APPROVED

THE HIGH COURT
JUDICIAL REVIEW

2016 No. 637 J.R.

BETWEEN

NIALL HALPIN
(SUING BY HIS MOTHER AND NEXT FRIEND EILEEN HALPIN)

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

MEATH COUNTY COUNCIL
GREENFIELD VENTURES LIMITED

NOTICE PARTIES

JUDGMENT of Mr. Justice Garrett Simons delivered electronically on 15 May 2020

NO REDACTION REQUIRED

INTRODUCTION

1. By judgment delivered on 24 May 2019, *Halpin v. An Bord Pleanála* [2019] IEHC 352 ("***the principal judgment***"), this court held that a decision of An Bord Pleanála to grant planning permission for development consisting of an "anaerobic digester plant" was invalid. This second, supplementary judgment is delivered in respect of an application for leave to appeal to the Court of Appeal. The within proceedings are subject to the special statutory judicial review procedure provided for under Sections 50 and 50A of the Planning and Development Act 2000 ("***the PDA 2000***"). One of the features of the procedure is that there is no automatic right of appeal to the Court of Appeal; rather, it is necessary for a putative appellant to obtain leave to appeal from the High Court.
2. An Bord Pleanála has identified a point of law in respect of which it seeks leave to appeal ("***the draft point of law***"). The parties have exchanged written legal submissions on this point, and the application for leave to appeal was heard by way of a remote or virtual hearing on 1 May 2020.
3. The applicant for planning permission, Greenfield Ventures Ltd, (hereinafter "***the Developer***") has not participated in the judicial review proceedings at any stage.

LEGAL TEST GOVERNING LEAVE TO APPEAL

4. Sub-sections 50A(7) and (8) of the PDA 2000 provide as follows:

> (7) The determination of the Court of an application for section 50 leave or of an application for judicial review on foot of such leave shall be final and no appeal shall lie from the decision of the Court to [the Court of Appeal] in either case save with leave of the Court which leave shall only be granted where the Court certifies that its decision involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to [the Court of Appeal].
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> (8) Subsection (7) shall not apply to a determination of the Court in so far as it involves a question as to the validity of any law having regard to the provisions of the Constitution.

5. The sub-sections had originally referred to "the Supreme Court", but by virtue of Section 75 of the Court of Appeal Act 2014, this is now to be read as a reference to "the Court of Appeal".

6. It should be noted that the form of the certified point of law operates to define the Court of Appeal's jurisdiction on the appeal. See Section 50A(11) of the PDA 2000, as follows:

> (11) On an appeal from a determination of the Court in respect of an application referred to in subsection (10), [the Court of Appeal] shall—
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> (a) have jurisdiction to determine only the point of law certified by the Court under subsection (7) (and to make only such order in the proceedings as follows from such determination), and
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> (b) in determining the appeal, act as expeditiously as possible consistent with the administration of justice.

7. The leading judgment on the interpretation of the statutory criteria governing the grant of leave to appeal remains that of the High Court (MacMenamin J.) in *Glancré Teoranta v. An Bord Pleanála (No. 2)* [2006] IEHC 250 ("***Glancré***"). The judgment sets out ten principles or considerations as follows:

> "1. The requirement goes substantially further than that a point of law emerges in or from the case. It must be one of *exceptional importance* being a clear and significant additional requirement.
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> 2. The jurisdiction to certify such a case must be exercised sparingly.
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> 3. The law in question stands in a state of uncertainty. It is for the common good that such law be clarified so as to enable the courts to administer that law not only in the instant, but in future such cases.
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> 4. Where leave is refused in an application for judicial review i.e. in circumstances where substantial grounds have not been established a question may arise as to whether, logically, the same material can constitute a point of law of exceptional public importance such as to justify certification for an appeal to the Supreme Court (*Kenny*).
>
> 5. The point of law must arise out of <u>the decision</u> of the High Court and not from discussion or consideration of a point of law during the hearing.

6. The requirements regarding 'exceptional public importance' and 'desirable in the public interest' are cumulative requirements which although they may overlap, to some extent require separate consideration by the court (*Raiu*).

7. The appropriate test is not simply whether the point of law transcends the individual facts of the case since such an interpretation would not take into account the use of the word 'exceptional'.

8. Normal statutory rules of construction apply which mean *inter alia* that 'exceptional' must be given its normal meaning.

9. 'Uncertainty' cannot be 'imputed' to the law by an applicant simply by raising a question as to the point of law. Rather the authorities appear to indicate that the uncertainty must arise over and above this, for example in the daily operation of the law in question.

10. Some affirmative public benefit from an appeal must be identified. This would suggest a requirement that a point to be certified be such that it is likely to resolve other cases."

8. Several of these considerations are "in play" in this case. The parties are in disagreement on the following issues (i) whether there is any uncertainty in the law; (ii) whether the draft point of law transcends the facts of the case; and (iii) whether the second limb of the statutory test is met, namely whether an appeal to the Court of Appeal is desirable in the public interest.

9. There have been a number of legal developments since the delivery of the landmark judgment in *Glancré* in July 2006 as follows.

10. The first development is the establishment of the Court of Appeal and the reordering of the Supreme Court's jurisdiction. This has implications for the High Court in the discharge of its certifying role under Section 50A(7) of the PDA 2000. Moreover, the case law of the Supreme Court in relation to the exercise of its constitutional jurisdiction to grant leave to appeal may provide some guidance, by analogy, for the High Court in the exercise of its own statutory jurisdiction. I will elaborate on this first development under the next heading below.

11. The second development is the introduction, under the Planning and Development (Amendment) Act 2010, of special rules in relation to the legal costs of certain types of environmental litigation. These rules are set out at Section 50B of the amended PDA 2000, and give effect to *inter alia* the requirements of the Environmental Impact Assessment Directive (2011/92/EU) ("***the EIA Directive***"). Member States are obliged to provide a "review procedure" which is "fair, equitable, timely and not prohibitively expensive". The "review procedure" is also applicable to development projects which are subject to the public participation provisions of the Directive on the control of major-accident hazards involving dangerous substances (2012/18/EU) ("***the Seveso III Directive***"). I will return to this point at paragraph 81 below when discussing the second limb of the statutory test, namely whether it is desirable in the public interest that an appeal should be taken.

