AN CHÚIRT UACHTARACH
THE SUPREME COURT

Supreme Court Record No: 2023/74

[2024] IESC 13

Charleton J.
O'Malley J.
Baker J.
Woulfe J.
Murray J.

Between/

FIONUALA SHERWIN

Applicant/Respondent

AND

AN BORD PLEANALA

Respondent

AND

CWTC MULTI FAMILY ICAV

Notice Party/Appellant

JUDGMENT of Mr. Justice Woulfe delivered on the 11th day of April, 2024

Introduction

1. The notice party/appellant (described in this judgment as "the notice party") appeals an order of the High Court dated the 8th May, 2023, following a judgment by Humphreys J. delivered on the 27th January, 2023 (see [2023] IEHC 26), which quashed a decision of An Bord Pleanála ("the Board") to grant permission for certain development to be carried out by the notice party.

2. The notice party was granted permission by the Board on the 4th November, 2021, for development on the site of the former Dublin Diocesan Seminary at Holy Cross College, Clonliffe, Drumcondra, Dublin 3, consisting of the demolition of a number of existing office and former college buildings on site, and the construction of a large-scale build to rent development extending to 1,592 apartment units set out in 12 residential blocks, ranging in height from 2 to 18 storeys, and associated works. The application for permission was made directly to the Board under the Strategic Housing Development ("SHD") procedure, pursuant to the Planning and Development (Housing) and Residential Tenancies Act, 2016 ("the 2016 Act").

3. A few salient features of the proposed development might be highlighted. Firstly, there are five main buildings on the development site which are included in the Dublin City Council ("the Council") record of protected structures, i.e. the record which must be part of every development plan pursuant to s. 51 of the Planning and Development Act 2000 ("the 2000 Act"). While it appears that the proposed development envisages that these five protected structures will all be reworked and repurposed to some extent, there are some parts of the protected structures (described by the trial judge at para. 65 as "very small parts") that are intended for demolition.

4. Secondly, there is an important building located just outside the development site (sometimes referred to as the "red line area") known as the "Red House". This building, which dates from approximately 1750 and is the oldest part of the site, is both a protected structure and also a recorded monument, pursuant to s. 12 of the National Monuments (Amendment) Act, 1994. The trial judge (at para. 68) referred to the Red House as one of a number of important buildings outside of the red line area which are not being physically altered, but which are either a part of the physical context for development or where there are allegedly visual and other impacts, or where curtilage is or may be affected.

5. Thirdly, a significant feature of the proposed development is the height of the majority of the blocks of apartments as proposed. It was contended by the applicant/respondent (described in this judgment as "the applicant") in the Court below that the proposed development exceeded the height restrictions for the area for seven of the twelve blocks of apartments, and would breach the skyline in an incongruous fashion. The applicant contended that the Dublin City Development Plan 2016-2022 (the "development plan") allowed for a maximum of 16 metres to 24 metres, but that seven blocks exceeded 24 metres, Block A4 exceeded its limit by 19 metres (182%), while Block D1 exceeded its limit by 38 metres (261%).

6. Fourthly, another feature of the proposed development is a proposed basement structure beneath the eastern end of a garden area known as the "Formal Green", the central garden area in front of the former Seminary building. During the course of the planning application the Council's Conservation Officer ("the C.O.") expressed serious concerns regarding the proposed basement in relation to the potential serious and injurious impact which she felt it would have on the wider setting and curtilages of the protected structures comprising mature trees, the health of the grounds adjacent to this area that

are indicated to be retained, and on the long term performance of the new green area above the basement. She recommended that the proposed basement should be omitted from the proposed development.

The High Court

7. The applicant challenged the grant of permission by way of an application for judicial review. The trial judge noted that there were eight core grounds of challenge in the amended statement of grounds and forty eight sub-grounds, making fifty six grounds in total.

8. Humphreys J. outlined at length the historical and cultural significance of the Dublin Diocesan Seminary at Clonliffe, and certain of the background to the proposed development. Having gone through the grounds of challenge point by point, it seemed to him that the case essentially boiled down to two net headings, which he summarised as follows (at para. 182):

(i) The first objection of the Council to the application, principally regarding impact on protected structures, and related issues regarding material contravention of the development plan and contravention of the legislation regarding such protected structures; and

(ii) The Council's second objection to the application, principally regarding the impact of the subterranean basement structure, and the related question of material contravention of the development plan in respect of that structure.

9. As regards the first net heading, Humphreys J. referred to s. 57(10) of the 2000 Act which provides that the Board shall not grant permission for the demolition of a protected structure, save in exceptional circumstances. He noted that the term "structure" is defined by the 2000 Act to mean any part of a structure, which has the

consequence that "demolition" means demolition of any part of a protected structure not merely demolition of the whole. He stated that the statutory policy, which is to protect such structures, would be utterly defeated if anything short of complete bulldozing of a protected structure was to be in principle permitted, with exceptional circumstances only applying to complete demolition.

10. Humphreys J. held that when one is dealing with any element of protected structure, including structures in the curtilage of protected structures, or structures otherwise falling within the definition such as by reason of being in attendant grounds, any proposals for full or partial demolition need to be carefully scrutinised for compliance with s. 57(10) of the 2000 Act. The problem for the Board was that the question of s. 57(10) was never considered at any point by the Board Inspector ("the Inspector"), despite the fact that the proposed development involved the demolition of some parts of a protected structure.

11. At para. 197 Humphreys J. indicated that the Board should adopt the following approach to s. 57(10):

> "To comply with s. 57(10) in the context of a development affecting a protected structure, the Board is obliged to proceed as follows:
>
> (i) to identify exactly what internal or external demolition is involved in the application;
>
> (ii) to identify whether each individual piece of demolition technically involves the demolition of any part of a protected structure (if not, then s. 57(10) does not apply);
>
> (iii) to assess in each case whether any particular piece of demolition, external or internal, would in itself (that is, separate from any benefit achieved by the works overall) adversely affect the

interest of the protected structure (for example whether the interest would be enhanced by removing an unsympathetic later adjustment) – if the result is such an enhancement, then by necessary implication from the purpose of the Act, s. 57(10) does not apply either;

(iv) if the net result of this analysis is that some individual piece of demolition is subject to s. 57(10), then the decision-maker must determine whether exceptional circumstances have been demonstrated (the benefit of the works overall can be considered at this point in a way that gives appropriate recognition to the fact that normally the best way to protect a structure is to keep it in use); and

(v) in considering any impacts on a protected structure, whether demolition or otherwise, the decision-maker must have regard to the need to protect the structure, which normally means that any detriments to the structure are the minimum necessary to achieve the benefit of the structure of its continued or re-fashioned use."

12. Humphreys J. went on to consider the requirements of the development plan regarding protected structures. He cited various provisions from the development plan, including a provision which stipulated that the design, form, scale, height, proportions, siting and materials of new development "should relate to and complement the special character of the protected structure". He held that this planning application certainly does not respect the existing scale of the protected structures in question, and he then continued as follows:

"224. The main defence to this point is in effect that the extension to the main seminary block *does* respect the scale of that building, and that the larger scale buildings (which clearly don't respect that scale) are situated at a remove. That is all well and good, but the remove is not on some entirely separate premises; all works are within the curtilages or attendant grounds of the protected structures. On that basis it is clear that the development plan provisions regarding height, scale and massing are being materially contravened. Indeed, the scale of the buildings proposed adjacent to protected structures is vastly out of line with the scale of the protected structures themselves. While one can see an argument for some planning judgment when one gets into the question of what structures would appear as dominating and what would appear as complementary, the question of whether the scale of the new structures within the curtilages and attendant grounds of the protected structures respects the existing scale is not a matter of planning judgment, but a matter of fact. Admittedly the conservation officer did not legalistically phrase this as a material contravention, but the point does not cease to have legal relevance merely because it is not phrased in a legalistic way.

225. The Board accepts that in the event of a departure from a development plan, such a departure requires to be assessed as a material contravention in some express way within the Board's decision (see *Redmond v. An Bord Pleanála* [2020] IEHC 151 (unreported, High Court, Simons J., 10th March, 2020)), so its defence hinges on the development not being such a contravention. Unfortunately, I do not agree. There is simply no way that such massively large or bulkier buildings within the curtilages and attendant grounds could be said to respect the mass and scale of the protected structures.

226. The consequence is that on these particular facts, the decision must be held to be infirm on this ground, because the Board's analysis of material contravention does not address the heritage aspects of the Dublin City Development Plan."

13. As regards the Red House specifically, Humphreys J. referred to potential adverse impacts identified by the C.O., including the fact that the principal vehicular access route to the development site is located very close to the front of the Red House, and the impacts on the curtilage and setting of the Red House. Humphreys J. referred to the Inspector's report, and stated that no discernible reference was made in that report to the concerns regarding the radically diminished curtilage of the Red House, or to the construction of the major vehicle route through the site, virtually up to its doorstep.

14. The trial judge then concluded on the Red House issue as follows (at para. 227):

"As regards the Red House specifically, it seems to me that the pleaded complaints regarding lack of reasons or defects in consideration have also been made out. While some of the impacts are addressed in the Inspector's report, other major impacts are not engaged with at all. While a decision-maker does not need to give micro-sub-reasons for every possible aspect of a submission made, he does have to give the main reasons on the main issues. Where the relevant local authority identifies its concerns in any formal submission, such issues are virtually by definition major issues. Thus if the Board disagrees, reasons are required. These are lacking in respect of the Red House, particularly the dramatic loss of curtilage (the loss of the "respectful buffer zone") and the insertion of an immediately adjacent major thoroughfare almost up to the front door of the structure. In addition, the impacts should normally be the minimum necessary in order to provide the required statutory protection for the structure,

in this case both as a protected structure and a national monument. Was it really necessary that the main access road would run right up to the front of the monument? Maybe, maybe not, but that question is not even properly asked."

15. As regards the second net heading identified by Humphreys J., the trial judge referred to a comment made by the C.O., that the proposed construction of a new basement beneath a large part of the Formal Green "will fundamentally and permanently destroy and disrupt this fine landscape and setting to the front of the seminary building and the rest of the historic seminary complex". He set out the detailed rationale for the C.O.'s objection, including her reference to certain provisions of the development plan which stated that "it is the policy of Dublin City Council to discourage any significant underground or basement development or excavations below ground level of, or adjacent to…properties which are listed on the Record of Protected Structures…In considering applications for basement developments, the planning authority will have regard to the following:…Impact of proposal on future planting and mature development of vegetation and trees on the site".

