APPROVED **[2021] IEHC 453**

THE HIGH COURT
JUDICIAL REVIEW

2020 No. 134 JR

IN THE MATTER OF SECTIONS 50 AND 50A OF THE PLANNING AND DEVELOPMENT ACT 2000 (AS AMENDED)

BETWEEN

THE BOARD OF MANAGEMENT OF ST. AUDOEN'S NATIONAL SCHOOL

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

MERCHANTS QUAY IRELAND CLG

NOTICE PARTY

JUDGMENT of Mr. Justice Garrett Simons delivered on 15 July 2021

INTRODUCTION

1. An Bord Pleanála has purported to grant planning permission for development consisting of what is described as a "medically supervised injection facility" ("***the facility***"). The users of illegal drugs will be permitted to inject themselves with controlled drugs at the facility. The controlled drugs will not be provided by the operator of the facility, but

rather will have been purchased by the drug users in advance of their attendance at the facility. Thereafter, the *possession* of the controlled drugs for immediate personal consumption by injection at a licensed facility will not be subject to the Misuse of Drugs Act 1977 (as amended). The sale and supply of the drugs will, however, continue to be subject to the Act. The persons involved in the supply of the drugs will, presumably, be guilty of an offence.

2. One of the striking features of the proposed development is that the facility is to be located immediately adjacent to a primary school. The board of management of the primary school ("***the school board***") had submitted a detailed objection to the proposed development, citing in particular the adverse consequences which it would have on the pupils and staff at the school. It had been submitted that the proposed development would cause a *de facto* "drugs marketplace" to be created in the area. These objections are not addressed, in terms, in An Bord Pleanála's decision. Indeed, there is no reference at all in the decision to the school or its pupils.

3. The school board has since instituted these judicial review proceedings which seek to challenge the validity of An Bord Pleanála's decision.

AN BORD PLEANÁLA'S DECISION

4. An Bord Pleanála made a decision on 23 December 2019 to grant planning permission for the facility on a *temporary* basis. The permission allows the premises at Merchants Quay to be used for the purposes of a medically supervised injection facility for a period of three years, beginning on the date of first operation.

5. This is provided for under Condition No. 2 of the planning permission as follows:

> "2. The use of the premises as a Medically Safe Injecting Facility shall cease on or before three years from the date of first operation, unless before the end of that period, permission for the continuance of the use beyond that date shall have been granted.

> Reason: To allow for a review of the development having regard to the circumstances then pertaining and in the interest of residential amenity and public safety."

6. This condition differs materially from that recommended by An Bord Pleanála's inspector; the latter had recommended that the use be permitted for a period of two years only, not three. I will return to consider the consequences of this discrepancy at paragraphs 38 *et seq*. below.

7. An Bord Pleanála is obliged, under section 34(10) of the Planning and Development Act 2000 ("***PDA 2000***"), to state the main reasons and considerations on which its decisions are based. The statement of reasons and considerations for the decision impugned in these proceedings reads as follows.

> "Reasons and Considerations
>
> Having regard to the zoning objective for the area, the pattern of existing and permitted development in the area, the site's inner city location, the range of services already on offer at the subject facility, the monitoring and evaluation proposed and the pilot scheme nature of the proposed development, it is considered that, subject to compliance with the conditions set out below, the proposed development would not seriously injure the amenities of property in the vicinity, would not adversely impact on the residential amenity or character of the area and would be acceptable in terms of public safety and convenience. The proposed development would, therefore, be in accordance with the proper planning and sustainable development of the area."

8. On a literal reading, this statement might appear to suggest that An Bord Pleanála had made *definitive findings* in respect of the impact of the proposed drug injection facility on the proper planning and sustainable development of the area. It might appear, for example, that the board had concluded that the proposed development "would not adversely impact on the residential amenity or character of the area". If this were so, then the logic of the imposition of a condition limiting the permitted use to a period of

three years, to allow for a subsequent review of the development, would be difficult to comprehend.

9. Counsel on behalf of An Bord Pleanála has explained, however, that An Bord Pleanála should be understood as having decided that it would be appropriate to grant a *temporary* planning permission for the operation of this facility for a limited duration only, to allow it to operate on a monitored basis. Counsel further explains that this would then allow a review of the facility to take place, to see whether it could operate successfully and to see whether it could achieve the stated aims of the project and achieve the benefits to the local area which were suggested would arise.