NEW APPELLATE ARCHITECTURE UNDER THE CONSTITUTION

12. Following on from the establishment of the Court of Appeal in October 2014, an appeal from a decision of the High Court in respect of a challenge to a planning permission might, in principle, be brought before either the Court of Appeal or the Supreme Court.

13. The gateway to the Supreme Court differs in four significant respects from that which controls access to the Court of Appeal. First, access to the Supreme Court is controlled by the Supreme Court itself; the High Court has no function in this regard and cannot grant leave to appeal. Secondly, the criteria for leave to appeal are different for the two appellate courts. In one respect, the criteria for leave to appeal to the Supreme Court are less onerous: it is enough that the decision of the High Court involves a "matter" of "general public importance", which is a lesser standard than a "point of law" of "exceptional public importance" under Section 50A(7) of the PDA 2000. In another

respect, however, the criteria are more onerous: there is an additional requirement to satisfy the Supreme Court that there are exceptional circumstances warranting a direct appeal to it. Thirdly, the application to the Supreme Court is a paper-based application, i.e. the Supreme Court usually determines the matter on the basis of the written notices filed by the parties, and there is not normally an oral hearing. Fourthly, it seems that access to the Supreme Court cannot be limited by legislation, whereas there can be legislative exceptions to the Court of Appeal's jurisdiction (save in cases which involve questions as to the constitutional validity of any law). (*Pepper Finance Corporation v. Cannon* [2020] IESC 2, [27]).

14. The Supreme Court in *Grace v. An Bord Pleanála* [2017] IESC 10 stated that it would be appropriate for High Court judges, in considering whether to grant a certificate of leave to appeal, to at least have regard to the new constitutional architecture. More specifically, the High Court should have regard to the fact that an appeal to the Supreme Court under the leapfrog provisions of Article 34.5.4° is open, but also have regard to the fact that an appeal to the Court of Appeal should remain the more normal route for appeals from the High Court.

15. Notwithstanding the differences between the constitutional test and the statutory test governing access to the two appellate courts, the Supreme Court's case law on the determination of an application for leave to appeal provides valuable guidance to the High Court. In particular, the distinction drawn between (i) the *interpretation* of, and (ii) the *application* of, legal principles can usefully be applied by analogy. The case law of the Supreme Court indicates that it will not normally be enough for a putative appellant to complain that the High Court did not properly apply *established legal principles* to the particular facts of the case; rather it seems that the basis of any appeal must be that the very legal principles relied upon by the High Court judge were incorrect.

16. This distinction has been explained as follows by the Supreme Court in *B.S. v. Director of Public Prosecutions* [2017] IESCDET 134.

> "It obviously follows from what has just been set out that it can rarely be the case that the application of well established principles to the particular facts of the relevant proceedings can give rise to an issue of general public importance. It must, of course, be recognised that general principles operate at a range of levels. There may be matters at the highest level of generality which can be described as the fundamental principles applying to the area of law in question. Below that there may well be established jurisprudence on the proper approach of a Court to the application of such general principles in particular types of circumstances which are likely to occur on a regular basis. The mere fact that, at a high level of generality, it may be said that the general principles are well established does not, in and of itself, mean that the way in which such principles may be properly applied in different types of circumstances may not itself potentially give rise to an issue which would meet the constitutional threshold.
>
> However, having said that, *the more the questions which might arise on appeal approach the end of the spectrum where they include the application of any principles which might be described as having any general application to the facts of an individual case, the less it will be possible to say that any issue of general public importance arises*.* There will, necessarily, be a question of degree or judgment required in forming an assessment in that regard in respect of any particular application for leave to appeal. However, the overall approach to leave is clear. Unless it can be said that the case has the potential to influence true matters of principle rather than the application of those matters of principle to the specific facts of the case in question then the constitutional threshold will not be met."
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> *Emphasis (italics) added.

17. An example of this approach being applied to a planning case is provided by *Buckley v. An Bord Pleanála* [2018] IESCDET 45. The Supreme Court refused leave to appeal in circumstances where the judgment of the High Court had merely entailed the application of well-established principles of planning law to the facts of the case. An example of a determination falling on the other side of the line is *Fitzpatrick v. An Bord Pleanála* [2018] IESCDET 61. An Bord Pleanála has placed particular reliance on this determination, and I will return to discuss it at paragraph 61 below.

18. The most recent Supreme Court determination in respect of planning law proceedings appears to be that in *Heather Hill Management Company clg v. An Bord Pleanála* [2020] IESCDET 39. The determination found that the decision of the High Court (from which it was sought to appeal) had involved the application of well-established law on the interpretation of development plans to the facts of the case, and did not, itself, raise any novel issue of law. Insofar as the High Court's decision had addressed the test governing screening for the purposes of Article 6 of the Habitats Directive, the Supreme Court's determination noted that the application of the same legal test to different facts may give rise to different outcomes, but that does not itself give rise to any issue of law of general public importance.

DRAFT POINT OF LAW

19. The point of law in respect of which An Bord Pleanála seeks leave to appeal is as follows:

> "Is the *O'Keeffe* standard of review to be applied on the basis of the Court's own analysis and understanding of the technical material on which the decision-maker made its decision, or is the question to be asked whether the technical material was capable, on analysis by a decisionmaker with relevant scientific expertise, of supporting the decision reached?"

20. The concerns underlying this draft point of law have been explained as follows by leading counsel for An Bord Pleanála in her submission on 1 May 2020. Whereas it is accepted that the principal judgment "ostensibly" acknowledges and purports to apply the principles in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39, it is the actual application of those principles which is a matter of concern for the Board. The principal judgment is said to represent a "significant shift" in the established jurisprudence. It is most unusual for an applicant to succeed on *O'Keeffe* grounds, especially in circumstances where the Board's decision or direction expressly identifies the material relied upon by the Board for the purpose of making its decision.

21. On the correct application of the *O'Keeffe* principles, a court cannot carry out a "substantive analysis" of the material in order to form a view itself whether the material is capable of sustaining the conclusion of the expert decision-maker. Whereas the court can ascertain that the material relied upon by the decision-maker is what it says it is, the court cannot "drill down" into the material.