16. Humphreys J. noted the Inspector's response to this objection as set out in her report. The Inspector queried if the removal of the proposed basement was necessary, provided the proposed works were undertaken in an appropriate manner. She had no information to believe they would not be undertaken in such an appropriate manner, and she was satisfied that if the Board was disposed towards a grant of permission, that the submission of a comprehensive method statement relating to same could be dealt with by means of condition.

17. The trial judge commented on the Inspector's treatment of the C.O.'s objection to the proposed basement as follows (at para. 236):

> "The critical piece of reasoning is that she queries if the removal of the basement is necessary provided that the proposed works are undertaken in an appropriate manner. On no view could that possibly be said to actually engage with the points made by the City Council, still less to answer those points clearly. There is no reference in this context to the impact on mature trees. That there is an impact seems to be clear in that I understand that all trees lying above the basement area are going to be felled. There is no engagement with the concerns regarding the health of the grounds adjacent to the area indicated to be retained. There is no engagement with the concerns about the long-term performance of the new green area above the basement. There is no engagement with the terms of the development plan, and again it seems to me, although it was not phrased in this way by the Conservation Officer, that the grant of permission for an underground structure within the curtilage of protected structures is also a material contravention of the terms of the development plan referred to by the Council."

18. Humphreys J. then concluded on this issue as follows (at para. 237):

> "So it seems to me that on these facts, the applicant also succeeds in relation to the City Council's second objection, both on the basis of lack of reasoning for disagreeing with the views of the City Council (being virtually by definition a major issue for which main reasons are required) and also by reason of a further unacknowledged and material contravention of para. 16.10.15 of the development plan on this aspect."

19. The notice party then applied for a certificate of leave to appeal to the Court of Appeal pursuant to s. 50A(7) of the 2000 Act, which application was refused by the trial judge: see *Sherwin v. An Bord Pleanala (No.2)* [2023] IEHC 232 ("judgment No.2"). In his

judgment No.2, Humphreys J. considered one of the identified questions on which leave to appeal was sought, which related to the standard of review by the Court of any determination as to material contravention of the development plan, and he stated as follows (at para. 11):

> "The standard of judicial review is a well-ridden hobby horse at this stage and is reasonably well traversed at appellate level. When I said there was "no way" that the development could be said to respect the height, scale and mass of the protected structures, that was not me usurping the board's planning judgment. I was saying that no reasonable board could consider that it did constitute such respect. If a towering eighteen-storey building on the Clonliffe site respects the height, scale and mass of these historic structures, then language loses all meaning. The lack of coherence between the height, scale and mass of the existing and proposed structures is blatant on the face of the materials; or to put it another way, an assertion that there is such respect simply flies in the face of common sense. Also relevant is the fact that the board didn't actually hold that the development respects the height, scale and mass of the protected structures. So there is strictly no second-guessing because there wasn't even a first guess. One could alternatively have phrased the point as a failure by the board to address its mind to the correct question, so in that sense we don't even get to the question of the scope of their planning judgment because there was no attempted exercise of such judgment on that specific question."

20. There was some discussion during the oral hearing of this appeal as to whether certain matters had been slightly reformulated by the trial judge in his judgment No.2, and as to any possible significance of same. It was suggested that in his original judgment

Humphreys J. had appeared to treat a question of material contravention as not a matter of planning judgment, but as a matter of fact, whereas in his second judgment he appeared to characterise that finding in a somewhat different manner, as one of irrationality.

21. In light of the conclusions which follow later in this judgment, I do not find it necessary to reach any concluded view on any possible reformulation by the trial judge, and if so as to any possible significance of same. However, I might just comment generally that a trial judge should be cautious, in dealing with an application for leave to appeal, to avoid revisiting findings made in the judgment sought to be appealed, lest any clarification might seem to amount to reformulation, which might then give rise to difficulties for the parties and the appellate Court on any appeal.

Determination

22. Following these judgments, the notice party made an application for leave to appeal to this Court. In a determination dated the 31st July, 2023, (see [2023] IESCDET 000108) this Court considered that this case raised issues of general public importance regarding the proper interpretation of s. 57(10) of the 2000 Act in particular, and the interpretation of development plans in general. The Court further considered that it was also in the interests of justice within the meaning of Article 34.5.4 that leave be granted. Given that the project relates to a very large major housing development in the inner suburbs of Dublin, it was in the interests of justice that there now be a single appeal against the decision of the High Court and that the appeal should lie to this Court. In the general interests of expedition and efficiency, the Court proposed to give leave in respect of various grounds raised by the notice party under the three headings in its grounds of appeal, *i.e.* s. 57(10)(b), standard of review and extent of duty to give reasons.

The Factual Position

23. The notice party outlined its understanding of the factual position regarding the development site as found by the trial judge as follows:

(a) There are five protected structures on the development site: the main Seminary building (1863); the Holy Cross Church; the South Link building; the Ambulatory, and the Assembly Hall;

(b) The Library Wing, North Link and New Wing buildings are later 20th Century extensions of a lesser quality to the main Seminary building and are not protected structures;

(c) There is no protected structure proposed for demolition in the application nor authorised under the permission granted;

(d) The permission granted requires the retention, restoration and incorporation of all five elements of protected structures present on the development site;

(e) The High Court held (at para. 65) that "there are some very small parts of the protected structures that are intended for demolition" which include:

(i) the demolition of the modern toilet blocks (attached to the main Seminary building),

(ii) the creation of a series of openings in the back wall (of the main Seminary building),

(iii) the removal of internal partitions in the main Seminary building, including arches in the back corridor (all modern), and

(iv) the removal of a storeroom and a corridor adjacent to the church in the South Link building, and

(f) The building known as the Red House is also a protected structure, but is located outside the development site.

24. The Board states that while the five protected structures on the development site are not due to be demolished, the trial judge found that there are some very small parts of the protected structures that are intended for demolition and lists same along the lines set out at para. 9(e) above. The Board suggests that it is not in doubt but that all of the above, except for the rear wall of the main seminary building, are later additions to the protected structures.

25. The applicant contends that the factual position outlined by the notice party, and set out at para. 23 above, does not provide a fair representation of the findings of fact made by the High Court, and it submits that the following factual findings made (or not contested) are relevant:

(a) The New Wing, Library Wing and North Link building would be protected structures as they lay within the curtilage of the Main Seminary building (a protected structure), but for the deliberate exclusion from the Record of Protected Structures by the Council in 2002, an issue peculiar to this case (paras. 49, 78 and 80).

(b) Parts of the fabric of the Main Seminary building are due for demolition including the toilets on either side of the main stairwell, as well as part of the back wall of the Seminary building. In addition, small buildings are also due for demolition, specifically a store room and corridor adjacent to the Church in the South Link building. There are also interior demolitions proposed, including striking features of the Main Seminary block interior (para. 196). The historic floor plan of the central corridor and cellular rooms on the upper two floors (Seminary building) is entirely lost (C.O. report, p. 17).

(c) Demolition works to the former Seminary building includes the removal of W.C. blocks to the north and south of the rear elevation and extensions either side of the central staircase; the majority of internal partition walls and selected windows and creation of new full height openings in existing rest elevation, to connect into the proposed new five storey block constructed directly to the rear of the protected structure to create new apartments facing the cloister garden, including the construction of new lifts and staircases. The rear section of roof will be removed to facilitate the construction of the new rear block. (C.O. report, p. 12).

(d) The curtilage of the Red House has been compromised by an insensitive and inappropriate boundary line striking horizontally across the site, instead of being considered in a manner that responds to the natural demarcations, tree line and undulations of the site (para. 215). In early pre-planning consultations, the Red House was within the red line/site boundary (C.O. report, pp. 24 – 25).

(e) All works proposed are within the curtilage or attendant grounds of the protected structures (para. 224).

(f) The architectural setting of the Red House would be significantly, adversely and injuriously impacted by the height, scale and massing of the 18 storey Block D1, which is located in relatively close proximity to the Red House (para. 216).

(g) The relative enormity of the new buildings within the receiving environment is substantial and will have a significant impact on the scale and character of the place which comprises a Z2 residential conservation area to the west and south east and a number of protected structures in the surrounding area (C.O. report, p. 28).

(h) The scale of the buildings proposed adjacent to protected structures is vastly out of line with the scale of the protected structures themselves (para. 224).

(i) The Board did not consider s. 57(10) of the 2000 Act at any stage of the planning application (para. 230).

(j) The demolition works in this case are not minor (para. 9 of judgment No.2).

(k) The lack of coherence between the height, scale and mass of the existing and proposed structures is blatant on the face of the materials (para. 11 of judgment No.2).

(l) The Board did not actually hold that the development respected the height, scale and mass of the protected structures (para. 11 of judgment No. 2).

The First Issue: Interpretation of Section 57(10)(b)

Submissions of the Notice Party

26. The notice party submits that the High Court's interpretation and application of s.57(10)(b) of the 2000 Act are incorrect. It argues that the trial judge did not properly address the substantive submission made on behalf of the Board and the notice party regarding the interpretation of the term "structure" in s.57(10)(b), including that s.2 of the 2000 Act clearly states that the definition of "structure" as including "any part of a structure so defined" applies *"except where the context otherwise requires*", and that s. 20(1) of the Interpretation Act, 2005 ("the 2005 Act"), provides for the same outcome. It is submitted that the context does require a different interpretation of the term "structure" in s. 57(10)(b), for a number of reasons.

27. Firstly, it is said that a number of provisions in Chapter 1 of Part IV of the 2000 Act specifically refer to parts of structures. The notice party submits that it makes absolutely no sense to refer to parts of structures, together with structures, unless you intend to differentiate them. The context then requires that same differentiation when it comes to the interpretation of s. 57(10)(b), because otherwise Chapter 1 would be utterly inconsistent.

28. Secondly, the notice party submits that the application of an exceptional circumstances test to the removal or alteration of any part of a protected structure (which by necessity will involve some works of demolition) defeats the statutory policy, particularly the stated purpose of "protecting structures, or parts of structures, which form part of the architectural heritage" (s. 51(1)). It proffers the example of the repurposing of protected structures which includes some works of demolition to a part of such a structure, to enable provision for disabled access or fire safety requirements for example, and it is contended that such works would not be possible in the absence of satisfying the exceptional circumstances test. The whole purpose of the legislation, as is clear from its language of protecting which includes conserving structures, is to ensure that such structures are used. If there is a requirement that any act of demolition requires exceptional circumstances, that inhibits their protection and use.