10. This interpretation of An Bord Pleanála's decision is said to flow from a reading of the decision in conjunction with the inspector's report. Counsel relies in this regard on the judgment of the Supreme Court in *Connelly v. An Bord Pleanála* [2018] IESC 31; [2018] 2 I.L.R.M. 453.

11. It is necessary, therefore, to consider the content of the inspector's report. The inspector had identified the core issue on the planning appeal as follows (at §7.7.1 of her report). (The abbreviation "MQI" refers to the notice party developer, Merchants Quay Ireland).

> "I note the very high level of dissatisfaction with the existing operation of MQI expressed by so many of the immediate community in the area. The predominant complaint expressed by the Observers is that public drug use, anti-social and criminal behaviour occurs daily around the existing facility. It is submitted by many that existing MQI efforts to control such behaviours are simply not effective, that MQI have a poor track record and therefore there is little confidence in their ability to control an intensified service. The Board must ask: if the awarding of a licence, the terms and conditions of which including monitoring, evaluation and community, is sufficient to change the track record evidenced to date. It is a difficult question to answer. The benefits to marginalised drug users from a MSIF, as submitted by the Applicant are worthy and that such a service is needed in Dublin City Centre is indisputable. The risks however, to the receiving environment, of such a project failing, are significant and severe. It is a big ask of a community who already appear to suffer greatly, to absorb another potential 'bad neighbour' use. There is the possibility that the proposed development however,

> might improve the area in terms of public injecting and drug related litter."

12. The inspector had recommended the following approach to An Bord Pleanála (at §7.7.4 and §7.7.5 of her report).

> "The third option is to grant a restricted life permission. The development management guidelines generally discourage the granting of permissions on a temporary basis. Section 7.5 of the guidelines state that the material considerations to which regard must be had in dealing with applications are not limited or made different by a decision to make the permission a temporary one. The reason for a temporary permission can never be that a time limit is necessary because of the adverse effect of the development on the amenities of the area. If the amenities will certainly be affected by the development, they can only be safeguarded by ensuring that it does not take place. The subject development is different however. It is clear that those proposing the subject development consider it will have a clear and marked improvement on the existing area, removing the anti-social behaviour associated with public drug taking, thereby improving the overall public realm. Opponents of the scheme consider that the effects of the existing MQI are so significant and severe and that any possibility of them being exacerbated must be resisted. In this instance and taking into consideration the submissions of all parties, it is considered that the opportunity should be given for the existing situation to improve. The development management guidelines refer to a use which may possibly be a 'bad neighbour' to existing uses, and state that it may be appropriate to grant a temporary permission to enable the impact of the development to be assessed. The proposed facility has been awarded a pilot 18-month licence from the HSE. An ongoing system of monitoring and evaluation has been proposed. As noted by one of the Observers, section 41 of the Planning and Development Act 2000, as amended does not allow for a limited planning permission of less than two years.
>
> Considering the compelling submissions on both sides of this proposed development and acknowledging the limitations of the planning system with regard to the clinical governance and operation of the proposed development, it is considered that both the vulnerable clients of MQI and the already negatively impacted community of Dublin 8 deserve the opportunity to try to improve the situation. The granting of a temporary permission with monitoring and evaluation conditions will allow the impacts of the proposed development to be regularly assessed. Should it be found that the stated aim of an improvement in the public realm has not been achieved, the mechanism exists under both the licence and the permission for the operation to cease."

13. As appears, the inspector had, initially, identified a period of eighteen months as the proper period for the temporary planning permission. This period coincides with the length of time identified for the pilot scheme by the Health Service Executive and by the Minister for Health, who is the licensing authority under the Misuse of Drugs (Supervised Injecting Facilities) Act 2017.

14. The inspector ultimately recommended that the time-limit be two years. This increase from eighteen months to two years came about because the inspector mistakenly thought that the minimum period for which a temporary planning permission could be granted is two years. This error arose out of a failure to distinguish between the time-limit on the *implementation* of a planning permission (section 40 of the PDA 2000), and the time-limit applicable to a *temporary* planning permission (section 34(4)(n) of the PDA 2000).

15. Most planning permissions are subject to a five year time-limit within which the permission must be implemented, i.e. the development works commenced and completed, and any material change in use made. If this is not done within the time-limit, then the planning permission expires. The default time-limit is five years, but a different time-limit may be prescribed in the planning permission. The minimum time-limit for the implementation of a planning permission is fixed at two years by section 41 of the PDA 2000. Provided that a planning permission is *implemented* within time, then the structures and use authorised by the planning permission can remain in place indefinitely.

