THE HIGH COURT

COMMERCIAL

[2022] IEHC 470

Record No. 2021/659JR

2021/ 137 COM

BETWEEN

SUE ANN FOLEY

APPLICANT

AND

ENVIRONMENTAL PROTECTION AGENCY

and

IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

IRISH CEMENT LIMITED

NOTICE PARTY

- AND -

THE HIGH COURT

COMMERCIAL

Record No. 2021/658 JR

BETWEEN

MICHELLE HAYES

APPLICANT

AND

ENVIRONMENTAL PROTECTION AGENCY

and

THE MINISTER FOR ENVIRONMENT, CLIMATE AND COMMUNICATIONS, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

IRISH CEMENT LIMITED

NOTICE PARTY

JUDGMENT OF Mr. Justice Twomey delivered on the 26th day of July, 2022

INTRODUCTION

1. Charleton J. stated extra-judicially, in the foreword to the *Trinity College Law Review* (noted below), that:

> '*[c]ivil cases are unfocused, demanding too much judicial time and this requires radical reform'*.

In the context of judicial review cases, the Bar Council made a related point in its submission to the *Review of the Administration of Civil Justice* (October, 2020) to the effect that the:

> *'manner in which the judicial review list currently operates is a drain on judicial resources but suggested that "in reality there is little enforcement"'*

of the rules.

2. It is against this background that this case considers, *inter alia*, the *'enforcement'* of the rules regarding pleadings in an application for judicial review, where the State respondents complain that a very considerable amount of time was spent by the applicants raising issues which were not part of their pleaded case, during a hearing which took seven days in the High Court.

3. In the context of the claim that there is '*little enforcement'* of the rules by a Court, this judgment considers in particular whether failures to comply with pleading rules, which led to valuable court time being used, should (a) result in the issues, which were not pleaded, nonetheless being addressed in the court's judgment, in case an appellate court were to decide that the matters were covered by the pleadings or (b) whether a stricter approach should be adopted which may discourage the practice of parties taking up court hearing time with matters which were not pleaded, particularly at a time of scarce resources in the High Court.

4. The judicial review at issue concerns a challenge to the legality of the issue of a revised industrial emissions licence granted to Irish Cement (the notice party in these proceedings) by the defendant, the Environmental Protection Agency (the "EPA"). The impugned revisions to

that licence permit it to change the fuel it incinerates at its cement plant in Castlemungret, Co. Limerick from fossil fuels alone to fossil fuels *and* non-hazardous processed waste plus alternative raw materials, with the prospect that this change will save up to 40,000 tonnes in carbon emissions per annum, reduce the amount of waste ending up in landfill and reduce the imports of fossil fuel.

5. For their part, the applicant in the first case ("Ms. Foley") and the applicant in the second case ("Ms. Hayes"), who are both living in the vicinity of the cement plant, allege that the grant of the revised licence by the EPA is unlawful. They claim, amongst other things, that the EPA failed to consider the effect of the revisions to the licence upon bryophytes (i.e. moss) in a nearby protected site under Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (the "Habitats Directive") and that the EPA failed to provide reasons for its decision that Irish Cement is a '*fit and proper person'* to be granted a revised licence, particularly where it had been guilty of three breaches of environmental legislation in the preceding 15 years.

6. In addition to these and the other substantive claims made by Ms. Hayes and Ms. Foley, this case raises a number of issues of general application, which will be briefly referenced at this juncture.

<u>Points not pleaded were argued in court</u>

7. Firstly, as already noted, this case considers the principle that the case which is argued in court should be the case which is made out by the parties in their pleadings. This principle was recently expressed in the following terms by the Court of Appeal in *Morgan v. ESB* [2021] IECA 29 at para. 11, in the context of a personal injuries claim:

> "A plaintiff is required to plead specifically and cannot properly rely on the pleading equivalent of the Trojan Horse, which can as needed be sprung open at trial to disgorge a host of new and/or reformulated claims." (*per* Collins J.)

Is there a need to limit long trials?

8. Secondly, this case considers a related issue regarding the length of trials. In this regard, Charleton J. has stated extra-judicially in the Foreword to the *Trinity College Law Review* (2022) at p. 2:

> "It is **the challenge of the courts to resume command over the adversarial system so that, at the earliest stage, the core of a case is identified** and focused on. Not just legal complexity has contributed to the problem of sprawl and lack of focus in our courts, but that quality of advocacy most appreciated by judges, **concision, has become almost a lost art.** When the approach to hearings changes over years by **gradually becoming longer and less focused**, that may not immediately be noticed, but it grows and grows. That becomes not just **a change in the quantity of time justice takes to administer but in the quality of justice itself**. **Civil cases are unfocused, demanding too much judicial time and this requires radical reform.** Criminal cases have a similar issue, with a *voir dire* being demanded on almost every issue (legally impossible, save for confession admissibility and competence to testify) and witnesses detained sometimes for weeks. How can that be fair? When I used to prosecute rape cases in the Circuit Criminal Court in Dublin, the duration was about two days. More recently, it's at least a week or two. And there are cases that have become noteworthy for lack of focus and for the unreasonable demands made of witnesses.
>
> **How is the growth in time, and thus expense, and sometimes the trauma, of trials to be explained**? Perhaps with the influence of the public inquiry, not into specific events crystallised precisely in court pleadings, but general traverses of events, cross-examinations have sprawled, as have issues grown. This has not been a healthy development. **Urgent attention is needed so that a similar model to the United**

States federal courts of assessing a case and allocating time and limiting issues is ushered in to our system." (Emphasis added)

This is relevant because the trial ran for seven days, which is almost two weeks of court sitting time.

Judicial review cases are a considerable cost to the taxpayer

9. Thirdly, where arguing matters which have not been pleaded, combined with the fact that a trial takes almost two weeks, arise in the same case, especially in a judicial review case (rather than a case which is exclusively funded by two private parties), this raises a third issue of some significance, namely that every judicial review that is conducted in the High Court is at a very considerable cost to the taxpayer. This is because judicial review involves a challenge to a decision of a State body and so it is inevitably the case that the taxpayer will be covering the legal costs incurred in defending that challenge and the longer the trial, the more cost to the taxpayer.

10. In judicial review the legal costs paid by the taxpayer are particularly significant. This is because, as the law currently stands, judicial reviews are heard only in the High Court, since s. 56 of the Courts of Justice Act 1924 excludes habeas corpus, certiorari, quo warranto, prohibition, information and mandamus from the jurisdiction of the Circuit Court, and as noted in de Blacam, *Judicial Review*, (3rd edn.) at p. 98 '*whatever the basis of the challenge, the applicant's case will be heard in public in the High Court'.*

11. The fact that *'Ireland ranks among the highest-cost jurisdictions internationally for civil litigation'* (*per* the *Review of the Administration of Civil Justice*, October 2020 at p. 267 chaired by Kelly P. (the "Kelly Review")) is particularly relevant in judicial review cases, since of the three courts of first instance (the District, Circuit and High Court), which could in theory hear judicial reviews, the High Court is by far the most expensive and it is this court to which judicial reviews are restricted. This means, in very broad terms, an action which lasts a day in

the High Court might incur legal costs of €50,000-€100,000, while a similar length action in the Circuit Court might incur legal costs of €5,000-€10,000 and in the District Court legal costs of €500-€1,000. Yet, in the absence of a change in the law, *all* judicial reviews, no matter whether they are of national importance or very minor in nature, will continue to be brought only in the High Court and thus at the greatest possible cost to the taxpayer.

An expensive judicial hammer to crack a nut

12. This means that for minor judicial reviews, having them heard in the High Court is akin to using a (very expensive judicial) hammer to crack a nut. For example, in *Shields v. The Central Bank of Ireland* [2020] IEHC 518, there was a judicial review brought, of a refusal to exchange damaged bank notes in the sum of €4,950, in the High Court (with litigation costs typically of tens or hundreds of thousands of euro) and not say in the District Court (which has jurisdiction to deal with matters of much more significance to a citizen, e.g. matters in which a citizen can be deprived of his liberty for up to 12 months). More recently in *Gannon v. Road Safety Authority* [2022/544/JR] an application for leave for judicial review was brought of the refusal to renew Mr. Gannon's driving licence, through an alleged mix-up regarding his son, of the same name, who was disqualified from driving, something which the judge said was something the High Court should not have to deal with (*Irish Times*, 30th June, 2022). It is also relevant to note that in the Court of Appeal case of *Tennant v. Reidy* [2022] IECA 137, which involved a dispute with a receiver over €20,000 and so was not a judicial review, but which incurred significant High Court costs, Noonan J. made a statement that seems equally applicable to many judicial reviews:

> "[G]iven the amounts involved and the value of the property, it seems to me that this matter should never have come before the High Court at all."

13. Yet, as the law currently stands, if a party wishes to bring a judicial review, no matter how minor, she must do so in the High Court, and so minor judicial reviews such as *Shields*

and *Gannon* will continue to be dealt with by the High Court at considerable cost to the taxpayer and at costs which are completely disproportionate to the issues to be resolved. It is to be noted that the Circuit Court and the District Court have the jurisdiction to hear cases that could hardly be more serious, such as manslaughter (in the Circuit Court) and orders taking children from their parents and putting them into care (in the District Court). Yet, as the law currently stands minor judicial reviews regarding challenges to the legality of a decision by a State body, such as the exchange of currency worth €4,950 or the issue of driving licences, must be heard at the cost of tens or hundreds of thousands of euro to the taxpayer in the High Court.

An issue for individual citizens as well as taxpayers collectively

14. This is not just an issue for the taxpayer who will be responsible for paying the lawyers for the State body defending the judicial review. It is also an issue for a citizen who wishes to challenge a decision of a State body, such as an error in the issue of a driving licence or refusal to convert €4,950 in damaged currency. Such citizens are entitled to have their rights vindicated when they allege that a State body has breached their rights, but should they be faced with the most expensive court of first instance in the State as their only option, particularly in a country where legal costs are among the '*highest-cost jurisdictions internationally'* (with High Court costs in the tens or hundreds of thousands of euro) and where the taxpayer is paying the costs for the other side of the litigation. If someone who had no knowledge of the court system was told that these were the costs involved in the resolution of minor disputes against State bodies, she might be surprised, to put it at its mildest.

15. While the judicial review in this case could not be described as minor, the fact that it took seven days in the High Court means that the taxpayer has had to engage lawyers at considerable expense for that period to defend the proceedings.

Too little enforcement by the courts of the rules?

16. Since these three issues (i.e. (i) parties going outside pleadings, (ii) the length of trials and (iii) judicial reviews in the High Court being a significant cost to the taxpayer and the citizen) come together in this case it is pertinent to note the observation made on behalf of the Bar Council in relation to the need to reform judicial reviews, which was noted in the *Kelly Review*. At p. 203 of the Review, it is noted that the Bar Council made a submission in which:

> "[It] was acknowledged that the **manner in which the judicial review list currently operates is a drain on judicial resources** but suggested that '**in reality there is little enforcement' of the reforms introduced by the 2011** amendments to the rules of court on time limits and the content of statements and affidavits, and that proper enforcement of the rules, including affording less latitude to respondent bodies to file and deliver opposition papers, should reduce the number of unmeritorious claims." (Emphasis added)

17. It seems clear that the reference to the '*reforms introduced by the 2011 amendments to the rules of court'* is a reference to the reforms introduced by the 2011 amendments to the *Rules of the Superior Courts* which deal with, *inter alia*, the requirement of an applicant in judicial review to clearly plead her case, and in particular the absence of enforcement by the courts of the rules on pleadings in judicial review cases.

Greater onus on courts to ensure efficiency in environmental cases?

18. A fourth issue of general application arises where the judicial review relates to an environmental issue, as in this case. This is because it is arguable that, while the threat of a costs order against a litigant operates as a deterrent to the inefficient use of court time, it does not have the same deterrent effect in environmental cases as in other cases. This is because in non-environmental cases if a litigant is inefficient in her use of court time, she is likely to have costs awarded against her (even if she wins her case) – see the Supreme Court decision in *Permanent TSB plc v. Skoczylas* [2021] IESC 10 at para. 12, where it is stated that:

"Part of the function of the court's jurisdiction to award costs is to encourage a **responsible and efficient approach to litigation**." (Emphasis added)

19. In this regard, in both *Word Perfect Translation Services Limited v. The Minister for Public Expenditure and Reform* [2022] IEHC 219 and *Somers v. Kennedy* [2022] IEHC 78 the High Court had to unnecessarily spend time dealing with a case on its merits, because the winning litigants failed to have the dispute decided on a preliminary point and so failed to conduct the cases '*in the most cost effective manner possible' (*per Butler J. in *Somers* at para. 10). Accordingly, in both cases, in reliance on s. 169(1) of the Legal Services Regulation Act 2015 and the Court of Appeal decision in *Chubb v. The Health Insurance Authority* [2020] IECA 183, the winning litigants were penalised, by not receiving their full costs, for their inefficient use of court resources.

20. In contrast, the principle in certain environmental cases is that costs should not be prohibitively expensive, see for example in *North East Pylon Pressure Campaign Ltd. v. An Bord Pleanála No.5* [2018] IEHC 622 where no order as to costs was made against an applicant for judicial review even though it had lost the litigation. See also the comments of Humphreys J. in *Flannery v. An Bord Pleanála* [2022] IEHC 327 at para. 32 regarding the deterrent aspect of a costs order. Commenting on how costs were to be awarded where the applicant won some points and lost others, he states:

"The incentives here do not favour discounting as some sort of general approach. **Unlike in commercial cases, there is never going to be anything like the same level of deterrent for applicants** to deter them from litigating the issue of costs all the way to the Supreme Court, Luxembourg, Strasbourg, and the Aarhus Convention Compliance Committee in Geneva if needs be, since the costs of the costs issue can never be prohibitively expensive." (Emphasis added)

Thus, the threat of an award of costs against an applicant may not operate as effectively (to encourage the efficient use of court time) in an environmental case, as it does in non-environmental cases. It is arguable therefore that there is a greater onus on the court in environmental cases to ensure that there is an enforcement of the rules on pleadings in those cases, since the taxpayer, even if it wins the case, may not be awarded its full legal costs against a losing applicant in an environmental judicial review.

21. It is against this legal background that the EPA and the second and third named respondents (collectively the "State") complain that a very considerable amount of time was spent by the applicants raising issues in this judicial review, which was brought on environmental grounds, during the seven days of the hearing, which were not part of their pleaded case, which then were replied to by the State (all at considerable cost to the taxpayer).

22. Having briefly considered those high-level legal principles which form the background to this case, it is now proposed to deal with the factual background.

FACTUAL BACKGROUND

23. This case involves a challenge, by Ms. Hayes of 3 Glentworth Street, County Limerick and Ms. Foley of Islanmore Stud, Croom, County Limerick, to the grant by the EPA of a revised industrial emissions licence (the "Revised Licence") to Irish Cement. The first industrial emissions licence was granted to Irish Cement by the EPA on the 15th May, 1996 and it was revised on three occasions prior to this application by Irish Cement to revise its licence, which is subject to this challenge.

24. It is proposed in this single judgment to deal with the two separate challenges by Ms. Foley and Ms. Hayes to the decision of the EPA to grant the Revised Licence. This is because, in the interests of efficiency, these two challenges were heard together. This is because not only are Ms. Foley and Ms. Hayes challenging the exact same decision (to grant the Revised Licence), but also some of their grounds of challenge to that decision are the same.

25. Several of the objections by Ms. Hayes and Ms. Foley to the grant of the Revised Licence centre on the fact that this cement factory is located near to areas designated or managed within a framework of international or EU Member State legislation, which are intended to achieve specific conservation objectives (a "Protected European Site") and in this case particular emphasis was placed on the alleged effect of the Revised Licence on the Lower River Shannon Estuary SAC (Special Area of Conservation) and the Shannon and Foynes Estuaries SPA (Special Protection Area).

26. The Revised Licence provides for the first time for the use by Irish Cement of non-hazardous waste at Castlemungret as an alternative fuel (i.e. as an alternative to fossil fuels) and the use of alternative raw materials, in relation to the production of cement at that factory. It is relevant to note that there are five cement plants on the island of Ireland (including the one in Castlemungret). Four are in Ireland and one is in Northern Ireland. All of the four other plants are permitted to incinerate waste as an alternative to fossil fuels. The three cement factories in Ireland, which are permitted to co-incinerate waste, are licenced by the EPA, since it is the regulatory authority in the State for this purpose. One of these three is a factory operated by Irish Cement at Platin in County Meath.