29. Thirdly, the notice party points to what is said to be the reaffirmation in s. 57(10)(a) that the decision-maker, in considering any application for permission in relation to a protected structure, shall have regard to the protected status of the structure, and it submits that this provides very considerable protection.

30. Fourthly, the notice party points to the very broad definition of "works" in the 2000 Act, and states that works to structures almost inevitably involve some demolition. It submits that no one thought that this would have the effect that every application for planning permission that involved a protected structure, which would necessarily in many if not all cases involve some element of demolition, would have to establish exceptional circumstances.

31. The notice party further submits that if it has to rely on s. 20 of the 2005 Act, it would say that the contrary intention appears in the enactment because of the consistent use of "part of a structure" in Chapter 1. Finally, the notice party's fallback or alternative

position is that the demolition required to trigger s. 57(10)(b) has to be substantial demolition if not total demolition.

Submissions of the Board

32. The Board's position is that it is not the case that any act of demolition requires to be tested against s.57(10)(b), and that the trial judge erred in law in reaching this conclusion and in the formulation of his five-step test. The Board submits that this construction of s.57(10) effectively undermines the rest of s.57, rendering much of it superfluous or, at least, devoid of any real meaning by expanding the 'exceptional circumstances' test in s.57(10)(b) far beyond its intended embrace. The simple point here, the Board submits, is that s. 57(10) does not apply to anything less than a total or substantial demolition of a protected structure.

33. The Board submits that to properly understand s. 57(10) it is necessary to at least take account of, *inter alia*, the other subsections of s. 57 and other sections within the relevant Part of the Act. It notes that the default position is that all development, save exempted development, requires planning permission, and that development is defined very widely and includes anything by way of works, including any act of demolition, as per s. 2(1) of the 2000 Act. Lots of development is, however, exempt from planning permission, such as the type of development that is exempt under s. 4(1)(h) of the 2000 Act, *i.e.* "development consisting of the carrying out of works for the maintenance, improvement or other alteration of any structure, being works which affect only the interior of the structure or which do not materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of the structure or of neighbouring structures".

34. An act of demolition *qua* works may therefore be exempt if the test in s. 4(1)(h) is met. On top of this, however, s. 57(1) states that, notwithstanding s. 4(1)(h), the carrying out of works to a protected structure shall be exempted development only where they would not materially affect the character of (a) the structure, or (b) any element of the structure which contributes to its special architectural, historical, archaeological, artistic, cultural, scientific, social or technical interest. The Board suggests that there is, therefore, a doubled-up approach, and development of a protected structure or part of protected structure will be exempt if it meets the standard in, for example, s. 4(1)(h) and if the test in s. 57(1) is met. The key point, however, it is said, is that insofar as the works at issue in this case are to be viewed as demolition, then s. 57(1) positively envisages that there can be acts or operations of demolition which can be carried out on some part or parts of a protected structure so long as the "character" test is met, and that can be done without an application for planning permission. It is contended by the Board that the trial judge's interpretation of s. 57(10) creates an absurd situation whereby the inclusion of any partial demolition, however minor, in a planning application, which may be incidental to a larger development, triggers the requirement for exceptional circumstances.

35. The Board notes that the trial judge applied the definition of "structure" in s. 2(1) of the 2000 Act, which includes "any part of a structure", but also notes that the definitions in s. 2(1) are expressed to apply "except where the context otherwise requires". The Board submits that applying the expanded definition of structure in s. 2(1) for the purposes of s. 57(10)(b) would lead to absurd results, and would mean that any structure within the curtilage of a protected structure, even a modern concrete shed building, could not be demolished save in exceptional circumstances. Applying the expanded definition would go beyond the intention of the Act, as set out in section 51. A requirement for

exceptional circumstances in every case, in order for the Board to grant permission, would undermine the purpose of Part IV of the Act, because it would impede the best method of conserving a historic building, namely keeping it in active use.

36. The Board claims that there is internal inconsistency in the High Court judgment regarding the application of the definition of 'structure' in s. 2(1), which is said to be inconsistent with the findings at para. 197 that s. 57(10)(b) does not apply where the result of the demolition is an *enhancement* of the interest. This is said to be a new test which does not appear in the legislation, and which is said to attract significant problems.

Submissions of the Applicant

37. The applicant disputes the notice party's argument that the term "protected structure" in s. 57(10)(b) has a narrow or restrictive meaning, and not the broader definition expressly stated in s. 2 of the 2000 Act. She submits that none of the four situations of interpretative doubt arising under s. 5(1) of the 2005 Act is triggered here. The definitions of "structure" and "protected structure" adopted by the Oireachtas in s. 2 of the 2000 Act are broad and purposeful, and are intended to give planning authorities a statutory compass within which to decide what buildings and other things on land are to be protected as heritage. In the context of protecting a building, the definition of a "protected structure" and of "structure", as it relates to protected buildings, makes literal and common sense. The provision of protection to structures of historic, architectural, social and scientific interest protects the building in question which includes the internal aspect of the building, the external aspect of the building immediately associated with the building, and any buildings which are immediately associated with the protected building.

38. It is submitted that the term "protected structure" as defined by the literal interpretation of "structure" under the 2000 Act has been adopted by the authorities. The decision in *Sherwin v. An Bord Pleanála* [2008] 1 I.R. 561 confirmed that the internal aspects and fixtures of a protected structure are protected features. The decision in *Begley v An Bord Pleanála* [2003] 1 JIC 1401 confirmed that buildings within the curtilage of a protected structure are themselves protected features. *O'Brien v Dun Laoghaire / Rathdown County Council* [2006] IEHC 177 held that demolition of a building within the curtilage of a protected structure required exceptional circumstances. *Doorly v Corrigan* [2022] IECA 6 held that largescale felling of a woodland area in the curtilage of a protected structure can constitute works interfering with the character of a protected structure, which trigger the necessity for permission.

39. Furthermore, it is said that textbooks on this subject compliment the interpretation of the High Court in respect of s. 57(10)(b). Finally, it is submitted that a review of the legislative history of Part IV of the 2000 Act confirms that the definition of "protected structure" includes the interior of the structure, the land lying within the curtilage of the structure, any other structures lying within that curtilage and their interiors, and all fixtures and features which form part of the interior or exterior of any of the said structures.

40. The applicant refers to the notice party's argument that works of demolition may only require planning permission and not the enhanced exceptionality assessment and submits that this argument would have merit but for the express wording of s. 57(10)(b) of the 2000 Act. She also refers to the High Court *ratio* on this issue that when one is dealing with any element of a protected structure, any proposals for full or partial demolition need to be carefully scrutinised for compliance with s. 57(10). It is submitted that this is a literal, logical and common-sense interpretation of the

legislature's wording and the intention of the legislature in respect of the protection of protected structures.

Decision on the First Issue

41. As set out above, s. 57(10)(b) of the 2000 Act, as amended, provides that the Board, in considering any application for permission made directly to it under the SHD procedure, shall not grant permission for the demolition of a "protected structure" save in exceptional circumstances. The net question arising is whether this requirement for "exceptional circumstances" is triggered by demolition of any part of a protected structure, or alternatively is only triggered by demolition of the entire structure or something close to the entire structure.

42. The starting point in seeking to answer this question is s. 2 of the 2000 Act which provides, *inter alia*, as follows:

"2 – (1) In this Act, except where the context otherwise requires

'protected structure' means –

(a) a structure, or

(b) a specified part of a structure,

which is included in a record of protected structures…;

'protection', in relation to a structure or part of a structure, includes conservation, preservation and improvement compatible with maintaining the character and interest of the structure or part;

…

'structure' means any building, structure, excavation, or other thing constructed or made on, in or under any land, or any part of a structure so defined, and

(a) where the context so admits, includes the land on, in or under which the structure is situate, and

(b) in relation to a protected structure or proposed protected structure, includes –

(i) the interior of the structure,

(ii) the land lying within the curtilage of the structure,

(iii) any other structures lying within that curtilage and their interiors, and

(iv) all fixtures and features which form part of the interior or exterior of any structure or structures referred to in subparagraph (i) or (iii)."

43. The general position, therefore, is that when the word "structure" is used in the 2000 Act, it *prima facie* means any structure or any part of any structure. The question then, as per the terms of s. 2(1) itself, is whether, when one is construing the word "structure" as it appears in s. 57(10)(b), the context requires a different meaning.

44. One might also note s. 20(1)(a) of the 2005 Act which provides as follows:

> "Where an enactment contains a definition or other interpretation provision, the provision shall be read as being applicable except in so far as the contrary intention appears in – (a) the enactment itself…".

It seems to me, however, that the above approach does not really add to the "except where the context otherwise requires" proviso ("the proviso"), in circumstances where the proviso is an express part of the applicable interpretation provision, as per s. 2(1) of the 2000 Act. In other words, the proviso renders any reliance upon s. 20(1)(a) of the 2005 Act unnecessary, by providing that the general definition may not always be applicable.

45. Returning to the proviso, what is meant by a defined term having a particular meaning as defined except where the "context otherwise requires"? Two observations come to mind. Firstly, the meaning of "context" was recently considered by this Court in *Heather Hill Management Company CLG v. An Bord Pleanála* [2022] IESC 43 ("*Heather Hill*"). In his judgment for the Court, Murray J. cited with approval the judgment of McKechnie J. in *The People (DPP) v. Brown* [2019] 2 I.R. 1 ("*Brown*"), and he summarised the essential points which McKechnie J. had made as follows:

> "(i) The first and most important port of call is the words of the statute itself, those words being given their ordinary and natural meaning (at paras. 92 and 93).
>
> (ii) However, those words must be viewed in context; what this means will depend on the statute and the circumstances, but may include 'the immediate context of the sentence within which the words are used; the other subsections of the provision in question; other sections within the relevant Part of the Act; the Act as a whole; any legislative antecedents to the statute/the legislative history of the Act, including…LRC or other reports; and perhaps…the mischief which the Act sought to remedy' (at para. 94).
>
> (iii) In construing those words in that context, the court will be guided by the various cannons, maxims, principles and rules of interpretation all of which will assist in elucidating the meaning to be attributed to the language (see para. 92).
>
> (iv) If that exercise in interpreting the words (and this includes interpreting them in the light of that context) yields ambiguity, then the court would seek to discern the intended object of the Act and the reasons the statute was enacted (at para. 95)."