16. The position in respect of temporary planning permissions is different. Here, the time-limit governs the length of time for which the development is permitted to remain *in situ*. In the case of a material change in use, this is the period of time for which the authorised use may be continued. Once the time-limit expires, then the use must cease. Conditions of this type are imposed pursuant to section 34(4)(n) of the PDA 2000. There is no

minimum period prescribed. The provisions of sections 40, 41 and 42 of the PDA 2000 do not apply to a temporary planning permission: see section 40(2)(a)(ii).

THE SCHOOL BOARD'S SUBMISSION TO AN BORD PLEANÁLA

17. The school board had made a very detailed submission to An Bord Pleanála in response to the developer's appeal. The points made in the submission included *inter alia* the following. First, the inappropriateness of locating a drug injection facility in close proximity to a primary school was highlighted. The submission cited a report from a clinical psychologist, retained by the school, to the effect that to have any facility close to a children's learning establishment that appears to normalise illegal practices (such as needle exchange, injecting with drugs or anti-social behaviour) as being acceptable would have an influence on a child's understanding. The clinical psychologist is recorded as saying that children "model" their lives and behaviour on the many influences they are exposed to: what they see will influence what they will do.

18. The school board also refers to the fact that legislators and planning authorities have recognised the impressionability of young children. The submission states that planning authorities (including, as it happens, Dublin City Council) have introduced "no fry zones" around schools to help alleviate and safeguard against childhood obesity. The relevant policy in the current Dublin City development plan reads as follows.

> "To safeguard the health of young people that no further fast food outlets shall be permitted within 250m of primary and secondary schools, (not to apply to delicatessen and convenience stores), unless an evidence-based case is made by the applicant that the proposed development would be in the interests of the proper planning and development of the area."

19. The submission also refers to what was then draft legislation (since enacted as the Public Health (Alcohol) Act 2018) pursuant to which the advertising of alcohol is banned from areas in and around schools and other educational facilities.

20. Secondly, it was submitted that the planning application represents an application for the expansion of the services at the premises by stealth, and that the proposed drug injection facility would represent an *additional* service. Attention was drawn to the fact that the proposed operating hours of the facility would overlap with hours at which children attended at the school (including attendance at a pre-school breakfast club and post-school homework club). The submission noted that the developer's appeal had stated that there will be a minimum of sixty-three supervised injections prior to 9 am, with each person allowed a maximum time of twenty minutes.

21. Thirdly, it was submitted that the proposed development would give rise to increased drug use and activity in the area and would cause a *de facto* "drugs marketplace" to be created. It is a basic principle of economics that supply follows demand.

22. Finally, it had been alleged in the submission that the developer had not complied in full with the requirements of a planning permission granted in October 2008.

FAILURE TO ENGAGE WITH THE SUBMISSION MADE

23. An Bord Pleanála's decision fails to engage with the detailed submission made by the school board. Indeed, the decision makes no reference at all to the school, education or the impact of the proposed development on the welfare of the pupils. This omission to make any reference whatsoever to the impact of the proposed drug injection facility on the school is all the more inexplicable in circumstances where the school board, in their submission on the appeal, had criticised the planning authority's decision for not referring to the proximity of the proposed development to the school, and had expressly requested An Bord Pleanála to have due regard to this proximity in its determination of the appeal.

24. Counsel for An Bord Pleanála sought to overcome this startling omission from An Bord Pleanála's decision by submitting that the decision must be read in conjunction with the inspector's report. This submission is correct insofar as it goes. The judgment of the Supreme Court in *Connelly v. An Bord Pleanála* [2018] IESC 31; [2018] 2 I.L.R.M. 453 confirms (at paragraph 9.2) that it is not necessary that all of the reasons must be found in the decision itself or in other documents expressly referred to in the decision. The reasons may be found anywhere, provided that it is sufficiently clear to a reasonable observer carrying out a reasonable enquiry that the matters contended actually formed part of the reasoning. If the search required were to be excessive, then the reasons could not be said to be reasonably clear.

25. On the facts of the present case, it is entirely proper that the board's decision be read in conjunction with the inspector's report. This is because not only does the outcome of the appeal largely approximate to that recommended by the inspector, An Bord Pleanála has also published on its website the board direction of 17 December 2019 which expressly states that the board decided to grant planning permission "generally in accordance with" the inspector's recommendation. The content of the inspector's report can, therefore, legitimately be called upon to elucidate the board's rationale. This is subject to the caveat—discussed further under the next heading below—that the board did not follow the recommendation in respect of the *time period* for which the temporary use should be authorised.