22. The Supreme Court's determination in *Fitzpatrick v. An Bord Pleanála* [2018] IESCDET 61 is cited as authority for the proposition that the application, in a particular case, of even well-established principles is capable of giving rise to important legal issues which ought to be considered by the appellate courts.

23. The Board emphasises that considerations of legal costs do not form part of the statutory test for the grant of leave to appeal. Whereas An Bord Pleanála has indicated that it would not seek any order for costs in respect of the High Court proceedings in the event an appeal were successful, no concession is offered in respect of the costs before the Court of Appeal.

THE PROCEEDINGS BEFORE THE HIGH COURT

24. The within proceedings involved a challenge to a decision of An Bord Pleanála to grant planning permission for development consisting principally of what has been described as an "anaerobic digester plant". The anaerobic digestion process has been described in the planning application as involving the natural breakdown of organic material by bacteria in the absence of oxygen. The process inputs will include cow slurry, hen manure and silage. The products of this process are biogas (including a mixture of methane, carbon dioxide, oxygen and hydrogen sulphide), and digestate (a compost like organic fertiliser). The biogas is to be fed to a combined heat and power ("CHP") plant which will generate renewable electricity for export to the national grid.

25. The Applicant for judicial review had advanced his challenge under a number of grounds. All but one of these were resolved in favour of An Bord Pleanála by the principal judgment. Leave to appeal is sought in respect of the High Court's decision in respect of An Bord Pleanála's approach to the Seveso III Directive (Directive 2012/18/EU on the control of major-accident hazards involving dangerous substances).

26. The Seveso III Directive has been transposed into domestic law by the Control of Major Accident Regulations 2015 ("***the COMA Regulations 2015***"), and by Part 11 of the Planning and Development Regulations 2001 (as amended) ("***the Planning Regulations***"). In brief, if an application for planning permission relates to a proposed development which represents an "establishment" for the purposes of the Seveso III Directive, then additional requirements must be complied with by the local planning authority and by An Bord Pleanála in their processing of the planning application. These requirements are set out *inter alia* at Part 11 of the Planning Regulations. There are also obligations imposed by the COMA Regulations 2015 themselves (see, for example, Regulations 8 and 24).

27. The dispute in the main proceedings turned on whether the proposed anaerobic digester plant constitutes a "lower-tier establishment" for the purpose of the Seveso III Directive. The anaerobic digestion process will give rise to the generation of biogas, which will include methane, oxygen and hydrogen sulphide, all of which qualify as Seveso III substances. (See page 3 of the Byrne Ó Cléirigh Consulting report). If the proposed development is likely to involve the bulk storage of biogas in excess of 10 tonnes, then it constitutes a "lower-tier establishment".

28. The thresholds under the Seveso III Directive and the COMA Regulations 2015 are referable to the maximum quantities which are present or *are likely to be present* at any one time. See Note 3 to Schedule 1 of the COMA Regulations 2015 as follows.

> "3. The qualifying quantities set out above relate to each establishment.
>
> The quantities to be considered for the application of the relevant Regulations of these Regulations are the maximum quantities which are present or are likely to be present at any one time. Dangerous substances present at an establishment only in quantities equal to or less than 2 % of the relevant qualifying quantity shall be ignored for the purposes of calculating the total quantity present if their location within an establishment is such that it cannot act as an initiator of a major accident elsewhere at that establishment."

29. One of the unusual features of the case is that the COMA Regulations 2015 came into effect *after* the exchange of submissions in the planning appeal had ended. Thus, neither the Developer nor the Applicant addressed An Bord Pleanála directly on this issue.

30. An Bord Pleanála made a decision, in principle, to grant planning permission on 2 September 2015. The Board subsequently identified a need for further clarification in relation to the COMA Regulations 2015. The Board decided to seek "expert advice" on this issue. More specifically, Byrne Ó Clearigh Consulting Engineers were "assigned" to prepare an "independent report" on the matter. This report was prepared on 13 April 2016 ("***the BOC report***"). See the affidavit of the Secretary of An Bord Pleanála, Mr Chris Clarke, of 2 November 2017 (page 5).

31. The conclusions of the BOC report are stated as follows:

> "5. CONCLUSIONS AND RECOMMENDATIONS
>
> The only material that we have identified at the proposed Greenfield Ventures facility that qualifies as a Seveso substance is biogas.
>
> Based on our assessment of the three vessels that will be used to store biogas, the normal operating inventory of biogas at the site is likely to be less than 10 tonnes, which is the threshold for qualification as a lower tier establishment.
>
> However, based on our understanding of the process the maximum biogas storage capacity at the site will vary, depending on the liquid levels in the vessels. The total capacities of these vessels is sufficient to store up to 21.57 tonnes at atmospheric pressure, or 23.73 tonnes if the vessels were pressurised to 1.1 bar.

> It is not credible that the full tonnes capacity could be used for biogas storage, as this would require the removal of all liquid from the vessels and that they were filled to capacity at the same time with biogas. However, we cannot determine, based on the information available, what the maximum capacity is and so we cannot determine if the site could store more than 10 tonnes of biogas at one time.
>
> For this reason we recommend that if, APB decides to grant permission for the development, there would be a condition imposed so that the operator would have to:
>
> - Demonstrate that the maximum quantity of biogas present on the site at one time could never exceed 10 tonnes. This would have to be done by implementing suitable operational controls to limit the biogas quantities (e.g. monitoring liquid levels in tanks, monitoring biogas concentrations in the vapour spaces of the tanks, use of flaring to manage inventory if required or other measures).
>
> OR
>
> - Proceed on the basis that the site is a lower tier establishment and prepare and issue a notification to that effect. In this case the operator will also need to ensure that they meet the requirements of SI 209 of 2015 (the Seveso III Regulations)."

32. The Board Direction of 12 May 2016 indicates that a condition "as recommended" by the BOC report was being attached to the planning permission.

> "[…] For the avoidance of doubt, and to align with the report prepared by Byrne O'Cleirigh, the Board included a condition, as recommended in the Byrne O'Cleirigh report, limiting the volume of biogas that can be present on site at any one time to not exceed 10 tonnes."

33. In fact, the condition actually imposed fell short of that recommended. Mr Boland in his affidavit of 6 September 2019 acknowledges that the condition is

> "not precisely the same" as that mooted in the BOC report. This is because condition no. 3 does not require the developer to 'demonstrate that the maximum quantity of biogas present on the site at any one time could never exceed 10 tonnes'."

