[2019] IEHC 866

THE HIGH COURT
JUDICIAL REVIEW

[2016/187 J.R.]

BETWEEN

EAST COAST TRANSPORT LIMITED
TRADING AS ECT SAND AND GRAVEL

APPLICANT

AND

AN BORD PLEANÁLA

FIRST NAMED RESPONDENT

AND

WICKLOW COUNTY COUNCIL

SECOND NAMED RESPONDENT

JUDGMENT of Ms. Justice O'Regan delivered on the 18th day of December, 2019

Issues

1. The above named applicant, owner of the relevant quarry, secured leave on the 16th of March, 2016, to maintain the within judicial review proceedings seeking to quash the decision of the first named respondent of the 2nd of February, 2016, together with an order restraining the second named respondent from serving an enforcement notice pursuant to the provisions of s.154 of the Planning and Development Act, 2000 as amended (PDA).

2. The second named defendant was included in the within proceedings for that injunctive purpose only and has not taken part in the substantive matter. The grounds relied upon are set out in twelve numbered paragraphs. However, four thereof merely quote verbatim the text of s.177O(5), s.177P, s.131 and s.132 of the PDA. Of the eight remaining paragraphs the following complaints are made:

   (a) The respondent (the board/ABP) made a negative determination based on insufficient information, in circumstances where the respondent failed to bring such deficiencies to the applicant's attention in advance of the decision, or otherwise allow the applicant to provide such information. In particular, it is claimed that the respondent failed to consider or raise a request under ss. 131 or 132 of the PDA.

   (b) The board reached its decision without having any, or any adequate regard to the legal consequence of its decision on the applicant.

   (c) The burden of proof required by the board is unduly onerous and difficult, in that it is suggested the board has refused substitute consent (S.C.) on the basis that it has not been proven that the development did not have any adverse effect on the environment.

   (d) There is no requirement in either European or Irish law requiring the board to be satisfied of the full extent of historical effects of the development.

3. By reason of the foregoing it is said that the decision is unreasonable, unduly harsh and vastly disproportionate. It has the effect of rendering the quarry activity unlawful. It is a

breach of fair procedure and natural and constitutional justice for the respondent to make its decision without giving the applicant an opportunity to address the matters of concern. Of the twelve paragraphs under the heading grounds of relief, aside from setting out in one paragraph the terms of s.131 and in another paragraph the terms of s.132, reference is made to ss.131/132 in three separate paragraphs of the remaining grounds.

Legal background

4. On the 3rd of July, 2008, the CJEU delivered judgment in C-215/06, *Commission of the European Communities v. Ireland* wherein it was held that, Ireland's willingness to allow regular retention permission other than in exceptional circumstances without the need for an Environmental Impact Assessment (EIA) does not accord with community law. Such retrospective regularisation should be subject to conditions that don't offer the relevant applicant an opportunity to circumvent EU law or dispense with applying its terms.

5. Section 261A of the PDA was introduced to review quarry development as a group, since the coming into force of the relevant EIA Directive in 1990 and/or the Habitats Directive in 1997. Under s.177F(1)(a), a facility of applying for S.C. in certain cases was introduced where the application for S.C. would be made directly to An Bord Pleanála (ABP) and would be accompanied by an Remedial Environmental Impact Statement (rEIS) which application is then to be assessed by ABP under s.177K of the PDA.

6. Section 177K of the PDA provides that where an application for S.C. is before the board, the board may decide to grant the S.C. subject to or without conditions, or to refuse it. When making its decision the board shall consider the proper planning and sustainable development of the area with regard being had to the matters thereafter enumerated in paras. I to L inclusive. Given that the area is not the area of, or part of, a European site, the board is obliged to have regard to:

   (a) the local development plan;

   (b) any special amenity area order;

   (c) the rEIS with the application;

   (d) the significant effects on the environment which have occurred, or which are occurring, or could reasonably be expected to occur because of the development;

   (e) the opinion of the planning authority;

   (f) any submissions or observations made; and,

   (g) any report or recommendation prepared by or on behalf of the board.