26. Recourse to the inspector's report does not, however, advance the board's defence of these judicial review proceedings. This is because the inspector did not engage adequately with the issues raised by the school board. The inspector, at most, sets out a fair summary of the school's submission (in particular, at pages 21-23 and 25 of her report). There is then a section of the report headed up "Location – Proximity to Sensitive

Uses" (§7.5). Again, the inspector sets out a fair summary of the submissions on both sides. This section of the inspector's report does not, however, reach any conclusions or make any findings in respect of the school's submissions. Rather, the inspector ends this section of her report by observing that, as with all of the issues assessed in the appeal, the outstanding question is the risk-benefit analysis of (i) an attempt to clean up the negative impacts of the existing service versus (ii) the possibility that a larger number of users and new services will negate the benefits of supervising such behaviours indoors. The inspector then emphasises that the purpose of the planning process is not to stray into the remit of the licensing process, but to assess the impact of the proposed development on the receiving environment. The inspector flags that this will be addressed further at §7.7 of her report.

27. In the event, this latter section of the report is confined to the impact on residential amenity and public safety, and the specific issues raised by the school board are not addressed. As appears from the passages of the report cited at paragraphs 11 and 12 above, the inspector confined her analysis to the impact on the general vicinity and area. Even then, the inspector took the view that the planning application presented a difficult question, and that a temporary planning permission was the appropriate answer. Crucially, the stated purpose of allowing planning permission on a trial basis was to allow for a subsequent review of the development in the interest of residential amenity and public safety. There is no reference to a review of the impact on the school and its pupils.

28. The right to make submissions carries with it, as a corollary, a right to be informed of the reasons for which those submissions are not accepted. See *Balz v. An Bord Pleanála* [2019] IESC 90; [2020] 1 I.L.R.M. 367 (at paragraph 57).

> "[…] It is a basic element of any decision-making affecting the public that relevant submissions should be addressed and an explanation given why they are not accepted, if indeed that is the case. This is fundamental not just to the law, but also to the trust which members

> of the public are required to have in decision making institutions if the individuals concerned, and the public more generally, are to be expected to accept decisions with which, in some cases, they may profoundly disagree, and with whose consequences they may have to live."

29. The principles in *Balz* have most recently been confirmed by the Supreme Court in *Náisiúnta Leictreach Contraitheoir Eireann v. The Labour Court* [2021] IESC 36.

30. In the present case, the school board had made a detailed submission which *inter alia* questioned the very principle of locating a drug injecting facility in such close proximity to a school. The submission expressly cited examples from legislation and from the local planning authority's own development plan which indicate that certain (even lawful) uses are not suitable in the vicinity of a school, i.e. alcohol advertisements and fast-food outlets. The school sought to draw an analogy with the proposed use.

31. The detail of the school board's submission is simply not engaged with at all in An Bord Pleanála's decision, and not adequately engaged with in the inspector's report.

REASONABLENESS AND REASONS

32. The school board has sought a declaration that An Bord Pleanála's decision was unreasonable and disproportionate. The threshold to be met by an applicant for judicial review who seeks to pursue such grounds is extremely high and is almost never met in practice. This is because an applicant must demonstrate that the decision impugned is fundamentally at variance with reason and common sense. The court cannot interfere with the decision of an administrative decision-making authority merely on the grounds that (a) it is satisfied that on the facts as found it would have raised different inferences and conclusions, or (b) it is satisfied that the case against the decision made by the authority was much stronger than the case for it. (*O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39 (at 71)). These limitations are of particular importance in relation to the

decisions of planning authorities and An Bord Pleanála (*ibid*.). These principles have been reconfirmed by the Supreme Court in *Meadows v. Minister for Justice and Equality* [2010] IESC 3; [2010] 2 I.R. 701.

33. The starting point in assessing any "reasonableness" challenge must be to identify what precisely the public authority has decided. This might be thought to be so obvious as not to require stating. In the present case, however, certain of the arguments advanced on behalf of the school board tend to overlook the fact that the impugned decision is to grant planning permission on a *temporary* basis only. There is a crucial difference between the decision actually made, and a decision to grant planning permission in conventional form. A permission of the latter type would have authorised the proposed use on a permanent basis. This would be subject only to the rarely invoked power to revoke a planning permission under section 44 of the PDA 2000. The argument for saying that it would have been unreasonable—on the basis of the limited analysis carried out by An Bord Pleanála—to grant a *permanent* planning permission would have been stronger than the argument in respect of the *temporary* permission actually granted.