34. The wording of the Board Direction in this regard is described in An Bord Pleanála's written submissions as containing "infelicitous language".

PLEADING POINT

35. As appears at paragraphs 54 to 66 of the principal judgment, An Bord Pleanála had raised a pleading point during the course of the hearing in May 2019. This point was resolved against the Board for the reasons set out in the principal judgment.

36. An Bord Pleanála has sought, for the purposes of the application for leave to appeal, to place *indirect* reliance on the fact of the pleading point having been decided against it. The Board states that it will not, generally, be concerned with the precedential value of a decision as to whether a particular argument in a particular case has been properly pleaded, and considers that such a point will usually be confined to the pleadings and facts of the particular case and will be unlikely to constitute a "point of exceptional public importance" within the meaning of section 50A(7) of the PDA 2000. (Written submissions, 4 February 2020, paragraph 4).

37. The Board nevertheless contends that the fact that it has not had an opportunity to respond to the point on which *certiorari* has been granted is a relevant consideration in the application for leave to appeal. In particular, the Board is seeking to adduce affidavit evidence for the purposes of grounding this application for leave to appeal to the Court of Appeal. In this regard, one of the Board members who made the decision impugned in the proceedings, Mr Conall Boland, has sworn an affidavit, dated 6 September 2019, to explain the basis on which the Board concluded that the proposed development would not be a Seveso "establishment". The affidavit sets out the relevant qualifications and expertise of the members of An Bord Pleanála, including, in particular, that of Mr Boland himself and of Dr Mary Kelly, the former chairperson of An Bord Pleanála. The affidavit then summarises the BOC report; the planning application documentation; and the Board's expert analysis of same. Mr Boland summarises his conclusions as follows:

"19. **Conclusion:** The three strands when brought together provided a clear and satisfactory picture of the operation of the proposed AD facility. The BOC report established that storage of gas in the tanks' gas storage roof space (even combining all three tanks) would be well below the SEVESO threshold. The application documentation indicated that gas will be stored in the roofspace above the biomass within the tank and tapped-off for combustion, as opposed to being stored in large volumes within the tanks themselves. Operationally, the scenario of the three tanks and roof spaces all being substantially filled with gas at the same time such that the 10 tonne limit is exceeded was considered by the Board to be implausible and clearly inconsistent with both the developer's stated position and our knowledge and understanding of the normal operational approach to AD.

20. The Board was therefore in a position to conclude that there was no likelihood of the 10 tonne limit for biogas being exceeded. The foregoing has already been summarised in paragraph 3 of the Board Direction dated May 12th 2016. It is acknowledged that the conclusion drawn was less tentative than that contained in the BOC report referred to above, nevertheless this was a rational and informed judgement on our behalf, informed by the documentation before us as well as our knowledge and understanding of how AD facilities work.

21. The imposition of Condition 3, taken with Condition 2 (which restricts the quantity of feedstock and prohibits any change in the mix of wastes indicated without a further grant of planning permission for same), represented a 'belt and brace' approach, providing reassurance that the capacity of biogas stored at any time would be maintained within the appropriate limits. Operations have to be maintained in accordance with the details provided (Conditions 1 and 2). This ensured that no alterations to the physical or operational aspects of the facility could take place that would push the facility into being a SEVESO tier 2 facility."

38. Counsel for the Applicant has objected to the introduction of this affidavit evidence. It is submitted that it must follow from the absence of any attempted appeal on the pleading point, that this court must assume that the pleading point had been properly decided. It is not under appeal. On this assumption, the Board cannot be said to have been taken by surprise at the hearing in May 2019, and there can be no basis for the Board seeking to introduce evidence post-judgment.

39. These submissions are, strictly speaking, correct. The Court of Appeal's jurisdiction is confined to the point of law as certified by the High Court: see section 50A(11) of the PDA 2000. The pleading point would not, therefore, be before the Court of Appeal. Moreover, a pleading point will rarely represent a point of law of "exceptional public importance", for the reasons identified by An Bord Pleanála in its own submission. Indeed, there is a risk that were a certificate of leave to appeal to extend to a pleading point, it might detract from the point of actual concern to An Bord Pleanála, namely the application of the principles in *O'Keeffe v. An Bord Pleanála*. Had leave to appeal been sought on the pleading point, and were the Court of Appeal to decide the pleading point in favour of An Bord Pleanála, then the appeal would be resolved on that narrow case-specific basis. It would not then be necessary for the Court of Appeal to decide the point of actual concern to An Bord Pleanála.

40. Given these considerations, An Bord Pleanála cannot be faulted for formulating the draft point of law as it has done. The drafting is admirably concise, and identifies with precision the point of law of actual concern. It properly excludes the pleading point.

41. I have given careful consideration to the correctness of my finding on the pleading point, and, indeed, the parties had been expressly invited by the court at an earlier stage to consider whether it should exercise its exceptional jurisdiction to reopen the principal judgment on that point. Written submissions were exchanged between the parties in this regard. Both parties submitted that the principal judgment should not be reopened. The ruling on the pleading point thus stands and is not under appeal.

42. Nevertheless, I have decided that the Board is entitled to rely on Mr Boland's affidavit for the following reasons. It follows by necessary implication from section 50A(11) of the PDA 2000 that the parties to an appeal will, generally, be confined at the hearing of the appeal to the affidavit evidence which had been filed before the High Court. It is

important, therefore, that all parties be afforded an opportunity to present such evidence as they wish to the High Court. Such evidence should, of course, normally be filed prior to the substantive hearing before the High Court.

43. Given the unusual circumstances of the present case, however, an exception is justified, and the affidavit evidence will be admitted. The Board has submitted that had it understood from the pleadings that the Board's *own* conclusion that the proposed development did not constitute an "establishment" for the purposes of the Seveso III Directive was being challenged in the judicial review proceedings (as opposed to a challenge to the correctness of the BOC report), then it would have adduced evidence of the type now contained in Mr Boland's affidavit.

