters including any report of the inspector (s. 37G(2)(b)).

456. When the Board was considering the EIS and the other information relating to the likely effects of the proposed development on the environment, the Board had to do so in the manner provided for in Article 3 of the EIA Directive and in the equivalent provisions of the 2000 Act, including s. 171A. As noted earlier, in carrying out the EIA and in considering EIS as required, the Board was obliged to “*identify, describe and assess*” in an appropriate manner and in light of each individual case and in accordance with Articles 4 to 12 of the EIA Directive, “*the direct and indirect effects*” of the proposed development on (among other things) “*human beings*”. The same terms are used to define “*Environmental Impact Assessment*” in s. 171A of the 2000 Act, namely, “*identify, describe and assess*” the direct and indirect effects of the proposed development on human beings. The applicant relied on a passage in the judgment of the CJEU in Case C-50/09 *Commission v. Ireland* in support of its contention that the words used in Article 3 of the EIA Directive had to be read in a way which supported its contention that the Board was required to resolve the issues of credibility, reliability and competence as part of the EIA which it was required to carry out. At para. 40 of its judgment in that case, the CJEU was comparing certain other obligations on competent authorities with the assessment obligation contained in Article 3 of the EIA Directive. The CJEU described the obligation in Article 3 as involving “*an examination of the substance of the information gathered as well as a consideration of the expediency of supplementing it, if appropriate, with additional data*”. The CJEU continued:-

“That competent environmental authority must thus undertake both an investigation and an analysis to reach as complete an assessment as possible of the direct and

indirect effects of the project concerned on the factors set out in the first three indents of Article 3 and the interaction between those factors.” (para. 40)

457. I do not read these passages as adding to the words used in Article 3 of the EIA Directive or as supporting the applicant’s claim that the Board was required to resolve the credibility, reliability and competence issues. The CJEU was referring in that case to the “*substance of the information gathered*” and to the possibility that further information may be required. It does not seem to me that a fair reading of that paragraph goes further than the words used in Article 3 itself. The obligation was to “*identify, describe and assess*” the effects on (among other things) human beings. The use of the words “*investigation*” and “*analysis*” does not, in my view, add to that obligation as those words were clearly used by the CJEU in the context of the assessment by the competent authority of the direct and indirect effects of the project on the relevant factors, including human beings.

458. I agree with the Board and Indaver that the decision of the High Court (Costello J.) in *O’Brien* correctly described the nature of the exercise which the Board was engaged in under s. 37G(2) in considering the likely consequences of the proposed development for proper planning and sustainable development and the likely effects of the proposed development on the environment. At para. 80 of her judgment in *O’Brien*, Costello J. stated:-

“...the Board is engaged in an administrative decision making process and not primarily in deciding disputes between parties.” (para. 81)

459. In *O’Brien*, Costello J. held that the inspector and the Board were not required by the EIA Directive or the 2000 Act to examine, analyse and evaluate all of the submissions or observations validly made to the Board. She held that the EIA Directive and the 2000 Act required that the direct and indirect effects of the proposed development be assessed and not the submissions or observations made (*O’Brien*, para. 44). Costello J. held that it was not necessary for the inspector or the Board to examine, analyse and evaluate the particular report

at issue in that case or the points made in that report in order to carry out a lawful EIA and that it was sufficient if there was an examination, analysis and evaluation of the direct and indirect effects of the proposed development on the environment (*O'Brien*, para. 45).

460. I should note that in *Balz v. An Bord Pleanála* [2019] IESC 90, O'Donnell J. in the Supreme Court (although not specifically in the context of an EIA or an AA) stated:-

"...It is a basic element of any decision-making affecting the public that relevant submissions should be addressed and an explanation given why they are not accepted, if indeed that is the case. This is fundamental not just to the law, but also to the trust which members of the public are required to have in decision making institutions if the individuals concerned, and the public more generally, are to be expected to accept decisions with which, in some cases, they may profoundly disagree, and with whose consequences they may have to live..." (para. 57)

461. In *Sliabh Luachra v. An Bord Pleanála* [2019] IEHC 888 ("*Sliabh Luachra*"), McDonald J. expressed the view that it was not always necessary that *"every submission made to the respondent should be individually addressed"* in a decision of the Board or in a report of an inspector. McDonald J. stated:-

"What seems to me to be crucial is that the points made in submissions should be addressed." (para 38)

462. I completely agree with what O'Donnell J. stated in *Balz* and with McDonald J.'s interpretation of O'Donnell J.'s observations. However, it does not seem to me that they provide support for the applicant's contention that the Board must resolve issues of credibility, reliability and competence, such as those raised by the applicant in the present case. Put in the context of this case, it seems to me that what the Board was required to do was to consider the submissions made in relation to the likely direct and indirect effects of the proposed development on public health (as well as considering the health of humans as part of

its consideration of the proper planning and sustainable development in the area). In my view, the Board did so and set out clearly in its decision why it had reached the conclusions which it reached on the human health issue. This is particularly so when the Board's decision is read with the two inspector's reports and the submissions made by Indaver and by the applicant and Dr. Reid and others.

463. I have no doubt that the applicant and Dr. Reid had legitimate concerns about the manner in which Indaver's expert, AWN, dealt with this issue at the hearing and subsequent to it. Through their hard work and diligence, the applicant's solicitors and Dr. Reid discovered those errors and discrepancies which they raised at the oral hearing. It is undoubtedly the case that there were clear errors and deficiencies in the material provided by Indaver's experts as part of the EIS and some of those errors and deficiencies were exposed by the applicant and by Dr. Reid at the oral hearing. However, whatever about the criticisms which the applicant and Dr. Reid have continued to make, both in response to the further information provided by Indaver in response to the Board's request of March, 2017 and in affidavits sworn in these judicial review proceedings, it must be acknowledged that corrections were made to the information relied upon by Indaver (even though the applicant and Dr. Reid still have significant issues with those corrections).