27. In addition to the requirement to obtain the Revised Licence from the EPA, it was also necessary for Irish Cement to obtain planning permission from An Bord Pleanála and this was duly granted in 2018. This permission specifically provides at Condition 4 that no alternative fuels (i.e. waste) or raw materials which are *hazardous* are permitted to be incinerated. At Condition 5 of this planning permission, it provides that no *unprocessed* alternative fuels (i.e. waste) or raw materials shall be delivered to the cement works and no further processing of alternative fuels/raw materials shall take place at the cement works.

28. Irish Cement claims that the revisions to its existing licence (the "Existing Licence"), pursuant to which it is currently permitted to incinerate fossil fuels in the existing kiln in Limerick, will result in an improvement in the nature and level of emissions from the plant.

29. In this regard, uncontroverted submissions were made that there will be a saving of up to 40,000 tonnes per annum, or up to 50% of the factory's output, in emissions of carbon dioxide by the use of waste as a fuel. Uncontroverted submissions were also made that the burning of non-hazardous waste, which has been processed, is a better method for the disposal of waste than one of the alternatives for its disposal, such as landfill.

30. The EPA point out that if Ms. Hayes and Ms. Foley are successful in their challenge to the *revisions* to the Existing Licence, all that this will mean is that Irish Cement will continue to burn fossil fuels such as petroleum coke in significant volumes, which gives rise to carbon dioxide emissions. This is because the decision which is being challenged is a decision to *revise* Irish Cement's Existing Licence which entitles it to burn fossil fuels. If the decision being challenged, to grant the Revised Licence which permits Irish Cement to also burn processed waste and alternative raw materials as well as fossil fuels, is revoked, then the Existing Licence to burn fossil fuels alone will continues in force without any amendment.

The challenge to the grant of the Revised Licence

31. Prior to these judicial review proceedings, an oral hearing (the "Oral Hearing") was held by the EPA over a six-day period to address the issues and objections raised to the grant of the Revised Licence. These proceedings were distilled into a report (the "Oral Hearing Report") by its chair, Mr. Patrick Byrne. It was accepted by counsel for Ms. Foley that the Chair and his colleague, Ms. Jennifer Cope, had to handle an enormous volume of very technical material and distil it into a 250 page report, which they did in a professional manner.

32. Counsel for Ms. Foley and counsel for Ms. Hayes had approximately eight hours each (and so a total of 16 hours) to outline before this Court the basis for their challenge to the EPA's

decision. A number of the claims made in the Statement of Grounds were not pursued at the hearing before this Court. What follows is this Court's understanding, based on those sixteen hours of oral submissions, of the 'key issues' that remain in dispute in this case. In reliance on *Flynn v. Breccia* [2017] IECA 74 at para. 32 and *Launceston Property Finance DAC v. Wright* [2020] IECA 146 at para. 120, this Court does not propose to set out in this judgment each and every point raised by the applicants during those sixteen hours, but all of those points have been considered by this Court in its analysis of what constitutes the key issues between the parties. In addition, as noted below, a number of points which were pursued at the hearing before this Court were not contained in the Statements of Grounds and accordingly this Court does not have jurisdiction to deal with them and these are set out below.

33. With this in mind, this Court will deal with what it understands to be the key claims made by Ms. Foley and Ms. Hayes in these proceedings. However, before doing so, it is proposed first to deal with the issue raised by the respondents regarding the use of court time on matters which were not pleaded and so which they say are not part of this case. This Court is addressing this issue first because of the very real impact of unnecessarily long civil trials on scarce court resources, as illustrated by the fact that the very recent Midlands rape trial of *DPP v. GGR* (CCDP0067/2018) and the four linked cases took over five years to be heard, due to scarce court resources (as well as the Covid pandemic). See also *Novartis v. Eli Lilly* [2021] IEHC 814 at para. 17 where the shortage of High Court judges was starkly illustrated by the fact that of the six rapes/murders listed in the Central Criminal Court to open on 8th November, 2021, just one got on for hearing.

34. It is crucial to emphasise that it is not being suggested that the onus is on *lawyers* in civil cases generally, or indeed in this case in particular, to consider the justice system as a whole or that they have any responsibility for delays in criminal or civil trials. This is because, when arguing their cases in court, lawyers follow their clients' instructions and promote and

protect fearlessly their clients' best interests as they see fit and they do not have a general or specific responsibility for the delays in other criminal or civil trials being heard. Rather the point being made is not specific to this case, but it is a very general one, namely that at a time of a shortage of judges there is an added onus *on the courts* to ensure that court resources are used efficiently to ensure that other litigants, in criminal as well as civil trials, have their cases heard promptly.

35. In this case, as noted below, a considerable proportion of the seven days was spent by Ms. Foley and Ms. Hayes on matters that were not pleaded and therefore form no part of this case and, consequently, a considerable amount of time was spent by the State and Irish Cement answering claims that were not pleaded (presumably in case this Court chose to deal with these claims on their merits, even though they had not been pleaded).

36. Before itemising those claims, which were not part of the pleaded case, this Court will first consider a question of general application, i.e. whether this Court should nonetheless consider the merits of a claim, even if this Court concludes that it has not been properly pleaded, *in case* an appellate court might conclude that the claim had in fact been pleaded.

THE RESPONSE OF A COURT TO AN ISSUE WHICH IS NOT PLEADED

37. It is understandable that many courts will, while holding that a particular claim was not pleaded, nonetheless deal with the merits of the claim, as if it had been pleaded. This is because it is possible that an appellate court might reach a contrary view on the pleading point. If that were to occur, at least the trial judge would have dealt with the merits of the claim and so the issue would not have to be sent back for a decision by the trial judge.

38. Because of this understandable approach by a trial judge, it is arguable that this is why lawyers might seek to raise, at a court hearing, points which had not been pleaded or had not been pleaded with sufficient particularity, i.e. on the basis that there is a chance that the judge

will nonetheless deal with those points in case an appellate court were to take a more benign view of the pleading point.

39. While this Court does not necessarily agree with this approach, it is important to note that no criticism is being made of the lawyers in this case, who are no doubt following their clients' instructions and are promoting and protecting their clients' best interests in raising the points they have raised.

The drawback of a court deciding issues which have not been pleaded

40. However, while it is understandable why a trial judge might deal with the merits of claims that were not pleaded, it suffers from certain disadvantages.

41. First, it means that there is no incentive for parties to ensure that their case is properly pleaded (so that their opponent knows the case she has to meet, which is a basic principle of our adversarial system of justice). Instead one party ends up being surprised at the hearing by the arguments which are made (which are likely to have been researched by her opponent, but not disclosed in her pleadings). This cannot, in this Court's view, be fair.

42. Secondly, it means that the practice of arguing in court claims that have not been pleaded, is likely to continue, with the consequent waste of valuable court hearing time, at a time when it has been well publicised that Ireland has a shortage of judges and thus there is an increased onus on courts to ensure that court resources are used efficiently.

43. Thirdly, if this Court were to nonetheless devote court resources to considering, deciding and preparing a judgment on the un-pleaded points on their merits, this would result in even further court resources being devoted to claims which should never have occupied court time in the first place. The losers in such an approach are those litigants who are waiting to have their cases heard because of, amongst other things, the inefficient use of court resources.

44. Fourthly, if this Court were to decide the legal issues on the points argued, but not pleaded, it would mean that the resulting judgment would be based on arguments which were

one-sided, i.e. properly researched and argued by one side, but not by the opposing side which had to meet the arguments *on their feet* without the benefit of researching the evidence or law supporting their side of the argument.

45. Fifthly, the Supreme Court has deprecated the approach in judicial review of making arguments in court for which leave has not been granted. Indeed, as noted by Barniville J. in *Rushe v. An Bord Pleanála* [2020] IEHC 122 at paragraph 103, Order 84 Rule 20 (3) (which is set out below) was inserted to give effect to the views expressed in this regard by the Supreme Court in *AP v. DPP* [2011] 1 I.R. 729. At para. 8 of that judgment, Murray C.J. states:

> "There has also been a tendency in some cases, at a hearing of the judicial review proceedings on the merits, for **new arguments to emerge in those of the applicant which in reality either go well beyond the scope of the particular ground** or grounds upon which the leave was granted or **simply raise new grounds**." (Emphasis added)

At paragraph 43 of his concurring judgment, Hardiman J. stated:

> "In too many judicial review cases, it will be found that **little attention has been paid to the absolute necessity for a precise defining of the grounds on which relief is sought until the case is actually before the court**. In my view, this case furnishes an extreme example of this unfortunate tendency." (Emphasis added)

If this Court were to deal with the un-pleaded claims on their merits, this would, in effect, be ignoring the criticisms made by the Supreme Court of this practice of arguing points which have not been pleaded, a practice which continues to this day, as evidenced by the approach in this case, as set out below.

46. It is for these reasons that this Court has determined that it will *not* consider the merits of claims argued in this case but not pleaded, in the hope that parties in the future will (i) carefully plead their case if they wish to include a claim (so as to enable their opponent to fairly

meet that claim) and (ii) restrict their arguments in court to the claims that have been pleaded (in the interests of saving court resources, taxpayers' funds and for the benefit of other litigants, whether in criminal or civil trials, seeking access to the courts). Instead, this Court will restrict this judgment to the very many issues which were pleaded and argued, which nonetheless amounts to a considerable number of issues.

THE CLAIMS MADE AT THE HEARING WHICH WERE NOT PLEADED

47. Having reached the decision, that this Court does not have jurisdiction to, and should not, decide on the claims made by the applicants which were not pleaded, this Court will outline which claims fall into this category. However, before outlining those claims, it is relevant to set out the principles applicable to analysing whether a claim has been properly pleaded and whether a court has jurisdiction to deal with the claim.

The law regarding pleadings in judicial review cases

48. It is clear from Order 84 Rule 20 (3) of the Rules of the Superior Courts that it is not sufficient for an applicant in judicial review cases to give as one of her grounds an assertion in general terms. This is because she must state precisely each ground and identify the facts relied upon as supporting that ground. This rule states:

> "**It shall not be sufficient** for an applicant to give as any of his grounds for the purposes of paragraphs (ii) or (iii) of sub-rule (2)(a) **an assertion in general terms** of the ground concerned, but the applicant should **state precisely each such ground**, giving particulars where appropriate, **and** identify in respect of each ground **the facts or matters relied upon as supporting that ground**." (Emphasis added)

49. If an applicant for judicial review fails to comply with this requirement, her claim cannot be pursued. As noted by Baker J. in the Supreme Court case of *Casey v. Minister for Housing and Oths.* [2021] IESC 42 at para. 28, a decision *'made… without pleading… cannot*

be sustained'. It is also clear from this judgment at para. 29 that the approach to pleadings in judicial review '*could be regarded as more strict*' than in non-judicial review cases.

50. Indeed, as noted by Barniville J. in *Rushe* at para. 113, this need to clearly and precisely set out the grounds is particularly important in the complex field of EU planning and environmental law, such as in this case. Yet, in this case and as noted below, this has not occurred.

51. It is also relevant to observe that in *Clifford & Sweetman v. An Bord Pleanála* [2021] IEHC 459, Humphreys J. said that '*the pleadings are absolutely vital'* and '*if there is a potentially viable point, but it isn't adequately pleaded, then it just isn't going to be a basis for relief*' (at para. 59).

52. Similarly, as noted by Murray C.J. in *A.P v. DPP* [2011] 1 I.R 729 at para. 8 *et seq*:

> "There has also been a **tendency in some cases, at a hearing of the judicial review proceedings on the merits, for new arguments to emerge** in those of the applicant which in reality either go well beyond the scope of a particular ground or grounds upon which the leave was granted or simply raise new grounds.
>
> The court of trial of course may, in the particular circumstances of the case, permit these matters to be argued, especially if the respondents consent, but in those circumstances the applicant should seek an order permitting any extended or new ground to be argued. This would **avoid ambiguity if not confusion** in an appeal as to the grounds that were before the High Court." (Emphasis added)

53. In a similar vein, it was observed by Barniville J. in *Rushe* at para. 113:

> "It is **not appropriate** that a case brought on a particular basis, in which reliefs are sought on stated grounds is, when the case comes on for hearing, transformed into one in which different or additional grounds are sought to be advanced in support of the reliefs sought or new and additional reliefs are sought. **Such a course would be unfair**

on the parties opposing the application for judicial review and **on the court**." (Emphasis added)

54. Holland J. in *Ballyboden Tidy Towns Group v. an Bord Pleanála, The Minister for Housing, Local Government and Heritage, Ireland and the Attorney General* [2022] IEHC 7 at para. 308 appears to rely on Murray C.J.'s phrase regarding '*ambiguity if not confusion'* to conclude that:

> "[I]f on the Grounds pleaded there is genuine 'doubt, ambiguity or confusion' an Applicant in Judicial Review cannot have the benefit of it."

All of this highlights the strict approach that is taken to pleadings in judicial review cases.

Reasons for the strict approach to pleadings in judicial review

55. The reason for this strict approach to pleadings would appear to be that in judicial review, one is dealing with something much more significant than an appeal of a decision that a person does not like and wants a court to reconsider.

56. Yet, one might be forgiven for thinking, in light of the massive growth in judicial reviews in recent years, that judicial review was in fact another form of appeal of a decision, by a State body, that a party does not like (see p. 204 and p. 207 of the *Kelly Review*, where it is noted that there has been 'an enormous growth' in judicial review). However, a judicial review is very different from an appeal.

The significance of a claim that a State body acted illegally

57. One of the reasons that judicial review is different from an appeal and that it is not to be undertaken lightly is because of the significance of what is involved in a judicial review, namely it is usually a claim that a decision-making State body acted unlawfully. This is why, it seems, judicial review proceedings cannot be issued without leave from the High Court (*albeit* that the threshold for the grant of leave is not very high) and why, if judicial review

proceedings are to be taken, there is a very tight time limit, i.e. the proceedings have to be instituted within 8 weeks of the decision being challenged. Indeed, the existence of such a strict time limit would also seem to suggest that the alleged illegality, which is claimed to make the administrative decision null and void, should be one which is immediately and reasonably obvious to a challenger (as distinct from, say, a long list of possible inconsistencies and discrepancies regarding a decision of a State body, which discrepancies have only come to mind over several months preparing for a hearing, or indeed on the eve of a hearing). In addition of course, many of the decisions being challenged will be of considerable significance e.g. in relation to strategic housing at a time of a housing crisis or infrastructure which is of strategic importance to the country. Thus, judicial review is not something to be used as a reflex response to a decision (by a State body) that a party does not like in much the same way as a party can generally appeal a decision that they do not like.

58. To put the matter more generally, what this case law and these legislative provisions seem to be saying is that when an applicant is claiming that a State body, such as the EPA, did something *unlawful,* such a claim is not to be made lightly (simply because the challenger is unhappy with the decision and so wants another bite at the cherry regarding the decision). It seems to this Court that this is one reason why judicial review proceedings must contain clear reasons as to why the decision is unlawful.

A claim that a professional or other person in a State body acted illegally is a serious claim

59. It is arguable that another reason for this strict approach to pleadings in judicial review cases is because, while in judicial review one is generally dealing with decisions by State bodies, in reality it is individuals who are being accused of engaging in unlawful acts. This is because a State body such as the EPA must always act through individuals and in many cases these individuals will be very experienced professionals with considerable expertise in planning, environmental issues or other specialties. It is important to remember that the persons

who make up that administrative body are having their reputations challenged by a claim that their actions were unlawful, in a similar, *albeit* not identical, manner as occurs in a professional negligence action.

60. In this regard, it is to be noted that in a professional negligence action, the case law makes clear that one cannot allege that a professional is guilty of wrong-doing in the form of negligence without an independent expert opinion to that effect (see *Cooke v. Cronin* [1999] IESC 54 at para. 25). Although not directly comparable, nonetheless since one is often dealing with a serious allegation of wrong-doing by individuals, it is logical that the case law makes clear that an allegation of illegality against an administrative body (and so a very serious allegation against the persons/professionals who make up that body) should not be made without, at the very least, setting out clearly and precisely every ground with the precise factual basis for claims which may be calling into question the professional reputation of the persons in the administrative body.

61. It is against the background of this strict approach to pleadings in judicial review, and that apparent reasons for that approach, that this Court will now consider the question of whether the claims, made at the hearing of this case by Ms. Hayes and Ms. Foley fall within the pleadings. The first claim made at the hearing by the applicants, which the State alleges was not pleaded, relates to whooper swans.

<u>Whooper Swans</u>

62. Ms. Hayes claims in her oral submissions that the assessment undertaken by the EPA in this case regarding the grant of the Revised Licence is defective and thus unlawful because of its failure to deal with, *inter alia*, whooper swans.

63. However, while there are passing references in her Statement of Grounds to whooper swans, the Statement of Grounds does not '*state precisely each such ground'* as required by

Order 84, Rule 20(3) and as required by the Supreme Court judgment of *AP v. DPP* [2011] 1 I.R. 729 at para. 5, *per* Murray C.J.