44. It seems to me, however, that one pragmatic solution to the potential difficulties presented by section 50A(11) of the PDA 2000 is to admit the affidavit evidence. (I will refer to the relevant extracts from the affidavit in context in the discussion below). The belated admission of the affidavit can cause no prejudice to the Applicant. The details provided as to An Bord Pleanála's expertise cannot seriously be disputed. Insofar as the explanation provided in the affidavit of the Board's rationale for its decision on the Seveso III Directive issues is concerned, this explanation is not new and had largely been presaged by the submissions made by counsel for An Bord Pleanála at the hearing of the substantive judicial review in May 2019. (The relevant arguments are summarised at paragraphs 80 to 87 of the principal judgment. See also paragraph 11 of Mr Clarke's affidavit).

DETAILED DISCUSSION

PRINCIPAL JUDGMENT: THE "DECISION" OF THE HIGH COURT

45. The "decision" of the High Court in respect of which leave to appeal is sought under section 50A(7) of the PDA 2000 comprises three principal findings as follows. First, that An Bord Pleanála's screening assessment for the purposes of the Seveso III Directive was subject to the attenuated form of review allowed under the *O'Keeffe v. An Bord Pleanála* principles. As expressly stated in the principal judgment, the court accepted that An Bord Pleanála's decision attracted curial deference. Secondly, that there was no material before An Bord Pleanála capable of supporting its decision that the anaerobic digester plant was not likely to exceed the 10,000 tonnes threshold. Thirdly, that there was a material error of fact in An Bord Pleanála's decision insofar as the Board appears to have thought that it was attaching a condition "as recommended" by the BOC report.

46. Each of these three findings is consistent with the well-established domestic case law in respect of the High Court's supervisory jurisdiction in judicial review proceedings. Put otherwise, none of these three findings can be said to give rise to "uncertainty" in the law, as required under the *Glancré* test.

47. The first finding follows, by analogy, from the judgment of the High Court in *Harrington v. An Bord Pleanála* [2005] IEHC 344; [2006] 1 I.R. 388.

48. The second finding involves a faithful application of the *O'Keeffe v. An Bord Pleanála* principles. The oft-quoted passage from Finlay C.J. explains that one of the circumstances in which a court can intervene to set aside a planning decision is where there had been no material before the decision-maker capable of supporting the decision. The High Court must thus consider the material before the decision-maker. Counsel for An Bord Pleanála accepts that the High Court is entitled to consider the material to a limited extent, but submits that the court cannot "drill into" the substance of the material.

This, it is said, is especially so where, as in the present case, An Bord Pleanála had expressly identified the material relied upon, namely the two extracts from the Developer's submission on the planning application cited in the Board Direction.

49. With respect, this is precisely the nature of the exercise carried out in the principal judgment. The court was not seeking to "second-guess" An Bord Pleanála's assessment or to substitute its views for those of An Bord Pleanála. Rather, the court made the obvious point that the very limited material before An Bord Pleanála was inadequate to allow it to reach a definitive determination that there was no likelihood of the 10,000 tonnes threshold being exceeded. This is explained as follows in the principal judgment:

> "92. Even applying curial deference, I am satisfied that—on the very unusual facts of the present case—the conclusions which An Bord Pleanála reached in relation to the Seveso III Directive were unreasonable and irrational in the sense that there was simply no material before the board capable of justifying its conclusions.
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> 93. In this regard, there are two aspects of the board's direction of 12 May 2016 which are of concern. First, the board concluded that there was no likelihood of the 10 tonne limit for biogas being exceeded. This conclusion was said to be based on the "technical information" provided by the Developer. However, when one considers the documentation actually relied upon by An Bord Pleanála, it is incapable of supporting this conclusion. (The relevant extracts have been set out at paragraphs 69 and 70 above).
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> 94. The information is presented in the most vague and general terms. There is no detail provided as to how the proposed anaerobic digester plant is to be operated. No indication is given of the volume of gases to be produced. There is no attempt to identify what fractions of the biogas produced will constitute substances for the purposes of the Seveso III Directive or the COMA Regulations 2015. The statement that 'long term storage (build-up) of gas' does not occur at the site is unexplained: no figures are given for the volume of gas involved nor what is meant by 'long term'. No explanation is provided for the statement that the 'combined storage capacity on site is less than 24 hrs'.
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> 95. There is no express reference to the threshold of 10 tonnes nor any statement that this would not be exceeded. Indeed, both submissions on the part of the Developer predated the coming into force of the COMA Regulations 2015 on 1 June 2015.

96. These omissions have to be seen against a factual background where the actual capacity of the tanks could, in theory, accommodate in excess of 21 tonnes of biogas. (See BOC report, page 10). Even allowing that the full of capacity would not be dedicated to biogas, no one reading these two submissions on behalf of the Developer could know whether the lesser figure of the 10 tonne threshold would be exceeded.

97. The lack of detail in the information provided by the Developer had previously been criticised by the inspector in her report of 23 April 2013 (albeit not in the specific context of the Seveso III Directive). The BOC report also states that the authors could not determine, based on the information available, what the maximum capacity of the vessels/tanks is and could not determine if the site could store more than 10 tonnes of biogas at one time. Whereas An Bord Pleanála is not, of course, bound by the recommendation in these reports as a matter of law, it is telling that both the inspector and the experts considered the information to be deficient.

98. I have carefully considered the materials relied upon by An Bord Pleanála, and there is nothing which supports the conclusion purported to have been reached by An Bord Pleanála.

99. As appears from An Bord Pleanála's verifying affidavit, the members of An Bord Pleanála, in October 2015, had been alive to the possibility that the development might trigger the then newly commenced COMA Regulations 2015, and this is the reason the board had commissioned the BOC Report. See paragraph 4(q) of Chris Clarke's affidavit of 2 November 2017, and the exhibited board direction of 30 October 2015. Notwithstanding this, the board ultimately purported to resolve this issue by reference to the documentation previously submitted by the Developer and not by reference to the expert report."

50. There is nothing surprising in this finding. It is entirely consistent with the earlier decision of An Bord Pleanála to seek independent expert advice on the application of the Seveso III Directive by way of the BOC report. It is implicit in this that An Bord Pleanála did not consider that it had the competence to determine this issue itself. The finding is also consistent with the conclusions of the report produced by the external experts, namely the BOC report. It is also consistent with the earlier warning by An Bord Pleanála's inspector that the information was inadequate.

51. None of this is changed by the content of the post-judgment affidavit of Mr Boland. The most that Mr Boland suggests is that, in his experience, the *controlled operation* of an anaerobic digester plant is unlikely to result in a build-up of gas in excess of the threshold.