34. The question for determination in these proceedings is whether it was unreasonable to grant a temporary planning permission which authorised the use for a three year period.

35. In assessing the reasonableness of the decision, it is necessary to consider the reasons stated for the decision. As explained by the Supreme Court in *Connelly v. An Bord Pleanála* (cited above), one function of the obligation to give reasons is to allow the courts to exercise their supervisory jurisdiction. See paragraph 6.15 of the judgment as follows:

> "Therefore, it seems to me that it is possible to identify two separate but closely related requirements regarding the adequacy of any reasons given by a decision maker. First, any person affected by a decision is at least entitled to know in general terms why the decision was made. This requirement derives from the obligation to be fair to individuals affected by binding decisions and also contributes to

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

36. The courts cannot properly exercise their supervisory jurisdiction in the absence of a statement of reasons. The "reasonableness" test obliges the court to consider, to a very limited extent, the rationale or justification for the impugned decision. The courts will, of course, show significant deference to the decision-maker's expertise in the exercise of a discretion which has been entrusted to them under legislation. The strength or weight of reasons required to explain a policy-type decision, such as that inherent in most planning appeals, is slight.

37. There are two aspects of the board's rationale for granting a temporary planning permission which are of concern. The first relates to the period for which the use is to be permitted, namely three years. The second relates to the purpose or objective of the temporary permission. These concerns are elaborated upon below.

(i). Period of temporary planning permission

38. There had been a clear consensus between the other public authorities, i.e. the Health Service Executive and the Minister for Health, that the appropriate period for the pilot scheme was eighteen months. Indeed, the Health Service Executive reserved the right to bring the operation of the facility to an end even earlier, i.e. after the initial six month period. The pilot scheme is described in the tender document as follows.

> "The HSE hereby invites suitably qualified and experienced service providers to submit tenders to provide a medically supervised injecting facility in Dublin City Centre area on a pilot basis; the pilot phase will be envisaged for an 18 month period with an evaluation at 6 months and again at 18 months. The facility will operate by means of a Licence to be granted under recent legislation. The service will provide for adults who use drugs who are on the premises of the

> supervised injecting facility with the permission of the licence holder, for the purposes of consuming drugs by injection only."

39. See also §1.3.10 of the tender documentation as follows:

> "An external evaluation of the pilot phase of the SIF will be carried out by an independent agent/organisation engaged by the HSE. The pilot phase will be envisaged for an 18 month period. However, Tenderers should note that the HSE reserves the right to review the service after 6 months based on the evaluation of the service after which a decision will be taken as to whether the HSE will continue to oversee the service as is, to amend the service being provided, or to cease the service and consider other options. In order to support the evaluation the operators of the SIF will be expected to record and provide information on the following areas: […]"

40. Eighteen months is the period identified by the inspector in her report. It is also the time period to which the developer refers at §5.1.7 of its appeal submission, when noting that An Bord Pleanála can restrict by condition the operation of the facility as may be deemed appropriate.

41. The inspector, in her recommendation, increased the period from eighteen months to two years. This increase was as a result of an error of law on the part of the inspector, rather than reflecting any principled view that a longer period than eighteen months should be allowed. (See discussion at paragraphs 14 to 16 above).

42. There is nothing in An Bord Pleanála's decision which explains why the board, unilaterally, determined that a period of three years was appropriate. An Bord Pleanála cannot fall back on the inspector's report as providing the reasoning in circumstances where An Bord Pleanála did not follow the inspector's recommendation in this regard.

43. Counsel on behalf of An Bord Pleanála submitted that the court should *infer* that a period of three years had been chosen because it coincided with the maximum possible contractual period allowed for under the tender documentation published by the Health Service Executive. The proposed contract was to be structured in such a way that,

following the initial six and eighteen month pilot periods, there was an *option* to extend the contractual period to a maximum duration of three years.

44. The difficulty with this submission is that there is nothing in either the board's decision or the inspector's report which supports such an inference. Whereas there is a reference to the tender documentation and the eighteen month pilot scheme in the inspector's report, there is no mention at all of the possibility that the contract might be extended to three years.