46. Secondly, the test arising from the proviso is that the context "requires" that the definition of the term "structure" shall not apply when it comes to interpreting that term

in s. 57(10)(b). It seems to me that the onus, or persuasive burden, is on the party seeking to rely on the proviso, in this case the notice party, to establish that this test has been met. Furthermore, that onus or persuasive burden is to establish that the context "requires" an alternative interpretation, not just that it allows it. I note that both of these propositions were accepted by senior counsel for the applicant during the course of the hearing herein.

47. As regards the application of the proviso in the present case, I have come to the conclusion that the trial judge erred in his interpretation of s. 57(10)(b) of the 2000 Act. In my opinion, the context does require a different meaning to be given to the word "structure" than the normal definition as set out in s. 2, so that the requirement for exceptional circumstances in the case of the proposed demolition of a protected structure is not triggered by the proposed demolition of any part of such a structure. My reasons for so finding are essentially twofold.

48. Firstly, as per *Heather Hill*, one must view the words used in context, including in particular here in the context of other sections within the same Part of the 2000 Act, *i.e.* Part IV and in particular Chapter 1 of Part IV dealing with protected structures, and also in the context of the other subsections of the provision in question, *i.e.* section 57. In Chapter 1, notwithstanding the fact that the general definition of structure includes any part of a structure, the drafter repeatedly chose to make specific reference in a number of provisions to "structures, or parts of structures" or to "a structure or any element of a structure". See, for example, s. 51(1), s. 52(1)(a), s. 53(1)(b), s. 54(1), s. 56, s. 57(1)(b), s. 57(2), s. 58, s. 60, s. 73(6) and s. 78.

49. The consistent pattern in Chapter 1 is that if it is intended that the word "structure" should include any part of or any element of a structure, then there is express language to state this. I accept a submission made by senior counsel for the applicant that it

would be "utterly inconsistent" for the word "structure" in s. 57(10)(b) to be interpreted as including any part of or any element of a structure, in the absence of that same express language to confirm this. This is particularly the case given the express language used in another subsection of the same section, s. 57(1) which refers to both "the structure" or "any element of the structure". For this reason, therefore, in my opinion the context requires a different meaning to be given to the word "structure" than that appearing in the definition in section 2.

50. Secondly, as regards viewing the words used in context, one must consider the overall regime governing protected structures as set out in the 2000 Act, and how s. 57(10)(b) fits into that structure. In the first instance the carrying out of some works for the alteration of any structure, including an act of demolition, may constitute exempted development outside the scope of planning control, if the words meet the double-test found in the combination of s. 4(1)(h) and s. 57(1) of the 2000 Act.

51. The first part of the test, as per the general exemption in s. 4(1)(h) is that such works are:

> "Works which affect only the interior of the structure and which do not materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of the structure or the neighbouring structures".

The second part of the test, as per s. 57(1), applicable where such works are works to a protected structure, is that:

> "Those works would not materially affect the character of –
>
> (a) the structure, or

(b) any element of the structure which contributes to its special architectural, historical, archaeological, artistic, cultural, scientific, social or technical interest."

52. It is the case, therefore, that certain minor acts of demolition of, say, a small part of a protected structure may in principle be exempted development. If exempt, such works would not require any application for permission, and the requirement for "exceptional circumstances" in s. 57(10)(b) could not be triggered, irrespective of the meaning of "protected structures".

53. If the proposed demolition works are not exempt, however, then the general obligation to apply for permission (in s. 32 of the 2000 Act) applies. In that case s. 57(10)(a) also clicks in, whereby the planning authority or the Board, in considering an application for permission in relation to a protected structure, must have regard to the protected status of the structure. It might be said that the planning authority or the Board would have to do this anyway, as they would be obliged to consider the planning history and planning status of the relevant property, in considering the proper planning and sustainable development of the area. However, this aspect of protected status of the structure is highlighted "for the avoidance of doubt", and this can be seen as the Oireachtas highlighting this special status in the context of *any* application for permission for works in relation to a protected structure, which on the face of s. 57(10)(a) includes demolition works.

54. The next layer of protection is then s. 57(10)(b), which provides for an especially strict rule when it comes to the granting of permission for one category of works to a protected structure, *i.e.* demolition works. To repeat again, the Board shall not grant permission for the demolition of a "protected structure", save in exceptional circumstances.

55. It seems to me that a harmonious interpretation of s. 57(10)(a) and (b) requires the interpretation that "protected structure" in s. 57(10)(b) means the entire structure, and not just any part of the structure. In my opinion the Oireachtas intended a graduated level of protection, whereby the lower level is that any application for demolition of part of a protected structure falls within s. 57(10)(a), and in such a case the Board are reminded to have regard to the protected status of the structure.

56. If, however, the application is more exceptional and involves the proposed demolition of the entire protected structure, then the especially strict rule in s. 57(10)(b) applies, and the requirement for "exceptional circumstances" is triggered. If demolition of part of a protected structure is within s. 57(10)(b), then it could not also fall within s. 57(10)(a), but I do not think that was the intention of the Oireachtas.

57. At para. 193 of his judgment the trial judge stated as follows:

> "The term "structure" is defined by the 2000 Act to mean any part of a structure, which has the consequences that "demolition" means demolition of any part of the protected structure and not merely demolition of the whole. Apart from being the clearly defined and normal and logical meaning, this is totally consistent with the statutory policy, which is to protect such structures. That policy will be utterly defeated if anything short of complete bulldozing of a protected structure was to be in principle permitted, with exceptional circumstances only applying to complete demolition. That would make a mockery of the statutory intention."

58. With respect, I cannot agree with the above comments. It is not the case that anything short of complete bulldozing of a protected structure is "in principle permitted", if the exceptional circumstances requirement does not apply to same. Anything short of complete bulldozing will require permission from the planning authority or the Board

(unless exempt), and the decision-maker must have regard to the protected status of the structure in considering any application for permission. Presumably the extent of the demolition, short of total demolition, may well be a significant factor for the planning authority or the Board in exercising its discretion whether to grant permission.

59. In my opinion, this second aspect of the context also requires interpreting "protected structure" in s. 57(10)(b) as not including demolition of part of a structure.

The Second Issue: Material Contravention of the Development Plan and Standard of Review

Relevant Provisions of the Development Plan

60. Chapter 11 of the development plan is entitled "Built Heritage and Culture". The introduction states that the built heritage contributes significantly to the city's identity, to the collective memory of its communities and to the richness and diversity of its urban fabric. It adds that local architectural features and the form of buildings and spaces, *inter alia*, all contribute to the city's character, identity and authenticity, and together form a key social, cultural and economic asset for the development of the city. It notes that the principal means by which Dublin's historic urban environment is protected is set out in the 2000 Act, as amended, and comprises principally the record of protected structures (s. 51) and architectural conservation areas (s. 81).

61. Section 11.1.3 states that the key challenge is to set out and implement effectively planning policy for the conservation or protection of the areas and structures of special interest in Dublin, and that the relevant policies are set out in this Chapter of the development plan. The key challenge is said to be made up of two inter-related components, one being to protect the structures of special interest which are included

on the record of protected structures. It states that ensuring that new investment, regeneration and intervention "acknowledges and respects" the significant archaeological and architectural heritage of the city is a key challenge that can be pursued through appropriate objectives for the protection, enhancement and management of the built heritage, while encouraging regeneration and change.

62. Section 11.1.5.1 refers to the record of protected structures which each planning authority is required to maintain, pursuant to the 2000 Act. It states that the purpose of protection is to manage and control future changes to these structures so that they retain their significant historic character, and notes that works which would materially affect the character of the protected structure require planning permission.

63. Against this backdrop the relevant policies of the planning authority for the conservation and protection of protected structures is then set out. The second such policy, CHC2, is stated to be as follows:

> "It is the policy of Dublin City Council:
>
> To ensure that the special interest of protected structures is protected. Development will conserve and enhance protected structures and their curtilage and will:
>
> …
>
> (d)Not cause harm to the curtilage of the structure; therefore, the design, form, scale, height, proportions, siting and materials of new development should relate to and complement the special character of the protected structure."

64. As regards the rationale for this policy, s. 11.1.5.2 states that the conservation and protection of the approximately 8,500 protected structures in Dublin is a key objective of the City Council, and this policy will assist in the delivery of the core strategy. As regards the application of this policy, s. 11.1.5.3 states as follows:

"The curtilage of a protected structure is often an essential part of the structure's special interest. In certain circumstances, the curtilage may comprise a clearly defined garden or grounds, which may have been laid out to complement the design or function. However, the curtilage of a structure can also be expansive and can be affected by development at some distance away. The protected structure impact assessment should also include an appraisal of the wider context of the site or structure and the visual impact. The design, form, scale, height, proportions, siting and materials of new development should relate to and complement the special character of the protected structure. The traditional proportionate relationship in scale between buildings, returns, gardens and mews structures should be retained, the retention of landscaping and trees (in good condition) which contribute to the special interest of the structure should also be required. Any development which has an adverse impact on the setting of a protected structure will be refused planning permission."

65. As regards basements, s. 16.10.15 provides as follows:

"It is the policy of Dublin City Council to discourage any significant underground or basement development or excavations below ground level of, or adjacent to, …properties which are listed on the record of protected structures.

In considering applications for basement developments, the planning authority will have regard to the following:

…

Impact of proposal on future planting and mature development of vegetation and trees on the site."

The Views of the Planning Authority

66. As mentioned earlier, this was an application for permission for a SHD, and thus was made directly to the Board (under s. 4 of the 2016 Act) and not to the planning authority. Perhaps by way of trade-off the legislation granted a specific consultative role for the planning authority. Section 8(5) of the 2016 Act provided that the relevant planning authority should submit to the Board a report of its Chief Executive setting out the Chief Executive's views on the effects of the proposed development on the proper planning and sustainable development of the area of the authority and on the environment. Section 9(1) provided that the Board shall, before making a decision on the application for permission, consider that report.

67. In the present case it appears that Dublin City Council submitted a report described as the "Chief Executive's Report", but which was actually a report prepared by an Executive Planner and a Senior Executive Planner dated the 7th September, 2021, and then presumably approved and adopted by the Chief Executive as his report. It is noteworthy that this report did not address the issue of protected structures, but under that heading stated that the works to the protected structures had been commented upon by Dublin City Council's Conservation Department. Those comments can be found in a detailed report dated the 31st August, 2021, which was described as the "Conservation Officer's Report", but which was in fact prepared by, or at least signed off by, a trio of the Executive Architectural Conservation Officer, the Senior Executive Architectural Conservation Officer (Acting) and the Senior Conservation Planner.