52. The difficulty, however, is that the independent experts engaged by An Bord Pleanála had indicated that a condition regulating the operation of the plant was necessary to demonstrate that the maximum quantity of biogas present on the site at one time could never exceed 10 tonnes. As discussed below, An Bord Pleanála failed to attach a planning condition "as recommended" by the BOC report.

53. Moreover, the first condition to the planning permission, which is a standard type condition requiring that the development be carried out in accordance with the plans and particulars lodged with the planning application, does not refer to the submission made on behalf of the Developer by Simon Clear & Associates on 30 March 2015. These particulars, accordingly, do not form part of the planning permission. See, by analogy, *Lanigan v. Barry* [2016] IESC 46; [2016] 1 I.R. 656.

54. The assumption underlying the Board Direction and Mr Boland's affidavit would only hold good had An Bord Pleanála actually put a condition in place requiring the controlled operation of the proposed development. The Board did not do so.

55. An Bord Pleanála was not a neutral observer in the decision-making process, rather they were the competent authority for the purposes of the PDA 2000 and for the Seveso III Directive. An Bord Pleanála had an obligation to ensure compliance with the Seveso III Directive in the context of land use planning.

56. The third finding is closely related to the second finding discussed above. The Board Direction indicated that it was attaching a condition "as recommended" in the BOC report. The issue is addressed as follows in the principal judgment:

> "100. The second aspect of concern is that the members of An Bord Pleanála appear to have thought that they were attaching the

> condition as recommended in the BOC report. In truth, the condition actually imposed, namely Condition No. 3, falls far short of the type of condition envisaged by the authors of the BOC report. Contrary to the recommendation, Condition No. 3 does not require the Developer to demonstrate that the maximum quantity of biogas present on the site at one time could never exceed 10 tonnes. The condition is not prescriptive in respect of the 'suitable operational controls' to be implemented in order to limit the biogas quantities, e.g. monitoring liquid levels in tanks, monitoring biogas concentrations in the vapour spaces of the tanks, use of flaring to manage inventory if required or other measures.
>
> 101. Put shortly, Condition No. 3 merely states an outcome, but does not require the Developer to demonstrate compliance with that outcome, nor does the condition put in place any controls to ensure that that outcome is achieved.
>
> 102. Thus the board was mistaken in thinking that it had attached the recommended condition. Notwithstanding the skilful submissions of counsel, I cannot accept that the board merely attached a condition "for the avoidance of doubt" but that this condition was not intended to be the condition recommended by the BOC report. The board's direction expressly states that the board included a condition as recommended in the BOC report. See also paragraph 11 of Mr Clarke's affidavit."

57. This is a material error of fact, and, as such, vitiates the decision to grant planning permission.

NO UNCERTAINTY / PRECEDENTIAL VALUE IS NIL

58. The judgment in *Glancré* indicates that, in order for leave to appeal to be granted, the law in question must stand in a "state of uncertainty". Uncertainty cannot be "imputed" to the law by an intended appellant simply raising a question as to the point of law. Rather, the authorities appear to indicate that the uncertainty must arise over and above this, for example in the daily operation of the law in question.

59. The principles have been summarised very recently by the High Court (Barniville J.) in *Shillelagh Quarries Ltd v. An Bord Pleanála* [2020] IEHC 22, [47].

> "In considering whether a point of law is of 'exceptional public importance', an important task for the court is to determine whether

> the law in question, to which the point of law relates, is in a state of uncertainty or is evolving. That was one of the fundamental principles summarized by MacMenamin J. in *Glancré*. It was also stressed by Baker J. in the High Court in *Ógalas*, by McGovern J. in the High Court in *Dunne Stores*, by Haughton J. in the High Court in *People Over Wind* and by Costello J. in the High Court in *Callaghan*. If the law is not uncertain, then the court will generally conclude that the point of law raised is not of 'exceptional public importance'. Where the law is in a state of uncertainty and, in particular, where the law is evolving in the area, the court will generally be satisfied that the point of law in question is one of 'exceptional public importance' […]."

60. The principal judgment cannot realistically be said to give rise to a "state of uncertainty". Nor can the law in this area be said to be "evolving". First, the principal judgment expressly endorses the principles in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39 and *Meadows v. Minister for Justice Equality and Law Reform* [2010] IESC 3; [2010] 2 I.R. 701. Indeed, An Bord Pleanála accepts that the principal judgment "ostensibly" applied these principles, but the Board goes on to suggest that the application of same was erroneous. For the reasons set out by the Supreme Court in *B.S. v. Director of Public Prosecutions* [2017] IESCDET 134; *Buckley v. An Bord Pleanála* [2018] IESCDET 45; and *Heather Hill Management Company clg v. An Bord Pleanála* [2020] IESCDET 39, the application of well-established principles will rarely give rise to a point of law of "general importance" (nor, by analogy, to a point of law of exceptional public importance").

61. It is correct, of course, to say that the application of a general principle may require further consideration. This was the approach adopted, for example, in *Fitzpatrick v. An Bord Pleanála* [2018] IESCDET 61.

> 6. However, it must also be acknowledged, as this Court pointed out in its recent decisions in *B.S.* and *PWC* that issues of principle can operate at differing levels of generality. The mere fact that there may not be a dispute as to the overall broad principles applicable to a case does not mean that there may not still potentially be issues of importance concerning the way in which those general principles are to apply in a particular category of case although, of course, as has

been pointed out, the closer one comes to the application of such more detailed matters of principle to the facts of an individual case the further one gets away from there being an issue of general public importance or, indeed, an issue of European law which would require a reference to the Court of Justice. In saying that, the Court would not wish to express any view on whether the threshold for issues of 'general public importance' as specified in the 33rd Amendment may or may not be the same or similar to the criteria by reference to which a court of final appeal would have to identify whether there truly was an issue of European Union law involved in the case whose resolution was necessary to resolve the proceedings thus requiring a reference.

7. There is no doubt that the case law of the Court of Justice and Opinions of Advocates General in this area give considerable guidance as to the general principles which are to be applied in a case where, as here, there is a prospect that the project for which specific permission is sought may involve expansion or continuation. The question is whether it is possible to resolve this case by the application of that established jurisprudence without having to consider issues concerning the potential application of broad general principles to the particular type of case with which the Courts are here involved.