464. A corrected Article 6.4 modelling report and attachments D and J were provided by Indaver to the Board. The corrected material together with the submissions of the applicant and of Dr. Reid in response to it and the supplemental report of the inspector commenting upon and evaluating the further information provided were all before the Board when it made its decision. The additional information before the Board included Prof. Johnston's report, the contents of which were summarised by the inspector in his supplemental report. The report of Dr. Johnston itself was, of course, also before the Board and the Board made clear in its decision that it had considered all of the material, including Dr. Johnston's report (which was

described in the Board Direction and Board Order as a “*peer review*” of the revised information provided by Indaver). The Board’s decision expressly recorded the fact that the Board considered Indaver’s response to the request for further information and the further submissions received in relation to that further information as well as the inspector’s supplemental report.

465. In my view, it was open to the inspector in his supplemental report, on the basis of all of the information which was before him, to reach the conclusions which he did in relation to the very low increased risk of dioxin intake based on the MARI modelling. It was also open to the inspector to conclude (as he did at para. 3.2.30 of his supplemental report) that the information submitted addressed the discrepancies identified at the oral hearing and “*would not indicate that the main findings and robustness of the modelling as presented would be altered, or that the conclusions reached are unsupported*”. I am satisfied that there was material before the inspector to support that conclusion. So too was there material before the Board to support the Board’s conclusions on this issue (at pp. 7 and 8 of the Board Order). As noted earlier, having referred to the issue which had arisen, to the provision of the further information and to the inspector’s conclusions on the basis of that further information, the Board stated that it had reached the same conclusion as the inspector and was satisfied that the further information supported the conclusions set out in the EIS. I am satisfied that there was material before the Board to support its conclusion that the conclusion in the EIS that there would be no deleterious effects on human health in the immediate vicinity or in a wider context was well based.

466. I do not agree with the applicant that the Board was required to go further and to pursue and resolve the issues of credibility, reliability and competence which had been raised by the applicant and by Dr. Reid at the oral hearing and were maintained by them in the further stages of the planning procedure and in the course of these judicial review

proceedings. I am satisfied that the exercise which the Board was engaged in was an administrative decision making process (albeit one in which it was required to act fairly and judicially) and that it was not concerned primarily with deciding disputed issues between the parties. While I do not rule out the fact that, in exceptional cases, the Board might find it necessary to resolve issues of credibility, reliability and competence, the Board did not find it necessary to do so in this case and was in a position to complete the exercise which it was required to do under s. 37G(2) without doing so.

467. The Board was obliged under that provision to consider (i) the likely consequences of the proposed development for proper planning and sustainable development in the area and (ii) the likely effects on the environment of the proposed development. It is clear from the terms of the decision itself that the Board carried out that exercise and considered the matters which it was required under that provision to consider. While the applicant and Dr. Reid may be understandably unhappy with the manner in which the Board ultimately decided to deal with the issues raised and with the ultimate outcome of the Board's decision on the two areas referred to in s. 37G(2), I believe that the Board acted in accordance with its statutory obligations and that it was not obliged to resolve the disputed issues of credibility, reliability and competence, in circumstances where it was in a position to reach conclusions on the matters on which it was required to do so, without resolving those disputed issues raised by the applicant. It seems to me that any other conclusion would inevitably lead the court into having to address the merits of the issues before the Board which is not something which the court should do in judicial review proceedings. For the reasons discussed earlier in this judgment in respect of other grounds, once the Board was satisfied that the EIS was legally compliant with the provisions of the EIA Directive and the national implementing provisions, the adequacy and robustness of the information contained in the EIS and of the conclusions drawn by the Board from that material was a matter for the Board and its decision is only

capable of review on *O’Keeffe* grounds. The applicant did not seek to impugn the Board’s decision under this heading in the first limb of its claim under ground 9. However, had it sought to do so, it would inevitably have failed, in light of all of the material before the Board.

468. Finally, in respect of the first limb, I should make clear that I have considered the judgment of Clarke J. in the High Court in *Ashford Castle*, on which the applicant relied in its written submissions in respect of the first limb of its case under this ground. The applicant relied on what Clarke J. stated at para. 37 of his judgment in that case. *Ashford Castle* involved a statutory appeal under the Industrial Relations (Amendment) Act, 2001, in which the plaintiff sought to appeal from a determination of the Labour Court on a point of law. At paras. 36 and 37 of his judgment, Clarke J. was commenting on the range of tasks which administrative bodies are given under statute. At one end of the spectrum, he referred to statutory bodies which had to determine issues of fact and law similar to those with which courts are frequently faced. At the other end of the spectrum, he referred to expert bodies which are required to exercise their own expertise in relation to matters involving the exercise of an expert judgment. In that context, he referred to bodies involved in the planning process where decisions involve the exercise of a planning judgement. He noted that issues of expert opinion might be in dispute and might have to be resolved in a manner similar to the way in which such issues would be resolved in the courts “*by hearing and, if necessary, testing competing expert evidence*” (para. 37). However, Clarke J. was not addressing the issue which arises under this first limb of ground 9, namely, whether the Board is obliged to resolve issues of credibility and the like. He was noting that there is a procedure for dealing with disputed issues which arise during the planning process, including having hearings where evidence can be tested. That is what happened in the present case. There was an oral hearing and there was cross-examination of witnesses, including of Indaver’s expert, Dr.

Callaghan. However, Clarke J. was not saying that the Board was obliged in all cases to resolve disputed issues of credibility. Nor, obviously, was he commenting on how the Board might be required to carry out its obligations under particular statutory provisions, such as those at issue in the present case. I do not, therefore, read the comments of Clarke J. in *Ashford Castle* as providing support for the applicant's contention that the Board was required to resolve the issues of credibility, reliability and competence on the part of Indaver's expert.