68. It is important to note that the Board Inspector treated the C.O.'s report, "as contained within the Chief Executive Report" (see page 89 of the Inspector's report), as providing the relevant assessment by Dublin City Council of the potential impacts of the proposed development on the protected structures within and adjacent to the site. In my opinion

she was clearly correct in doing so, given the way in which the report of the Chief Executive was structured and submitted. It is also noteworthy that it was only the C.O.'s report that was adduced as evidence before the High Court, and the rest of the Chief Executive's report was only subsequently allowed to be included in the appeal papers before this Court.

69. The C.O.'s report referred to policy CHC2 as one of the policies and objectives of the development plan taken into account by her in her assessment of the proposed development, and its potential impact on the architectural and built heritage of the city. The report considered in particular the impact of the proposed development on the architectural setting and curtilage of the Red House. The authors entirely disagreed with the conclusion in the Environmental Impact Assessment Report (the "EIAR") that "the proposed new high quality blocks will have a positive impact on the setting of the Red House". In their opinion the architectural setting of the Red House would be significantly, adversely and injuriously impacted by the height, scale and massing of the eighteen storey Block D1, which is located in relatively close proximity to the Red House.

70. The C.O.'s report later considered more generally the overall scale and massing of the proposed development and impacts on the adjacent protected structures within and adjacent to the site. At p. 28 the report stated as follows:

> "As previously stated, and notwithstanding the interesting form, materiality and design of Block D1 located at the eastern end of the formal lawn/central garden, I am of the opinion that the proposed height, scale and massing of the building at 17 + 1 storeys are excessive in this context and will entirely dominate and injure the architectural setting of the protected structures – the former Seminary

> and the Red House…In my opinion, a building of this height, scale and massing in this location is unjustifiable."

In their conclusion the authors repeated the above opinion and recommended that, accordingly, Block D1 should be omitted from the proposed development.

71. The C.O.'s report also considered the proposed basement, in the context of impacts on the mature landscaping and trees. It stated that the existing attractive and long-established verdant landscape throughout the existing complex includes mature trees and other planting, pathways, lawns and formal gardens, which are an intrinsic part of the setting and character of the protected structures within this institutional complex. The proposed basement to be constructed beneath the eastern end of the Formal Green gave rise to serious concerns, in relation to the potential adverse and injurious impact this would have on the mature trees and health of the grounds adjacent to this area that are indicated to be retained, and on the long term performance of this "new" green area above the basement. The report noted the provisions of s. 16.10.15 of the development plan, as set out above, and then concluded as follows:

> "There will already be so much disruption to the ground conditions arising from the construction of all of the new buildings, I question the potential destruction of what is one of the most important aspects of this site – its green areas and landscaping. It would be preferable that all basements are only located beneath building footprints where the ground will inevitably be disturbed, and not beneath the most important green area within the site to the east of the former Seminary – the central basement should be omitted."

The Inspector's Report and the Board's Decision

72. The Inspector's Report dated the 19th October, 2021, considered the matter of impacts on architectural heritage, as part of a planning assessment. As regards the Red House, the Inspector noted the concerns expressed in relation to impacts on this protected structure, in particular on its character and setting. While the Red House was outside the red line boundary and did not form part of this current application, notwithstanding this, any impacts on its character and setting required assessment. She noted the significance of the Red House within the overall lands, being the first structure to form part of the overall complex. She acknowledged, however, that its setting has changed over time as the site has developed and evolved, and, if the current proposal was permitted, its setting would again change. The site was adapting to current needs and the Red House structure (while outside of the red line boundary) would form part of this. She noted the proximity of the proposed Blocks to the Red House and stated that significant setbacks were proposed, including a setback of approximately 43m to Block D1 at the nearest points.

73. As regards Block D1, the Inspector noted the above opinion of the C.O., as expressed in the Chief Executive's report, regarding the adverse impact on the architectural setting of the protected structures (the former Seminary and the Red House). She also noted, however, that the planning authority in their recommended conditions did not recommend the omission of Block D1 (although, one might note, the C.O. in her report did so recommend). She stated that the Department of Housing, Local Government and Heritage ("the Department") had also raised concerns in this regard, and had contended that the omission of Block D1 would re-balance the overall plan between the old and new, and allow for a significant piece of historical landscape to be given back to the Red House.

74. The Inspector then concluded as regards Block D1 as follows (at s. 11.8.21):

> "While I acknowledge the concerns expressed in this regard, I consider that the removal of Block D1 is not necessary in this instance. I am satisfied that the proposed Block D1 can comfortably sit, side by side, with existing protected structures in the vicinity without detriment to their character and setting. Block D1 is a contemporary piece of architecture that reflects the current period. The protected structures reflect the periods in which they were designed and completed. Structures from different periods co-existing within the same land parcel add a depth to the site, reflecting its historic evolution and its historic layers as the site has been developed over time. The location of proposed Block D1 provides a strong presence/building line as one travels along the avenue from the site entrance at Clonliffe Road and it also provides a defined edge to the Formal Garden area. Impacts on views have been dealt with in the preceding section and also within s. 13 of the submitted EIAR. I am satisfied in this regard."

75. As regards the proposed basement beneath a large part of the Formal Garden, the Inspector noted the concerns raised by the C.O., and the fact that the omission of this basement is included within conditions recommended by the planning authority. She noted that the relevant Department had not raised specific concerns in this regard. She then concluded on this issue as follows (at s. 11.8.28):

> "I note the landscaping proposals for the formal garden. I query if the removal of the proposed basement is necessary, provided the proposed works are undertaken in an appropriate manner. I have no information to believe they would not be undertaken in such an appropriate manner and I am satisfied that if the Board is disposed towards a grant of permission, that the submission of a

comprehensive method statement relating to same could be dealt with by means of condition."

76. The Board decided to grant permission generally in accordance with the Inspector's recommendation, by a Board Direction dated the 2nd November, 2021. The Direction stated that, in coming to its decision, the Board had regard to various matters, including the policies set out in the development plan. The Board considered that the proposed development would respect the existing character of the area and the architectural heritage of the site. While the Board considered that a grant of permission would or could materially contravene certain sections of the development plan in relation to unit mix and floor area, and in terms of height, the decision did not address any material contravention arising from the heritage provisions of the development plan. The decision did not require the omission of the proposed basement underneath the formal green from the proposed development, but included a condition that, prior to commencement of any works on site, revised details should be submitted to and agreed in writing with the planning authority with regard to a method statement detailing construction of the proposed basement.

The High Court Findings on this Issue

77. As set out previously at para. 12 above, in the High Court the trial judge held that the grant of permission was a material contravention of the development plan provisions relating to heritage and protected structures, for the reasons as quoted therein. The trial judge also held that the grant of permission for an underground structure was a "further unacknowledged and material contravention" of s. 16.10.15 of the development plan: see paras. 15 – 18 above.

Submissions of the Notice Party

78. The notice party submits that, critically, the trial judge erred (at para. 224) in deciding that the issue as to "whether the scale of the new structures within the curtilages and attendant grounds of the protected structures respects the existing scale is not a matter of planning judgment but a matter of fact". It is submitted in addition that the trial judge erred, having drawn the distinction between planning judgment and fact, in displacing the assessment of mass and scale carried out by both the members of the Board and its Senior Inspector (at para. 225).

79. The notice party cites the judgment of Holland J. in *Jennings v. An Bord Pleanála* [2023] IEHC 14 *("Jennings")* on the question as to whether the court should, as to the substantive decision of the decision-maker on the question whether the development plan has been contravened, substitute its view for the decision-maker's view. Holland J. stated that, ordinarily, decisions requiring the exercise of planning judgment are reviewable only for irrationality (whatever that may precisely mean) rather than full-bloodedly for substantive correctness. He concluded that where a development plan, on a proper interpretation, allows appreciable flexibility, discretion and/or planning judgment to the decision-maker, review is for irrationality rather than full-blooded. Where it does not allow appreciable flexibility, discretion and/or planning judgment to the decision-maker, review is full-blooded as the issue is one of law.

80. The notice party submits that where provisions of a development plan are framed in language whose application to a given set of facts requires the evaluation of planning considerations, a court cannot substitute its own view on an issue ordinarily within the decision-maker's "special skill, competence and experience" by deciding that an issue is an issue of fact. The question as to whether a grant of planning permission would be

in material contravention of the policies and objectives of a development plan is, in the first instance, a matter for the decision-maker in the planning process. However, where an application for judicial review is made on grounds asserting that the grant of permission constitutes a material contravention, the first issue which arises is the correct interpretation of the relevant development plan, which is a matter of law for the courts. Thereafter, a second issue arises as to whether the development plan, once correctly interpreted, has been correctly applied to the facts of the planning application.

81. The notice party contends that the trial judge erred in respect of this latter issue, and that his determination that the development plan's provisions had been materially contravened itself involved the exercise of expert judgment. It submits that the application of policy CHC2 involves a judgment as to how the matters stated, such as the height of the proposed development, relate to the protected structure, in the sense of not being discordant with same. It contends that the EIAR made such a judgment, as did the Chief Executive's report, and ultimately the Inspector came to the same view. Therefore, there was evidence on which a conclusion could be based that was reasonable, even though one might take a different view.

82. The notice party also submits that the decision of the High Court in this respect contradicts the view of the Chief Executive of the planning authority on the effects that the proposed development would have on the proper planning and sustainable development of the area. It is said to be significant that while the C.O. recommended refusal of permission because she felt that the height, scale and massing in this location is unjustifiable, the Chief Executive's report contained the statement that the authority recommended that permission should be granted.

Submissions of the Board

83. The Board also submits that the trial judge erred in finding, at para. 224, that the question of whether the scale of the new structures within the curtilages and attendant grounds of the protected structures respects the existing scale is not a matter of planning judgment, but a matter of fact. It notes that the wording at para. 224 does not precisely reflect the relevant provisions of the development plan, and it identifies provisions with language such as "relate to and complement the special character of the protected structure", and it states that it appears that the trial judge was referring to these provisions. It submits that the approach adopted by the trial judge, in substituting his view as to whether the development respects the scale of the protected structures for the Board's view, on the basis that this is a matter of fact, is inconsistent with well-established principles applicable to judicial review.