8. At this point the Court is not persuaded that it can safely be said that there might not be a point of general importance concerning the application of the broad general principles identified in the case law to a category of case such as this. In saying so the Court would wish to emphasise that it is not, at this stage, to be taken as in any way indicating that such a point necessarily arises but rather that one of the matters which the Court will have to consider is whether such a point arises and whether, if that be so, this Court is obliged to make a reference to the Court of Justice under the *CILFIT* jurisprudence. The Court would emphasise that the *CILFIT* jurisprudence places a significant obligation on a court of final appeal in cases such as this."

62. The present case is distinguishable from that under consideration in *Fitzpatrick*. In that case, the principles governing the assessment of development projects which were subject to potential future expansion were said to be found in an Advocate General's Opinion which had been delivered in 1994, in Case C-396/92, *Bund Naturschutz in Bayern* (EU:C:1994:179). The Opinion had never been formally endorsed by the Court of Justice. Indeed, the specific issue does not appear to have been discussed in any detail in the subsequent case law of either the Court of Justice or of the domestic courts.

63. By contrast, the principles in issue in the present case, namely the *O'Keeffe* principles, are ones which have been cited and consistently endorsed by the courts for almost thirty years. There are literally hundreds of cases endorsing those principles.

64. More fundamentally, perhaps, the draft point of law does not actually seek clarification of the *O'Keeffe v. An Bord Pleanála* principles. The question as formulated admits of only one answer, namely that the correct application of the *O'Keeffe* principles is that posited in the second limb:

> "[T]he question to be asked [is] whether the technical material was capable, on analysis by a decisionmaker with relevant scientific expertise, of supporting the decision reached?"

65. In truth, An Bord Pleanála is seeking to correct what it believes to be the *incorrect application* of the *O'Keeffe v. An Bord Pleanála* principles to a particular case, rather than seeking any clarification as to the underlying principles. In the context of nearly any other statutory decision-making, the decision-maker would be entitled to bring an appeal to correct such an alleged error. However, in the specific context of the planning legislation, the Oireachtas have chosen, for policy reasons, to strike a different balance between finality in planning matters and an entitlement to appeal.

66. For reasons similar to those expressed by the Supreme Court in *B.S. v. Director of Public Prosecutions* [2017] IESCDET 134, the more the questions which might arise on appeal approach the end of the spectrum where they concern the application of general principles to the facts of an individual case, the weaker the grounds for saying that an appeal would raise a point of law of exceptional public importance.

67. An Bord Pleanála's expressed concern is that the principal judgment may represent a "significant shift" in the jurisprudence. With respect, any such concern is not well founded. The principal judgment is of almost nil precedential value because it arose out of a very unusual set of circumstances, as follows.

(i). The principal judgment was concerned with the determination made by An Bord Pleanála in respect of the *threshold issue* of whether the proposed anaerobic digester plant constituted an "establishment" for the purposes of the Seveso III Directive. Whereas the principal judgment held that even this threshold determination attracted curial deference, the decision-making involved is very different from that involved in a decision to grant or refuse planning permission. The latter decision entails the exercise of a very wide discretion in respect of planning policy. The principal judgment cannot be "read across" to such decisions.

(ii). The sequence of events in respect of the planning appeal were very unusual. In particular, the COMA Regulations 2015 came into effect *after* the exchange of submissions in the planning appeal had ended. Thus, neither the Developer nor the Applicant addressed An Bord Pleanála directly on this issue. Indeed, it appears that a decision in principle to grant planning permission had already been made by An Bord Pleanála *before* the implications of the 2015 Regulations were addressed by the Board itself. (See Chris Clarke's affidavit, paragraph 4(p)).

(iii). Whereas the ultimate decision resides with An Bord Pleanála, and the Board is not bound by the recommendation of the BOC report, it is nevertheless significant that An Bord Pleanála felt the need to seek independent expert advice. (See Chris Clarke's affidavit, paragraph 4(r)). It is also significant that the Board reached its decision based on precisely the same information which had been available to it *prior* to its referring the matter to the external experts. (This is to be contrasted with a number of recent High Court judgments where the Board's decision not to follow a recommendation of its inspector had been based on further information obtained *subsequent* to the date of the inspector's report).

(iv). An Bord Pleanála had purported to impose a condition "as recommended" by the BOC report. The Board Direction is factually incorrect in this respect.

68. It seems highly unlikely that a similar confluence of events will arise in another case.

69. It is also telling that—notwithstanding that twelve months have passed since the principal judgment was delivered—An Bord Pleanála has not specifically identified any other proceedings in which that judgment has been relied upon as a precedent by a party. Counsel for An Bord Pleanála pointed out that had the principal judgment been cited, the Board would have objected to its being relied upon on the basis that it was the subject of an application for leave to appeal to the Court of Appeal. Nevertheless, the very fact that little or no attempted reliance has been placed on the principal judgment in the intervening twelve months suggests it has not created any "uncertainty" in the law.

APPEAL NOT DESIRABLE IN PUBLIC INTEREST

70. The second limb of the statutory test under section 50A(7) of the PDA 2000 requires the High Court to consider whether an appeal to the Court of Appeal is "desirable in the public interest". This is a separate consideration from the first limb (*Glancré*, point 6). As illustrated by the facts of *Arklow Holidays Ltd v. An Bord Pleanála* [2006] IEHC 102; [2007] 4 I.R. 112, the High Court may decide to refuse leave to appeal even in cases where the first limb of the test had been met.

71. Given that I have concluded that the draft point of law does not constitute a point of law of exceptional public importance, it is not, strictly speaking, necessary to consider the second limb of the test. For the sake of completeness, however, I should say that leave to appeal would have been refused in any event on the basis that the second limb of the statutory test is not met. It seems to me that an appeal is not desirable in the present case for the following two reasons.

72. First and foremost, there is a real risk that the proceedings will become moot before any appeal can be heard. This is because the impugned planning permission is set to expire in July 2021. (The permission was granted in 9 June 2016, and will cease to have effect in accordance with the withering provisions under section 40 of the PDA 2000 unless implemented within five years and 45 days).