45. It is correct to say, per *Connelly v. An Bord Pleanála*, that reasons may be found elsewhere in the documentation, provided that it is sufficiently clear to a reasonable observer carrying out a reasonable enquiry that the matters contended actually formed part of the reasoning. If, however, the search required were to be excessive, then the reasons could not be said to be reasonably clear.

46. It would be necessary for a member of the public to engage on precisely such an excessive search to find the reference to three years in the tender documentation. Such a member of the public would have to trawl through the hundreds of pages of documentation on the appeal file, and then examine the fine print of the tender documentation.

47. There is no sound basis for inferring that this tender documentation is the source of the three year period. It is at least as plausible to infer that An Bord Pleanála were labouring under the same error of law as the inspector, and mistakenly thought that a temporary planning permission could not be granted for a period of eighteen months.

48. The practical consequence of the planning permission is that, for a three year period, there would be no possibility, *under the planning legislation*, of putting an end to the authorised use. This would be so irrespective of the impact of same. Even if it transpired that the proposed drug injection facility were to have the adverse impacts anticipated by the school board and the other objectors, the local planning authority, Dublin City

Council, would be powerless to do anything about it under the PDA 2000 until the three year period expired.

49. This would be so notwithstanding that the board's own inspector had described the risk, to the receiving environment, of the project failing as "significant and severe". (See §7.7.1 of the inspector's report, cited at paragraph 11 above).

50. Counsel for An Bord Pleanála submits that, from the perspective of a grant of planning permission, it is entirely appropriate for the board to determine that the facility is something that can operate for a limited period, that being three years, to allow evaluation and monitoring to take place, and it can then allow the Health Service Executive to determine whether the pilot project is operating in the manner in which it is meant to. (Day 1 transcript, page 146/7).

51. If and insofar as An Bord Pleanála appears to suggest that the lack of control under the planning legislation is not a concern in that the licensing system under the Misuse of Drugs (Supervised Injecting Facilities) Act 2017 could be relied upon instead, this would be unreasonable in the wider sense of An Bord Pleanála abdicating its responsibility to the Minister for Health. The licensing system and the planning system exist in parallel and the question of the location of the development and its suitability in terms of land-use planning are matters for An Bord Pleanála. The two systems are intended to be complementary and An Bord Pleanála is obliged to regulate the proposed use in terms of land-use planning. Tellingly, the board's own inspector considered it important that a mechanism should exist under both the licence and the permission for the operation of the facility to cease should it be found that the stated aim of an improvement in the public realm had not been achieved. (See §7.7.5 of the inspector's report, cited at paragraph 12 above). The choice of a period of three years renders the planning legislation ineffective in this regard.

52. In summary, in the absence of any explanation in An Bord Pleanála's decision as to why a period of three years was considered appropriate, the court is driven to the conclusion that the decision is unreasonable. In the absence of any explanation, the decision is to be condemned either (i) as failing to state adequate reasons for what was a crucial finding, or (ii) as irrational insofar as the inference must be that there were no lawful reasons capable of sustaining the decision.

(ii). Purpose or objective of the temporary permission

53. An Bord Pleanála has sought to defend the proceedings on the basis that it was reasonable to grant planning permission on a temporary basis, to allow the impacts of the proposed use to be reviewed after a trial period.

54. It may be convenient to recall the wording of Condition No. 2.

> "2. The use of the premises as a Medically Safe Injecting Facility shall cease on or before three years from the date of first operation, unless before the end of that period, permission for the continuance of the use beyond that date shall have been granted.
>
> Reason: To allow for a review of the development having regard to the circumstances then pertaining and in the interest of residential amenity and public safety."

55. Aside from the fact that the rationale for choosing the longer period of three years has never been properly explained, it is also a cause of concern that there is no reference to educational uses, the school or its pupils in Condition No. 2 of the planning permission. Instead, the review is to be carried out from the perspective of residential amenity and public safety alone. It is unreasonable to limit the review in this way, given that one of the principal issues raised on the appeal had been the appropriateness of locating the facility in close proximity to an existing school. As appears from the points raised by the school board, the impacts upon a school and its pupils are different to the more general impact on the residential amenity of an area.

PLEADING POINT

56. For the sake of completeness, I should set out my findings on a pleading point raised on behalf of An Bord Pleanála and the notice party, Merchants Quay. It should be explained that, although appearing at this late stage in the judgment, it had been necessary for me to reach a finding on the pleading point first, in advance of my consideration of the merits of the case. This is because it is only once the parameters of the pleaded case have been identified that the court can then embark upon the substance of the case. I have, however, deliberately deferred setting out my findings until this stage of the judgment. This is done for ease of exposition. It is hoped that the reader will be in a better position to understand the pleading point now that they have an appreciation of the circumstances of the case.