84. It is submitted that the trial judge's reference to "planning judgment" at para. 224 is inconsistent with the above finding. On a proper reading of the specific provisions of the development plan referred to by the trial judge, these provisions involve matters of planning judgment which the legislature has unequivocally and firmly placed within the jurisdiction of the planning authorities and the Board, who are expected to have special skill, competence and experience in planning questions. The Board contends that there was evidence to support the judgment made in this case, that Block D1 should be permitted, and it was necessary for the High Court judge to engage with that evidence and to say why that evidence does not stand up.

85. The Board submits that the trial judge also erred in finding (at paras. 236 – 237) that the grant of permission for an underground structure within the curtilage of the protected structures is a material contravention of s. 16.10.15 of the development plan. It contends that s. 16.10.15 allowed appreciable flexibility, discretion and planning

judgment to the decision-maker. In particular, it does not constitute an outright ban on basement development in the vicinity of protected structures, and accordingly, it is submitted that the applicable test is one of irrationality. There was a perceived risk to trees adjacent to the formal garden, and what the Inspector did and what the Board adopted was to reduce the risk by the inclusion of a method statement.

Submissions of the Applicant

86. During the hearing senior counsel for the applicant was asked about the meaning of para. (d) of policy CHC2, whereby the scale and height etc of new development "should relate to and complement the special character of the protected structure". In reply, counsel stated that this provision meant that a "dissonance" should not arise from the construction of a new building beside a protected structure, and the dissonance may arise from matters such as scale, height, proportions and siting. He later elaborated that in saying dissonant, he meant that the proposed development must not cause harm to the purpose of making the structure a protected structure, which is to conserve it in its environment and place and to retain its individuality and its special character and aspect.

87. The applicant's primary submission was that the Inspector had failed to apply the test in policy CHC2. There are different elements of the proposed new development referred to in that provision, for example scale, height, proportions and siting. Each element has to be considered in terms of whether the new development relates and complements the protected structure. The Inspector had, however, failed to consider these matters for the purpose of her assessment.

88. The applicant's alternative submission was that, if the Inspector's assessment could be viewed as including an indirect application of the test in policy CHC2, then the

conclusion she reached in applying that test was irrational, in the sense that it was one which no reasonable decision-maker could have reached.

89. As regards the proposed basement, the applicant submits that the Inspector failed to assess whether the proposal was in compliance with the relevant provisions of the development plan, by simply raising a query as to whether removal of the proposed basement was necessary. It is further submitted that the High Court was entitled to make a finding of material contravention in respect of the basement, whether the standard of review was either irrationality or a "full blooded" review. The applicant contends that the notice party has not pointed to whatever section of the development plan it maintains allowed appreciable flexibility to the decision-maker, such that the argument can be fully addressed.

Decision on the Second Issue

The Legal Principles

90. The development plan is a very important statement of planning policy which each planning authority is required to adopt, generally every six years. It regulates the future development of property by setting out, *inter alia*, policy objectives which indicate the parameters within which permission may be granted or refused. The development plan informs the public of the approach that will be followed by the planning authority (and the Board) in decision-making, unless there is good reason to depart from it as may be permitted by the planning legislation, subject to particular procedures being followed.

91. In *Attorney General (McGarry) v. Sligo County Council* [1991] 1 I.R. 99, this Court, per McCarthy J., described the development plan as follows (at 113):

> "The plan is a statement of objectives; it informs the community, in its draft form, of the intended objectives and affords the community the opportunity of inspection, criticism, and, if thought proper, objections. When adopted it forms

> an environmental contract between the planning authority, the Council, and the community, embodying a promise by the Council that it will regulate private development in a manner consistent with the objectives stated in the plan and, further, that the Council itself shall not effect any development which contravenes the plan materially. The private citizen, refused permission for development on such grounds based upon such objectives, may console himself that it will be the same for others during the currency of the plan, and that the Council will not shirk from enforcing these objectives on itself."

92. In *Byrne v. Fingal County Council* [2001] 4 I.R. 565, McKechnie J. agreed with the above remarks and added as follows (at 580):

> "In my opinion, a development plan, founded upon and justified by the common good and answerable to public confidence, is a representation in solemn form, binding on all affected or touched by it, that the planning authority will discharge its statutory functions strictly in accordance with the published plan. This implementation will be carried out openly and transparently, without preference or favour, discrimination or prejudice. By so doing and by working the plan as the law dictates, the underlying justification for its existence is satisfied and those affected, many adversely, must abide the result. They must suffer the pain, undergo the loss and concede to the public good."

93. Particular procedures must be followed before a planning authority or the Board can grant planning permission for a development which would materially contravene the development plan. In the present case the relevant provision is s. 9(6) of the 2016 Act whereby the Board may only grant permission in the case of a "non-zoning" material contravention where it considers that certain stipulated special circumstances apply. As stated above at para. 76, the Board in deciding to grant permission in this case

considered certain material contraventions of the development plan, and applied those special circumstances to same, but did not address any material contravention arising from the provisions regarding protected structures or regarding basements. If any material contravention does arise in that regard, then the Board's decision would constitute a breach of s. 9(6) and would thus be invalid.

94. As regards what is to be understood by the concept of material contravention, it is stated in Browne, *Simons on Planning Law* (3rd ed., at para. 1-89) that it "must be (unhelpfully) admitted from the outset that the question of what is or is not a material contravention is a question of degree and, for this reason, it is difficult to extract any general principles from the case law". The author states that when one thinks of a material contravention, perhaps the clearest example that comes to mind is that where the proposed development conflicts with the zoning objectives of the development plan. He notes that less obviously, however, there would be other objectives in a development plan of more general universal application which might also be breached by a particular development. He illustrates, by way of example, that there is case law to the effect that breach of various types of development objectives may give rise to material contravention, including objectives for the preservation and protection of monuments, as in the *McGarry* case.

95. In *Maye v. Sligo Borough Council* [2007] 4 I.R. 678, Clarke J. (as he then was) considered how development plan objectives may vary in their nature. He held that material contravention could arise based on the general objectives of the plan, in addition to the more specific provisions. He noted that the way in which development plans are set out vary. Certain aspects of the plan may have a high level of specificity. In those cases, it may not be at all difficult to determine whether what is proposed is in contravention of the plan, and it would only remain to exercise a judgment as to the

materiality of any such contravention. However, at the other end of the spectrum, it is not uncommon to find objectives in a development plan which may, to a greater or lesser extent, be properly described as aspirational. Such objectives may be expressed in general terms. In such cases, a much greater degree of judgment may need to be exercised as to whether the development proposed amounts to a material contravention of the development plan.

96. It is well established that the interpretation of a development plan is ultimately a matter for the courts. Any misinterpretation of the development plan by the relevant planning authority is an error of law which goes to jurisdiction. It is also well established that the development plan is not to be treated as if it were a piece of primary or secondary legislation emanating from skilled draughtsmen, and inviting the exceptive canons of construction applicable to such material. Instead, a development plan falls to be construed in its ordinary meaning as it would be understood by members of the public without legal training, as well as by developers and their agents, unless the document, read as a whole, necessarily indicates some other meaning.

97. While the authorities are clear that the interpretation of the provisions of the development plan is ultimately a matter of law for the court, it has been suggested that the *application* of those provisions (as properly interpreted) is a matter for the planning authority/the Board in the exercise of planning judgment, with the consequence that there can only be limited review of any such judgment by the courts on grounds of irrationality. Thus, in *O'Reilly v. O'Sullivan*, Unreported, High Court, 25th July, 1996, Laffoy J. stated as follows (at p. 21):

> "Counsel for the applicants argue that decisions of this Court…illustrate that the issue as to whether a proposed development materially contravenes the relevant development plan is determined without reference to the *O'Keeffe*

> principles. There are undoubtedly situations, as the cases cited illustrate, in which the *O'Keeffe* principles have no part to play in determining whether a proposal would constitute a material breach of a development plan. For instance, the second named respondent's current development plan might have provided that halting sites are not permitted on lands zoned F and G, in which case the proposed development at Blackglen Road would clearly constitute a material contravention. However, as the evidence established, halting sites, which, in my view, includes temporary as well as permanent halting sites, are "permitted in principle" on the site at Blackglen Road "subject to compliance with the relevant policies, standards and requirements" set out in the development plan. In my view, where a controversy arises on judicial review as to the application of the relevant policies, standards and requirements stipulated in a development plan, that controversy must be resolved by reference to the *O'Keeffe* principles."

98. This suggested division of review of decisions as to material contravention, between decisions on interpretation and decisions on application of the development plan, has received its most detailed analysis to date in the recent decision of Holland J. in *Jennings*, which decision was heavily relied upon by the notice party and the Board in this appeal. In that case Holland J. noted how counsel for the Board had initially argued that the court had no role in reviewing the application of the correctly interpreted development plan provisions to the facts of the planning application, other than on an *O'Keeffe* irrationality standard. As argument progressed, however, this proposition had become more nuanced in light of the variety of content of development plans.

99. Holland J. then stated as follows (at para. 69):

> "The requirements of development plans vary widely on a spectrum from the highly prescriptive, clear, and quantified, to the expression of broad and general policies allowing considerable flexibility and the application of planning judgment in their application, with myriad gradations in between. Counsel for the Board ultimately agreed that, at the highly prescriptive, clear, and quantified end of the spectrum, the contravention/non-contravention question will be a matter of law for the court. But, counsel argued, in the application of broad and general policies allowing considerable flexibility and the application of planning judgment, the *O'Keeffe* irrationality standard applies. Though he did not say so, the logic of his argument was that, between those extremes, on which side of the line a particular set of facts lies would be a matter of judgment on a case by case basis."

100. Holland J. also mentioned the case of *South-West Regional Shopping Centre Promotion Association Limited v. An Bord Pleanála* [2016] IEHC 84 ("*SWR*"). In that case, Costello J. stated that, in deciding a planning application, "the Board must make its own determination as to whether or not the proposed application as a matter of law and fact would materially contravene the development plan" (at para. 91).

101. Holland J. then proceeded to conduct a detailed analysis of the relevant authorities touching upon the standard of review by the court of determinations of material contravention. His analysis suggested to him that there are weighty authorities both ways as between the *O'Keeffe* standard and the standard of "full-blooded" review, and that there are genuine tensions resulting from entirely legitimate, weighty and countervailing considerations. These included that the application of broad and flexible planning policies should be left to the planning decision-maker as reviewable only for rationality and as decisions the court is not well-fitted to make and, on the other hand, that as

material contravention goes to the jurisdiction of the planning decision-maker in the application of a development plan to which it should be strictly kept, it should not be allowed to determine its own jurisdiction.