(2) *The second limb: s. 37F(2)*

469. I now turn to the second limb's case under this ground. The applicant rested on its written submissions on this ground. It submitted that since the Board did not record an opinion that the information and material received from Indaver in October, 2017 did not "*contain significant additional information on the effect of the proposed development on the environment to that already submitted*" (using the words of s. 37F(2)), the Board was required to make that additional information available and to invite further submissions. The applicant further contended that the additional information furnished by Indaver in October, 2017 was significant as it was relied upon by the inspector in his supplemental report. The issue as to whether the further information provided by Indaver in October, 2017 should be made available for inspection and whether further submission should be invited was expressly considered by the deputy chairperson, in consultation with the chairperson, in October, 2017 and a decision was made on 23rd October, 2017 that such further cross circulation was not necessary. The issue was reconsidered by the Board at its various meetings in May, 2018 and the Board Direction of 24th May, 2018 records that, having considered the matter, the Board was satisfied that no further cross circulation of submissions was necessary and that there was no need for any further submissions from the parties. While the Board may not have used the express language in s. 37F(2), I am satisfied that that was

not fatal to its decision: *Dublin County Council v. Eighty Five Developments Ltd (No. 2)* [1993] 2 IR 392, per McCarthy J. at 402-403; *Buckley v. An Bord Pleanála* [2015] IEHC 572, per Cregan J. at paras. 105 and 144; *Alen-Buckley v. An Bord Pleanála (No. 2)* [2017] IEHC 541 (Haughton J.); and *Kelly/ALDI*, per Barniville J. at paras. 100-104.

470. Notwithstanding the fact that the Board did not use the precise words contained in s. 37F(2), it was clearly the case that the Board did not consider that it needed further information, submissions or observations and the inference is that the Board concluded that the additional information was not significant in the sense of requiring any such further submissions or observations. It seems to me that that was a decision for the Board as to whether it needed to receive any further information in order to complete the statutory task entrusted to it under s. 37G(2). In circumstances where, by October, 2017, the Board already had a great deal of information before it which included not only the EIS, the evidence from the oral hearing, the inspector's report and the further information provided by Indaver in May, 2017 on foot of the Board's request but also the submissions and observations from many observers, including the applicant and Dr. Reid in July, 2017 and the further information provided by Indaver in October, 2017 and by May, 2018, it had the inspector's supplemental report, in my view, the Board was entitled to take the view that it had sufficient information before it to consider the likely consequences of the proposed development for the proper planning and sustainable development in the area and the likely effects on the environment of the proposed development. While the Board's decision in that regard would be open to challenge in accordance with the *O'Keeffe* principles, the applicant has not sought to challenge the decision on that basis. Had it done so, the challenge would undoubtedly have failed in circumstances where there was ample material before the Board for it to conclude that it had sufficient information to enable it to carry out the tasks entrusted to it under s.

37G(2). Therefore, in my view, the applicant's case in the second limb under this ground must also fail.

471. In conclusion, therefore, I am satisfied that the applicant's case on both limbs arising under ground 9 must fail.

20. Ground 10: Alleged Failure to Carry out Proper EIA and/or Alleged Failure to assess Impact of Proposed Development on Human Health

(a) Brief Summary of Parties' Positions

(1) The Applicant

472. The applicant's case under this ground was essentially that the Board ignored and did not resolve a dispute between experts on the issue as to whether the incinerator would negatively impact upon human health. The applicant contended that several experts expressed the opinion that the incinerator would negatively impact upon human health and that the Board did not resolve that dispute. A second and related part of the applicant's case under this ground was that the Board did not resolve an issue between two of the experts, Dr. Martin Hogan and Prof. Anthony Staines, as to whether the document contained at appendix 6.2 of the EIS which was entitled "*Health Impact Assessment*" actually constituted a health impact assessment. The applicant submitted that Dr. Hogan was forced to make certain concessions in his evidence at the oral hearing and yet the Board relied on his report without having addressed the contrary views expressed by Prof. Staines. Similar to the case made by the applicant under the first limb of ground 9, the applicant contended that the Board was required to resolve the dispute between the experts but failed to do so in breach of its duty under Article 3 of the EIA Directive.

473. At the hearing of the proceedings, the applicant's counsel stated that the applicant was content to rest on its written submissions on this issue and very appropriately accepted that

this was a difficult ground for the applicant to succeed on. Nonetheless, the point was not expressly abandoned by the applicant and will, therefore, have to be determined.

(2) *The Board and Indaver*

474. It was submitted by the Board and by Indaver that this ground also amounted to a merits based attack on the Board’s decision. They contended that the Board was under no obligation individually to resolve all of the disputes between the experts and to engage expressly on each and every submission made. Both the Board and Indaver submitted that the Board’s duty was to “*identify, describe and assess*” the direct and indirect effects of the proposed development on the various factors referred to in Article 3 of the EIA Directive, including human beings. Reliance was placed on the judgments of Costello J. in the High Court in *O’Sullivan v. An Bord Pleanála* [2017] IEHC 716 and in *O’Brien* (discussed above). Reference was made to those parts of the inspector’s main report which dealt with human health (noting that those parts which dealt superficially with the dioxins issue had been addressed separately under ground 9) and to the relevant terms of the Board’s decision itself, as recorded in the Board Order.

(b) Facts relevant to this Ground

475. The inspector’s main report made reference in various places to the question of human health and to the potential effects on human health from the incinerator. The inspector addressed this issue in s. 9.5 of the report dealing with “*Air Quality*”. In that context, he referred to chapters 6 and 8 of the EIS and noted that matters relating to air quality were addressed in chapter 6 (para. 9.5.2). The inspector noted that many of the submissions received referred to a high level of interaction between air quality and the impact of air emissions on public health. He noted that the issue was raised in the course of the oral hearing and that concerns were expressed by medical doctors and by other professionals who contended that “*impacts from air emissions were of significance in the assessment of the*

proposed development and that effects on health, both human and animal, were interrelated and intertwined with effects arising from emissions” (para. 9.5.2). The inspector referred to the submissions received on that issue, including the submission from Prof. Anthony Staines. The inspector then discussed the issue in the context of his consideration of air quality in paras. 9.5.3 to 9.5.6. He dealt specifically with the issues relating to the impact on health in s. 9.7 of his report.