7. Section 177F identifies the obligatory contents of the rEIS, namely a statement of the significant effects on the environment which have occurred, or are occurring, or can reasonably be expected to occur because of the development, together with details of any appropriate remedial measures undertaken or proposed in respect of any significant

adverse effects on the environment, together with such information as may be prescribed under s.177N.

8. Under s.177F(2)(a) it is provided that before an applicant makes an application for S.C., he or she may request the board to give him or her an opinion in writing prepared by the board on the information required to be contained in the rEIS and the board shall, as soon may be, comply with that request.

Factual background

9. The within quarry is situated at Ballinabarney North and Bolagh South, Redcross, Co. Wicklow. On the basis that it was a pre-1964 operated quarry, it was entitled under the provisions of s.261 to operate without the necessity to apply for planning permission, until such time as there was an intensification of the work and/or the area of the quarry equalled or exceeded five hectares.

10. The applicant applied for and was initially granted planning permission from Wicklow County Council (WCC). This grant was appealed and subsequently the respondent on the 31st of August, 2009, refused permission following the decision of the CJEU aforesaid, on the basis that the permission involved a significant element of retention.

11. On the 12th of August, 2012, WCC served notice in accordance with s.261A of the PDA directing the applicant to apply to the respondent for S.C. with an rEIS based upon the development which post-dated the 1st of February, 1990, for which an EIA should have been carried out but was not. The requirement was made based upon an acceptance of a pre-1964 development and fulfilment of the requirements of registration.

12. The decision to apply for S.C. was reviewed by the respondent on the application of the applicant, and on the 3rd of April, 2014, the respondent confirmed WCC's direction aforesaid. Prior to making its decision the respondent secured an inspector's report dated the 1st of December, 2013. The basis for the decision was the significant intensification and expansion of the quarry since 1995.

13. In a direction from the respondent to the applicant on the 28th of March, 2014, it was identified that the rEIS needed to be comprehensive and up to date and re-submitting the 2008 EIS would not be acceptable (in the review by the respondent of WCC's direction of 17th August, 2012, the applicant's relied on the 2008 EIS).

14. On the 19th of September, 2014, the applicant applied for S.C. in respect of an area of 20.1584 hectares. Prior to the decision now impugned which issued on the 2nd of February, 2016, the respondent had an inspector's report dated the 16th of September, 2015 (a 23 page document). The inspector had made a site visit on the 8th of June, 2015. As the respondent affirmed the recommendation contained in the inspector's report, the decision of the 2nd of February, 2016, can be read in conjunction with the inspector's report aforesaid.

15. The opinion of the planning authority was provided by way of a manager's report of the 27th of November, 2014. This is effectively an eleven-page document and at p. 10 thereof under the heading of additional environmental impacts it is stated:

> "A walk over survey was undertaken by A.W.N. Consulting Limited (the professionals who prepared the rEIS on behalf of the applicant) in July, 2014 as part of the preparation of the rEIS but no water samples were taken. Thus there is no additional up to date information to determine whether the hydrocarbon results in 2008 were an isolated event or whether the water quality has altered since 2008".

16. On the same page under the heading manager's opinion it further states:

> "All hydrogeological assessments, surface water and ground water quality results, levels and flow rates relate to investigations dating back to 2008. In this regard with the exception of an indication of a lowering of ground water level in the boreholes at the quarry in 2014 there is no additional information available to determine whether the hydrogeology, surface or ground water quality and quantity has been adversely altered since 2008."

17. Aside from the foregoing it might be said that the manager's opinion is largely supportive of the granting of S.C..

18. The applicant did not seek an opinion of the board pursuant to the provisions of s.177F(2)(a) aforesaid.

19. The board's inspector's report sets out the history in respect of the matter including the enforcement action on foot of complaints received in December, 2007 and subsequent inspections in 2008, 2009 and 2011 during which period the quarry was noted to be in operation. It appears that extraction in 2011 had been less intensive than previously, and in January, 2012 there was no excavation or processing with the quarry active again in April, 2012.