64. In particular, the following references to whooper swans in the Statement of Grounds could not be said to be a clear and precise ground upon which relief is sought:

- The first reference, at para. 44 of the Statement of Grounds, is contained in the factual grounds for the claim and it is not in fact a claim made by Ms. Hayes at all, but simply a quotation from a letter from the EPA to Irish Cement on 1st November, 2018 in which it states that:

> "The NIS should identify the latest Conservation Objectives for all Natura 2000 sites within the zone of influence.
>
> There are concerns in relation to the ecological data and the potential presence of at least one SCI bird species, namely Whopper swan, from the SPA, from the proposed development site."

- At para. 49 of the factual grounds, the whooper swan is referenced in a long list of many species and habitats:

> "The NIS as submitted did not set out the baseline conditions of the site in relation to habitats and species for which the SPA and SAC sites are designated. It did not record the presence of species which [Regional Planning Services] had noted, such as the whooper swan. The relevant habitat types for which the SAC is designated include: Sandbanks, Estuaries, Mudflats and sandflats, Costal lagoons, Large shallow inlets and bays, Reefs, Perennial vegetation of stony banks, Salicornia and other annuals colonising mud and sand, Atlantic salt meadows, Mediterranean salt meadows, Water courses of plain to montane levels, Molinia meadows on calcareous, peaty or clayey-silt-laden soils, and Alluvial forests with Alnus glutinosa and Fraxinus excelsior. Relevant SAC species included Sea Lamprey, Brook

Lamprey and River Lamprey, Salmon, **Common Bottlenose Dolphin** and Otter. Relevant SPA (bird) species included Cormorant, **Whooper Swan**, Light-bellied Brent Goose, Shelduck, Wigeon, Teal, Pintail, Shoveler, Scaup, Ringed Golden and Grey Plover, Lapwing, Knot, Dunlin, Black-tailed and Bar-tailed Godwit, Curlew, Redshank, Greenshank and Black-headed Gull. While **whooper swans** and cormorants have actually been sighted at Bunlicky, other species were not addressed in the screening or NIS, and their presence was not excluded. Nor did the NIS consider the ways in which the emissions from the site might impact upon them. The NIS focused on water discharges into Bunlicky. It did not look at the potential for impact from atmospheric emissions which could be deposited much further away." (Emphasis added)

65. Having made reference to the foregoing numerous habitats and species, in her legal grounds, at para. E.3 (5), Ms. Hayes claims that the grant of the Revised Licence is unlawful because it infringes Article 6(3) of the Habitats Directive as it:

"[F]ailed to assess all relevant habitats and species for which the Lower River Shannon Estuary SAC and Shannon and Foynes Estuaries SPA are designated".

66. In reply to the claim that her case regarding the whooper swan has not been properly pleaded, Ms. Hayes points out that she has pleaded, as noted above, that there was a failure to assess all relevant habitats and species for which the Shannon and Foynes Estuaries SPA are designated and that one of the species for which the Shannon and Foynes Estuaries SPA is designated is the whooper swan.

67. When one considers that well over 40 species and habitats are designated for the Shannon and Foynes SPA and when one bears in mind the complexity of a claim that any particular species has not been assessed, or has not been assessed properly, this Court cannot see how, in light of the foregoing law regarding pleadings in complex judicial review

proceedings, this plea could be regarded as sufficient to enable, *inter alia*, the professionals and/or other persons who made the relevant decision in the EPA to meet a claim that they have acted unlawfully regarding just one particular species, the whooper swan, which alleged failure is not particularised.

68. Ms. Hayes sought to rely on the case *Eco Advocacy v. An Bord Pleanála* [2021] IEHC 265 to entitle her to pursue this claim, despite what this Court regards as the failure to properly particularise that claim. However, it seems to this Court that, as implied by Ms. Hayes, the *Eco Advocacy* case is not in fact authority for a principle that just because there is a point of EU environmental law at issue, a party does not have to comply with the normal rules of pleadings in judicial review proceedings which oblige her to set out clearly and precisely each ground upon which relief is sought.

69. This Court reaches this conclusion regarding the *Eco Advocacy* case because, in that case, Humphreys J. did not make a finding to that effect but rather his decision in that case was to make a preliminary reference on that issue to the European Court of Justice under Article 267 of the TFEU in the following terms:

> "Does the general principle of the primacy of EU law and/or of co-operation in good faith have the effect that, either generally or in the specific context of environmental law, where a party brings proceedings challenging the validity of an administrative measure by reference, expressly or impliedly, to a particular instrument of EU law, but does not specify which provisions of the instrument have been infringed, or by reference to which precise interpretation, the domestic court before which proceedings are brought must, or may, examine the complaint, notwithstanding any rule of domestic procedure requiring the specific breaches concerned to be set out in the party's written pleadings."

70. Secondly, it seems clear from Humphrey J.'s subsequent judgment in *Ballyboden v. An Bord Pleanála* [2021] IEHC 648 at para. 23 *et seq*, where he specifically references the *Eco Advocacy* case, that he does not in fact appear to believe that any change has been made to Irish law regarding the requirements for clear and precise pleadings in EU environmental law cases as a result of his decision in *Eco Advocacy*. This is because in that case, he quotes the '*pertinent observation'* by Barniville J. in *Rushe* at para. 108 regarding:

> "[T]he obligations **on an applicant who seeks judicial review to set out clearly and precisely** each ground upon which each relief is sought"

and that

> "It is **not open to an applicant to advance new arguments during the course of the hearing** which go beyond the scope of the ground or grounds upon which leave was granted or to raise new grounds." (Emphasis added)

71. After quoting from Barniville J.'s judgment, Humphreys J. went on to conclude at para. 26, in relation to the adequacy of surveys under Article 12 of the Habitats Directive that:

> "In order to comply with the requirement that applies in the present circumstances, **the pleadings would have had to explain and state positively how** as a matter of law the alleged obligation under art. 12 arose and **what that obligation was and how it was not complied with,** or, as referred to above, provide **a route-map from the provision relied on to the relief claimed**. But this essential information is so completely lacking as to render this ground wholly unacceptable as a basis for any finding that the decision here is invalid by reason of inadequate surveys." (Emphasis added)

72. For these reasons, this Court concludes that as regards the claims made regarding the whooper swan, these are not part of this judicial review and the case of *Eco Advocacy* does not mean that Ms. Hayes can pursue claims, regarding the whooper swan or other matters, that are

not part of her pleadings. Accordingly, in reliance on *Rushe* at para. 108, what is absent in this case is the *'jurisdiction of the court to conduct the review'* of Ms. Hayes' claims regarding the whooper swan which she made at the hearing, since they were not pleaded.

Dolphins

73. The position regarding dolphins is even more stark than whooper swans, since the only reference to dolphins is the reference to '*common bottlenose dolphin*' at para. 49 of the Statement of Grounds (referenced above) among the long list of species and habitats for which the Lower River Shannon Estuary SAC is designated.

74. This reference, it seems, combined with the fact that in her legal grounds Ms. Hayes claims that there was a failure to assess '*all relevant habitats and species'* for which the Lower River Shannon Estuary SAC is designated, is alleged to amount to setting out *'clearly and precisely each and every ground upon which'* relief is sought.

75. When one considers, *inter alia*, how serious the claim that is being made by Ms. Hayes is, namely that a State body, and therefore the professionals or other persons working therein, have acted illegally, this plea is, in this Court's view, deficient and does not grant this Court jurisdiction to hear the claims made by Ms. Hayes in this regard.

76. It is important in this regard to bear in mind that this is not simply an appeal, whereby a different body (namely a court) might consider the same facts and reach a different conclusion than the EPA regarding the decision to grant the Revised Licence. Rather a judicial review is a claim that the professionals and/or other persons who are experts in environmental protection, and whose job it is to have regard to the environment, acted *illegally*, a claim which many professionals would regard as questioning their professionalism and integrity. While it does not require an expert opinion to this effect (as is required, for example, if a claim was to be made against say a lawyer accused of wrongdoing/professional negligence), it seems to this Court that an allegation of wrongdoing/illegality against a State body and the

persons/professionals therein, is not something that should be alleged without at the very least setting out precisely and clearly the basis for such a claim of illegality and the facts or matters which support that claim, which has not been done in this instance.

Water Framework Directive

77. Another example of an argument pursued at the hearing for which leave could not have been granted by the High Court when it granted leave in this case, since it was not contained in the Statement of Grounds, is the claim made by Ms. Foley at the hearing regarding Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy (the "Water Framework Directive"). The background to this claim is that there is an artificial body of water on the cement factory site in Castlemungret, which is called the Bunlicky Pond.

78. When one examines the Statement of Grounds for references to this Directive, the first thing to observe is that no relief is sought by Ms. Foley in her Statement of Grounds by reference to the Water Framework Directive. At para. 40 it is claimed that the EPA:

> "[F]ailed to comply with or have any or any appropriate regard to the Water Framework Directive in the consideration of and determination of the application."

79. However, it is difficult to think of a more general plea regarding legislation, whose breach allegedly led to an unlawful decision by the EPA. It appears to this Court that this plea is the antithesis of setting out *'clearly and precisely'* the grounds upon which relief must be sought in judicial review proceedings. Accordingly, it is difficult to see how this paragraph *per se* could be the basis for any claims made at the hearing regarding the Water Framework Directive.

80. Then at para. 39 of her Statement of Grounds it is claimed by Ms. Foley that the EPA:

> "[M]ade a fundamental error of law and fact in considering that Bunlicky Pond was not a designated water body for the purposes of the Water Framework Directive and the analysis, findings and approach adopted within paragraph 2.7 of the Inspector's report is inconsistent and incompatible with the obligations under the Habitats Directive."

81. It is important to note that this plea does not state that the EPA *erred in not designating Bunlicky Pond* for the purposes of the Water Framework Directive. Rather it is a claim that the EPA erred in *concluding that the pond was not designated* for the purposes of that Directive, even though it is common case that it is not so designated.

82. It is also relevant to note that there is no reference to the Water Framework Directive in Ms. Foley's written submissions.

83. Yet at the hearing before this Court, Ms. Foley claimed that in her challenge to the EPA's decision, she is making a similar argument to that which was made in *Sweetman v. An Bord Pleanála* [2021] IEHC 16. However, as regards the pleadings and legal submissions in that case, it was noted by Hyland J. at para. 87 *et seq* that:

> "The Board **argues that this argument has not been pleaded and should not be permitted.** However, in contradistinction to the position relating to the Brussels airport argument, an examination of the pleadings discloses that the **thrust of this argument was identified in the Amended Statement of Grounds** and was **fully articulated in the legal submissions** filed by the applicant. In the Amended Statement of Grounds, the applicant **sought a declaration that the Board acted *ultra vires* the WFD** in conducting a risk characterisation of a water body. At paragraph 40 it is **pleaded that the Board acted ultra vires the WFD in approving a development that would put a water body at risk of not complying with WFD objectives**. At paragraph 41 it is **pleaded that the European Communities (Water Policy) Regulations 2003**

delegates the role of characterisation of river basin districts to the EPA, and that the Board has **no delegated power to characterise waterbodies or otherwise decide if they are at risk of not complying** with the objectives of the WFD and has no skills or experience to do so.

In his **legal submissions, the applicant argues that the Board acted ultra vires** in conducting a risk characterisation of a water body when a classification should have been made by the competent authority, being the EPA and in approving a development that would put a waterbody at risk of not complying with WFD objectives (paragraph 51). He identifies provisions of Irish implementing legislation referred to in the discussion below.

The applicant **refers to the conclusion of the Inspector that the WFD status of Loch an Mhuilinn is "not known"** and refers to his conclusions that the lake ecology would "probably be at risk" due to water abstraction on one classification methodology and "probably not at risk" using a different classification methodology. **He argues that neither of the classifications were made by the EPA and neither were compared to a classification** of the lake pre-abstraction and that the consequence of this was that the Board had no information before it to tell if the water abstraction would cause a deterioration of the status of a body of surface water or otherwise jeopardise the attainment of good surface water status **as required under the WFD**. Reference was made to Case C-461/13 *Bund für Umwelt und Naturschutz Deutschland* ECLI:EU:C:2015:433 (the Weser case).

In my view, having regard to the above, there **is a sufficient identification of the argument in respect of the WFD and for that reason I reject the submission of the**

Board that this argument ought to be rejected as insufficiently pleaded." (Emphasis added)

84. Thus, it is very clear that there is an enormous difference in the pleaded case of Ms. Foley and the case that was pleaded in *Sweetman*.

85. When all of these factors are taken into account, this Court cannot see how Ms. Foley can pursue an argument at the hearing that the EPA should have designated a water body such as Bunlicky Pond under the Water Framework Directive or that a reference should be made to the CJEU in this regard (as was claimed by Ms. Foley, though her counsel, before this Court).

86. This Court cannot see how those claims could be said to have been properly pleaded. On this basis, this Court concludes that it does not have jurisdiction to address those claims regarding the Water Framework Directive.

No consideration of proportion of waste and fossil fuel to be incinerated

87. Ms. Foley claimed at the hearing before this Court was that there are 62/63 types of waste products which are permitted under the Revised Licence and that the EPA should have considered in what proportion each type of waste was being used in order to know the level of emissions and the abatement technology that needed to be utilised, before granting the Revised Licence.

88. However, this claim was not contained in the pleadings of Ms. Foley and so this Court has no jurisdiction to deal with the claims made by Ms. Foley.

89. Counsel for the EPA claims that not only did Ms. Foley not plead this point, but also that Ms. Hayes did not plead it. At para. 82 of her Statement of Grounds, Ms. Hayes makes the following very general claim:

"There was no breakdown of the individual alternative fuels and raw materials and there is uncertainty and lack of detail over what alternative fuels and raw materials will be

used, the proportions of the alternative fuels and waste materials etc. There was no assessment of the impacts of the individual substances on the environment, ecological receptors and on human health or on the storage, transport and handling of these materials and the impact upon Protected European Sites. Whole tyres are high in organic matter from the rubber, sulphur from cross linking of the rubbers and metals from the steel fragments in the tyres; fly ash and bottom ash are very high in heavy metals and mineral content; meat and bone meal are very high in nitrogen and organic matter. Mine waste contain high concentrations of heavy metals, sulphides and radioactive materials arsenic, mercury and other toxic substances. Cyanide is commonly used in metal extraction of gold where it is used to dissolve the metal to an aqueous solution as it is a simple and cost effective technique. No detail of the composition or the proportions of these types of wastes and raw materials has been provided making a meaningful risk assessment and proper analysis impossible."

90. However, to the extent that this paragraph might be said to contain a claim regarding the proportion in which waste is to be incinerated, it completely disregards the conditions of the Revised Licence, which fully meet any concerns regarding the proportion in which waste is used and thus eliminates any doubt in this regard. This is because Condition 6.3 states:

"Co-incineration - Test Programme

6.3.1 The licensee shall prepare a test programme for the co-incineration of each individual or combination of wastes proposed for introduction into the kiln. This programme shall be submitted to the Agency at least three months prior to implementation.

6.3.2 The test programme, following approval by the Agency, shall be implemented and a report on its implementation shall be submitted to the Agency within one month of its completion.

6.3.3 The criteria for the operation of the abatement equipment as determined by the test programme shall be incorporated into the standard operating procedures.

6.3.4 The Test Programme shall as a minimum:

6.3.4.1 Verify the residence time, the minimum temperature and the oxygen content of the exhaust gas which will be achieved during normal operation and under the most unfavourable operating conditions anticipated;

6.3.4.2 Establish all criteria for operation, control and management of the abatement equipment to ensure compliance with emission limit values specified in this licence;

6.3.4.4 Assess the performance of any monitors on the abatement system and establish a maintenance and calibration programme for each monitor;

6.3.4.4 Establish criteria for the control of all waste input; and

6.3.4.5 Confirm that all measurement equipment or devices (including thermocouples) used for the purpose of establishing compliance with this licence have been subjected, in situ, to normal operating temperatures to prove their operation under such conditions.

6.3.5 Co-incineration of waste shall not be permitted (outside of the approved Test Programme) until such time as the Agency has indicated in writing that it is satisfied with the results of the Test Programme for each individual or combination of wastes."

91. In particular, it is clear that co-incineration will not be permitted unless it complies with emission limit values. Thus it is clear that irrespective of the types of waste brought onto the

site, the emission level values must not be exceeded and so this claim, regarding the absence of a proper assessment of the proportion in which waste is to be incinerated, cannot be a basis for claiming that the EPA's assessment is defective and that the decision to grant the Revised Licence is unlawful.