476. In s. 9.7.2, the inspector dealt with the impact on human health in general. He referred to appendix 6.2 of the EIS which presented a Health Impact Statement and to submissions made on behalf of Indaver at the hearing, including by Dr. Hogan. The inspector then commented on the submissions made by observers and noted (at para. 9.7.2.2) that risk to health arising from the development was raised in a large number of submissions, both before and during the oral hearing. The inspector noted that submissions from observers raised “*major concerns*” in relation to the impact of emissions from the proposed development on public health. In the same paragraph, he referred to submissions being made by health practitioners in the geographical area (both general practitioners and specialists) and set out in some detail the nature of the submissions made on this issue over the course of the following few pages of the report (pp. 88 to 90). The inspector then discussed the question of the health impact of air emissions before turning to his consideration of dioxins. I have referred earlier to the inspector’s analysis of the dioxins issue and it is not necessary to do so again here. As noted earlier, the inspector prepared a supplemental report dealing with the dioxins issue which it is again unnecessary to discuss here. In his discussion in s. 9.7.3, the inspector considered the Health Impact Assessment submitted by Indaver and various issues which the observers had raised in relation to it. He was satisfied with the information provided.

477. The Board dealt with the issue of human health in the EIA part of its decision as recorded in the Board Order under the heading “*Health/Air Quality*”. I have referred to this part of the Board’s decision earlier in considering ground 9. The Board made clear that it was considering this issue taking into account all of the documents listed on p. 5 of the Board Order, including the submissions made at the oral hearing and the various reports of the inspector. Having done so, and having expressly taken into account all of the information before it on the issue of human health, the Board was satisfied that the statement contained in the EIS that there were no deleterious effects on human health in the immediate vicinity or in the wider context of the proposed development was “*well based*” (pp. 7 and 8 of the Board Order). Having done so, the Board concluded the EIA part of its report by stating that, subject to implementation of the mitigation measures proposed, “*the proposed development would not have unacceptable impacts on the environment*” (p. 9 of the Board Order). In its consideration of the question of proper planning and sustainable development, the Board also considered that the proposed development would not be prejudicial to public health (p. 11 of the Board Order).

(c) Decision on Ground 10

478. This was a particularly difficult ground for the applicant and counsel rightly acknowledged that. I am satisfied that the applicant cannot succeed on this ground. In my view, it represents an attempt by the applicant to invite the court to intrude into an area which is the preserve of the Board, namely, the assessment of evidence in relation to an important issue falling within its area of responsibility under s. 37G(2) of the 2000 Act. The court clearly cannot act as a court of appeal in these judicial review proceedings and the applicant properly acknowledged that.

479. The Board was required to consider the likely effects of the proposed development on the environment and the likely consequences for proper planning and sustainable

development in the area, under s. 37G(2). On the EIA aspect of its role, as noted earlier, once the EIS complies with the formal requirements of the EIA Directive and national implementing measures, Article 94 and Schedule 6 to the 2001 Regulations (as amended), an assessment of the adequacy of the information contained in the EIS is primarily a matter for the discretion of the Board, subject to review on *O’Keeffe* grounds with, where appropriate, consideration of issues of proportionality in accordance with *Meadows v. Minister for Justice* [2010] 2 I.R. 701. So too is the Board’s assessment of the information provided by the applicant for the permission and by the observers. I agree with the Board and Indaver that the Board is not required to address individually or on a point by point basis each and every submission or a piece of information which may have been provided to it in the course of the planning process. That proposition is supported by the judgment of Costello J. in the High Court in *O’Brien*. It is also supported by the more recent judgment of McDonald J. in *Sliabh Luachra*, to which I referred earlier in respect of ground 9. The position might well be different when considering the particularly stringent obligations on a decision maker in carrying out an AA under the Habitats Directive, as considered by the Supreme Court in *Connelly* and in the many cases referred to in that context in that case. However, those particular considerations do not apply to the Board’s carrying out of an EIA or to its assessment as to the likely consequences of the proposed development for proper planning and sustainable development in the area.

480. While acknowledging the difficulty for the applicant of this ground, the applicant’s counsel did helpfully draw my attention to the opinion of Advocate General Kokott in Case C-723/17 *Lies Craeynest & ors v. Brussels Hoofdstedelijk Gewest & ors* (opinion delivered on 28th February, 2019)(ECLI:EU:C:2019:168) which contained a discussion of the standard of judicial review in Member States of administrative decisions implementing Directive 2008/50/EC on Ambient Air Quality and Cleaner Air for Europe (opinion delivered on 28th

February, 2019). The judgment of the CJEU in the case was subsequently given on 26th June, 2019 (ECLI:EU:C:2019:533). At para. 54 of its judgment, the CJEU confirmed the position in relation to the standard of review in respect of decisions taken by national authorities under national legislation implementing EU law which was set out in Case C-71/14 *East Sussex County Council* (EU:C:2015:656, para. 52). As was noted during the course of counsel's submissions on this issue at the hearing of these proceedings, it is well established that having regard to the wide scope of judicial review in Ireland in accordance with the *O'Keefe* principles with the added proportionality requirement under *Meadows*, judicial review in Ireland satisfies the principles of equivalence and effectiveness referred to by the CJEU in *East Sussex*. That that is so is clear from the judgment of Humphreys J. in *Holohan v. An Bord Pleanála* [2017] IEHC 268 (paras. 87 to 103). At para. 103, Humphreys J. observed that "*the jaws of judicial review have already been opened wide enough*" and that "*it is not necessary or appropriate to seek to widen them further, either under the guise of national or European law*".