20. It is noted that following the applicant's application made on the 1st of July, 2008, for retention and continuation of use of the property, WCC made a request for additional information from the applicant including matters related to hydrogeology, habitat restoration and protection among other matters. It was noted that the area of extraction was approximately 2.9 hectares in 1995, 7.4 hectares in 2000 and 16 hectares in 2005.

21. Insofar as environmental impacts are concerned it is noted that the areas of extraction extended below the water table resulting in the creation of ground water ponds in the base of the pit, and this altered the classification of ground water vulnerability from high to extreme. Water samples taken in 2008 noted some contamination and the report noted a walk over survey in July, 2014 for the purposes of the rEIS and further noted no water samples were taken. The report dealt with the manager's opinion aforesaid.

22. At p. 12 it was indicated that as a matter of principle in terms of the extension of the quarry which has taken place, the inspector considered that the development was acceptable. Under the heading EIA it was noted that the operation had involved de-watering of the quarry which it is stated to be at, or marginally below the water table at the time of preparing the rEIS. It was noted that the 2008 EIS indicated that excavation was already below the water table. The effect of the de-watering had included a loss of water from the water course to the north and water quality issues are also reported.

23. At p. 14 the inherent difficulty of the applicant in describing a development in the context of apparently limited environmental management and monitoring was acknowledged. Because of the 2008 EIS report a snapshot of the situation in 2008 was available, however it was noted that the rEIS presents little new information and does not adequately utilise records from other sources so as to present a picture of the nature and intensity of the operation over the decades.

24. In terms of the data presented the report notes that there was very limited indication of what occurred in earlier decades, or the changes which occurred since 2008. There was no evidence presented in relation to the direction of the working of the quarry, or the period of commencement of de-watering and limited information relating to mitigation and monitoring was included in the EIS.

25. At p. 15 it was noted that WCC on the 15th of April, 2009, gave notification of a decision to grant the application for retention and continuation of use, subject to two conditions, however following an appeal to ABP permission was refused. Nevertheless, the quarry continued in operation without having regard to the conditions which would be deemed necessary in order to ensure environmental protection. It was noted that phase 3, which was predicted to impact on the stream, had commenced and it was noted that there was no evidence before the board to suggest that monitoring of ground water levels, water quality and dependant ecology took place. In the absence of such information it is stated that it is difficult to conclude that the development did not give rise to significant adverse effects on water quality and the dependent ecology.

26. At p. 17 two areas of particular concern were identified, namely the average scores identified in the Water Framework Directive report required to be addressed further and pressures determined for the purposes of ascertaining whether or not mitigation is necessary. Secondly the view of the inspector was that the assessment undertaken had failed to provide adequate information on impacts during the operational phase. The description of the effects as temporary was deemed insufficient. It was further indicated that the rEIS is deficient in its failure to properly address alternatives. The inspector concluded that the board could not be satisfied based on the available information that the development did not give rise to unacceptable adverse impacts.

27. At p. 21 it was noted that there was a history of complaints relating to air quality impacts. According to the inspector the rEIS was not comprehensive. It was especially deficient in terms of describing the development which took place in earlier decades and it failed to

adequately consider environmental impacts prior to 2008, in particular as post-2000 extraction was at high levels.

28. The rEIS is also deemed deficient in relation to cumulative effects (the authorised waste facility being highlighted). It was deficient in relation to alternatives and mitigation measures were said not to be clearly defined and not presented as commitments. It is complained that the assessment of impacts was not based on best available information and was not comprehensive, and in those circumstances the inspector opined that there was no alternative but for the board to refuse permission as the board could not be satisfied that the development did not give rise to adverse impacts especially in relation to surface water, ground water and ecology.