102. For Holland J., to refer simply to the "question of material contravention" and identify "it" as one of law may be to obscure the fact that it is in truth a number of questions, some or all of which may arise in a given case. He suggested the following (possibly incomplete) list (at para. 108):

> "First is the question of interpretation of the relevant content of the development plan; that is undoubtedly a question of law, subject to "full-blooded review".
>
> Second is the question, closely linked to the first, whether, on that interpretation, the plan leaves any or more or less discretion or planning judgment to the decision-maker, or, which may amount to the same thing, it sets broad policy, imprecise, or subjective standards, for example on matters aesthetic. Given a necessity to "discern whether the promise has been kept and the solemn representation honoured openly, transparently and strictly in accordance with the plan (such that) the court must attribute clear meaning to the plan as best it can…", there is an obvious interpretative tension between attributing clarity (in the sense of precision) and the recognised necessity that a development plan, of general application to a wide and often complex locality and a wide range of circumstances, be flexible with holistic decision-making in mind. However, in this context it can also be remembered that appreciable flexibility is provided by the statutory provisions allowing for material contravention.

> The third question is that of applying the plan, as so interpreted, to the facts – that is to say the substantive content of the planning application – to discern whether there is a contravention of the plan.
>
> The fourth question is whether, in light of the answer to the second, the court should, as to the substantive decision of the decision-maker on the third question (whether the plan has been contravened), substitute its view for the decision-maker's."

103. The fourth question was seen by Holland J. as an issue of fundamental principle, as to the choice of standard of review as between "full-blooded" and "irrationality". He stated that to some extent, in some cases, this choice of standard of review may be informed by the view taken as to what review for irrationality, in particular of planning decisions, means, and whether the *O'Keeffe* "no materials" standard or a more flexible and facts-responsive standard informed more strongly by considerations of proportionality and the view taken in decisions such as *N.M. (DRC) v. The Minister for Justice, Equality and Law Reform* [2016] IECA 217 is adopted. He noted that, ordinarily, decisions requiring the exercise of planning judgment are reviewable only for irrationality (whatever that may precisely mean) rather than full-blooded leave for substantive correctness.

104. Holland J. concluded on this issue as follows:

> "112. Accordingly, I confess to the view that, on questions of material contravention there is much to be said for the analysis of…Laffoy J. in *O'Reilly*. That view is that where a development plan, on a proper interpretation,
>
> - allows appreciable flexibility, discretion and/or planning judgment to the decision-maker, review is for irrationality rather than full-blooded.

- does not allow appreciable flexibility, discretion and/or planning judgment to the decision-maker, review is full-blooded as the issue is one of law.

113. That conclusion requires a focus on the terms of the aspect(s) of the plan allegedly materially contravened and on which side of the dividing line a particular part of the plan lies may be a difficult question in a particular case."

105. I am in broad agreement with the approach set out by Holland J. which seems to me to be sensible and appropriate. Like him I would highlight that the question of whether a provision in a development plan does in fact allow appreciable flexibility, discretion and/or planning judgment to the decision-maker may be a difficult question in a particular case. For my part, I would also highlight in particular the need to remember that the issue under consideration is the standard of *review* by the court. Whatever standard should apply, the first question must be the nature of the determination (if any) actually made by the decision-maker, "as to whether or not the proposed application as a matter of law and fact would materially contravene the development plan", (per Costello J. in *SWR*), in circumstances where there has been the required focus by the decision-maker on the specific provision of the plan allegedly materially contravened. In my opinion that question is the crucial starting point, before one gets to the questions as to the standard of review by the court.

Application of the Principles: Policy CHC2

106. I turn next to the application of the above principles to the facts of the present case. The starting point for me, as per the previous paragraph, is the nature of the determination (if any) made by the Board as to whether or not the proposed development, as a matter of law and fact, would materially contravene policy CHC2 as set out in the development plan. It seems to me that the details of this planning application, and the materials before

the Inspector and the Board, clearly required a focus by the Board on policy CHC2. A very significant and unusual detail of the proposed development was the proposal to construct Block D1, at a height way above the height restrictions in the development plan, and to do so in close proximity to a number of protected structures.

107. As set out at para. 69 above, the C.O.'s report referred to policy CHC2, and the assessment and conclusion focused on the proposed height and scale of Block D1, although not expressly alleging a material contravention of the development plan in terms. In any event, the Inspector was clearly aware of policy CHC2, as one might expect, as she listed it as one of the relevant policies of the development plan noted by her and she quoted it almost in full (at p. 24).

108. In the circumstances it was incumbent on the Inspector to make a determination as to whether or not the proposed development, as a matter of law and fact, would materially contravene policy CHC2 and in particular para. (d) of that policy. The required determination was whether the proposed development would cause harm to the curtilage of a protected structure, and more specifically whether the design, form, scale, height, proportions, siting and materials of the new development would "relate to and complement" the special character of the protected structure.

109. It seems to me that the first step in making the required determination was for the Inspector to consider the text of para. (d) of policy CHC2 and to interpret that text to some degree, in terms of what she understood it to mean. In many cases the interpretation of such a provision may be clear and even self-evident, but in other cases there may be some lack of clarity requiring *some* level of engagement with the text. In the present case, on one view the provision could be seen as relatively prescriptive and clear. While the first part of para. (d) is more general, *i.e.* the development will not cause harm to the curtilage of the structure, the second part specifies how this is to be assessed. It provides

that seven stated factual matters, including the scale and height of the proposed development, should "relate to and complement the special character of the protected structure".

110. Again, on one view that test might be thought, in its ordinary meaning as it would be understood by members of the public, to be relatively clear and specific; *i.e.* do things like the scale and height of the proposed development relate in a complementary manner to the special character of the protected structures, as that special character is described in the planning application documents? However, on another view, that test might be thought to involve at least *some* aesthetic judgment by the decision-maker. The point, it seems to me, is that it was necessary for the Inspector to give some indication as to her understanding of what the test meant, before she moved on to her application of that test, as so interpreted, to the facts of this planning application.

111. I would add that this approach does not impose an obligation to engage in a mechanical or legalistic analysis when considering each and every allegation of contravention of the development plan. It does, however, require *some* level of engagement with the relevant provision where that provision is of fundamental importance in the context of the particular planning application, and where the interpretation and application of that provision is not clear. This requirement does not seek to impose, and in my opinion does not impose, too onerous a burden on the Inspector, who it is acknowledged will not normally be legally qualified, given the principle of interpretation as set out at para. 96 above, i.e., that a development plan falls to be construed in its ordinary meaning as it would be understood by members of the public without legal training, as well as by developers and their agents, unless the document, read as a whole, necessarily indicates some other meaning.

112. That brings me to the planning assessment carried out by the Inspector in this case, and the nature of any determination as to material contravention actually made by her. At s. 11.8.18 of her report she did say that any impacts on the "character" and setting of the Red House require assessment, and at s. 11.8.19 she did consider the issue of the proximity of the proposed Blocks to the Red House. At s. 11.8.19 she also noted the opinion of the C.O., with its reference to the proposed scale and height of Block D1.

113. The Inspector's conclusion as regards Block D1, as set out s. 11.8.21 of her report, is quoted in full at para. 74 above. It is striking that there is absolutely no express reference of any kind to policy CHC2, and thus no attempt to interpret the precise test set out in that policy to any degree, and no attempt to apply that test as so interpreted to the facts of this planning application. In other words, there was no proper assessment by the Inspector as to whether the proposed development would cause harm to the curtilage of adjacent protected structures, because there was no assessment as to whether aspects of Block D1, such as the scale and height, would "relate to and complement" the special character of the protected structure.

114. The Inspector did state in her conclusion that she was satisfied "that the proposed Block D1 can comfortably sit, side by side, with existing protected structures in the vicinity without detriment to their character and setting". However, I am satisfied that this opinion as to Block D1 comfortably sitting side by side with existing protected structures, without detriment to their character, cannot be viewed as an implicit or indirect assessment of compliance with policy CHC2. It appears from the sentences which followed this opinion that the opinion is essentially based on one consideration, that structures from different periods can co-exist within the same land parcel etc, rather than based on the considerations expressly stipulated in policy CHC2.

115. In the circumstances I would agree with the trial judge's statement, at para. 11 of judgment No. 2, that the Board did not actually make any determination as to material contravention, and that "there is strictly no second-guessing because there was not even a first guess". I would therefore quash the Board's decision but on a slightly different basis to the trial judge, *i.e.* on the basis of a failure to take relevant considerations into account, those considerations being the relevant provisions of the development plan and s. 9(6) of the 2016 Act.

Application of the Principles: The Proposed Basement

116. It seems to me that the details of this planning application, and the materials before the Inspector and the Board, also required a focus by the Board on the policy set out in s. 16.10.15 of the development plan ("the s. 16.10.15 policy"). As set out at para. 65 above, this provision states that it is the policy of Dublin City Council to discourage any significant basement development adjacent to properties which are listed on the record of protected structures. It adds that in considering applications for basement developments, the planning authority will have regard to, *inter alia*, any impact of the proposal on the mature development of trees on the site. Notwithstanding same, a significant detail of the proposed development was a proposal to construct a basement beneath a large part of the Formal Garden, the central garden area in front of the former Seminary Building.

117. As set out at para. 71 above, the C.O.'s report referred to the s. 16.10.15 policy, and the assessment and conclusion focused on the potential injurious impact the proposed basement would have, *inter alia*, on the wider setting and curtilages of the protected structures comprising mature trees, although not expressly alleging material contravention of the development plan in terms.

118. In circumstances where the relevant policy in the development plan had been highlighted by the C.O., it seems to me that it was again incumbent on the Inspector to make a determination as to whether or not the proposed development, as a matter of law and fact, would materially contravene that policy. The required determination was whether a grant of permission would run counter to the stipulated policy of the planning authority to discourage any significant basement development adjacent to a protected structure, and the stated commitment, in considering applications for basement development, to have regard to any impact of the proposal on mature development of trees on the site.

119. As in the case of policy CHC2, it seems to me that the first step again was for the Inspector to consider the text of the s. 16.10.15 policy and to interpret that text to some degree, in terms of what she understood it to mean. Once again, on one view, the provision could be seen as relatively prescriptive and clear; *i.e.* as it is the policy of Dublin City Council to "discourage" any significant basement development adjacent to protected structures, then permission would not normally be granted for any such development, particularly if there would be an injurious impact on mature trees in the curtilage of the protected structure.