481. In conclusion, in respect of this ground, to succeed, the applicant would have to establish that the Board's decision was unreasonable or irrational in the *O'Keefe* sense. The applicant came nowhere near meeting that test. The totality of the information available to the Board, listed at the commencement of that part of the decision recording the EIA which it carried out, provided ample evidence for the Board to reach the conclusion it did in relation to the potential effects on human health. It was not, in my view, necessary for the Board to engage individually with each and every one of the submissions made to it. The Board was clearly aware of the evidence considered by the inspector at the oral hearing and was entitled to reach the decision it did on the basis of the material before it.

482. I am satisfied, therefore, that the applicant's case, under this ground, must also fail.

21. Ground 11: Alleged Failure by Inspector to provide Board with Fair and/or Complete and/or Sufficient Report

(a) Brief Summary of the Parties' Positions

(1) The Applicant

483. The applicant contended that the inspector failed to provide a fair, accurate and complete report to the Board of the matters which arose at the oral hearing. At para. 97 of the amended statement of grounds, the applicant listed nine matters which arose at the oral hearing on which it said the inspector failed to provide a fair, accurate and complete report to the Board. As a consequence, it was contended that the Board failed to take into account relevant considerations and failed to comply with its obligations under Article 3 of the EIA Directive and Part X of the 2000 Act to “*analyse, evaluate and assess*” the relevant information as required. The applicant sought to contrast the report of the inspector in this case with the reports of Inspector Jones and Inspector Yucel-Finn in relation to Indaver’s previous applications in 2001 and 2008. In support of this ground, the applicant relied on *Murphy v. Dublin Corporation* [1972] 1 IR 215 (“*Murphy*”) and *Simonovich v. An Bord Pleanála* (Unreported, High Court (Lardner J.), 24th July, 1998 (“*Simonovich*”) (reported in O’Sullivan and Shepherd: Irish Planning Law and Practice (Issue 40) (February, 2014) (para. 1006).

(2) The Board and Indaver

484. In response, the Board and Indaver contended that the applicant was, under this ground, seeking to invite the court to engage in a merits based challenge to the Board’s decision. They submitted that the two reports of the inspector in connection with Indaver’s 2016 application were comprehensive, fair and accurate and complied with the requirements for such reports referred to in the case law, including *Murphy*, *Simonovich*, *O’Brien* and *Keeney Construction Ltd v. An Bord Pleanála* [2005] IEHC 30 (“*Keeney Construction*”).

Insofar as the applicant appeared to be suggesting that the Board required specifically to reference and address each individual submission made to him for the purposes of the oral hearing, it was submitted that the High Court (Costello J.) in *O'Brien* had held that no such obligation was imposed upon the inspector.

485. Indaver submitted that the essence of the applicant's complaint under this ground was not that the specific issues referred to were not considered by the inspector, but rather that the specific submissions and evidence to which the applicant referred at para. 97 of the amended statement of grounds were not expressly referred to in the inspector's report. Indaver submitted that the provision of a fair and accurate report by the inspector did not require the inspector separately to refer to each piece of evidence or each submission received at or for the purposes of the oral hearing.

(b) Facts relevant to this Ground

486. It is unnecessary separately to set out the facts relevant to this ground. The applicant's case is that the inspector did not refer to certain pieces of evidence in his report. When setting out my decision on this ground in the next section, I will deal with each of the pieces of evidence on which the applicant relied under this ground.

(c) Decision on Ground 11

487. Under s. 146 of the 2000 Act, the Board is entitled to assign a person to report to it in respect of any matter arising in connection with the performance of any of the Board's functions under that Act. Section 146(2) provides that the person assigned to report to the Board under s. 146(1) must make a "*written report on the matter to the Board, which shall include a recommendation, and the Board shall consider the report and recommendation before determining the matter*".

488. The authorities establish that any report prepared by an inspector for the Board must be fair and accurate. Both the Board and Indaver accepted that the report of the inspector in

this case (and this ground concerns the inspector's main report and not his supplemental report) had to be fair and accurate. What is meant by fair and accurate has previously been considered by the courts.

489. In *Murphy*, Walsh J. in the Supreme Court stated the following, in connection with a report prepared by an inspector to the relevant Minister under the Housing Act, 1966:-

“In as much as he is there for the purpose of reporting to the Minister, the inspector's function is to convey to the Minister, if not a verbatim account of the entire of the proceedings before him, at least a fair and accurate account of what transpired and one which gives accurately to the Minister the evidence and the submissions of each party because it is upon this material that the Minister must make his decision and on no other.” (per Walsh J. at 239)

Unlike an inspector appointed by the Board under the 2000 Act, the inspector to which Walsh J. was referring in *Murphy*, had no function to advise the Minister or to arrive at any preliminary judgment. In contrast, the inspector appointed by the Board is required under s. 146(2) to include a recommendation in his or her report to the Board.

490. In *Simonovich*, the High Court (Lardner J.) considered the content of a report prepared by an inspector for the Board in connection with an oral hearing in an application for planning permission for a quarry. The applicant successfully challenged the decision of the Board granting permission for the quarry on the ground that the inspector's report was not a fair and accurate account of the evidence and the submissions made on an issue which arose in the course of the hearing, namely, whether or not the Battle of the Boyne had occurred on the site of the proposed development. In finding that the inspector's report did not provide a fair and accurate account of what transpired and did not accurately give to the Minister the evidence and submissions of the parties at the hearing, Lardner J. observed that there were only three direct references to the issue in the report and that each of them was brief. The

inspector had concluded that it seemed “*reasonably certain that the site did not feature to any extent in the events of the Battle of the Boyne*”. Lardner J. held that the report failed to give a fair and accurate account of the evidence and the submissions on the issue to the Board. While noting that the report did not have to be a verbatim account, the court held that the “*considerable scope and extent*” of the evidence of the particular expert who addressed this issue on behalf of the objector was referred to in the report “*with a brevity which rendered the report inadequate*”. The court concluded that neither the body of the report nor the assessment represented adequately to the Board the matters which had been addressed by the expert.