92. Furthermore, Mr. Seamus Breen, Head of Quality and Sustainability at Irish Cement, in his evidence dated 30th November, 2020 to the Oral Hearing stated at p. 14 that:

> "Kiln No.6 is operated with a modern CEMAT PCS7 Siemens control system. This control system has the capability to gather up to 17,000 pieces of information every second (temperatures, pressures, power loadings, fan speeds, hopper levels, feed rates, emission levels etc.) where the information can be viewed in charts or trends. Various interlocks (programmed safety stoppages of the kiln) are in place to stop the kiln in the event of sudden increases of monitored parameters. This is true of emissions from the Kiln also. All emission parameters as specified in schedule C of P0029-05 from Kiln 6 stack are interlocked with kiln operation i.e. when the parameter to be measured continuously approaches the emission limit value (ELV), the kiln automatically stops so as not to exceed the ELV of that parameter. There will be no change in the event that the EPA decides to authorise the use of alternative fuels at the ICL Limerick cement factory."

93. It is clear from the foregoing evidence that a shutdown will occur in the factory before an emission level value is exceeded and so there cannot be a breach of the emission level values and thus there is no scientific doubt regarding the effect of the emissions on the nearby protected sites.

94. Thus, to the extent that a claim has been made by Ms. Hayes regarding the treatment by the EPA of issues relating to emission levels being exceeded because of the introduction of waste, this is not supported by the evidence.

Ducting of emissions through Kiln 6 rather than Coke Mill 6

95. In her oral submissions to this Court, Ms. Foley spent some time on a claim that the assessment by the EPA did not deal with the fact that emissions would not be emitted by Irish Cement through Coke Mill 6, but would in fact travel through ducting to be emitted through Kiln 6.

96. However, this Court does not have jurisdiction to deal with this claim that the professionals and/or other persons working in the EPA (and so the EPA) acted unlawfully in not dealing with this issue.

97. This is because, as previously noted, an applicant in judicial review is required to obtain the leave of the court for the grounds upon which it seeks to allege illegality, in view of, *inter alia*, the seriousness of such a claim. No such leave was granted. This is evidenced by the fact that there is no reference in Ms. Foley's Statement of Grounds to this claim regarding ducting and so one cannot say Ms. Foley has, as required by Order 84, Rule 20(3), stated precisely this ground, nor did she identify the facts relied upon as supporting that ground.

Modelling used by Dr. Menzies for dioxin and furan air quality

98. Ms. Foley claimed at the hearing before this Court that the assessment by the EPA in this case is unlawful because it did not properly deal with the issue of whether the modelling, used by Dr. Don Menzies in his report on '*Dioxin and furan air quality and human health impact and risk assessment'* to the Oral Hearing, was up to date.

99. However, this Court does not have jurisdiction to deal with this claim, as again there is no reference in the Statement of Grounds to this claim regarding Dr. Menzies' modelling and so one cannot say Ms. Foley has, as required by Order 84, Rule 20(3), stated precisely this ground, nor did she identify the facts relied upon as supporting that ground.

Analysis of total organic compounds

100. At the hearing before this Court, Ms. Foley claimed that although the assessment contains an analysis of an air quality standard for *individual* components of the organic compounds that make up the total organic compound ("TOC"), being the total of those chemical compounds which contain organic matter, there is not an air quality standard for the *aggregate* of TOC.

101. She claimed that the assessment done by the EPA is defective because it should have looked at the individual components of the TOC when carrying out this assessment. However, there is no plea to this effect in the Statement of Grounds and therefore Ms. Foley did not have leave of the High Court to challenge the EPA's decision on this basis and accordingly this Court has no jurisdiction to hear this claim regarding TOC.

102. In relation to Ms. Hayes, while there is a plea relating to TOC, it is the case that during eight hours of submissions to this Court no submissions were made by her regarding TOC, apart from her counsel reading out a footnote, in the context of derogations that might be granted, in Part 4 in Annex VI to the Directive 2010 /75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) (the "Industrial Emissions Directive"). This footnote simply states:

> "The competent authority may grant derogations for the emission limit values set out in this point in cases where TOC and SO_2 do not result from the co-incineration of waste."

103. On this basis, this Court cannot see any basis for concluding that this is a matter in dispute between the parties.

Conclusion regarding points argued, but not pleaded

104. For the reasons previously set out, this Court believes that, having decided that the foregoing claims, which were made at the hearing, were not contained at all, or with sufficient

precision, in the Statement of Grounds, it follows that this Court should not therefore address them. In particular, this Court considers that if it did nonetheless address these points, it risks sending out the message to litigants that there is no real incentive for them to carefully plead their case, since whether they properly plead their case or not, the court will still deal with claims that fall outside the pleadings.

POINTS THAT WERE PLEADED AND ARGUED AT THE HEARING

105. Next this Court will consider the points which were pleaded and so were permitted to be, and then duly were, argued at the hearing before this Court.

Background to the grant of the Revised Licence and the challenge thereto

106. Before doing so, the following background is relevant. In this case, the application dated 27th April, 2016 from Irish Cement for the Revised Licence was accompanied by an Environmental Impact Statement ("EIS"). A screening for an Appropriate Assessment ("AA") was carried out in November 2018 and it was determined that an AA would be required.

107. On 1st November, 2018, the EPA wrote to Irish Cement about the outcome of the AA screening determination and, arising from that determination, a Natura Impact Statement ("NIS") was submitted by Brady Shipman Martin on behalf of Irish Cement on 11th December, 2018.

108. A review of the EIS was conducted on behalf of the EPA by the Regional Planning Service and an Environmental Impact Assessment ("EIA") screening determination by the EPA was published on 4th April, 2019. As noted later in this judgment, after this review by the EPA, a number of requests were made by the EPA for further information from Irish Cement. On 3rd September, 2019, the EPA deemed the EIS to have complied with Article 9 of the Planning and Development Regulations 2001, as amended.

109. The EPA appointed an inspector to consider Irish Cement's application for a revised licence and an Inspector's Report dated 4th September, 2019 with a recommended determination was provided to the EPA.

110. The EPA published a proposed determination on 18th September, 2019 on foot of its decision made on 10th September, 2019. Arising from submissions received in relation to the proposed determination, an Oral Hearing in respect the application was held over a period of six days, beginning on 2nd December, 2020.

111. The Chair of the Oral Hearing, Mr. Byrne, submitted the Oral Hearing Report dated 6th April 2021, to the EPA, which contains the recommendation that the Revised Licence be granted to Irish Cement.

112. On 18th May, 2021 the EPA granted the Revised Licence to Irish Cement, subject to the conditions contained therein and it is this decision which is being challenged in these proceedings.

Application of the Habitats' Directive

113. The decision in this case, which is being challenged, is the decision to grant a revision of an industrial emissions licence. Since there are protected sites under the Habitats' Directive in the vicinity of Irish Cement's factory, the grant of the Revised Licence is subject to Article 6 (3) of the Habitats' Directive and the European Communities (Birds and Natural Habitats) Regulations 2011 (S.I. No. 477/2011).

114. It is relevant to first consider Article 6(3) of the Habitats Directive, which states:

> "Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the

conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public."

115. It will be seen from the wording of Article 6(3) that before the EPA can grant a revised licence, it must have decided that the grant of the licence will '*not adversely affect the integrity of the site concerned*' and in this case we are dealing with a number of protected sites such as the River Shannon and River Fergus SPA, Sleivefelim and Silvermines Mountains SPA, the Shannon and Foynes Estuaries SPA and the eastern part of the Bunlicky Clayfield Pond in the vicinity of the Irish Cement factory.

116. A key decision which is being challenged in these proceedings therefore is the decision of the EPA that the grant of the Revised Licence will not adversely affect the integrity of the protected sites. This decision is being challenged on, *inter alia*, the basis that there is an absence, and/or insufficiency, of reasons for the decision.

117. There was little or no debate amongst the parties regarding the legal principles which apply to the dispute between them and it is not therefore proposed to set that law out in any detail, save where there is a dispute regarding the interpretation of the principles.

118. In relation to the claim under the Habitats Directive made by both Ms. Foley and Ms. Hayes, it is common case that it is clear from the Supreme Court's decision in *Connelly v. An Bord Pleanála* [2018] IESC 31 at paras. 8.15 and 8.16 that before consent is granted by the EPA to the issue of a revised licence, that the following principles (applied in that case to a decision being made by An Bord Pleanála and hence the reference to the Board) apply to this decision being made by the EPA:

"Thus, it seems to me as a result of the foregoing analysis that the overall conclusion which must be reached before the Board has jurisdiction to grant a planning consent after an AA is that all scientific doubt about the potential adverse effects on the sensitive area have been removed. However, there seems, as a matter of EU law, to be a separate obligation to make specific scientific findings which allow that conclusion to be reached. This is apparent from the above passages from *Kelly* and the European case law therein cited.

The analysis in *Kelly* shows that there are four distinct requirements which must be satisfied for a valid AA decision which is a necessary pre-condition to a planning consent where an AA is required. First, the AA must identify, in the light of the best scientific knowledge in the field, all aspects of the development project which can, by itself or in combination with other plans or projects, affect the European site in the light of its conservation objectives. Second, there must be complete, precise and definitive findings and conclusions regarding the previously identified potential effects on any relevant European site. Third, on the basis of those findings and conclusions, the Board must be able to determine that no scientific doubt remains as to the absence of the identified potential effects. Fourth and finally, where the preceding requirements are satisfied, the Board may determine that the proposed development will not adversely affect the integrity of any relevant European site."

119. It seems to this Court that a key claim by Ms. Foley and Ms. Hayes is that the EPA failed to carry out any, or a proper, assessment in this case and failed to give reasons for not accepting arguments presented to the EPA on behalf of Ms. Foley and Ms. Hayes.

120. It is clear from para. 7.5 of the judgment of Clarke C.J. in *Connelly* that when considering the reasons for a decision reached by a body such as the EPA, the reasons for that

decision can be found in a range of materials *'outside both of the decision itself together with materials expressly referred to in the decision'.*

121. In this case therefore it is clear that the assessment by the EPA and the reasons for the decision by the EPA that the grant of the Revised Licence will not adversely affect the integrity of the sites concerned, is to be found primarily, but not exclusively, in the hundreds of pages that make up the Inspector's Report dated 4th September, 2019, the Report of the Oral Hearing dated 6th April, 2021, the Minutes of the 1044th Meeting of the Licencing Meeting of the EPA held on the 29th April, 2021 , the Revised Licence itself and its conditions dated 18th May, 2021 and the various documents annexed or referred to in those documents. Against this background the following specific claims were made by Ms. Foley and Ms. Hayes in relation to the Habitats' Directive.

Nitrogen Emissions

122. One of the claims made by Ms. Foley at the hearing before this Court relates to emissions arising from the co-incineration of waste and alternative raw materials with the existing fuel used by Irish Cement, i.e. fossil fuels (petroleum coke).

123. Paragraph 43 of her Statement of Grounds states:

> "Submissions, comprising expert submissions, made on behalf of the Applicant, included, submissions which stated:
>
> > 'The assessments of impact on human health and ecological sites largely rely on the assertions that ELVs will be complied with but since the Applicant has not proven that they can achieve that compliance, the impact assessments do not prove beyond reasonable scientific doubt that there will be no adverse impact on human health or ecologically sensitive sites.
> >
> > ….

> The air quality impact on ecological sites has not been carried out correctly due to errors in the modelling methodology for nitrogen oxides emissions and nitrogen deposition. The qualifying interests for various protected sites are sensitive to air pollution and specifically to nitrogen oxides, sulfur dioxide and hydrogen chloride and hydrogen fluoride in particular, but the impact assessment has not considered maximum emission rates, true nitrogen deposition rate and the maximum predicted ground level concentration of various pollutants at the designated sites. The flaws in the assessment mean that it has not been demonstrated that there will be no adverse air quality impact on ecological sites.'" (Emphasis in original)

124. In relation to nitrogen, the NIS deals with nitrogen deposition effects on habitats and species. It provides at paragraph 4.3.2.2.1 that:

> "The predicted concentrations comply with the AQS [Air Quality Standards] for the protection of vegetation. In addition, this worst-case value is predicted at the site boundary, levels are significantly less at the nearest logically sensitive areas.
>
> According to published guidance on the application of nutrient nitrogen critical load ranges in air pollution casework **the UNECE critical loads for nitrogen** for a range of the most sensitive habitats across Europe **range from between 3-10 kg N ha^{-1} yr^{-1}** (for permanent dystrophic lakes, ponds and pools, none of which occur within the zone of influence of the proposed development) **and 10-20 kg N ha^{-1} yr^{-1}** (for woodland habitats, heathland and poor fens). Other sensitive habitats such as raised and raised blanket bogs have critical loads of approximately **5-10kg N ha^{-1} yr^{-1}.**
>
> Assuming a deposition velocity of 0.001 m/s the nitrogen deposition rate is calculated based on the following:

- 1 μg/m^3 NO_2 = **0.1 kg N ha^{-1} yr^{-1}**

This results in a total value of 0.80kg N ha^{-1} yr^{-1}. **This figure is greatly below the UNECE critical load levels for even the most sensitive habitats**. As a consequence the deposition rates within any European site are significantly lower than this figure." (Emphasis added)

125. It will be seen therefore that the issue regarding nitrogen has been addressed and it falls comfortably within the levels recommended by the UNECE (the United Nations Economic Commission for Europe).

126. The impact of emissions on air quality from the introduction of alternative fuels and materials at the Irish Cement factory is considered in an appendix to the NIS in a report from ARUP entitled *Assessment of Atmospheric Emissions* dated 12th December, 2018. This report considers the effect on air quality by comparing the predicted existing ground level concentrations (GLCs) of pollutants from the factory with those predicted for the proposed scenario under the Revised Licence. The emissions are modelled using what is known as a Breeze AERMOD computer package.

127. At p. 23 of this report it is stated that:

"The maximum GLC [Ground Level Concentrations] of PM_{10} is **predicted to be 45.7% of the AQS [Air Quality Standard]** for the annual mean for the proposed scenario. Of this, 42.3% is due to the background concentrations and 3.4% is potentially due to [Irish Cement]. **The predicted concentrations comply with the AQS.**

The maximum 24-hour average GLC of PM10 is predicted to be 43.7% of the AQS for the 24-hour mean. Of this, 33.8% is due to the background concentration and 9.9% is potentially due to ICL.

The predicted concentrations comply with the AQSs, refer to Figure 1 for isopleths showing the 90.41st percentile of 24-hr average concentrations.

The maximum GLC of $PM_{2.5}$ is predicted to be 45.8% of the AQS for the annual mean. Of this, 42% is due to the background concentration and 3.8% is potentially due to ICL. The predicted concentrations comply with the AQS.

A less than 1% decrease in ground level concentrations of $PM_{10}$and $PM_{2.5}$ is predicted to occur due to the proposed development." (Emphasis added)

Thus, it is to be noted that not only are the levels well within the air quality standards, but there will in fact be a decrease in ground level concentrations of nitrogen under the Revised Licence.

128. This report, at p. 32, deals with nitrogen deposition in the context of the assessment of ecologically sensitive sites. Paragraph 4.7 states:

"As outlined above for the proposed scenario, the maximum GLC of NOx is predicted to be 46.8% of the AQS for the annual mean for the protection of vegetation. Of this 37.7% is due to background concentrations and 9.1% is potentially due to ICL. The predicted concentrations comply with the AQS for the protection of vegetation. This worst-case value is predicted at the site boundary, which overlaps with Bunlicky Pond which forms part of the Inner Shannon Estuary – South Shore NHA and is partially included in the Fergus Estuary and Inner Shannon, North Shore SPA.

Assuming a deposition velocity of 0.001m/s the nitrogen deposition rate is calculated based on the following:

- 1 µg/ m^3 NO2 = 0.1 kg N ha^{-1} yr^{-1}

> This results in a total value of 0.80kg N ha^{-1} yr^{-1}. **This is significantly lower than the UNECE critical load for nitrogen** of 5 – 10 kg N ha^{-1} yr^{-1} for permanent oligotrophic waters, softwater lakes" (Emphasis added)

Again, it is noted here that the value is significantly lower than the UNECE critical load for nitrogen.

129. Ms. Foley claims that the wrong deposition level was used and that the same figure as that recommended by the Environmental Agency for England should have been used. However, this concern was in fact addressed by the EPA in its letter of 29th May, 2019 to Irish Cement in which the EPA specifically referred to the values of the Environmental Agency for England in relation to the assessment of nitrogen dioxide emissions:

> "The assessment has assumed a deposition velocity of 0.001 m/s for nitrogen dioxide. **The Environmental Agency for England (EA) recommends** values of 0.0015 m/s (grassland) or 0.003 m/s (forest) (Environmental Agency, AQTAG06, "*Technical guidance on detailed modelling approach for an appropriate assessment for emissions to air"* March 2014). Please recalculate impacts using the EA recommended values." (Emphasis added)

Therefore, the EPA has in fact addressed this concern by seeking information based on the recommended values used by the Environmental Agency for England and then by considering the following response from Irish Cement dated 29th May, 2019 in which it is stated at p. 6 that:

> "Table 4 below also presents the results of the assessment **using the EA recommended values** for deposition velocities as requested by the Agency….. **Deposition of Nitrogen Dioxide are in compliance with the most conservative critical load** for both the grassland and forest deposition velocity, at 23% and 44% of the load, respectively. [….]