29. The board subsequently made a decision pursuant to the provisions of s.177K of the legislation as follows:

> "on the basis of the information submitted in support of the application for substitute consent, the board considered that the environment impact statement is deficient in its failure to consider cumulative effects and/or alternatives and to provide sufficient historic and contemporary information in relation to key impacts and in particular the effects on the water resources hydrology and aquatic environment of the area. The board is not satisfied that the development which has taken place has not resulted in significant and adverse effects on the environment. The development would therefore be contrary to the proper planning a sustainable development of the area."

Submissions

Section 172(1D) and section 172(1E)

30. Section 172(1D) provides that where the board is considering whether an EIA report identifies and describes adequately, the direct and indirect effects for the relevant environment, if the board considers the report does not identify or adequately describe such effects it shall require the applicant to furnish further information.

31. Section 172(1E) provides that the board shall require the applicant to furnish it with further information that the board considers necessary to enable it to carry out an EIA under that section.

32. The applicant submits that both sections have clear application in the instant circumstances and refers to the judgment of Faherty J. in *Redrock Developments Limited v. An Bord Pleanála* [2019] IEHC 792, where the argument under s.172 aforesaid was raised but dismissed in the particular circumstances of that case. The inspector's report had found that the EIS had identified likely significant direct and indirect effects. Notwithstanding the foregoing it is clear that the court in *Redrock* seemed to accept at para. 145 of the judgment that the sections were relevant to a S.C. application. The respondent suggests that the provisions above did not in fact apply to a S.C. application until November, 2018 when the legislation was amended so as to incorporate the relevant subsection of s.172 into a S.C. application. More fundamentally however, the respondent

suggests the applicant is not entitled to rely on this argument as it was not part of the grounds secured at leave stage.

33. The respondent relies on the Supreme Court judgment in *AP v. Director of Public Prosecutions* [2011] IESC 2, where Murray C.J. indicated that a party applying for judicial review, in the interests of the good administration of justice, must set out clearly and precisely each and every ground upon which the relief is sought. The court noted that it was not uncommon for many applications to be expressed in grounds of the most general terms, and this can prove to be quite an unsatisfactory basis on which to seek leave. The court felt that if during a hearing of an application for leave it emerged that a ground or relief sought can, or ought to be stated with greater clarity and precision, then this should be done at leave stage. The court referred to a tendency for new arguments to emerge in such applications that in reality go well beyond the scope of a particular ground or grounds upon which leave was granted, or simply raise new grounds. It was noted that the trial court may in particular circumstances permit the matters to be argued especially if the respondents consent. The applicant should seek an order permitting any extended or new ground to be argued. Should the respondent object because the argument goes beyond the scope of the grounds on which leave was granted they should raise the matter and make their objection clear. At para. 10 of the judgment, Murray C.J. stated that it is incumbent on parties to judicial review to assist the High Court by ensuring that grounds for judicial review are stated clearly and precisely and any additional grounds should be raised only after an appropriate order has been applied for and obtained. The judgment of Hardiman J., makes reference to the absolute necessity for a precise defining of the grounds on which relief is sought.

34. The respondent also relies on the judgment of Haughton J. on the 25th of September, 2017 in *Alen-Buckley & anor. v an Bord Pleanála & ors*. [2017] IEHC 541. The court made reference to the *AP v. DPP* judgment aforesaid in relation to the obligation on an applicant to set out clearly each and every ground upon which relief was sought. At para. 15 of his judgment Haughton J. stated that linking new matters back to generally pleaded grounds is impermissible.

Analysis

35. Order 84, r. 20, sub-rule 3 of the Rules of the Superior Courts provides that it shall not be sufficient for an applicant to give as any of his grounds, an assertion in general terms, but rather should state precisely each such ground giving particulars where appropriate and the facts and matters relied upon in support of same.

36. No application was made to this Court as considered by Murray C.J. in *AP v. DPP* aforesaid.

37. The applicant asserts that under the PDA legislation the board has an myriad of powers, obligations and entitlements to raise matters, all of which are channelled through the auspicious of s.131, whether mandatory or discretionary. There is no evidence to this effect and the respondent strenuously denies same in that it is refuted that s.131 is the vehicle for raising matters appearing under other provisions in the legislation.