491. The issue was considered again by the High Court (O’Neill J.) in *Keeney Construction*. That was an application for leave to seek judicial review, in which the applicant had to demonstrate substantial grounds for contending that the Board’s decision was invalid. One of the grounds raised by the applicant concerned the fairness and accuracy of the inspector’s report. Having referred to the *dicta* of Walsh J. in *Murphy* and of Lardner J. in *Simonovich*, O’Neill J. proceeded to summarise the extent of the obligation on the inspector to provide a fair and accurate report as follows:-

“In essence, therefore, what is involved in giving to the Board a fair and accurate report is one which fairly sets out and fully sets out for the benefit of the Board the relative contentions in regard to whatever the issues are in the planning application, but bearing in mind that the Board already have a variety of material before them, and it would be superfluous for any report to recite material which was clearly available and highlighted in other documentation. But the essence of it is that the report must present to the Board a fair and accurate picture of the proposal and of the reasons for it and of the reasons against as made by the objectors and as made by the applicant in the planning permission.” (p. 15)

492. On the facts of that case, O’Neill J. refused to grant leave to challenge the Board’s decision on that ground (and all of the other grounds advanced). The court considered the report and noted that, in addition to the report, the Board also had the planning file which included the EIS in the case and a submission from an expert, which had not referred to in the inspector’s report, and which formed the basis of the applicant’s challenge on that ground. However, O’Neill J. held that, in light of the fact that the report was otherwise before the court, and that no complaint was made by the applicant of any dearth of information before the Board, the absence of an express reference in the inspector’s report to the particular expert’s submission at issue did not render the report other than true and accurate (p. 17).

493. The issue was considered again by the High Court (Costello J.) in *O’Brien*. The applicants in that case relied on *Simonovich* in support of their contention that the inspector was required to give a fair and accurate summary of a particular expert report in his report to the Board and that he was not entitled to reject the submissions of the expert without an adequate explanation. Costello J. noted that the facts in *Simonovich* were very different to the case before her. She observed that the Board did not have a report from the relevant expert (the historian) in *Simonovich* and relied on the inspector fairly to summarise his evidence. In *O’Brien*, the particular report was summarised by the inspector and the complete report was before the Board. Costello J. continued:-

“Therefore, Simonovich does not provide a basis for concluding that the Inspector or the Board failed to consider the submissions of the applicants, including the [particular expert] report. It does not establish the principle that an Inspector must set out in his report to the Board his analysis of the submissions of every expert report submitted to the Board.” (para. 43)

494. I agree with the description of the extent of the obligation on an inspector to provide a fair and accurate report to the Board outlined by O’Neill J. in *Keeney Construction* and by

Costello J. in *O'Brien*. It seems to me that the approach adopted in those cases is directly applicable to the type of oral hearing and the many difficult and complex issues which the inspector had to consider in preparing his report for the Board. It has to be remembered that unlike in *Simonovich*, in addition to receiving the inspector's main report (and his supplemental report), the Board also had the many other documents referred to in the Board decision, including the EIS and the submissions of the parties made at the oral hearing and subsequent to the hearing in response to the further information provided by Indaver.

495. In summary, in order for a report of an inspector to be fair and accurate it (a) does not have to be a verbatim account of the evidence given and submissions made at the oral hearing and (b) does have to fairly and fully set out for the benefit of the Board the relative contentions on the issues which arise at the oral hearing and present a fair and accurate picture of the proposal and the reasons for and against it. However, the following points must also be made:-

- (i) It must be borne in mind that, apart from the inspector's report, the Board will also have (and did have in this case) a large body of further information including the evidence given and submissions made at the hearing (in the form of a witness statement or a precis of evidence) as well as other documentation such as the EIS and the appendices thereto; and
- (ii) It is not necessary that every submission made at the oral hearing must be individually addressed in the inspector's report, provided that the essential points made in those submissions are addressed (and in that regard, I agree with the observations of McDonald J. at para. 38 of his judgment in *Sliabh Luachra* to which reference was made earlier).

496. It has to be acknowledged that the inspector's report in the present case is an impressive document. The inspector was required to deal with a vast range of highly complex

issues and did so in an admirable fashion. I am satisfied that the report was a fair, complete and accurate report, notwithstanding that it did not necessarily specifically and separately address all of the many submissions made to him. The inspector received hundreds of submissions and, conducted hearings over seventeen days and heard evidence from about 90 witnesses at the hearing. Overall, my impression is that the inspector did a very impressive job in the preparation of his report and it would be incorrect to describe that report as other than fair and accurate.

497. I deal now briefly with each of the matters which the applicant contended had not been fairly and accurately reported on by the inspector.

498. In my view, it follows from the case law which I have just touched on that the inspector is not obliged to recite every piece of evidence which arose at the oral hearing or individually to address every submission made. In order to provide a fair and accurate report, the inspector must deal with the issues raised in the submissions rather than each submission or piece of evidence which arose at or in connection with the hearing. I agree with the submission made by Indaver that, in referring to the particular issues or pieces of evidence listed at para. 97 of the amended statement of grounds, the gist of the applicant's complaint really amounts to a failure by the inspector to make reference to particular pieces of evidence or particular submissions which may have been made in the course of and for the purposes of the oral hearing and not a complaint that particular issues which ought to have been addressed by the inspector were not addressed at all.

499. In considering whether an inspector's report was fair and accurate, the court should avoid seeking to micromanage the inspector's role and should step back from the detail of the submissions and evidence provided at and in connection with the oral hearing and consider whether all of the issues which the inspector was required to address in the report were actually addressed in a fair and accurate manner. In my view, the inspector met that standard

and his main report and supplemental report did present the Board a fair and accurate account of the issues which were required to be dealt with in those reports.