> The modelled deposition rates for nitrogen remain significantly below the critical load for even the most sensitive habitats and as **such there will be no impact ecologically sensitive sites**." (Emphasis added)

130. Thus, while the assessment in the original NIS used one deposition model and was well below the UNECE level, the application of higher deposition values still leaves the nitrogen levels below the UNECE recommended level.

131. Ms. Foley's submission to the Oral Hearing in this regard relied on a report by Dr. Imelda Shanahan ("Dr. Shanahan's Report"), a fellow of the Institute of Chemistry Ireland, dated 7th December, 2020. At p. 25 of the report, she states that in terms of assessing the impact of emissions on protected sites, compliance with air quality standards for NO_x and $S0_2$ needs to be shown. The clear inference from this statement is that meeting these standards is how one shows that there is no impact on ecologically sensitive sites.

132. Dr. Shanahan notes at p. 26 that the approach adopted in the EIS for the deposition modelling of nitrogen used the deposition velocity of 0.001 m/sec, while EPA Guidance Note AG4 has a deposition velocity of 0.0 015m/sec, which is 50% higher than the rate applied in the EIS.

133. At paragraph 5.5.6 she states

> "It is noted that the [EPA] did request that the correct deposition velocity would be applied and that the revised assessment should be undertaken. The applicant responded in July 2019 with an updated assessment report but no revised model was submitted. There was no reference in that submission to consideration of the revised increased deposition rate in the NIS and it has not been demonstrated that the increased deposition rate was assessed as part of the NIS."

134. Since one of Ms. Foley's complaints against the EPA is that it did not engage with certain submissions made on her behalf by Dr. Shanahan, it is curious that Dr. Shanahan simply refers to the request made by the EPA of Irish Cement and does not engage with the foregoing reply to that request from Irish Cement dated 29th May, 2019.

135. In contrast, the Chair of the Oral Hearing dealt with this issue in his Report at p. 45 where he states:

> "The Assessment of Atmospheric Emissions (12 December 2018) notes that the predicted ground level concentration of NOx is predicted to be 46.8% of the Air Quality Standards Regulations for the annual mean for the protection of vegetation. The report calculates the nitrogen deposition rate, **based on a deposition velocity of 0.001 m/s taken from Transport Infrastructure Ireland Guidance,** of 0.8 kg N ha^{-1} yr^{-1}. The report notes that this is significantly lower than the UNECE (2003) critical loads for nitrogen for permanent oligotrophic waters, soft water lakes of 5-10 kg N ha^{-1} yr^{-1}. [Irish Cement] **provided, 3 July 2019, nitrogen contributions based on EU values for deposition velocities (0.0015 m/s** – grassland and 0.003 m/s – forest) which indicates nitrogen deposition rates of 1.15 kg N ha^{-1} $yr^{-1}$for grassland and 2.21 Kg N ha^{-1} $yr^{-1}$for forest. **The predicted increased deposition rates remain lower than the UNECE critical load for nitrogen of 5 – 10 Kg N ha^{-1} yr^{-1}.**
>
> [Irish Cement] submitted a NIS on 12 December 2018. Appendix 4 of the NIS includes the Assessment of Atmospheric Emissions dated 12 December 2018. The NIS includes a summary of the predated ground level concentrations (Table 5 Predicted ground level concentrations for the existing and proposed scenarios). The NIS considers the '*Nitrogen Deposition effects on habitats and species*' and concludes that '*it can reasonably be concluded that, in the case of the Qualifying Interest (for SACs) and Special Conservation Interest (for SPAs) for the European sites under appraisal, there*

will be no significant effects as a result of the proposed development.' **In the [Irish Cement] response received on 3 July 2019** it is stated that:

> 'In preparing the response to this [Request for Further Information] [29 May 2019] a full review of the Nature Impact Statement prepared in December 2018 was undertaken. The NIS concluded the following (extract):
>
> This report concludes on the best scientific evidence that it can be clearly demonstrated that no element of the project will result in any impact on the integrity or Qualifying Interest/ Special Conservation Interest of any relevant European site, either on their own or in combination with other plans or projects, in light of their conservation objectives. In particular, the only potentially significant risks to European sites arise from potential changes to water and air quality. However, the construction phase mitigation measures, coupled with compliance with the very struct emission limits set out in the IE Licence, will ensure that there will be no such impacts. **In consequence there will be no risk of any adverse effects on Qualifying Interest or Special Conservation Interest habitats or species either alone or in combination with other plans or projects, for any European site.** The Conservation Objectives of the European sites will be in no way affected.
>
> **This assessment remains valid, no changes to the NIS conclusions are required.**" (Emphasis added)

Accordingly, since the results using the revised deposition rate are still below the recommended UNECE level, the Chair did not recommend any changes to the NIS conclusions.

136. It is difficult therefore to see any basis for a challenge to this aspect of the decision of the EPA since in essence what happened is that Ms. Foley said that the NIS used the wrong

deposition rate, the EPA agreed with this point and sought data using the revised deposition rate and noted that this still fell below the recommended levels. Accordingly, this Court does not see how it could be said that there is any gap or *lacuna* in this analysis to give rise to a reasonable scientific doubt or that an intelligent person could not discern the reason for the EPA's analysis and conclusions regarding the submissions of Ms. Foley.

Sulphur Emissions

137. The only reference to sulphur dioxide in Ms. Foley's Statement of Grounds is a passing reference to sulphur dioxide contained at para. 43 of the Statement of Grounds, a paragraph which deals primarily with nitrogen emissions:

> "The air quality impact on ecological sites has not been carried out correctly due to errors in the modelling methodology for nitrogen oxides emissions and nitrogen deposition. The qualifying interests for various protected sites are sensitive to air pollution and specifically to nitrogen oxides, **sulfur dioxide** and hydrogen chloride and hydrogen fluoride in particular, but the impact assessment has not considered maximum emission rates, true nitrogen deposition rate and the maximum predicted ground level concentration of various pollutants at the designated sites. The flaws in the assessment mean that it has not been demonstrated that there will be no adverse air quality impact on ecological sites.'" (Emphasis added)

138. This plea is based on the views expressed by Ms. Foley's expert, Dr. Shanahan, in her report. Despite this very general plea, Ms. Foley made various claims regarding sulphur dioxide during the course of the hearing.

139. However, Ms. Hayes has made a case by reference to sulphur dioxide and Ms. Hayes adopted the oral submissions made by Ms. Foley to this Court in relation to sulphur dioxide regarding Dr. Shanahan's Report.

140. At paragraph 5.1.5 and 5.1.6 of her report, Dr. Shanahan states:

> "The main source of SO2 in the emissions from the existing facility is from the petcoke used as fuel. Sulfur content of fuels varies and the simple solution to the emission of SO_2 is to ensure that fuel with a sufficiently low content of sulfur is used to fuel the plant. If the Applicant does not want to pay a higher amount for fuel that has lower sulfur, **then they can install abatement that allows them to meet the required ELV of 50mg/Nm^3** and based on their own monitoring data **a very minor change is all that is required to ensure that the ELV is complied with.**
>
> Since the Applicants own data indicates that they **can readily comply with a lower ELVfor SO2 without doing anything further**, and can achieve the BAT ELV of 50mg/Nm3 with minor improvements required to achieve BAT **I cannot see any justification for an increase in the ELV beyond BAT**. The Applicant has not presented any clear reasoning for the request and their own continuous monitoring data indicates that it is not required so I can only conclude that the Applicant is seeking the increase in the SO2 ELV to accommodate the co-incineration of wastes and this is expressly prohibited by the Commission Implementing Decision on BAT (2013/163 EU) which states that BAT is to select fuels with low sulfur content and that the ELV is 50mg/Nm3 (a value that depends on the initial level prior to abatement)." (Emphasis added)

141. It is relevant to note that Dr. Shanahan acknowledges that one can achieve the required emission level values by installing abatement. At paragraph 5.1.10 she makes a similar acknowledgement when she states that:

> "Under circumstances where it appears that the significant increases in pollutant mass emission rates are proposed to allow for coincineration of wastes, and no evidence of

any other purpose has been presented, the ELVs for co-incineration of waste should be applied rigorously and **no derogations should be granted**. **Each of the BAT [best available technology] ELVs is readily achieved by selecting the correct fuels, BAT techniques and abatement systems** and I can see no reason for the Applicant to avoid the selection and **application of BAT** other than the cost of achieving the BAT ELVs." (Emphasis added)

142. At paragraph 5.8.3 of her report, she states

"BAT was established for co-incineration of waste by Commission Decision 2013/163/EU "*COMMISSION IMPLEMENTING DECISION (CID) establishing the best available techniques (BAT) conclusions under Directive 2010/75/EU of the European Parliament and of the Council on industrial emissions for the production of cement, lime and magnesium oxide"*. It is surprising and disappointing that 7 years after the implementing decision and approximately 25 years after the requirement to ensure that BAT is applied was flagged by the EU the Applicant is still looking for derogations from what represents BAT for the industry. The Inspector has stated that they have relied on the BAT emission limits specified in this CID and **I concur with that assessment that the correct approach is to apply the ELVs quoted in that decision**." (Emphasis added)

143. In considering these points regarding sulphur dioxide the Chair at p. 47 of his Report states that, in effect, he agrees with Dr. Shanahan that no derogation should be granted from the 50mg/ m^3 regarding sulphur dioxide, since he states that:

"Based on the above **I considered that an emission limit value of 50mg/ m^3 for SOX expressed as SO_2 is achievable**.

I recommend that:

• 'SOx expressed as SO2 'is defined in the glossary as 'the sum of sulphur dioxide (SO2) and sulphur trioxide (SO3) expressed as SO2';

• 'Oxides of sulphur (as SO2)' be amended to 'SOx (as SO2)' and the **ELV for 'SOx (as SO2)' for A2-01 be amended to 50 mg/Nm3** in *Schedule C.1.2 Description, limit values and monitoring at emission point reference number A2-01*;". (Emphasis added)

144. It is relevant to note, considering Ms. Hayes is challenging the EPA's decision on the grounds that her scientific concerns were not addressed or were rejected without sufficient reasons, that, just like the claim regarding nitrogen, so too in relation to sulphur dioxide, the EPA does in fact agree with these claims regarding sulphur dioxide. In particular, the EPA agrees that the BAT emission limits should be applied, and it agrees with Dr. Shanahan that no derogation should be granted in relation to sulphur dioxide and that Irish Cement should be required to stick to the limit of 50 mg/ Nm^3. For this reason, this Court cannot see any basis for challenging the legality of the decision of the EPA in relation to the claims regarding sulphur dioxide.

Emission Level Values and conditions in the Revised Licence

145. To the extent that Ms. Foley (at para. 43 of her Statement of Grounds) pleads that the EPA has not established beyond reasonable scientific doubt that there will be compliance with emission limit values (ELVs), it is relevant to refer to the conditions in the Revised Licence.

146. This is because it is clear from the decision of Hogan J. in the Court of Appeal decision in *People Over Wind v. An Bord Pleanála* [2015] IECA 272 that ensuring that no scientific doubt remains can be achieved through the use of conditions in a licence (in that case, for the grant of planning permission for a windfarm). There, Hogan J. held that there were no *lacunae* regarding the protection of the species in question (freshwater pearl mussel) from the risk of

increased sedimentation through the entry of silt into the watercourses. This was because this risk was:

> "[I]dentified and fully addressed ….by Condition 17(k) of the permissions which effectively obliged the developer to ensure that no silt or sediment at all will enter the upstream watercourses." (at para. 47).

With this principle in mind, it is relevant firstly to note that in this case, insofar as any objections were raised as part of the Oral Hearing by Ms. Foley, it is stated (at p. 43 of the Oral Hearing Report) that concerns and issues which were raised in written objections and written/oral submissions to the Oral Hearing (and so this would include Ms. Foley's concerns regarding ELVs), are dealt with in the subsections which follow that comment in the report.

147. Secondly and significantly, the following subsections in the Oral Hearing Report deal with, *inter alia*, conditions which are to be inserted in the Revised Licence. One of those conditions is an obligation upon Irish Cement to prepare a test program for the co-incineration of waste. Condition 6.3 (as outlined previously) states:

> "The licensee shall prepare a **test programme for the co-incineration of each individual or combination of wastes proposed** for introduction into the kiln. This programme shall be submitted to the Agency at least three months prior to implementation.
>
> The test programme, following approval by the Agency, shall be implemented and a report on its implementation shall be submitted to the Agency within one month of its completion.
>
> The criteria for the operation of the abatement equipment as determined by the test programme shall be incorporated into the standard operating procedures.
>
> The Test Programme shall as a minimum:

Verify the residence time, the minimum temperature and the oxygen content of the exhaust gas which will be achieved during normal operation and under the most unfavourable operating conditions anticipated;

Establish all criteria for operation, control and management of the abatement equipment **to ensure compliance with emission limit values specified in this licence**;

Assess the performance of any monitors on the abatement system and establish a maintenance and calibration programme for each monitor;

Establish criteria for the control of all waste input; and

Confirm that all measurement equipment or devices (including thermocouples) used for the purpose of establishing compliance with this licence have been subjected, in situ, to normal operating temperatures to prove their operation under such conditions.

Co-incineration of waste shall not be permitted (outside of the approved Test Programme) until such time as the Agency has **indicated in writing** that it is satisfied with the results of the Test Programme for each individual or combination of wastes." (Emphasis added)

148. In the context of a licence to co-incinerate waste and fossil fuels, this is a highly significant condition since it effectively states that there will be no entitlement on the part of Irish Cement to co-incinerate waste and fossil fuels, unless it has been established by a test program that there is compliance with emission limit values set out in the licence. The significance and onerous nature of this condition is emphasised by the fact that the co-incineration of waste, the very purpose of the Revised Licence, is effectively *prohibited* unless the EPA has indicated *in writing* that it is satisfied.

149. It seems to this Court that the insertion of the foregoing condition regarding compliance with ELVs is therefore a complete answer to any claims by Ms. Foley that there is a scientific doubt regarding this issue and concerning any adverse effect on the integrity of the site in this regard.

Treatment of chromium emissions

150. Ms. Hayes claims at para. 58 *et seq* of her Statement of Grounds that the EPA's decision is unlawful because the EPA used a figure for background concentration of hexavalent chromium (also known as chromium VI) based on ambient site monitoring of the Irish Cement factory from August 2017 to February 2018. Ms. Hayes claims that a correct baseline in this context is a site that is unaffected by the site under consideration.

151. She also claims that the assessment had the option of using a 3% or an 8% figure for chromium and it chose the 3% figure in order to ensure that the site complied with the guidelines, when it should have used the 8% figure in order to comply with the precautionary principle (which Ms. Hayes stated requires that where a scientific position is uncertain, one errs on the side of caution and assumes that the less favourable standard applies).

152. At p. 18 of ARUP's *Assessment of Atmospheric Emissions* dated 12th December, 2018, it is noted that no EPA monitoring was available for chromium and that on-site monitoring was undertaken at two locations at Irish Cement's factory from August 2017 to February 2018. This monitoring led to readings for background concentrations for chromium of 0.0037µg/m^3.

153. In relation to Ms. Hayes' first objection, this Court cannot see any basis for Ms. Hayes' complaint that the background levels should have been taken at a site that is unaffected by the site under consideration, presumably a greenfield site or some other location, other than the factory.

154. This is because it seems to this Court that in order to determine the actual (as distinct from theoretical) effect of the grant of the Revised Licence, it is necessary to consider the actual

and current concentration of emissions versus the likely concentration of emissions, if the Revised Licence were to be granted. Indeed, it is on this basis that the EPA and Irish Cement have submitted that there will in fact be a reduction in carbon emissions arising from the reduced use of fossil fuels, i.e. by comparing the current levels at the factory versus the future levels at the factory.

155. Ms. Hayes supports her view by claiming at para. 58 of her Statement of Grounds that by using Irish Cement's factory as the baseline for the assessment, Irish Cement has skewed any existing emission problems that might exist at the factory.

156. However, the decision being challenged is one to grant the Revised Licence. It is not a decision regarding whether there is, or is not, an existing emissions problem at Irish Cement's factory. To the extent that Irish Cement might have emission problems under its Existing Licence (and it is important to note that there is no evidence to support such a suggestion) this is a separate matter to be dealt with by the EPA under its monitoring and enforcement obligations. It does not fall to be considered when there is a grant of a revised licence, such that it leads to a conclusion that baseline values should not be taken from the factory site.