57. The approach to be followed in identifying the parameters of the pleaded case are well established. Section 50A(5) of the PDA 2000 provides that no grounds shall be relied upon in the application for judicial review under Order 84 other than those determined by the court, on the leave application, to be "substantial" under subsection (3)(a). Order 84, rule 20(3) of the Rules of the Superior Courts provides that an applicant for judicial review should state precisely each ground of challenge, giving particulars where appropriate, and identify in respect of each ground the facts or matters relied upon as supporting that ground.

58. It should be noted that there is a distinction between the *grounds* of challenge and the *evidence* provided in support of those grounds. Whereas the grounds of challenge must be pleaded within the eight week time-limit allowed for judicial review proceedings, there is some leeway in respect of the timing of the delivery of evidence in support of those grounds. See *McNamara v. An Bord Pleanála (No. 2)* [1996] 2 I.L.R.M. 339 at 352 as follows:

> "[…] The applicant is not precluded from introducing evidence after expiration of the two-month limitation period in further support or amplification of the grounds of objection he relies on; provided that such grounds are specified in his original documentation which has been served on all relevant parties within time. It should be emphasised, however, that the applicant's statutory obligation regarding appropriate notice to the developer within time, extends only to his grounds for challenging the planning permission. Apart from service of an affidavit verifying such grounds, he has no obligation to furnish any other information within the limitation period as to evidence or arguments in support of the case he proposes to make on judicial review."

59. In *People Over Wind v. An Bord Pleanála (No. 1)* [2015] IEHC 271, the High Court (Haughton J.) described the procedural requirements under section 50A(5) of the PDA 2000 and Order 84, rule 20(3) as "stringent", and as allowing "little room for manoeuvre" either for applicants or for the court post the order granting leave to apply for judicial review. Haughton J. held that, in assessing the scope of a statement of grounds, the approach that should be adopted by a court is that of a "fair and reasonable reading" of the statement of grounds—not from the point of view of one or other parties to the proceedings—but rather from the point of view of the court on an objective basis. Adopting this approach, Haughton J. ruled that the applicants were not entitled to rely on general pleas to advance a specific and detailed complaint which had not been pleaded, contrary to Order 84, rule 20(3).

60. In *McEntee v. An Bord Pleanála*, unreported, High Court, Moriarty J., 10 July 2015, the applicant sought to argue, at the full hearing of the judicial review proceedings, that An Bord Pleanála had not adequately evaluated the proposed development in the course of its EIA, or that the EIA was not accurately recorded by the board. Moriarty J. reiterated that it is not appropriate to seek to rely on broad general catch-all pleas which tell the respondent little of the actual basis or nature of the challenge it faces and what the respondent should do to meet the case against it. The judge went on to say that—in determining whether an argument has been properly pleaded—the court should adopt a

"fair and reasonable" reading of, and conduct a thorough and objective examination of, the statement of grounds. On the facts of *McEntee*, the court held that the statement of grounds made no specific reference to the main argument which the applicants had attempted to pursue at the hearing. The court went on to say that the statement of grounds did not set out, let alone set out with precision, an argument that An Bord Pleanála either did not undertake an EIA, or that it had (improperly) relied on the evaluation in the inspector's first report as fulfilling its requirement to carry out an assessment. Further, there was no mention anywhere in the statement of grounds of article 3 of the EIA Directive, nor of Part X of the PDA 2000.

61. In the more recent judgment of *Kelly (Eoin) v. An Bord Pleanála* [2019] IEHC 84 (at paragraph 128), the High Court (Barniville J.) has indicated that notwithstanding a breach of Order 84, rule 20(3), it might be appropriate in certain circumstances for the court to consider the merits of an argument, provided always that the other parties would not be prejudiced.

62. Applying the principles in these three judgments to the statement of grounds in the present case, I have come to the conclusion that—on a "fair and reasonable" reading—the case as pleaded is broad enough to encompass the arguments advanced in respect of reasons and reasonableness.