38. The respondent also points to the fact that in the grounds portion of the statement of grounds nowhere does the applicant reference a mandatory obligation. The respondent states that they were only made aware of this new argument by the applicant during the course of the hearing on the first day.

39. I am satisfied that having regard to O. 84 and *AP v. DPP*, this is one of the situations identified by Murray C.J. at para. 8 of his judgment, to the effect that the argument under s.172 is well beyond the scope of the grounds upon which leave was granted, if not an entirely separate ground. Given the objection of the respondent, the fact that the respondent only became aware of the ground almost four years after leave was granted and bearing in mind that no particular order was sought or obtained, in the words of Haughton J. aforesaid the linking of s.172 back to the argument made under s.131 within the statement of grounds is impermissible. Section 131 is framed in discretionary terms and s.132 is framed in absolute discretionary terms and therefore there is no obvious link to s.172 which is framed in mandatory terms.

Decision to exercise or consider exercising the board's discretion under ss.131/132

40. The applicant argues that the only basis for the refusal of S.C. was the deficiency identified in the rEIS without further information being sought. No concern is expressed in respect of the present or future operation (for example, the manager's opinion generally).

41. The applicant claims it has property rights and will be unable to secure further planning permission without an S.C. and given therefore the substantial consequences of a negative decision from the respondent, the respondent's obligation to raise in further particulars, arises not only on the legislation but under the auspices of fair procedure and natural and constitutional justice.

42. By reason of the refusal of the S.C. WCC must serve an enforcement notice although this has been delayed pending the outcome of the within judicial review application. The applicant argues that there was no prior irregularity or enforcement notice unlike the applicant in *McGrath Limestone Works Ltd. v An Bord Pleanála and ors.* [2014] IEHC 382, a judgment of Charleton J. where the court found that because of the unauthorised nature of the development in that matter, a legitimate expectation did not arise. As this is a novel type application it is important for the board to identify precisely what they are looking for. The deficiency or failure to consider cumulative effects and/or alternatives is a difficult, if not impossible task. In all of the circumstances, the determination is manifestly unreasonable and disproportionate.

43. It is asserted that the concerns expressed in the inspector's report as to the matters being unknown are types of concerns common in planning applications and generally subject to a further information request. The inspector was wrong to say that there was no alternative – there was the alternative of seeking further particulars. The applicant argues that as the board did not draw specific attention to the matters herein before described in the manager's opinion, and given that in general the opinion was favourable to the applicant, the applicant couldn't be condemned for not addressing the water issues

identified. In the alternative, only the water issues might have been considered brought to the applicant's attention, however cumulatives, alternatives and matters which came under the umbrella of "key impacts" remain unknown to the applicant.

44. Insofar as the respondent counters that it was available to the applicant to seek an opinion under s.177F(2)(a) of the board's requirements, the applicant counters that it is just as easy for the board to raise particulars.

45. Insofar as the respondent counters that the applicant was also on notice because of the prior inspector's report (1st of December, 2013) in respect of the board's review of the application of s.261A, or indeed the provisions of s.177F, or the direction to the applicant given by the board on the 28th of March, 2014, is concerned, the applicant suggests these issues were incorporated in the rEIS. In this regard it is noteworthy that there is no challenge to the accuracy of the inspector's report.

46. The applicant complains that there is no evidence whatsoever that the board considered using its discretion under ss.131/132 in circumstances where the applicant was not aware of the various headings of requirement of the board, and was given no opportunity to address the board's concerns by way of particulars or further documentation or otherwise, in advance of such a catastrophic decision for the applicant.

47. The respondent counters the arguments aforesaid by:

    1. Pointing to the intensification of user between 1995 and 2005 thereby requiring planning permission with an rEIS. The respondent argues that thereafter the development was unauthorised and indeed enforcement notices were served in 2008.