157. For these reasons, this Court does not believe that, in relation to the decision to grant the Revised Licence, the EPA should consider that decision in the context of a greenfield site, rather than the existing Irish Cement site.

158. In relation to the second of Ms. Hayes' claims regarding chromium, it is firstly relevant to note that regarding the proposed effect of the revisions to the Existing Licence, p. 21 of ARUP's report indicates that there will in fact be a percentage decrease (of <0.1%) of chromium relative to air quality standards.

159. However, chromium is made up of different compounds including chromium VI and therefore the EPA sought further information from Irish Cement in order to assess the impact of chromium VI. By letter dated 29th May, 2019, the EPA asked Irish Cement to:

> "Update the assessment report to include an assessment of the risk of impacts due to Chromium VI by reference to EA guideline value of 0.0002µg/m^3."

160. In its reply dated 29th May, 2019, at p. 7, Irish Cement references the Air Resources Board (ARB) (1986) *Public Hearing to Consider the Adoption of Regulatory Amendments Identifying Hexavalent Chromium as a Toxic Air Contaminant Report 6* from the United States. Irish Cement then states that this US report:

> "[S]tates that ambient concentrations indicate that chromium VI comprises 3% to 8% of total ambient chromium. Applying both these percentages, the predicted concentration that could arise from the process falls well within EA guidelines of 0.0002µg/m^3….
>
> However, the existing background concentration (assuming that 8% of chromium is chromium VI) already exceeds this EA guideline. The application of the 3% factor results in the background concentration comply with the guideline level."

It is important to bear in mind that the 3% to 8% is a range of the percentage of chromium VI in the background. If the actual percentage of chromium VI was to be 3% then the process would be well within the guidelines.

161. However, it is clear from the Oral Hearing that rather than relying on a range of background levels of chromium VI, the EPA had in fact measurements of the actual level of background chromium VI at the factory. This is because Ms. Sinead Whyte, an associate with ARUP, provided a statement to the Oral Hearing, which states at p. 14 thereof that:

> "Chromium is a relatively common element in the Earth's crust. It occurs predominantly in two forms or oxidation states; Chromium III and Chromium VI. Chromium VI reduces naturally to Chromium III, the more common form, in the environment. Measuring the relative frequency of the different forms of Chromium in

the environment is considered difficult. In order to estimate the percentage of Chromium VI within total Chromium, a reference from the United States25, stated that ambient concentrations indicate that chromium VI comprises 3% to 8% of total ambient Chromium. The July 2019 RFI response document to the EPA predicted the concentration of both Chromium VI using both the lower, 3% and upper 8% concentration of total Chromium. In addition, the background levels of Chromium were estimated again for both the lower, 3% and upper, 8% factors. No guess work was applied in the estimations of Chromium VI, rather, published data was used to estimate ground level concentrations.

Applying both the 3 and 8 percentage, the maximum predicted concentration of Chromium VI that could arise from the process falls well within the EA guideline of 0.0002µg/m3 based on worst-case emission conditions.

Ambient chromium and chromium VI monitoring was carried out in the vicinity of the Irish Cement Limerick plant in January to February 2020. Total Chromium was measured at 0.0023ug/m3 and Chromium VI at <0.000057ug/m3. **It can be concluded from these results that a maximum of 2.5% of Total Chromium is Chromium VI**. The air dispersion modelling assessment of Chromium submitted to the EPA in May 2019 calculated levels of Chromium VI by applying percentages of 3% and 8% of Chromium as Chromium VI.

By applying a percentage of 2.5% of Chromium as Chromium VI, results in a maximum contribution due to process emissions only of 0.000011µg/m3, which is 9.75% of the UK Environment Agency limit of 0.0002µg/m3. Based on this percentage, background concentrations of Chromium VI are predicted to be a maximum of 0.00009 µg/m3 (46% of the limit) with a combined process and background values predicted at a maximum of 0.00012 µg/m3 **which is 56% of the limit.**

> Accordingly, it has been established that background levels of hexavalent chromium have been correctly assessed in the application documentation, using the correct criteria and without reliance on "guess work" or inappropriate assumptions." (Emphasis added)

162. It seems clear therefore that rather than relying on a report from the US regarding the range of levels of chromium VI in the background, there was an assessment done of the actual levels of chromium VI in the background at the factory. Applying therefore the actual background levels, rather than a figure within an assumed range of background levels, the EPA concluded that the relevant EA guideline value of 0.0002µg/m^3 was met.

163. At p. 230 of the Report of the Oral Hearing it is to be noted that, somewhat curiously Ms. Hayes, who complains that the EPA did not engage with the submissions and evidence made by her, does not appear to engage with the evidence provided by Ms. Whyte to the hearing. This is because in her closing submissions to the Oral Hearing, Ms. Hayes refers solely to the 3% – 8% range, and so ignores the actual levels of 2.5%, when she states that:

> "Minimising the hexavalent chromium background concentrations to bring it within the guidelines is nothing short of guesswork."

164. As is clear from the foregoing, the whole purpose of using actual background readings is to eliminate guesswork, yet Ms. Hayes makes no reference to the fact that actual readings were used, rather than a percentage taken from a range.

165. In contrast, in the Chairman's Report at p. 51 he notes the existence of the range of 3% – 8% of chromium VI concentration in ambient air, but he then references the actual percentage of chromium VI contained in Ms. Whyte's evidence and the fact that this would lead to the level of chromium VI remaining within the EA guidelines and, on this basis, he recommends no change to the emission limit value specified for chromium VI.

166. On the basis of the foregoing, it seems clear that Ms. Hayes' complaints regarding the treatment of chromium VI are unfounded and there is no basis for a challenge to the EPA's decision on these grounds.

The Emission Level Values and volumetric flow

167. In her oral submissions, Ms. Foley claims that there was a failure by the EPA to consider the worst-case scenario in the context of increased volumetric flows and the emission rates under the Revised Licence.

168. However, at p. 7 of Ms. Whyte's statement of evidence to the Oral Hearing, she deals with this criticism of the atmospheric modelling. She states:

> "The modelling assessment considered a number of **highly conservative assumptions when determining worst-case concentrations**, as follows:
>
> - Emission sources operating at **maximum flow rates**;
> - Emission sources operating at **maximum emission** concentrations, rather than average emission concentrations
> - Emission sources operating **every hour of every day** of the year;
> - The assessment is based on the meteorological conditions that give rise to the **maximum predicted concentration** over a five-year period;
> - Receptor location is that which experiences the **maximum predicted concentration**.
>
> The model predictions are therefore **extremely conservative, giving worst-case case** ground-level concentrations, which are unlikely to be realised in practice.
>
> As outlined in Section 39 of the EPA inspector's report, *"a detailed air dispersion modelling assessment was carried out in accordance with EPA guidance. The model*

was thoroughly examined by the Agency and ***also by third party experts on behalf of the Agency*** *in the form of Ricardo Energy & Environment, experts in the field of air modelling. Additionally, the HSE employed the services of Public Health England – Centre for Radiation, Chemical and Environmental Hazards (PHE-CRCE) to review the model during the planning and IE licensing process. All parties considered the model to be in keeping with Agency Guidance and to be* ***reflective of the worst-case scenario*** *in the vicinity of the ICL installation."*

The objection contends that the true extent of atmospheric contamination of the addition of waste as a co-fuel has not been determined. **In essence, however, there is no change to the emission pollutants or limit values from the previous licence (P0029-05) to those set out in the Proposed Determination (P0029-06) despite the change to the types of fuels and raw materials to be used on site.** The changes considered in the modelling assessment are outlined above and reflect the scope of the licence review **incorporating the reduction in use of fossil fuels.** In addition to considering the change in predicted ground level concentrations due to the proposed activity, the modelling assessment demonstrated full compliance with air quality standards when operating at maximum licenced emissions." (Emphasis added)

On this basis, this Court concludes that it is incorrect for Ms. Foley to allege that the EPA did not take account of worst-case scenarios for emission rates.

169. In relation to Ms. Foley's claim that there was no consideration of the increased volumetric flows or other deficiencies in the modelling in relation to the use of worst-case scenario, Ms. Whyte states at p. 2 of her statement of evidence that:

"As part of the application for a revised licence, an air dispersion modelling assessment was carried out. The assessment compared the existing licensed scenario to the proposed situation. However, the following changes formed part of the impact assessment:

- The revised site layout incorporating new buildings to accommodate the use of Alternative Fuels and Alternative Raw Materials on site;
- The proposed increased volumetric flowrate for Kiln six, Cement Mill 6 and Cement Mill 7;
- The venting of emissions from Coal Mill 6 (A2 – 02) through Kiln six (A2 – 01). The proposed increased volumetric flowrate for Kiln 6 will accommodate emissions from Coal Mill 6; and
- Removal of Corn Mill 6 (A2 – 02) as an emission point.

The modelling assessment was carried out in accordance with EPA guidance. Five years of metrological data from Shannon Airport was used in the assessment. Two nested receptor grids were used; one extending for 4 km across the cement plant with receptors at 100mintervals, the second for 20 km with receptors at every 1 km**. Maximum concentrations were predicted at the worst-case receptor for the worst-case hour/day/year based on licenced parameters.**" (Emphasis added)

It is clear therefore that, despite Ms. Foley's submissions, the assessment did in fact deal with the increased volumetric flow rate and worst-case scenarios.

170. Therefore, there is no factual basis for Ms. Foley's claims under this heading and so no basis for invalidating the EPA's decision on this ground.

Regulation 10 of the 2013 Regulations

171. Ms. Hayes claims that the EPA is prohibited from requesting further information pursuant to Regulation 10 of S.I. No. 137 of 2013 Environmental Protection Agency (Industrial Emissions) (Licencing) Regulations 2013 (the "2013 Regulations") more than once.

172. While the application from Irish Cement for the revision of their Existing Licence, to allow co-incineration to take place at the cement plant, was received on 9th May, 2016 (along with an EIS), it is common case that requests for further information, pursuant to Regulation 10, were made by the EPA on 1st July, 2016, 18th October, 2016 and 1st November, 2018.

173. Ms. Hayes claims that this involved a breach by the EPA of Regulation 10, since she alleges only one such request for information is permitted, and that this alleged breach renders the grant of the Revised Licence invalid.

174. Regulation 10 states:

> "(1) On receipt of an application for a licence, the Agency shall—
>
> (a) stamp the application with the date of receipt, and
>
> (b) examine whether the application complies with the requirements of Regulation 9.
>
> (2)(a) Where the Agency considers that an application for a licence **complies with the requirements of Regulation 9**, it shall send to the applicant an acknowledgment stating the date of receipt of the application.
>
> (b)Where the Agency considers that an application for a licence does not comply with any or all of the requirements referred to in subparagraph (a) which relate to the application, it may, as it considers appropriate having regard to the extent of the failure to comply with the said requirements, by notice in writing—
>
> (i) **inform the applicant of such failure of compliance** and that the application cannot be considered by the Agency, or

(ii) require the applicant, within such period as may be specified by the Agency, to take such steps, or to **furnish such further particulars, plans, drawings or maps, as may be necessary to comply with the said requirements** and, where the applicant fails to comply with a requirement under this subparagraph, the Agency may, as it considers appropriate having regard to the extent of the failure, inform the applicant, by notice in writing, of such failure and that the application cannot be considered by the Agency." (Emphasis added)

175. It is this Court's view that Ms. Hayes' interpretation of this regulation, to the effect that it permits only one request for information by the EPA from an applicant for a revised licence, is not correct.

176. Firstly, it is well established that the ordinary meaning of the words in a statutory provision is to be applied, unless that meaning is ambiguous or uncertain or it would defeat the intention of the legislature. As noted by McKechnie J. in the Supreme Court case of *DPP v. Brown* [2019] 2 I.R. 1 at para. 93 in relation to interpreting words in legislation:

> "Provided that they are clear and unambiguous, the judge's role is at an end, and the words should be given their plain meaning."

177. This is such a case, since the foregoing words in Regulation 10 are clear and this Court cannot see any ambiguity or uncertainty. The words grant the EPA a wide discretion to seek, '*as it considers appropriate',* information from an applicant. In particular, there is no suggestion that the EPA is limited to doing so on one occasion and this Court cannot see how it could read such a restriction into this regulation.

178. Secondly, if the legislature had wished to restrict the EPA in this regard, it could easily have done so, as was done in relation to information which is requested by the EPA pursuant to Regulation 13 of the 2013 Regulations. The omission of any similar wording in Regulation

10 reinforces this Court's view that reading in such language to Regulation 10, as suggested by Ms. Hayes, is without any justification. It seems to this Court that the legislative intention is clear, namely that while the EPA is restricted to seeking further information on one occasion, pursuant to Regulation 13, it is not so restricted in relation to Regulation 10.

179. Thirdly, it is important to remember that the person who is complaining about the request to Irish Cement for more information, on more than one occasion, is not Irish Cement, the party which is seeking the Revised Licence, but a third party (Ms. Hayes), who is seeking to invalidate the grant of the Revised Licence. Irish Cement, which was seeking the Revised Licence, did not object to providing the additional information to the EPA and it duly provided it on the occasions requested, in order to enable the EPA to make its decision on the application.

180. Furthermore, *even if* this Court were to find, which it is not doing, that the EPA can only request information once under Regulation 10, it is not clear to this Court what the legal consequence might be for the simple fact that the EPA requested information from an applicant for a licence, which that applicant *voluntarily* provided. The situation might be different if Irish Cement refused to provide the information which the EPA maintained it was entitled to seek. However, this is not the case here.

181. Fourthly, it is relevant to note that the purpose of Regulation 10 is to deal with the situation where the EPA is examining whether an application '*complies with the requirements of Regulation 9'*. Regulation 9 sets out the very detailed requirements which must be contained in the application for a licence or a revised licence, ranging from anodyne information such as the names, addresses and telephone numbers of the applicant to more technical information such as the raw materials involved in the proposed activity to be licensed. Thus, it seems to this Court, that the whole purpose of Regulation 10, when read in conjunction with Regulation 9, is for the EPA to revert to the applicant to seek any missing information which is statutorily required for its application to be complete. In these circumstances, it seems illogical to this

Court that the EPA should only be entitled to contact the applicant '*to inform the application of such failure of compliance*' on only one occasion. In these circumstances, this Court cannot see how, as a matter of logic, it could conclude that the interpretation suggested by Ms. Hayes is required in order to achieve the intention of the legislature.

182. Fifthly, this Court can see no basis for effectively transposing into Regulation 10, from Regulation 13, the requirement therein that the EPA can seek further information from the applicant on only one occasion. This is because Regulation 13 clearly deals with a completely different situation. It deals with the '*consideration of applications*', by which must be meant applications which are ready to be considered, i.e. by virtue of the fact that they comply with Regulation 9. In this scenario under Regulation 13, where the EPA has a completed application which complies with the detailed statutory requirements of Regulation 9, it is logical that the EPA cannot endlessly seek further information (i.e. information, other than that which is statutorily required under Regulation 9) from the applicant (who, at that stage, has submitted a completed application and so is awaiting a decision).

183. While a limit on the number of times that the EPA can seek further information under Regulation 13 in relation to a completed application is therefore logical, a similar restriction under Regulation 10, in relation to an application that is not yet complete, defies logic in this Court's view.

184. For all of these reasons, this Court rejects Ms. Hayes' claim that the grant of the Revised Licence is unlawful simply because of the request by the EPA for information under Regulation 10 on more than one occasion.

Application of the wrong EIA Directive?

185. Ms. Hayes and Ms. Foley claim that the wrong EIA Directive was applied by the EPA to Irish Cement's application for the Revised Licence.

186. The background to this claim is that Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (the "2011 Directive") was promulgated on 13th December, 2011 and appeared in the official Journal on 28th January, 2012, while Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment (the "2014 Directive") was promulgated on 16th April 2014, and appeared in the official Journal on 25th April, 2014.

187. In situations like this, where one directive is being amended or replaced by another, it is common to see transitional provisions regarding which directive will apply in situations where there has been engagement between applicants and a licensing authority which overlaps with the period when the law is changing. In this regard, Article 3 of the 2014 Directive provides that:

> "1. Projects in respect of which the determination referred to in Article 4(2) of Directive 2011/92/EU was initiated before 16 May 2017 shall be subject to the obligations referred to in Article 4 of Directive 2011/92/EU prior to its amendment by this Directive.
>
> 2. Projects shall be subject to the obligations referred to in Article 3 and Articles 5 to 11 of Directive 2011/92/EU prior to its amendment by this Directive where, before 16 May 2017:
>
> (a) the procedure regarding the opinion referred to in Article 5(2) of Directive 2011/92/EU was initiated; or
>
> (b) the information referred to in Article 5(1) of Directive 2011/92/EU was provided."