73. Counsel for An Bord Pleanála suggested that an application might be made for an early hearing of the appeal. However, in circumstances where the Developer has not participated in the judicial review proceedings at any stage, and, in particular, has not sought to expedite the proceedings, there would appear to be an air of artificiality in seeking an early hearing. If the beneficiary of the planning permission does not take any steps to progress judicial review proceedings, then it would appear difficult to justify those proceedings gaining priority over other cases.

74. It would not seem fair to put the Applicant to the hazard on costs in respect of an appeal which may well become moot. In this regard, whereas An Bord Pleanála has indicated that it would not seek any order for costs in respect of the High Court proceedings in the event an appeal were to be successful, no concession is offered in respect of the costs before the Court of Appeal.

75. Secondly, there has already been inordinate delay in the progress of these proceedings. The relevant chronology is as follows.

9 June 2016	An Bord Pleanála's decision to grant planning permission
29 July 2016	Leave to apply for judicial review granted
6 November 2017	An Bord Pleanála files opposition papers
30 April 2019	Hearing of substantive application for judicial review
24 May 2019	Reserved judgment delivered
1 May 2020	Hearing of application for leave to appeal to Court of Appeal
15 May 2020	Reserved judgment delivered

76. There appears to have been significant delay on the part of An Bord Pleanála in filing its opposition papers in the within proceedings. The Applicant had to issue two motions in this regard.

77. The overall delay in the planning process is even greater when one considers the earlier procedural history. The planning application itself had been made to the planning authority on 20 March 2012, that is over eight years ago. An Bord Pleanála's initial decision on the planning appeal (30 May 2013) had been set aside by the High Court, with the consent of the parties, on 8 July 2014 in separate judicial review proceedings (Record Number 2013 No. 609 J.R.). The planning appeal was then remitted to An Bord Pleanála for further consideration.

78. The case law indicates that the High Court may take "delay" into account when considering whether an appeal is desirable in the public interest. In most instances, this will work in favour of a developer. Leave to appeal a decision which *upholds* a planning permission may be refused where the court considers that it would be contrary to the public interest to allow an appeal which would further delay an important development project. See, for example, *Arklow Holidays Ltd v. An Bord Pleanála* [2006] IEHC 102; [2007] 4 I.R. 112, [24].

> "The public interest, in an issue such as this, needs to take into account the nature of the development proposed and the potential

> consequences of a significant further delay in the matter being finally disposed of before the courts.".

79. The issue of delay can, however, cut the other way. Judicial review proceedings should not remain outstanding for years at a time. A party seeking judicial review is entitled to have his or her proceedings determined in a timely manner. This principle is stated as follows in *Glancré*, at paragraph 36 of the judgment.

> "Secondly it has been well established that it is an aim of the legislature in enacting the planning legislation that certainty and finality be promoted in planning decisions and that challenges hereto should be dealt with expeditiously. To permit a further appeal would not serve that aim."

80. The courts are under a statutory obligation "to act as expeditiously as possible consistent with the administration of justice" in determining statutory judicial review proceedings under the PDA 2000 (see section 50A(10)). It would not be in keeping with the spirit of this statutory obligation to prolong these 2016 judicial review proceedings further by allowing leave to appeal. This is especially so where, as in the present case, there has been a significant legislative development during the course of the planning appeal, namely the transposition of the Seveso III Directive into domestic law by the Control of Major Accident Regulations 2015.

81. Although not decisive, I note that Member States are obliged under article 11 of the EIA Directive to provide a "review procedure" which is "fair, equitable, timely and not prohibitively expensive". The "review procedure" is also applicable to projects which are subject to the public participation provisions of the Seveso III Directive (see article 23(b)). The requirement that the review procedure be "timely" resonates with the statutory obligation "to act as expeditiously as possible consistent with the administration of justice".

82. In the event that the Developer continues to have an intention to pursue the development of an anaerobic digester plant, then it would seem preferable that this be done by way of

its making a fresh application for planning permission, by reference to the amended legislation, rather than for leave to appeal to the Court of Appeal to be granted, and a planning application first submitted in 2012 to be kept alive.

83. Finally, for the sake of completeness, it should be recorded that An Bord Pleanála relies on the fact of the pleading point having been decided against it as being relevant to the second limb of the statutory test. It is said that it would not be in the public interest for a decision of the High Court which is regarded as significant by An Bord Pleanála to go unappealed in circumstances where, it is suggested, the Board had not had a full opportunity to address the issue by way of affidavit evidence. Counsel cites the judgment of *McDonncha v. Minister for Education and Skills* [2018] IESC 50.

84. Such considerations would only ever arise in a case where the first limb of the statutory test has been met. These considerations could not convert a point of law, which does not reach the threshold of an "exceptional" point of law, into a certifiable point. The two limbs of the statutory test are cumulative. For the reasons set out earlier, there is no uncertainty in the law which would justify granting leave to appeal on the draft point of law. Moreover, any alleged prejudice to An Bord Pleanála has, in any event, been addressed by the admission of Mr Boland's affidavit. Further, the content of that affidavit had largely been presaged by the submissions made by counsel for An Bord Pleanála at the hearing of the substantive judicial review in May 2019. (The relevant arguments are summarised at paragraphs 80 to 87 of the principal judgment. See also paragraph 11 of Mr Clarke's affidavit).

CONCLUSION AND FORM OF ORDER

85. The application for leave to appeal pursuant to Section 50A(7) of the PDA 2000 is dismissed.

86. The attention of the parties is drawn to the practice direction issued on 24 March 2020 in respect of the delivery of judgments electronically, as follows.

> "The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of delivery subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the Court is required to make will also be published on the website and will include a synopsis of the relevant submissions made, where appropriate."

87. The parties are invited to engage in correspondence *inter se* on the question of costs, to include the costs of the substantive application for judicial review, and the costs of the application for leave to appeal to the Court of Appeal. In the event that the parties cannot reach a consensus as to the appropriate costs order to be made, then each side should file short written legal submissions electronically in the Central Office of the High Court, and send a copy of same by email to the Registrar assigned to this case, within twenty-one days of the date of this judgment.

Appearances
Neil Steen, SC and Niall Handy for the Applicant instructed by O'Reilly & Co Solicitors
Nuala Butler, SC and Fintan Valentine for An Bord Pleanála instructed by Fieldfisher Ireland

Approved