500. For completeness, however, I will now address each of the matters to which the applicant referred at para. 97 of the amended statement of grounds in respect of which it was alleged the inspector did not provide a fair and accurate report.

501. Paragraph 97(a) referred to the “*prospective applicant*”/jurisdiction issue which formed the basis of ground 1. I set out my conclusion in respect of the applicant’s case under that ground earlier in this judgment. The applicant has succeeded on the interpretation issue underlying that ground and I have left over for further consideration, if necessary, what precise relief should be granted. The inspector did refer, albeit not as clearly as he might have done, to an issue raised as to the identity of the Indaver entity which had applied for the permission at s. 9.11.2 of the main report and, in particular, in paras. 9.11.2.1 to 9.11.2.3 (pp. 108-109). The inspector addressed these issues primarily in the context of the ownership of the site, but he did make specific reference to “*issues relating to registered business name as distinct from the applicant’s name*” and “*clarifications in relation to who is the applicant Indaver/Indaver Ireland Ltd as Indaver Ireland Ltd was referred to in the initial documentation to the Board in addition to Indaver Ireland*” (para. 9.11.2.1). The inspector referred to the fact that he had received certain submissions on these issues from the applicant’s solicitors. He also noted that the submissions related to the the validity of Indaver’s 2016 planning application and also possible issues in relation to enforcement. I accept that, having noted that issues concerning the validity of the application had been raised, including those arising from the identity of the particular Indaver entity in whose name the application was made, the inspector proceeded to address that issue and to provide his conclusion by reference to the issue as to whether the Indaver entity had a sufficient interest in the land to submit the application and by reference to the possible enforcement

issues which might arise and not by reference to the “*prospective applicant*”/jurisdiction issue. However, having regard to the conclusions which I have reached in relation to that specific issue under ground 1, it would not, I believe, be necessary or appropriate to grant any further relief under this ground.

502. The issue raised by the applicant at para. 97(b) of the amended statement of grounds is no longer an issue in the case. The applicant did not pursue any of the issues concerning land ownership and, so, that issue does not arise for consideration under this ground.

503. At para. 97(c), it was alleged that a report or statement of Dr. Bettie Higgs, a lecturer in geology, and the issue of coastal erosion was not adverted to and was not analysed, assessed or evaluated. The applicant was factually wrong in so asserting. The inspector dealt with the issue of coastal erosion at s. 9.10 of his report (pp. 103 to 106). He specifically referred to the submissions made by the applicant and by Dr. Higgs (referred to as “*Ms. Bettie Higgs*”) at para. 9.1.0 on p. 104 of the report. He then addressed that issue in the following pages (pp. 104 to 106) and expressed his conclusion on p. 106. I do not accept that the inspector did not provide a fair and accurate report on the issue of coastal erosion and on the specific issues raised by Dr. Higgs. The issue of coastal erosion formed the basis for one of the conditions imposed by the Board (condition 12).

504. At para. 97(d) of the amended statement of grounds, the applicant contended that the inspector did not provide a fair and accurate report with respect to the evidence of Dr. Dara Fitzpatrick on the issue of the impact of the proposed incinerator on human health in the form of exposure to harmful chemicals and the absence of necessary monitoring systems. While the inspector may not expressly have referred to Dr. Fitzpatrick’s, his report contained extensive consideration of the issues of air quality and of the impact of a proposed development on human health. He dealt with air quality at s. 5.1 of his report (pp. 77 to 83). He referred to various submissions which had been made in relation to emissions and on their

impact for public health. He specifically referred to some of the witnesses who gave evidence on that issue (for example, at para. 9.5.2, on p. 78). Having discussed the issue, the inspector set out his conclusions on air quality (at para. 9.5.6.2, pp. 82-83). He then addressed the effect of emissions from the incinerator in the proposed development on human health at s. 9.7 of the report (on pp. 87 to 98). In that section, he considered the dioxins issue in some detail (see, for example, para. 9.7.4, pp. 92 to 96). He also addressed this issue in his conclusions (at para. 12.2.1) and in his reasons and considerations (on pp. 143 and 144). It should also be noted that the inspector addressed this issue in great detail in his supplemental report when considering the further information provided by Indaver and the submissions made by several observers (including the applicant) on that further information. I am satisfied that the inspector did provide a fair and accurate report of the issues in relation to the impact of the incinerator on human health in the context of emissions.

505. At para. 97(e) of the amended statement of grounds, the applicant contended that the inspector failed to report fairly and accurately on various issues relating to flood risk. I reject that contention. The inspector considered the issue of flood risk in various places throughout the report and in various different contexts, including at paras. 9.1.4, 9.1.5, 9.4.8.4, 10.4.2.2 and 11.2.4.7. Insofar as the applicant also refers to the question of coastal erosion patterns under this heading, as I have already indicated, the inspector considered the question of coastal erosion in s. 9.10 (pp. 103 to 106 of his report). There is no suggestion that the Board did not understand what the issues were in relation to flooding or coastal erosion. I am not satisfied that the inspector failed to report fairly and accurately to the Board on the issues of flooding or coastal erosion.

506. At para. 97(f) of the amended statement of opposition, the applicant complained about the absence of any reference to the evidence at the oral hearing of Prof. Anthony Staines that the EIS contained no health impact assessment. The applicant was factually mistaken on that

point. Prof. Staines' submission on the Health Impact Statement was specifically referred to at para. 9.5.2 (p. 78 of the report). Various issues concerning the adequacy of the Health Impact Assessment were addressed by the inspector at para. 9.7.3 (pp. 90 to 92). In that part of his report, the inspector set out the criticisms of the Health Impact Assessment and his comments and conclusions on that issue. In my view, the inspector did report fairly and accurately in relation to the criticisms made that the EIS did not contain a Health Impact Assessment and that the document entitled "Health Impact Assessment" did not in fact constitute such an assessment.