120. However, on another view, the policy might be seen as involving at least *some* residual discretion and planning judgment on the part of the decision-maker, insofar as the policy does not appear to constitute an outright ban on basement development in the vicinity of protected structures. The point again, it seems to me, is that it was necessary for the Inspector to engage with the policy and to give some indication as to her understanding of what the policy meant, before she moved on to her application of that policy, as so interpreted, to the facts of this planning application.

121. That brings me again to the actual planning assessment carried out by the Inspector, and the nature of any determination as to material contravention actually made by her. As set out at para. 75 above, the Inspector noted the concerns raised by the C.O. (which included the invocation of the s. 16.10.15 policy), and three other matters. She then concluded very briefly on this issue (at s. 11.8.28), which conclusion might be repeated here for ease of reference:

> "I query if the removal of the proposed basement is necessary, provided the proposed works are undertaken in an appropriate manner. I have no information to believe they would not be undertaken in such an appropriate manner and I am satisfied that if the Board is disposed towards a grant of permission, that the submission of a comprehensive method statement relating to same could be dealt with by means of condition."

122. It is again striking that there is absolutely no reference of any kind made by the Inspector to the relevant policy in the development plan, and thus no attempt by her to interpret that policy to any degree, and no attempt to apply that policy as so interpreted to the facts of this planning application. In other words, there was no assessment by the Inspector as to whether a grant of permission for the proposed basement development would materially contravene the s. 16.10.15 policy of discouraging basement development adjacent to protected structures, particularly having regard to the potential injurious impact on mature trees.

123. The Inspector did state in her conclusion that she queried if the removal of the proposed basement was necessary provided the proposed works were undertaken in an appropriate manner. However, I am again satisfied that this query/opinion on the part of the Inspector cannot be viewed as an implicit or indirect assessment of compliance with the s. 16.10.15 policy. Firstly, insofar as she queries if removal of the proposed basement is "necessary",

this begs the question: necessary having regard to what? There is no indication that her query means necessary having regard to the considerations expressly stipulated in the development plan policy, in circumstances where, as noted by the trial judge, there is no engagement with the terms of the development plan.

124. Secondly, the Inspector answers her own query in the negative, on condition that the proposed works are undertaken in an appropriate *manner* in accordance with an agreed method statement. However, the relevant policy in the development plan deals with the broader issue, as to whether the works can be permitted at all, in particular having regard to any potential impact on mature trees, as opposed to the manner of same. As noted by the trial judge (at para. 236), the Inspector made no reference in this context to the impact on mature trees, and it seemed to Humphreys J. to be clear that there was going to be such an impact, as he understood that all trees lying above the basement area were going to be felled.

125. In the circumstances, I am again satisfied that the Board did not actually make any determination as to material contravention in relation to the proposed basement, in circumstances where it was incumbent on it to do so. I would therefore also quash the Board's decision for a failure to take these further relevant considerations into account, being the relevant provisions of the development plan relating to basements and s. 9(6) of the 2016 Act.

The Third Issue: Duty to Give Reasons

126. As set out at paragraphs 14 and 18 above, the trial judge also quashed the Board's decision to grant permission on the ground of lack of reasons. While this ground overlaps to some extent with the material contravention issue as discussed above, it also requires separate independent consideration.

127. This Court has considered the principles governing the giving of reasons in planning matters in its judgment in *Connelly v An Bord Pleanála and ors* [2018] IESC 31 ("*Connelly*"). As the judgment of Clarke C.J. observed, the standard to be imposed on the Board should not be "too exacting" (at para. 14.1) and a Court reviewing such decision-making must ensure that the reasons given are adequate to enable an interested party to know why a decision went the way it did, and whether there existed any legitimate basis for seeking to mount a challenge. In the course of that judgment Clarke C.J. emphasised that the type of reasons which may be necessary will depend, amongst other things, on the type of decision which is being made and the legal requirements which must be met in order for a sustainable decision of that type to be reached. In particular the Court noted that materials expressly referred to in a decision of the Board can be taken by necessary implication to form part of the reasoning leading to the ultimate decision of the Board. In that appeal the Court concluded that the Board had not properly engaged in the process of making an appropriate assessment which had required "complete, precise and definitive findings" (at para. 8.16) regarding the requirements of EU law.

128. The approach identified in *Connelly* remains the correct approach of a Court to a review of a decision by the Board.

129. In the present appeal the Board to a large extent relied on the detailed and extensive report of the Inspector and this is apparent from the Board's decision itself. That approach was perfectly legitimate, and indeed understandable, in circumstances where the Board needed the expertise and detailed knowledge of its Inspector in regard to the wide range of matters arising. In turn, the Inspector recited the report of the C.O., and other reports relevant to environmental and other issues raised in the planning process.

130. Two matters were referred to with considerable emphasis by the C.O. in her report. The first of these concerned the height of a number of the blocks in the development, in particular the height of D1 and A4. The proposed Block D1 is nearly three times the height limitation in the development plan for Dublin City. The proposed Block A4 is twice that height. The area in question is not identified in the development plan for either high or medium rise development. The C.O.'s strongly worded concern was that the height, scale and massing of Block D1 was excessive and would entirely dominate and injure the architectural setting of the protected structures and the surrounding environs. She noted that the architectural setting of the Red House "would be significantly adversely and injuriously impacted by the height, scale and massing of the 18-storey Block D1" (at p. 26 of the report). Later (at p. 28) she noted that the height, scale and massing was "excessive" in the context in which they were proposed and they would "entirely dominate and injure the architectural setting".

131. The Inspector (at para. 10.8.20) noted the concerns of the C.O. and that the planning authority did not recommend the omission of Block D1 (although, as stated earlier, the C.O. in her report did so recommend). The Inspector acknowledged these concerns but did not consider that the removal of Block D1 from the development was "necessary" and that the block could "comfortably sit, side by side" with the existing protected structures. The Inspector thought that the location of Block D1 "provides a strong presence/building line as one travels along the avenue". She nowhere dealt with the strongly expressed views of the C.O. as to the likely significant adverse and injurious impact on the protected structures because of the close proximity to the Red House. The position the Inspector took was a general one concerning the architectural merit of the proposed block, and she did not deal at all with the fact that the C.O.'s report noted that the dominant typology of small dwelling units (70 per cent of which

would be studio or bedsit or one bed units), would "seriously impact" on the historic buildings, and would be likely to result in long-term difficulties with maintenance and conservation of the protected structures. The Board's decision likewise fails to deal with these difficulties. Nor does either the Inspector's report or the decision of the Board deal with the suggestion by the Department that the omission of Block D1 would "re-balance the overall plan between the old and new and allow for a significant piece of historic landscape to be given back to the Red House" (para. 11.8.20).

132. Finally, in that regard the Inspector (at para. 11.6.9) suggested the inclusion of a tall building such as D1 "may be considered acceptable visually" if the overall scheme represented a high quality residential development. In the light of the expression of concern by the C.O. regarding the quality of this residential development in general, the Board ought to have, but did not, consider the conditionality of the view expressed by the Inspector, and in turn the views expressed by the C.O. and the Department, or the concerns regarding the long-term maintenance and conservation of the protected structures, all of which were central planning issues that required a specific assessment by the Board.

133. Further disquiet expressed by the C.O. concerned the basement, and the language used by the Inspector is again is of note. The C.O. remarked that the loss of almost half the trees is "indefensible" and that the long established verdant landscape is an intrinsic part of the setting and character of the protected structures. She observed that one of the most important aspects of the site in question is its green areas and landscaping, and that the construction of the basement would inevitably disturb this and impact on the health of the grounds which are to be retained. She also noted that the long-term performance of the new green area above the basement could be regarded as likely to be injurious to the historic setting. The Inspector notes (at para. 11.8.28 of her report)

that the destruction or disruption of the landscape could be remediated if the works were undertaken in an appropriate manner and in conformity with a "comprehensive method statement". The condition that she recommended was inserted by the Board in its decision.

134. However, the Board did not address the broader concerns as to the loss of the verdant and historic landscape, and the imposition of a condition providing for an agreement with the planning authority on an appropriate method statement does not address the overwhelming evidence that the landscape would be indefensibly lost. The Board's decision is defective in failing to address the overwhelming concerns expressed by the C.O. as to the inevitable destruction of half of the mature trees on the site and of an important material element of the site. The very generally-expressed condition providing for a method statement goes nowhere near the form of scrutiny and detailed direction that would have been required to protect the landscape.

135. The law relating to the degree of engagement or the adequacy of reasons given by a decision-maker does require a degree of deference to an expert body such as An Bord Pleanála. It is also well established in the authorities that a court should not treat a decision of An Bord Pleanála as if it were a judgment of the Superior Courts or a piece of legislation, and that the reasoning and analysis is looked at by examining the decision as a whole and the documents and arguments and evidence referred to. However, as Clarke C.J. in *Connelly* explained, the requirement to give reasons is not a form of "box ticking" (para. 5.4) and relevant factors must be taken into account and analysed. The strength of the objections by the Department, and more especially by the C.O. in her report, did require a detailed consideration by the Inspector and ultimately by the Board in its decision.

136. It is not possible to read the decision of the Board in conjunction with the report of the Inspector and to understand the reasons why the Board gave permission for the construction of Block D1 in the light of the observations regarding its typology, its closeness to and impact upon the protected structures, and the high-density use which was likely to have some bearing on the ongoing conservation and maintenance of the protected structures. It is equally not possible to ascertain what type of method statement would have met the strongly expressed disquiet of the C.O. concerning the loss of landscape and trees.

137. The report of the C.O. contained strong recommendations and negative observations regarding these two factors, the landscape and the height in conjunction with the typology and high-density intended use. These were factors of singular importance, not perhaps found in many other large-scale residential developments and required to be specifically dealt with by the Inspector/the Board.

138. I am not satisfied that the reasoning of the Board was adequate and the adequacy of the reasons must be tested in the light of the overwhelmingly negative view of the C.O. and of the relevant Government Department regarding these important aspects of the development.

139. I would therefore uphold the finding of the trial judge as to the lack of adequate reasons.

Conclusion

140. In conclusion, I would uphold the order of the trial judge to quash the decision of the Board to grant permission, albeit in part for slightly different reasons as set out above. I would therefore dismiss the appeal.