188. Section 3 of the Environmental Protection Agency Act 1992, as amended ("the 1992 Act") clarifies that '*the information specified in Annex IV to Directive 2011/92/EU'* is known, as the EIS.

189. It is common case that the application made by Irish Cement in this case was accompanied by an EIS and that it was made before 16th May, 2017 and so was *prime facie* subject to the 2011 Directive, rather than the 2014 Directive.

190. In this regard, Ms. Hayes pleads at para. 31 of her Statement of Grounds that *'an EIS had been submitted before 16 May 2017'.* However, she also pleads that additional information was requested after that date and in particular she points out that it was not until the 3rd September, 2019 that the EPA deemed the EIS complied with the 2013 Regulations. She relies in this regard on the letter from the EPA of that date to Irish Cement, which states:

> "I advise that the information received has been assessed and the review is now deemed to be in compliance with Regulation 9 of the EPA Act (*sic*) as amended as of 02 August 2019."

191. On this basis, it is claimed that the 2014 Directive should have been applied to the application, since this deemed compliance with Regulation 9 occurred *after* the deadline date of 16th May, 2017. Since it is therefore claimed that the 2011 Directive was applied in error, rather than the 2014 Directive, it is claimed that the decision to grant the Revised Licence is unlawful.

192. Recital 39 of the 2014 Directive outlines the reasoning for the transitional provisions which apply to applications made before the cut-off date of 16th May, 2017. It states:

> "**In accordance with the principles of legal certainty** and proportionality and in order to ensure that the transition from the existing regime, laid down in Directive 2011/92/EU, to the new regime that will result from the amendments contained in this

Directive is as smooth as possible, it is appropriate to lay down transitional measures. Those measures should ensure that the regulatory environment in relation to an environmental impact assessment is not altered, with regard to a particular developer, **where any procedural steps have already been initiated under the existing regime** and a development consent or another binding decision required in order to comply with the aims of this Directive has not yet been granted to the project. Accordingly, the related provisions of Directive 2011/92/EU prior to its amendment by this **Directive should apply to projects for which the screening procedure has been initiated, the scoping procedure has been initiated, (where scoping was requested by the developer or required by the competent authority) or the environmental impact assessment report is submitted before the time-limit for transposition**." (Emphasis added).

193. It is important to note that a key driver for the transitional provisions is ensuring legal certainty and that, if '*any procedural steps have already been initiated'* under the 2011 Directive, there should be no doubt arising about which Directive applies, since it is the 2011 Directive, rather than the 2014 Directive, that will apply.

194. A similar issue arose in the case of *M28 Steering Group v. An Bord Pleanála* [2019] IEHC 929. The application, in that case for a proposed road development, was submitted together with an EIS on 15th May, 2017, and thus before the cut-off date of 16th May, 2017 for the purposes of the 2014 Directive.

195. It was argued that this application could not benefit from the transitional arrangements because it did not meet the mandatory requirements of Article 5 (1), Article 5 (3) and Annex 4 of the 2011 Directive. MacGrath J. concluded that, in view of the transitional provisions of the 2014 Directive, and in particular the principles of legal certainty enshrined in Recital 39, the application for the road development in that case was subject to the 2011 Directive,

notwithstanding the claim that it did not meet the mandatory requirements of Article 5 (1), Article 5 (3) and Annex 4 of the 2011 Directive.

196. Reliance was placed by MacGrath J. on the decision in C-431/92 *Commission v. Germany* [1995] E.C.R I-2189, where a similar issue arose regarding when a project was '*initiated'* for the purposes of determining if Directive 85/337/EEC (Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment) applied. At para. 32 of that judgment the CJEU held that:

> "[I]nformal contacts and meetings between the competent authority and the developer, even relating to the content and proposal to lodge an application for consent for project, cannot be treated for the purposes of applying the directive as a definite indication of the date on which the procedure was initiated. **The date when the application for consent was formally lodged thus constitutes the sole criterion which may be used.** Such a criterion accords with the principle of legal certainty and is designed to safeguard the effectiveness of the directive." (Emphasis added)

197. In this case, the application by Irish Cement, along with the EIS, for the Revised Licence, was formally lodged on 9th May, 2016. It seems to this Court that based on the foregoing, the crucial criterion for determining whether the 2011 Directive or the 2014 Directive applies to this application is that date. Since that date is *before* the deadline date of 16th May, 2017 for the 2014 Directive to start to apply to applications, this means the 2011 Directive applies. It would defeat legal certainty if the fact that the EPA sought further information after this date regarding the EIS meant that the 2011 Directive did not apply to the application.

198. Furthermore, the fact that the EPA deemed the application to be fully satisfactory or complete on 3rd September, 2019 is not something which is legally significant for the purposes of the 2014 Directive. In particular, there is no reference in the transitional provisions in Article

3, or elsewhere in the Directive, to the competent authority having to decide that the information provided under Article 3 has to be found by the competent authority to be fully satisfactory or complete, and that any particular legal consequences would flow from such a decision. Rather Article 3(2)(b) of the 2014 Directive simply requires the information to be provided before 16th May, 2017.

199. Indeed, the illogicality of the interpretation suggested by Ms. Hayes is highlighted when one considers the terms of Article 3(2)(a) of the 2014 Directive, which states:

> "Projects shall be subject to the obligations referred to in Article 3 and Articles 5 to 11 of Directive 2011/92/EU prior to its amendment by this Directive where, before 16 May 2017:
>
> (a) the procedure regarding th**e opinion referred to in Article 5(2) of Directive 2011/92/EU was initiated**". (Emphasis added)

Article 5(2) of the 2011 Directive, to which Article 3(2)(a) refers, states:

> "Member States shall take the necessary measures to ensure that, if the developer so requests before submitting an application for development consent, **the competent authority shall give an opinion on the information to be supplied** by the developer in accordance with paragraph 1. The competent authority shall consult the developer and authorities referred to in Article 6(1) before it gives its opinion. The fact that the authority has given an opinion under this paragraph shall not preclude it from subsequently requiring the developer to submit further information." (Emphasis added)

200. This procedure, whereby an applicant for an industrial emissions licence may seek, in advance of the formal application being lodged, the views of the competent authority, is known as seeking a 'scoping opinion'. Thus, if a scoping opinion is sought prior to 16th May, 2017,

and so 'initiated' prior to that deadline date, the 2011 Directive will apply to the subsequent application for the licence made by that applicant.

201. It follows that an applicant, who does not submit an application for a licence/revised licence with an EIS until after the deadline, but who has merely sought a scoping opinion from the EPA (seeking the views of the competent authority on what information might be supplied in its application for a licence/revised licence), is nonetheless subject to the 2011 Directive, if the request for that scoping opinion was made by the applicant prior to the deadline.

202. Yet, according to Ms. Hayes where the application process is much more advanced, i.e. where it is not a case of Irish Cement merely requesting a scoping opinion from the EPA regarding what might be in the EIS, but where Irish Cement has actually submitted an EIS to the EPA prior to the deadline date, the 2011 Directive does not apply, simply because the EPA sought further information from the applicant regarding the application after the deadline date.

203. The illogicality of this interpretation is clear, since such an approach flies in the face of the legal certainty which Recital 39 and Article 3 of the 2014 Directive requires. This is because the question of which Directive applies would then have to be determined on a case-by-case basis and by undertaking a qualitative analysis of each application as well as an analysis of the nature of the queries raised by the EPA thereon.

204. For this reason, this Courts rejects the proposed interpretation of Article 3 of the 2014 Directive and so rejects the challenge to the EPA's decision on the grounds that it was unlawful for the EPA to apply the 2011 Directive to Irish Cement's application for the Revised Licence.

Transposition claim

205. Ms. Foley and Ms. Hayes both claim that the State has failed to transpose the 2014 Directive into Irish law.

206. It is relevant to note however, that the only claim made at the hearing was a claim that there was a failure to transpose into Irish law the transitional provisions of the 2014 Directive

(in particular, Article 3 of the 2014 Directive to which references has been made). Thus, no claim was made at the hearing regarding the failure to transpose any of the other provisions of the 2014 Directive into Irish law.

207. Both applicants claim that, if the State had transposed the transitional provisions of the 2014 Directive into Irish law, as they claim the State should have, then the 2014 Directive would have applied to Irish Cement's application for a Revised Licence. However, it should be clear from this Court's analysis of those transitional provisions at para. 185 *et seq* above, that this Court has concluded that the 2011 Directive applied to Irish Cement's application (because the application was made prior to the deadline of 16th May, 2017). Accordingly, it is academic whether the State did or did not implement those transitional provisions of the 2014 Directive into Irish law. This is because if the State had transposed the transitional provisions into Irish law, the result would be no different and the 2014 Directive would still not apply to the application. Article 3 of the 2014 Directive would still lead to the conclusion that Irish Cement's applicant was subject to the 2011 Directive, since as a matter of fact the EIS was submitted before the deadline date of 16th May, 2017.

208. On this basis, this Court concludes that the 2011 Directive was correctly applied by the EPA to Irish Cement's application and whether or not the State transposed the transitional provisions of the 2014 Directive into Irish law has no effect on that issue. Accordingly, the claims by Ms. Hayes and by Ms. Foley that the State failed to transpose the transitional provisions of the 2014 Directive into Irish law does not need to be considered by this Court.

The effect on moss (bryophytes)

209. A considerable portion of the time allocated to Ms. Hayes during the hearing was taken up with her claim that the grant by the EPA of the Revised Licence to Irish Cement, that was revised to include permission for co-incineration of waste, was unlawful because the EPA failed to consider the impact on of that decision on bryophytes (i.e. moss).

210. She claims that if the EPA had so considered the impact on bryophytes, this would have required the EPA to carry out/facilitate further investigation of the consequential impact on other species in the Lower River Shannon Estuary SAC and the River Shannon and River Fergus Estuaries SPA.

211. In this regard, it is relevant to note that the Oral Hearing Report concludes at p. 32 that:

> "**Bryophytes are not qualifying interests** for either the lower River Shannon SAC or the River Shannon and River Fergus Estuaries SPA and the [Irish Cement] installation is an industrial site, therefore I consider that a **habitat survey of bryophytes is not required**." (Emphasis added)

212. Ms. Hayes argues that this approach by the Chair, and subsequently duly adopted by the EPA, was unlawful. She claims that the EPA should have conducted a habitat survey of bryophytes for the Lower River Shannon Estuary SAC or the River Shannon and River Fergus Estuaries SPA. She claims that this failure to conduct a habitat survey of bryophytes invalidates the grant of the Revised Licence.

213. In essence, Ms. Hayes' claim is that, even though the Lower River Shannon SAC and the River Shannon/Fergus Estuaries SPA are not designated for bryophytes, the EPA should have done a habitat survey for bryophytes. Even on *a prima facie* level, Ms. Hayes' approach would appear to be illogical since if one was required to conduct a habitat survey on every single species in a Protected European Site, it would beg the question as to what is the purpose of designating a particular species for a certain site, if surveys had to be done for *all* species on the site and not just protected or designated species.

214. However, the substance of the point being made by Ms. Hayes needs to be considered. She supports her view, that a habitat survey of an unprotected species such as moss/bryophytes should have been undertaken, by reference to paragraphs 39 and 40 from the judgment of the CJEU in C-461/17 *Holohan v. An Bord Pleanála* ECLI:EU:C:2018:883, which states:

"As regards other habitat types or species, which are present on the site, but for which that site has not been listed, **and** with respect to habitat types and species located outside that site, it must be recalled that the Habitats Directive, as follows from the wording of Article 6(3) of that directive, subjects '[a]ny plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon' to the environmental protection mechanism of that provision. In that regard, as stated by the Advocate General in points 43 and 48 of her Opinion, the conservation objective pursued by the Habitats Directive, recalled in paragraph 35 of the present judgment, entails that typical habitats or species must be included in the appropriate assessment, if they are necessary to the conservation of the habitat types and species listed for the protected area.

In the light of the foregoing, the answer to the first three questions is that Article 6(3) of the Habitats Directive must be interpreted as meaning that an 'appropriate assessment' must, on the one hand, catalogue the entirety of habitat types and species for which a site is protected, and, on the other, identify and examine **both** the implications of the proposed project for the species present on that site, and for which that site has not been listed, **and** the implications for habitat types and species to be found outside the boundaries of that site, provided that those implications are liable to affect the conservation objectives of the site." (Emphasis added)

215. Ms. Hayes claims that this extract, and in particular the expression *'implications of the proposed project for the species present on that site*', means *all* species. Accordingly, she claims that even where a species is not a qualifying interest for a protected area, there is an obligation to carry out a survey of that species. However, it seems to this Court that on a careful reading of the foregoing paragraphs as a whole, and in particular the emphasised words, that this is not the case.

216. Firstly, the second paragraph must be read in the context of what preceded it in the first paragraph. The first paragraph makes clear that one is concerned with two categories, (a) species on the protected site, but for which that site is not listed (referred to herein as 'unprotected species'), and (b) species located outside the protected site. This paragraph goes on to make clear that the conservation objective pursued by the Habitats Directive entails that such species must be included in the assessment *if* they are necessary to the conservation of the habitat types and species listed for the protected area (referred to herein as 'protected species').

217. Secondly, at the start of the second paragraph the use of the expression '*in light of the foregoing*' makes it clear that it is against this backdrop (of those two categories only being included *if* they are necessary to the conservation of protected species) that the second paragraph is to be considered.

218. Thirdly, on this basis, the second paragraph clarifies that an assessment must catalogue the species for which the area is protected, and examine *both* the implications of the project for the species present on the site (for which the site has not been listed i.e. unprotected species), *and* for species found outside the site, *provided that* those implications are liable to affect the conservation objectives of the site.

219. When one bears in mind the terms of the first paragraph, this makes it clear that unprotected species are included in the assessment *if* they are necessary for the conservation of the protected species. It seems clear to this Court that the *proviso* in the second paragraph applies to those unprotected species. Accordingly, an assessment is not required to be undertaken of unprotected species such as bryophytes in the Lower River Shannon Estuary SAC and the River Shannon and River Fergus Estuaries SPA, where their protection has not been designated as necessary for the conservation of the habitat types and species listed for those protected areas.

220. On this basis, this Court does not agree with Ms. Hayes that a specific bryophytes survey was required in the context of the specific conservation objectives of the protected sites in question, since firstly bryophytes are not a qualifying interest (protected species) for those two protected sites, and secondly Ms. Hayes has provided no evidence that there is any potential effect on the conservation objectives of these two sites arising from a potential impact on bryophytes.

221. In these circumstances, it seems to this Court, that in relation to bryophytes, Ms. Hayes' case is reduced to a bald assertion that a survey should have been done of that species. As is clear from the decision of O'Neill J. in *Harrington v. An Bord Pleanála* [2014] IEHC 232 at para. 39 *et seq*, the fact that an objector to a particular development or licence makes an assertion (in that case, a claim that a site was an active blanket bog and so merited priority habitat protection under the Habitats Directive), does not mean that she has raised a scientific doubt. At para. 43 he states:

> "**The making of a bald assertion without any evidence to support it could not be said to give rise to "a scientific doubt**" which would require, in the case of a site potentially qualifying as a priority habitat, the respondents to do, by way of enquiry, whatever was necessary to eliminate that doubt." (Emphasis added)

222. Similarly, in this case, Ms. Hayes' claim that there should have been a survey of bryophytes is without any evidence to support it and amounts to a mere assertion and does not give rise to any scientific doubt. On this basis, this Court concludes that there is no basis for challenging the legality of the grant of the Revised Licence on the grounds of the potential impact upon bryophytes.

Fit and proper person

223. Ms. Foley claims that the decision by the EPA to grant the Revised Licence should be invalidated because of the failure of the EPA to provide any, or sufficient, reasons that Irish Cement is considered to be a '*fit and proper person'* to be granted the Revised Licence (for the purposes of s. 84(4) of the 1992 Act), in circumstances where it has been convicted on three previous occasions of offences over a 15 year period under that Act.