507. At para. 97(g) of the amended statement of grounds, the applicant contended that the inspector did not refer to and did not report on the issue of "project splitting" whether by reference to the Seveso III Directive and the Domestic Seveso Regulations or by reference to incremental planning applications. The applicant raised the issue of "project splitting" and the Seveso provisions under ground 3. I have found against the applicant on its claims of "project splitting" and improper avoidance of the Seveso provisions. In those circumstances, I do not believe that there is any merit to the applicant's complaints concerning the failure by the inspector to refer to this issue in his report.

508. At para. 97(h) of the amended statement of grounds, the applicant complained about the absence of any reference to the evidence from a firm of consultant hydrogeologists which provided evidence on behalf of the applicant on the likely increase in the level of greenhouse gases which would be emitted from the proposed incinerator. My attention was drawn to the report of S.M. Bennet & Co. Ltd, the hydrogeological and environmental engineers referred to in this ground, dated 4th March, 2016. While there was an issue between the parties as to whether para. 97(h) correctly summarised the terms of that report, I do not have to resolve that issue. The EIS contained a chapter on the climate impacts of the proposed development which addressed the calculation of greenhouse gas emissions in the construction and in the

operation phase of the development (chapter 9 of the EIS). The inspector referred to this at s. 10.4 (para. 10.4.1.1 of the report, on pp. 117-118) and specifically referenced the question of climate and air quality at para. 10.4.2.4 (pp. 122-123). I am not satisfied that the applicant has established that the inspector's report was not fair and accurate with reference to the question of emissions as suggested by the applicant and I do not believe that the inspector's failure to make specific reference to the Bennet report renders the inspector's report defective or other than fair and accurate.

509. Finally, at para. 97(i) of the amended statement of grounds, the applicant contended that the inspector failed to report fairly and accurately on the full extent of the alleged deficiencies in the report of Dr. Hogan and that, as a consequence, the Board proceeded to carry out its assessment of the impact of emissions on human health without knowledge of those alleged deficiencies. I do not accept that this is a good basis for impugning the inspector's report. I addressed earlier under ground 10, the applicant's complaints in relation to Dr. Hogan and I rejected the claims made by the applicant under that ground. Similarly, with respect to the claim made under this ground, I am not satisfied that the inspector did not report fairly and accurately on the health impact of emissions from the proposed incinerator. That issue was addressed extensively in the inspector's report, as already indicated, including in s. 9.7.2 of the report where specific reference was made to Dr. Hogan's evidence and to the criticisms made in respect of the Health Impact Assessment by the observers, including the applicant (see ss. 9.7.2, 9.7.3 and 9.7.4, pp. 87 to 96). I reject the contention, therefore, that the report was not fair and accurate in relation to Dr. Hogan's evidence and that the Board proceeded to carry out its assessment without having received a fair and accurate report of the matters raised at the hearing.

510. In those circumstances, I reject the applicant's claims under this ground. I am satisfied that the inspector's report was a fair and accurate report of the matters raised at and in

connection with the oral hearing and that the inspector performed an admirable job in putting together his main report which dealt with a range of issues and numerous grounds of objection and controversy between the participating parties. Consequently, I reject the applicant's contention that the Board failed to take into account relevant considerations (being those referred to in para. 97 of the amended statement of grounds) and that the Board failed to comply with Articles 3 and 6 of the EIA Directive and the relevant provisions of Part X of the 2000 Act in relation to the issues raised under this ground.

511. In conclusion, therefore, I reject the applicant's claims under ground 11.

22. Summary of Conclusions

512. In summary, for the reasons set out in this judgment, I have concluded that the applicant has succeeded on two of the eleven grounds of challenge which it has made to the decision of the Board of 29th May, 2018 to grant permission to the first named notice party, Indaver Ireland Limited, for the development of a waste-to-energy facility at Ringaskiddy, County Cork.

513. I have concluded that the applicant has been successful in the case which it advanced under ground 4 (the objective bias ground). I have concluded that the Board's decision was affected by objective bias by reason of the prior involvement of one of its members, the then deputy chairperson of the Board, in work which he did in 2004 when employed by a firm of consultants who were engaged by Indaver to make submissions to Cork County Council and Cork City Council on reviews to those Councils' waste management plans. Having carefully considered the position in light of all the evidence and in light of the clear legal test in this jurisdiction for objective bias, I was satisfied that the work done by the relevant member of the Board had a clear, rational and cogent connection with Indaver's application to the Board for permission for the development of the waste-to-energy facility at Ringaskiddy.

514. I have also found for the applicant on the case advanced by it under one of the other grounds, ground 1 (the “*prospective applicant*”/jurisdiction ground) which gave rise to an issue of statutory interpretation of a number of the SID provisions of the 2000 Act. I have concluded that the correct interpretation of those provisions requires that the person who applies for permission for a SID must be the same entity as the person who is referred to in the statutory provisions as the “*prospective applicant*”, being the person who has engaged in the required pre-application consultation procedure with the Board. I agreed during the hearing that I would leave over the issue as to what relief or remedy, if any, should be granted in the event that the applicant were to succeed on this ground. I have, however, set out some further considerations which may well be relevant to the relief or remedy which may be appropriate in light of the applicant’s success on the issue of interpretation which arose for consideration under this ground.

515. I have concluded that the applicant is not entitled to succeed on any of the other grounds advanced by it at the hearing (the applicant did not pursue one of those other grounds but did pursue eight of them). I have set out in respect of each of those grounds my reasons for so concluding.

516. I will consider further with counsel the appropriate reliefs to be granted and other orders to be made consequent upon the conclusions reached in this judgment. I propose listing the matter for mention on a date convenient to the parties by which time they will have had the opportunity of considering the terms of this judgment.