63. The relief sought at paragraph (d)(H) of the statement of grounds is a declaration that the impugned decision is void, as it fails to give any, or any adequate, reason for not respecting and vindicating the rights of the children of the applicant's school, or for not seeking further information in relation to their health and welfare. This is broad enough to encompass the challenge to the adequacy of the statement of reasons. Moreover, it is apparent from the statement of opposition filed on behalf of An Bord Pleanála that the board was, at that early stage, already in a position to articulate the arguments ultimately

relied upon at hearing. In particular, it is pleaded in the statement of opposition that the board had decided to grant permission generally in accordance with the inspector's recommendations; that the board would rely on the totality of the analysis contained in the inspector's report; and that the inspector's report contains a detailed analysis of all of the issues raised by the school board.

64. More generally, the adequacy of the stated reasons would implicitly arise for consideration in the context of the analysis of the challenge to the reasonableness of the board's decision. As discussed earlier, the "reasonableness" test obliges the court to consider, to a very limited extent, the rationale or justification for the impugned decision.

65. The relief sought at paragraph (d)(B) of the statement of grounds is a declaration that the board's decision was unreasonable, disproportionate and made contrary to fair procedures and or natural and constitutional justice. A further declaration is sought at paragraph (d)(E) to the effect that the impugned decision is void as it purports to grant permission for 3 years for activity that is *prima facie* unlawful after 18 months. This is broad enough to encompass the challenge to the reasonableness of the decision to grant planning permission for a three year period.

66. Again, the arguments relied upon by An Bord Pleanála at the hearing of the proceedings are all presaged in the statement of opposition. In particular, the argument that the licensing of the facility under the Misuse of Drugs (Supervised Injecting Facilities) Act 2017 is distinct from the grant of planning permission, and that the board has no role in the grant of a licence under that Act, is clearly made. Further, the argument that the three year period in Condition No. 2 reflects the maximum contract duration of three years contained in the tender issued by the Health Service Executive is expressly pleaded (at paragraph 13 of the statement of opposition).

67. In summary, it is apparent from the statement of opposition that An Bord Pleanála had been able to identify and respond to the two grounds on the basis of which these proceedings have ultimately been decided. As it happens, the court has ruled against the board on those arguments on the merits (for the reasons set out earlier). For present purposes, however, what is significant is that the board had been able to identify and engage with the argument in the statement of opposition. There is no question of the board having been taken by surprise at the hearing.

CONCLUSION AND PROPOSED FORM OF ORDER

68. One of the principal issues for determination on the planning appeal had been whether it is consistent with proper planning and sustainable development to locate a medically supervised drug injecting facility in close proximity to an existing primary school. The school board had made a detailed submission in opposition to the proposed development. This submission contended that the two land uses were incompatible and had identified what the school board said would be adverse impacts on the school.

69. An Bord Pleanála's decision, even when read in conjunction with the inspector's report as per *Connelly v. An Bord Pleanála*, does not engage adequately with these submissions. The decision is not saved by reference to the fact that planning permission had been granted on a *temporary* basis only. The stated reason for the three year limitation on the authorised use is to allow for a review thereafter, but there is, again, no reference to the impact on the school or its pupils. The failure to properly address the school board's submissions and to explain the reasons for which they were not accepted represents a breach of the statutory requirement to state the main reasons and considerations for the decision. This breach is enough, on its own, to invalidate the planning permission.

70. I have also concluded that the planning permission is invalid on the separate ground that, *in the absence of any explanation for same*, the decision to permit the authorised use for three years is unreasonable. The reasons for this latter finding are set out at paragraphs 38 to 52 above.

71. Accordingly, I propose to make an order of *certiorari* setting aside the decision to grant planning permission. My provisional view is that the matter should then be remitted to An Bord Pleanála for reconsideration. If any of the parties disagree with the proposed orders, then this should be addressed by way of written legal submissions to be filed by 1 October 2021.

72. Insofar as the costs of the proceedings are concerned, the default position under Part 11 of the Legal Services Regulation Act 2015 is that a party who has been "entirely successful" in proceedings is *prima facie* entitled to costs against the unsuccessful party. The court retains a discretion, however, to make a different form of costs order.

73. Were the default position to apply, then the applicant for judicial review would be entitled to recover its costs as against the respondent, with the notice party developer bearing its own costs. If any of the parties wishes to contend for a different form of costs order, then written legal submissions should be filed by 1 October 2021.

Appearances

Jim O'Callaghan, SC and Aillil O'Reilly for the applicant instructed by Flynn O'Driscoll
Aoife Carroll for the respondent instructed by Philip Lee
Eamon Galligan, SC and Sonja O'Connor for the notice party instructed by Crowley Millar

Approved Garrett Simons