224. Irish Cement was convicted in 2007 for breaching its licence regarding dust emissions and it was convicted of two further breaches of its licence relating to dust emissions in 2018. Section 83(5) of the 1992 Act makes clear that the EPA is not permitted to grant a licence or a revised licence unless it is satisfied that the applicant or licensee is a fit and proper person to hold same. It is relevant to note that there are three requirements to be satisfied for an applicant to be regarded as a fit and proper person for a licence under the 1992 Act. Section 84 (4) and (5) of the 1992 Act state:

> "(4) For the purpose of this Part, a person shall be regarded as a fit and proper person if—
>
> (a) neither that person nor any other relevant person has been convicted of an offence under this Act, the Act of 1996, the Local Government (Water Pollution) Acts 1977 and 1990 or the Air Pollution Act 1987 prescribed for the purposes of this subsection,
>
> (b) in the opinion of the Agency, that person or, as appropriate, any person or persons employed by him to direct or control the carrying on of the activity to which the licence or revised licence relates or will relate has or have the requisite technical knowledge or qualifications to carry on that activity in accordance with the licence or revised licence and the other requirements of this Act, and

(c) in the opinion of the Agency, that person is likely to be in a position to meet any financial commitments or liabilities that the Agency reasonably considers have been, or will be entered into or incurred by him in carrying on the activity to which the licence or revised licence relates or will relate, as the case may be, in accordance with the terms thereof or in consequence of ceasing to carry on that activity.

(5) The Agency may, if it considers it proper to do so in any particular case, regard a person as a fit and proper person for the purposes of this Part notwithstanding that that person or any other relevant person is not a person to whom subsection (4)(a) applies."

Thus, to be a '*fit and proper person'*, the applicant must have the requisite technical knowledge to carry on the licenced activity, it must have the requisite financial means to carry on the licenced activity and it must not have been convicted of an offence under environmental legislation. If this is the case, it is automatically deemed to be a fit and proper person.

225. However, it is important to note that s. 84(5) grants the EPA an untrammelled discretion, i.e. '*if it considers it proper to do so in any particular case*', to regard any applicant, who has been convicted of offences under environmental legislation, to be a fit and proper person. Thus, the requirement in s. 84(4)(a), relating to having no previous convictions, must be read subject to the EPA's absolute discretion in s. 84(5).

226. Ms. Foley complains that insufficient reasons have been given for the EPA's decision that Irish Cement is a *'fit and proper person'*. It is relevant to note that she does not complain that insufficient reasons have been given for the EPA's decision that Irish Cement satisfies the second and third limbs of the *'fit and proper'* test, i.e. the technical requirements or the financial requirements. However, she complains that the EPA has not given sufficient reasons that Irish Cement satisfies the first limb of the fit and proper test, in circumstances where it has three previous convictions under environmental legislation.

227. Humphreys J. has usefully summarised in *Balscadden Road SAA Residents Association Ltd. v. An Bord Pleanála* [2020] IEHC 586 at para. 39 the principles to be applied by a court when assessing a claim that an administrative body has failed to give reasons, or sufficient reasons, for its decision:

> "Considering a range of caselaw in relation to the question of reasons, including *RPS Consulting Engineers Ltd. v. Kildare County Council* [2016] IEHC 113, [2017] 3 I.R. 61; *Sliabh Luachra Against Ballydesmond Windfarm Committee v. An Bord Pleanála* [2019] IEHC 888 (Unreported, High Court, McDonald J., 20th December, 2019); *Friends of the Irish Environment CLG v. Government of Ireland* [2020] IEHC 225 (Unreported, High Court, Barr J., 24th April, 2020*); O'Neill v. An Bord Pleanála* [2020] IEHC 356 (Unreported, High Court, McDonald J., 22nd July, 2020); *Crekav Trading G.P. Ltd. v. An Bord Pleanála* [2020] IEHC 400 (Unreported, High Court, Barniville J., 31st July, 2020); and *Leefield Limited v. An Bord Pleanála* [2012] IEHC 539 (Unreported, High Court, Birmingham J., 4th December, 2012), one can draw a number of conclusions as follows:
>
> (i). the extent of reasons depends on the context;
>
> (ii). what is required is the giving of broad reasons regarding the main issues;
>
> (iii). there is no obligation to address points on a submission-by-submission basis - reasons can be grouped under themes or headings;
>
> (iv). it is not up to an applicant to dictate how a decision is to be organised - the selection of headings or order of material is, within reason, a matter for the decision-maker;
>
> (v). there is no obligation to engage in a discursive, narrative analysis - the obligation is to give a reasoned decision;

(vi). there is no obligation to set out the reasons in a single document if they can be found in some other identified document; and

(vii). reasons must be judged from the standpoint of an intelligent person who has participated in the relevant proceedings and is appraised of the broad issues involved, and should not be read in isolation."

228. To this summary, one can add, in this case, the statutory requirement, under s. 87 (9A) of the 1992 Act, that, in relation to the grant of a revised industrial emissions licence, the EPA is required to '*make available*' the '*main reasons and considerations on which the decision… is based'*.

229. Applying this legislation and the case law, firstly one can say that the hundreds of pages of documents that make up the decision in this case must be made available to Ms. Foley and Ms. Hayes. In this regard, this appears to have been the case and this Court does not understand the applicants to have made any issue regarding these documents (insofar as they contain the reasons for the decision) being made available to them.

230. Two of the principles from the *Balscadden* case are of particular relevance to this Court's analysis of whether the EPA failed to give any, or sufficient, reasons regarding Irish Cement being a '*fit and proper person'*. The first is that the extent of the reasons which are required in this instance is determined from the standpoint of an intelligent person who has participated in the proceedings and is aware of the issues involved.

231. The second principle, which is particularly relevant when considering the need to give reasons in this case, is the context in which the decision, that Irish Cement was a fit and proper person, was made.

The background context in which the decision was made

232. Before considering the specific context of the decision being challenged in this case, it is relevant to note some background context to that decision. This background context includes

the fact that the EPA is an expert body which has already granted an industrial emissions licence to Irish Cement for its plant in Castlemungret and the fact that the EPA has an important role in monitoring that licenced activity under the 1992 Act. Additional background context to the decision is the fact that the EPA has licenced the co-incineration of waste with fossil fuels at all the other cement factories in the State, Castlemungret being the only cement factory in Ireland (and indeed on the island of Ireland) not yet licensed for such co-incineration. It is also relevant background context that in relation to one of those licences, the one in Platin, County Meath, Irish Cement is the licensee and so it has been deemed to be a 'fit and proper person' to hold an emissions licence for co-incineration of waste and fossil fuels*, albeit* not in County Limerick, but at a different plant in County Meath.

233. Other relevant background context to the decision that Irish Cement is a fit and proper person, notwithstanding its convictions, is that s. 84 (5) of the 1992 Act *expressly* provides for a person to be a fit and proper person, notwithstanding that it has been convicted of an offence under environmental legislation. Also, it is relevant to note that the EPA has a very wide discretion regarding its decision in this regard. Accordingly, it is not simply a case of there being a bald reference to a *'fit and proper person'* and then the EPA being at large as to how it decides whether a person with convictions for environmental offences could be regarded as a '*fit and proper person'*. Instead, there is a clear statutory discretion granted to the EPA to deem a person to be a '*fit and proper person*' even though it has convictions for environmental offences.

234. Then there is the context which is more specific to this case to be considered.

The specific context in which the decision was made

235. The most important part of this context is the fact that the decision being challenged is not a decision to grant a licence *de novo*, but rather it is a decision to revise an existing licence. This is important because there is a significant difference between a licensing agency

considering the grant of a licence for the first time to an applicant on the one hand, and, as in this case, an applicant applying to a licensing agency to revise its existing licence.

236. Because of the qualitative difference between a *de novo* application for a licence and an application for revisions to an existing licence, there is a difference between the extent of the reasons which will be required. Thus, there is a difference in the extent of reasons required for a decision that a person is a fit and proper person to be *granted* a licence and the extent of the reasons required for a decision that a person is a fit and proper person to have her existing licence *revised*.

237. In this case, at the time of the decision on the Revised Licence, Irish Cement was the holder of the Existing Licence. This is important because while Irish Cement had been convicted of three offences during the course of a 15-year period, there was no evidence that, at the time of its decision to grant the Revised Licence, the EPA did not regard Irish Cement as anything other than a fit and proper person for the purposes of its Existing Licence, notwithstanding those convictions.

238. In particular, there was no evidence that the EPA felt that it should seek to exercise its powers under s. 97 of the 1992 Act to revoke or suspend the Existing Licence of Irish Cement on the basis that Irish Cement no longer satisfied the requirement of being a fit and proper person. In this regard s. 97(1)(a) expressly provides that the EPA may revoke or suspend the operation of a licence if the *'fit and proper person'* requirements are no longer satisfied.

239. The only reasonable conclusion that one can draw from these facts is that at the time when the EPA had to consider whether to grant the Revised Licence to Irish Cement, it considered that Irish Cement was a fit and proper person for the purposes of the Existing Licence, notwithstanding its three previous convictions. This is a very important part of the context of the decision and so a very important factor in considering whether reasons needed

to be given by the EPA for its decision that Irish Cement was a fit and proper person for the purposes of the Revised Licence.

240. The relevance (to the need for reasons) of this context can be best illustrated by considering the scenario if the EPA had taken, in all these circumstances, the contrary decision to the one it took, namely if the EPA refused to issue the Revised Licence because it deemed Irish Cement not to be a fit and proper person.

241. Such a decision would have been a much more significant decision (to the one taken by the EPA, to continue to regard Irish Cement a '*fit and proper person'* so as to grant it the Revised Licence). As such, that hypothetical decision would have required very clear reasons.

242. This is for the simple reason that the day before that hypothetical decision to refuse to regard Irish Cement as a fit and proper person for the Revised Licence, Irish Cement would have been regarded as a fit and proper person to have an industrial emissions licence (the Existing Licence). Accordingly, detailed reasons would have to be given for the fact that the following day the EPA did not regard Irish Cement as being a fit and proper person for the purposes of the Revised Licence. Presumably, these reasons would outline the differences between the Revised Licence and the Existing Licence, which were such as to render Irish Cement a fit and proper person to operate the Existing Licence, but not a fit and proper person to operate the Revised Licence.

243. In other words, the EPA would have to outline why the use of non-hazardous waste as alternative fuel and the use of alternative raw materials in the cement factory meant that Irish Cement was not a fit and proper person, yet the use of fossil fuels meant that it was a fit and proper person.

244. When one considers the decision, which was actually taken from this perspective, it seems clear to this Court that, while there would have been a need for reasons for the *refusal* of the Revised Licence because Irish Cement was not a fit and proper person, there is no need

for the EPA to gives reason for the decision to grant the Revised Licence. This is because a decision to refuse the Revised Licence (because of the convictions going back several years) would, in effect, amount to a decision that (on the day of the decision on the Revised Licence) the EPA *no longer regarded* Irish Cement as a fit and proper person to be granted an industrial emissions licence (even though the day before it regarded it as a fit and proper person to hold the Existing Licence).

245. In contrast, a decision to grant the Revised Licence is, in effect, a decision simply to *continue to regard* Irish Cement as a fit and proper person, which does not require reasons. This is particularly so when no evidence has been provided that the difference between the Existing Licence and the Revised Licence were such as to impact upon the decision as to whether Irish Cement was a fit and proper person.

246. To put the matter another way, where a person enters a decision-making process as the holder of an existing licence, and therefore is by definition a fit and proper person to hold that licence, then there is no necessity for reasons to be given for that person to *still be regarded* as a fit and proper person, unless there are changes to the licence or other circumstances which necessitate a fresh consideration of this issue, and no evidence has been provided to this Court of any such changes or circumstances in this case.

The effect of the decision to refuse the Revised Licence

247. Related to the fact that one is dealing with an application for a revised licence, rather than a *de novo* licence, is the fact that *if* the EPA refused the Revised Licence because it decided that Irish Cement was not a fit and proper person to hold the Revised Licence, the effect of that decision would be that Irish Cement would continue, as the holder of the Existing Licence, to burn fossil fuels, but would not hold a licence to burn non-hazardous waste as alternative fuels or alternative raw materials.

248. This is because Irish Cement was already the holder of an industrial emissions licence at that time, and this is very important context to the decision being taken by the EPA at the time (and therefore the context in which to consider whether reasons were necessary).

249. To put it another way, in considering the need for reasons, this was not a decision as to whether Irish Cement was a fit and proper person to hold *any* industrial emissions licence because of its previous convictions. Rather, since Irish Cement was regarded as a fit and proper person to hold the Existing Licence to burn fossil fuels, this was simply a decision as to whether it was a fit and proper person *not just to burn fossil fuels*, but to burn fossil fuels *and* waste *and* alternative raw materials. The extent of the reasons, if any, to be provided for this decision needs to be seen in that context and also in the context that no evidence has been provided that the difference between the Existing Licence and the Revised Licence is such as to impact upon the decision as to whether Irish Cement was a fit and proper person.

Standpoint of an intelligent person who has participated in the proceedings

250. Furthermore, it seems to this Court that from the standpoint of an intelligent person, the fact that Irish Cement was regarded by the EPA as a fit and proper person to hold the Existing Licence, notwithstanding its three previous convictions, meant that it was highly likely, if not certain, that it would be regarded as a fit and proper person to hold the Revised Licence, notwithstanding these three previous convictions.

251. For this reason, this Court cannot see that there is any merit in the argument that the EPA should have provided to an intelligent person such as Ms Foley, who participated in the process, reasons to support its decision, which in effect was *simply to continue to regard* Irish Cement as a fit and proper person to hold an industrial emissions licence, whether that was the Existing Licence (to use fossil fuels) or the Revised Licence (to burn waste and alternative raw materials, as well as fossil fuels).

252. Another way to put the matter is that the reason that Irish Cement is a fit and proper person for the purposes of the Revised Licence is that it is the holder of an Existing Licence. Therefore, by definition it is a fit and proper person for the purpose of the Existing Licence and therefore is *prima facie* a fit and proper person to hold the Revised Licence. It seems to this Court that this reason should be obvious to an intelligent person who had participated in the proceedings.

253. That is the end of the argument regarding reasons for the EPA decision regarding Irish Cement being a fit and proper person. In the words of Fennelly J. in *Mallak v. The Minister for Justice, Equality and Law Reform* [2012] 3 I.R. 297 at para. 68 *'there may be situations where the reasons for the decision are obvious'* and it seems to this Court that, for the foregoing reasons, this is such a case. On this basis, this Court concludes that it was not necessary for the EPA to provide reasons for its decision that Irish Cement is a fit and proper person.

<u>There are reasons contained in the conditions to the Revised Licence</u>

254. Even if this Court is wrong that reasons are not necessary for this part of the EPA's decision, the EPA claims that in any event there were reasons provided which would have been obvious to an intelligent person familiar with the proceedings. In this regard, the three offences committed by Irish Cement were in respect of dust. Uncontroverted submissions were made that dust emissions are not emissions from the cement manufacturing operation, but rather that these dust emissions (known as 'fugitive dust') are wind-born dust which comes from the factory, the site, the roads, *etc.* which came about due to extended dry weather.

255. In this regard, the EPA point out that, to the extent that any reasons are required for its decision to continue to regard Irish Cement as a fit and proper person, the reasons should be obvious since Conditions 5 and 6 of the Revised Licence deal with fugitive dust and so seek to reduce the likelihood of Irish Cement committing any of the three offences of which it has been convicted in the past.

256. However, Ms. Foley argued that the conditions attaching to a licence are a completely separate matter from the question of whether a person is deemed to be a fit and proper person for that licensed activity. On this basis, she claims that the conditions attaching to a licence cannot be regarded as reasons for a grant of a licence. She argues that an applicant is either a *'fit and proper person'* or not, and it is a completely separate matter regarding the conditions which are to be attached to a licence, that is then granted to that fit and proper person.

257. However, this Court does not agree with this analysis since it seems to this Court that the conditions circumscribe the licensed activity and therefore the question of whether a person is a fit and proper person to undertake a particular activity can only be determined in the context of the activity which is licensed (i.e. in light of the conditions) and not an activity which is not licenced.

258. Accordingly, although not required in this Court's opinion, the conditions attaching to the Revised Licence, insofar as they address fugitive dust and thus the issue which led to the previous convictions, are themselves reasons for the decision of the EPA to regard Irish Cement as a fit and proper person.

259. Furthermore, it seems clear that, from the standpoint of an intelligent person involved in the process, the imposition of these conditions in the Revised Licence amounts to reasons as to why the EPA regarded Irish Cement as a fit and proper person to be issued with the Revised Licence.

260. For the foregoing reasons, this Court does not accept Ms. Foley's argument that the decision to grant the revised licence to Irish Cement is unlawful because of its failure to give any, or sufficient, reasons for its decision to regard Irish Cement as a fit and proper person.

CONCLUSION

261. For all the foregoing reasons, this Court rejects the applicants' challenges to the EPA's decision in this case.

262. This Court orders the parties to engage with each other to see if agreement can be reached regarding all outstanding matters without the need for further court time, with the terms of any draft court order to be provided to the Registrar. In case it is necessary for this Court to deal with final orders, this case will be provisionally put in for mention on the first week of the next term (Tuesday 4th October, 2022), at 10.45 am (with liberty to the parties to notify the Registrar, in the event of such listing being unnecessary).