    2. The respondent states that the development was unauthorised for a period by reason of s.261(10) of the PDA as the applicant had failed to provide the information requested.

    3. The applicant made an application for retention in 2008 thereby acknowledging planning permission was outstanding.

    4. In 2009 the planning application was refused, nevertheless it is clear from the content of the inspector's report that development has continued without planning and without compliance, albeit not imposed, with the conditions under which WCC proposed granted planning permission – in other words it is complained that the applicant continued to operate the quarry as though with planning permission without conditions which in turn fed into a difficulty for the applicant in producing sufficient information to enable a proper EIA to be conducted.

    5. Neither Ni Raiftearaigh J. in *Hayes & ors. -v- An Bord Pleanála & ors*. [2018] IEHC 338, nor Faherty J. in *Redrock* were convinced that a refusal of S.C. would be the end of the road for the applicant, and indeed the respondent points to the

applicant's grounding affidavit at para. 16 acknowledging that a further application might be processed subject to securing leave to apply.

6. Further, it is clear from case C-215/06 (a similar statement was made in case C-197/17 and C-197/16) that the CJEU requires that an environment impact account be taken from the time of completion of the development, following the actual development, provided national rules allowing for regularisation do not provide the parties concerned with an opportunity to circumvent the rules of EU law or dispense with applying them.

7. The respondent points out that there is no issue taken with the substance of the reason for the refusal.

8. Both *The National Trust for Ireland v. McTigue Quarries Ltd. & ors*. [2018] IESC 54, and *Hayes* confirm supplementary consent is regularising historic development, and of particular significance is the consideration of possible harm done and the remediation thereof.

9. An opportunity was available to the applicant to properly address this application with the board in advance of completing the rEIS to ascertain the nature of the information which should be included, but they chose not to do so.

10. Aside from alerting the applicant to issues relative to water contamination in the manager's opinion the board also gave a specific direction to the applicant on the 28th of March, 2014 (herein before referred to).

11. The respondent refers to s.177F which requires a rEIS to be a complete statement of significant effects. The board's decision that the operation of the quarry intensified on the 3rd of April, 2014 was not challenged.

12. Simons *'Planning and Development Law'* (2nd Ed., 2007) at para. 8-172 states that: "if a quarry extends beyond the excavation area as anticipated or contemplated as of October 4th, 1964, same represents unauthorised development". In the circumstances it is asserted that the quarry development for some considerable time now had been unauthorised, both under domestic and EU regimes.

13. Section 34(12) of the PDA was amended to prevent retention that requires a full EIA. At para. 10.4.3.1 of the board's inspector's report of the 1st of December, 2013, reference to changes in the surrounding environment since 2008 were noted, as was the fact that the 2008 EIS would not be sufficient, for example in relation to cumulative impacts.

14. In *McGrath* Charleton J. quoted with approval the judgment of O'Neill J. in *M&F Quirke and Sons & ors. v. An Bord Pleanála & ors*. [2009] IEHC 426, where the court noted that it was inevitable that over the years changes would have taken place in the lands quarried and any argument to the effect that the quarry was

operated in a certain way over forty years ago, that it should continue in the same manner must be untenable. In this regard, over the years the area in which a quarry is located may change significantly, so that the effects of the quarrying operations on the surrounding area may be very different to the effects in 1964. The court noted that it could never be said that there was an unrestricted right to use property for any activity, including quarrying, regardless of the effects.

48. In *Kildare County Council v. An Bord Pleanála* [2006] IEHC 173 MacMenamin J. dealt with an assertion of a breach of fair procedures in failing to request additional information. The applicant asserted that it was unfairly deprived of an opportunity to submit additional information. On the facts of the case the court was satisfied that there was material before the board to support its view that the EIS was deficient. The court then rejected the contention that there had been a breach of fair procedure given that the provision in question was discretionary in nature. At para. 75 the court was satisfied that it was open to the board to decide, in its discretion that it had adequate information to conclude that approval should be refused on the merits of the application. MacMenamin J. was satisfied that given the oral hearing, the issue of necessity or justification for the proposed development was to the forefront of the applicant's case and the court was also satisfied that the matter had been fully ventilated by all parties. It had been opened to the applicant at every opportunity to make whatever point he wished.

49. In *Cicol Limited v. An Bord Pleanála & ors*. [2008] IEHC 146, a judgment of Irvine J. on the 8th of May, 2008, the applicant indicated that there was no evidence that the respondent had examined the policy of the legislation, and therefore the applicant could not be satisfied that it had regard to all the statutory obligations, and therefore sought to quash the decision. Ms. Justice Irvine felt the argument was without merit as the board said in its decision it had regard to all it was required to. In addition, at para. 108 of the judgment it was indicated that a provision which incorporates "may" does not give rise to an obligation.

50. Based on the foregoing the respondent says that the applicant was clearly aware of the need for the rEIS to address the impacts of past quarry developments in a comprehensive way and that the whole purpose of the S.C. procedure was to provide the board with comprehensive information as to the effects the development carried out has had on the environment. Bearing in mind the totality of the notice highlighted above, or available to the applicant, the applicant cannot complain on a lack of fair procedure as it had adequate and fair opportunity to carry out a full or remedial EIS. In these circumstances it was contended that the board was entitled to proceed and determine the application on its merits.

51. Insofar as *Kildare County Council* is concerned the applicant suggests that it is not favourable to the respondent because of the oral hearing and full consultation which occurred, unlike in the instant matter.

Analysis

52. The applicant has not challenged the finding that the rEIS gives very little additional information over that contained in the 2008 EIS. The applicant chose not to invoke the facility in this novel type situation available under s.177F(2)(a). The applicant argues that the board should have been more mindful to the consequences of the outcome of the S.C. application. However, the applicant did not engage the facility of securing the board's opinion, did not react to the matters raised in the manager's opinion, did not supplement in a comprehensive manner the 2008 EIS, did not assist itself by continuing to operate the quarry since 2008 without records or monitoring and did not have regard to the inspector's report of the 1st of December, 2013, herein before referred to.

53. In the light of the above factual matrix I am not satisfied that the onus of proof on the applicant has been discharged to establish that there was a breach of fair procedure by the respondent in not exercising its discretion under ss.131/132 of the PDA. In accordance with Irvine J.'s judgment aforesaid it has not been established that there was an obligation on the part of the board, to recite in its decision its consideration of exercising its discretion, or indeed any possible consideration of the implications of the refusal of the S.C. on the applicant so as to support the granting of an order of *certiorari*.

Lawful standards or burden of proof

54. The applicant argues that there is no standard or burden of proof prescribed by the legislation and it was not lawful for the board to refuse the S.C. on the basis that it had not been proven the development did not have any adverse effects. Such a burden is unduly onerous and difficult. It is suggested that the decision applied the wrong test – it cannot be for the applicant to establish no such adverse effects as this is an impossibly high bar in proving a negative.

55. To suggest that the development may have had effects is unreasonable where no effects have been identified. The applicant points to the fact that there is no finding of adverse effect and the board cannot hold the applicant to a standard of establishing no adverse effects. In respect of past effects no concern of substance is raised.

Analysis

56. It is clear from the decision that same is in accordance with s.177F(1) of the PDA, in that the primary consideration as per the final para. of the decision is that the development would be contrary to the proper planning and sustainable development of the area, which is the basis identified in the legislation for granting or rejecting an application for S.C..

57. In my view the applicant has not established that the board sought proof of a negative. In this regard the decision is based on a deficit of information to enable the board to be satisfied there were no significant and adverse effects on the environment – the concern is not in respect of any effect at all but rather significant and adverse effects in the context of a failure by the applicant to provide adequate information to enable the board to fully address the situation.

58. In the circumstances, I am satisfied that the applicant has not demonstrated that the board reached its decision outside the scope of s.177F of the PDA.

Conclusion

59. In the circumstances, the reliefs claimed are hereby refused.